

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 110
3017511

BETWEEN KATRINA ROCHFORD
Applicant

A N D GOLF OF MEXICO LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Michael McDonald, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 1 August 2018 at Christchurch

Submissions Received: Submissions from advocate for Applicant on 1 August 2018

Date of Determination: 6 August 2018

DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral indication delivered on 1 August 2018.

- A. Golf of Mexico Limited unjustifiably dismissed Katrina Rochford.**
- B. In satisfaction of Ms Rochford’s personal grievance Golf of Mexico must pay Ms Rochford the following amounts:**
 - a. \$14,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - b. \$4,954.56 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.**
- C. Costs are reserved with a timetable set for submissions if required.**

Employment relationship problem

[1] Katrina Rochford worked for Golf of Mexico Limited in its Pepe's Mexican Grill restaurants for four years.

[2] On 28 February 2017, Ms Rochford was working at Golf of Mexico's Wairakei Road restaurant when Peter Bucher, of Golf of Mexico, asked to speak to her outside. Ms Rochford went outside and sat down with Peter Bucher and his brother Mikey Bucher, a shareholder in Golf of Mexico.

[3] Ms Rochford says that Peter Bucher then told her that the Wairakei Road restaurant was closing and she was being given two weeks' notice of termination of employment.

[4] As a result of the termination of her employment Ms Rochford raised personal grievances for unjustified dismissal and unjustified disadvantage.

[5] Golf of Mexico, in response to the personal grievances, stated that it had consulted with Ms Rochford over the potential closure of the Wairakei Road restaurant and alternative employment for her in other restaurants owned and operated by Golf of Mexico. Golf of Mexico says, Ms Rochford agreed that the closure of the Wairakei Road restaurant was inevitable and she did not want to accept any of the alternative employment, leaving it with no choice but to terminate Ms Rochford's employment.

[6] I have investigated the unjustified dismissal and unjustified action causing disadvantage claims.

The issues

Unjustified dismissal

[7] The issues to be resolved in respect of the unjustified dismissal claim are:

- (a) Was Ms Rochford dismissed; and

- (b) If so, was the dismissal justified, with the onus resting on Golf of Mexico to show its actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act)?

Unjustified action causing disadvantage

[8] The issues to be resolved in respect of the unjustified disadvantage claim are:

- (a) Did the events complained of cause disadvantage to Ms Rochford's employment; and
- (b) If so, were Golf of Mexico's actions justifiable, again relying on the test for justification and the duty of good faith set out in the Act?

Remedies

[9] If Ms Rochford is successful with either claim I must then consider what remedies, if any, she is entitled to. And if she is entitled to any remedies I must consider whether she contributed to her grievances in such a way that any remedies awarded should be reduced.

Preliminary matter

[10] Golf of Mexico lodged a statement in reply to the statement of problem. It also participated in a case management conference call for this matter on 24 April 2018. During that call, Peter Bucher indicated that no one from Golf of Mexico was intending to participate in the investigation meeting. I warned Mr Bucher about the consequences of non-attendance and encouraged him and others to attend my investigation so that Golf of Mexico could present its position. Mr Bucher advised that he understood this and therefore he would attend. He also advised that 1 August 2018 was suitable for him and the other witness for Golf of Mexico, Mikey Bucher.

[11] During the case management conference call, I issued directions for an investigation meeting to take place on 1 August 2018. The directions were recorded in a notice of direction and notice of investigation meeting and these were served on Golf of Mexico.

[12] Witness evidence was lodged on behalf of Ms Rochford and this was served on Golf of Mexico. Despite my directions and follow up by the Authority with Mr Bucher no evidence was received from Golf of Mexico.

[13] So, Golf of Mexico received all of the relevant information in respect of Ms Rochford's claim, it indicated reluctance to attend my investigation but confirmed it would do so. It was given the opportunity to lodge witness evidence and it failed to do this. Golf of Mexico was also aware of the date, time and location of my investigation and could have attended. Despite all of this Golf of Mexico did not attend the investigation meeting and it did not contact the Authority to explain why it could not or would not attend.

[14] The notice of investigation meeting advised Golf of Mexico that "*If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*" And, in the case management conference I warned Golf of Mexico that I would proceed in its absence and advised it to attend. So, Golf of Mexico was aware that I would proceed if it did not attend the investigation meeting.

[15] Considering all of the above, there was no apparent reason why the investigation meeting could not continue in Golf of Mexico's absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

Unjustified dismissal

[16] Despite Golf of Mexico not attending the investigation meeting its position in response to Ms Rochford's personal grievances was set out in the statement of reply and I considered this as part of my investigation.

[17] The key aspects to Golf of Mexico's statement in reply included:

- (a) The termination of Ms Rochford's employment arose out of a decision to close the Wairakei Road restaurant due to a reduction in turnover;

- (b) Golf of Mexico did discuss the pending closure of the restaurant with Ms Rochford and it discussed alternative employment options with Ms Rochford;
- (c) Ms Rochford declined the alternative roles offered to her;
- (d) Golf of Mexico did not terminate Ms Rochford's employment for redundancy but rather, Ms Rochford repudiated her employment agreement by refusing to accept alternative employment offered.

Dismissal

[18] The first issue in terms of an unjustified dismissal claim is clearly disputed by Golf of Mexico – it says it did not dismiss Ms Rochford rather, she repudiated her employment agreement, amounting to a resignation, by refusing to accept alternative employment.

[19] I have considered the evidence on this issue carefully including what is in the statement in reply, despite no one confirming that by way of evidence under oath or affirmation for Golf of Mexico, and what is set out in the contemporaneous correspondence.

[20] Ms Rochford's evidence and the contemporaneous correspondence all indicate that Golf of Mexico terminated Ms Rochford's employment by way of redundancy as it was closing the Wairakei Road restaurant. The statement in reply is also inconsistent in places with the stated repudiation argument.

[21] Weighing up all of the evidence, I conclude that Golf of Mexico did terminate Ms Rochford's employment.

Was the dismissal justified?

[22] As I have found there was a dismissal, I must now consider if Golf of Mexico's actions in dismissing Ms Rochford were justified.

[23] In *Grace Team Accounting v Brake*¹, the Court of Appeal said that if an employer can show that a redundancy is genuine and that consultation requirements have been met then the test of showing that the dismissal was justified is likely to be met. The Court stated at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[24] Justification requires Golf of Mexico to prove that its decision to dismiss Ms Rochford was genuine and it met the notice and consultation requirements of the Act.

Was the redundancy genuine?

[25] So, first I must consider if the redundancy was genuine. That involves considering the underlying business reason for the dismissal.

[26] In *Scarborough v. Micron Securities Products Ltd*², the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[27] This means, when assessing if the redundancy was genuine it is not my role to substitute my business judgment for that of Golf of Mexico. What I must do is look at the analysis made by Golf of Mexico to determine that closure of the Wairakei Road restaurant was appropriate and that the termination of Ms Rochford's employment was required. Based on this analysis I must then decide:

- (a) Whether the conclusion to close the restaurant was one that a fair and reasonable employer could have made in those circumstances; and

¹ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541

² [2015] NZEmpC 39

(b) Whether the decision to terminate Ms Rochford's employment, because of the closure, was one that a fair and reasonable employer could have made in those circumstances.

[28] In the statement in reply, Golf of Mexico says the reason for the proposed closure of the Wairakei Road restaurant is that there was decline in sales of approximately 50% and this drop in revenue led to the decision to close the restaurant but it appears that some food preparation was to continue at that site.

[29] In contrast the evidence I heard from Ms Rochford was she was not aware of the decline in revenue at the Wairakei Road restaurant. She was not told of a closing date for the restaurant and does not know when in fact it did close. There was, in her view ongoing work there given the food preparation work done for other restaurants, which she was already doing as part of her role and as far as Ms Rochford knows this continued and may be continuing at the Wairakei Road site.

[30] I am not satisfied that Golf of Mexico made a comprehensive investigation into the concerns that informed its decision to close the Wairakei Road restaurant. There is no evidence of that presented in the statement in reply nor did Golf of Mexico present anything to Ms Rochford in consultation to show this. The fact that none of the documents submitted by Golf of Mexico confirm the date when it closed the restaurant also adds to this conclusion.

[31] If there was a confirmed closure date for the Wairakei Road restaurant and some evidence about what work, if any that continued (or continues) to be undertaken at that site then I might be able to infer that Golf of Mexico had made an informed decision on closure. But the simple point is I cannot even do this.

[32] In conclusion, I cannot say that the decision to close the Wairakei Road restaurant was one that a fair and reasonable employer could have made in those circumstances.

[33] If however, for the sake of completeness, I accept that the Wairakei Road restaurant was closed and take this as being evidence that at least the closure of the restaurant was

genuine, then I must proceed to consider the second aspect of whether the redundancy was genuine.

[34] The second element of testing whether a redundancy is genuine is about assessing whether there were alternatives to dismissal.

[35] In this case, Golf of Mexico says it offered Ms Rochford alternative roles in two restaurants. Ms Rochford says she was not offered these roles and she says further if she had been offered them at the time she would have accepted.

[36] I accept Ms Rochford's evidence on this point. It was credible and explained in clear and rational terms. Ms Rochford had worked with the Bucher family in different ventures for over 14 years. She considered them to be friends as well as employers and she enjoyed working with them. Whilst she was shocked by the closure of the Wairakei Road restaurant if she had been offered a transfer back to the Northwood restaurant, where she had worked previously, she would have happily accepted that.

[37] In conclusion, I do not accept there was any discussion of redeployment or any discussion of how dismissal might be avoided and on this basis, I find that the decision to dismiss was not one that a fair and reasonable employer could have come to – that is, the redundancy was not genuine.

Was the process of consultation a fair one?

[38] In *Grace Team Accounting*, the Court of Appeal confirmed that the second aspect of the question of whether a dismissal for redundancy is justifiable is to consider whether the process by which the consultation over the proposed redundancy occurred was a fair one. As the Court of Appeal expressed, the requirements of s 4 of the Act and s 103A of the Act are the starting point for that.

[39] In *Stormont v Peddle Thorp Aitken Limited*³ Judge Inglis (as she was then) summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[40] In my view I need to consider:

- (a) Was Ms Rochford given information, such as a proposal for closure with supporting information, to enable her to make informed comments on the possible closure of the Wairakei Road restaurant and the disestablishment of her role;
- (b) Did Golf of Mexico made a genuine effort to consult with Ms Rochford once it had provided that information:
 - a. Did it give her an adequate opportunity to respond; and
 - b. If it did give Ms Rochford an opportunity to respond, did Golf of Mexico then consider those responses;
- (c) Once a decision was made to close the restaurant, did Golf of Mexico sufficiently consult with Ms Rochford and consider alternatives to dismissal⁴?

[41] The problem that Golf of Mexico faces in satisfying the test of justification is that it did not consult with Ms Rochford over closure of the Wairakei Road restaurant at all. I accept Ms Rochford's evidence that in the meeting of 28 February 2017 there was no

³ [2017] NZEmpC 71

⁴ Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102

consultation over the possible closure of the restaurant but rather she was told it was happening and she was being made redundant.

[42] In simple terms when I look at the requirements for consultation above and consider the evidence I find there was a complete and comprehensive failure to consult over the closure of the Wairakei Road restaurant and the termination of Ms Rochford's employment.

[43] For this reason, Ms Rochford's dismissal was not justified.

Conclusion

[44] Ms Rochford was unjustifiably dismissed from both a procedural and substantive perspective.

Unjustified action causing disadvantage

[45] The unjustified action grievance was argued in the alternative and given my finding on unjustified dismissal, there is no need to consider this grievance.

Remedies

[46] Having determined that Ms Rochford was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act. In this regard, Ms Rochford seeks compensation and reimbursement.

Compensation

[47] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Ms Rochford for the humiliation, loss of dignity and injury to feelings she suffered because of the actions giving rise to the grievance. What I must consider is the effects of the unjustified dismissal on Ms Rochford including the flawed consultation and then I must assess the compensatory value of those effects.

[48] Ms Rochford gave evidence of the impact of the dismissal. During this evidence she was emotional and tearful, indicating that even now the unjustified dismissal still has an impact on her. The evidence shows that as a result of the way she was treated Ms Rochford was:

- (a) angry and upset about how she was treated;
- (b) humiliated by the process and lack of support and discussion, and she felt ignored which would have impacted her self-esteem;
- (c) stressed for some weeks, which manifested in sleepless nights and a withdrawal from family and friends who described her as being particularly sad during this time;
- (d) tearful and emotional, which I believe indicates feelings of helplessness and betrayal or being let down by people who she had worked with for years and were close friends.

[49] In deciding the level of compensation Ms Rochford is entitled to for the loss of dignity, humiliation and injury to feelings described above, I have considered the decision Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald*⁵.

[50] I do not think the level of loss of dignity, humiliation and injury to feelings in Ms Rochford's case to be on a par with that considered by the Chief Judge. I accept it is in the middle range of the bands that the Chief Judge has referenced, but it is at the lower end of that middle range.

[51] I assess the level of compensation to be \$14,000.00.

Reimbursement

[52] Ms Rochford seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

⁵ [2017] NZEmpC 132

[53] If I am satisfied that Ms Rochford has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act I must award Ms Rochford at least the lesser of her actual loss or three months ordinary time remuneration.

[54] Ms Rochford was able to find new employment commencing on 5 May 2017. This means Ms Rochford was unemployed and without any remuneration for eight weeks because of the unjustified dismissal. That is, I am satisfied that Ms Rochford has a personal grievance and that she lost remuneration because of that grievance.

[55] Ms Rochford is paid more in her new job than Golf of Mexico paid her. This means that her actual loss is eight weeks remuneration, which is less than three months ordinary time remuneration. So completing the assessment required by s 128 of the Act, this means I must award Ms Rochford eight weeks remuneration.

[56] I calculate eight weeks remuneration to be \$4,954.56 (gross), based on her average weekly earnings.

Contribution

[57] As I have awarded remedies to Ms Rochford, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁶

[58] This assessment requires me to determine if Ms Rochford behaved in a manner that was culpable or blameworthy, and this behaviour contributed to the unjustified dismissal occurring.⁷

[59] I do not accept that Ms Rochford's behaviour during this matter was in any way culpable or blameworthy and there is no contribution.

⁶ Section 124 of the Act.

⁷ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Determination

[60] Golf of Mexico Limited unjustifiably dismissed Katrina Rochford.

[61] In satisfaction of Ms Rochford's personal grievance Golf of Mexico is to pay Ms Rochford, the following amounts:

- (a) \$14,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$4,954.56 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.

Costs

[62] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred in taking part in these proceedings. If they cannot agree, then any party seeking costs can lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority