

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 381
3123574

BETWEEN

ROBYN STEELE
Applicant

AND

KAYLEE INVESTMENTS LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Danielle Mills-Godinet, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 15 June 2022 at Christchurch

Submissions Received: On the day from the Applicant

Date of Determination: 11 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Robyn Steele was employed by Kaylee Investments Limited (Kaylee Investments) from November 2018 until her employment was terminated for reason of redundancy on 26 March 2020. Employment followed the purchase by Kaylee Investment of the business Ms Steele had been working in. Ms Steele's position was described in her employment agreement with Kaylee Investments as catering assistant/baker and her place of work was at Leeds Street or as directed to support events. Her terms and conditions of employment remained the same following her employment with Kaylee Investments, and she was given a pay increase after a few months.

[2] Kaylee Investments is a duly incorporated company having its registered office in Christchurch. It carried on the business of catering and cafés and traded as Victoria Foods. The sole director of Kaylee Investments is Mark Cowan.

[3] In April 2019 Ms Steele was asked if she would be interested in relocating and working at Air New Zealand Engineering at the airport as Kaylee Investments had taken on a new contract for the Hanger café. Ms Steele was reassured that if it did not work out, she would be able to return to her usual position in town at Leeds Street. Ms Steele agreed to the change and on 1 May 2019 started working at the Hanger café.

[4] Ms Steele worked with three new staff who were employed to work at the Hanger café. Two existing staff from the previous business were also retained. Ms Steele's role included baking and serving. She said in her evidence that other staff undertook the same duties. Pies and lunchtime meals were initially prepared in town by the chef and other staff and transported to the airport café. In or about August 2019 Ms Steele's duties and those of other staff increased to include the preparation of the mid-day meal and organising menus, rather than these being prepared at Leeds Street.

[5] Ms Steele says that she was unjustifiably dismissed for reason of redundancy following a restructure process between 16 and 26 March 2020. Alternatively, that she was unjustifiably disadvantaged. She does not accept that the redundancy was genuine and says that the process was not undertaken in good faith and was not fair.

[6] Ms Steele seeks compensation, reimbursement of lost wages, her notice period to be paid at her average hours of 40 hours rather than the minimum hours in her employment agreement, and costs.

[7] The statement in reply set out that Kaylee Investments no longer operates or trades in any capacity, but the cost of putting the company in liquidation and the fact there are no assets to recover means it is still registered. Kaylee Investments has sold its catering/food business that traded as Victoria Foods.

[8] In relation to the substantive matters the statement in reply referred to the bank and accountant raising issues with it from the beginning of 2020 about its financial situation, and that there needed to be changes made. The Covid-19 situation then impacted on its

events/hospitality business and meant a downsizing was necessary. The statement in reply referred to at least six staff, including Ms Steele, being made redundant.

The Authority investigation processes

[9] On 14 June 2022 the Authority received advice from a solicitor who had previously represented Kaylee Investments. Mr Cowan asked her to advise the Authority and Ms Steele that there was no money available to defend the matter or meet any award and work commitments meant that he was not able to appear. It was set out that Mr Cowan understood the consequences of not doing so. There was advice that Kaylee Investments is no longer trading and is insolvent. Affidavits lodged in another matter concerning Kaylee Investments, including from an accountant, set out the financial situation.

[10] The Authority proceeded to hear evidence from Ms Steele and from her partner, Graeme Baird.

Issues

[11] The Authority needs to determine the following issues in this case:

- (a) Was the dismissal for reasons of redundancy unjustified which includes an assessment of the following?
 - (i) The legal framework?
 - (ii) The provisions in the employment agreement?
 - (iii) Was the redundancy for a genuine reason?
 - (iv) Was there a fair process with adequate information provided and proper consultation?
 - (v) Alternatively, were there actions of Kaylee Investments that caused disadvantage to Ms Steele and were unjustified?
- (b) If the dismissal was unjustified then what remedies should be awarded and are there issues about mitigation and contribution.

Was the dismissal for reason of redundancy unjustified?

The legal framework

[12] The Authority is required to apply the justification test in s 103A of the Employment Relations Act 2000 (the Act) and objectively assess whether the dismissal of Ms Steele was what a fair and reasonable employer could have done in all the circumstances. That includes an assessment of whether the procedural fairness factors in s 103A (3) of the Act are satisfied.

[13] The Court of Appeal confirmed the application of the justification test in *Grace Team Accounting Ltd v Brake*.¹ In *Brake* the Court of Appeal emphasised the importance of addressing the genuineness of the redundancy decision. It was stated that if the employer could show the redundancy is genuine and that notice and consultation requirements of s 4 have been duly complied with, that could be expected to go a long way towards satisfying the test.²

[14] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. They are to be active and constructive in establishing and maintaining productive employment relationships. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information, before a decision is made.

The employment agreement

[15] Clause 16.1 in the employment agreement defines redundancy as the position becoming superfluous to the needs of the company. It provides that a good faith process is to precede a termination. Notice may be worked out or paid in lieu at the discretion of the employer.

Redundancy for genuine reasons

[16] Although there was no appearance on behalf of the company, I objectively assess that the company was facing financial difficulties in the lead up to the lockdown in 2020. An accountant's letter is attached to the statement in reply, dated 28 July 2020. It confirms two matters. Firstly, whilst no 2020 financial statements had been prepared at that stage due to a

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

² Above n 1 at [85].

lack of funds, the business was in a poor financial state prior to the Covid lockdown which was made worse by the lockdown itself and that led to a bank forced sale.

[17] Secondly, the accountant's letter confirmed that the company sold its business and assets to a third party in June 2020 for a significant loss to what the business had been purchased for two years previously. All funds were used to repay secured creditors however there was a significant shortfall to a bank, of several hundred thousand dollars.

[18] I accept there was a genuine basis for a restructuring to achieve cost savings.

[19] Ms Steele gave evidence of some unsatisfactory interactions in her employment that led her to a view she had been targeted for redundancy. Notwithstanding the genuine basis for restructuring, her fears and suspicions about why her position had been selected for redundancy were not allayed. An objective assessment of the process and selection of Ms Steele's position is required to ascertain if good faith obligations were met in the provision of information and that there was proper consultation.

Was there a fair process with adequate information provided and proper consultation?

16 March 2020 – first meeting in the process

[20] On 13 March 2020 Ms Steele received a text message from her employer to attend a meeting on 16 March 2020. She was not advised in the message what the meeting was about, and it was not suggested that she attend the meeting with a support person.

[21] Ms Steele attended the meeting alone. Mr Cowan was present with his wife. There was advice that the company was struggling financially and had to make some changes. Ms Steele understood that there had been discussions with a lawyer and accountant. Ms Steele reminded Mr and Mrs Cowan that she had been promised if it did not work out at the airport, she could go back to town. She was not reassured that would be considered. At the end of the meeting Ms Steele was given a proposal for change.

Proposal for change

[22] The proposal for change document referred to financial difficulties, with the previous three months of business below predicted forecasts. Figures were said to be available on request. The impact of Covid-19 was referred to with cancellation of conferences and a cut

back in spending. There was reference to all areas of the business being considered but it was stated the Air New Zealand business was where the company was “suffering the most.”

[23] It was proposed to end the contract for operation of one café, and that there be changes at the Hanger café where the meal preparation and baking was undertaken. It was proposed that the staff at Leeds Street would do the baking and lunch and meal preparation.

[24] Three roles were set out as impacted. The first was at a café at which it was proposed that the contract be ended. The second was the position of baker/cook at the Hanger café which was seen as Ms Steele’s role and the third was a part time food preparation role.

[25] The timeline for the process was set out. Feedback was to be provided to the proposal by Monday 23 March with an anticipated decision on the final structure on 26 March 2020. The proposal provided that a time could be made to meet and discuss feedback and thoughts on the proposal.

[26] There was a letter accompanying the proposal. It provided, amongst other matters, that there are currently no redeployment opportunities within the organisation. If the proposal did proceed it was stated that Ms Steele’s employment was likely to come to an end and she would be entitled to two weeks’ notice. It was set out that she would be given the option of working this out or being paid in lieu and there would be no steps taken to enforce the restraint of trade.

[27] After the meeting Ms Steele made some inquiries with the other employees at the Hanger café who did the same sort of work she did. They had not received a proposal. Ms Steele formed a view that she had been targeted.

Feedback and advice of redundancy

[28] After the meeting on 16 March Ms Steele received a telephone call from her son who had returned from Australia to say that he had been sent to the doctor for a Covid-19 test as he had flu-like symptoms. He was told by the doctor that anyone he had contact with would have to isolate until his test came back.

[29] Ms Steele contacted her manager to let her know that she would be away until the test result was available. She also sent a text message to Ms Cowan on 18 March to advise that she was waiting on a clearance to return to work but that when she did, she would like to have a meeting to discuss the changes proposed in the document.

[30] Ms Cowan responded that was fine.

[31] Ms Steele received confirmation that her son was negative for Covid and that she could return to work. She was advised in an email dated 23 March 2020 that the company had made more people redundant. Those staff had been advised they could remain at home on full pay. Ms Steele was advised that she was not required to come to work until 26 March 2020.

[32] Ms Steele considered that the decision had already been made.

[33] Ms Steele's support person was her partner Mr Baird. Mr Baird was of the view that the company was not doing things properly.

[34] He raised his concerns with Mr Cowan.

No meeting on 23 March 2020

[35] There had been agreement to a meeting on 23 March 2020. This meeting was then cancelled by Mr Cowan. He wrote in an email dated 20 March that he found Mr Baird's emails aggressive and threatening and was not comfortable to meet. The Authority was only provided with one email from Mr Baird dated 20 March 2020. That did not appear on reading to support the conclusions reached by Mr Cowan but I do not rule out a possibility of other emails.

Feedback

[36] There was feedback provided to the proposal by Mr Baird in writing on behalf of Ms Steele. The Authority was not provided with the email containing that feedback. The letter of dismissal addresses the following feedback said to have been received from Ms Steele:

- (a) There was a promise that Ms Steele would have a position in town if the airport café role did not work out.
- (b) The title of Ms Steele's role is catering/baker assistant and not baker/cook.
- (c) Ms Steele has longer service than others whose positions have not been disestablished.
- (d) A subsidy is available to retain staff.
- (e) That the company is taking advantage of the pandemic to get rid of people.

- (f) There was also a concern raised that Ms Steele should have been permitted a support person on 16 March, that she was not allowed to work during the consultation period and that there had been no meeting as agreed on 23 March 2020.

26 March 2020 – letter of termination

[37] On 26 March 2020, Mr Baird received a letter containing the outcome of the proposal for change. The letter set out that the feedback had been considered and went through each aspect raised and commented to them. Ultimately the proposal to disestablish the role was confirmed.

[38] There was confirmation in the termination letter that roles had been disestablished at Leeds Street and there were no vacancies to redeploy Ms Steele to. The result was that her employment was terminated due to redundancy, and she was entitled to notice which would be paid out in lieu. The letter provided that 26 March 2020 was Ms Steele's last day of employment.

[39] On 31 March 2020 Ms Steele was advised in a letter by Kaylee Investments that there had been some clarification in relation to the wage subsidy scheme and that they had determined to proceed with the proposal. There was a proposal to extend the notice period to 12 weeks based on:

- (a) You will not be required to work during your notice period;
- (b) At the end of your notice period you would be paid any outstanding holiday pay or alternative day entitlements;
- (c) The 12 weeks notice would be paid at the rate of the subsidy we receive for you;
- (d) If a role became available within the 12 weeks notice period you would have an opportunity to be considered for this along with the others made redundant by us due to COVID-19; and
- (e) this would be full and final settlement of all matters arising out of the employment relationship.

[40] Ms Steele did not accept the proposal.

Conclusions on fairness of the process

[41] Good faith obligations require that Ms Steele be provided with information relevant to the continuation of her employment and an opportunity to comment on the information before a decision is made. Sufficiently precise information is required therefore, so that there is an

opportunity to provide a view. A good faith process is also an obligation in the employment agreement.

[42] There was a proposal provided to Ms Steele. Kaylee Investments were entitled to have a working plan in mind about any changes. Importantly however, there was no overall information provided about the restructuring including how the restructure had impacted other areas of the Kaylee Investments business, particularly Leeds Street. That was material because Ms Steele had been told she could return to the Leeds Street business if things did not work out at the Hanger café. The response to Ms Steele's feedback that she was promised a position at Leeds Street if the Hanger café did not work out, was set out in the letter of dismissal. It was as follows:

In usual circumstances we would have endeavoured to find work for you back at Leeds St if it was available, this is not the case currently.

[43] Later in the letter it is stated that roles had been disestablished at Leeds Street and there were no vacancies to redeploy Ms Steele. What those roles were and whether positions continued to exist, and if so which positions, was unclear.

[44] Failure to provide information about that so Ms Steele could understand and provide a view on this was a serious defect in the process.

[45] Another serious defect in the process was that Ms Steele was unclear why her position had been selected for redundancy, rather than that of other staff members performing the same tasks at the Hanger café. When she raised this as a feedback issue the response in the letter of termination was as follows:

We cannot take others out of the jobs they are contracted to and give their job to you, simply because you have longer service.

[46] Ms Steele asked for a meeting to talk about her feedback. Although initially agreeable to a meeting, Kaylee Investments said that they felt threatened by Mr Baird's communications and declined to hold a meeting. Even if there was concern, guidelines about conduct at the meeting could have been set to enable it to take place. Ms Steele had been given the option of a meeting in the letter that accompanied the proposal given to her on 16 March 2020, which she advised she wanted, but no meeting took place. A genuine opportunity for Ms Steele to

provide her views on the information provided was not available. Importantly, she was deprived of answers to her questions before the decision to dismiss was made.

[47] Ms Steele was not permitted to return to work until the decision to dismiss was made. This could support an element of pre-determination.

[48] There were other aspects of the very short process that deviated from the ideal however, the matters set out above are the main reasons why I conclude that the information provided and the consultation, was inadequate. The procedural factors in s 103A of the Act have not been satisfied and not in a minor way, but in a way that caused unfairness.

[49] There was a basis for a restructuring because of financial issues that faced Kaylee Investments in 2020. The procedural unfairness however was significant. There was a very short process, a lack of information about why Ms Steele's position had been selected and a lack of information about what was happening more broadly with the business of Kaylee Investments. There were elements of pre-determination. The decision to dismiss Ms Steele for reason of redundancy was not a decision that an employer acting fairly and reasonably could have made in all the circumstances. Applying the test in s 103A of the Act, the dismissal was unjustified.

[50] Ms Steele has made out her personal grievance that she was unjustifiably dismissed. That finding absorbs the unjustified disadvantage claim. Ms Steele is entitled to consideration of remedies.

Remedies

Lost wages

[51] Ms Steele seeks three months lost wages. Section 123(1)(b) of the Act provides for reimbursement of the whole or part of the wages lost because of the personal grievance. Section 128(2) of the Act provides for an order of the lesser of a sum equal to lost remuneration or to three months ordinary time remuneration. Ms Steele gave evidence that she has not worked since her dismissal for reason of redundancy.

[52] It is difficult for the Authority, in the absence of evidence from Kaylee Investments, to conclude with certainty whether a fair process would have meant the relationship would have lasted for three months. The business was sold in June 2020 although the exact date is not

apparent. I intend to approach the matter on the basis that given the offer to extend the notice period from two weeks to twelve weeks by payment of the wage subsidy, the relationship could have remained on foot for that period at least.

[53] Ms Steele did not accept payment of the wage subsidy offered for a further ten weeks of notice in addition to the two already paid. The reason was a lack of trust. I don't conclude that broke the causal link between the grievance and the loss. Ms Steele's actual loss, even if she had accepted the wage subsidy offer was much greater than three months ordinary time remuneration.

[54] Ms Steele wanted reimbursement based on her average hours worked rather than the employment agreement rate. The Authority is assessing reimbursement for a period when Ms Steele did not work. I cannot rule out issues with work and reduced hours over the lockdown period. The employment agreement provides guaranteed hours of 30 per week. The guaranteed number of hours in the employment agreement is the appropriate basis for calculation in the circumstances.

[55] Subject to any issues as to contribution, three months lost wages based on 30 hours per week at \$22 per hour is \$8,580 gross.

Compensation

[56] Ms Steele gave evidence that she had been led to believe her job was safe if the Hanger café did not work out. She remained unclear why she had been selected and felt betrayed. I accept the failure to provide information and consult properly to enable an understanding about the situation had a significant impact on her wellbeing. Mr Baird said that he saw Ms Steele deteriorate and go into depression. I am not able to, and do not conclude from the evidence, that the extended period of not working was in whole or significantly due to the dismissal. Ms Steele says that staff she worked with are still employed. If they are then they are not working for Kaylee Investments. A new business can decide what employees, if any, they want to retain. The sale of the business took place in June 2020. There could be no absolute guarantee of employment for any employee beyond that date.

[57] I accept Ms Steele suffered humiliation, loss of dignity and injury to her feelings. There remains a sense of injustice about what happened to her. I conclude an appropriate award under this head considering other similar cases and subject to any issues of contribution is \$15,000.

Contribution

[58] I do not find that Ms Steele contributed to the grievance about the redundancy. The above remedies are not reduced.

Increase in the notice payment to reflect averaging of hours worked

[59] Ms Steele seeks an adjustment to her notice payment of \$440. That is on the basis that her notice in lieu payment for two weeks was based on the minimum hours in her employment agreement rather than her average hours. The notice period fell over the level 4 lockdown period. The evidence from Mr Baird and Ms Steele was that they believed the café continued to operate over level 4 lockdown. In the absence of evidence from Kaylee Investments, I could not be satisfied to the required degree it was an essential service and able to operate at that time. Even if Ms Steele had been able to work her notice out, it is not certain she would have worked her usual average hours. I do not conclude that it was inappropriate in the circumstances to base the notice period on the guaranteed hours in the employment agreement. I do not make an adjustment.

Costs

[60] It is appropriate to fix costs. The investigation meeting was to have started at 9.30am but started at 9.50am to enable Ms Mills-Godinet to talk to Ms Steele and Mr Baird about the affidavits lodged on behalf of Kaylee Investments with the financial information. The investigation meeting concluded at 11.30am.

[61] That is a quarter of a day and based on the daily tariff for the first day of investigation of \$4,500 an award of \$1,125 is appropriate.

[62] There should also be reimbursement of the filing fee of \$71.56.

Orders

[63] I order Kaylee Investment Limited to pay to Robyn Steele the sum of \$8,580 being reimbursement of lost wages under s 123(1)(b) of the Act.

[64] I order Kaylee Investments Limited to pay to Robyn Steele the sum of \$15,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

[65] I order Kaylee Investments Limited to pay to Robyn Steele the sum of \$1,125 for costs and \$71.56 for reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority