

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 451
3127754

BETWEEN CHRISTINE STEVENS
Applicant
AND SQUARE PEG LIMITED
Respondent

Member of Authority: Leon Robinson
Representatives: Dave Cain, advocate for Applicant
Michael Smyth, counsel for Respondent
Investigation Meeting: 1 July 2021 at Auckland
Submissions received: 14 July 2021 from Applicant
14 July 2021 from Respondent
Determination: 12 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Christine Stevens (Ms Stevens) claims her dismissal for redundancy was unjustifiable because it was not genuine or procedurally fair. She says too, a direction given to her on 20 March 2020 that go home on annual leave unjustifiably disadvantaged her. Square Peg Limited (SPL) responds that it had genuine reasons and adequately consulted with Ms Stevens before it made its decision to terminate her employment for redundancy and its direction was justifiable to effect advance notice it had of an impending national lockdown.

[2] The parties were unable to resolve their employment relationship problem by the use of mediation. Ms Stevens asks the Authority to resolve her personal grievances by granting her formal orders for reimbursement, compensation and a contribution to the costs of her representation.

The Authority's investigation

[3] The Authority establishes the facts of this employment relationship principally through an investigation meeting held at Auckland. The parties and their witnesses lodged written statements of evidence and were examined under oath or affirmation by the Authority and the representatives. The Authority also received documentary evidence and submissions from the representatives on the evidence taken and relevant matters of law.

[4] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The factual background

[5] Ms Stevens was employed as SPL's Asset and Tenancy Manager from 26 October 2019. She had been offered employment by SPL's managing director Ms Sandy Williams (Ms Williams) whom she had known from a previous employment. Ms Stevens reported to Ms Williams. The terms of the employment were recorded in a written employment agreement signed on 15 September 2019.

[6] The Authority is told SPL is a social housing, facilities and asset management company and was intended to be the umbrella company for four other limited liability companies namely:-

Sheltering Arms Limited - an emergency housing provider to the Ministry of Social Development.

Kerr's Motel and Homestay Limited - a motel and homestay located in Wiri.

The Franklin Estate Limited - a wedding venue located in Clarks Beach, Pukekohe.

Property Locker Limited - a property management company.

Ms Williams and SPL's other director and shareholder Ms Susan Hastie (Ms Hastie) are also the only directors and shareholders of those other companies. SPL employed the staff who worked in these businesses.

[7] Ms Stevens' SPL role involved her working across the businesses of the other companies. The job brief was to oversee the daily operational requirements of all entities under the SPL umbrella that related to property management. Ms Stevens had thirteen direct reports.

[8] By the end of 2019 Ms Stevens began to feel some of her responsibilities were being removed from her without consultation or her agreement. She agreed that the security team be managed by another person for what she thought was on a temporary basis.

[9] Mr Colin Kennedy (Mr Kennedy) was appointed General Manager in February 2020 whose responsibilities included the security team and Ms Stevens. In the same month Ms Stevens says Ms Williams removed her day-to-day management of Sheltering Arms Limited operations and directed her to focus on Property Locker Limited business. Ms Stevens says that when she learned Ms Hastie's son was dealing with Kerrs Motel & Homestay Limited tenancies she no longer doubted she was being "pushed out".

[10] On 20 March 2020 Ms Williams learned from the Ministry of Social Development that New Zealand would be moving into a lockdown. She was also advised that the Ministry would not be referring any more beneficiaries to Sheltering Arms business for emergency housing. COVID-19 had accelerated the Government's preference for transitional housing rather than emergency housing. The impact of both the lockdown and the change in Government policy meant that the Sheltering Arms business would potentially be without revenue for a considerable period of time while it itself sought to transition. Its operations would also be significantly curtailed. Existing tenants would be re-housed and/or moved into transitional housing. The shift in Government policy had been indicated to SPL in November 2019.

[11] Ms Williams addressed all staff at Mill Lodge. She informed them that emergency housing for Sheltering Arms was coming to an end and New Zealand was moving towards a lockdown. She suggested to staff options for taking annual leave and working reduced hours.

[12] There was then a separate meeting where Ms Williams and Mr Kennedy spoke to Ms Stevens. In the circumstances Ms Stevens was asked to take two weeks annual leave whilst they worked out what to do. Ms Stevens did not object or consent.

[13] On the afternoon of the 26 March 2020 Mr Kennedy sent an email to Square Peg staff. The communication conveyed a message that the COVID-19 wage subsidy for businesses was not easily accessed and the accompanying Government “spin” was not to be believed there being ‘fishhooks’ to it, by and large it being “smoke and mirrors”, and was not as easy as the Government was “pretending”. The message materially advised Sheltering Arms’ business was in “dormant mode” and there was no work to be done from home. There was an apology more clarity could not be given. Mr Kennedy concluded his email by recommending staff ‘hunker down’ and expressing hope that there would be jobs to return to after lockdown.

[14] SPL did not make application for the Government COVID-19 wage subsidy because it considered that it could not ensure continued employment beyond the period of the wage subsidy, a condition of it. It was not eligible too because its revenues had not dropped the required 30% as it was still receiving rental income from the Ministry of Social Development.

[15] SPL considered a loan from the Government imprudent and the terms unattractive.

The issues arising

[16] The issues requiring investigation and determination included:

- (a) was Ms Stevens’ employment, or 1 or more conditions of her employment with Square Peg, affected to her disadvantage by some unjustifiable action by Square Peg, that unjustifiable action being the suspension from her duties on 20 March 2020?
- (b) was Square Peg’s decision to dismiss Ms Stevens by reason of redundancy, and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?
- (c) if Square Peg is found to have acted unjustifiably (by disadvantaging and/or dismissing Ms Stevens), what remedies should be provided to Ms Stevens:-
 - (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate loss) following dismissal?;
 - (ii) compensation under section 123(1)(c)(i) of the Act?

- (d) If any remedies are provided, should they be reduced (under section 124 of the Act) for blameworthy conduct by Ms Stevens that contributed to the situation giving rise to the personal grievances?
- (e) Should either party contribute to the costs of representation of the other party?

Unjustifiable disadvantage?

[17] Ms Stevens says that she was told she was being placed on paid then unpaid leave (once her leave was used up) for two weeks. She says Ms Williams told her that at the end of those two weeks she would be advised if her employment would continue or not and further, that she could apply for the wage subsidy but to do that she would have to be unemployed. Ms Stevens says she had an impression Ms Williams and Mr Kennedy wanted her to resign. She says she later learned it was for SPL to make application for a wage subsidy on her behalf and that she would not have had to resign.

[18] On 20 March 2020 when Ms Stevens met with Mr Kennedy and Ms Williams there was considerable uncertainty in what was and still continues to be, extraordinary times. I am not persuaded of Ms Stevens impression that she ought to resign. Whatever was said, I find that it amounted to Ms Stevens being informed that she was to remain away from work for two weeks on paid and then unpaid leave.

[19] It is not correct that Ms Stevens was suspended or stood down. It was known by all that the impending lockdown meant self-isolation for everyone. I find that in the circumstances the direction she remain at home away from work in the context of the lockdown unobjectionable.

[20] However, the decision that she access her annual leave was not hers. I am not persuaded that Ms Stevens was presented with a choice. When annual holidays are to be taken by an employee is to be agreed between the employer and employee. SPL relies on the absence of an objection. At best SPL had Ms Stevens' acquiescence but it did not have her express agreement. It was a choice made for Ms Stevens and SPL was not entitled to make it. SPL subsequently reimbursed Ms Stevens for two weeks salary.

[21] I find that SPL's decision that Ms Stevens take annual leave constituted a disadvantage to Ms Stevens that was unjustifiable. Ms Stevens has a personal grievance unjustifiable disadvantage for which she is entitled to have settled by formal orders in her favour. SPL has reimbursed Ms Stevens. I do not consider she suffered any loss

for which she ought to now receive an award of compensation for. A penalty would have been a different matter but Ms Stevens does not ask the Authority to impose one.

Unjustifiable dismissal?

[22] As the initial two week period proposed to employees to remain away from work came to an end, SPL appreciated that empty properties were not being re-tenanted and Government policy preferring transitional housing arrangements was taking effect. Ms Williams and Mr Kennedy examined where they could make savings and identified eight roles as potentially surplus to requirements as a result of changed Government policy and the compounding effect of lockdown. These eight roles were Property Manager/Operations Support, Social Worker, Security Officer, Inspection Agent, Landscape Gardener, Property Manager, and the role Ms Steven's was employed in Asset and Tenancy Manager.

[23] The Employment agreement defined redundancy as when the employee's position is no longer needed. It obliged the parties to follow a good faith restructuring process after which the redundant employee was entitled to notice but not compensation.

[24] Mr Kennedy invited Ms Stevens and her support person to attend a meeting with him initially for 2 April 2020 but rescheduled for Monday 6 April 2020. Ms Stevens attended with her father Mr Gary Stevens (Mr Stevens).

[25] Mr Kennedy had a script to assist him and explained that the revenues across the constituent businesses were falling and that what was once a face-to-face business could no longer happen. He explained the lack of face-to-face interaction meant that a digital dependent model which was likely to be more viable for the future given that no-one knew how long lockdown would last. He explained too that there was a government moratorium on using the Kerr's Road property for emergency housing and emergency housing was being phased out in favour of transitional housing. He added that they were a long way from knowing whether transitional housing status could be achieved. He concluded that, because of all these factors, it was believed that Ms Steven's role was surplus to requirements and he sought her feedback on that.

[26] Ms Stevens and Mr Stevens asked about the Property Locker's business operations. Ms Stevens also suggested that the Kerrs Road boarding house could be

used for long term tenancies. Mr Kennedy said he would take Ms Stevens' suggestions to senior management for consideration.

[27] He suggested that Ms Stevens would be "better off" to claim a benefit than the wage subsidy. Ms Stevens dismissed the suggestion and said that in light of her skills and knowledge she was clearly a value to the business and Ms Williams would not have recruited her if she did not believe that to be the case. Mr Kennedy pointed out the process was not about Ms Stevens performance. Ms Stevens asked to be included in the company's wage subsidy application rather than be made redundant. She stated that rather than making a decision immediately continuing her employment with the assistance of government financial support would be a better solution for them both. Mr Kennedy suggested that he would take the suggestion to senior management for their consideration

[28] The parties met again the following day to further discuss the proposal and to hear Ms Steven's feedback. There was initial discussion on the future of Kerr's Road Motel and Homestay and the wage subsidy. Mr Kennedy explained that the business did not yet qualify for the wage subsidy. He said that other employees had been offered the subsidy but they worked for different companies. Ms Stevens reminded him she worked across all companies but Mr Kennedy made clear there would be no subsidy on Ms Stevens' behalf. When he was asked about alternative roles within the business Mr Kennedy advised that there were none. Ms Stevens asked whether she could have a reference and Mr Kennedy agreed.

[29] SPL says Ms Stevens did not suggest any alternative proposals to the proposal to disestablish her role. Mr Kennedy says that in the environment they faced, it would have been difficult for her to do so. He says the other seven employees with whom he had discussions about redundancy were all very accepting of the difficult situation and only one had challenged their dismissal. He says one person was redeployed into a significantly reduced role.

[30] A letter dated 7 April 2020 signed by Mr Kennedy confirmed Ms Stevens termination for redundancy and the payment of four weeks salary in lieu of notice.

[31] Ms Stevens emailed Mr Kennedy on 14 April 2020 expressing confusion and suggesting SPL may have acted too quickly.

[32] Mr Kennedy following his script, must have informed Ms Stevens that the remote model of working meant a slimmed down team could sit on the phones instead of having to do face to face visits. The memoire has him then concluding that for Ms Stevens “the best option is redundancy” with “four weeks notice pay on garden leave(sic)”.

[33] SPL proposed to make a decision that was likely to have an adverse effect on the continuation of Ms Stevens employment. It was obliged to provide her with access to information relevant to the continuation of her employment, about the decision; and an opportunity to comment on the information to SPL before the decision was made.

[34] Ms Stevens was not provided with any information about the proposal to disestablish her position. SPL decided hers was one of eight which was potentially no longer required. It did not explain to her how that was so. It had decided hers was a position where it could make savings. But Ms Stevens was not provided the information about why her employer believed that. A fair and reasonable employer would have presented that information. Ms Stevens was denied an opportunity to comment on SPL’s conclusion and that was not fair to her.

[35] As well, SPL had decided on a remote model of working that meant a slimmed down team could sit on the phones instead. It provided no information to Ms Stevens about this new model for her to comment on. But it had also decided she was not someone who could sit on the phones instead. It did not tell her it had made that decision and it did not tell her why she could not. It also concluded her position was not included in a slimmed down team, but there was no process by which it was entitled to reach the conclusion. It made that decision without any reference to her and that was no fair to her.

[36] Mr Kennedy made commitments to refer various points to senior management for follow up. I am not persuaded he did so and that was not fair to Ms Stevens. It is not apparent to me that there was any genuine and unbiased consideration of the feedback Ms Stevens gave.

[37] The suggestion that Ms Stevens would have been better off on the benefit rather than the wage subsidy was a deplorable suggestion. Ms Stevens was right to dismiss the suggestion quite understandably preferring instead the indefinite employment. The requests she made of her employer to pursue a wage subsidy application in respect of

her employment were dismissed out of hand without due regard for her continuing employment and that redundancy is the last resort. A fair and reasonable employer would have done all that it could to pursue the matter so as to permit the connection with its employee to continue.

[38] SPL was obliged to identify alternatives to redundancy because that is what a fair and reasonable employer would do. I am not satisfied that it discharged this obligation in Ms Stevens' case. It presented no evidence of making any such enquiries and simply declared to Ms Stevens there were none. Its denial was not credible in the absence of some foundation for it. I am not persuaded that the opportunity for which Ms Sue Ataie was engaged could not have been an opportunity presented to Ms Stevens as an alternative to her redundancy.

[39] For all these reasons I am not persuaded that SPL's decision to dismiss Ms Stevens by reason of redundancy, and how that decision was made and carried out, was what a fair and reasonable employer could have done in all the circumstances at the time. I find that she has a personal grievance for unjustifiable dismissal and she is entitled to remedies to resolve that personal grievance. I do not consider there is any blameworthy conduct on Ms Stevens' part which would require a reduction in both the nature and extent of any remedies to be awarded to her.

[40] Ms Stevens gives evidence of the steps she took to obtain alternative employment after her dismissal from SPL. I am satisfied that she took steps to mitigate her losses.

[41] I am satisfied that Ms Stevens suffered loss of income for which she is entitled to be reimbursed. I order Square Peg Limited to pay to Christine Stevens the gross sum of \$25,000.00 as reimbursement.

[42] Ms Stevens gives evidence that her dismissal from SPL has had an enormous impact on her both emotionally and financially. She is devastated about how her employment ended and she feels absolutely betrayed. I heard from Ms Stevens father Mr Gary Stevens too. He described his observation of how Ms Stevens was affected and in particular how she needed emotional and financial support after her dismissal. I am satisfied that Ms Stevens has suffered hurt and humiliation, loss of dignity and injury to her feelings as a result of the unjustifiable dismissal I have found. I order Square Peg Limited to pay to Christine Stevens the sum of \$15,000.00 as compensation.

Costs

[43] If they are not able to do so and an Authority determination on costs is needed Mr Cain may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Smyth would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Leon Robinson
Member of the Employment Relations Authority