

**Attention is drawn to the order prohibiting publication of certain information referred to in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 60  
3220919

BETWEEN	THR Applicant
AND	GRENADIER REAL ESTATE LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Robert Thompson, advocate for the Applicant Werner van Harselaar, counsel for the Respondent
Investigation Meeting:	6 November 2023 at Christchurch
Submissions Received:	6 November 2023 from the Applicant 6 November 2023 from the Respondent
Date of Determination:	2 February 2024

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1] THR has applied for non-publication orders in relation to her identity. Her advocate advances the application on the basis that publication of her identity will have an adverse and ongoing impact on her reputation and future career prospects.

[2] Grenadier Real Estate Limited oppose the application.

[3] My discretion to grant the non-publication order sought is broad but I must exercise it in line with the applicable principles. The key principle is that of open justice i.e. parties being named and identified in litigation. But that principle can be displaced by sound reasons.<sup>1</sup>

[4] So, I must be satisfied that there are sound reasons for displacing the presumption of open justice. A broad submission that there may be unspecified reputational damage that will arise for an applicant that may also prejudice their future career prospects is, in my view insufficient. The simple point is this potential reputational damage could apply to all parties to litigation and despite this the principle of open justice has always been held to be paramount.

[5] In this case however there is, in my view, personal circumstances of THR that elevate the concerns about reputation and career prospects. These circumstances do not need to be disclosed and analysed - I am satisfied that in these particular circumstances non-publication should be granted.

[6] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act), I make a non-publication order prohibiting the publication of name and identity of the applicant. For the purposes of this determination the applicant will be referred to as THR.

### **Employment relationship problem**

[7] THR was employed as an Office Administrator in a Grenadier branch office.

[8] In February 2022 THR spoke to a Business Operations Officer at Grenadier about work issues. Subsequently, THR raised her work issues with the Grenadier Chief Operating Officer as she felt nothing had been done. THR then met with the COO on 22 February 2023.

[9] In the meeting on 22 February 2023 the COO raised the prospect of THR resigning and being paid compensation.

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<sup>1</sup> *Erceg v Erceg* [2017] NZSC 28

[10] THR left the meeting and got some employment advice. There was then some communication between THR's adviser and Grenadier but matters were not resolved and THR did not return to work.

### **The Authority's investigation**

[11] THR raised personal grievances for unjustifiable dismissal and unjustified disadvantage and then lodged a statement of problem in the Authority with claims based on these grievances.

[12] I investigated THR's claims by receiving written evidence and documents, holding an investigation meeting on 6 November 2023 and assessing the oral and written submissions of the representatives.

[13] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **What happened?**

[14] THR started work at a branch office of Grenadier on 7 June 2022. THR was employed as an Office Administrator.

[15] The first six months of THR's employment were uneventful as she settled into her role and was trained.

[16] THR says that things started to change for her at work in 2023 when new agents started working from the branch office and her work increased.

[17] In particular, she says the biggest change and impact on her came about when a new Office Manager, Candice Toughey, commenced working in February 2023.

[18] By 10 February 2023, THR was sufficiently concerned about her work and the dynamics in the office with Ms Toughey that she decided to speak to Anna Penny, a Business

Operating Officer at Grenadier who she had dealings with for training and support around the use of Grenadier processes and procedures.

[19] THR and Ms Penny have different views of what was discussed when they met:

(a) THR says when she met with Ms Penny she told her she was feeling stressed with the workload at the branch office because of the new agents and she felt that Ms Toughey was ignoring her. THR says Ms Penny told her she was good friends with Ms Toughey – at which point THR decided not to mention anything further about her work concerns.

(b) Ms Penny says THR was concerned about her workload as the only Office Administrator and made comparisons with other branch offices where they had two Office Administrators. Ms Penny says she told THR that there were not enough agents or work to warrant another Office Administrator in the branch office, and she offered support with training and assistance on systems to streamline THR's work, which included an offer to sit with her and help her in this regard. Ms Penny also says THR only referred to not having an opportunity to have a meeting with Ms Toughey to which she told THR she had worked with Ms Toughey before and would ask Ms Toughey to arrange a catch-up with THR.

[20] After the meeting on 10 February 2023 Ms Penny contacted Ms Toughey as discussed and Ms Toughey arranged a meeting with THR.

[21] Ms Toughey and THR met on 10 February 2023. The end result of the meeting was that THR was left feeling uncertain about her relationship with Ms Toughey and less supported than she had hoped.

[22] Over the next few days THR felt the concerns she had raised with Ms Penny had not been addressed and the work environment was getting worse for her. She perceived that some of the agents were being critical of her work and there was a negative attitude toward her. THR says she was also told by one of the agents that Ms Toughey had asked the agents to

report any mistakes that THR made to her. THR also felt that her relationship with Ms Toughey had not improved and she thought Ms Toughey was ignoring her.

[23] So, on 21 February 2023 THR rang Grenadier's Chief Operating Officer, Bryan Bloomfield. Mr Bloomfield's evidence was that THR was upset in the 21 February call and he says THR wanted to talk about Ms Toughey. In any event THR and Mr Bloomfield agreed to meet the following morning to discuss her issues.

[24] In the 22 February 2023 meeting THR told Mr Bloomfield her concerns about Ms Toughey including that she thought Ms Toughey was rude and dismissive of her and she felt unsupported in her work. Mr Bloomfield asked THR if there was anything she would like him to do and THR asked him to speak to Ms Toughey and see if a resolution could be worked out.

[25] Mr Bloomfield then told THR that there was another option when the relationship between an employer and employee is not working out, that is if THR thought Grenadier was not the right fit for her they would pay THR six weeks wages under s 123 of the Act and she would leave.

[26] THR was shocked and overwhelmed by what Mr Bloomfield had said, she left the meeting and called her sister for some advice. Following this she sent an email to Mr Bloomfield that stated: "You have made me an offer to leave my employment. Please email me the paperwork to sign. ...."

[27] Mr Bloomfield sent an email in reply later that day which had a record of settlement attached and asked her to sign and return it to Mr Bloomfield.

[28] Following this THR's advocate and Mr Bloomfield exchanged correspondence. The end result was that THR treated Mr Bloomfield's action as a dismissal and she did not return to work with Grenadier.

## **Unjustified action causing disadvantage**

[29] An unjustified action causing disadvantage personal grievance is set out in section 103(1)(b) of the Act. This provides that an employee may have a personal grievance where their employment or any condition of employment is or was affected to their disadvantage by some unjustified action by their employer.

[30] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions unjustifiable?

[31] THR's personal grievance for unjustified action is based on allegations that Grenadier did not provide support, training or assistance to her and it did not investigate THR's concerns raised with Ms Penny.

[32] So, the first step for me is to decide if Grenadier:

- (a) Did not provide support, training or assistance to THR; and
- (b) Did not investigate THR's concerns raised on 10 February 2023.

[33] I can deal with the first aspect of this grievance in fairly short terms. I am satisfied on the evidence that I heard that Grenadier did provide support, training and assistance to THR in the course of the first six months of her employment.

[34] In terms of the second aspect, it is clear from the evidence that I heard that Grenadier did not investigate THR's concerns that were raised on 10 February 2023.

[35] Turning to the second question to be addressed it is also clear that failing to investigate THR's concerns would cause a disadvantage to her employment.

[36] The problematic aspect is applying the third question of the analysis for an unjustified action grievance. I am satisfied on the evidence I heard that THR had concerns about her workload and her relationship with Ms Toughey, however I am not satisfied that she expressed these concerns clearly enough to Ms Penny. On this basis, Ms Penny was not provided with sufficiently clear or particularised complaints from THR such that there was an obligation on her, and more generally on Grenadier, to investigate. This being the case the outcome is that Grenadier's failure to investigate THR's complaints was in fact justified in the circumstances.

[37] As a result, my conclusion is THR is not successful with her personal grievance for unjustified action causing disadvantage.

### **Unjustifiable dismissal**

[38] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[39] Dismissal is the termination of employment at the initiative of the employer. It is normally an unequivocal act by the employer, which amounts to a sending away.<sup>2</sup> In some cases an employer may say it did not intend to dismiss an employee but the language used in an exchange with an employee can still amount to a dismissal.<sup>3</sup>

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<sup>2</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

<sup>3</sup> See for example, *No 1 Autohaus Ltd v Wrigley* EmpC Auckland AEC75/97, 18 July 1997 where the words "Good God, look at you, you can just go" were held to be a dismissal.

[40] The assessment of whether the employer's statement is a sending away, when it is not clear, is a question of fact based on an analysis of not just the statement but also the circumstances giving rise to it. And, as stated by Judge Holden in *Cornish Truck & Van Limited v Gildenhuis*:<sup>4</sup>

[45] The test is an objective one: was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated?

[41] THR says that Mr Bloomfield's conversation with her on 22 February 2023 was a sending away; particularly the suggestion that Grenadier would pay her six weeks' wages and she would leave.

[42] It is clear that there was not a straightforward sending away by Mr Bloomfield and he says he did not intend to dismiss her rather he was simply exploring an option for THR if she thought things were not working out.

[43] So, in this case, I must decide if the actions of Grenadier were such that it would be reasonable for a person in THR's position to interpret them as a sending away.

[44] In terms of THR's position the following aspects are relevant:

- (a) THR was relatively junior and just starting out in an office-based career. She was vulnerable because of her limited experience and she felt vulnerable because of the issues she wanted to raise.
- (b) THR was unhappy with how she was being treated in the office and believed she had raised her concerns about this with Ms Penny – at least to a certain level as she felt Ms Penny was too close to Ms Toughey such that there was little point in expressing all of her concerns.
- (c) THR was concerned about what Ms Penny might have said to Ms Toughey and also concerned about what Ms Toughey was telling the agents in the office about her.

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<sup>4</sup> *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6 at [45].

- (d) THR felt things did not change over the next week or so and she was concerned about the impact the office environment was having on her.
- (e) THR was so concerned she called the COO of Grenadier to get some help. She was upset and anxious and needed help – she felt so strongly about this that she reached out to one of the most senior people in Grenadier.
- (f) When THR first spoke to Mr Bloomfield she was upset so he knew this was a significant issue for her.
- (g) In the meeting on 22 February 2023 THR explained her concerns to Mr Bloomfield, particularly how she felt about her relationship with Ms Toughey – the person she reported to. THR told Mr Bloomfield that the work environment and her view of the relationship with Ms Toughey was impacting on her health.
- (h) When Mr Bloomfield asked THR what he could do to help her she asked him to speak to Ms Toughey to see if matters could be resolved – clearly she wanted to continue to work at Grenadier and as part of that she saw that improving her relationship with Ms Toughey was key. THR did not tell Mr Bloomfield that she could not work with Ms Toughey. It must have been clear that she wanted to work on the relationship with Ms Toughey and she saw Mr Bloomfield’s intervention as a simple yet productive step.
- (i) Mr Bloomfield said he would speak to Ms Toughey.
- (j) Then without prompting or any indication from THR that she was thinking about leaving her employment, Mr Bloomfield told her there was another option. Regardless of how Mr Bloomfield expressed it, the option amounted to THR being paid six weeks’ wages to leave Grenadier.

[45] In these circumstances, I conclude that it would be reasonable for someone in THR’s position to think Mr Bloomfield was actually dismissing her request to intervene with Ms Toughey as being too difficult or the issues raised would cause too much of a problem Ms

Toughey and Grenadier. And for these reasons Mr Bloomfield was telling her the only option was for her to be paid to leave, i.e., she needed to resign and Grenadier would pay her six week's wages.

[46] Telling an employee that they should resign, particularly, where there does not appear to be a commitment to maintaining the employment relationship by addressing the employee's concerns amounts to a sending away.

#### *Conclusion on dismissal*

[47] In all of the circumstances I find there was a sending away by Mr Bloomfield because a person in THR's position could reasonably have viewed his option as a sending away.

[48] I conclude that Grenadier did dismiss THR.

#### *Unjustified dismissal*

[49] Having concluded that there was a dismissal arising out of the meeting on 22 February 2023 I must consider if dismissal was justified. There are two aspects to justification; whether the employer carried out a fair process in coming to the decision to dismiss and whether the decision to dismiss was substantively justified.

[50] Neither requirement for a dismissal to be justified were met in respect of THR's dismissal and the dismissal was unjustified.

#### **Breach of good faith**

[51] In her statement of problem THR also seeks a penalty for an alleged breach of good faith by Grenadier.

[52] I accept the facts I have established from the evidence that Grenadier did breach the duty of good faith in its dealings with THR.

[53] However, I do not accept that in doing so Grenadier's conduct meets the level required for a penalty to be imposed. In order to impose a penalty, I need to be satisfied that Grenadier's breach was deliberate, serious and sustained or was intended to undermine the

employment relationship.<sup>5</sup> Essentially this means I need to find that Grenadier intended to dismiss THR by telling her about the option to leave for a payment. On the evidence before me I cannot reach that conclusion. And I will not impose a penalty against Grenadier.

## **Remedies**

[54] As THR has been successful with an unjustified dismissal claim I must consider what remedies she may be entitled to. In this regard, I may award any of the remedies provided for under s 123 of the Act.

### *Compensation*

[55] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[56] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of the dismissal. Various decisions of the Employment Court provide guidance on this exercise of quantification.<sup>6</sup>

[57] I have been able to assess from THR's evidence and from her sister's evidence that THR felt humiliated by her dismissal, she lost faith in employers and has been concerned and anxious over her new employment, she suffered from anxiety, panic attacks, and sleeplessness and she became withdrawn, losing confidence and trust in others.

[58] Based on my assessment of THR's harm and loss, as described, against other awards of compensation I quantify the compensation payable to THR at \$28,000.

### *Reimbursement*

[59] As THR has a personal grievance and as she has lost remuneration as a result of that grievance then pursuant to sections 123 and 128 of the Act, she is entitled to the lesser of her lost remuneration and three months' ordinary time remuneration.

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<sup>5</sup> Section 4A of the Employment Relations Act 2000.

<sup>6</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113; and *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101.

[60] THR's actual lost remuneration is less than three months' ordinary time remuneration; it is \$7,692.32 and this is the amount she is entitled to.

### *Contribution*

[61] As I have awarded remedies to THR I must now consider whether she contributed to the situation that gave rise to her grievance.<sup>7</sup> This assessment requires me to determine if she behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.<sup>8</sup>

[62] THR did not contribute to the action that gives rise to her grievance and there is no reduction required in respect of the compensation and reimbursement awarded to her. I will add here that THR's actions in raising her concerns and seeking to resolve matters that had arisen for her in the workplace is commendable and should be encouraged. It is unfortunate that this resulted in her dismissal and she should not in any way feel that she contributed to, or caused, the unfortunate outcome.

### **Summary**

[63] Grenadier unjustifiably dismissed THR. In settlement of this grievance Grenadier must pay THR:

(a) \$28,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) \$7,692.32 for lost remuneration pursuant to ss 123(1)(b) and 128 of the Employment Relations Act 2000.

### **Costs**

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, THR may lodge, and then should serve, a memorandum on costs within 14 days of the date of

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<sup>7</sup> Section 124 of the Act.

<sup>8</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

issue of this determination. From the date of service of that memorandum Grenadier will 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.

[65] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>9</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).