

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 71
5382255

BETWEEN	BARBARA TAUREREWA Applicant
A N D	TOTAL PROPERTY SERVICES (WELLINGTON) LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Graeme Ogilvie, Advocate for Applicant Michael Gould, Counsel for Respondent
Investigation Meeting:	On the papers
Written submissions	28 February & 15 March 2013 for the Applicant 6 March 2013 for the Respondent
Date of Determination:	13 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Prior to 1 March 2012 Ms Barbara Taurerewa was employed as a part time cleaner by Total Property Services (Wellington) Limited, (Total Property). She undertook cleaning work at Waiwhetu Medical Centre, Wellington (the Medical Centre).

[2] On 8 February 2012 Total Property received notice from the Medical Centre that it was terminating the service agreement between them with regards to the provision of cleaning services. Over the course of the following week Total Property sought to persuade the Medical Centre to continue with its services but was not successful.

[3] On 17 February 2012 Total Property wrote to the Medical Centre and requested information as to the identity and contact details of the subsequent contractor who would be providing cleaning services to it from 1 March 2012 onwards.

[4] Ms Taurerewa was advised later that day by Total Property of the impending change to the cleaning arrangements at the medical centre. She says she was told that the subsequent contractor was obliged to employ her if she elected to transfer her employment to the subsequent contractor.

[5] Approximately three days later Ms Taurerewa advised Total Property that she wished to transfer to the subsequent contractor as she wanted to continue working at the Medical Centre. She says that she also told her supervisor that she would like to stay with Total Property and that her supervisor said there was other work available. Ms Taurerewa says she did not fully understand the relevant law and its implications at that stage.

[6] On 24 February 2012 the Medical Centre provided Total Property with the name and contact details of subsequent contractor; Ms Kay Cobb.

[7] On 27 February 2012 TPS wrote to Ms Cobb. The letter detailed the obligations of both Total Property and Ms Cobb pursuant to Part 6A of the Employment Relations Act and advised that Ms Taurerewa had elected to transfer to Ms Cobb's employ. The letter attached additional information about Ms Taurerewa's terms and conditions of employment.

[8] Ms Cobb responded by email on the same day. She stated she would not be employing anyone to do the cleaning at the medical centre as she would be doing the cleaning herself. In these circumstances she advised that she did not need to meet with Ms Taurerewa.

[9] Ms Taurerewa reports that she was informed of the contents of Ms Cobb's email on 28 February 2012. She says she was told that her employment with Total Property would finish the following day when the agreement between Total Property and the Medical Centre was concluded.

[10] Ms Taurerewa claims she has a personal grievance against Total Property for "*unjustified dismissal or actions*". She also alleges that Total Property breached its

contractual obligation to pay one month's notice on termination of her employment. She seeks payment of one month's notice plus holiday pay and \$3,000 as compensation pursuant to s. 123(1)(c)(i).

[11] Total Property does not accept Ms Taurerewa's claims. It says it did not terminate Ms Taurerewa's employment. Total Property denies that the notice provisions contained in the parties' individual employment agreement are applicable in circumstances where Ms Taurerewa elected to transfer to the new employer.

The issues

[12] The issues for the Authority to determine in these matters are:

- Was Ms Taurerewa dismissed unjustifiably by Total Property?
- Is Ms Taurerewa entitled to a contractual payment from Total Property of one month's wages in lieu of notice?
- Should remedies be awarded?

Was Ms Taurerewa dismissed unjustifiably by Total Property?

[13] Ms Taurerewa says that the way her employment ended at Total Property was very unfair. She says Total Property could have offered her a different job when it became aware that Ms Cobb was unwilling to employ her.

[14] By way of background Ms Taurerewa lodged a separate application to the Authority against Ms Cobb, alleging she had been unjustifiably dismissed. In that determination¹ I held that on Ms Taurerewa's election to transfer her employment² she became, pursuant to s. 69I(2) of the Employment Relations Act, an employee of Ms Cobb's on 1 March 2012. I further noted that in these circumstances Ms Cobb became Ms Taurerewa's employer despite her assertions to the contrary.³ I concluded that as a consequence of Ms Cobb's failure to recognise the statutorily imposed employment relationship, Ms Taurerewa was effectively dismissed. Ms Taurerewa's dismissal was found to be unjustified and Ms Cobb was ordered to pay remedies associated with that matter to Ms Taurerewa.

¹ *Taurerewa v Cobb* [2013] NZERA Wellington 70

² Section 69I(1)

³ Section 69I(3)

[15] For the same reasons as expressed in the determination involving Ms Cobb⁴ I am of the view that Total Property was not Ms Taurerewa's employer at the time she was dismissed. It follows that Total Property did not dismiss Ms Taurerewa.

[16] I also do not accept the inference contained in Ms Taurerewa's submissions that Total Property should have provided Ms Taurerewa with alternative work in response to Ms Cobb's declaration that she would not be employing Ms Taurerewa. Total Property was under no obligation to remedy Ms Cobb's intention to disregard the legislation. I find Total Property was entitled to assume that Ms Cobb would become Ms Taurerewa's employer on 1 March 2012 as required by the legislation.

[17] I am satisfied that Ms Taurerewa was neither unjustifiably dismissed nor disadvantaged by Total Property actions.

Did TPS breach its contractual obligations to provide payment of months' wages following termination of her employment?

[18] Schedule B of the employment agreement between Ms Taurerewa and Total Property refers to the parties' recognition of Part 6A of the Act. Clause 2 of Schedule B provides amongst other things;

1. ...
 2. If the transferee does not employ the Employee, and he or she is, as a result of the restructuring, surplus to the requirements of the Employer, the Employer shall give notice of termination of employment of one month to the Employee. Total may at its discretion pay salary in lieu of part or all of the notice. The employee shall not be entitled to any redundancy compensation.
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[19] Ms Taurerewa submits that Total Property has not complied with its obligation to pay her a months' notice according to the provisions of Schedule B.

[20] Submissions on Ms Taurerewa's behalf state that Total Property made specific provision to pay her a month's notice in the exact circumstances in which she found herself, whereby the transferee, Ms Cobb, did not employ her and she became surplus to the requirements of Total Property. It was further submitted that where there is uncertainty as to the meaning of a contractual provision, as alleged in this matter, then the *contra proferentem* rule applies and the clause should be construed against the drafter of it, in this case, Total Property.

⁴ Ibid at 3.

[21] I do not consider that the relevant words contained at clause 2 of Schedule B are ambiguous. I regard the ordinary or plain meaning of the words used at clause 2 required Ms Cobb did “*not employ*” Ms Taurerewa. While Ms Taurerewa may perceive that Ms Cobb did not employ her, (given she was not provided with work or pay from 1 March 2012 onwards), I have already found that by operation of law Ms Cobb did employ Ms Taurerewa. Ms Cobb’s repudiation of the employment relationship did not abrogate the mandatory statutory provision of s. 69I(3).

[22] I am unable to find that Ms Taurerewa was entitled to notice of termination of employment in circumstances where she elected to transfer her employment to Ms Cobb.

Summary

[23] Ms Taurerewa’s claims are dismissed in their entirety.

Costs

[24] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority