

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 630
3226279

BETWEEN ELISABETTA TURCONI
Applicant

AND JITBUG LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Hilary Ord, advocate for the Applicant
Caleb Phang for the Respondent

Submissions received: 23 and 29 July 2024 from the Applicant
17 July 2024 from the Respondent

Date: 18 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jitbug Limited (Jitbug) is a specialist early childhood education (ECE) recruitment agency placing ECE teachers in permanent and relieving roles. Mr Caleb Phang is the co-founder, co-director and manager of Jitbug.

[2] Elisabetta Turconi was employed by Jitbug as a Customer Success Consultant on 13 September 2021. Ms Turconi went on maternity leave on 4 August 2022. On 3 April 2023 Ms Turconi's employment at Jitbug was terminated.

[3] Ms Turconi claims that she was unjustifiably disadvantaged by Jitbug and that Jitbug unjustifiably dismissed her on one month's notice.

[4] Jitbug denies it unjustifiably disadvantaged Ms Turconi or unjustifiably dismissed her. It claims Ms Turconi resigned on one month's notice.

The Authority's Investigation

[5] For my investigation I received written statements and supporting documents from Ms Turconi, her partner George Hargraves and friend Lucia Fusco. I also received from Jitbug a written statement from Caleb Phang and supporting documents.

[6] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions with the Authority.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this preliminary determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

Issues

[8] The issues for investigation and determination are:

- (a) whether Ms Turconi has a personal grievance for unjustifiable disadvantage by Jitbug's actions?
- (b) whether Ms Turconi has a personal grievance for unjustifiable dismissal, or did she resign?
- (c) if Ms Turconi has a personal grievance or grievances, what remedies should be awarded, considering:
 - i. reimbursement of lost wages under s123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate her loss); and
 - ii. compensation under s123(1)(c)(i) of the Act?
- (d) if any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Ms Turconi that contributed to the situation giving rise to her grievance?
- (e) did Jitbug breach its good faith obligations to Ms Turconi;
- (f) if so, should a penalty be ordered?; and

(g) should either party contribute to the cost of representation of the other party?

Background

[9] On 13 September 2021 Ms Turconi was employed by Jitbug as a Customer Success Consultant.

[10] Ms Turconi went on paid annual leave from 4 August until 10 August 2022. On 11 August 2022 Ms Turconi began a six-month period of maternity leave.

[11] On 12 January 2023, Ms Turconi contacted Mr Phang, requesting to extend her maternity leave as unpaid leave until the end of March 2023. She also asked to return to her role at 25 hours per week to give her flexibility of being able to work and be a full-time mother.

[12] Mr Phang responded that he was happy for Ms Turconi to take leave without pay until the end of March, but that it was not possible for her to work 25 hours a week because the company was very busy launching international recruitment in Australia. An extension of unpaid parental leave was granted to 3 April 2023.

[13] On 22 February 2023 Mr Phang emailed Ms Turconi asking for confirmation of her agreed starting date of 3 April 2023 and some work arrangement/hours flexibility. Mr Phang replied he would give Ms Turconi a call on Friday 24 February 2023.

[14] On 24 February 2023 Mr Phang phoned Ms Turconi to discuss the return to work plan for Jitbug and raised options for Ms Turconi regarding her employment and return to work. Mr Phang stated that due to rapid changes in the business, Ms Turconi's role and position would be affected, and she may not be able to return to work in April 2023.

[15] Mr Phang offered Ms Turconi 2 options:

(a) Option 1 required Ms Turconi to remain on unpaid leave until July 2023 without any guarantee that there would be a position for her in July.

(b) Option 2 required Ms Turconi to resign and accept one month's pay.

[16] The phone call occurred on a Friday afternoon and Mr Phang asked Ms Turconi to make a decision on his offer by Monday.

[17] During the phone call Mr Phang said if Ms Turconi resigned, he would pay a month's salary for the month of April as he "felt bad" and this would help Ms Turconi transition into a new job. Mr Phang made it clear that if Ms Turconi agreed to this, Ms Turconi would have two months to find work. One month being the remainder of her unpaid parental leave, and the other being a paid one month's salary. Ms Turconi's individual employment agreement (IEA) stipulated a four week notice period for termination of employment.

[18] Ms Turconi stated she was concerned that her position was being made redundant. Mr Phang replied he was not making her redundant.

[19] On 27 February Mr Phang followed up the phone call with an email presenting the options in writing. The offer for Option 2 (to resign) was made on a "without prejudice" basis. Mr Phang also included a new third option to relocate Ms Turconi to Australia.

[20] On 1 March 2023 Ms Turconi emailed Mr Phang clarifying that she was intending to return to work full time on 3 April 2023 and asked if there was an opportunity, to work from home. Prior to going on maternity leave, Ms Turconi had worked from home, four days per week, with one day in the office.

[21] Mr Phang replied by email and restated the three options from his email of 27 February 2023. He confirmed that Option 1 (return in July) would work better for Jitbug. If returning in July was not a good option for her, then option 2 (one month pay on a without prejudice basis) was something Jitbug could do. He said that as this option would give Ms Turconi 2 months to look for other employment that it may suit her better.

[22] Mr Phang restated the third option of relocating to Australia, but stated Ms Turconi would have to leave for Australia as soon as possible.

[23] On 10 March 2023 Mr Phang emailed Ms Turconi that he would need to do some shuffling to accommodate Ms Turconi's return to work. Mr Phang requested Ms Turconi delay her return to work until 17 April 2023.

[24] On 14 March Mr Phang emailed Ms Turconi informing her that she would not be paid for the two-week delay from her agreed start date of 3 April 2023 to 17 April

2023. He stated he expected her to return the favour, for Jitbug granting her additional unpaid maternity leave.

[25] On 17 March Ms Turconi emailed Mr Phang to clarify that she was expecting to do her old job when she returned to work on 3 April 2023.

[26] On 20 March Mr Phang emailed Ms Turconi and informed her that her role would be the same.

[27] On 3 April 2023 Ms Turconi emailed Mr Phang and stated:

I was looking forward to joining the team again, working with the old members and meeting the new ones. I was looking forward to facing the challenges that the recruiter role gives to me. But thinking about your first phone call and all the emails we exchanged since then, I can't help but feel that I am not welcomed back.

You have made this pretty clear to me. I have realised that the excitement I had for returning to the office has sadly gone and been replaced with anxiety, affecting my mental health. With that being said, I would like to consider your offer of 1 months' pay to find a new job, plus accrued leave. I would also like to know what I am entitled to, this being: 2 days bereavement leave that I was entitled to when my father passed away and the commission, I am entitled to for the placements I made.

[28] Mr Phang immediately replied by email:

I will take your email as notice of resignation effective immediately then. And yes, I will pay you one month's pay. Regarding additional payment-accrued annual leave, bereavement, commission – I will get Abhilash from Accounts to get in touch with you on this.

[29] On 12 April 2023 Jitbug's accountant sent Ms Turconi an email that she would be paid, and her final pay would be 3rd May 2023.

[30] On 12 April 2023 Ms Turconi raised a personal grievance with Jitbug.

Whether Ms Turconi has a personal grievance for an unjustifiable disadvantage by Jitbug's actions

[31] An unjustifiable disadvantage personal grievance is set out in s 103(1)(3) of the Act which states that an employee may have a personal grievance if the employee's employment or one or more conditions of their employment have been affected to the employee's disadvantage and by some unjustifiable action by the employer.

[32] The employee needs to establish that their employment conditions have been affected to their disadvantage. The employer then needs to demonstrate that their actions were that which a fair and reasonable employer could have done in the circumstances at the time the action occurred.

[33] In addition, s 4 of the Act requires parties to an employment relationship to deal with each other in good faith. This includes the requirement of an employer who is proposing to make a decision that will, or is likely to, have an adverse effect in the continuation of employees' employment, to provide potentially affected employees with access to relevant information and an opportunity to comment on that information.¹

[34] Ms Turconi submits that during her maternity leave Jitbug failed to provide her with sufficient information, regarding how or why the restructure of Jitbug and business developments in Australia would impact on her return to work. Ms Turconi submits Jitbug's withholding of information was deliberate, and as a result caused her serious concern and contributed to her stress and anxiety.

[35] Jitbug's failure to adequately consult with Ms Turconi, and undertake a fair and reasonable process unjustifiably disadvantaged her. Those were unjustified actions and Ms Turconi has established her personal grievance for unjustified disadvantage on those grounds.

Whether Ms Turconi has a personal grievance for unjustifiable dismissal

Was Ms Turconi unjustifiably dismissed, or did she resign?

[36] The principles of the law regarding resignations are summarised as follows:

- (a) resignation is a unilateral act. Once an employee has given notice of resignation, the employer cannot decide the resignation was not effective;
- (b) the employee does not have to justify the resignation or demonstratively think it through;
- (c) the key issue is, on an objective assessment whether the employee has resigned; and

¹ Employment Relations Act 2000, s4(1A)(c)

(d) whether the employee's resignation was due to an employer's breach or conduct will be addressed by the law relating to constructive dismissals.²

[37] The main question is whether, on an objective assessment the email of 3 April 2023 amounts to a resignation by Ms Turconi.

[38] On an objective assessment Ms Turconi's email of 3 April cannot be a resignation. It is clear that Ms Turconi only wishes to consider the offer made by Jitbug and in this regard she asks what she is entitled to. There is no clear, unambiguous statement that Ms Turconi accepts Jitbug's offer and is leaving her employment.

[39] Despite this, Mr Phang on behalf of Jitbug accepted Ms Turconi's email as formal notification of her resignation, informing her it would be "effective immediately."

[40] Jitbug submitted Mr Phang construed the email as notice of Ms Turconi's resignation. From Mr Phang's point of view, through the previous email interactions, he felt Ms Turconi was only interested in getting her way and not wanting to partake in any option discussions around her return to work. He stated he felt annoyed and frustrated that the applicant was wanting an extra 2 weeks' pay, when in his mind, the return date had not been finalised and agreed by both parties.

[41] Mr Phang stated he had to make certain assumptions based on the context and content of her emails. In his view from the context and content of the 3 April 2023 email it appeared that Ms Turconi had already made up her mind and he assumed that she was resigning.

[42] Even with the context and content of the 3 April email there is no basis for Jitbug to assess it as a resignation by Ms Turconi; Jitbug accepted that in hindsight. Ms Turconi did not resign and Mr Phang in haste failed to question or clarify the intent of her final email. Jitbug ended Ms Turconi's employment by misinterpreting and misrepresenting her email as a resignation and responding as it did.

[43] It follows that Jitbug's dismissal of Ms Turconi was unjustified; there was no process carried out nor was there a substantive basis for the dismissal.

² *Mikes Transport Warehouse v Vermuelen* [2021] NZEmpC 197.

[44] In short, Jitbug could not reasonably conclude that Ms Turconi's email amounted to a resignation. From that point onward Ms Turconi was unjustifiably dismissed by Jitbug.

Good faith

[45] Communications with Jitbug Ltd ceased when Ms Turconi went on 6 months maternity leave on 4 August 2022. On 28 October 2022 Ms Turconi was removed from the Teams Chat. Communications only resumed when Ms Turconi contacted Jitbug on 12 January 2023.

[46] Ms Turconi submits that as an employee she had an expectation that in good faith she would be consulted on any possible proposal that may adversely affect the continuation of her employment. This did not occur and in the circumstances Jitbug did not provide Ms Turconi with relevant information or undertake any genuine consultation with her. Jitbug breached its obligations of good faith to Ms Turconi.

[47] Jitbug breached s4(1A) of the Act during the applicant's period of parental leave by not communicating with her about the developments at Jitbug, that would ultimately affect her continuing employment.

Remedies

Ms Turconi has been successful with her unjustified disadvantage personal grievance and unjustified constructive dismissal personal grievance; I will turn to consider what remedies she is entitled to.

Reimbursement of Lost Wages

[48] Ms Turconi seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to sections 123(1)(b) and 128 of the Act.

[49] Following her dismissal Ms Turconi attempted to mitigate her loss by finding other work. In the circumstances it is reasonable that Ms Turconi be paid her gross weekly pay of \$1250.00 from 3 April to 15 May 2023, being the date of her dismissal to finding new employment.

[50] I order Jitbug to pay Ms Turconi six weeks salary as reimbursement of wages, being \$7,500 and holiday pay of \$600.³

Compensation for humiliation, loss of dignity and injury to feelings

[51] As the two personal grievances stem from the same factual matrix and course of conduct, and Ms Turconi and her partner gave evidence as to the combined effect the conduct had on her wellbeing, I will take a global approach in considering compensation.

[52] Compensation 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. Ms Turconi submits that compensation of \$25,000 for the hurt and humiliation in relation to unjustified disadvantage and unjustified dismissal and on the evidence of impact provided by the Ms Turconi and her partner would be justified.

[53] In regard to the unjustified dismissal Ms Turconi said she felt the way she was treated by Jitbug has had a significant, negative impact on her and has caused her financial hardship.

[54] After the 24 February 2023 phone call Ms Turconi started to feel very distressed and very anxious about the uncertainty of her future with Jitbug. The additional option of going to Australia with her 7-month-old baby for just a few months was impracticable.

[55] Ms Turconi described feeling anxious and stressed about her future at Jitbug, and being disadvantaged and helpless by not being able to return to her job after maternity leave:

It still hurts my feelings thinking about all the sleepless nights and all the sad moments spent wondering what I had done to be pushed away in that way.

I felt broken in my heart and in my thoughts. I still haven't fully recovered from the anxiety caused by this whole situation, and I definitely lost confidence in myself and in my potential.

[56] In assessing the level of compensation, I need to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of Jitbug's

³ Holidays Act 2003, s 23.

unjustified actions and the dismissal. Recent decisions of the Employment Court provide guidance on this exercise of quantification.⁴

[57] I am satisfied Ms Turconi has experienced significant harm for humiliation, loss of dignity and injury to feelings. Further, the failures by Jitbug to comply with basic fairness requirements that caused Ms Turconi humiliation, loss of dignity and injury to feelings entitles her to compensation. I consider that an award of \$20,000 is appropriate.

Contribution

[58] The Authority is required under s124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded. I do not consider Ms Turconi's actions contributed to her situation and therefore no reduction is necessary.

Penalties

[59] Having found that Jitbug has breached the duty of good faith owed to Ms Turconi, I must next consider whether an award of a penalty is warranted .

[60] The test for a penalty for breach of good faith is high. Ms Turconi submitted the good faith breaches were deliberate, serious and sustained and intended to undermine the employment relationship.

[61] In relation to the breach of good faith, egregious bad faith is not required under s 4A of the Act before a penalty can be awarded,⁵ the Authority must be satisfied the failures were deliberate, serious and sustained, or that it was intended to undermine the employment relationship.⁶

[62] The lack of consultation and ongoing failure to provide Ms Turconi with relevant information were deliberate, serious and sustained and undermined the employment relationship with Ms Turconi.

⁴ *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.

⁵ *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179 at [60].

⁶ Employment Relations Act 2000, s4A.

[63] In the circumstances I believe the imposition of a penalty is appropriate, taking into account the vulnerability of Ms Turconi returning to the workplace from being on parental leave.

[64] In assessing a penalty for this breach, I have had regard to the factors set down in s 133A of the Act. The Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited* and further refinements have been subsequently made by the Court, including in *Nicholson v Ford*.⁷ There has been no previous conduct for consideration. I am not aware of the financial situation of the company. The maximum penalty against a company is \$20,000.00. I have considered other similar penalty awards in other cases. In relation to this breach, I make an award of \$5,000 being payable to Ms Turconi.

Summary of orders

[65] Ms Turconi was unjustifiably disadvantaged and constructively dismissed, for which remedies have been awarded. Within 28 days of the date of determination Jitbug Limited is ordered to pay Elisabetta Turconi the following sums:

- (a) \$20,000 under s 123(1)(c)(i);
- (b) \$7,500 (gross) in wage arrears; and
- (c) \$600 (gross) in holiday pay.

[66] Jitbug Limited is also ordered to pay a \$5,000 penalty, payable to Ms Turconi.

Costs

[67] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[68] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Turconi may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Jitbug will then have 14 days to lodge any reply memorandum. On

⁷ *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[69] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

Andrew Gane
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1