

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 291
5572268

BETWEEN IRAANI VLASSOF
 Applicant

A N D ACCESS GROUP (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 No appearance for Respondent

Investigation Meeting: 24 September 2015 at Auckland

Record of oral
Determination: 24 September 2015

DETERMINATION OF THE AUTHORITY

No appearance by respondent

[1] Access Group (New Zealand) Limited (Access Group) did not file a Statement in Reply or apply for leave to file a Statement in Reply out of time. The Statement of Problem was served on Access Group by track-and-trace CourierPost on 03 August 2015 at its registered office.

[2] The Authority also received a “*read receipt*” from an email sent to Mr David Ratu (sole director and shareholder) at his Access Group email address. The Authority reminded Mr Ratu on 9 August 2015 that a statement in reply needed to be filed if Access Group wanted to defend Ms Vlassof’s claims. The Authority did not receive a response to this.

[3] The Notice of Investigation meeting was personally served on Mr Ratu by Mr Dean Grace on 15 September 2015. In addition to the Notice of Investigation meeting, Mr Ratu was also served with another copy of the Statement of Problem.

[4] Shortly before the start of the investigation meeting today Mr Ratu phoned the Authority to say he had the flu so would not be attending the meeting. The investigation meeting was held anyway.

[5] Access Group has not filed a Statement in Reply, it has not filed an application for leave to file a Statement in Reply, it has not complied with the Authority's directions to provide information and Mr Ratu has not filed a medical certificate with the Authority.

Employment relationship problem

[6] Ms Vlassof was originally employed as the Marketing Executive for Access Group but over time the decision was made that she would work in a newly created arm of the business offering Pre-employment Services. This involved Ms Vlassof creating training materials and delivering training programmes and courses to help the unemployed become job-ready.

[7] Ms Vlassof was employed as a pre-employment services director by Access Group. She started work on 29 July 2013. The parties signed an employment agreement on 5 August 2013. Ms Vlassof claims that she was unjustifiably dismissed. She also seeks wage arrears of \$6,650 for salary, notice and holiday pay arrears.

[8] Ms Vlassof says that on Thursday, 24 October 2013 or Friday, 25 October 2013 she received an email from the Access Group chief executive, Mr Ratu, advising that he wished to meet with her on Tuesday, 29 October 2013 at 9am. Ms Vlassof said she replied to Mr Ratu asking if there was anything she needed to bring or to prepare for but did not receive a reply from Mr Ratu.

[9] Ms Vlassof says that on Tuesday, 29 October 2013 she met with Mr Ratu who informed her that Access Group could no longer afford to pay her. Ms Vlassof raised concern that she had only been paid half of her fortnightly salary the week before and Mr Ratu said he was going to consult his lawyer and would then get back to her.

[10] Ms Vlassof attended work on Wednesday, 30 October 2013 but Mr Ratu was not there. Ms Vlassof says she emailed Mr Ratu asking about her notice and when she was going to receive her outstanding salary. Mr Ratu replied that he was still waiting to hear back from his lawyer.

[11] On Thursday, 31 October 2013, Ms Vlassof says she met with Mr Ratu and his brother (another colleague) Mr Bijay Ratu, who told her that she could finish work that day or come back the next day (01 November 2013) and finish then. Ms Vlassof says she got very emotional and left for the day but did come back into work on 01 November 2013 to collect her personal belongings. Ms Vlassof emailed Mr David Ratu on 05 November 2013 asking when she would be paid the outstanding salary due to her but got no response from him.

[12] Ms Vlassof raised a personal grievance for unjustified dismissal on 26 January 2014. She also requested her wage and time records as per s.130(2) of the Employment Relations Act 2000 (the Act) and her holiday and leave record as per s.82(1) of the Holidays Act 2003 (HA03). These were not provided.

[13] On 08 September 2015 the Authority directed Access Group to provide Ms Vlassof's wage and time records and holiday and leave records, her final pay advice and her payslips. That information has not been provided.

[14] Ms Vlassof's employment agreement contained a restructuring and redundancy clause. This clause stated that Access Group was to consult with her regarding the possibility of redundancy before a decision to make her redundant was made.

[15] Clause 12.5 of Ms Vlassof's employment agreement required Access Group to provide her with "*sufficient information to enable understanding and meaningful consultation*" and to consider her views with an open mind before deciding to make her redundant. It also required Access Group to consider redeployment before Ms Vlassof would be made redundant.

[16] Ms Vlassof says that Access Group did not pay any PAYE to Inland Revenue Department despite deducting it from her wages. She has produced her income tax statement from IRD to corroborate that. That is a matter IRD may wish to pursue directly with Access Group.

[17] Ms Vlassof says she is owed five days' wage arrears for the fortnight pay period 07-18 October 2013 and 10 days' wage arrears for the next fortnight pay period, 21 October to 01 November 2013 (which includes a statutory holiday – Labour Day). Ms Vlassof says she worked four days of the ten days' notice period

and so she is owed six days' pay in lieu to compensate her for not working out her full notice.

Issues

[18] The issues to be determined are:

- (a) Was Ms Vlassof's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) Is Ms Vlassof owed wage arrears?
- (d) What if any costs should be awarded?

Was Ms Vlassof's dismissal justified?

[19] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Access Group's actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances.¹

[20] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations in s.4(1A) of the Act which requires an employer who is proposing to make a decision which may adversely impact on an employee's ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision is made.

[21] A fair and reasonable employer is also expected to comply with all four of the procedural fairness tests set out in s.103A(3) of the Act and with its own policies/procedures as well as the contractual obligations into has entered into.

[22] I find that Access Group is unable to discharge the onus of justifying Ms Vlassof's dismissal.

[23] There was no evidence of any consultation process, no sharing of relevant documentation, no opportunity for Ms Vlassof to give any feedback on the proposed disestablishment of her position, no substantive information about the commercial justification for the decision, no information regarding Ms Vlassof's selection for

¹ Section 103A(2) of the Act

redundancy and no opportunity for her to have her views considered before she was made redundant.

[24] There is also no evidence that Access Group complied with its contractual obligations in terms of clause 12.5 of Ms Vlassof's employment agreement, with the good faith requirements in s.4(1A) of the Act or any of the four procedural fairness tests in s.103A(3) of the Act.

[25] Accordingly I find that Ms Vlassof's dismissal was substantively and procedurally unjustified.

What remedies should be awarded?

Distress compensation

[26] Ms Vlassof gave evidence of the humiliation and embarrassment about her redundancy. She says it was particularly stressful because Mr Ratu had guaranteed her salary and job security in order to entice her to leave her previous job. Ms Vlassof says she had worked in her previous job for ten years in which she has been successful and was highly regarded by colleagues and managers.

[27] Ms Vlassof says she had to seek medical attention as a result of the stress that she was under due to her dismissal, the need to find a new job and her pressing financial situation that her job loss caused. Access Group is ordered to pay Ms Vlassof \$5,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings.

Mitigation

[28] Ms Vlassof says that it was a difficult time of the year for her to obtain new employment. She was on Seek and Trade Me jobs every day looking for work. She applied for half a dozen jobs every week and called all of the contacts that she had in human resources and recruitment.

[29] Ms Vlassof obtained new employment as a Night Manager and started work in that new role on 04 December 2013. I am satisfied that Ms Vlassof appropriately mitigated her loss.

Lost remuneration

[30] Ms Vlassof is entitled to lost remuneration for the period that she was out of work. She says she lost \$5,500 over the period 04 November to 03 December 2013. Access Group is ordered to pay her that amount under s.128(1) of the Act.

Is Ms Vlassof owed wage arrears?

[31] I accept Ms Vlassof's evidence that she is owed unpaid salary and unpaid holiday pay. Ms Vlassof's claim for unpaid pay in lieu of notice does not succeed because that amount is covered in the lost remuneration that has been awarded which covers the actual lost Ms Vlassof incurred as a result of her unjustified dismissal.

[32] Access Group is ordered to pay Ms Vlassof \$3,750 salary arrears.

[33] Ms Vlassof did not receive any holiday pay upon termination. Ms Vlassof says she did not take any paid annual leave while employed. Access Group is ordered to pay Ms Vlassof \$1,400 unpaid holiday pay (being 14 weeks wages x \$1,250 x 8%).

What if any costs should be awarded?

[34] Ms Vlassof represented herself at the investigation meeting today because she could not afford the cost of her lawyer attending. Ms Vlassof has been represented by counsel up to today and has incurred actual legal fees of \$1,779.31. Her legal fees were supported by GST invoices that were produced to the Authority today.

[35] Access group is ordered to pay MS Vlassof \$500 towards her actual legal costs which is a pro-rata application of the Authority's notional daily tariff which is currently \$3,500.

[36] Access Group is also ordered to pay Ms Vlassof \$71.56 to reimburse her filing fee.

Orders

[37] Within 28 days of the date of this determination Access Group is ordered to pay Ms Vlassof:

- a. \$5,000 distress compensation;
- b. \$5,500 lost remuneration;

- c. \$3,750 wage arrears;
- d. \$1,400 holiday pay;
- e. \$500 towards her actual legal costs;
- f. \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority