

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 698
3275479

BETWEEN JULIAN CHEVALIER
Applicant

AND NECTA NZ LIMITED
Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Ursula Nicholls, counsel for the Applicant
Michael Law, representative for the Respondent

Investigation Meeting: 13 August 2024 in Wanganui

Submissions Received: Up to and including 23 August 2024

Determination: 22 November 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Chevalier, previously known as Javier Gibert, says that his dismissal on the basis of redundancy was an unjustified dismissal because Necta NZ Limited (Necta) failed to follow a proper process and provide sufficient information to Mr Chevalier so that he could actively engage in meaningful consultation.

[2] Further, Mr Chevalier says that there was a breach of good faith by Necta because it did not communicate with him, did not provide agreed support and training, and did not honour its agreement with Mr Chevalier.

[3] Necta's position is straightforward. It argues that a number of the grievances raised by Mr Chevalier are out of time and that there was no breach of good faith. It says that it attempted to engage in a consultation process with Mr Chevalier but rather than engage, Mr Chevalier simply wanted to leave his employment with paid notice. Necta says redundancy was genuine and it followed what it believed to be a fair process.

The Authority's investigation

[4] The Authority heard from two witnesses, namely Julian Chevalier and Michael Law, the director of Necta. The witnesses affirmed their evidence.

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act) I do not refer in this determination to all the evidence received during the investigation meeting. Further, whilst I have not referred to all submissions made on behalf of parties, I record I have fully considered them.

Background

[6] Mr Chevalier was employed by Necta as a full stack developer. Mr Chevalier suffers from a disability which causes his body to over produce growth hormones. He also suffers from an anxiety disorder and PTSD.

[7] For those reasons, he sought assistance from Workwise to support his return to work and became eligible for 80 percent salary funding.

[8] WorkSafe approached Mr Law, the director of Necta, asking for his assistance to reintegrate Mr Chevalier into the workforce. As a result of this, Mr Chevalier and Necta entered into an employment agreement which was for a fixed period of time, commencing on 5 April 2023 and ending on 4 April 2024.

[9] Despite the fixed term nature of the agreement, the agreement provided that it could end early under some circumstances, including redundancy.

[10] During the first few weeks of his employment, Mr Chevalier decided he would work from the office to show his commitment to the company but understood that Mr Law had agreed he could work from home regularly.

[11] Mr Chevalier was aware that Mr Law was not happy with him working from home.

[12] In late May 2023, Mr Chevalier raised issues he had with a colleague who he felt was making jokes at his expense. He felt that Mr Law was not taking the matter seriously. Mr Chevalier also had issues with Mr Law's relationship to him, feeling that he was often condescending.

[13] On 18 August 2023 he arrived at work and Mr Law pulled him aside for a meeting.

[14] At that meeting, he was advised that there was a possibility he would be made redundant, with Mr Law saying he could not sustain the employment because of finances. He said the company was not making any money and he needed to reduce the hours of other employees.

[15] Mr Chevalier was given a written proposal and advised he had a week to provide feedback.

[16] Mr Chevalier says that he felt cheated because he felt that the redundancy had been planned all along to match the amount of subsidy which Necta had received.

[17] On 31 August 2023, Mr Chevalier again met with Mr Law and discussed whether he could stay on part-time. Mr Law responded saying that this was not possible, but there may be a potential to be contracted on a commission basis.

[18] On 31 August 2023, Mr Chevalier was given a letter confirming that his employment was to be terminated effective 29 September 2023 on the basis of redundancy.

[19] From Mr Law's perspective, he confirmed he met with Mr Chevalier on 18 August 2023. The meeting took one and a half hours and he discussed with Mr Chevalier the financial position of the company. He says that all relevant information was provided and on Wednesday 31 August 2023 he met with Mr Chevalier to discuss feedback. Mr Chevalier said he did not have any feedback to offer and accordingly Mr Law made the decision to end Mr Chevalier's employment on the basis of redundancy.

[20] In respect of the other matters raised by Mr Chevalier in respect of other colleagues and allegations of lack of training and patronising behaviour, Mr Law noted that these were raised out of time and made it clear that the company did not waive its rights in respect of them.

Discussion and analysis

[21] Mr Chevalier confirmed that although he raised an issue regarding a colleague with Mr Law, he did not raise it as a formal personal grievance, rather he said, he was

asking for Mr Law to help him with the colleague and give him advice on how he could navigate his way through the issue. Likewise in respect of other issues, in answering questions from the Authority, Mr Chevalier confirmed no formal complaints were made to the company.

[22] Mr Chevalier when discussing the 18 August meeting, advised he was not given any financial information supporting Mr Law's view that the company could not afford him. He confirmed he did not ask for the financial information but felt it should be provided anyway.

[23] It is clear that there were discussions between the parties regarding alternatives, such as Mr Chevalier working reduced hours, but Mr Chevalier says that when he offered to do so, the conversation was shut down and he felt that the decision to end his employment had already been made. Mr Chevalier also noted that he was aware that Necta was a pre-revenue startup company. Because of this, the evidence was the company was struggling for cash and Mr Law accepted that he had made a miscalculation regarding provision of the subsidy. He was not aware that the subsidy did not include holiday pay and the company simply did not have the means to fund Mr Chevalier's employment once the subsidy ran out.

[24] Mr Law accepted that not much information regarding the company's finances was provided but was adamant that it had been explained to Mr Chevalier that the company was not making money.

[25] At the time of the investigation meeting, Necta held no assets and employed no employees.

[26] There was no real consultation with Mr Chevalier regarding redundancy. Mr Law's perspective was that Mr Chevalier had not given any feedback throughout the process and he believed that he and Mr Chevalier had agreed to a process and he thought he had complied with the law.

[27] Mr Law provided evidence that Necta does not have any paying customers and accordingly it remains a pre-revenue startup enterprise. He produced financial information confirming that the company has made no profit and in essence has no assets.

Conclusion

[28] Necta's reasons for ending Mr Chevalier's employment on the grounds of redundancy may have been genuine. As Mr Law seemed to accept during the investigation meeting, consultation in a redundancy context is mandatory. Section 4 (1A) of the Act contains an explicit requirement for the disclosure of information in consultation in redundancy situations. Necta did commence a consultation process, however it had an obligation to make that consultation meaningful.

[29] It is difficult to see how it could be meaningful when Mr Chevalier was not provided with financial data which would have enabled him to engage more meaningfully in the process. This is especially so bearing in mind that Mr Chevalier was not represented and suffers from a disability. Mr Law was aware of Mr Chevalier's vulnerability. Further, Mr Chevalier put up alternatives such as staying on part time which were rejected. There is no evidence or analysis as to why those alternatives were rejected out of hand.

[30] Mr Chevalier raised other grievances where he says he was disadvantaged in his employment. However, it is clear these were not raised as personal grievances. Further, the issues he had with another colleague were raised by him with Necta and it seems appropriate steps taken. Accordingly, other than his personal grievance claiming unjustified dismissal, I find that Mr Chevalier has not succeeded in his claims of unjustified disadvantage.

[31] As Mr Chevalier has succeeded in his claims that his dismissal was unjustified because of a consultation process which fell below the standard expected of an employer when assessing it against s 103 A of the Act, he is entitled to a consideration of remedies.

[32] Necta was a startup company which had yet to earn revenue. Further, following the termination of his employment, Mr Chevalier was not available for work and accordingly on the evidence I have heard, has not suffered lost income as a result of his dismissal rather other factors have caused this.

[33] Mr Chevalier did give poignant evidence of the effect his dismissal had on him. It was clear from what he said, his feelings of hurt and humiliation, injury to feelings and loss of dignity related very much to the fact he felt his views were not being listened

to and that his redundancy was contrived. The process Necta followed in respect of consultation left it open to Mr Chevalier to feel this way. His suggestions were seemingly dismissed, and he was not given any information regarding the finances which may have well allayed any negative suspicions Mr Chevalier had regarding the genuineness of the redundancy. I consider an award of \$12,000.00 as appropriate compensation under the circumstances.

[34] Section 124 of the Act requires me to consider whether Mr Chevalier contributed to his grievance in any blameworthy manner. Mr Chevalier was dismissed because of redundancy which is generally a no-fault determination of employment. I find that Mr Chevalier did not contribute in any blameworthy manner to his dismissal.

Orders

[35] Necta NZ Limited is ordered to pay Julian Chevalier a sum of \$12,000.00 pursuant to s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation he has suffered because of his unjustified dismissal. The sum is to be paid within 28 days of the date of this determination.

Costs

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

[37] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Chevalier 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 Necta NZ Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[38] 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.¹

Geoff O’Sullivan
Member of the Employment Relations Authority

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