

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 102
3023297

BETWEEN PHILLIP COOPER
 Applicant

A N D UNIT SERVICES
 WELLINGTON LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Ruth Pettengell, Advocate for Applicant
 Peter Tonks, Representative for Respondent

Investigation Meeting: 26 June 2018 at Christchurch

Date of Determination: 20 July 2018

DETERMINATION OF THE AUTHORITY

- A. Unit Services Wellington Limited acted in an unjustified manner by reducing Phillip Cooper’s guaranteed hours of work and this caused a disadvantage to his employment.**
- B. In satisfaction of this personal grievance Unit Services Wellington Limited must pay Phillip Cooper:**
- a. \$4,000.00 without any deduction, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and**
- b. \$888.00 (gross) pursuant to s 123(1)(b) of the Employment Relations Act 2000.**
- C. Unit Services Wellington Limited did not breach Phillip Cooper’s employment agreement and the breach of contract claim is dismissed.**

D. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] Unit Services Wellington Limited employed Phillip Cooper from September 2015. Mr Cooper effectively resigned on 13 November 2017 when he started a new job.

[2] Mr Cooper complains about two things leading up to his resignation. First, Unit Services reduced his guaranteed hours of work from 40 per week to 20 without any consultation. Second, Unit Services failed to consult with him over the potential sale of its business, which could have led to Unit Services terminating his employment for redundancy.

[3] Unit Services says it discussed both of these matters with Mr Cooper. The change in hours was inevitable and Mr Cooper knew this as Unit Services had been paying him for some time for 40 hours of work despite the fact there was not 40 hours work for him to do. And in connection with the proposed sale of the business, Mr Cooper had previously worked for the prospective purchaser and he told Unit Services he was not going to work for the purchaser so he would look for another job.

[4] Mr Cooper has raised his complaints as claims, being a personal grievance for unjustified action causing disadvantage in relation to the reduction in hours and a breach of contract claim in relation to the potential sale of the business, this being a breach of the restructuring provisions of his employment agreement.

[5] Mr Cooper also raised a personal grievance for unjustified dismissal arising from the sale of the business and the failure of Unit Services to secure his transfer to the purchaser. Mr Cooper did not pursue that grievance on the basis that he commenced a new job prior to the sale of the business so there was no dismissal.

[6] For the personal grievance I must consider:

- (a) Did the event complained of – the reduction in Mr Cooper’s guaranteed hours - cause disadvantage to Mr Cooper’s employment?

(b) If so, was Unit Services' action – the reduction in Mr Cooper's guaranteed hours - justifiable?

(c) If not, what remedies, if any, is Mr Cooper entitled to?

[7] For the breach of contract claim I must consider:

(a) What is the contractual obligation imposed on Unit Services in relation to consultation over the proposed sale of its business?

(b) Did Unit Services breach this obligation in terms of its consultation with Mr Cooper?

(c) If so, what remedies, if any, is Mr Cooper entitled to?

Unjustified action causing disadvantage

[8] The terms of Mr Cooper's employment included that he was guaranteed 40 hours work per week.

[9] From mid-2017, work for Unit Services in Christchurch had slowed down and it was unable to provide Mr Cooper with 40 hours work per week. For a number of weeks Unit Services continued to pay Mr Cooper his guaranteed hours in the hope that workflow would improve.

[10] Unfortunately, this did not happen and in September 2017, Unit Services advised Mr Cooper that a reduction in his guaranteed hours was likely. Despite this Unit Services continued to pay Mr Cooper for 40 hours per week for another four weeks.

[11] In the first week of October 2017, Unit Services spoke with Mr Cooper again. In this conversation, Unit Services advised him that it was going to reduce his guaranteed hours to 20 hours per week. It told him there was more work in Wellington if he was interested in relocating.

[12] In this meeting, Unit Services also discussed the possible sale of the business, advising him who the prospective purchaser was. Mr Cooper's response to this was to advise Unit Services that he had "history" with the purchaser, which was that he had worked for the purchaser before, and he did not intend to work for them again, so he would look for a new job.

[13] At the end of the meeting, Mr Cooper told Unit Services that he would get legal advice on the change to his hours of work.

[14] The reduction in hours took effect from the week commencing 16 October 2017, when Mr Cooper worked 23 hours. The following week he worked 20 hours.

[15] From the next week, commencing 30 October 2017, Mr Cooper was off work on unpaid sick leave as he had an operation (and at that time, he had no accrued sick pay). Mr Cooper was due to return to work in the week commencing 6 November 2017 but this was delayed. Mr Cooper did not work that week but despite this and despite the fact that Mr Cooper did not have any accrued sick pay, Unit Services paid him for 10 hours work.

[16] Mr Cooper then commenced his new employment on 13 November 2017 without giving Unit Services notice of resignation.

[17] So, in terms of the unjustified action grievance, Mr Cooper's guaranteed hours were reduced and this impacted on two weeks of work. The reduction in hours did cause a disadvantage to Mr Cooper's employment.

[18] The next question is, therefore, was the reduction in hours justified?

[19] There are two parts to justification – was the process by which Unit Services effected the change a fair process and was the change substantively justified?

[20] Mr Cooper's main complaint appears to be that Unit Services did not discuss the reduction in hours with him before it imposed it i.e. he complains about the first limb of justification, saying the way in which Unit Services went about imposing the reduction of his guaranteed hours was not fair.

[21] Whether the way in which Unit Services effected the change in terms of Mr Cooper's employment is justified turns on whether it has discharged the duty of good faith in s 4 of the Employment Relations Act 2000 (the Act)¹ and met the requirements of the test for justification in s 103 of the Act. That is, I must consider whether in consultation over changing Mr Cooper's guaranteed hours Unit Services

¹ In *Jinkinson v Oceania Gold (NZ) (No. 2)* [2010] NZEmpC 102 the Employment Court made it clear that a failure to meet the duty of good faith will render a dismissal unjustified; the Court stated at [42] “[t]he relationship between ss 4(1A)(c) and 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with section 4(1A)(c) will not be justifiable.”

met its duty of good faith and the consultation process was what a fair and reasonable employer could have done in all of the circumstances. More specifically this requires an assessment of whether:

- (a) there was a proper consideration of the need for the proposed change by Unit Services;
- (b) Unit Services raised its concerns which gave rise to the proposed change with Mr Cooper and gave him access to all of the necessary information about the proposed change;
- (c) Mr Cooper had the opportunity to comment on the proposed change;
- (d) Unit Services considered what Mr Cooper said about the proposed change before it made its decision to implement it.

[22] I am satisfied that:

- (a) Unit Services had properly considered or investigated the need to reduce hours of work for its employees. This assessment had been ongoing for some time; it had involved a change in management and a concerted effort to increase work that had not been successful. Unit Services concluded its only option was to look at immediate reductions in hours and the possible sale of its business.
- (b) Unit Services did raise its concerns with Mr Cooper in September 2017, explaining to him that a reduction in hours was possible or even likely in the future. Mr Cooper had access to some of the information he needed to understand the concern and the proposal, as he was aware of the downturn in work, the inability to increase workflow and the decision to look at reducing hours and the possible sale of the business. However, this was insufficient as the information was only that which Mr Cooper had knowledge of through his own work – it did not include what work was projected or forecast, what other employees were doing, and the proposed reductions for other employees.
- (c) Mr Cooper did not have a proper opportunity to comment on the proposed reduction in hours. There was a discussion of the reduction

in hours and the possible sale of the business in the meeting in October 2017. However, a few aspects of this meeting are problematic.

First, the person who conducted the meeting was not one of the managers for Unit Services but rather a consultant who was not Mr Cooper's direct manager or one of the managing directors of the business. The problem was he was not someone who had any influence on or input into the decision to reduce Mr Cooper's guaranteed hours. Mr Cooper was aware of this and asked if he could speak to one of the managing directors about the reduction in hours.

Second, the evidence shows that prior to this meeting Unit Services had already decided to reduce Mr Cooper's hours. Therefore, it appears that the meeting was not conducted on the basis that Mr Cooper could comment on the proposal and any alternatives.

And, third it seems likely that if Mr Cooper had any comments to make on the proposed reduction in hours then Unit Services was not going to consider them as it had already decided the outcome.

[23] Unit Services' actions are not justified and Mr Cooper has a valid grievance for unjustified action causing disadvantage concerning the process of consulting and implementing the change in hours. Its failure to consult appropriately means it unilaterally imposed a change to Mr Cooper's terms of employment, which it could not do in the circumstances.

[24] Turning to whether the decision to reduce Mr Cooper's guaranteed hours was substantively justified, the question is whether the decision is one that a fair and reasonable employer could have come to in all of the circumstances.

[25] I accept that the decision to reduce Mr Cooper's guaranteed hours appears to be substantively justified. There is no doubt that the workflow for Unit Services had reduced. Unit Services had been paying Mr Cooper for 40 hours work per week despite the fact there was not enough work for him for some time. And, there was no indication that workflow would increase.

[26] However, what is not clear is whether there may have been some compromise available with the distribution of work between employees. Or whether there may

have been some short-term alternative arrangement to enable Mr Cooper to keep working 40 hours per week whilst he looked for another job. Or whether, if Mr Cooper been able to speak to one of the decision makers, he may have been able to persuade Unit Services to keep paying him for 40 hours per week despite the lack of work.

[27] In short, the consultation was sufficiently flawed that I cannot say the end decision was substantively justified.

[28] Given these circumstances, I cannot say that the decision to reduce Mr Cooper's hours was one that a fair and reasonable employer could have come to and his claim for a personal grievance succeeds.

Breach of employment agreement

[29] In connection with the potential sale of the business the contractual obligation imposed upon Unit Services was for it to:

- (a) consult with employees over the potential sale of its business;
- (b) negotiate with the prospective purchaser over the possible transfer of employees recording any agreement in the sale and purchase documents; and
- (c) activate the redundancy provisions of the employment agreement if an employee does not transfer to the purchaser.

[30] Mr Cooper's evidence was that he knew about the potential sale of the business in September 2017 but Unit Services did not confirm this to him.

[31] Then, as described above, in the meeting in early October 2017, there was a further discussion about the proposed sale. The result of that meeting was that it was clear to Unit Services that Mr Cooper had no interest in transferring his employment to the prospective purchaser.

[32] Notwithstanding this, Unit Services invited Mr Cooper to attend a meeting with the prospective purchaser on 18 October 2017. Mr Cooper did not attend that meeting.

[33] Then, before the sale of the business was confirmed and subsequently completed, Mr Cooper commenced new employment.

[34] In these circumstances, I accept that the obligation on Unit Services to consult further with Mr Cooper and subsequently negotiate with the purchaser over the potential transfer of his employment to it was discharged. Unit Services had told Mr Cooper of the potential sale at an early point. Unit Services invited Mr Cooper to meet the prospective purchaser but he did not attend. At this point, it appeared to Unit Services that, as Mr Cooper had advised, he did not intend to work for the purchaser, so it did not need to discuss his potential transfer with the purchaser. And, in any event this was prior to the sale being agreed so, in my view there was no obligation to negotiate the possible transfer of Mr Cooper's employment.

[35] Mr Cooper then started new employment before the sale completed, so there was no requirement to consider his transfer or to invoke the redundancy provisions in his employment agreement.

[36] Unit Services did not breach Mr Cooper's employment agreement and his breach of contract claim is dismissed.

Remedies

[37] As Mr Cooper has been successful with his personal grievance for unjustified action causing disadvantage, I must consider what remedies he is entitled to.

[38] I may award any of the remedies sought under s 123 of the Act, which in this case includes compensation and reimbursement.

Compensation

[39] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Mr Cooper for, what is often described as, "hurt and humiliation", which arises out of the actions giving rise to the grievance. What I am looking for is the effects of the unjustified action on Mr Cooper and then I must assess the compensatory value of those effects.

[40] Mr Cooper's evidence about the effect of the flawed consultation and the unilateral reduction in hours included:

- (a) The significant financial difficulty he experienced;
- (b) Difficulties with his relationship with his partner;
- (c) Unhappy that his hours had been reduced;
- (d) Frustrated at not being able to sit down with one of the managing directors to discuss the reduction in hours and the pending sale of the business;
- (e) Anxiety over being able to provide financially for his family.

[41] The difficulty with assessing this evidence is not all of these effects are attributable to Unit Services' actions. There were a number of significant personal events that occurred for Mr Cooper at or around this time, including two family bereavements and both himself and his partner requiring operations for existing medical conditions.

[42] These events have a substantial impact on my assessment of the compensation Mr Cooper seeks. These events, undoubtedly, affected or caused much of the effects described by Mr Cooper, such as the negative impact on his relationship.

[43] In particular, the financial difficulties Mr Cooper complains of was contributed to by the cost of attending the tangis in Wellington and the lack of payment for two weeks he was unable to work due to his operation, as he had no sick leave. In fact, Unit Services assisted him with the financial impact of these events by paying for his travel to Wellington, paying him for two days that he was due to work after his operation despite the fact he was unable to work and paying out his holiday pay in lieu of sick pay.

[44] The evidence I heard of all of the effects described is, in my view, considerably lower than the middle of middle band assessed as being \$20,000.00 by Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald*². And, when I add to that my assessment of how much of the effects were actually caused by Unit Service's actions which gave rise to the grievance the compensation level drops much lower again.

² [2017] NZEmpC 132

[45] Given the evidence I heard and my assessment of how much of the “hurt and humiliation” can be attributed to the actions of Unit Services I conclude that the compensation payable is \$4,000.00.

Reimbursement

[46] Mr Cooper also seeks reimbursement for the earnings he has lost as a result of Unit Services’ unjustified actions pursuant to s 123(1)(b) of the Act.

[47] This is a straightforward assessment as I have concluded that the reduction in hours was substantively unjust. Mr Cooper is entitled to the remuneration he should have been paid for the two weeks of work he completed before his operation less the amount he was paid. I calculate this amount to be \$888.00 (gross)

Contribution

[48] As I have awarded remedies to Mr Cooper, I must now consider whether he has contributed to the situation that gave rise to his grievance.³

[49] This assessment requires me to determine if Mr Cooper behaved in a manner that was culpable or blameworthy, and this behaviour was part of what caused the grievance, or put another way, contributed to the grievance occurring.⁴

[50] I do not accept that Mr Cooper’s behaviour during the consultation was in any way culpable or blameworthy and there is no contribution.

Determination

[51] Unit Services acted in an unjustified manner by reducing Mr Cooper’s guaranteed hours of work and this caused a disadvantage to his employment.

[52] In satisfaction of this personal grievance Unit Services must pay Mr Cooper:

(a) \$4,000.00 without any deduction, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) \$888.00 (gross) pursuant to s 123(1)(b) of the Employment Relations Act 2000.

³ Section 124 of the Act.

⁴ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

[53] Unit Services Wellington Limited did not breach Mr Cooper's employment agreement and the breach of contract claim is dismissed.

Costs

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

[55] If they are not able to do so and I am required to determine costs, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority