

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 191
3233839

BETWEEN	NATHAN CRISP Applicant
AND	MALCOVE DISTRIBUTORS LIMITED Respondent

Member of Authority:	Alex Leulu
Representatives:	Laura Trethewey and Margaret Blanche, advocates for the Applicant Danny Gelb, advocate for the Respondent
Investigation Meeting:	5 November 2024 in Auckland
Submissions received:	6 and 8 November, 24 December 2024 and 10 February 2025 from the Applicant 30 January 2025 from the Respondent
Determination:	3 April 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nathan Crisp was employed as an operations coordinator for Malcove Distributors Limited (MDL). On 11 May 2023 Mr Crisp resigned from his employment. Mr Crisp claimed he was unjustifiably disadvantaged and was constructively dismissed by MDL.

[2] MDL opposed Mr Crisp's claims saying its actions were those of a fair and reasonable employer.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Crisp and former MDL employees, Helen Kingi and Rachel Ramlose. The director

for MDL, Adam Pilbrow also lodged a written statement. Apart from Ms Ramlose, all witnesses attended the investigation meeting and answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) Was Mr Crisp unjustifiably disadvantaged during his employment with MDL?
- (b) Was Mr Crisp constructively dismissed by MDL?
- (c) If Mr Crisp was unjustifiably disadvantaged and/or constructively dismissed by MDL, was he entitled to remedies including:
 - (i) compensation in accordance with s 123(1)(c)(i) of the Act; and
 - (ii) remuneration for lost wages (subject to evidence of reasonable endeavours to mitigate his loss)?
- (d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Crisp that contributed to the situation giving rise to his grievance(s)?
- (e) Was Mr Crisp correctly paid amounts due to him in accordance with his employment agreement and the Holidays Act 2003? If not, to determine also whether an order should be made against MDL for any outstanding amounts to be paid to Mr Crisp?
- (f) Should either party contribute to the costs of representation of the other party?

Penalty claims for breach of good faith

[6] In his closing submissions Mr Crisp sought a penalty against MDL for a breach of good faith. This was the first time he had made a claim for a penalty against MDL. A penalty claim must be commenced 12 months either from the date when the alleged

action first became known to Mr Crisp or when he should reasonably have become aware of the action.¹ Mr Crisp's statement of problem was lodged on 6 June 2023 and at the time he did not make any claims for a penalty against MDL. Noting his employment ended in May 2023, Mr Crisp's closing submissions were lodged on 24 December 2024. This was well outside the time for when he should have commenced his penalty claim. For this reason, the Authority has no jurisdiction to consider Mr Crisp's penalty claim.

Context

Mr Crisp's initial employment

[7] MDL operates as a promotional logistics company in both Australia and New Zealand. In March 2022 Mr Crisp started his employment with MDL where he reported to Mr Pilbrow.

[8] Mr Crisp did not have a specific role or task description which formally identified what his role was for MDL. Both parties agreed Mr Crisp was employed in a project-based role where he provided general operational support across MDL's day to day dealings with its clients. Both parties agreed their work relationship was relatively positive during the initial stages of Mr Crisp's employment.

MDL's restructure proposal

[9] In January 2023 MDL lost a service contract with one of its biggest clients. As a result of the loss, MDL was faced with a significant reduction in both revenue and work. MDL tried to mitigate its loss but was unable to secure a suitable replacement contract.

[10] On 15 February 2023 Mr Pilbrow sent a letter to all MDL employees signalling MDL's intention to restructure its business (the restructure proposal). The restructure proposal generally explained the loss of the client service contract and the impact on the company. The proposal also provided MDL's general views about the future of the business and sought staff feedback as follows;

You probably guessed this was coming, but we still have too many people for our workload without this client. So, I've got to make the call about how many people we'll have to make redundant, and who it will be.

¹ Employment Relations Act 2000, s 135(5).

I need your input, both about how we can cut costs and limit the number of people who these redundancies will affect, and feedback about how I should decide who stays and who goes.

[11] Mr Crisp provided feedback to the restructure proposal on 19 February 2023. In his feedback Mr Crisp asked MDL a series of clarification questions and provided his general views on how the business can avoid redundancy. On 23 February 2023 MDL responded and addressed Mr Crisp's feedback by letter (MDL's consultation response).

[12] On 7 March 2023 MDL confirmed by letter to Mr Crisp its proposed outcome to the restructure proposal (proposed outcome). In the letter, MDL confirmed its decision to restructure its operations and identified specific areas for change. Mr Crisp's area of work was one of the affected areas where MDL proposed to disestablish his operations coordinator role.

Mr Crisp's personal grievance

[13] Due to stress relating to MDL's proposed outcome, Mr Crisp went on sick leave on 8 March 2023. On 10 March 2023 Mr Crisp raised a personal grievance for unjustified disadvantage and sought further information about MDL's proposed outcome.

[14] In March 2023 Mr Crisp went on pre-arranged annual leave which continued from his sick leave. Around this time Mr Crisp said he was adversely affected further because he was not paid his annual leave. He also said his work email access was cut off on 17 March 2023.

[15] The parties continued to engage while Mr Crisp was on annual leave. They also attempted to resolve the grievance through mediation which took place on 5 April 2023. Unfortunately, they were unable to resolve their differences.

[16] On 12 April 2023 MDL contacted Mr Crisp saying it was considering a possible change to its proposed outcome which meant his role may not be disestablished. They communicated further to try and find a suitable date to meet.

[17] During this time Mr Crisp returned from annual leave and requested to remain on paid leave (as special leave). His reason was because there was a lack of uncertainty

about his future role for MDL. MDL declined Mr Crisp's request for special leave and required him to return to work. MDL also acknowledged non-payment of his annual leave and said this was due to a payroll anomaly which it rectified.

The 9 May 2023 meeting

[18] On 9 May 2023 Mr Crisp met with Mr Pilbrow to discuss the changes to MDL's redundancy proposal (the 9 May meeting). MDL proposed for Mr Crisp to keep his role for MDL but to provide him with an updated job description (second proposed outcome). At the end of the meeting, they agreed for Mr Pilbrow to send the job description to Mr Crisp to allow him to consider the second proposed outcome.

[19] After the 9 May meeting MDL sent Mr Crisp an email confirming their discussions and provided him with details of the change of his job description. On 11 May 2023 Mr Crisp contacted MDL confirming his resignation from his employment with MDL.

Unjustified disadvantage

Mr Crisp's claims

[20] In determining both Mr Crisp's grievance claims for unjustified disadvantage and unjustified dismissal, the Authority must determine on an objective basis, whether MDL's actions met the statutory standard of what a fair and reasonable employer could have done in all the circumstances at the time.²

[21] Mr Crisp's claims against MDL focussed on allegations as to deficiencies in its restructure approach and its proposed outcomes arising from its restructure process. Mr Crisp submitted MDL had acted unreasonably throughout its restructure process by failing to:

- (a) genuinely engage with Mr Crisp during the restructure process;
- (b) properly arrange redeployment options for Mr Crisp; and
- (c) undertake a proper consultation process throughout the restructure process (including MDL's alleged failure to properly consult with him when it made unilateral changes to his job description as part of its second proposed outcome).

² Employment Relations Act 2000, s 103A.

MDL's arguments

[22] MDL argued it had a genuine need to restructure its organisation. In carrying out its restructure process, MDL submitted it had followed a fair process where MDL staff were properly consulted.

[23] In support of its claims, MDL referred specifically to its engagement approach which consisted of an initial restructure proposal letter, providing an opportunity to provide feedback, providing a response to staff feedback and providing two proposed outcomes.

[24] MDL also explained the reason for its second proposed outcome was because the first proposed outcome led to other staff members leaving MDL before the restructure process had ended. This meant its position had changed and allowed for a different outcome for Mr Crisp. MDL said the change in its proposed outcome showed:

- (a) it did not predetermine the outcome of its restructure proposal; and
- (b) it acted with a fully open mind to the situation as the process progressed.

Authority's analysis on unjustified disadvantage

[25] Under the Act, parties to an employment relationship are to deal with each other in good faith. This duty also applies when an employer proposes a decision that has an adverse effect on an employee.³ An employer must provide access to relevant information about the proposed decision and provide an opportunity for an employee to comment before any decision is made.⁴

[26] The Employment Court confirmed the following in respect of an employer's obligation to provide access to information to employees during a restructure process:⁵

When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

³ *Jinkinson v Oceania Gold NZ Ltd* (2009) NZELC 93, 341.

⁴ Employment Relations Act 2000, s 4(1A)(c).

⁵ *Vice-Chancellor of Massey University v Wrigley* (2011) 9 NZELC 93, 782 at [48].

[27] MDL's redundancy proposal did not provide sufficient information to allow staff to properly understand the impact on the organisation and the effect of such an impact to their own specific areas of work. MDL's redundancy proposal consisted of a one and half page letter with no supplementary information or documentation.

[28] The redundancy proposal letter also made general statements about the company's situation and its approach towards a proposed redundancy. As an example the restructure proposal letter stated the following about the loss of MDL's client contract:

... I will need to look at Malcove with an eye to restructuring. This isn't a great eye to have to look over the business with, because it looks like we have too many staff for our projected workload.

[29] The letter did not provide sufficient detail to explain its conclusion around staff numbers or its projected workload. As previously stated, the redundancy proposal letter sought feedback from staff about how the business was to cut costs and avoid the need to make staff redundant. However there was no tangible information about which aspects of MDL's operation was affected and how it was affected. Such information would have provided Mr Crisp and other employees a chance to properly understand the relevant issues faced by MDL and to have a real opportunity to express their thoughts about these issues.

[30] MDL's consultation response was also expressed in a general way for which it did not provide much further detail which would have assisted Mr Crisp's understanding of the impact on the company and his role.

[31] Both parties accept the loss of the client service contract was significant and MDL had a genuine reason to consider changes to its operations. However, its process for proposing restructure and consultation was flawed. Had MDL provided better access to information, it may have been able to receive more targeted feedback and be in a better position to decide based on such feedback.

[32] The flaws in MDL's restructure process led to Mr Crisp seeking clarity throughout the process and ultimately leading to him taking sick leave. Clearly this was an adverse effect on Mr Crisp's employment and for this reason, Mr Crisp was unjustifiably disadvantaged by MDL's actions.

Constructive dismissal

The parties' arguments

[33] Together with his unjustified disadvantage claims, Mr Crisp's grounds for his constructive dismissal claim also referred to allegations of his treatment by MDL leading up to his resignation which included:

- (a) MDL failing to provide proper support and consideration for his personal wellbeing; and
- (b) Demoting him from his role as part of its second proposed outcome to its restructure process. He said this was also a breach of the terms and conditions of his employment agreement because he alleged MDL had unilaterally changed his role without consultation.

[34] MDL said Mr Crisp failed to show he had been constructively dismissed and disputed whether it breached the terms of their employment agreement. It also argued the change to Mr Crisp's job description (because of the second proposed outcome) was not a demotion. It said, the role was essentially the same but changed the focus from across all areas of MDL's business to one part of MDL's business. Mr Crisp still retained the same salary and the same responsibilities.

Authority's analysis on constructive dismissal

[35] A constructive dismissal is when an employer's conduct compels a worker to resign. This includes circumstances where an employee's disadvantage was caused by an employer's breach of obligations owed to the employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee an employee would resign rather than put up with the ongoing breaches.⁶

[36] The initial proposal to disestablish Mr Crisp's operations coordinator role was essentially a proposal (and not a decision) and it was clear some decisions needed to be made subject to further feedback from Mr Crisp. As already stated, the restructure process up to that stage was flawed.

[37] The restructure process continued and MDL's situation changed when others left the workplace before it concluded. This led to MDL's second proposal to Mr Crisp.

⁶ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

MDL was entitled to change its proposed outcome and given Mr Crisp's time away from the workplace, it allowed MDL the chance to provide him with a second proposal.

[38] Mr Crisp was clearly upset after the initial proposed outcome and as a result, was on different types of leave leading up to the 9 May meeting. Mr Crisp continued to engage with MDL about his employment from the time he went on sick leave up until the 9 May meeting. Mr Crisp was clearly engaging with the hope of continued employment with MDL.

[39] During the 9 May meeting it appeared Mr Crisp was relatively neutral to the second proposal and wanted to consider the proposal further. The email from MDL to Mr Crisp on the same day appeared to reflect this view also.

[40] Based on all these factors, it is difficult to assess whether MDL could have foreseen Mr Crisp resigning from his role after the 9 May meeting. By attending the 9 May meeting, Mr Crisp had clearly considered continued work for MDL (and MDL's second proposal was for him to continue to be employed). No decisions had been made and feedback had been sought. Based on these circumstances, MDL had not foreseen Mr Crisp's resignation. For these reasons, Mr Crisp was unable to establish his constructive dismissal claim against MDL.

Remedies

[41] Mr Crisp was unsuccessful in his constructive dismissal claim and therefore was not entitled to a remedy for lost wages. In terms of compensation for hurt and humiliation, because of MDL's actions relating to his unjustified disadvantage, Mr Crisp suffered some form of distress and harm. This distress led to a significant time on sick leave which was exacerbated by MDL cutting off his access to emails and failing to pay his annual leave when it was due to be paid.

[42] MDL said Mr Crisp should be awarded a low-level amount for compensation because he had not provided any evidence detailing the possible hurt and humiliation that he may have suffered.

[43] I accept Mr Crisp did suffer hurt and humiliation because of MDL's actions. Considering similar cases, an appropriate remedy was an order for MDL to pay Mr Crisp an amount of \$7,000 for hurt and humiliation in respect of his unjustified

disadvantage claim. MDL is to pay this amount to Mr Crisp within 28 days of the date of this determination.

Contributory conduct

[44] Under s 124 of the Act the Authority must consider whether any remedies awarded for a personal grievance should be reduced due to any blameworthy conduct by Mr Crisp which contributed to the situation giving rise to his personal grievance.

[45] At the time of the restructure, there were clear disparity of views between Mr Crisp and Mr Pilbrow as to the reasons behind the restructure process. MDL said Mr Crisp failed to continue his interaction with MDL after the first proposal outcome and therefore this amounted to contributory conduct. I disagree. Mr Crisp's actions were a reaction to a flawed restructure process. No reduction of the remedy awarded to him is required.

Wage arrears claim

[46] Mr Crisp's employment agreement contained a notice period of resignation by employee of one month and stipulated at clause 21.3:

In the event that the employee leaves without notice or during the notice period without written consent of the employer, the employer reserves the right to deduct a day's salary for each day not worked during that notice period. This may include deduction of any moneys that have accrued due for any period of leave.

[47] Mr Crisp claimed he should have been paid out a months' notice in line with his agreement. Also, he claimed he should have been paid outstanding holiday pay that would have been accrued if he was paid out for his notice period. MDL opposed Mr Crisp's claims saying there was no obligation for it to pay him for this notice period.

[48] There was no evidence to show Mr Crisp asked MDL to pay out his notice. There was also no evidence to show MDL had consented to Mr Crisp leaving within the notice period. Mr Crisp resigned with the intention of not returning to the workplace. In line with clause 21.3 of Mr Crisp's employment agreement, he was not entitled to payment for the notice period and therefore not entitled to any annual holiday pay for this period.

Costs

[49] Although Mr Crisp was represented, he did not incur any costs for representation. Accordingly costs are not awarded because Mr Crisp had not incurred costs of representation.

[50] However, Mr Crisp is entitled to reimbursement of the filing fee of \$71.55 he incurred in lodging his application to the Authority. MDL is to pay the sum of \$71.55 to Mr Crisp within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority