

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 518  
3131437

BETWEEN                      DARREN CROMBIE  
Applicant

AND                              MOSSCAR SERVICES  
LIMITED  
Respondent

Member of Authority:        Peter Fuiava

Representatives:            Kylie Hudson and Simon Greening, counsel for the  
Applicant  
Aishleen Sluiters and William Buckley, counsel for the  
Respondent

Investigation Meeting:      28 July 2021

Submissions received:      21, 28 July 2021 from Applicant  
21, 28 July 2021 from Respondent

Determination:                16 November 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is a claim for unjustified dismissal. Moss-car Services Limited (MSL) trades as a second-hand car dealership in Auckland. It owns two sales yards, one in Penrose and the other in Tauranga. Darren Crombie started working for MSL on 7 October 2019 as a vehicle sales consultant until his employment ended some eight months later on 3 June 2020 by way of redundancy.

*Relevant facts*

[2] Mr Crombie was employed full-time and was paid a base retainer of \$30,000 per annum (which equates to \$576.92 gross per week) plus a commission for every

vehicle or unit sold. His individual employment agreement defined redundancy as the situation where an employee's position became surplus to the needs of the employer.

*The COVID-19 pandemic*

[3] On 25 March 2020, New Zealand went into COVID-19 Alert Level 4 lockdown for four weeks and five days. During that time, MSL was not able to trade. On 27 April 2020, the country moved to Alert Level 3 which allowed MSL to trade but on a 'click and collect' basis only. On 13 May 2020, New Zealand moved to Alert Level 2.

[4] On 1 May 2020, the general manager of the Penrose store, Glen Haslem, issued a memo to all staff advising them that the cost to the business due to the Alert Level 4 lockdown and part-trading at Alert Level 3 had been "extremely high". There had been a period of "zero income" and the future ahead was uncertain. Mr Haslem's letter further recorded that the majority of people and businesses had been hit financially with many unlikely to reopen or were now taking steps to significantly reduce expenses and staff. It was likely that the purchase of high value items such as vehicles would dramatically reduce as a result.

[5] The memo advised staff of MSL's intention to retain as many of them as possible. Mr Haslem stated however that some big changes needed to be made which would unfortunately result in some redundancies. The company was presently conducting a review and restructure of each department to ensure each part of the business could continue to operate effectively going forward.

[6] On 25 May 2020, Mr Crombie and his co-workers received a second letter from Mr Haslem. It reiterated the dramatic effect the Alert Level 4 lockdown had on MSL's ability to stay financially viable. The number of cars sold had reduced significantly and retaining its existing level of staff was now no longer possible. Mr Haslem anticipated that the monthly combined sales volume of 150-170 units would reduce to around 100 units per month, a drop of some 40 percent.

[7] Mr Haslem proposed a restructure of staff across all departments at the Penrose branch, the details of which would be outlined in departmental team meetings later that same afternoon. This was to be followed by individual meetings with each staff member concerned. Staff were advised that they could seek independent advice and

bring a representative or support person to their meeting. Mr Haslem's letter stated that no decisions had been made and none would be made until staff had been given an opportunity to provide feedback on the proposal for change.

#### *Proposal for change*

[8] Later that same afternoon, Mr Crombie received an individualised letter from Mr Haslem (25 May 2020) which set out a proposed restructure of the sales department. It reiterated MSL's anticipated reduction in the usual monthly sales from approximately 160 units to around 100 units. It was proposed that the sales team be reduced from eight to five, which was based on MSL's longstanding expectation that sales consultants would sell 20 units each per month.

[9] Other proposed changes included a change to the roster to ensure adequate sales coverage, the cancellation of individual concessions outside of work, additional car grooming duties for the remaining sales staff, and the introduction of a more corporate attire. The letter ended with Mr Crombie being invited to a meeting to discuss the proposed changes and how that might affect him. He was reminded that he could seek independent advice and that he could bring a representative or support person to the meeting. The letter reiterated that no decisions had been made until he had been given the opportunity to provide feedback.

#### *Feedback meeting*

[10] Mr Crombie met with Mr Haslem and Kerry Deane, MSL's human resources manager, on 27 May 2020. He did not bring a support person with him. There is some dispute as to whether the meeting had been given a specific time that day or whether Mr Haslem had forgotten about Mr Crombie.

[11] In any event, Ms Deane took handwritten notes of what transpired at the meeting which Mr Crombie confirmed at the investigation meeting was an accurate record. Briefly stated, the minute recorded that Mr Haslem had reiterated the need for restructuring due to the impact of the COVID-19 pandemic on MSL's business. Sales had dropped from 160 units per month to an anticipated 100 units per month, a reduction of approximately 40 percent. The situation was expected to last for a while and the business was struggling.

[12] Mr Haslem repeated what his letters had said earlier about MSL's decision to reduce its Penrose sales team from eight to five salespeople. This was necessary to give the remaining staff the chance to earn a decent level of income rather than have all eight salespeople struggling.

[13] Mr Haslem went through the remaining proposed changes with Mr Crombie and asked him for his feedback and suggestions. Mr Crombie acknowledged that, while he may not have had many deals on the board, he had helped MSL in other ways such as taking cars to its Tauranga sales yard.

[14] With respect to Mr Crombie meeting the new work requirements, there is a dispute as to whether Mr Haslem had said to him that he "ticked all the boxes" which Mr Haslem denied saying. In any event, during the feedback meeting, there was no mention of a selection criteria by Mr Haslem or Ms Deane to Mr Crombie.

[15] After the feedback meeting, Mr Crombie returned to work. He worked the remainder of the week before having the next four days off as it happened to align with the Queen's birthday long weekend and his rostered days off.

*Mr Crombie is made redundant*

[16] Mr Crombie returned to work on Wednesday 3 June 2020. Sometime that morning (there is a disagreement about the precise time) he was invited by Mr Haslem into his office where Ms Deane was also present.

[17] During the meeting that followed, which was very brief, Mr Crombie was advised that he was being made redundant. He was handed a signed letter from Mr Haslem (3 June 2020) which stated that these were unsettling times and that MSL was endeavouring to ensure that it survived the COVID-19 pandemic in light of an anticipated 40 percent drop in sales volume. The decision was not a reflection of Mr Crombie's abilities but simply a hard decision that needed to be made.

[18] Mr Crombie asked whether he could be paid out instead of being required to work his four weeks' notice. Mr Haslem agreed. While Ms Deane drafted something in writing for Mr Crombie to sign, he returned to his vehicle to collect his dealer's plate. A short time later, he was in Mr Haslem's office to sign the request form before leaving

the premises. He then drove to the workplace of his partner, Martina Evans, to inform her of what had happened.

*Email correspondence with Mr Haslem*

[19] At 12 pm that same afternoon, Ms Evans sent Mr Haslem the first of a series of emails in which she stated that he had not followed a fair process notably that there had been a lack of notification regarding Mr Crombie's feedback meeting which denied him the opportunity to bring representation.

[20] In response, Mr Haslem explained that staff had been advised by letter (25 May 2020) of the proposed restructure which was due to the effects of the COVID-19 pandemic on MSL's business. Staff had further been advised that they could seek independent advice and bring a support person with them to their meeting.

[21] In a subsequent email, Ms Evans stated that Mr Crombie had not been given a set time for his 27 May 2020 feedback meeting. During that meeting, he had been told that he was already meeting the proposed changes which had given him "false hope". In addition, he had not been given advance notice that he would be having his redundancy meeting on 3 June 2020 so that he could bring a representative or a support person.

[22] By email of 5 June 2020, Mr Haslem reiterated that, because of the COVID-19 pandemic, the Alert Level 4 lockdown, and Alert Level 3 lockdown their trading was only by 'click and collect', MSL was struggling financially. During the meetings of 27 May and 3 June 2020 with Mr Crombie, he had not indicated that he needed a support person. Mr Haslem further stated that, as it now appeared that Mr Crombie wanted to provide further comment about his redundancy, he was willing to meet with him again and pay for any counselling if Mr Crombie required it.

[23] The offer of a further meeting and counselling were declined. Although Ms Evans was happy to meet with MSL to discuss "remedial actions to rectify the situation", she was not prepared to put Mr Crombie through another meeting so that he could relive the redundancy experience again.

[24] By letter of 12 June 2020, Mr Crombie's counsel raised a personal grievance against MSL for unjustified dismissal on the basis that the company had failed to engage in adequate consultation regarding its selection criteria prior to selecting Mr Crombie for dismissal. The letter further alleged that he had been unjustifiably disadvantaged when he agreed to an early release of his notice period. However, that claim was later abandoned and was not taken any further.

[25] On 26 January 2021, Mr Crombie commenced proceedings against MSL by lodging a Statement of Problem with the Authority. It recorded that MSL had not followed a fair consultation process with Mr Crombie and that he had not been informed of the proposed selection criteria or given an opportunity to comment on it.

[26] In response, MSL lodged a Statement in Reply which claimed that its decision to terminate Mr Crombie's employment was both substantively justified and procedurally fair.

### **The Authority's investigation**

[27] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act 2000 (the Act). As permitted by s174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[28] I received written statements and heard oral evidence from Mr Crombie and Ms Evans. For MSL, I received written statements and heard evidence from Mr Haslem, Ms Deane and Peter Johnston, the business owner of MSL. For completeness, both counsel made closing oral submissions and provided the Authority with written submissions.

[29] As permitted by s 174E of 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**

[30] The issues requiring investigation and determination are:

- (a) Was Mr Crombie provided with relevant financial information?

- (b) Was Mr Crombie provided with information regarding MSL's selection criteria before he was made redundant?
- (c) If Mr Crombie was not given information regarding MSL's selection criteria, was this procedural error minor?
- (d) If MSL's actions were not justified in respect of Mr Crombie's dismissal, what remedies should be awarded?

*Disclosure of a financial forecast or a set of accounts not necessary*

[31] It was submitted that it had not been pleaded in Mr Crombie's Statement of Problem that MSL's decision to dismiss him was substantively unjustified, rather the Statement of Problem focussed on alleged procedural defects only. As such, it was submitted that the Authority should confine its determination to the Statement of Problem as pleaded and not consider whether the decision to dismiss Mr Crombie was substantively justified.

[32] I cannot agree. As a specialist decision-making body, the Authority is not inhibited by strict procedural requirements.<sup>1</sup> It is not a forum for strict pleadings and it is not bound to treat a matter as being a matter of the type described by the parties.<sup>2</sup> Further, the nature of a personal grievance may be of a type other than that alleged.<sup>3</sup> I have therefore proceeded to consider whether MSL's decision to dismiss Mr Crombie on the grounds of redundancy was substantively justified.

[33] In order for a redundancy to be justified, MSL must demonstrate that its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>4</sup> In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:<sup>5</sup>

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

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<sup>1</sup> Employment Relations Act 2000, s 143(f).

<sup>2</sup> Section 160(3).

<sup>3</sup> Section 122.

<sup>4</sup> Section 103A.

<sup>5</sup> *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

[34] Part of this assessment requires a consideration of s 4(1)(A)(c) of the Act. Under s 4(1)(A)(c), an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide that employee access to information relevant to the continuation of their employment. In addition, the employee is to be provided an opportunity to comment on the information to their employer before the decision is made.

[35] It was submitted that MSL had failed to provide Mr Crombie with adequate financial information upon which its proposed restructuring of the sales department was based. I note that Mr Crombie was not provided with a set of financial accounts or a financial forecast which set out a case for restructuring. However, for the reasons that follow, such documents were not required in this case.

[36] Mr Johnston gave evidence that car volume sales for the months of March and April 2020 fell 39 and 96 percent respectively. I attribute those results to the COVID-19 Alert Level 4 lockdown during which time most businesses, including MSL, were not able to trade.

[37] Mr Johnston stated under oath that he had to invest a further \$1.1 million of his own funds (from his father's inheritance) into MSL because the business had no cash flow with which to pay its overheads, debts, capital stock and GST that were incurred during the period of the Alert Level 4 lockdown.

[38] It was submitted that MSL could have kept Mr Crombie in employment longer because it received the COVID-19 wage subsidy. While the subsidy helped to cover MSL's salary bill, there was never any certainty as to how long the wage subsidy would be available. When it ended, MSL would still have the problem of having eight sales staff struggling to make a reasonable income from an anticipated 40 percent drop in monthly car sales.

[39] The move to Alert Level 3 did little to arrest MSL's financial difficulties. Mr Johnston's evidence was that car sales were down 49 percent in May 2020 which I find is indicative of the restrictive trading conditions of 'click and collect' at Alert Level 3. I note Mr Haslem's evidence that MSL's target market were blue-collar

workers. I agree with him that, given the uncertainty at the time with the economy and employment, motor vehicle purchases were likely to decrease.

[40] During cross-examination, Mr Johnston stated that Mr Crombie's sales deals were recorded on a white board at MSL. While I accept that Mr Crombie had not been provided with any financial documents or a financial forecast, he could see from the whiteboard the decline in the number of car sales which spoke for itself. When combined with the Alert Level 4 lockdown period, I am satisfied that Mr Crombie understood why there was a need to restructure the business.

[41] I note Mr Johnston's comment of "crystal balling the future". I do not take him to mean that he reached his decision to restructure on a whim or sheer speculation. He would have seen first-hand how poorly his business had performed over a three-month period resulting in his investment of \$1.1 million to keep it viable. In my view, the decision to restructure was a necessary one. The decision to dismiss Mr Crombie on the grounds of redundancy was substantively justified.

*No selection criteria information provided*

[42] Mr Crombie was one of eight staff who lost their jobs during the restructure. Three sales staff, two groomers, and three service staff were made redundant. I note that none of the letters Mr Crombie received from MSL referred to a selection criteria. Mr Haslem gave evidence that he had hoped there would be some voluntary redundancies after he had written to staff in May 2020. He had hoped also that the Queen's birthday weekend, historically a good period of trading for MSL, would manifest. Unfortunately neither scenario eventuated which meant that Mr Johnston needed to make a decision. In consultation with Mr Haslem and Ms Deane on the morning of 3 June 2020, the same day Mr Crombie was made redundant, the selection criteria of 'last on, first off' was adopted.

[43] However, the difficulty for MSL was that it did not go back to Mr Crombie and consult with him about the selection criteria prior to dismissing him. The selection criteria was not implicit in the consultation process MSL had undertaken with Mr Crombie especially when none of its letters referred to 'last on, first off'. Moreover, Mr Crombie, Mr Haslem and Ms Deane all agreed that the selection criteria of 'last on,

first off’ was not mentioned at any stage during Mr Crombie’s feedback meeting of 27 May 2020 or at his redundancy meeting on the morning of 3 June 2020.

[44] Section 4(1A)(c) of the Act makes clear that it is the employer’s responsibility to provide an employee access to information that may have an adverse effect on the continuation of their employment. It was not Mr Crombie’s role to discern what the selection criteria was.

[45] As to when Mr Crombie became aware of the selection criteria remains unclear. His letter of dismissal from MSL of 3 June 2020 makes no reference to ‘last on, first off’ and none of Ms Evans’ subsequent emails to Mr Haslem referred to the selection criteria either. I find that this was because she could not have known what Mr Crombie did not know himself.

[46] It was submitted that ‘last on, first off’ was transparent, objective, and the fairest selection criteria to be applied in the circumstances. While this may be so, Mr Crombie did not know the method by which he had been selected for redundancy which was unfair. He needed to be told that there was a selection criteria in place, what it was, and why this meant he should be selected for redundancy.

[47] In his written statement to the Authority, Mr Crombie stated that it made more sense for MSL to retain “younger” employees who could handle the additional work duties required of them. He further stated at the investigation meeting that, had he known that the selection criteria was ‘last on, first off’, he would have said that it was not fair because it did not take into account his performance or what he could “bring to the table”.

[48] While it was not possible for MSL to use age or health as a selection criteria to make staff redundant (this would amount to unlawful discrimination under the Human Rights Act 1993) *audi alteram partem* (Latin for hear the other side) still applied. Had Mr Crombie been told of the selection criteria and given an opportunity to respond, this would have gone a long way in his coming to terms with the final decision.

[49] The procedural error here was not minor and it resulted in Mr Crombie being treated unfairly.<sup>6</sup> It undermined the justification behind his dismissal. A decision to dismiss in all the circumstances known at the time was not therefore one that a fair and reasonable employer could have made.

[50] I find that Mr Crombie was unjustifiably dismissed from his employment with MSL.

### **Remedies**

[51] In a situation where there was a flawed consultation process, but the substantive outcome is justified; the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right.<sup>7</sup>

[52] In this case, I estimate no more than one week would have been sufficient for MSL to complete the consultation process correctly with Mr Crombie. Accordingly, I find that Mr Crombie is entitled to one weeks' lost remuneration pursuant to s 123(1)(b) of the Act. This equates to lost wages of \$576.92 gross, this being his base retainer.

[53] As Mr Crombie had worked for MSL for only eight months and by his own admission, his sales performance had been "average" for a number of reasons, even if the procedural requirements had been followed, on balance, the outcome would have been the same. In terms of humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act, I therefore limit any award to the humiliation, loss of dignity and injury to feelings which arose as a result of the procedural unfairness associated with Mr Crombie's dismissal.

[54] Although Mr Crombie would have known from Mr Haslem's previous letters that redundancy was a possible outcome for him, the shock, surprise, hurt feelings, and emotional stress Mr Crombie experienced could have been avoided altogether had he been advised of the selection criteria and given an opportunity to respond.

[55] In the circumstances, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$4,000.

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<sup>6</sup> Employment Relations Act 2000, s 103A(5).

<sup>7</sup> *Waitakere City Council v Ioane* [2004] 2 ERNZ 294 (CA).

[56] MSL is ordered to pay Mr Crombie the sum of \$4,000 pursuant to s 123(1)(c)(i). Payment must be made no later than 5 pm Wednesday 8 December 2021.

### *Contribution*

[57] As I have awarded remedies to Mr Crombie, I must consider whether he has contributed to the situation that has given rise to his personal grievances.<sup>8</sup> As this is a redundancy situation where Mr Crombie is not at fault as MSL's letter of 3 June 2020 makes clear, a reduction in remedies is not warranted.

### *Filing fee*

[58] Mr Crombie is to be reimbursed the filing fee of \$71.56 by MSL.

### **Costs**

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

[60] If they are not able to do so and an Authority determination on costs is needed Mr Crombie may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MSL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

### **Outcome**

[62] The overall outcome that I have reached is as follows:

- (a) Darren Crombie was unjustifiably dismissed from his employment with Mossca Services Limited.

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<sup>8</sup> Employment Relations Act 2000, s 124.

<sup>9</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- (b) Mossca Services Limited is ordered to pay the following amounts to Darren Crombie no later than 5 pm Wednesday 8 December 2021:
- (i) \$576.92 gross for lost wages;
  - (ii) filing fee of \$71.56; and
  - (iii) \$4,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.
- (c) Costs are reserved

Peter Fuiava  
Member of the Employment Relations Authority