

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 169
5603802

BETWEEN DAVID CROWTHER
 Applicant

A N D MEDIAWORKS RADIO
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mary-Jane Thomas, Counsel for Applicant
 Gillian Service, Counsel for Respondent

Investigation Meeting: 23 March 2017 and 9 May 2017 at Christchurch

Submissions Received: On 9 May 2017 at the investigation meeting from both
 parties

Date of Determination: 3 October 2017

DETERMINATION OF THE AUTHORITY

A. MediaWorks Radio Limited did not unjustifiably disadvantage or unjustifiably dismiss David Crowther.

B. David Crowther was not entitled to 2% of all MediaWorks Radio Limited's local and national sales budgets after 31 October 2015. He was entitled to 2% of local and national sales budgets of all brands previously run by Radioworks Limited, no matter who made the sales.

Employment relationship problem

[1] Dave Crowther worked as the sales manager for Radioworks Canterbury Limited (Radioworks), a subsidiary of MediaWorks Limited and then MediaWorks Radio Limited (MediaWorks) from 2001 until he resigned on 22 December 2015.

[2] Mr Crowther says that he was unjustifiably disadvantaged, and unjustifiably constructively dismissed.

[3] Part of his claim relates to his assertion that MediaWorks was bound to pay him a contractual payment of a 2% overrider, or bonus, on total local and national advertising budgets for the merged radio business up to 22 December 2015.

[4] MediaWorks says it conducted a genuine restructuring process in good faith and that Mr Crowther resigned his position voluntarily without opting to be considered for re-deployment within the new structure. It also says his claim for the overrider on the merged business is misconceived, and that it paid him what it owed under his employment agreement.

Decision issued outside of three-month period

[5] I have issued this determination later than the three-month period allowed after the conclusion of the investigation meeting. The Chief of the Authority has decided under s 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination later than the latest date specified in s 174C(3)(b) of the Act. The parties were notified in advance that this determination would be issued late.

Background leading up to and including the proposal for redundancy

[6] By 2015, Mr Crowther's remuneration as sales manager, managing a team of nine sales representatives, was approximately \$320,000 per annum. That was made up of payments set out in a signed letter of 5 December 2002 addressed to Mr Crowther at "Radioworks Canterbury":

After much discussion and agreement this correspondence confirms in writing your new package as of 1 September 2002.

1. 2% Overrider on total sales (Local and National budget, total revenue (7,010,780).

...

[7] The letter was signed by Rob McDonald, Radioworks' general manager. The parties agree that Mr Crowther's remuneration was to be calculated based on that letter until the end of his employment. They disagree about how the letter should be interpreted for the period after 31 October 2015.

[8] Until 2015, MediaWorks operated two radio businesses in Christchurch, which although both wholly owned by MediaWorks, competed with each other within the commercial radio marketplace. Mr Crowther was the sales manager for Radioworks radio brands, and managed a sales team of nine representatives.

[9] The other MediaWorks radio business was More FM, which operated a number of radio stations. More FM had its own general manager, Ben Harris, and its own sales manager, Ms XUY¹, managing a sales team of eight representatives.

[10] In December 2014, there was an initial discussion about merging the two businesses. MediaWorks wanted to compete more efficiently in the rapidly changing media market and to reduce duplicated costs.

[11] Mr Crowther says that the initial meetings for a business restructuring exercise began in March 2015. During 2015, extensive discussion and planning took place involving Wendy Palmer, the chief executive officer of MediaWorks national radio business, Mr McDonald, Mr Crowther, Mr Harris and Ms XUY. They all agreed that both teams should be able to sell each other's brands.

[12] They began doing so from the end of July 2015. From this point on, Mr Crowther continued to be paid the overrider on the previous Radioworks brands.

[13] Mr McDonald and Mr Crowther initially disagreed with the proposal to merge the sales divisions. They were concerned that clients might take the opportunity to minimise their advertising spend once the radio stations/brands were consolidated into one business. They took part in numerous discussions about the benefits and disadvantages of a partial or a complete merger of the sales divisions.

[14] Mr Crowther says that on 26 August 2015 he was told, for the first time, in a meeting that his, Mr McDonald, Ms XUY and Mr Harris's roles could be affected and that they would need to have new employment agreements. He says Ms Palmer did not tell him that directly prior to responding to Mr Harris raising the issue in the meeting.

¹ I have decided to anonymise Ms XUY as she did not give evidence at the investigation meeting. Certain documents created by her have been included in the written evidence. If Ms XUY were identified it is possible some information that she may rather remain private would be unfairly publicised.

[15] Ms Palmer agrees that in a meeting, likely in August 2015, she said that Mr Crowther and Ms XUY's roles might change at a later stage if the full sales merger went ahead. However, she says she would also have said that there had not been a full review of the sales structure, so nothing was changing at that stage.

[16] Mr Crowther says that at that meeting, on 26 August 2015, he discussed his own contractual remuneration structure with Ms Palmer. He says he became anxious and wanted details of the proposed changes as soon as possible. He says that he and Ms Palmer had a discussion that became "a little heated". He felt Ms Palmer wanted him to agree his contract should change because of the merger.

[17] However, Ms Palmer says at that stage, MediaWorks had done no work on the sales part of the business (which Mr Crowther was part of) and so there was no intention at that point to offer new employment agreements for Mr Crowther and any other sales staff. She does not accept they discussed the 2% overrider part of his remuneration structure as early as August.

[18] Mr Crowther says that he and Ms Palmer had agreed to meet the following Thursday to discuss "the new contract". However, he got an email saying Ms Palmer would not be coming to Christchurch again until the week of 21 September. Ms Palmer says the discussions about the merger were delayed from the end of August until late September because Mr Crowther and Mr McDonald went overseas.

[19] By September 2015, Mr McDonald and Mr Crowther decided they supported a total merger of the two sales operations and let Ms Palmer know that.

[20] On 25 September 2015, Mr Crowther sent Ms Palmer an email seeking to have her bring his "new contract" when she came to Christchurch the following week. On 28 September, Ms Palmer responded that until the "administrative, creative and operational changes that were underway" were "locked in" and "Rob and Ben settle into their new roles" his and Ms XUY's positions remained the same. She then wrote:

Once that is all complete we will consider whether the structure of the sales division is to be reviewed and will of course include you in that thinking.

[21] Unfortunately, Ms Palmer's response did not reach Mr Crowther and on 1 October he sent her another message that if there were to be changes to his existing contract he needed to be able to review a new contract, otherwise he assumed his old

contract would remain in place after the merger. Ms Palmer's response was to get her 28 September email re-sent to him.

[22] During October 2015, Mr Crowther put in a lot of work and long hours to allow the merger to happen, along with Ms XUY, Ms Palmer, Mr McDonald and Mr Harris.

[23] Ms Palmer says that at a meeting on 7 October Mr Harris "made a passing comment to the effect that there would be new contracts". She says the discussions moved on to how they could merge clients and she does not believe she made a commitment to provide Mr Crowther with a new contract.

[24] On 14 October, Ms Palmer indicated that she hoped to call Mr Crowther and others that day before she went overseas. However, she did not manage to call Mr Crowther and the following day sent him an email:

... just to confirm that ... once we have locked down the areas that Rob and Ben are working on at the moment we will consider whether the structure of the sales division is to be reviewed.

[25] She thanked Mr Crowther very much for his good work in relation to the merger, and added that she would speak to him in November when she came to Christchurch. She offered to speak to him at any time before that despite being overseas.

[26] On 16 October, Mr Crowther replied:

As you said to me previously, my contract will be changing. There should be no reason Ben or Rob's situation should hold up my contract.

I need to know what my new contract is. ...

[27] The full merger of sales operations of the two radio businesses took place on 31 October 2015. Around that time, the administrative and creative teams were merged. All Christchurch staff were by then housed in the same offices. Due to the restructuring, some job losses occurred in the administrative and creative teams.

[28] Around that time, the structure *governing* the sales teams changed so that Mr Harris became the general sales manager, with Mr Crowther and Ms XUY reporting directly to him. However, Mr Crowther was still in charge of managing the same sales team and Ms XUY remained in charge of managing her sales team. The only structural change for Mr Crowther at that stage was that his direct manager

became Mr Harris, not Mr McDonald. Mr McDonald became the general manager of the Canterbury radio business and the regional manager of the Otago radio business. He continued to work very closely with Mr Crowther, Ms XUY, Mr Harris and Ms Palmer.

[29] On about 9 November, Ms Palmer met with the sales team and told them a proposed restructure of the sales operation would be presented to them.

[30] Mr Crowther and Ms Palmer met one-on-one after that meeting and talked about how he was currently paid. They did not have a copy of his current employment agreement, specifically the letter setting out the basis for his remuneration. Mr Crowther explained how his remuneration worked and explained that he considered the 2% override should now apply to all sales in the merged structure. Mrs Palmer let him know she was shocked by that assumption because he still did the same job and managed the same team. She asked him if he believed he should get 2% of what Ms XUY's team billed and he told her that was what his contract said.

[31] Mr Crowther says he did not believe Ms Palmer had not seen his contract and did not know the basis on which he was paid. However, I accept that she had not seen it at that stage. He says Ms Palmer told him it was unlikely that he would be paid on the total national and local budget of the combined sales teams. That is because his income would effectively double and that the board would not accept that, if that were the result of the contract as it was currently drafted. She told him he was one of only two people in the country who still had that contract.

[32] On 16 November, Mr Crowther sent Ms Palmer a copy of the 2% letter. By that time, she had also received a copy from HR. In his email, he asked again for his "new Employment contract which clearly sets out the intended changes to my terms and conditions".

[33] Ms Palmer responded:

... what I said to you at our meeting was in response to your query regarding your employment contract.

My response was that, if there were to be any discussion around changes to your terms of employment, I would of course advise you in advance of any meeting so that you could bring a support person should you wish. I also note that your role has not changed nor have we discussed it changing, the issue we talked about specifically in the

meeting was around how the remuneration model in your current contract would work under the new overall Christchurch structure.

[34] On 19 November 2015, Mr Crowther, Mrs Crowther and another person incorporated a company called Certified Scaffolding North Shore Limited, with Mr Crowther as a shareholder and the sole director.

[35] On 22 November, Mr Harris resigned unexpectedly. On 25 November, Ms Palmer alerted the sales team to “a proposed sales structure for Christchurch to be put in place with the departure of Ben”. She told them they would meet the next day to present the proposal. Ultimately, Mr Harris agreed to remain engaged with MediaWorks as a consultant for some months, but he would no longer be an employee.

[36] After that, communication between the parties broke down significantly. Mr Crowther refused to meet or talk to anyone on 25 November without having the proposal in writing.

[37] On 26 November, Ms Palmer presented the written restructuring proposal to the sales staff and stipulated 2 December as the date the period for feedback was to conclude.

[38] MediaWorks’ stated purpose in the restructuring proposal was to reduce duplication because the “current and foreseeable sales landscape in Christchurch, does not justify a structure with two Sales Managers.”

[39] The proposal was for a general sales manager with a team of eight account managers to report directly to Mr McDonald, who remained as general manager. A sales manager, with ten account managers, would report directly to the general sales manager.

[40] Mr Crowther cancelled an individual meeting because he thought there was no point in meeting until he knew what his proposed remuneration package was to be. He also cancelled a planned trip to Auckland.

[41] On 1 December, Mr Crowther went on sick leave. He never returned to work. On the same day, Mr McDonald emailed Ms Palmer that Mr Crowther was:

... not happy,

and

...really starting to panic over the remuneration of the new contracts as he hasn't heard yet as to what we are offering with both positions.

[42] Two important events happened on 2 December, which Mr Crowther considers were linked. Ms Thomas raised Mr Crowther's personal grievance claims of unjustified disadvantage, and MediaWorks provided an indicative remuneration structure to Mr Crowther. The proposed remuneration structure was for the sales manager to have a salary package of \$199,000 and the general sales manager to earn \$234,000. The general sales manager's proposed remuneration was almost \$100,000 less than Mr Crowther earned.

[43] On 4 December, Mr McDonald sent an email to Ms Palmer and the HR person dealing with Mr Crowther's situation to the effect that a mutual friend of Mr Crowther and Mr McDonald's had been to see Mr Crowther. Mr McDonald reported that the friend told him that Mr Crowther had decided to move on from MediaWorks and did not want any discussion.

[44] Mr McDonald visited Mr Crowther on 4 December to see if he and Mr Crowther could resolve the situation. Mr McDonald told Mr Crowther that the business did not want to lose him:

that he was well-liked and well-respected ... and that I wanted to find a way to fix the situation. ... Dave made it clear that he did not want to have discussions with Wendy or to try and resolve it.

The issues

[45] There are two claims before the Authority. Each raises a number of issues to be determined; I need to consider some of the facts under each head of personal grievance. I must determine:

- (a) Whether MediaWorks carried out the restructuring consultation in an unreasonably protracted manner that led to Mr Crowther being under unacceptable stress for over 12 months, causing him unjustified disadvantage. To address that issue, I need to ask whether MediaWorks' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances.

- (b) I also need to consider whether MediaWorks acted as a fair and reasonable employer when considering whether Mr Crowther was unjustifiably constructively dismissed. In particular, I must assess:
- a. Whether MediaWorks breached a duty or duties it owed to Mr Crowther;
 - b. If so, was that breach, or were the breaches, so serious that MediaWorks repudiated the employment agreement such that it was reasonably foreseeable that Mr Crowther was likely to resign as a result?
 - c. Whether any such breach was the actual cause of Mr Crowther's resignation.
- (c) Whether Mr Crowther is due any remedies for any finding of unjustified disadvantage or unjustified constructive dismissal. If so, I need to consider any contribution to the situation leading to his personal grievance/s.
- (d) Whether Mr Crowther is due any further money under the 2% override contractual provision.

Was Mr Crowther disadvantaged by an unjustified action or actions?

[46] Mr Crowther's claim that the restructuring was an unreasonably protracted process over the period of a year is not correct. The suggestion to merge the two radio businesses was made at the end of 2014. However, the evidence discloses that it was not until March 2015 that discussions became focused on the possibility of merging the businesses and how that might work.

[47] I do not accept Mr Crowther's evidence that he and Ms Palmer had a specific discussion about his remuneration in August 2015. I consider it more likely than not that Ms Palmer's recollection is correct and that Mr Crowther's memory is not accurate. The evidence supports that and shows that the discussion at the meeting was about new contracts for Mr Harris and Mr McDonald, not for Mr Crowther or Ms XUY. The documentary evidence also shows that while Mr Crowther was concerned to get any new contract that might be proposed for him from September, he

did not start referring specifically to his current remuneration until 9 November, and later.

[48] I accept that the impact of the merger on his remuneration might have been his personal concern all along, but he did not raise that with MediaWorks until November. I do not accept that as early as August 2015 MediaWorks put Mr Crowther on notice that his terms and conditions of employment would change, or were about to change.

[49] Even if he got that impression, during September and October MediaWorks was firm and consistent in its messages to Mr Crowther that no review of the sales team structures was underway, and that such a review would not happen until sometime in the future. On 15 October 2015, Ms Palmer's email to Mr Crowther said that once Mr Harris and Mr McDonald had finished the areas they were looking at, which should be by the time she got back from overseas, they would consider "whether the structure of the sales team is to be reviewed".

[50] During that time, it is clear that Mr Crowther had a suspicion that with the merger of the two radio businesses his and Ms XUY's roles may be restructured. In addition, he believed that under any restructure he was likely to be offered less favourable remuneration than he had enjoyed to date. That led to uncertainty for him, which he says saw him suffering sleepless nights and undue stress from at least the end of September.

[51] He first raised the issue of stress with Ms Palmer in his email of 16 October:

I am going through enough stress having to implement these changes
and still waiting for my contract.

[52] Business restructuring is always stressful, even if one's own job is not directly or currently under threat. However, at that stage there was nothing that MediaWorks did that caused any disadvantage to Mr Crowther in his terms and conditions of employment. The stress Mr Crowther felt then was related to the restructuring necessary for the merger and some uncertainty as to whether further restructuring would take place, which would directly affect his position.

[53] I do not accept Mr Crowther's email of 16 October was sufficient to put MediaWorks on notice of anything except that Mr Crowther had found the merger process stressful, which was to be expected, and that if there was a new contract

proposed he wanted it sooner and not later. However, Ms Palmer had been and remained clear that there was at that stage no proposed new contractual arrangement for him.

[54] MediaWorks did not specifically foreshadow a restructuring proposal for the sales teams until November. I do not accept that the purpose of the whole restructuring was to get rid of Mr Crowther because he was paid too much, or to retain him but at reduced remuneration. A significant merger of two separate businesses had taken place and it was a commercial decision that MediaWorks was entitled to make to review the sales team structure once the merger had occurred. The proposal to restructure the sales teams was made within four weeks of the merger of the businesses. That was not a protracted period.

[55] I accept Ms Palmer's evidence that before Mr Harris resigned she hoped to retain the two sales manager roles for Mr Crowther and Ms XUY, although with some reorganisation. Her evidence was that as soon as it was clear Mr Harris was leaving the employment structure was not hers and Mr McDonald's to manage, because HR and the board had to be consulted. Therefore, she and Mr McDonald designed a proposal they hoped would see them retain Mr Crowther and Ms XUY while reducing costs as the board required her to do. The proposed structure was the same as that in Auckland, and one Ms Palmer was confident the board would accept.

[56] Ms Palmer's evidence, which I accept, is that had she known that Mr Crowther was suffering stress, she would have immediately taken steps to try to ameliorate that stress. MediaWorks did not have any reason to understand that Mr Crowther was so stressed that it was affecting his health before he went off work on 1 December. Mr Crowther did not provide medical evidence to MediaWorks until 9 December 2015, when his GP provided a medical certificate and notes from a consultation that day.

[57] MediaWorks acted appropriately to offer support to Mr Crowther in the relatively short period that the restructure was on foot, a period of less than a month. Mr Crowther was told that he could engage a support person for any meetings, that he had access to EAP, and that he could speak to his manager or to the Human Resources division at any time. In addition, Mr McDonald went to visit him. Ms Palmer offered to come down and speak to him.

[58] MediaWorks twice extended the deadline for Mr Crowther to provide feedback on the proposed reorganisation. In fact, MediaWorks was obliged to extend the feedback deadlines as it provided relevant information to Mr Crowther at two different times after the proposal was first presented.

[59] I accept Ms Palmer's evidence that she was not aware of Mr Crowther's grievances before MediaWorks released the proposed remuneration structure to him on 2 December 2015. I do not accept that the only reason MediaWorks provided the proposed remuneration to Mr Crowther that day is that he had raised his personal grievance.

[60] Mr Crowther's major concern was the proposed reduction in his remuneration in the guise of a restructuring. Mr Crowther told MediaWorks that he thought the proposed role of general manager of sales was the same job that he had been doing already. I do not accept that either of the proposed roles were the same as what he had been doing previously. The general sales manager's role was a more senior role, which saw 19 people reporting through to it, effectively doubling the number of people that reported to Mr Crowther. The sales manager's role was a more junior role than Mr Crowther's role, although it had one more sales person reporting to it.

[61] Ms Thomas, on Mr Crowther's behalf, sought more information from MediaWorks and received some more information in response, such as the EY report on comparable market salaries in Christchurch. She made some critique of that report, which was a part of Mr Crowther's feedback. Media Works is incorrect that Mr Crowther gave no feedback. I accept his feedback was minimal, but there was no requirement for more.

Did the disagreement about remuneration amount to unjustified disadvantage?

[62] I wish to address the issue of the disagreement over how Mr Crowther's remuneration should have been calculated after the merger.

[63] Mr McDonald was well aware of Mr Crowther's remuneration terms. It may have been prudent for MediaWorks to address what the full merger of the radio businesses meant for Mr Crowther's remuneration, if anything. However, that did not happen because Mr McDonald did not share Mr Crowther's view of what the 2002 letter meant in relation to the merged business. It simply did not occur to him that is how Mr Crowther would see things.

[64] On 9 November, Ms Palmer told Mr Crowther that if his interpretation of his remuneration contract was correct, that he stood to be paid 2% on the total merged budget of the two businesses despite not managing all the sales staff, it was unlikely the board would wish to continue to pay him in that way. However, they entered into that discussion without Ms Palmer having seen the contract and she later made it clear that her comments should not be taken to mean that MediaWorks had a new employment agreement to present to Mr Crowther.

[65] Once Ms Palmer had a copy of the 2% letter she reiterated that there was no current plan to change the sales team structure but acknowledged they needed to resolve how the remuneration model in his current contract would work under the new merged business.

[66] At that stage, at most, the disagreement of how the 2002 remuneration arrangements would apply to the new structure was a dispute about what the contract meant. Section 5 of the Employment Relations Act 2000 (the Act) defines a dispute as:

...a dispute about the interpretation, application, or operation of an employment agreement.

[67] Either party could have initiated further negotiation about how the 2% should apply to the new situation, or suggested mediation.

[68] MediaWorks' disagreement with Mr Crowther over the interpretation of the contract cannot amount to an unjustified disadvantage. Each party had genuinely held but opposing views of how it should be interpreted under the new structure.

Conclusion on disadvantage claim

[69] Mr Crowther's uncertainty about what might happen to his role once the merger took place was well founded, because of the significant reorganisation inherent in merging two businesses. However, I am satisfied that MediaWorks' actions were justifiable in that they were the kind of actions that a fair and reasonable employer could have undertaken in all the circumstances. It also carried out its actions in the way a fair and reasonable employer could have carried them out. Mr Crowther does not have personal grievance of unjustified disadvantage.

Further events up to and including the end of the employment relationship

[70] MediaWorks and Ms Thomas entered into correspondence. In a letter dated 7 December, MediaWorks extended the feedback period to 9 December. However, after that it again extended the timeframe for Mr Crowther to give feedback.

[71] On 9 December, Mr Crowther visited his GP who prescribed sleeping tablets and noted Mr Crowther:

Attends with severe stress related symptoms triggered by significant work issues. ...

He is clearly unfit for work in his current state...

It is as yet unclear when he will be fit to resume work.

[72] On 10 December, MediaWorks wrote to Ms Thomas denying the restructure was “a guise with the purpose of reducing Dave’s income.” It reiterated it wanted to hear feedback from him, and wrote:

We are aware of the impact the new remuneration structure would have on Dave’s current income should this change proceed. In the event he was redeployed to one of the future roles ... we would discuss the implications of that for him, including for his remuneration with a view to fairly managing the impact of the change.

[73] Ms Palmer’s evidence was that meant that she would look to reduce Mr Crowther’s income only gradually if he was appointed to one of the roles.

[74] On 14 December 2015, Certified Scaffolding North Shore Limited changed its name to Approved Scaffolding Limited.

[75] On 15 December, MediaWorks sent Ms Thomas a copy of an Ernst Young (EY) report it had commissioned on the market rate for the proposed sales roles, which had been provided to it by EY the day before. MediaWorks extended the period for feedback until 16 December, but then agreed to have a telephone call to hear feedback from Mr Crowther.

[76] On 17 December, Mr McDonald, MediaWorks’ HR consultant, Mr Crowther and Ms Thomas took part in the telephone call during which it was established that Mr Crowther believed the jobs were the same as what he had been doing, and that he wanted to be redeployed to the general sales manager’s role.

[77] On 18 December, MediaWorks confirmed the proposal would proceed and sent Ms Thomas the selection criteria for the general sales manager's role. Interviews were limited to Mr Crowther and Ms XUY for both roles. MediaWorks confirmed that in the phone call Mr Crowther had indicated he wished to be considered for the general sales manager's role. It also asked for a confirmation by 10 am on 22 December whether Mr Crowther intended to be considered for either or both of the roles.

[78] On 22 December 2015, Mr Crowther resigned his position and raised a personal grievance of unjustified constructive dismissal.

[79] MediaWorks replied that its preference was for Mr Crowther to continue working for it. If Mr Crowther still wished to resign MediaWorks offered him one month's paid notice from 23 December and eight weeks of redundancy compensation. It confirmed it would pay out the balance of his annual leave. However, it asked him to get back to it the following day if that was not what he wanted. Mr Crowther did not respond and therefore MediaWorks treated his resignation as if it had been a redundancy and paid the month's notice and eight weeks of redundancy compensation.

Was Mr Crowther unjustifiably constructively dismissed?

[80] Any breach by an employer that leads to a finding of constructive dismissal must have been a repudiatory breach. The onus rests with Mr Crowther to prove that the conduct of MediaWorks was of such a repudiatory character as to entitle him to elect to end the employment relationship.

[81] The most significant implied duty on both parties in an employment relationship is to maintain a relationship of trust and confidence. In *Wellington Clerical Workers IUOW v Greenwich*, Justice Williamson observed in describing this type of constructive dismissal:²

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.³

²[1983] ACJ 965

³No 2 above, at page 975

[82] I have not found Mr Crowther's claimed unjustified disadvantage grievance to be proved. I also find the claim of an unjustifiably prolonged period of restructuring cannot form a basis for an unjustified constructive dismissal claim. For a finding of constructive dismissal, there must have been some other repudiatory breach.

Do any MediaWorks' actions after 2 December amount to repudiatory breaches?

[83] Ms Thomas submits that MediaWorks breached its duty of good faith to Mr Crowther by accusing him of acting in breach of his duty of good faith. Mr Crowther considers MediaWorks allegations undermined the employment relationship and were unreasonable leading to his trust and confidence in the relationship being destroyed. Counsel's submissions went so far as to allege that MediaWorks made the allegations with the intention of destroying the employment relationship.

[84] The first reference to a lack of good faith was in the MediaWorks letter of 10 December:

We are aware that Dave has advised Rob McDonald that he never intends to return to MediaWorks which we find very disappointing. This would also suggest that *Dave is not intending to respond to our proposal or to engage with us in good faith* on these changes. This is again disappointing as within any workplace change is best achieved through discussion.

(emphasis added)

[85] Ms Thomas responded that it was not the case that Mr Crowther never intended to return to work. I am satisfied that is what Mr Crowther had told Mr McDonald, and their mutual friend, in person. I am not saying that should be taken as Mr Crowther's resignation. Mr Crowther was very emotionally charged and angry during his conversation with Mr McDonald, which took place in his own home. In addition, Mr McDonald was in mixed role of friend and confidant, and employer representative. It was not a formal resignation.

[86] However, there was nothing repudiatory in MediaWorks trying to get clarity on what Mr Crowther's intentions were and pointing out that if he was intending to resign while allowing MediaWorks to continue its engagement on the redundancy proposal with him, that could amount to a lack of good faith.

[87] As it was, Ms Thomas was able to clarify with MediaWorks that Mr Crowther did not intend to resign and did intend to remain engaged in the process with it, at that point.

[88] The second reference was in the letter dated 15 December:

... again this *indicates an unwillingness to engage in good faith which is disappointing* ...

... Dave has an expectation that he is entitled to be paid 2% of the new merged business revenue ... which unfortunately supports our view that *Dave is not interested in engaging in good faith* and has no intention of responding constructively to our proposals.

(emphasis added)

[89] Ms Thomas replied that she did not understand why Mr Crowther's expectation of being paid 2% of the merged business was a sign that he was "acting in bad faith." She expressed the view that the 2% letter supported his contention he was entitled to be paid 2% of the newly merged business revenue.

[90] Looking at the correspondence in context, I do not consider that MediaWorks acted in breach of its good faith obligations to Mr Crowther. It questioned whether he was engaging with it in good faith. Those phrases were in letters that also expressed a desire to keep engaging with Mr Crowther, and that included the phrase, "as within any workplace change is best achieved by discussion". MediaWorks clearly expressed that its disappointment with Mr Crowther was with what it identified as his lack of engagement on the proposal and/or his decision not to return to work.

[91] In addition, although the matter was not discussed and not addressed at all by Ms Thomas, MediaWorks expressed twice that it intended to manage the implications and impact of such a proposed reduction in income for Mr Crowther if he applied for and was successful in getting one of the two new roles. MediaWorks expected to be able to appoint Mr Crowther to one of the new roles, probably to the general sales manager role. It expected the amount of remuneration to be further discussed and negotiated.

[92] MediaWorks' letters included no repudiatory breach or breach of its duty of good faith.

[93] In addition, I find that the disagreement about the 2% override was not a repudiatory breach by MediaWorks. In *New Zealand Institute of Fashion Technology v Aitken*⁴, the Employment Court decided:

Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal. ... The parties owed each other a duty to refer the dispute to mediation ...

[94] Mr Crowther cannot rely on the dispute about the 2% to found his claim of constructive dismissal.

[95] Ms Thomas' submits that by 17 December, Mr Crowther had already lost trust and confidence in MediaWorks. However, he wanted to find an alternative to resigning. That must have meant that he had not entirely lost trust and confidence. He certainly did not tell MediaWorks before or during that call that he had lost trust and confidence, and that he blamed it for that. If he had already lost his trust and confidence, then he was not acting in good faith when he said he wished to apply for the general sales manager's role. It must have appeared to MediaWorks that he was engaging in the restructuring process in good faith at that time. MediaWorks was engaging in good faith.

[96] There was no action of MediaWorks either during that call or after it that could amount to a repudiatory breach allowing Mr Crowther to call the employment relationship to an end.

[97] MediaWorks did not have an ulterior motive to get rid of Mr Crowther.

[98] Mr Crowther's evidence was that he was highly stressed because of MediaWorks' behaviour towards him and that the redundancy proposal and the thereby reduced income was the last straw. MediaWorks' behaviour overall, including the November proposal to restructure the sales teams, was sufficient to cause him unhappiness and resentment, I do not consider it amounted to dismissive or repudiatory conduct.

[99] MediaWorks did not breach any express or implied duty towards Mr Crowther, including its duty of good faith to him. Therefore, Mr Crowther's claim to have been constructively dismissed fails.

⁴ [2004] 2 ERNZ 340

Is Mr Crowther entitled to any further payment under the 2% override?

[100] The relevant sequence of events starts with the discussion Mr Crowther and Ms Palmer had on 9 November, nine days after the full merger had taken place. Ms Palmer and Mr Crowther put one another on notice that they had differing interpretations of what his contractual arrangements for remuneration meant under the merged entity. Ms Palmer was very clear that she did not support Mr Crowther's view that he had become entitled to 2% of the local and national budget on the former More FM brands as well as on the Radioworks brands.

[101] By 16 November, Ms Palmer had a copy of the 2% letter, but there was no further discussion or negotiation between them about what the term meant. MediaWorks let Mr Crowther know in writing that, as at that date, there was nothing new proposed as to how his remuneration would be paid. I consider that was sufficient to notify him, in the context of the 9 November discussion, that it intended to calculate his remuneration as it had done in the past on 2% of the local and national budgets of what had been Radioworks' brands only.

[102] On 4 December, two days after Mr Crowther raised his unjustified disadvantage grievance, a payroll staff member calculated and paid Mr Crowther's commission in the same way it had been calculated before the merger. Mr Crowther responded by email saying he did not believe his pay was correct "as per my contract" and asked her to check it.

[103] The payroll staff member asked Ms Palmer and Mr McDonald for guidance as she presumed Mr Crowther was asking for commission "on the total of the merged market's revenue."

[104] On 14 December 2015, Mr Crowther again emailed the payroll staff member:

... we merged the ChCh operation into one business unit and revenue,
as per total revenue reports.

As per my contract, I get paid on total revenue plus bonuses. Can you
please ensure that my November pay reflects the Total Revenue for
our ChCh merged business unit.

[105] The payroll staff member responded that Mr Crowther needed to contact Ms Palmer or Mr McDonald about that.

[106] On 15 December, MediaWorks wrote to Ms Thomas:

Despite being absent on sick leave and unable to work, Dave has today emailed and called our payroll section to enquire as to his pay for this month. It is clear that Dave has an expectation that he is entitled to be paid 2% of the new merged business revenue. There is no basis for this ...

[107] MediaWorks asked that Mr Crowther contact his manager to discuss the matter and not the payroll staff.

[108] I need to assess what “2% Override on total sales (Local and National budget, total revenue ...” meant after the merger.

[109] In doing so, I need to use the usual principles of interpretation of employment agreements. In the recent case of *AFFCO New Zealand Limited v New Zealand Meat Workers and Related Trades Union and Roberta Kerewai Ratu & ors*⁵, the Supreme Court affirmed the approach to interpretation of employment contracts is as set out by it in 2014:

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.” This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.⁶

[110] In ascertaining the meaning of the contract, I must look at the ordinary meaning of the words used before referring to the context of the contract and any relevant background.

[111] From December 2002 until 31 October 2015, both parties agreed on what they intended the 2% override clause to mean. It meant that, in addition to the other bonuses set out in the letter, Mr Crowther was entitled to a monthly payment of 2% of the local sales budget for the stations under the Radioworks’ stable, and 2% of the national sales budget for those stations.

⁵ [2017] NZSC 135, 7 September 2017.

⁶ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015 1 NZLR 432 (footnotes omitted).

[112] The More FM business had a different contractual arrangement with Ms XUY. I need not consider that.

[113] As of 31 July 2015, both teams were able to sell one another's brands. I do not know exactly what Mr Crowther understood about how that change affected his 2% remuneration agreement. It is clear that his first attempt to ensure payroll paid him 2% of the total merged sales did not occur until after the total merger of the businesses on 31 October 2015.

[114] Ms Thomas submits that the 2% override is clear that Mr Crowther should receive 2% of the local and of the national budgets for the merged sales.

[115] The plain words are clear, but it also clear that, prior to 1 November 2015, Mr Crowther and MediaWorks understood that to be on total Radioworks' brands sales only.

[116] The context of the term includes the fact that the letter is addressed to Mr Crowther at Radioworks, signed by the manager of Radioworks, and how it had always been interpreted and paid.

[117] Although the contract does not articulate the reason behind the payment terms, the parties understood that the method of remuneration was both to incentivise and to reward Mr Crowther to sell as much advertising as he could and so that he would encourage and support his sales team to do so.

[118] MediaWorks purpose in including the 2% term was achieved. Mr Crowther and his team were committed, hard-working, built good client relationships and sold a lot of advertising. That was reflected in Mr Crowther's remuneration.

[119] The contract did not change and the clear words did not change. What changed were the circumstances in which Mr Crowther was working. However, his work circumstances changed on 31 July 2015 when he and his team were able to sell to More FM stations as well. That did not lead Mr Crowther to argue that the basis on which he should be paid had changed fundamentally.

[120] The business or commercial common sense context of the contract was that Mr Crowther was to be rewarded for his own and his team's sales efforts, not that under changed circumstances he would also be rewarded for sales undertaken by another sales manager and her team.

[121] Ms Thomas made what can only be an alternative submission that the 2% term was ambiguous and I should apply the rule of contra proferentum to find that Mr Crowther's interpretation is correct. I do not agree that the contractual words were ambiguous. The words did not become ambiguous because the businesses merged. I understand that Mr Crowther interpreted the term to mean he would earn 2% of the total local and national sales of the merged business. However, in checking the plain words of the contract in context, even in the changed circumstances, it means that he was entitled to 2% of total local and national budgets of what were before 1 November 2015 the Radioworks stations only.

[122] With one exception set out below, it does not make commercial sense to pay an overrider to a sales manager who has not actually made sales himself or made them via the sales representatives who report to him.

[123] Mr Crowther was entitled to a 2% overrider on all sales of the total local and national budget on those stations that prior to 31 October 2015 had been Radioworks brands, whether the sales were made by his team members or Ms XUY's team members.

[124] He is eligible for 2% on sales made to previous Radioworks stations by Ms XUY's sales staff because Mr Crowther and/or his sales staff would have been instrumental in introducing them to the clients and assisting them to make sales.

[125] If MediaWorks has already paid him that way he is not entitled to any further payment. If it has not, he may be entitled to more. If there are further payments to be made, the parties should seek to come to an agreement on the amount. Mr Crowther has leave to come back to the Authority for me to set that amount if the parties cannot agree.

Costs

[126] I reserve the issue of costs. The parties should seek to agree on costs, bearing in mind the tariff-based approach of the Authority and the principles under which I would exercise my discretion. The investigation meeting took less than two full days. It is likely to have been completed in one full day except for Ms Palmer's unavailability due to illness on the first day. Any party wishing to apply for costs has 20 days to do so from the date of this determination. The other party should get its response to the application in within a further 15 days.

Christine Hickey
Member of the Employment Relations Authority