

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 699
3177230

BETWEEN SHERIE ANNE DARVILL
Applicant

AND TARGETTI (NZ) LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: Applicant in person
Emma Butcher and Ben Cleland, counsel for the
Respondent

Investigation Meeting: 4, 5 and 6 July 2023 at Auckland

Submissions received: 2 August 2023 and 30 August 2023 from Applicant
16 August 2023 from Respondent

Determination: 23 November 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sherie Darvill was employed by Targetti (NZ) Limited (Targetti) as a senior lighting consultant. Ms Darvill's employment was terminated after her role was made redundant on 20 June 2022.

[2] Ms Darvill claimed she was unjustifiably dismissed because Targetti did not have lawful justification for terminating her employment. Her claims included an allegation she was unjustifiably disadvantaged during her employment.

[3] Targetti denied all Ms Darvill's claims and said its actions were in accordance with what a fair and reasonable employer could have done in all the circumstances at the time.

The Authority's investigation

[4] For the Authority's investigation, written witness statements were lodged from Ms Darvill, her partner Soren Gamst and a number of Targetti representatives: Debra Phillips, business owner; Arthur Phillips, lighting consultant; Andrew Lay, sales consultant; and Cedric Williams, specification manager. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also submitted written closing submissions.

[5] 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

[6] The issues requiring investigation and determination were:

- (a) Was Ms Darvill unjustifiably dismissed and/or unjustifiably disadvantaged by Targetti?
- (b) If Targetti's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (b) Compensation under s 123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Darvill that contributed to the situation giving rise to her grievance?
- (d) Was Ms Darvill owed any outstanding wages from Targetti?
- (e) Did Targetti breach the duty of good faith it owed to Ms Darvill?
- (f) Should either party contribute to the costs of representation of the other party?

Context

The start of Ms Darvill's employment

[7] Targetti carried on business as an architectural and commercial lighting provider. It employed around seven staff members with its sales operation covering New Zealand regions including Auckland, Hamilton, Tauranga and the Far North.

[8] Ms Darvill began her employment with Targetti on 26 August 2019. As part of her role, she sold and promoted lighting products to customers within Auckland and areas outside the Auckland region. Her role also included promoting Targetti products (and their specifications) to architects, engineers and lighting designers.

[9] Ms Darvill was paid a salary of \$80,000 for 40 hours work, Monday to Friday. As part of her employment agreement, she was provided with what were called "tools of the trade" which included a work vehicle, a mobile phone and a laptop computer. She was also provided with a work email address and access to various Targetti computer systems to assist her with her work.

Reduction of salary

[10] On Monday 23 March 2020 the Prime Minister announced New Zealand will move to an Alert Level 4 COVID-19 lockdown on Wednesday 25 March 2020 (the lockdown). On Tuesday 24 March 2020 Mr Lay met with Targetti staff members to organise work arrangements during the lockdown.

[11] Part of the discussion included an agreement on reducing staff pay while staff worked from home. Although Ms Darvill and Targetti agreed on reducing her pay, they disagreed on aspects of how her pay would be reduced and whether her pay would be restored to its original amount.

[12] Ms Darvill returned to work in the Targetti offices in May 2020. Leading up to and after her return, she had asked Targetti when her salary was to return to its original amount. The matter remained unresolved up until she went on parental leave in October 2020.

Parental leave

[13] While Ms Darvill was on parental leave, Targetti introduced a new staff remuneration structure where staff would be paid a base salary of \$50,000 and receive a five percent commission on sales over \$60,000.

[14] On 4 October 2021 Ms Phillips called Ms Darvill to discuss arrangements for her return to work. As part of the discussion, Ms Phillips explained the implementation of the new remuneration structure and expectations around overnight work travel outside of Auckland. Ms Phillips also said a further discussion will be required about whether Targetti would continue to provide Ms Darvill with a work vehicle. They also agreed for Ms Darvill to return to work on 1 February 2022.

[15] Ms Darvill was concerned about what was explained in Ms Phillip's email. This led to an ongoing exchange of communications between them about Ms Darvill's concerns.

[16] On 15 December 2021 Ms Phillips emailed Ms Darvill responding to her concerns about the remuneration structure, out of Auckland travel and the potential loss of her use of a work vehicle. Ms Phillips also raised the future possibility of terminating Ms Darvill's role due to redundancy.

[17] Ms Darvill did not return to work on 1 February 2022. Instead, she raised a personal grievance for unjustified disadvantage in respect of the new remuneration structure, the reduction in her pay, the expectations around her work travel and loss of use of the work vehicle. Ms Darvill's grievance also alleged Targetti was threatening her with redundancy if she did not agree with their work expectations.

[18] After raising her personal grievance, there were further communications between representatives for both parties to try and resolve Ms Darvill's grievance. This led to the parties attending mediation on 11 April 2022. The parties were unsuccessful in resolving the issues between them.

Return to work

[19] On Tuesday 12 April 2022 Ms Darvill returned to work and it was agreed she would receive her original salary of \$80,000 gross per annum, and a vehicle would be provided to her in due course.

[20] After returning to work, Ms Darvill and Targetti continued to disagree on the expectations of her role. On 26 April 2022 Ms Darvill and Ms Phillips met to discuss Ms Darvill's claims against Targetti. Amongst other things, both parties discussed the potential for the work relationship to progress positively. During the meeting, Ms Phillips denied Ms Darvill's allegations of a threat of redundancy. Ms Darvill secretly recorded this meeting without Ms Phillip's knowledge.

[21] After the meeting, Ms Darvill and Targetti were engaged in ongoing attempts to address Ms Darvill's out of Auckland travel and providing Ms Darvill access to the required "tools of the trade".

[22] On 26 May 2022 Ms Darvill went on a work trip to Tauranga (the Tauranga trip). This trip led to a dispute between her and Targetti as to whether she was authorised to go on the trip and whether she was entitled to be paid expenses for the trip.

Redundancy

[23] On 7 June 2022 Targetti sent Ms Darvill a letter proposing to make her role redundant because her role was not efficiently meeting its commercial requirements. Targetti also sought feedback from Ms Darvill before making its decision. Ms Darvill provided feedback to Targetti on 15 June 2022.

[24] On 20 June 2022 Targetti wrote to Ms Darvill answering her concerns and confirmed its decision to terminate her employment on the grounds of redundancy. Termination of Ms Darvill's employment was effective immediately and she was paid in lieu of notice.

Was Ms Darvill unjustifiably disadvantaged?

[25] Ms Darvill's claims against Targetti for unjustified disadvantage were initially framed in her statement of problem as a bullying claim. However, in her closing submissions, her unjustified disadvantage claims are broader than a bullying claim and includes claims against Targetti in respect of:

- The reduction to her pay;
- Targetti's proposed remuneration structure changes;
- The loss of her use of a work vehicle;

- Not being provided with “tools of the trade”; and
- Expectations for out-of-town travel and non-payment of travel expenses.

[26] The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.¹ In this case it is appropriate to address Ms Darvill’s unjustified disadvantage claim as set out in her closing submissions.

Salary reduction and wage arrears claim

[27] Ms Darvill said she was unjustifiably disadvantaged because Targetti had continued to unilaterally reduce her salary after the lockdown. She also said Targetti should have documented the salary reduction in the form of a written variation to her individual employment agreement.

[28] Although she initially agreed to a temporary reduction in salary, she expected to return to full salary after the end of the lockdown.

[29] Ms Darvill said the reduction was for her 40-hour week salary to be paid at 32 hours. This was reflected in her payslips during this time.

[30] Upon discussing the matter with Mr Lay before the lockdown, Ms Darvill was told all staff were subject to a salary reduction. In their evidence Arthur Phillips and Debra Phillips confirmed they were not subject to the reductions. Ms Darvill submitted this was also neither fair nor reasonable.

[31] Ms Darvill had also sought payment of wage arrears for the unpaid portion of her full salary from when she returned to work after the lockdown in May 2020, up until October 2020 when she went on parental leave.

[32] Targetti said there was no agreement to an end date or a review date of the reduction. This was largely due to the short period of time to discuss the reduction and to arrange future work arrangements before the country wide lockdown.

¹ Employment Relations Act 2000, s 160(3).

[33] Mr Lay said the reduction was a salary reduction as opposed to a reduction of hours. He acknowledged the payslips mistakenly showed a reduction of hours initially, but this was rectified in July 2020.

[34] Prior to the lockdown, many businesses were faced with an uncertain future and had to make several business decisions in a short period of time. Targetti was in this situation and was able to continue operating with agreements with staff on pay reductions. Because of the uncertainty it was unable to reach an agreement with Ms Darvill as to when her pay was to return to full salary.

[35] Although Targetti had a reasonable amount of time to document the pay reduction in a written variation to Ms Darvill's employment agreement, any potential disadvantage to her should take into account a number of factors.

[36] Firstly, from May 2020 to August 2020, Mr Lay and Ms Darvill had attempted to work together to finalise a written variation, however no agreement was reached before her parental leave.

[37] Secondly, although there were deficiencies in how Targetti addressed the salary reduction administratively, Ms Darvill had agreed to the reduction in salary for the benefit of the company and her employment.

[38] Thirdly, the circumstances behind Ms Phillips or Arthur Phillips not taking a pay cut should be viewed differently to Ms Darvill and other sales staff. This is mainly due to the personal interests they have in the company given Ms Phillips was the company director and Arthur Phillips was already accepting a low salary for the financial benefit for the company. Arthur Phillips confirmed in evidence his working hours (at the time) of about 70 hours a week and he was responsible for 80 per cent of Auckland sales for the company. A reduction of pay would have taken his salary below \$50,000 which was a comparatively lower salary to Ms Darvill, but an indication of his personal interest in the company. This interest was realised at the time of the investigation meeting where he had assumed the role of acting managing director for Targetti.

[39] Finally, Ms Darvill had suffered financial pressure because of the reduction but she understood the commercial reasons for the reduction. This was shown in an email

from her to Targetti in June 2020, where she said to Targetti she was grateful to be in full time employment given the circumstances at the time.

[40] Ms Darvill accepted the salary reduction and continued to work for Targetti on the reduced salary. Unfortunately, before going on parental leave, she was unable to come to an agreement with Targetti as to when the reduction would end. After her return from parental leave, restoring her full salary was agreed. Because she had agreed for the earlier reduction and eventually negotiated a restoration of her full salary, she was not disadvantaged by the salary reduction. For the same reason, she was not entitled to payment of wage arrears for outstanding wages.

Removal of the work vehicle

[41] In accordance with her employment agreement, Ms Darvill was entitled to the use of a vehicle. At the start of her employment, Todd Phillips the managing director for Targetti had emailed Ms Darvill confirming her use of the vehicle could only be taken from her for reasons of serious misconduct.

[42] After Ms Darvill had responded to Ms Phillips' 15 October 2021 email (about the potential loss of the use of a work vehicle), Ms Phillips emailed Ms Darvill saying the use of the vehicle could be removed at any time.

[43] Ms Phillips was not aware of Todd Phillips' previous email saying a vehicle could only be removed due to serious misconduct. Ms Phillips only became aware of the email on 11 April 2022 when a copy of the email was given to Targetti by Ms Darvill.

[44] Targetti argued Ms Darvill should have made Targetti aware of Todd Phillip's email earlier. However, Ms Darvill said she thought Targetti management were aware of the email.

[45] Ms Darvill had experienced stress associated with the potential loss of the work vehicle. Her main concern was how the loss of the vehicle would affect her daily life and her ability to carry out her role. Although Targetti eventually accepted she was entitled to a work vehicle in April, she did not immediately receive a vehicle upon her return after parental leave. She had to borrow a vehicle from a friend to allow her to get to work and to carry out her role.

[46] Targetti submitted the loss of the vehicle did not cause any disadvantage to Ms Darvill because she did not need the vehicle to perform her duties. Targetti also offered to pay the costs of her travel to and from work and was provided a car park.

[47] Targetti should have kept a better record of the initial agreement with Ms Darvill, and she was well within her right to believe the company was aware of Todd Phillips' email. As Ms Darvill was returning to her sales role, she was entitled to be provided a work vehicle which she needed to carry out her work. She was therefore unjustifiably disadvantaged when she was not provided a work vehicle upon her return.

Tools of the trade

[48] Ms Darvill's entitlement to "tools of the trade" was set out in her individual employment agreement as follows:

The employer will provide all tools of the trade to enable the employee to perform to their best abilities. The tools and/or equipment to be supplied by the employer are: Mobile phone, laptop, car and support.

[49] Ms Darvill said she was also disadvantaged when she was not provided with her phone and laptop upon her return to work. She said these tools were not made available to her until five weeks after she returned from parental leave.

[50] She also claimed she was not given access to both her original email and the Targetti Quotation System (quotation system). Her previous email address was important to her because she was able to connect with her previous client contacts through her old email address. The quotation system was also important because she said it was a helpful tool to assist her with product prices and customer quotes.

[51] Targetti accepted Ms Darvill was not provided the tools of the trade or access to email and the quotation system upon her return. It submitted she did not require the tools upon her return, and it mitigated her loss by providing her with a desktop computer and a tablet for travelling.

[52] Arthur Phillips said the change to Ms Darvill's email was because of an upgrade to Targetti's IT system. Targetti were supposed to provide her with her old emails but for whatever reason this did not eventuate. Targetti also submitted Ms Darvill's email address belonged to the company, and she was not entitled to insist on using her previous email address nor did she require this to perform her duties.

[53] Ms Darvill's role required her to sell and promote lighting products (and specifications) to customers and she was expected to travel in and outside of Auckland to do this. She returned to the same role upon her return from parental leave. Her employment agreement entitled her to the use of a laptop and a mobile phone, and she was entitled to receive these upon her return (or shortly thereafter).

[54] She was also reasonably entitled access to the quotation system upon her return. The system was a feature of her role prior to going on parental leave and upon returning. The system was also in use by other Targetti staff.

[55] Changes to IT systems are not uncommon in any workplace and given the amount of time Ms Darvill was on leave, the likelihood of such a change was not unexpected. However, the emails and client details of former clients were important to Ms Darvill carrying out her duties. This was recognised by Targetti because it intended to provide her access to her old emails. She should have been provided her previous email or alternatively access to her old emails and contacts. Ms Darvill was the only staff member who did not have access to her old email.

[56] For all the above reasons, Ms Darvill was unjustifiably disadvantaged when she was not provided her tools of the trade, access to her previous email and access to the quotation system within a reasonable time upon her return to work.

Travel requirements

[57] Ms Darvill said her travel pattern prior to taking parental leave was an accurate reflection of her travel requirements. Prior to taking parental leave, the majority of her work was Auckland based and any travel outside of Auckland was usually a day trip with the occasional overnight stay.

[58] After returning from parental leave, she said her work cycle required her to work three nights out of town a week. Targetti told her day trips were no longer the preference of the company. She disagreed with the changes. This led to ongoing disagreements between her and Targetti about travel requirements.

[59] Targetti said her travel frequency prior to going on parental leave was not an accurate reflection of her travel requirements. This was because after she started, she carried out training which was followed by the Christmas break. Shortly after the break,

the country went into lockdown. After returning from lockdown, she worked a relatively short period of time before going on parental leave. Based on the available evidence, this was a total accumulated period of around five months between May 2020 and October 2020. Targetti claimed this was too brief a period to properly gauge the travel requirements of her role.

[60] Although both parties accept Ms Darvill was expected to travel outside of Auckland as part of her role, her employment agreement and job description provided little detail about the frequency or the destination of her out of town travel. The “place of work” provision of her employment agreement said:

The employee agrees to travel for work regularly, which may include being away overnight. This will be in New Zealand.

[61] Ms Darvill said during her job interview with Todd Phillips and Arthur Phillips, they agreed her out of town travel would be limited to day trips with little overnight travel. Up until taking parental leave (and not including the lockdown period), Ms Darvill’s travel arrangement reflected the job interview travel expectations.

[62] While Ms Darvill was on parental leave, Targetti had clearly considered its commercial position post-covid and wanted to implement changes. It had also acknowledged Ms Darvill’s previous travel arrangements as was evidenced in Ms Phillip’s email of 1 October 2021 where she said:

We have your position of Sales open, however travel out of Auckland needs to be on a regular basis.

[63] Although out of town travel was always a feature of Ms Darvill’s role, she was entitled to expect the same if not similar arrangement upon her return to work after parental leave. For this reason, Ms Darvill was unjustifiably disadvantaged when she was required to undertake travel over and above her previous work arrangement.

Payment of expenses

[64] Ms Darvill claimed she was owed travel expenses for the Tauranga trip. She also said she was always reimbursed for all her expenses while travelling.

[65] In line with Ms Darvill’s employment agreement, Targetti accept Ms Darvill was reimbursed for reasonable work-related expenses. However, it argued the

Tauranga trip was not authorised by Targetti and the company did not ordinarily reimburse employees for personal food purchases.

[66] Ms Darvill pursued her expenses after the termination of her employment. After Targetti checked its records, it reimbursed Ms Darvill for a portion of her expenses. The remaining expenses appear to be less than \$19 however Ms Darvill claims Targetti had deliberately decided not to pay these expenses.

[67] The evidence is inconclusive as to whether Targetti had reimbursed Ms Darvill for all expenses in her previous travel trips and had purposely withheld the payment of expenses. For these reasons there is insufficient evidence to support Ms Darvill's claim for unjustified disadvantage in respect of non-payment of her expenses.

Remuneration Structure

[68] Based on her closing submission, Ms Darvill claimed she was unjustifiably disadvantaged by Targetti when it had threatened redundancy if she did not agree to the new remuneration structure.

[69] She also claimed she was not properly consulted on the change and was misled by Targetti when it said the remuneration structure applied to all sales staff and she could earn the same salary amount as her original salary. This was because there was only one other staff member who was subject to the new remuneration structure.

[70] Targetti said seeking the agreement to change the remuneration structure cannot be said to be an unjustifiable action causing disadvantage to Ms Darvill. It also denied it threatened Ms Darvill with redundancy (addressed below in respect of Ms Darvill's unjustified dismissal claim)

[71] Generally, Targetti's new remuneration structure was only offered by Targetti to Ms Darvill and there was no dispute she did not accept the offer. Ms Darvill was not disadvantaged by Targetti's attempt to negotiate her acceptance to the new remuneration structure because it was an offer made to her, not imposed on her without her agreement.

Ms Darvill's bullying claims

[72] Ms Darvill's claim for bullying arises from two main arguments. Firstly, upon return to her role from parental leave, she was required to report to four different people as part of her day-to-day work. She reported to Mr Williams as her operational manager but also reported to Ms Phillips for human resources and travel, Mr Lay for systems support and Arthur Phillips for work resources and training.

[73] She described this as micromanagement and believed this level of management limited her autonomy in the workplace and caused her hurt and embarrassment. She was also the only Targetti staff member who was subject to this level of management.

[74] Secondly, Ms Darvill claimed she was bullied because of the requirement to travel which included three interactions with Targetti management. On 10 May 2022, Arthur Phillips sent an email to Ms Darvill about travel arrangements. Generally, the email was about how Ms Darvill's home situation was impacting her ability to travel to Tauranga and Hamilton for work. In the email, Arthur Phillips set out the company's expectations:

this is a busy and demanding role so you will need to get yourselves organised to accommodate that with family demands if you are going to be able to do this role successfully.

[75] On 23 May 2022 Ms Phillips had approached Ms Darvill at her desk. Ms Darvill described Ms Phillips as being "very upset" and stood by her desk and raised her voice. Ms Phillips spoke to her about being unhappy with the ongoing dispute between them and described Ms Darvill's actions as "picking fights for the sake of it".

[76] On 1 June 2022 Todd Phillips approached Ms Darvill as she was preparing for a sales trip to Hamilton and Northland. The trip was planned together with Ms Phillips and Mr Lay.

[77] Ms Darvill said Todd Phillips was angry because she had recently travelled to the Waikato twice, and then Tauranga. He said to her "there was no need to go again when you're not even seeing your Auckland clients".

[78] Todd Phillips was not aware of the trip being planned with Ms Phillips and Mr Lay. Ms Darvill tried to explain the plan, but she said he was still highly agitated and continued to shout at Ms Darvill in front of others at the office. Ms Darvill became upset and went to the bathroom to compose herself. Ms Darvill explained she felt

“belittled and pulled in opposite directions” and humiliated in front of her work colleagues.

Targetti’s response

[79] In its submissions, Targetti relied on the definition of bullying as set out in WorkSafe New Zealand’s “Preventing and Responding to Workplace Bullying: The Guidelines”.² The guidelines define bullying as:

repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.

[80] Although there is no statutory definition for bullying, the Employment Court had described the WorkSafe definition as a “yardstick” for assessing whether appropriate steps were taken by an employer.³ The guidelines provide a useful guide for allegations of bullying and confirms bullying is not:

- (a) One-off or occasional instances of forgetfulness, rudeness or tactlessness;
- (b) Constructive feedback and legitimate advice or peer review;
- (c) A manager requiring reasonable verbal or written work instructions to be carried out;
- (d) A single incident of unreasonable behaviour; or
- (e) Differences in opinion or personality clashes that do not otherwise escalate into bullying, which is what the behaviour complained of amounts to.

[81] Targetti said Ms Darvill’s reporting lines cannot be construed as bullying or an unjustified disadvantage because there was no express or implied term of employment requiring Ms Darvill to report to any particular person or to only one person. Targetti also said her claim was not raised as a personal grievance within the statutory time limit of 90 days.

² WorkSafe New Zealand “*Preventing and responding to Workplace Bullying: The Guidelines*”, first published in 2014 and updated in 2017.

³ *FGH v RST* [2018] NZEmpC 60, (2018) 15 NZELR 944

[82] Ms Darvill was unhappy about having to report to Ms Phillips and the other managers, and she had expressed this a number of occasions shortly after her return to work. This included in an email on 2 June 2022 where she said:

...I feel am being pulled in all directions by everyone having a hand in managing me. It is stressful and upsetting and creates an uncomfortable work environment.

[83] This was sufficient evidence to show her grievance was raised in time in respect of being managed by multiple managers. However, given how long Ms Darvill was on leave, Targetti had put in place steps to try and help reintegrate Ms Darvill into her role. This was expressed by Ms Phillips in an email on 12 May 2022:

I don't want to have to micromanage you on an ongoing basis, but as part of rebuilding the trust and ensuring how you are spending your time to re-establish the client relationships is in line with our sales strategy. Again, you have been a long time out of the business and need to catch up. If I can see exactly what you are doing, I can give you guidance and direction. This won't be forever, just until you are fully back on track. The sooner the better from both of our perspectives. I am happy with our meeting and with your progress in the office yesterday, which I did tell you.

[84] Each of the four managers had specific areas of expertise to support Ms Darvill upon her return to work. Although Targetti's approach may not have achieved its intended outcome in integrating Ms Darvill back into the workplace, there was insufficient evidence to support her disadvantage claim for bullying.

[85] Targetti said the interactions Ms Darvill had with Todd Phillips, Ms Phillips and Arthur Phillips were reflective of tensions in the employment relationship created by the ongoing dispute between Ms Darvill and Targetti about employment expectations. These interactions did not amount to bullying.

[86] Arthur Phillip's email on 10 May 2022 fell within what can be described as one-off occasion of tactlessness. Overall, the communication appeared to be reasonable yet referenced sensitive aspects of Ms Darvill's personal life and should have warranted a more subtle approach. However, the email itself was not bullying.

[87] The interactions with Todd Phillips and Ms Phillips also fall within instances of forgetfulness, rudeness or tactlessness. Viewed in the context of the ongoing dispute and tension between Ms Phillips and Targetti, these interactions were understandable.

[88] The interaction between Ms Darvill and Todd Phillips was unpleasant for Ms Darvill given the nature of the interaction and it occurred in front of her peers. However, the interaction clearly arose from a miscommunication between Todd Phillips and Targetti management. Todd Phillips did not know Ms Phillips and Mr Lay had already spoke to Ms Darvill about her planned travel.

[89] Ms Darvill's interactions with Todd Phillips and Ms Phillips did not amount to bullying of her by them. However, it is not to say their behaviour was appropriate given their position in the company and what is expected from an employer when dealing with its employees.

Was Ms Darvill unjustifiably dismissed?

Test of justification

[90] Ms Darvill's employment agreement with Targetti included a standard redundancy clause as follows:

Redundancy is when an employee's role is no longer needed. If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in Ending employment. They will not receive redundancy compensation or other redundancy entitlements.

[91] In determining redundancy matters, the Authority must determine on an objective basis, whether the employer's actions, and how the employer acted, met the statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time.⁴ The Authority does not make its own decision on whether or not a position was surplus to the needs of the employer.

Ms Darvill's submissions

[92] Ms Darvill claimed her redundancy was predetermined and Targetti's consultation process was a charade. She said Targetti's restructure of her role was not genuine because the main reason for it was to end her employment. This all stemmed from the ongoing issues which arose after her return from parental leave.

[93] In support of her view, Ms Darvill claimed Targetti's restructure process was deficient because:

⁴ Employment Relations Act 2000, s 103A.

- (a) She was not provided with sufficient information to consider the restructure process;
- (b) The new role had not been confirmed by Targetti at the time of her redundancy;
- (c) The rationale for the structure was confusing because Ms Phillips had initially said the restructure was because there was a shortage of staff and staff were “screaming for help”. However, Ms Phillips also said Ms Darvill tasks were to be absorbed by other staff members.
- (d) Her role was the only role affected by the restructure and there was no other consultation or discussion with other Targetti staff.

Targetti's submissions

[94] Targetti disagree with Ms Darvill and believe its actions were those of a fair and reasonable employer. It also argued its decision to make Ms Darvill redundant were not premeditated and had not previously threatened redundancy. The previous alleged threats did not say redundancy was going to occur.

[95] During the two months since Ms Darvill's return from parental leave, Targetti said it was frustrated in its interactions with Ms Darvill in trying to establish the expectations of her role. Specifically, the frustration centred around Ms Darvill's out of town travel, her access to tools of the trade and salary expectations. In her evidence, Ms Darvill also shared this frustration.

[96] Targetti said these frustrations meant Ms Darvill's role was not meeting the commercial requirements of the company. The new role was a sales-focussed role which was to be paid in accordance with the new salary commission remuneration and will require consistent out of town and overnight travel. This also meant the product specification aspect of her work was no longer required.

[97] Targetti also said it followed a proper consultation process where Ms Darvill was given appropriate opportunity to respond to the proposal (which she did) and a decision was made based on all the available information.

Analysis

[98] The Authority must consider whether Targetti's decision to make her redundant was for a genuine business reason and "not used as a pretext for dismissing a disliked employee".⁵

[99] As a result of COVID-19 epidemic, Targetti had to reassess its sales strategy in an attempt to build up its sales operation. This led to the proposed changes to the remuneration structure for Targetti staff and also the decision to more frequently service areas outside of Auckland. This later became the rationale for restructuring Ms Darvill's role. The available evidence shows Targetti's decision to propose these changes were a genuine business decision.

[100] Targetti was entitled to make commercial decisions which include making a decision to restructure its operations. Given the ongoing employment relationship problem leading up to the restructure, it is understandable why Ms Darvill disagreed with Targetti's reasons for the restructure. This is especially given the similarities between the new proposed role and her previous role at the time.

[101] The main difference between her role and the new proposed role was the commission-based salary structure and the need to service out of Auckland regions more frequently. These differences were genuine considerations for Targetti and it was entitled to make the decision to restructure its operations to meet its business requirements.

[102] The consultation process was conducted appropriately in this case. After Ms Darvill was notified of the restructure on 7 June 2022, she was given until 13 June 2022 for feedback. This was extended to 15 June 2022 where Ms Darvill responded disputing the genuineness of Targetti proposal. This led to Targetti's decision to make Ms Darvill redundant on 20 June 2022.

[103] As part of the consultation process, Ms Darvill was offered the proposed role but she declined the offer. I acknowledge Ms Darvill's reservations about out-of-town travel and the proposed commission-based salary and the effect of both on her personal circumstances.

[104] However, her expectations to keep her original terms and conditions of employment were untenable in a situation where Targetti opted to make a commercial

⁵ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

decision to change its operation for the future benefit of the company of its size and scope. For these reasons, a fair and reasonable employer in Targetti's position could have made that decision to end her employment on the grounds of redundancy and so, Ms Darvill was not unjustifiably dismissed by Targetti.

Breach of Good Faith

[105] Ms Darvill's claims for breach of good faith all relate to various delays in communication between her and Targetti at various times of her employment. This included delays in responding to her questions about:

- (a) confirming her salary upon her return to the work from parental leave;
- (b) the personal grievance she raised with Targetti (including communications about arranging mediation); and
- (c) the redundancy outcome and after her dismissal.

[106] Ms Darvill also claimed a breach of good faith against Targetti's actions in response to her communications which contributed to the delay of her return to work from parental leave.

[107] Targetti said it responded to all questions raised by Ms Darvill in writing both before and after she returned from parental leave. Targetti also claimed it made multiple attempts to contact Ms Darvill in January 2022 to make arrangements for her return from parental leave. Ms Darvill did not respond until she raised her personal grievance in February 2022.

[108] Ms Darvill claims of a breach of good faith should mostly be considered within the wider context of her employment relationship problem. It is reasonable to expect some delay of communication between parties who are engaged in ongoing discussions to resolve an employment relationship problem, especially when the parties are represented by legal counsel.

[109] There is no evidence to suggest there was an intentional delay on either side and there is no breach of good faith by Targetti in respect of the claims made by Ms Darvill.

Remedies

[110] Ms Darvill had established a personal grievance for unjustified disadvantage relating to three different actions by Targetti. She was entitled to an assessment of remedies to address her grievance.

[111] For all her unjustified disadvantage claims, Ms Darvill said she had suffered detriment to her employment and sought an award of \$25,000 for hurt and humiliation.⁶ After her return from parental leave, Ms Darvill said she was greatly stressed about the loss of her vehicle. At the time, she did not have a personal vehicle of her own and she felt Targetti did not properly consider her personal circumstances.

[112] When she disclosed a copy of the email from Todd Phillips to Targetti, she said she felt blamed further when Targetti responded with its disappointment about Ms Darvill not providing the email earlier.

[113] The failure of Targetti to provide her with a laptop, mobile phone and access to the quotation system had only contributed to her stress.

[114] In respect of her travel, she felt Targetti's requests for overnight travel were an unreasonable demand for a breastfeeding mother of a young family, newly returned from parental leave.

[115] Overall, she had become increasingly upset about not being heard, and had lost trust in Targetti. She also said she was made to feel worthless and unwanted. Weighing the circumstances of this case with the range of awards made in similar cases, an appropriate award of compensation for the humiliation, loss of dignity and injury to feelings Ms Darvill suffered is \$18,000. Subject to any contributory conduct, this amount of compensation is awarded under s 123(1)(c)(i) of the Act and must be paid to her within 28 days of the date of this determination.

Contributory conduct

[116] 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 Ms Darvill which contributed to the situation giving rise to her personal grievance.

⁶ Employment Relations Act 2000, s 123(1)(c)(i).

[117] There were clear disagreements between the parties about Ms Darvill's employment expectations and as a result, the trust and confidence between the parties was adversely affected. This led to a significant number of interactions between them which included three separate occasions where Ms Darvill resorted to covert recordings of interactions with Targetti staff.

[118] None of these interactions contributed to Targetti's failure to provide her with her tools of the trade, a vehicle and its insistence for her to travel over and above what was agreed as part of her employment agreement. Ms Darvill did not contribute to the situation giving rise to her personal grievance. No reduction of the remedy awarded to her is required.

Costs

[119] Ms Darvill was self-represented and had not incurred costs of professional representation. However, the filing fee of \$71.56 she incurred in lodging her application can reasonably be recovered. Targetti is to pay the sum of \$71.56 to Ms Darvill within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority