

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 482
3112053

BETWEEN TRISH GALLIGAN
Applicant

AND PEOPLE MEDIA GROUP
LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: William Fussey, counsel for the Applicant
Ray Parmenter, counsel for the Respondent

Investigation Meeting: 20 June 2022 at Auckland

Submissions and further
Information received from
Applicant and Respondent: 22 June 2022

Date of Determination: 28 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Galligan worked as an accounts manager for People Media Group Limited (PMG). Ms Galligan claims PMG has unjustifiably disadvantaged her, and unjustifiably dismissed her by purporting to make her redundant.

[2] PMG states that Ms Galligan agreed to being made redundant and that the redundancy was genuine.

The Authority's investigation

[3] I investigated Ms Galligan's claims by receiving written evidence and other documents on behalf of Trish Galligan, from Trish Galligan, Ms Galligan's husband Neil Rasmussen, and a former employer Christine Rosser. For PMG I received evidence from Managing Director Mike Taillie, Chief Financial Officer Emma Taillie, Marketing Manager George Grbich and contractor Chris Field. During an investigation meeting held on 20 June 2022, I heard evidence from witnesses who answered questions put by myself and the parties' representatives.

[4] As permitted by s174E 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.

[5] This determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Issues

[6] The issues for investigation and determination are:

- (a) Was Ms Galligan unjustifiably dismissed by PMG's decision to make her redundant, taking account of:
 - (i) whether those decisions were predominantly motivated by genuine business reasons; and
 - (ii) whether Ms Galligan was fairly consulted about the process for change and her feedback fairly considered; and
 - (iii) whether alternatives to redundancy and for redeployment to other positions were fairly considered?
- (b) Was Ms Galligan unjustifiably disadvantaged by PMG's decision to dismiss her on the grounds of redundancy?;
- (c) If PMG's actions were found to have unjustifiably disadvantaged and/or dismissed Ms Galligan, what remedies should be awarded considering:

- (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
 - (ii) interest awarded on any lost wages; and
 - (iii) compensation for hurt, humiliation and injury to feelings.
- (d) If any remedies are awarded, should they be reduced for any blameworthy conduct by Ms Galligan that contributed to the situation giving rise to her grievance?;
- (e) Did actions by PMG breach the employers obligations when bargaining for an IEA or Ms Galligan's IEA, and if so, should a penalty be imposed?; and
- (f) Should either party contribute to the cost of representation of the other party?

Background

[7] PMG was predominately involved in the inbound tourism sector and owned "Arrival" magazine which is distributed to airports throughout New Zealand. PMG also operates online shopping websites.

[8] Trish Galligan commenced her employment with PMG on 1 May 2018, having signed an individual employment agreement (IEA) on 30 April 2018. Ms Galligan's minimum hours were from 9.30 am to 3.30 pm five days per week. Her hourly rate of pay was \$32.50.

[9] The IEA contained a redundancy provision (clause 15) which included a provision offering a suitable alternative position, and when a suitable alternative position cannot be found, requires PMG to provide written notice of not less than four weeks prior to the date of termination.

[10] On 4 March 2020, PMG Managing Director Mike Taillie emailed all employees advising of the potential negative impact of the pandemic on PMG's business, and asking employees whether they were able to take leave without pay or work reduced hours. Specifically, the email stated that rather than thinking about restructuring PMG would rather have team members going on leave without pay or working reduced hours.

[11] The next day, Ms Galligan replied stating she was happy to take leave without pay and/or work reduced hours. On 15 March 2020, Mr Taillie sent a text to Ms Galligan saying

that he was making it possible for people to access their computer accounts when working from home.

Discussions with Ms Galligan

[12] On 16 March 2020 Mr Taillie met with Ms Galligan at a café. Ms Galligan said they discussed whether she would be happy to work reduced hours or whether she preferred to go on leave without pay. Ms Galligan said she was open to either option and discussed what she might do to keep herself busy if she was to be on leave without pay for an indefinite period. Ms Galligan said that at no time was redundancy mentioned.

[13] On 17 March 2020 an email from Mr Taillie was sent to all employees about a potential restructure. The email referred to different options such as reduced hours, leave without pay and redundancy.

Events of 18 March 2020

[14] On 18 March 2020, Ms Galligan again met with Mr Taillie at a café. Ms Galligan said at the meeting she confirmed her agreement to go on leave without pay for the foreseeable future. They also discussed that if there was work from time to time that she would be able to do it. Ms Galligan's perception was that she was going on leave without pay, and she informed several of her colleagues she was going on leave without pay. Mr Taillie said at the meeting he advised Ms Galligan that her position was being made redundant. Mr Taillie's evidence is supported by a diary note he claimed he made on the 18th of March 2020.

[15] Mr Taillie emailed Ms Galligan shortly after the meeting. The subject had confirmation of the discussion regarding ongoing work. The email dated 18 March 2020 thanked her for her flexibility and referred to expected ongoing future work, because it talked about Ms Galligan coming in for days or half days and he would keep in touch about it. The email stated, "Thanks so much for being a rock star in terms of flexibility" and confirmed she would be finishing up today, but did not mention redundancy.

[16] Mr Taillie stated that he then drafted a Redundancy Letter to Ms Galligan and left it on her desk in the early afternoon. The letter confirmed Ms Galligan was redundant, that she would finish up today rather than working out a paid notice period, and that he would be in touch from

time to time if some work should come up. Ms Galligan's evidence was she never saw or received the Redundancy Letter.

[17] A social gathering was held at PMG on the afternoon of 18 March 2020 commencing at 2.30 pm and extending into the evening. The applicant understood this to be a COVID 19 farewell for everyone, or a farewell to a staff member who had been made redundant. Ms Galligan was under the impression that she was going on indefinite leave without pay so was keen to participate in the event which would be the last time the team would be together. One staff member was leaving permanently due to being made redundant earlier in the day.

[18] Later, in a text sent at 6:55 pm that same day, 18 March 2020, Mr Taillie asked Ms Galligan for some personal details so he could apply for the COVID 19 wage subsidy on her behalf. Ms Galligan provided him these details. The following day, 19 March 2020, Ms Galligan commenced what she believed to be a period of leave without pay.

Events since March 2020

[19] On 7 April 2020, Mr Taillie advised the Ministry of Social Development (MSD) that he had to make some staff redundant post applying for and receiving the wage subsidy. On 16 May 2020 Ms Galligan queried with MSD whether Mr Taillie had applied for the wage subsidy on her behalf and was advised by MSD that her IRD number had been included in PMG's application.

[20] On 29 May, Mr Taillie texted Ms Galligan and asked how she was doing. Ms Galligan asked whether he had applied for the wage subsidy for her, and Mr Taillie advised that he had applied for everyone but had to pay back and report for those that were made redundant, and he would contact her the following week.

[21] After not hearing back from Mr Taillie, Ms Galligan emailed him on 12 June 2020 requesting confirmation as to what had happened with the wage subsidy. Mr Taillie responded to say that he was confused, from his point of view Ms Galligan's employment had ceased. Ms Galligan was surprised by this news and requested that Mr Taillie pass on her wage subsidy to her.

[22] On 16 June 2020 Mr Taillie responded and advised Ms Galligan that she had been made redundant from her role on 18 March 2020. This in Ms Galligan's recollection was the first time she had heard Mr Taillie mention the word redundancy.

[23] On 18 June 2020, Ms Galligan instructed her legal representatives to send a personal grievance letter to PMG.

[24] On 26 June 2020, Ms Galligan provided further details of her claims and asked for PMG's position regarding attending mediation. The letter said that Mr Taillie had notified her that her employment had been terminated by way of text message on 29 May 2020. Ms Galligan later corrected this position and said he had notified her it was terminated by way of redundancy on 16 June 2020. On 6 July 2020 Ms Galligan rang the MSD telephone number raising concerns about alleged misuse of the wage subsidy in order to advise that she had not had it passed on to her.

[25] On 8 July 2020, PMG responded to Ms Galligan's claims including providing the file note of a meeting on 18 March 2020 and a copy of the Redundancy Letter that was allegedly left on Ms Galligan's desk on 18 March 2020, which Ms Galligan advises she never received.

Discussion

Was Ms Galligan unjustifiably dismissed?

[26] When considering whether such decisions were justified, the Authority must determine whether the employer's actions, and how the employer acted, met the objective statutory standard being what a fair and reasonable employer could have done in all the circumstances at the time.¹

Whether PGM's decision to dismiss Ms Galligan on the grounds of redundancy were predominantly motivated by genuine business reasons?

[27] Mr Taillie gave evidence as to the potential loss of revenue for the business and the financial implications for PMG. Given the well documented evidence of the devastating impact COVID 19 and the closing of the borders to international tourists had on the travel industry

¹ Employment Relations Act 2000, s 103A.

and related publishing businesses, I find there were genuine business reasons for PMG's proposed restructure.

Whether Ms Galligan was fairly consulted about the process for change and her feedback fairly considered?

[28] There was some limited consultation with staff, including Ms Galligan, on the economic consequences for PMG. However, there is an issue as to whether Mr Taillie informed Ms Galligan she had been made redundant. Mr Taillie informed all staff by email on 4 March 2020 of the significant impact COVID 19 could have on the business and asking whether staff were able to take leave without pay or reduced hours. Ms Galligan responded that she would be happy to take leave without pay. Ms Galligan's evidence was that at the meeting on 16 March 2020 Mr Taillie discussed with her being on leave without pay, but there was no mention of redundancy. The 17 March 2020 email sent to all employees regarding restructuring referred to different options such as reduced hours and redundancy, and continued to refer to leave without pay.

[29] At the crucial meeting on 18 March 2020 Mr Taillie's evidence was that he told Ms Galligan she was redundant. However, Ms Galligan denied that during the meeting, or any previous meeting, did Mr Taillie mention her position was redundant. It is possible both Ms Galligan and Mr Taillie left the meeting with different perceptions as to what had been discussed. A text sent by Mr Taillie to Ms Galligan shortly after the meeting stating "you will be finishing up today" was interpreted by Ms Galligan as she was going on leave without pay, to which she had already agreed. The text did not mention redundancy.

[30] What was significant at the investigation meeting was that in regard to the Redundancy Letter there was no evidence that Ms Galligan had ever received it. Mr Taillie did not hand it to her in person and he did not advise her of the letter.

[31] Mr Taillie's evidence was that this was a scary time for him, and the business was looking at ruin in the foreseeable future. It is clear that the fluid COVID 19 situation was very difficult for businesses. Things were happening at a very fast pace, and it is possible Mr Taillie overlooked advising Ms Galligan she had been made redundant.

[32] I find that Mr Taillie failed to adequately advise Ms Galligan she had been made redundant and that she only became aware she had been made redundant on 16 June 2020. Even if Mr Taillie had communicated to Ms Galligan that she had been made redundant, Ms Galligan was not adequately consulted on the impact that the reduction of business would have on her role and the proposal to make her role redundant. As an employee Ms Galligan had an expectation that in good faith PMG would undertake a reasonable restructuring process, and that she would be consulted on it.

Whether alternatives to redundancy and for redeployment to other positions were fairly considered?

[33] PMG submitted that due to a downturn in business it believed it was appropriate to select Ms Galligan's role for redundancy. Ms Galligan expected that she would be consulted on a fair and transparent selection process and the possibility of redeployment. This did not occur and in the circumstances no genuine consultation took place with Ms Galligan.² There was no evidence that PMG had considered other options of redeployment for Ms Galligan.

[34] PMG's failure to complete a fair process and consider the possible redeployment to another position was not what a fair and reasonable employer could have done in the circumstances. Those were unjustified actions and Ms Galligan has established her personal grievance for unjustified dismissal on those grounds.

[35] These were more than procedural flaws. They went to the substance of the decision to dismiss Ms Galligan. PMG breached good faith obligations under the Act and breached her employment agreement. She did not have a fair opportunity to address the process before that conclusion was reached.

Was Ms Galligan unjustifiably disadvantaged by PMG's decision to dismiss Ms Galligan on the grounds of redundancy?

[36] PMG's failure to undertake a fair and reasonable process, the failure to adequately consult with Ms Galligan and consider the possible redeployment to another position has unjustifiably disadvantaged Ms Galligan. Those were unjustified actions and Ms Galligan has established her personal grievance for unjustified disadvantage on those grounds.

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

Remedies

Personal Grievances

[37] I find Ms Galligan has two personal grievances. One for unjustifiable disadvantage and one of unjustifiable dismissal. As the two personal grievances stem from the same factual matrix and course of conduct, and Ms Galligan gave evidence as to the combined effect the conduct had on her wellbeing, I will take a global approach in considering whether remedies are appropriate.

Reimbursement of wages

[38] Although Ms Galligan was on a period of agreed leave without pay, this arrangement discontinued when she was dismissed. As she was unjustifiably dismissed Ms Galligan has a claim for reimbursement of wages under s123(1)(b) of the Act.

[39] The Court has previously found that when dealing with a redundancy situation where the process was found to be procedurally deficient and the employer was clearly facing financial difficulties, and, despite the procedural failings, allowance must be made for the likelihood that if a proper process had taken place, the employee would have still been dismissed. In such a situation, the unfair process would not be fully causative of the employee's loss.³

[40] Following her dismissal Ms Galligan was unemployed for 12 months despite reasonable attempts to find employment. In the circumstances it is reasonable that Ms Galligan be paid 3 months salary as reimbursement of wages.

Compensation for humiliation, loss of dignity and injury to feelings

[41] Ms Galligan gave evidence about the effects on her of PMG's decision to dismiss her for redundancy and the process leading up to that decision. She stated the dismissal caused significant stress for which she sought medical assistance. She said she found it hard to get over how she had been treated and it had damaged her confidence. Ms Galligan gave evidence of her attempts to find employment and mitigate her losses. She eventually obtained a new role as a retail assistant on 8 July 2021.

³ *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146.

[42] I determine that an appropriate award to compensate for the effects on her, accepting her evidence, was \$12,000. PMG is ordered to pay to Ms Galligan compensation of \$12,000.

Recovery of contractual entitlement

[43] Ms Galligan is also entitled to recover four weeks salary in lieu of notice, because that was a contractual entitlement, which fell due the moment the PMG dismissed her in the absence of serious misconduct. Her entitlement arises independently of her claim for lost earnings, which is a statutory entitlement. No duplication is involved; *Atwill v Tanners Timberworld Ltd.*⁴

[44] Payment in lieu is not a payment in reimbursement of lost wages under s 128 of the Act but is payment of a liquidated sum agreed to by the parties upon entry into the employment agreement. If Ms Galligan had found paid work the day after her dismissal she would still have been entitled to the agreed payment in lieu.

Interest

[45] Ms Galligan can recover interest on her entitlement to four weeks salary, payable in lieu of notice as set out in paragraph [43] above, from the date of dismissal, being 16 June 2020, until the date of payment. The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by the PMG using the Civil Debt Interest Calculator.⁵

Claim for Penalty

[46] Having found that PMG has breached statutory duties owed to Ms Galligan at paragraph [35] above, I must next consider whether an award of a penalty (or penalties) is warranted as sought. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act.

[47] The failure by PMG to openly address redundancy in communications with Ms Galligan regarding the restructuring was a breach of section 4 of the Act, duty of good faith,

⁴ 1 ERNZ 321, page 325 in particular.

⁵ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

because they undermined Ms Galligan's confidence in the employment relationship and breached her employment agreement. However, the factual matrix of the good faith breach and breach of her employment agreement is the same as the personal grievances for which the remedies have been awarded in Ms Galligan's favour. In the circumstances I decline to exercise my discretion and award a penalty.

Summary of orders

[48] Ms Trish Galligan was unjustifiably disadvantaged and unjustifiably dismissed for which remedies have been awarded. Her claims for wage reimbursement have been upheld. The Authority orders as follows:

- (a) Within 28 days of the date of determination People Media Group Limited is ordered to pay Ms Trish Galligan the following sum:
 - (i) Reimbursement of lost wages being 3 months' salary. The parties' representatives to agree the calculated amount or leave granted to return to the Authority to calculate the amount; and
 - (ii) compensation for hurt, humiliation and injury to feelings under \$12,000; and
 - (iii) four weeks salary in lieu of notice, the parties' representatives to agree the calculated amount or leave granted to return to the Authority to calculate the amount.
- (b) Within 28 days of the date of determination People Media Group Limited is to calculate and pay Ms Trish Galligan interest on the contractual entitlement as awarded in paragraph [44] above.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Galligan may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum PMG would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.⁶

Andrew Gane
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.