IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 143
3142301

	BETWEEN	SHANE HAWKINS Applicant
	AND	MRL POWER SOLUTIONS LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Joshua Pietras, counsel for the Applicant Carolyn Heaton, counsel for the Respondent
Investigation Meeting:	9 February 2022 at Wellington
Submissions received:	15 February 2022 from Applicant 17 February 2022 from Respondent
Determination:	13 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Shane Hawkins, was employed by the respondent as a Mechanical Technician, in late 2018.

[2] His employment was without significant incident, until in late 2019 and continuing into 2020, he was issued with multiple "letters of concern" and a written warning, regarding his lateness for work, or non-attendance at work, which problems stemmed from his persistent migraines. In addition, the respondent also alleged he had falsified timesheets, although this allegation was entirely withdrawn after the applicant provided his explanations.

[3] Shortly thereafter, the applicant was made redundant. The applicant raises a claim of unjustifiable dismissal, on the grounds that his redundancy was neither genuine, nor procedurally fair.

[4] The respondent denies this, and points to the loss of its major client as justifying the applicant's redundancy.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged for the applicant, from Mr Hawkins himself, Mr Terry Patterson, and Ms Aimee Trott. For the respondent, witness statements were lodged from Mr Richard Head and Mrs Aletia Head, the owners of the respondent company. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[6] 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

[7] The issues requiring investigation and determination were:

(a) Was the applicant unjustifiably dismissed?

(b) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- lost wages pursuant to section 128 of the Act, holiday pay on this sum, plus lost wages of $60 per week from 1 December 2020 ongoing; (subject to evidence of reasonable endeavours to mitigate loss); and
- compensation under s123(1)(c)(i) of the Act

(c) In addition, the applicant claims he is owed: reimbursement of 7 days unpaid sick leave calculated at the "Government Wage Subsidy Rate"; reimbursement of 8 hours for a cancelled shift; reimbursement of 1 day's unpaid leave; and

(d) Should either party contribute to the costs of representation of the other party?

Facts

[8] The applicant, Mr Shane Hawkins, first came to work for the respondent (MRL) as a Mechanical Technician in around August 2018. He was initially employed on a short term basis, through a labour hire company. In the event, MRL was able to offer Mr Hawkins permanent employment. He entered into an individual employment agreement with MRL dated 8 December 2018.

[9] Mr Hawkins was interviewed and employed by MRL's General Manager, Mr Terry Patterson. Mr Hawkins disclosed to Mr Patterson that he suffered from recurrent migraines, and often took codeine (under his doctor's supervision) to manage the pain. This meant that he would expect to test "non-negative" for opiates if drug tested.

[10] Mr Hawkin's pre-employment drug test was "non-negative" for opiates, and he provided a letter from his general practitioner confirming his use of paracetamol/codeine for migraine headaches, and the doctor's opinion that this medication was "well tolerated" by Mr Hawkins, and did not raise any significant safety concerns from an employment perspective. Mr Hawkins commenced employment for MRL, and both Mr Patterson and Mr and Mrs Head, the owners of MRL, confirmed that Mr Hawkins was a reliable worker. In time, Mr Hawkins was offered a permanent employment agreement, as already mentioned above.

[11] Mr Hawkins continued to suffer from migraines. In practice, this meant that he would be late for work at least once a month, and sometimes it appears (from the relevant leave reports) as often as once a week, as if he awoke with a migraine, he would need to wait for his pain medication to take effect before he was able to attend work.

[12] Initially, there was no problem with this. Mr Patterson gave evidence to the effect that he was a "hands-on" type of manager, and he explained that as long as Mr Hawkins texted him early on a work day, he did not find it difficult to accommodate Mr Hawkins' absences, and would "adjust and prioritise tasks" to ensure appropriate work was available for Mr Hawkins to do on the days he needed to start late.

[13] As Mr Hawkins was paid by the hour, no issues arise as to the correctness of his pay.

[14] In due course, Mr Patterson resigned from MRL. His role was taken over by the owners of the company, Mr and Mrs Head.

[15] MRL had a significant contract with Centerport. By the time Mr Patterson resigned in October 2019, both Mr and Mrs Head and MRL staff generally, knew that the work MRL performed for Centerport would come to an end at some point in the future. This is because MRL hired multiple generators to Centerport, and serviced and fuelled them. For various reasons, Centerport was in the process of purchasing its own machines, and was waiting for them to be shipped to New Zealand. Centerport advised MRL of this well in advance, as when Centerport's own machinery arrived, it would no longer need MRL's services, meaning a more-or-less immediate end to the contract between Centerport and MRL.

[16] Mrs Head gave evidence that she took over the task of assigning work to members of the team, including Mr Hawkins. She explained that every day, there would be a meeting at 8.30 am, where she would assign work for that day. If Mr Hawkins was not present for that meeting, then the work that needed to be done that day would effectively be assigned to others, meaning that if he arrived late, there would generally be no work for him to do. In addition, Ms Head gave evidence that the Centerport work was time-sensitive, in that certain pieces of machinery needed to be checked and re-fuelled twice a day. If Mr Hawkins was late to this job, this meant that there was a risk that the machines would run out of fuel or otherwise stop working, putting MRL at risk of breaching their contract with their major client.

[17] Mr Patterson also mentioned this, but put less weight on it, as he explained he was willing and able to reschedule work and "re-route people" to ensure the work got done, and he could effectively accommodate Mr Hawkins absences.

[18] It was apparent that Mrs Head did not take such a flexible approach, and focused on giving work assignments on a daily basis, rather than by piecing together work available for Mr Hawkins throughout the day.

[19] At some point during Mr Hawkins' employment, Mrs Head directed that on those days when Mr Hawkins was late for work, he would need to take a day's sick

leave. In her view, this was necessary because when Mr Hawkins came in late, by the time he arrived at work, all work had been assigned and other staff had already left, so as to be at client premises in a timely way.

[20] Holiday and leave records show that Mr Hawkins was taking sick leave on an almost weekly basis, and he accepted that he would have been late to work due to his migraines maybe as often as once a week. The practical impact of this was that Mr Hawkins relatively quickly exhausted his paid sick leave entitlements each year, and his sick leave was often unpaid.

[21] The evidence shows that in the last year of his employment with MRL, Mr Hawkins was issued with 3 "letters of concern" relating to his sick leave and/or absences from work, and a written warning which covered 2 separate instances of absence from work, one caused by a misunderstanding as to start time, and one related to Mr Hawkins' migraines and resulting late start.

[22] On 21 May 2020, Mr Hawkins experienced flu-like symptoms while at work. He went home, and took a COVID-19 test. On 25 May 2020, Mr Hawkins provided a medical certificate from his doctor, stating that he would be fit to return to work on 1 June 2020.

[23] MRL advised Mr Hawkins that he could not return to work until he provided a negative COVID-19 test. Mr Hawkins provided his negative COVID-19 test on the afternoon of 2 June, and returned to work on 3 June. He was on unpaid sick leave from 21 May to 29 May, being 7 working days.

[24] In June and July 2020, MRL commenced a formal disciplinary process resulting from a concern that Mr Hawkins had falsified his timesheets. Mrs Head gave evidence that MRL had suffered adverse financial impacts resulting from the move to Level 4 in March 2020, as most (although not all) of MRL's work was non-essential. As a result, she took time to look through the business financials to identify if any cost savings could be made. Part of this was reviewing staff timesheets. While doing this, she became aware that Mr Hawkins' timesheets did not match the timesheets provided by other staff, and a disciplinary process was commenced with the allegation being that Mr Hawkins had falsified his timesheets.

[25] Mr Hawkins met with Mr and Mrs Head to explain his timesheet recording process, and his explanations were accepted and the disciplinary action was withdrawn in full. Mr Hawkins was required to take a day off work, unpaid, to prepare for this meeting.

[26] It appears the only outcome of this was that Mr Hawkins was instructed to fill out his timesheets differently in the future. For the avoidance of doubt, I note that there was no connection between this issue, and Mr Hawkins absences from work caused by migraines.

[27] At the end of July 2020, MRL's contract with Centerport came to an end. MRL staff, had to go to Centerport to recover all of MRL's machines, and store them at MRL's yard. Mr Hawkins assisted with the recovery and storage tasks.

[28] The financial impact of this on MRL was immediate, resulting in a loss of revenue of approximately $30,000 per month.

[29] On 17 August 2020, Mr Hawkins was given a consultation document, proposing a restructure of MRL's mechanical team, on the grounds that there was no longer adequate resources to maintain the same levels of staffing. The proposal was to reduce the mechanical team by one. An organisational chart was provided as part of the consultation document. It showed the team as consisting of:

a. An Electrical Senior
b. A Mechanical Senior
c. A Mechanical Technician; and
d. An Apprentice.

[30] The proposal was to retain the roles of Electrical Senior and Mechanical Senior, rename the Apprentice role as Mechanical Junior and disestablish the role of Mechanical Technician. Mr Hawkins held the role of Mechanical Technician, so it was his role that was dis-established.

[31] Mr Hawkins chose to apply for the role of Mechanical Senior. He did not apply for the role of Mechanical Junior.

[32] Although he interviewed for the role of Mechanical Senior, he was not successful, and the role was given to the incumbent. The evidence indicates that this was on the basis of the incumbent's higher level of qualifications.

[33] Mr Hawkins indicated that he viewed himself as too experienced for the Mechanical Junior role, and said that he did not apply for it as he did not want to take the pay cut that would have come with that role. Mr Hawkins also said that the apprentice role was held by Mr Head's son, and his view was that the "mechanical junior" role had effectively been set aside for him as the boss's son, so there was not a lot of point in him applying for this role.

[34] Mrs Head said that Mr Hawkins had been interviewed for the role of Mechanical Senior as he had applied for this. She said he had not been considered for the role of Mechanical Junior, because she understood he wouldn't accept a pay cut.

[35] When asked if the role of Mechanical Junior had been set aside for his son, Mr Head explained that he "had to really" as it was his son. Mrs Head confirmed this, although she did say that in hindsight she wished they had given the role to Mr Hawkins as he was a better worker.

[36] Mr Hawkins was accordingly made redundant, on 15 September 2020. He was paid 4 week's wages in lieu of notice.

[37] Mr Hawkins found new employment on 23 November 2020, resulting in a total of 5 weeks lost wages. Mr Hawkins has raised a claim of unjustifiable dismissal seeking various remedies, including lost wages. As his new employment is at a lower rate of pay, he also claims lost wages at the rate of $60 per week on an ongoing basis.

Was Mr Hawkins Unjustifiably Dismissed?

[38] Mr Hawkins claims that his dismissal was unjustified on two grounds: first, that his redundancy was not genuine, and second, that it was procedurally unfair. I will deal with each of these claims in turn.

[39] Mr Hawkins' claim that his redundancy was not genuine is based on two factors in particular. First, he claims that there was a severe personality conflict between himself and Mrs Head, and she was attempting to find a way to make him leave his

employment. Mr Hawkins view was that the restructuring proposal was just another step in this long-running process, as shown by the multiple 'letters of concern" about his absences from work, the rule requiring him to use his sick leave when he was late to work, the instituting of a disciplinary process over his timesheets, and the direction that he not return to work until he had provided the results of a negative COVID-19 test. Second, it was Mr Hawkins' view that MRL had plenty of work available despite the loss of the Centerport contract, servicing its existing machinery.

[40] In response, Mr and Mrs Head reject that they were trying to get Mr Hawkins to leave his employment with MRL. They say that they were entitled to be concerned about his repeated absences from work, and that it was appropriate for them to want to be informed by Mr Hawkins as soon as possible when he would not be attending work on time, so that they could arrange for work (particularly time sensitive work) to be performed by others in his absence. In relation to commencing disciplinary action over Mr Hawkins' timesheets, Mr and Mrs Head accept that in the event, Mr Hawkins was able to completely explain his timesheets to their satisfaction, and that as a result they withdrew all disciplinary action. However, they say they were right to raise their concerns as on the face of it, it appeared to be a very serious matter until explained. In relation to the requirement that Mr Hawkins provide a negative COVID-19 test before being allowed to return to work, it appears that Mr Hawkins believed the medical certificate from his doctor was sufficient, whereas Mrs Head was expecting the results of a COVID-19 test, and when Mrs Head asked explicitly for a negative test result, Mr Hawkins contacted his doctor for this information and provided it.

[41] It is relatively obvious that Mr and Mrs Head wanted to run their business in a more structured and predictable way, particularly after Mr Patterson had left. Indeed, it is not entirely clear that Mr and Mrs Head knew the full extent of the flexibility that had been extended to Mr Hawkins prior to Mr Patterson's leaving. Mr Hawkins had benefited from Mr Patterson's ability and willingness to arrange work flexibly in the conditions that prevailed at that time. When that flexibility was no longer available to him, this was a change for Mr Hawkins.

[42] The issues as to timesheet completion and the provision of a negative COVID-19 test do not appear to be related, and it is significant that no further action arose from either incident once communication between the parties occurred.

[43] In relation to Mr Hawkins' suggestion that there was plenty of work, in particular, servicing machines, Mr Head pointed out that while there was some of this work to be done, it was not paid work, so this was essentially a cost to the company even though a certain amount of it needed to be done.

[44] Finally, MRL provided financial details showing the month-on-month drop in revenue caused by the loss of the Centerport contract. As indicated, this was relatively significant.

[45] I accept the evidence of Mr and Mrs Head that the underlying rationale for Mr Hawkins' redundancy was genuine. In particular, both Mr and Mrs Head remained complementary of Mr Hawkins' work ethic and skills throughout their evidence, including Mrs Head's suggestion that she wished they had retained Mr Hawkins into the apprentice role.

[46] However, even if I accept that there was a genuine business related reason behind MRL's restructure, I must also consider if the process followed by MRL was procedurally fair. The test of justification is set out at paragraph 103A of the Act.

[47] The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] In reaching my conclusion, I must consider:

a. did MRL sufficiently investigate before taking action;
b. did MRL raise concerns that it had with Mr Hawkins before taking action;
c. did Mr Hawkins have a reasonable opportunity to respond;
d. did MRL genuinely consider Mr Hawkins' explanation or comments.

[49] I may also take into account any other factors I think are appropriate.

[50] Mr Hawkins was dismissed by reason of redundancy. The commonly accepted definition of redundancy is a situation where a:

> … worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer[1].

[51] The test for justification of a dismissal under s 103A of the Act applies to redundancies as well as all other forms of dismissal, with the necessary modifications of the statutory language[2].

[52] Mr Hawkins' employment came to an end as a result of a formal restructuring process, based on the fact that MRL had recently suffered the loss of a major client and was looking to make staff (and associated cost) reductions.

[53] MRL states it met its obligations to consult, and it undertook a formal consultation process. The proposed restructure was put to Mr Hawkins for comment in a written proposal. Mr Hawkins' then lawyer wrote to MRL seeking additional time to allow Mr Hawkins to comment, but in the end, Mr Hawkins did not comment. Some three weeks later, MRL confirmed that it would proceed to implement the proposal.

[54] Mr Hawkins applied for the role of Senior Mechanic, and was interviewed for it, but was ultimately unsuccessful. Mr Hawkins was advised in writing on 15 September 2020, that he was redundant. He was not required to work his notice period.

[55] Mr Hawkins raises various concerns about the procedural fairness of this process, specifically:

a. The redundancy proposal was not supported by financial information;
b. The only role proposed to be disestablished was Mr Hawkins' role;
c. MRL failed to provide Mr Hawkins with job descriptions for the two remaining senior roles and one junior role, in a timely way;
d. MRL hired a replacement mechanic shortly thereafter;
e. MRL failed to consider redeployment opportunities.

[56] I will briefly consider these concerns.

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[1] *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).

[2] The Court of Appeal has confirmed that "it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.", in the case of *Grace Team Accounting v Brake* [2014] NZCA 541, at [77].

[57] The claim that the redundancy proposal was not supported by financial information was conceded by Mr Head, who accepted that the financial information before the Authority (a letter from Deloitte showing the "turnover" relating to the Centerport contract with MRL on a month-by month basis, demonstrating a significant and on-going drop once the key contract came to an end) was not part of the redundancy proposal documentation. The consultation document stated that:

> COVID-19 has caused significant and ongoing uncertainty for businesses such as ours. Unfortunately, there have been negative economic impacts, and recently the financial position of M R L Power Solutions Limited (MRL) has been compromised by a sudden downturn in business. …Looking forward, we do not believe that we will have adequate resources to maintain the same level of staffing.

[58] No other rationale or financial information was provided.

[59] Before the Authority, MRL took the position that the reason for the restructuring and Mr Hawkins' dismissal was the loss of the Centerport contract. The rationale was primarily financial, which was demonstrated by the financial information provided by Deloitte.

[60] Two other relevant factors were also mentioned by Mr and Mrs Head, first that the type of work lost when the Centerport contract ended was work that Mr Hawkins primarily performed, being work that was considered particularly suitable for Mr Hawkins' experience and qualifications, as it was mechanical in nature (vs electrical work) and it was work that could not be performed unsupervised by a junior, but did not necessarily require the attendance of a senior. Second, MRL responded to Mr Hawkins' view that there was plenty of repair work available by explaining that although this work was available, it was non-chargeable and therefore did not assist MRL's financial situation and that there was now less of this work available due to the loss of the Centerport contract.

[61] None of this was part of the consultation document, nor able to be ascertained from it. In fact, the consultation document referred in a general way to the impacts of COVID-19 on the business, which did not appear to be part of the rationale for the restructure as it was explained at the investigation meeting.

[62] No explanation was given by MRL as to why this more specific information, and the financial information in particular, was not provided to Mr Hawkins as part of the consultation process, or why the consultation document referred to COVID-19 instead. Mrs Head indicated that an estimate of losses going forward had in fact been prepared by one of the office staff, but was never shared, and explained that she told everyone to talk with her if they wanted more information.

[63] MRL's position overall is that Mr Hawkins must have known that his position was proposed to be disestablished, because everyone knew that the Centerport contract (or at least, the key part of it) had come to an end. Relying on such an assumption is simply not enough to fulfil MRL's legal obligations in a situation where Mr Hawkins' employment was at risk.

[64] In light of the lack of specific information about MRL's financial situation and the income-producing work (or lack thereof) remaining available for Mr Hawkins to perform, it is not surprising that Mr Hawkins formed the view that the redundancy process was not genuine. It would have been possible for MRL to provide the financial and other information that existed to Mr Hawkins at the time, or at the very least the estimate that Mrs Head referred to[3], and if this had been done, it might have allayed some of his concerns.

[65] It is not sufficient to rely on a general statement to "ask if you want more". The employer is in control of the information available and it is the employer's responsibility to proactively provide this information. This failure to provide relevant information is a breach of the requirement that MRL adequately and fairly raise its concerns with Mr Hawkins before taking action[4], and disadvantaged him in his ability to understand and engage with the consultation process.

[66] Mr Hawkins concern that his role was the only role proposed to be disestablished does not amount to an unfairness without more. As I have already commented above, MRL was able to explain to the Authority the reasons why it was

[3] The Deloitte information put before the Authority showed financial information for the financial year commencing April 2020 through to March 2021. Although only a part-year could have been put to Mr Hawkins at the time the consultation process commenced in August 2020, this would presumably have shown the drop in revenue resulting from the ending of the key Centerport contract at the end of July. No other information was provided by MRL.

[4] See section 103A(3)(a) of the Act, as well as the requirement to provide access to information relevant to the continuation of the employee's employment before that decision is made, at section 4(1A)(c) of the Act.

Mr Hawkins' role in particular that was proposed to be disestablished, due to the type of work that role performed. The unfairness stems from MRL's failure to properly explain its views to Mr Hawkins at the time and consult with him about it.

[67] Mr Hawkins also raises concerns that he was not at first provided with job descriptions for the roles that would remain after the proposed restructure, that is the roles of Senior Mechanic and Junior Mechanic. He was provided with these job descriptions on 7 September, which was the date he was advised MRL was proceeding with the restructure, and he interviewed for the role of Senior Mechanic on 14 September.

[68] This allowed Mr Hawkins a week to read the job descriptions and prepare for interview. There is no inherent unfairness in this length of time, taking into account there were only two job descriptions, and that the roles as proposed were not entirely unfamiliar to Mr Hawkins. Indeed, he explained at the investigation meeting that he had considered both roles and decided to apply for the senior role but not the junior role, and his reasons why. This suggests that he was in a position to reasonably engage with the job descriptions, and did so. This is also reflected in the comments Mr Hawkins made at his interview for the senior role.

[69] Mr Hawkins further explained that he had decided to apply for the senior role, but did not wish to apply for the junior role on the grounds that he was not a junior/apprentice, and was not willing to accept the reduction in pay that might have resulted. This was a position that he was entitled to take.

[70] I have considered the potential impact of MRL's decision not to offer Mr Hawkins the junior role. On balance, I find that there was no substantive unfairness in this decision, because of Mr Hawkins' understandable position that he would not have accepted that role, and because Mrs Head said in her evidence that she understood this to be his firm position, so they did not discuss it further.

[71] Finally, I need to consider the potential impact of MRL's decision to hire a new staff member shortly after Mr Hawkins was dismissed. MRL accepts that it hired a new staff member approximately 3 months after Mr Hawkins had been dismissed. This staff member was an aluminium fabricator, unlike Mr Hawkins whose skills were in electrical engineering. There is nothing to this concern, given the differing skill set of this new staff member.

[72] While I have found that the redundancy itself was for genuine business reasons in light of the information provided at the investigation meeting, I have also found that MRL failed to fairly and properly provide all relevant information. This information existed at the time of consultation, and could have been provided to Mr Hawkins. Instead, the consultation document referred in a vague and inaccurate way to "COVID-19 caus[ing] significant and ongoing uncertainty", which was not the rationale for the disestablishment of Mr Hawkins' role.

[73] The impact of this failure to provide was not just a breach of MRL's duties to provide relevant information[5], and to consider and consult[6]. It undermined Mr Hawkins' ability to understand why his role was being disestablished, and thus his ability to meaningfully participate in and contribute to the restructure process. It deprived him of the essential reassurance that should have come with having his employment terminated by reason of redundancy, that is, the assurance that this was a process focused on the needs of the business, rather than any wrongdoing on the part of himself as an employee, or because of his migraines and sick leave[7].

[74] As a result, Mr Hawkins dismissal should properly be viewed as unjustified[8].

[75] As a result of Mr Hawkins' unjustified dismissal he becomes entitled to claim remedies including lost remuneration, and compensation payments for humiliation, loss of dignity, and injury to feelings.

[76] Section 123(1)(b) provides that the Authority may reimburse the employee wages or other money lost by the employee as a result of the grievance, and subsection (c)(i) provides for payment to the employee of compensation by the employee's employer for humiliation, loss of dignity, and injury to the feelings of the employee.

[77] An award of lost wages must be based on actual loss, and must take into account the circumstances of the particular case[9]. Mr Hawkins has claimed for 5 week's lost

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[5] As part of the employer's obligations to act in good faith, at section 4 of the Act.
[6] As part of the test of justification for employer actions, at section 103A of the Act.
[7] *Grace Team Accounting Ltd v Brake*, [2014] ERNZ 129, at para [87].
[8] *Grace Team Accounting Ltd v Brake*, [2014] ERNZ 129.
[9] See *Sam's Fukuyama Food Services Ltd v Zhang*, [2011] ERNZ 428 at para [37] where the Court of Appeal declined to award the full amount of wages lost by the employee as a result of his dismissal, saying: "It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment".

wages, as well as on-going losses at the rate of $60/week, on the grounds that although he succeeded in getting another job after some 5 weeks, his new employment paid $60/week less for some weeks until he was awarded a pay-rise. As Mr Hawkins' dismissal was unjustified, it is appropriate to award him the 5 week's wages that he lost. However, my view is that it is not appropriate to award the amount of $60 per week in lower wages, as it remains possible that Mr Hawkins' employment at MRL would not have continued throughout that period of time, given MRL's financial situation[10].

[78] Mr Hawkins' weekly wage was $960.00 gross, so accordingly, MRL is ordered to pay Mr Hawkins' 5 weeks lost wages, being $4,600.00 gross. Holiday pay at the rate of 8% is also payable on this sum, being $368.00 gross.

[79] Mr Hawkins is also entitled to compensation for hurt and humiliation. He gave evidence about feeling that the work he put in was not enough even though he "put in 100%", and that he felt the weight of feeling that Mr and Mrs Head didn't want him to be there. These feelings were apparent throughout in the way he gave his evidence.

[80] In addition, while the parties were preparing for the investigation of this matter, Mrs Head sent an email to the Wellington Civil Legal Aid inbox, saying:

> Can you please look into whether Shane Hawkins…should be eligible for legal aid….Why I am concerned by this is because I am being taken to ERA Court by him and if I win which I believe I will, I can't make any financial claims against Shane for legal costs. I find this extremely unfair…he's pretty savy.
>
> If you could investigate this for me & let me know of the outcome, I would appreciate this hugely and it would be nice to get some fair equal justice in our system.

[81] Nothing came of this, and there is no reason to believe that Mr Hawkins wrongfully claimed legal aid. However, it illustrates the breakdown in the relationship between Mr Hawkins and Mrs Head, and supports the negative impacts Mr Hawkins says he experienced throughout the process, especially as it was Mrs Head whom he was apparently supposed to approach if he wanted further information.

[82] Standing back and taking all these matters into account, my view is that a compensatory sum of $12,000 is appropriate. MRL is ordered to pay to Mr Hawkins the sum of $12,000 without deduction.

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[10] *Ibid,* noting the Court's comment at [36] that "Any award of compensation in a particular case must have regard to the individual circumstances of the particular case."

Other matters

[83] In addition, Mr Hawkins claims he is owed other amounts for unpaid wages.

[84] Mr Hawkins claims reimbursement for 1 day of unpaid leave, being a day of unpaid leave on 27 July 2020, where he was told to take this day off work to prepare for a disciplinary meeting on the following day (this being the disciplinary meeting about his timesheet recording process already discussed above).

[85] The leave records show that Mr Hawkins was on unpaid leave for 27 July 2020, which is marked as "SPEC – SICK", although the note next to this entry records this as "preparation for meeting".

[86] MRL accepts that Mr Hawkins was told to take 27 July off to prepare for the meeting. Subsequent to the investigation meeting, MRL suggested that the day of 27 July was taken as sick leave and there was a medical certificate to support this, however, a copy of this medical certificate was not provided.

[87] The leave record is inconsistent, as the reference is to both "special leave" and "sick leave", with the notation "preparation for meeting". In my view, it is more likely that the notation of "preparation for meeting" is correct, and Mr Hawkins needs to be paid for this day. Mr Hawkins' has provided his daily rate as $184 per day, and accordingly, MRL is ordered to pay to Mr Hawkins the sum of $184 in outstanding wages. Holiday pay is payable on this sum calculated at the rate of 8%, and accordingly, MRL is ordered to pay to Mr Hawkins the sum of $14.72 in outstanding holiday pay.

[88] Mr Hawkins seeks reimbursement of 8 hours (or one days' pay) for a cancelled shift on 20 April 2020. This is described as a "forced sick day" and he says this left him with no paid sick leave available when he actually got sick on 4 May 2020, which day was taken as unpaid leave.

[89] On 20 April 2020, Mr Hawkins was expecting to work, albeit as he says, "on minimal duties" due to the prevailing Alert Level. He had a migraine, and called his then team lead, Devon, to let Devon know that he would be about 90 minutes late to work.

[90] Mr Hawkins had been rostered to perform a particular job that day. He told Devon that he estimated that the job would only take about 2.5 hours, and as he was also rostered on the following day, he would be able to complete the work that day. Devon agreed, and Mr Hawkins did not come in to work on 20 April. Instead, he performed the 2.5 hour job the following day in addition to his other work.

[91] Despite this, Mrs Head later found out and said that as Mr Hawkins had been rostered on for 20 April, he would need to take a full sick day to account for his absence.

[92] Mr Hawkins says that despite not working on 20 April, he should have received 80% of his ordinary pay, as MRL had been granted the wage subsidy.

[93] The leave report shows that Mr Hawkins was paid for 1 day's sick leave on 20 April 2020. There is no indication on the leave reports (or in evidence given by the parties) that this was a reduced payment – Mr Hawkins appears to have been paid for 1 day at his usual daily rate.

[94] Mr Hawkins was paid by the hour. He did not attend work on 20 April due to a migraine. This means that there was no entitlement to be paid for work done on that day as there was no work done by him. In terms of accounting for his absence, Mr Hawkins notified his employer, so he was not absent without leave. In terms of his work, Mr Hawkins arranged to perform the work assigned to him on 20 April 2020 on the following day. He states he did perform this work, and it appears, was paid for this work at his normal hourly rate, in addition to being paid at his normal hourly rate for the work assigned to him on 21 April. Under these circumstances, it appears that Mr Hawkins has been correctly paid for the work he actually performed over this two-day period.

[95] In relation to Mr Hawkins' claim for the reimbursement of 8 hours' pay for what he says is forced sick leave at the rate of 80% of his normal pay, I am concerned that Mr Hawkins is in effect "double counting". Mr Hawkins has no general entitlement to be paid when absent from work on 20 April 2020, unless it is pursuant to an entitlement to leave, or with the agreement of his employer. There is no suggestion in the evidence before me that MRL had agreed with Mr Hawkins to pay him a flat rate, or any rate, for time he was not at work.

[96] This being the case, Mr Hawkins effectively had the option of either taking paid sick leave or being on unpaid leave for the non-worked day of 20 April 2020. Mr Hawkins further says that the impact of being required to use a paid sick day on 20 April 2020, is that he no longer had that day to use when he became sick on 4 May 2020, which day was treated as unpaid sick leave. There is no indication that being given a day's paid sick leave on 20 April as opposed to being given this on 4 May placed any special cost on Mr Hawkins that properly needs to be compensated for.

[97] Accordingly, Mr Hawkins claim for payment in relation to a paid sick day on 20 April 2020 is declined.

[98] Mr Hawkins also claims for reimbursement of 7 days unpaid sick leave while self-isolating due to flu-like symptoms, calculated at the "Government Wage Subsidy Rate". This claim arises from the incident previously mentioned, when Mr Hawkins began to experience flu-like symptoms while at work. He went home, and sought a COVID-19 test.

[99] The leave reports show what occurred.

[100] For 2 days, 19 May and 20 May, Mr Hawkins received paid sick leave. These two days are marked as "Sick Leave[11]", with the code "SICK", and the reason for the leave is noted as "Flu".

[101] Then for the next 7 working days, from 21 May to 29 May 2020, he was on unpaid leave. This leave is marked as "Unpaid leave", with the code "SPEC" (which I infer stands for "special leave"), and the explanatory note states that the reason for leave is "Flu (covid regulations)".

[102] On 25 May 2020, Mr Hawkins obtained a medical certificate from his doctor, stating that he would be fit to return to work from 1 June. He sent this certificate to Mrs Head, who required he provide a negative COVID-19 test prior to returning to work.

[11] Unpaid sick leave is marked on the leave report as "unpaid sick leave".

[103] In the end, Mr Hawkins returned to work on 3 June 2020. His claim for reimbursement is only for the 7 working days between 21 May and 29 May excluding weekends, shown on the leave reports as "Flu (covid regulations)".

[104] The question is then, did Mr Hawkins have an entitlement to be paid for these particular days, when he was sick and when MRL (via Mrs Head) had told Mr Hawkins to remain at home until he was able to provide evidence of a negative COVID-19 test result (which is consistent with the notations on the leave records).

[105] The Court of Appeal has recently re-affirmed that when the employer directs an employee to stay home/away from the workplace, then the employee still needs to be paid unless there has been some specific agreement between the parties such as agreed leave without pay or reduced hours of work. No agreement existed here. Mr Hawkins was sick, and therefore had an entitlement to receive paid sick leave for these 7 days. The only question remaining is whether he had sufficient entitlement to paid sick leave to cover this period.

[106] The difficulty that Mr Hawkins faces is that the leave records show that in the next 4 months, down to the ending of his employment, he took 13 days sick leave and 2 days of unpaid leave without a reason specified. In other words, it appears he had exhausted his paid sick leave entitlements for that year by June, and subsequent sick leave taken was on an unpaid basis. On looking at the leave report, I note that Mr Hawkins was granted only 4 days of paid sick leave in May of 2020 before his sick leave become unpaid. I would have expected that he was entitled to 5 days of paid sick leave, not 4 days, and that therefore he is owed 1 additional day of paid sick leave to account for this.

[107] Mr Hawkins was on sick leave for the working days between 21 and 29 May 2020. The records indicate that at that time, he had 1 day of paid sick leave available to him, which should have been paid to him. Accordingly, MRL is ordered to pay to Mr Hawkins 1 day's wages at his daily rate of $184 per day. Holiday pay is payable on this sum at the rate of 8%, being $14.72 gross.

Orders

[108] MRL is ordered to pay to Mr Hawkins:

a. Payment of 5 week's lost wages, being $4,600.00 gross.
b. Payment of holiday pay on this at the rate of 8%, being $368.00 gross.
c. Payment of $12,000 in hurt and humiliation without deduction.
d. Payment of 1 days' outstanding wages, being $184.00 gross.
e. Payment of holiday pay on this at the rate of 8% being $14.72 gross.
f. Payment of 1 day's outstanding sick leave being $184 gross.
g. Payment of holiday pay on this at the rate of 8% being $14.72 gross.

Costs

[109] Costs are reserved as requested by the parties. The parties are encouraged to resolve any issue of costs between themselves.

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

[111] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[12]

Claire English
Member of the Employment Relations Authority

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