

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANĀ TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 256
3174202

BETWEEN

NATHAN JANE
Applicant

AND

ROBERTS NZ LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Ruth Pettengell, advocate for the Applicant
Sarah Ongley, counsel for the Respondent

Investigation Meeting: 9 February 2023

Submissions received: 20 February and 8 March 2023, from the Applicant
28 February, from the Respondent

Determination: 23 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nathan Jane was employed by Roberts NZ Limited (RNZL) as a carpenter from 8 March 2021 until his dismissal by way of redundancy seven months later on 11 October. The background to this employment relationship problem includes the Covid-19 response period during which Auckland, the location of the Mr Jane's employment, was in lock down and RNZL, was still able to operate albeit with restrictions.

[2] Mr Jane has raised two personal grievances. He says the RNZL's actions unjustifiably disadvantaged him in his employment and that his dismissal was unjustified. He seeks remedies to compensate his losses and a contribution to costs. For completeness, Mr Jane's claim for wage arrears is resolved.

[3] RNZL denies that Mr Jane was unjustifiably dismissed or unjustifiably disadvantaged in his employment. It says the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances.

The Authority's investigation

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Jane, his partner Jade Shaw and for RNZL, Colin Roberts, Eve Goldsworthy, Jacob Clampitt and Richard Clancy. A witness for whom a witness statement was filed was unable to attend the investigation meeting to affirm their witness statement or answer questions. No weight can be placed on that witness statement.

[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 identified for investigation and determination are:

- i. Was Mr Jane unjustifiably disadvantaged in his employment when required to attend work during COVID-19 level 4?
- ii. Was Mr Jane unjustifiably dismissed by RNZL way of redundancy on or about 11 October 2021?
- iii. If so, is Mr Jane entitled to a consideration of remedies sought:
 - a. Compensation of \$4,000 and \$20,000 under s 123(1)(c)(i) of the Act;
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Jane which contributed to the circumstances which gave rise to his grievance?
- v. Is either party entitled to an award of costs?

Relevant law

The test for justification

[7] When the Authority considers justification for the actions of RNZL including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of RNZL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[8] RNZL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[9] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.¹

[10] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act's legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act's objects of "acknowledging and addressing the inherent inequality of power in employment relationships". The provisions specified included s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [85].

[11] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law.”²

Discussion

Was Mr Jane unjustifiably disadvantaged in his employment?

[12] Mr Jane says on 17 August 2021, when New Zealand moved to Covid-19 alert level 4, he and other RNZL staff were told all work had to stop until further notice except for some contracts for which they were deemed essential workers. They were told where work could continue through the lockdown and they may be required to attend work.

[13] On 8 September Mr Jane received an email marked ‘urgent’ providing an update that RNZL had been authorised to conduct work outside the Auckland region from the following Monday. This was significant because the lockdown restricted interregional travel only to authorised people.

[14] An in-person staff meeting at the RNZL offices was scheduled for 10 September. Staff were asked not to attend the meeting if they had covid or covid like symptoms and to that end were requested to undertake a covid test prior to attending the meeting. The meeting was held outside in the site yard and a barbeque meal was provided after the meeting. Mr Roberts said not a lot was discussed at the meeting other than starting work on Monday.

[15] On 13 September staff, including Mr Roberts were called into work to prepare for the work outside the Auckland region. The work fell into the essential category. There was some discussion about whether people were comfortable attending work that day and undertaking the work they were requested to do. Mr Jane told the Authority he felt uncomfortable doing some of the work because he did not think it was essential but did not feel he could speak up. The work he did that day included building sanitising stations for the work trucks. Under questioning he accepted such work was necessary to fit out the trucks for the essential work RNZL was contracted to undertake. What he

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

says is work carried out by other employees outside the restriction scope but proximate to him has caused him disadvantage in his employment.

[16] The next work Mr Jane performed for RNZL was on 21 September. He had been called the day before and asked to do some work at the workshop. The work was making cabinets. Mr Jane says he did not think this was essential work and working in the shed was a health and safety risk. Mr Roberts gave evidence the work was related to the essential contract work and that there was sufficient ventilation and space in the workshop to minimise any risk. I accept that was the case.

[17] At work on 22 September Mr Jane attended a meeting where health and safety protocols were discussed. He, along with other staff members then worked off site at a residential building site. That work had been completed by 11 October. Mr Jane did not undertake the interregional work or other essential work off site.

[18] I am satisfied on the evidence before the Authority that the work Mr Jane undertook was necessary and within the ambit of essential work including the work and health and safety briefings which followed appropriate health and safety protocols. It is accepted Mr Jane apprehended some work was no essential, but he was not sufficiently proximate to that work to closely observe it and if it did involve 'make work' given the outdoor environment, it did not cause a disadvantage to him in his employment. The circumstances he seeks to rely on do not amount to an unjustified disadvantage.

Was Mr Jane unjustifiably dismissed by way of redundancy?

[19] The next part of Mr Jane's employment relationship problem concerns his personal grievance for unjustified dismissal. On 11 October Mr Jane attended a staff meeting on site with other staff. The staff were called individually into the meeting room while the others waited outside. Mr Jane said he felt good after the weekend and was unsure what they were all doing there. He says when he was called up for his meeting Mr Roberts and Mr Clancy were there for RNZL, he was told he was being let go, the business had been hurt by the consequences of the Covid-19 response and he was being let go because it was 'last on first off'. He says he was then handed a signed dismissal letter with immediate effect and told he would be driven home in the work van because the van needed to be returned. He says the dismissal process was so unfair and unreasonable as to render his dismissal unjustified.

[20] RNZL submits the context of Mr Jane's redundancy is the ongoing COVID-19 pandemic and the direct and substantial impact it had on its business. It submits any deficiency in the process is minor and technical and compliance would have made no difference to the outcome. It says it handled Mr Jane's dismissal discreetly and fairly, paid him two weeks' pay in lieu of notice, one week in excess of the parties' employment agreement and told him it would re-employ him when circumstances allowed.

(i) *Was Mr Jane's redundancy genuine?*

[21] The evidence is clear that RNZL's business was significantly affected by the COVID-19 pandemic response. It is accepted after the last residential building project was completed by 11 October further available work, at least in the short to medium term, was limited to the essential work and that this was insufficient to keep all staff in full time hours. In these circumstances it is accepted that it was necessary for RNZL to look to reduce costs which might include staff costs.

[22] RNZL submits this context and the subsequent restructuring of the business establish the genuineness of Mr Jane's dismissal for redundancy. While it is accepted Mr Jane's dismissal occurred in this context, the circumstances of his dismissal were so swift and the process so deficient as to render RNZL vulnerable to questions as to the genuineness of Mr Jane's dismissal. For this reason, there is insufficient evidence to satisfy the Authority Mr Jane's redundancy was genuine.

(ii) *Has RNZL complied with the notice and consultation requirements of s 4 of the Act?*

[23] No. Even on RNZL's account of Mr Jane's dismissal, the consultation obligations cannot be met. Mr Jane went into the meeting unprepared and without any reasonable opportunity to prepare. He received no prior notice of the purpose of the meeting on 11 October and he was not asked to bring a support person or representative to the meeting. It is not clear, even on RNZL's account, if it was made clear to Mr Jane redundancy would be a consequence of declining the essential work. RNZL is unable to establish it has fairly considered any issue raised by Mr Jane because it cannot establish it fairly put any such issue to him for comment. It has failed in the consultation obligations owed to Mr Jane.

[24] Mr Jane denies he had expressed a strong preference not to do the essential work which was available. RNZL understood this was the case. While it is likely to have some basis for that belief, the difficulty RNZL faces is it cannot establish that basis on the evidence before the Authority because the dismissal process it undertook was so swift and there is no contemporaneous record of Mr Jane holding to such a strong preference. RNZL has not established Mr Jane would not do the work on offer.

[25] With respect to the selection criteria used of 'last on first off'. This was not agreed to in the parties' written employment agreement. Mr Jane says he was not in fact the last on and he was not given a chance to comment on the reasonableness of such criteria or its application to him. Again, the swiftness of the dismissal process and RNZL's failure to allow Mr Jane the opportunity to have a representative or support person present has left it vulnerable to criticism that it has failed to consult fairly and reasonably on the selection criteria.

[26] RNZL was responsible for and wholly in control of the process which has resulted in Mr Jane's dismissal. The deficiencies outlined above are not minor or technical and mean RNZL cannot demonstrate it acted fairly and reasonably in dismissing Mr Jane. On the evidence before the Authority Mr Jane's dismissal for redundancy on 11 October 2021 was unjustified.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[27] I accept the circumstances of Mr Jane's personal grievances have had a profound and negative impact. He gave compelling evidence of its ongoing negative impact. He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$16,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Jane that contributed to the situation giving rise to his grievance?

[28] No deduction from the remedies awarded is to be made under s 124 of the Act. Mr Jane's dismissal was a 'no fault' redundancy and his conduct did not contribute in

a blameworthy way to the situation giving rise to her personal grievances. As found, the evidence is not clear enough to establish Mr Jane unreasonably declined to work in the location or expressed such a strong preference not to work at that location as to find RNZL had a reasonable basis to believe he would decline work in that location.

Summary

[29] Roberts NZ Limited must pay Nathan Jane the following amount within 21 days of the date of determination:

- (i) \$16,000 under 123(1)(c)(i) of the Act.

Costs

[30] 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 Mr Jane 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 Roberts NZ Limited 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.

[31] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.³

Marija Urlich
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.