

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 373
3150102

BETWEEN MATTHEW McCLYMONT
Applicant

AND MANUHIRI KAITIAKI
CHARITABLE TRUST
Respondent

Member of Authority: Alastair Dumbleton
Representatives: Adam Flaws, advocate for Applicant
 No appearance for Respondent
Investigation Meeting: 26 July 2022
Determination: 9 August 2022

DETERMINATION OF THE AUTHORITY

- A. Matthew McClymont has a personal grievance of unjustified dismissal.**
- B. The Manuhiri Kaitiaki Charitable Trust is to remedy the grievance by paying him compensation and reimbursing his lost wages.**
- C. The Trust breached a term of Mr McClymont's employment agreement relating to notice of termination for redundancy.**
- D. The Trust is to remedy the breach by paying him salary in lieu of notice.**
- E. Interest is to be paid by the Trust on the reimbursement and notice payments.**

F. The Trust is to compensate Mr McClymont for costs and expenses incurred in resolving his claims in the Authority.

Employment Relationship Problem

[1] Mathew McClymont applied to the Authority for an investigation and determination of personal grievances raised by him, in which he claimed he was disadvantaged and dismissed by unjustified actions of his employer. He also applied to recover a payment due under an express term of his employment agreement upon termination of employment.

[2] The Manuhiri Kaitiaki Charitable Trust (the Trust) employed him as a resource management unit Technical Officer from 9 September 2019 until his dismissal on 28 July 2020.

[3] The Trust is a post Treaty settlement governance entity. It implements and monitors environmental strategies and Kaupapa, for the preservation and conservation of Te Taiao and the ecosystems within the rohe of Ngati Manuhiri. The Trust was incorporated in July 2013.

The Trusts engagement in resolution of the claims

[4] Following Mr McClymont's dismissal his advocate wrote to the Trust in August 2020 raising a grievance and other claims. Solicitors for the Trust replied in September 2020 rejecting all claims. They advised that the Trust had told Mr McClymont at the time, his employment had come to an end by reason of redundancy.

[5] A statement of problem was lodged in the Authority on 2 September 2021, following mediation held in April 2021. As the Authority was unable to serve it, the application was served personally by Mr McClymont's advocate on the Trust and its Chairman Mr Terrence Hohneck, on 10 March 2022.

[6] A statement in reply was not lodged by the Trust within 14 days of service as required by the Employment Relations Authority Regulations 2000, Regulation 8.

[7] The Trust and Mr Hohneck were notified in May 2022, in writing, of a case management conference of the Authority intended to take place by telephone on 16 June 2022.

[8] The Authority contacted the Trust on 16 June and left a message about the telephone conference about to take place that day, but the Trust did not respond.

[9] Nothing was heard from the Trust and the investigation meeting was fixed to be held on 26 July 2022. The Trust was notified of that date on 21 June 2022 and was advised that a reply or response to the application could no longer be made without first obtaining leave from the Authority.

[10] An intended or proposed statement in reply was provided to the Authority by Mr Hope the Trust's solicitor, to support an application for leave to lodge it out of time. It was received about 4 months after service of Mr McClymont's claims and six days before the investigation meeting was to be held.

[11] No explanation was provided for the failure to lodge a statement in reply within the regulatory 14 day period, or for the subsequent delay of more than three months, from the end of March until the beginning of July, when the Trust instructed Mr Hope.

[12] The application for leave and an adjournment was opposed by Mr McClymont. It was declined by the Authority, which noted the applicant's opposition and the need for the Authority to consider the effective and efficient use of its resources and the allocation of those fairly to all parties before it.

[13] For the Trust to come in over the top of the arrangements made by the Authority with Mr McClymont, with little notice and no explanation, would be unduly disruptive of this case and others waiting their turn for hearing.

[14] The Trust failed to use the opportunities it was given to take part in an investigation of Mr McClymont's claims. Those opportunities are not unlimited and the Trust did not have complete freedom of choice to decide when an investigation meeting would take place. The vast majority of respondents, without the Trust's level of resources, take their responsibilities seriously and do manage to meet their obligations.

Investigation meeting of 26 July

[15] The Trust or its representatives did not attend the meeting.

[16] Evidence was taken from Mr McClymont and submissions were made by Mr Flaws his advocate.

[17] This determination resolves Mr McClymont's personal grievance claims and recovery action.

[18] Not all the evidence heard and submissions made have been set out or referred to in the determination. The Authority has been guided by s 174E of the Employment Relations Act 2000 (the ER Act) in that regard.

Dismissal

[19] In June and July 2020 before his dismissal, Mr McClymont had had discussions about restructuring with the Chairman of the Trust, Terrence Hohneck, and its Acting CEO, Nicola MacDonald. The restructuring was Covid-19 Pandemic driven and no issue arises in this case about the existence of a genuine redundancy situation.

[20] The discussions developed to a point where it was proposed to make Mr McClymont's position redundant. He was offered a similar position, carrying a 2% salary increase, but a sticking point was his wish to retain a benefit which allowed him to refuel his vehicle each week. He had been receiving this since he began his employment.

[21] The discussions ended on 28 July 2020 when Mr Hohneck abruptly dismissed Mr McClymont and ordered him out of the workplace. When Mr McClymont protested his rights, Mr Hohneck told him several times to get out of the building and taunted him to 'take him to Court'. Then and there, he was required to leave behind his work laptop and cell phone. Mr McClymont accepted he had been dismissed and removed himself immediately as ordered.

[22] He received no notice or payment of salary in lieu of notice, a benefit due to him under an express term of the employment agreement.

[23] Mr McClymont's dismissal effected in the way it was and without notice, suggest punishment may have been intended, although there is no indication in this case of any misconduct or poor performance on the part of Mr McClymont. The Trust has acknowledged recently it was happy with his work.

[24] The Authority finds from his evidence that Mr McClymont was deeply hurt and humiliated by the peremptory dismissal, the emotional and financial effects of which markedly affected his general health and carried over into his relationship with his partner and their plans for the future. He was unable to find suitable new employment for two months after his dismissal and consequently he has lost wages in that period.

Dismissal was unjustified

[25] The Authority is satisfied that Mr McClymont was summarily dismissed from his employment and that this occurred on 28 July 2020.

[26] Given the nature and purpose of the notice provisions and the entitlements Mr McClymont had under them, the breach of the employment agreement in that regard by the Trust was a serious one, which supports a claim for remedies available under the ER Act from a personal grievance. Although a penalty could have been successfully claimed, awarding even part of it to Mr McClymont would not have addressed all of the harm caused to him by the Trust's failure to comply with the employment agreement.

[27] The Authority finds that the dismissal was unjustified when viewed objectively and applying the test at 103A(2) of the ER Act. The employer's actions and how the employer acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[28] Looking at the Trust's actions overall, Mr McClymont's claim of unjustified disadvantage is captured in the unjustified dismissal grievance.

[29] The Authority finds that defects in the process followed by the Trust in dismissing Mr McClymont were not minor, and they were not such as to result in no unfairness to Mr McClymont. Accordingly, the dismissal must be found by the Authority to have been unjustified.

[30] Even although the Trust had grounds for considering restructuring, and even although the Trust may have been approaching the point where it could reasonably have made a decision to make Mr McClymont's position redundant after fully consulting him about its proposals, it could not reasonably have dismissed him abruptly and ordered him to leave his workplace immediately. The Trust had no cause such as serious misconduct to do that justifiably.

[31] It could not reasonably have dismissed him until he had been adequately and sufficiently consulted, and if the Trust had dismissed him then it remained under an obligation to terminate the employment in compliance with the employment agreement at clauses 11 and 12.2. In particular, in a redundancy situation the Trust had expressly undertaken to bring the employment to an end by giving three months' notice or, if it wished, paying three months' salary in lieu of notice.

[32] The Authority finds that the Trust did not put Mr McClymont in a position to know with certainty how long he had before the decision to make his position redundant would be finally made by the Trust and announced to him. He needed to know how long he had to try and negotiate better terms for the replacement position he had been offered. The Trust reached a point where it had enough of negotiating with Mr McClymont but signalled that by instantly dismissing him rather than giving him a final opportunity to accept the replacement position.

Breach of term of employment agreement

[33] A fair and reasonable employer could not have unilaterally exempted itself from complying with a contractual undertaking it had given to act in a certain way in a redundancy situation.

[34] The Authority is also satisfied that the notice provisions did not enable the Trust, in the absence of serious misconduct by Mr McClymont, to dismiss without actual notice and still retain a discretion whether to pay in lieu of notice. This view of the notice provisions was offered by the Trust when applying for leave to respond to Mr McClymont's application. The Authority finds any discretion the Trust had was an election either to give actual notice or to pay in lieu of notice. It could do one or the other, but the Trust did neither.

Reimbursement of lost wages

[35] The Authority is satisfied that Mr McClymont lost income as a consequence of his dismissal. It took him nearly two months to find new employment, despite making reasonable attempts, which he kept a record of. Even if genuine redundancy could have led to his termination, he would have had a less stressful time looking for new work if he had been allowed to work out his notice period of three months, or if he had been paid salary in lieu.

[36] The Authority is satisfied that Mr McClymont has a claim for lost wages in the amount quantified by him. As a result of his grievance, unjustified summary dismissal and a lack of certainty in the consultation timetable, he lost wages or salary until he found employment from 21 September 2020. His lost wages post dismissal were mitigated by Government funded Covid-19 relief support, leaving a net loss of \$8,849.00. The Trust is ordered to reimburse that amount to him under ss 123(1)(b) and 28(2) of the ER Act.

Recovery of contractual entitlement

[37] Mr McClymont is also entitled to recover three months' salary in lieu of notice, because that was a contractual entitlement, which fell due the moment the Trust dismissed him in the absence of serious misconduct. His entitlement arises independently of his claim for lost earnings, which is a statutory entitlement. No duplication is involved; *Atwill v Tanners Timberworld Ltd*¹. Payment in lieu is not a payment in reimbursement of lost wages under s 128 of the ER Act but is payment of a liquidated sum agreed to by the parties upon entry into the employment agreement. If Mr McClymont had found paid work the day after his dismissal he would still have been entitled to the agreed payment in lieu.

[38] The proposed statement in reply described the claim for lost wages and payment in lieu of notice as double dipping. As the Court held in *Atwill*, through his successful personal grievance claim, the employee in that case was entitled to reimbursement of the whole of the wages or other money lost to him as a result of the grievance. The grievance in that case was an unjustifiable dismissal, which was in part a breach by the

¹ 1 ERNZ 321, page 325 in particular

employer of its obligation to give the employee reasonable notice or pay him in lieu thereof. In addition, the employee was held entitled to recover an unpaid portion of pay in lieu of notice, as he had been paid for one month instead of three in lieu of notice. The situation in this case is quite similar.

[39] Pursuant to s 131(1) of the ER Act and clause 12.2 of the employment agreement, the Trust is ordered to rectify its default in payment due under the agreement, by paying Mr McClymont three months' salary in the sum of \$16,750 gross.

[40] Over two years after his dismissal Mr McClymont has still not been paid anything in lieu of notice. For that reason it would be artificial to now retrospectively set off a payment due the day he was dismissed but never paid.

[41] Alternatively it would have been open to the Authority to compensate Mr McClymont under s 123(1)(c)(ii) of the ER Act for the loss of an expected benefit of notice under his employment agreement, which Mr McClymont might reasonably have been expected to obtain if he had not been summarily dismissed.

Compensation for distress

[42] Termination of employment in a genuine redundancy situation in many cases will cause distress and anxiety, but to the extent the employer can justify its actions the employee will not have a personal grievance and compensation for hurt and humiliation will not be an available remedy. Compensation may be awarded where the manner of dismissal in an otherwise genuine redundancy is unjustified and the way dismissal was carried out has particular consequences for the employee that are compensable under the ER Act.

[43] A voice recording made of the dismissal is proof that Mr McClymont was treated badly by Mr Hohneck. A listener to the recording is likely to need reminding that Mr Hohneck was not dismissing an employee for gross misconduct he had been caught in the act of committing, although that is the impression given by Mr Hohneck's language when ordering him from the premises. This was not at all what a fair and reasonable employer could have done in the circumstances.

[44] Mr Hohneck's actions belied the Trust's boast in the Letter of Appointment Mr McClymont was given, that it considered staff to be its greatest asset.

[45] In assessing compensation the Authority views the peremptory dismissal of Mr McClymont as a triple blow, which took away from him the job he still had and, at the same time, the job he could have had to replace it in the likely event his job was made redundant, and also the Trust's actions showed a complete disregard for his entitlement to notice, or pay in lieu, due under the employment agreement. After being ordered from the Trust premises he could not reasonably be expected to accept the job earlier offered to him. The Trust took away from him that chance of alternative employment, thereby increasing his distress. The failure by the Trust to honour its contractual undertaking as to notice, also added to his hurt and humiliation.

[46] The Authority is satisfied that the way in which Mr McClymont was dismissed caused him humiliation and chronic stress requiring medical intervention. Due to the manner of his departure, he could have no confidence that the Trust would give a fair and objective appraisal of him if asked by a prospective employer. The Authority accepts that the Trust's unjustified actions and the affect this had on Mr McClymont, including the financial consequences, contributed to the eventual breakdown of his relationship with his partner

[47] The Trust may have become frustrated with the progress of its consultation with Mr McClymont, but that was not an excuse for crudely sacking him on the spot. Holding out for better terms of the job he had been offered was not blameworthy conduct. The ER Act recognises that an employee such as Mr McClymont is an inferior bargaining position and it therefore may be expected that some employees will stand their ground in negotiating for terms and conditions they want. The Authority finds that Mr McClymont did nothing wrong to cause his summary dismissal. No adjustment to remedies is therefore required on account of contribution.

[48] Mr McClymont claims \$25,000 as compensation for distress caused by the manner of his dismissal. That figure is about mid-range in the bands the Employment Court has used as a guide to assessing compensation. In the assessment of the Authority the harm and suffering needlessly caused to Mr McClymont is to be compensated by \$20,000 paid to him by the Trust. Although this sum is less than \$25,000, it takes into global account the recovery of three months' salary in lieu of notice as well as two months lost wages, both of which Mr McClymont is entitled to.

[49] The amount of compensation takes account of the effects of the unjustified dismissal on Mr McClymont, as an individual having his own personal sensitivities and levels of resilience. He spoke persuasively about his suffering, the harshness of dismissal without notice, the loss of contact with workplace and other professional associates, and the humiliation of being escorted from the workplace in front of colleagues.

[50] In this case the Authority considers it likely that if Mr McClymont had not been summarily dismissed he would eventually have accepted the new position offered to him, even if, after further discussion, he remained unable to get agreement to have the petrol allowance continue to be a term of his employment. By acting the way it did the Trust prevented the discussions from running their course and prevented Mr McClymont from having the opportunity of weighing his options and retaining a job, if that is what he wanted. He had enjoyed his work, in which he was trained, qualified and experienced.

Interest

[51] Mr McClymont is entitled to interest on the three months' salary payable in lieu of notice, from the date of dismissal, 28 July 2020, until the date of payment, and interest on lost wages from the date of service of the grievance claims, 10 March 2022, until the date of payment.

[52] Interest is to be calculated by the Trust using the Civil Debt Interest Calculator available at www.justice.govt.nz/fines/civil-debt-interest-calculator .

[53] The order for payment of interest is made under clause 11(1) of Schedule 2 of the ER Act.

Costs

[54] Mr McClymont is entitled to a contribution towards costs incurred by him in bringing his application to the Authority and in engaging a professional advocate to prepare for and attend the investigation meeting. He has been invoiced a total of \$6,062, an amount the Authority regards as reasonable and to which the Trust should pay a reasonable contribution.

[55] Although the meeting needed only a half day, it was reasonable to prepare for it on the basis that the Trust might have been given leave to take part, in which case, as can be seen from the Trust's proposed statement in reply, a much longer meeting would have been necessary.

[56] An uplift to \$4,400, a little below the Authority's rate for a one day meeting, is appropriate. The Trust is ordered to pay that amount pursuant to clause 15 of Schedule 2 to the ER Act.

[57] In addition, the Trust is to reimburse \$71.50 to Mr McClymont, the fee paid for lodging his claims in the Authority.

Summary of orders

[58] To remedy Mathew McClymont's personal grievance of unjustified dismissal, the Manuhiri Kaitiaki Charitable Trust is to pay him -

- (i) \$8,849 net lost wages, reimbursed under ss 123(1)(b) and 128(2) of the ER Act, and
- (ii) \$20,000 compensation, under s 123(1)(c)(i) of the Act.

[59] As money payable under an employment agreement -

- (iii) \$16,750, recovered under s 131(1)(a) of the Act.

[60] Interest is to be paid on –

- (iv) \$8,849, from 10 March 2022 until paid in full, and
- (v) \$16,750, from 28 July 2020 until paid in full.

[61] As costs –

- (vi) \$4,400.

[62] As expenses –

- (vii) \$71.50.

[63] All payments ordered by the Authority are to be made to Mr McClymont within 21 days of the date of this determination.

Alastair Dumbleton
Member of the Employment Relations Authority