

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 459
3164161

BETWEEN JOHN MCCOLLUM
Applicant
AND ANNEX GROUP LIMITED
Respondent

Member of Authority: Andrew Gane
Representatives: Rachel Webster, counsel for the Applicant
Simon Greening and Andrew Breen, counsel for the
Respondent
Investigation Meeting: 9 May 2023 at Hamilton
Submissions and other: 19 May 2023
material received:
Determination: 18 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John McCollum was employed by Annex Group Limited (AGL) in November 2020 as a Labour Hand, in its design, print and signage services business.

[2] In December 2021 AGL decided to make Mr McCollum's role redundant and in January 2022 when Mr McCollum did not start working in a newly created role for him, AGL treated him as having resigned.

[3] Mr McCollum raised two personal grievances. Firstly, that he was unjustifiably disadvantaged by AGL deciding to make Mr McCollum's position redundant effective 23

December 2021, without undertaking due process. Secondly, he also alleged he was unjustifiably dismissed on 19 January 2022 from his employment at AGL.

[4] Mr McCollum's personal grievances were not resolved with AGL, so Mr McCollum lodged a statement of problem in the Authority with claims based on his personal grievances seeking compensation and reimbursement of wages, as well as reimbursement of legal costs.

[5] AGL lodged a statement in reply stating that Mr McCollum was not unjustifiably disadvantaged or dismissed. AGL says Mr McCollum resigned from his role and did not apply for a new role.

The Authority's Investigation

[6] I investigated Mr McCollum's claims by receiving written statements and other documents from Mr McCollum. For AGL, I received evidence and supporting documents from Lynda White, business manager, Kylie Harris, production manager, and Matt Polzleitner, company director. During the investigation meeting on 9 May 2023, I heard evidence from witnesses who answered questions asked by myself and the parties' representatives.

[7] 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. In determining this matter, the Authority has carefully considered all the material before it, including all the evidence by the parties and their submissions.

Issues

[8] The issues for determination and investigation were:

- i) Whether Mr McCollum has a personal grievance for unjustifiable disadvantage by AGL making a decision to make Mr McCollum's position redundant, effective 23 December 2021, without undertaking due process?
- ii) Whether Mr McCollum has a personal grievance for unjustifiable dismissal, or did he resign?
- iii) If AGL's actions were found to be unjustified, what remedies should be awarded considering:

- a) Reimbursement lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
 - b) interest awarded on any lost wages; and
 - c) compensation under s 123(1)(c)(i) of the Act.
- iv) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Mr McCollum that contributed to the situation giving rise to his grievance?
- v) Should either party contribute the cost of representation of the other party?

What happened?

[9] AGL provides a range of design, print and signage services to businesses.

[10] Mr McCollum was employed by AGL in November 2020 as a Labour Hand on a fixed term basis. In January 2021 Mr McCollum signed a letter of offer for a permanent position as a Labourer with hours of work 6am to 3pm. This was changed in a verbal agreement with Ms Harris (5.30am-2.30pm) to allow Mr McCollum to pick up his son from school.

[11] Throughout the Covid period AGL had a significant reduction in work and the business experienced financial difficulties.

[12] On 10 November 2021 there was a staff meeting and staff were told that due to a downturn in business their hours of work would be changed from 22 November 2021. Mr McCollum's hours would be changed to working business hours (8.30am-4.30pm). The change meant that Mr McCollum could no longer collect his son from school. Mr McCollum alleged there was no consultation at all about the change of hours. He says he was presented with a variation to his employment agreement two days later and asked to sign it. He raised his concerns with AGL and did not sign the variation to his employment agreement, however the matter was not resolved.

[13] By November 2021 AGL had determined that there was not enough work for the Labour hand role to be fulfilled on a full-time basis. So, when another employee, in a similar role as a Finisher, retired on 12 November 2021 AGL decided to merge the two roles into one. AGL offered the role to Mr McCollum. AGL submitted that the intent was always to retain Mr

McCollum in the company, however, Mr McCollum states that this was never conveyed to him.

[14] On 6 December 2021 AGL wrote to Mr McCollum stating, “With staff retirement and general downturn in business it has been a management decision for your role within the company to be made redundant effective on 23rd December 2021”. Mr McCollum stated he was completely shocked. At no stage prior to this letter was there any proposal to make my position redundant. He states was never consulted about this decision. There was no reversal of that decision prior to 23 December 2023.

[15] Mr McCollum sought legal advice as he believed there was no consultation process and that he should have had an opportunity to have input before AGL made the decision to make him redundant. Mr McCollum’s representative wrote to AGL on 12 December 2021 requesting information regarding the redundancy, however no information was provided by AGL.

[16] On 21 December 2021 AGL responded to Mr McCollum’s representative asking to meet with Mr McCollum.

“To go through the importance of the changes needing to be implemented for the survival of the company moving into the New Year. We would like to discuss what the structure will look like moving forward...and would like the opportunity to obtain feedback.”

[17] AGL requested that Mr McCollum let them know by 4pm 23 December 2021 whether he was willing to meet AGL. Unfortunately, Mr McCollum was on sick, and bereavement leave on 22 and 23 December 2021 and was unable to respond.

[18] Mr Polzleitner emailed Mr McCollum’s representative on 10 January 2022, but advised the decision to merge his role was not being changed. Mr Polzleitner stated that a consultation process had been followed. He stated that as he had not heard from Mr McCollum, he assumed that Mr McCollum would have been restarting work when AGL resumed business on 10 January 2022.

[19] On 13 January 2022 Mr Polzleitner emailed Mr McCollum’s representative again asking for Mr McCollum to confirm whether he would accept the new position. Mr Polzleitner concluded that Mr McCollum’s failure to return to work or engage with AGL’s meeting

requests meant he had resigned. Mr Polzleitner confirmed his understanding by a letter to Mr McCollum's representative dated 19 January 2022.

Unjustifiable action causing disadvantage.

[20] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act, which states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[21] Mr McCollum states that AGL's failure to undertake a fair and reasonable process, including the failure to adequately consult with him over the proposal to make his role redundant in December 2021 through the merger of his role with the Finisher role, unjustifiably disadvantaged his employment.

[22] Section 4(1A) (c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employees' employment, to provide potentially affected employees with access to relevant information and an opportunity to comment on that information.

[23] There was some limited consultation with staff, including Mr McCollum, on the economic consequences COVID had on the PGL's business. However, crucially there was no discussion with Mr McCollum regarding the merger of his role with the role of Finisher and there was no mention of redundancy.

[24] Consultation may be viewed as a continuum which has key components such as the provision of adequate and comprehensible information, and the allowance of sufficient time for employees to understand, consider and respond to what is being proposed by the employer regarding their jobs. The integrity of consultation depends on the key components of a composite process being present together. Inadequate information, or insufficient time, or consultation on only part of the employer's plans, will by themselves be defects tending to undermine the entire process.¹

[25] I find that Mr McCollum was not adequately consulted on the impact that the reduction of business would have on his role and the proposal to make his role redundant. As an employee

¹ *Unite Incorporated and Others v Hospitality Services Limited* [2021] NZERA 276

Mr McCollum had an expectation that in good faith AGL would undertake a reasonable restructuring process, and that he would be consulted on it. Mr Polzleitner said at the investigation meeting that AGL did have policies and protocols in place to undergo a restructuring process, however, that they did not undertake a formal restructure process as AGL usually would, because AGL saw this as a promotion and there would still be work available for Mr McCollum.

[26] The action taken by AGL did not adequately or sufficiently meet the requirements of s 4(1A) of the Act. Compliance with those requirements was not to an extent that was reasonable in the circumstances and having regard to the objectives and purposes of consultation.

[27] I find Mr McCollum was disadvantaged by AGL's unjustifiable actions set out above.

Unjustified dismissal

[28] The removal of Mr McCollum's full-time role effectively made Mr McCollum redundant. The evidence supports Mr McCollum's contention that the decision to make his position redundant was made prior to the meeting of 6 December 2021 with Ms White and Ms Harris. Ms White said she met with Mr McCollum to offer him the new position and outline what the job would entail. She said she explained why the merge of two roles, the finisher and labourer role, into one was happening and that it was being offered to him first before advertising the role.

[29] Mr Polzleitner gave evidence as to the potential loss of revenue for the business and the financial implications for AGL. AGL submitted that due to a downturn in business it believed it was appropriate to select Mr McCollum's role for redundancy. I find there were genuine business reasons for AGL's proposed restructure and the merging of the roles.

[30] It is accepted that AGL had considered other options of redeployment for Mr McCollum into the new merged position of Labour Hand and Finisher and offered to transition him into the new position. However, the new role was subject to a vaccination mandate and therefore was not on terms and conditions that were similar to his current role. Mr McCollum did not want to be vaccinated. AGL's failure to complete a fair process was not what a fair and reasonable employer could have done in the circumstances.

[31] These were more than procedural flaws. They went to the substance of the decision to dismiss Mr McCollum. Clearly AGL failed to meet the requirements of s 103A of the Act and s 4(1A) of the Act meaning its action was unjustified and breached his employment agreement. He did not have a fair opportunity to address the process before that conclusion to terminate his position was reached.

[32] AGL did not retract its decision to make Mr McCollum's position redundant as of 23 December 2021 however AGL did continue to pay him into January 2021. AGL did not terminate Mr McCollum's employment on the basis of redundancy on 23 December 2021, despite not retracting that decision, but instead dismissed him on 19 January 2022 when Mr Polzleitner alleged that Mr McCollum had resigned. Mr McCollum did not resign and nor was he paid his contractual entitlement of one week's notice.

[33] AGL has not demonstrated that its actions and how it acted in the lead up to Mr McCollum's dismissal were what a fair and reasonable employer could have done in the circumstances at the time of the dismissal. Because of these various failures, the consultation process was not fair and therefore not justified, and it follows the dismissal was unjustified both procedurally and substantively. I find Mr McCollum's dismissal for redundancy was unjustified and his personal grievance for unjustifiable dismissal succeeds.²

Remedies

Personal Grievances

[34] I find Mr McCollum 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 Mr McCollum gave evidence as to the combined effect the conduct had on his wellbeing, I will take a global approach in considering whether remedies are appropriate.

Reimbursement of wages

[35] Mr McCollum seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to sections 123(1)(b) and 128 of the Act.

² Employment Relations Act 2000, s 103A.

[36] Following his dismissal Mr McCollum was unemployed despite reasonable attempts to find employment. In the circumstances it is reasonable that Mr McCollum be paid 3 months' salary as reimbursement of wages, being \$11,520.00 and holiday pay of \$921.60.

Compensation for humiliation, loss of dignity and injury to feelings

[37] Mr McCollum gave evidence about the effects on him of AGL's decision to dismiss him and the process leading up to that decision. He stated the dismissal caused significant stress, both physical and mental. He said he found it hard to get over how he had been treated and it had damaged his confidence. Mr McCollum gave evidence of his attempts to find employment and mitigate his losses.

[38] I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$15,000.00 AGL is ordered to pay to Mr McCollum compensation of \$15,000.00.

Recovery of contractual entitlement

[39] Mr McCollum is also entitled to recover one week's salary in lieu of notice, because that was a contractual entitlement, which fell due the moment AGL dismissed him. His entitlement arises independently of his claim for lost earnings, which is a statutory entitlement. No duplication is involved; *Atwill v Tanners Timberworld Ltd.*³

[40] 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 Mr McCollum had found paid work the day after his dismissal he would still have been entitled to the agreed payment in lieu.

Interest

[41] Mr McCollum can recover interest on his entitlement to one week's salary, payable in lieu of notice as set out in paragraphs [34] and [37] above, from the date of dismissal, being 19 January 2022, until the date of payment. The order for payment of interest is made under clause

³ 1 ERNZ 321, page 325 in particular.

11(1) of Schedule 2 of the Act. Interest is to be calculated by the AGL using the Civil Debt Interest Calculator.⁴

Contribution

[42] As I have awarded compensation to Mr McCollum, I must now consider whether each Mr McCollum contributed to the situation that gave rise to his grievances. When assessing if his actions contributed to the situation that gave rise to his grievances, I am looking for a causal link between his actions and the situation that gave rise to the unfair consultation, being his grievance. If I am satisfied that there is a link, then I must consider whether his behaviour was culpable or blameworthy, which would require a reduction in remedies. Given the circumstances of the consultation I am not satisfied that there is any behaviour by Mr McCollum that amounts to contribution and warrants a reduction in remedies.⁵

Summary of orders

[43] Mr McCollum was unjustifiably disadvantaged and unjustifiably dismissed for which remedies have been awarded. His claims for wage reimbursement have been upheld. I make the following orders:

- (a) Within 28 days of the date of determination AGL is ordered to pay Mr McCollum the following sum:
 - (i) Reimbursement of lost wages being 3 months' salary being \$11,520 and holiday pay of \$921.60; and⁶
 - (ii) compensation for hurt, humiliation and injury to feelings under \$15,000; and
 - (iii) one week's salary in lieu of notices, 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 AGL is to calculate and pay Mr McCollum interest as awarded in paragraph [41] above.

⁴ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

⁵ Employment Relations Act, s 128(3).

⁶ Employment Relations Act, ss 123(1)(b) and 128.

Costs

[44] 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 McCollum 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 AGL 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.

[45] 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.⁷

Andrew Gane
Member of the Employment Relations Authority

⁷For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.

