IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2020] NZERA 222
3032571

	BETWEEN	IAIN MILNE Applicant
	AND	AWESOME ART LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Kelly Coley, advocate for the Applicant Kathy Jarrett, for the Respondent
Investigation Meeting:	24, 25 January and 18 July 2019 at Palmerston North
Submissions Received:	Up to and including 19 August 2019
Determination:	8 June 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Iain Milne, claims to have been both unjustifiably dismissed and unjustifiably disadvantaged by Awesome Art Limited. The disadvantage claims relate to the process adopted by Awesome Art during a restructure along with claims he was spoken about in a derogatory way and his final pay was delayed.

[2] Awesome Art denies a dismissal occurred and argues Mr Milne departed of his own volition. It denies the derogatory comment claim and notes that while late the final pay was actioned.

Background

[3] Mr Milne was engaged by Awesome Art as a signwriting apprentice in 2014 though he had previously worked for the company in other capacities. Awesome Art

was primarily operated by Owen Jarrett though his wife, Kathy, was also involved. Also operating from the same premises was Mrs Jarrett's business, Jarrett & Associates.

[4] Mr Milne says he noticed disconcerting events starting to occur mid 2017. In particular he says he saw differences in the way the company was being run and staff were being treated. He considers some clarity was provided on 29 September when he was called to meeting to discuss a client's dissatisfaction and using work time for personal interests.

[5] A letter of the same date, and which in uncontested evidence Mr Milne says he received at the commencement of the meeting, comments on these issues.[1] Having done so it goes on to say:

> It is also timely to advise in considering these issues we have reconsidered the nature of Awesome Art Ltd operation.
>
> We will be advising all staff of the possibility in the new year both Awesome Art and Jarrett & Associates Ltd will reduce staffing to only the Directors and seek contractors as required. The other and more immediate likelihood is both operations will reduce to a 4 day week to reduce overheads and enable the Directors some respite in their workload.
>
> … We assure you employment until the conclusion of your apprenticeship, Past you time served as an apprentice we can offer no promise of employment.

[6] The above advice was, from the employers perspective, a signal they were contemplating retirement and a winding down of the business. Here it should be noted there was evidence they had, at one stage, considered it possible Mr Milne might buy the business.

[7] The businesses future was next raised in a meeting invitation sent to all staff on 9 October. It referred to surgery Mr Jarrett had recently had which reduced his ability to work. It goes on to comment that both Mr and Mrs Jarrett had decided *We must now make a priority our own health and well being* before again referring to the two options outlined in the 29 September letter to Mr Milne (Directors and contractors or a 4 day week) before saying they would be open to other suggestions. Here it

[1] Letter Owen Jarrett to Iain Milne dated 29 September 2017

should be noted that while the reduction to four days was implemented in the new year staff continued to be paid for five.[2]

[8] Further confirmation of the owners thinking came in a letter to staff the next week.[3] It again reiterated the owners were contemplating change and advised:

> There are three resolutions being considered all accept retirement is very close March 2020 for Owen.
> 1. Closing both businesses and selling the recently appraised 462 Church Street.
> 2. Reducing both business's to owner operated working only with clients we want to.
> 3. Reducing both businesses to four-day weeks working Tuesday to Friday on a trial basis until the end of the 2018 financial year

[9] Owners and staff met on 31 October to discuss these proposals and the following day the owner's notes were distributed to staff. The covering email notes staff were *assured … employment and payment through to the start of work after in (sic) January 2018.* That said it is also clear from both the evidence and the notes that as well as concerns about their lifestyle the Jarrett's also had concerns about staff performance and there was no clear delineation between the two. The email records:

> There will be a reassessment of how well the 4P's being planning, priorities, process and procedure are now adhered to by the team and if that has resulted in in any better outcomes. At that time we will all know how well we have worked together over the next two months, we will also be able to use the break to reassess our own personal plans and objectives.
>
> We believe by being as open and frank about the challenges as we see them you all have an opportunity to work towards a very different future with or without Awesome Art and Jarrett & Associates. There is in essence three months notice that we may not have all achieved what has been discussed before we start back after shutdown.
>
> If we succeed in working better together and focusing on the 4P's by January 2018 the next assessment will be 31 March 2018. It is at that point and we will flag well in advance our personal feelings as to whether it is time for us to retire and close the business, operate as directors only or carry on and a much improved fashion.

[10] Mr Milne's summary of the meeting is it was one in which staff were told work hard and get dollars in the door if we are to continue operating in the new year. Mr Jarrett does not dispute that but adds he remained confident things would *come right*.

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[2] Mr Milne's brief at [8]
[3] Letter to 'All team members' dated 17 October 2017

[11] That the two issues (staff performance and the Jarrett's future) were intertwined was again evident in an email sent to staff on 10 November. While primarily focusing on performance the email ended with a request staff provide feedback which Mr Milne did.

[12] On 16 November the Company responded to the feedback via an email to all staff. It records that the staff's *responses show you appreciate there are areas for improvement*. It discusses various aspects of the way work is performed and expresses some disquiet from the owner's perspective. The e-mail then advises:

> It is six months since we were required to put heads down bums up, we are now physically and mentally exhausted, in pain and poor health. In September we proved to ourselves, we could earn – two staff down and renovate a property. We cannot carry on, the stress we are placed under to maintain employment for everybody in the current circumstances is not sustainable. We do not doubt your commitment, what is in doubt it is the application of that commitment, the quality of work being produced and the time it takes to do so. The challenge moving forward is productivity (effective, efficient working that produces quality work in a timeframe customers will pay for) solving it is crucial.

[13] The email then sets some targets for the next two weeks and while the staff understood there would be a further discussion about what the future held prior to Christmas that did not occur till February 2018. In the interim, however, Messrs Jarrett and Milne had discussions about the possibility of transferring Mr Milne's apprenticeship to another employer. Mr Milne rejected this primarily because the employer was in Wellington as opposed to Palmerston North.

[14] On 7 February 2018 the staff received a further memo from their employer. It outlined various issues which had led the owners to decide *we will work through a gradual closure of both businesses*. The letter went on to advise they would:

> 1. Reduce both businesses from 19 February 2018 to four-day weeks working Tuesday to Friday until the end of the 2018 financial year.
> 2. Reduce both businesses to owner operated working with clients we want to.
> 3. Finalise all employment of staff as at 31 March 2018. As required retain contractors or short fixed-term employees for specific tasks with yourselves being offered same firstly until such time as you have new employ.

[15] The letter closed with advice there would be individual meetings to work through *personal arrangements*. Mr Milne interpreted this letter as notice of

dismissal and in this he was not alone. Even a witness appearing for the employer stated she thought likewise. She said it was a relief to have an answer but also evidenced a clear understanding some staff might be retained on specific task related IEA's but that would be discussed during individual meetings which were then to occur with all staff.

[16] Mr Milne's meeting occurred on 9 February 2018. He says it canvassed two points. One was the proposal he buy and operate the business which had previously been raised. This he rejected on the grounds of cost and an inability to supervise the completion of his own apprenticeship. The second was a further discussion about transferring his apprenticeship to the Wellington employer. It was during this meeting he says the statement which gives rise to the grievance concerning a derogatory comment was made. He says he was told his bloodlines meant he was incapable of running a successful business or words to that effect. He says the comment stuck in his mind and that he found it offensive and hurtful.

[17] Mr Milne's recollection of what was discussed is, to some extent, consistent with an agenda Mrs Jarrett prepared. It had two main headings – completion of Mr Milne's apprenticeship and *Sell the business*. The agenda notes the latter was not an option at that time but the parties differ on what was discussed under the apprenticeship head. The Jarrett's say it was how they could continue to support Mr Milne to complete his apprenticeship and they are adamant they stated he could stay to do so and guaranteed retention till 30 June.

[18] Mr Milne disagrees. He says it was clear from the meeting of 7 February that the employment was about to end especially in the absence of any firm offer to the contrary. He is adamant he has no recollection of 30 June being discussed and, as a result of his belief dismissal was imminent, Mr Milne sought to mitigate any potential loss. He applied for, and obtained, what was initially a casual/on call role though it was at least doing something he enjoyed. He commenced at the beginning of April and as events transpired the hours were such that there is no claim for lost wages.

[19] Here it has to be noted Awesome Art was aware of this application. Indeed Mr Jarrett spoke to the new employer, who was a client, about it in late February though he did not raise this conversation with Mr Milne. He says he chose to wait and see what would happen when the apprenticeship supervisor next visited on 13

March which the evidence would suggest was a desire to see whether Mr Milne could work both jobs.

[20] That raises the issue of Mr Milne's apprenticeship and efforts to continue its progression. These feature significantly in the company arguments supporting its assertion Mr Milne was never dismissed.

[21] It would be fair to say Mr Milne was not performing adequately in this regard. While he had completed the required hours he was behind with respect to other assessments.

[22] As part of the apprenticeship process there are regular visits from a supervisor employed by a company called Comptenz. One of those visits occurred on 13 March 2018. In his report of the visit the supervisor noted:

> Iain mentioned that his company was about to restructure and Iain's position would be terminated. There may be an opportunity for you to continue your training in your new job but under the direction of your current employer. As you have a number of units yet to be completed this may prove problematic in the meantime and it was decided to continue for one meantime (sic) to see if this arrangement is going to work out.

[23] Communication about the apprenticeship continued into July 2018 with Mr Milne also completing an assignment. Awesome Art also continued to pay apprenticeship related fees.

[24] Included in the communications was one to Mr Milne on 20 July advising Awesome Art had a job which could be used to assist in the completion of a required unit standard. On the same day there was an email from the apprenticeship supervisor to Mrs Jarrett which included:

> I would like to sort Iain's employment issue out early next week. I have asked Iain to let me know in writing what his intentions are regarding his apprenticeship and his status with your company. I am currently awaiting his response which he said will be issued today.

[25] In its response Awesome Art characterised Mr Milne's status as being *Absent without leave*.

[26] Mr Milne responded to the apprenticeship supervisor on 26 July advising he could not see how he could continue the apprenticeship. This led to its cancellation by Competenz the following day.

Discussion

[27] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[28] Mr Milne's prime claim is he was unjustifiably dismissed. Awesome Art denies this claiming it was made clear Mr Milne could remain at least to the extent he would be assisted in completing his training requirements. It is accepted that after that there were no guarantees.

[29] In essence the issue became one of whether Mr Milne was pushed or jumped prior to that occurring.

[30] A dismissal is a sending away and it is because of this Mr Milne will struggle with this claim and least with effect his final day which turned out to be 29 March 2018.

[31] For a start the employment agreement requires the terminating party provide written notice. It is common ground no such notice exists as exhibited by the following passage in Mr Milne's closing submission:

> On or around 7 February 2018, the Applicant received what he believed to be notice of the termination of his employment. While it could be perceived this notice did not specifically give notice of the termination of the Applicant's employment, the Applicant genuinely believed it did.

[32] That Mr Milne, and for that matter others present at the meeting, believed termination was imminent is clear from their oral evidence but there was a caveat. The caveat was that individual discussions were to occur and, as events transpired and notwithstanding the indication the business was going to revert to using Directors and contractors, these discussions resulted in some staff being retained beyond 31 March.

[33] In Mr Milne's case the individual discussion occurred on 9 February and he accepts his recollection is hazy. He accepts he was angry and may have missed various points. Opposing that is the evidence of Mr Jarrett who is adamant he maintained the position he had all along – namely that Mr Milne would be supported to complete his apprenticeship and could remain to do so.

[34] There is then the Jarrett's behaviour around this time. In some ways their actions were not consistent with their having dismissed Mr Milne and here it must be remembered those who were departing were, in the minds of the employer, doing so for reasons of redundancy. That meant no fault and two who did depart at the end of March received gifts. Mr Milne didn't as the employer was of a view he still remained and Awesome Art maintained contact with the apprenticeship supervisor and continued to pay relevant fees. Those later points are not the actions of an employer who considers it has dismissed its apprentice.

[35] Mr Milne also said it was the letter of 7 February which, in his mind confirmed his dismissal. Again, it doesn't, and while its content is far from promising, it did say retention on short fixed term contracts remained possible.

[36] Most telling however was the evidence of Competenz's apprenticeship supervisor whose evidence I consider vital. Indeed I gave the parties notice, in an email sent while the matter was adjourned between January and July that I would place considerable weight on his evidence given the disparity in their recollections. He was the closest available to an independent witness. I also indicated at that time the evidence appeared to be pointing toward a resignation as opposed to dismissal before noting:

> … a finding Mr Milne was not dismissed would not conclude this matter. That is because the evidence of both he and [the company witness referred to 15 above] strongly indicates the message imparted was clear. That was a message upon which Mr Milne then acted with the result he no longer completed his apprenticeship. In other words while not a dismissal there are strong grounds upon which he can still claim he was disadvantaged and s 122 allows me to go there especially as the remedies sought in this instance would apply unchanged to either finding – dismissal or disadvantage.[4]

[37] As part of his duties the apprenticeship supervisor met with both Mr Milne and his employer approximately once every three months. As already said one of those meetings occurred on 13 March. The supervisor states Mr Milne advised his employment was coming to an end due to the implementation of a director only model. The supervisor stated he and Mr Milne discussed the implications and the possibility of completing at least a level three qualification given that could occur with the furnishing of one outstanding assignment.

[4] E-mail to the parties representatives on 8 February 2019

[38] Perhaps more importantly for present purpose he said they discussed the fact an apprenticeship required at least 30 hours employment a week and that while Mr Milne clearly thought he was leaving he also added *no decision had been made* and added the contradictory assertion that he understood he could continue his qualification notwithstanding the new job.

[39] The evidence would suggest the subsequent discussion with Mr Jarrett was inconclusive. He was aware of the other job but Mr Milne's status remained unresolved. The supervisor's summation was it *was all pretty unclear.* He went on to say he felt *it was knocking ideas about as to how it would play out* and that no decisions had yet been made.

[40] The co-ordinator also evidenced a discussion he had with Mrs Jarrett on 6 May in which he said she was still expressing a desire to assist Mr Milne complete his apprenticeship despite his absence and finally there was the July correspondence I have already mentioned ([23] to [26] above).

[41] When considered in its totality the above evidence, and particularly that of the apprenticeship supervisor when discussing the meetings of 13 March, lead me to conclude Mr Milne was not dismissed. Here I emphasise the evidence Mr Milne said no decision had yet been made. Despite that and fearful of his future he acted and obtained alternate employment. He not only commenced that employment of his own volition but failed to make any attempt to return to Awesome Art. His dismissal claim therefore fails.

[42] Turning now to the potential application of s 122 I raised with the parties.

[43] There can be no doubt the outcome of these events was disadvantageous to Mr Milne, at least with respect to his employment with Awesome Art. He was engaged to complete an apprenticeship and while part of his failure to do so may be attributable to his approach to assignments it is the employers position they had undertaken to assist him and ensure he had a means of completion. Assuming that is correct it follows that Awesome Art has assumed a duty to advance discussion which ensure that occurred. At the very least there is a duty to communicative and that is imposed by statute.[5]

[5] Section 4(1A)(b) of the Employment Relations Act 2000

[44] It is in respect to a failure to be communicative that a clear disadvantage arises. As already said the message received by staff, including those who gave evidence on behalf of the employer and despite the absence of formal notice, is they were led to believe termination was to occur at the end of March unless alternate arrangements were made. If I then accept Mr Jarrett is correct and Mr Milne was clearly told there would be an alternate arrangement under which he was retained and supported to complete his apprenticeship I must also conclude the employer assumed responsibility for ensuring those arrangements were put in place. Mr Jarrett, by his own evidence, confirms this did not occur. He accepts there was no discussion about the hours Mr Milne would work and here I again note some issues. It was Mr Jarrett's evidence Mr Milne could complete his apprenticeship by working 15 hours a week which could have possibly allowed him to work both jobs especially as the new one included weekend work. This was at least Mr Jarrett's understanding and he says that was the plan agreed when he met with Competenz on 13 March.[6] Here I note that does not sit well with Competenz's evidence, which I accept, nor the contemporaneous written evidence.

[45] Indeed this evidence highlights other concerns. Completion of the apprenticeship by working 15 hours week till the end of May would have seen considerable change to Mr Milne's conditions of work. That would require agreement but there is no evidence, or even claim, it was ever discussed. Mr Jarrett says said he simply assumed Mr Milne would continue to come in as he previously had yet he accepts he made no enquiries about Mr Milne's absence when he failed to return in early April. Indeed he made a very telling comment - *I'd just given up.*

[46] Mrs Jarrett attributes the failure to contact to Mr Milne and complains he left Awesome Art in the lurch as Mr Jarrett was then largely absent for health reasons. Despite that she also failed to make any enquiries herself and relies on correspondence between Mr Milne and another employee on 5 April. It discusses an assignment Mr Milne had to complete for the level 3 qualification and Mr Milne then observe they parties could discuss completion of level 4. Again there is no evidence this triggered any such discussion.

[47] I can only conclude that assuming Awesome Art is correct in asserting the employment continued its failure to communicate adequately regarding the manner in

[6] Brief of evidence at [t]

which that would occur failed to rectify what appears a significant miscommunication and ensured Mr Milne's permanent departure. It also ensured Mr Milne failed to complete the apprenticeship which must constitute a significant disadvantage given that was the purpose of his employment. Once a disadvantage is established, it is for the employer to justify its actions. On this it must fail given the total lack of efforts to rectify the problem in a timely way and the offered explanation – it was Mr Milne who left us in the lurch and failed to communicate.

[48] Given the above I conclude Awesome Art's failure to communicate adequately while the employment continued ensured a termination which the company says it was desperate to avoid and which therefore need not have occurred.

[49] The other disadvantage that became apparent is again one of failure to communicate. It is clear conflicting messages were coming from Awesome Art. On one hand the business was going to wind down while on the other it might survive if performance improved. One approach raises the spectre of is what is potentially a perfectly reasonable rationale for restructuring, namely the imminent retirement of the businesses principles. The other, namely that the issues were performance based, should have been addressed in a very different way. This conflict was never properly addressed, let alone resolved making it difficult for Mr Milne to understand what it was he was addressing.

[50] Given the points above I conclude Awesome Arts failure to communicate effectively led to Mr Milne making choices which were clearly disadvantageous – he left the employment and lost the chance of completing his apprenticeship. Awesome Art then exacerbated the situation by failing to make timely enquiries which might have rectified what was clearly a serious miscommunication problem when it became clear there were problems in the first week of April.

[51] Turning to the two pleaded disadvantages. I take neither any further and dismiss both claims. With respect to the claim Mr Milne was spoken to in a derogatory way on 9 February I note that even if it did occur there is an absence of any evidence as to how this affected the employment to his disadvantage. Indeed, and accepting his belief he had already been dismissed it is difficult to see how any further disadvantage could occur.

[52] With respect to the final pay, and accepting the evidence shows it was delayed, that is an event that occurred outside of the employment and after it had been brought to a conclusion by Mr Milne. Here I note two other points which would, in any event, have precluded a remedy for this. First it is more appropriate such a failure be addressed through other means such as arrears, compliance and penalty actions. Second, the money was ultimately paid and third it is clear this was a confusing situation which clearly gave rise to, and to some extent, explains, the delayed payment.

Remedies

[53] Mr Milne sought compensation for hurt and humiliation. As already said there is no wage claim. When asked to quantify his claim he advised he was seeking $15,000 as a global sum.

[54] I support of his claim Mr Milne gave evidence about Awesome Art having been his life for some 8 and a half years and the hurt he felt at having that taken from him. He spoke of the confusion engendered by a lack of understanding as to what was going on, and more particularly why. This is a reference to the intermingling of issues about performance and the future of the company.

[55] He spoke of unrecognised, at least to him, signs of depression and a reluctance to admit he was struggling despite signs of which were noticed and commented on by others. He evidenced a failure to eat properly, weight loss, and a withdrawal from social activity due to a loss of confidence.

[56] His commented he remained *shocked it had come to this* and could not be resolved before making his final comment in this regard – it was a very difficult process to go through.

[57] Having considered the evidence and the outcome, which while I have rejected the dismissal claim is essentially the same, along with recent awards in both the Court and Authority I conclude the claim should be granted in full. Mr Milne should not be disadvantaged by having lodged a reasonable claim.

[58] Finally the conclusion Mr Milne has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of

contributory conduct on Mr Milne's part.[7] The only possible thing that might lead to such a conclusion is the fact Mr Milne also failed, to some extent, to communicate over what he intended doing but this I disregard for three reasons. One is the evidence is it was not only he who was led to think dismissal might have occurred. Two is the fact both he and Mr Jarrett gave evidence that at least initially they thought both jobs could be performed and three, if this was a restructuring as Awesome Art claims, the onus falls on the employer. This is not, I conclude, a situation in which s 124 applies.

Conclusion

[59] While Mr Milne has failed to convince me he was dismissed I have concluded that as a result of various ancillary events he was unjustifiably disadvantaged.

[60] As a result I order the respondent, Awesome Art Limited, pay the applicant, Iain Milne, the sum of $15,000.00 (fifteen thousand dollars) as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[61] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

[7] Section 124 of the Employment Relations Act 2000