

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 254  
3039634

BETWEEN MARGUERITTE NERU  
Applicant  
AND PACE FURNITURE LIMITED  
Respondent

Member of Authority: Andrew Dallas  
Representatives: Michael McDonald, advocate for the Applicant  
John Shingleton, counsel for the Respondent  
Investigation Meeting 30 January 2019  
Submissions Received: On the day  
Date of the Determination 1 May 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**Non-publication order**

[1] Under cl 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibit from publication any financial information lodged in these proceedings relating to Pace Furniture Limited (Pace).

**Employment Relationship Problem**

[2] Ms Neru says she was unjustifiably dismissed by Pace as part of a defective restructuring and redundancy process. Pace denied this. Pace strongly resisted Ms Neru's allegations and claims for remedies under the Act before the Authority.

## **The Authority's investigation**

[3] During the Authority's investigation meeting, I heard evidence from Ms Neru, Director of Pace, Warwick Lynch, former Pace employee, Pauline Caldwell and business consultant, Steve Wilkinson.

[4] Having regard to s 174E of the Act, I have not referred in this determination to all the evidence received from witnesses nor have I referred to all submissions advanced by the representatives. However, I record, for completeness, I have fully considered all material put before the Authority.

## **Issues**

[5] The issues for investigation and determination by the Authority are:

- (i) Was Ms Neru's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (ii) If Pace's actions were not justified, what remedies should be awarded to Ms Neru, considering:
  - (a) Lost wages; and
  - (b) Compensation for hurt, humiliation and injury to feelings;
- (iii) If Ms Neru is successful, should Pace contribute to her costs of representation?

## **What happened?**

[6] Ms Neru commenced employment with the company now known as Pace as a machinist in about March 2011. At the time the company was in the hands of another owner.

[7] Ms Neru was employed pursuant to a purported individual employment agreement. However, in reality this was a non-compliant (under the Act) employment contract made under s 19 of the Employment Contracts Act 1991, which was repealed in 2000. Her employment transferred to Pace on 1 April 2016. Ms Neru was not provided with a new employment agreement at that time (or subsequently) and her terms and conditions of employment remained the same.

[8] The employment relationship was generally harmonious. However, on and from May 2017, Ms Neru said Mr Lynch engaged her in several discussions about when she intended to retire. While Mr Lynch did not deny this, he had a slightly different recollection of the number of times these conversations occurred and what was said.

[9] On Ms Neru's account, she said she never gave Mr Lynch a firm indication she would be retiring but did advise him she would give him plenty of notice when she decided to retire. However, due to a mistaken belief that Ms Neru was, in fact, retiring, Mr Lynch employed a replacement for her. Mr Lynch said he was surprised to learn Ms Neru had changed her mind.

[10] In or about January 2018, due to production scheduling an agreement was reached between Pace and its five machinists, including Ms Neru, to work, in effect, what was a four day week.

[11] Also in early 2018, Mr Lynch asked Mr Wilkinson to review the business. In February 2018, Mr Wilkinson sent a letter to Mr Lynch which provided his review of the business and outlined a way forward. Mr Lynch described the review as "sobering".

*Meeting on 22 February 2018*

[12] On 22 February 2018, Mr Lynch convened a "general meeting" with production staff which comprised five machinists (including Ms Neru) and two cutters. However, two of the machinists were actually absent from the workplace. Ms Neru said there was no advance notice of the meeting. Mr Lynch said the purpose of the meeting was to give production staff a "heads up" that he was going to start a "possible" restructuring process due to the company's poor financial situation and he had engaged the services of a business consultant (Mr Wilkinson) to assist him.

[13] The machinist employed to replace the supposedly retiring Ms Neru resigned the day after this meeting.

### *Restructuring “proposal” letter*

[14] Mr Lynch subsequently provided soon to be affected staff with a letter. A review of the letter suggests the restructuring proposal was much more of a reality than a possibility. The letter, which was personally addressed to Ms Neru but undated, did not provide any financial information other than that wages represented 40% of the company’s total revenue with an expected rise to 50% and that Mr Wilkinson (who was not named in the letter) had advised that wages needed to be reduced by “at least” 100 hours a week to offset this.

[15] The letter said “further analysis” had “indicated” that this reduction in labour needed to come from the production side of the business. Ms Neru was also advised in the letter that there would be a meeting in three or four days, to which she was entitled to bring a support person, to seek her feedback “on this proposal”.

### *A number of meetings and discussions?*

[16] Mr Lynch said he held “a number” of meetings and discussions with Ms Neru after the first meeting on 22 February 2018. However, he said “regrettably” he did not take any notes. Ms Neru disputed the number of meetings and discussions she had with Mr Lynch. However, she did say during one discussion with Mr Lynch she asked why she was being singled out. Ms Neru said she also offered to reduce her hours to 30 per week.

### *The Wilkinson letter*

[17] Sometime after the meeting on 22 February 2018, two of the machinists were provided by Mr Lynch with a letter he had received from Mr Wilkinson about the restructuring. Ms Neru said she was not provided with this letter but was given a copy by one of her colleagues. The letter was Mr Wilkinson’s review of Pace. Although Mr Wilkinson would claim during the investigation meeting it was underpinned by a number of other documents and discussions.

[18] A review of this relatively short letter discloses that it sets out Mr Wilkinson's "preliminary overview of the business" and provides sparse financial information in relation to Pace, although it did acknowledge the business was "marginally profitable". As to the restructuring proposal, the letter did not specify how the production side of business was identified or chosen and why the reduction in labour deployment should be 100 hours. Evidently Mr Wilkinson also provided Mr Lynch with a "summary of process for restructure".

*Ms Neru's redundancy*

[19] On 6 March 2018, Ms Neru said she was asked by Mr Lynch to go to his office to look at a chair. Once there, Ms Neru said Mr Lynch told her she was to be made redundant. Ms Neru said she was shocked by this information and contested it by referring to her excellent work ethic. Mr Lynch could not remember the exact day of what was to be the final discussion with Ms Neru about the redundancy process. However, he suggested it was "around 6 March 2018". Mr Lynch also said he did not tell Ms Neru she was to be made redundant but rather he had not made up his mind.

[20] Ms Neru said she was so visibly upset by the exchange with Mr Lynch, she was asked by a co-worker if she was "ok". To which she responded by saying she was not. Ms Neru said that when she went home from work, she was very distressed and could not sleep. The next day, Ms Neru made an appointment to see her doctor who diagnosed her with stress and placed her on sick leave. She advised Mr Lynch she was on sick leave until 14 March 2018.

[21] Even if Mr Lynch's account is accepted that the decision to make Ms Neru redundant was not communicated to her on 6 March 2018, it was clearly communicated to her very soon afterwards. On 7 March 2018, Mr Lynch emailed Ms Neru, who was now on sick leave, a letter making her redundant with effect from 23 March 2018. A review of the letter discloses that it contains very little new information but was rather impersonally headed, as it was "Dear Margueritte Neru". Additionally, in the body Ms Neru was referred to as "Margorie". The letter also made explicit that Mr Wilkinson's proposal to reduce labour deployment in the production area by 100 hours was accepted.

[22] Due to her distressed state, Ms Neru was not required to return to work after receiving confirmation of her redundancy. Mr Lynch would provide her with a breakdown of her entitlements via email.

[23] A personal grievance for unjustified dismissal was raised for Ms Neru by her advocate on 23 March 2018.

### **The Authority's view of Ms Neru's employment relationship problem**

[24] The primary issue before the Authority is whether Ms Neru's dismissal was justified. The Court of Appeal in *Grace Team Accounting Ltd v Brake*<sup>1</sup> emphasised the importance of addressing the genuineness of a redundancy decision by showing that a non-genuine redundancy – one effected for a purpose other than genuine business needs – is unlikely to satisfy the test of justification for dismissal set out in s 103A of the Act. However, if an employer can demonstrate the redundancy was genuine and that contractual and good faith requirements under the Act have been complied with, satisfaction of the test of justification was far more assured.

[25] The Court of Appeal observed that the focus of the inquiry as to whether an employer has met the test of justification is on substantive fairness.<sup>2</sup> A key element of that inquiry in redundancy situations is whether the employer complied with its good faith obligations.<sup>3</sup> For an employer to meet its good faith requirements under the Act when proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of employees, it must provide the affected employees with access to information which is relevant to the continuation of employment and an opportunity to comment on that information before the decision is made<sup>4</sup> and consult with affected employees.<sup>5</sup>

---

<sup>1</sup> [2014] NZCA 541 (CA)

<sup>2</sup> *A Limited v H* [2016] NZCA 419 (CA)

<sup>3</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [60]

<sup>4</sup> Employment Relations Act, s 4(1A)(d)

<sup>5</sup> Employment Relations Act, s 4(1A)(c)

[26] It was clear from the evidence the redundancy process adopted by Pace was a mechanistic, paint-by-numbers approach which lacked transparency. It was unduly hasty and not supported by accurate recordkeeping by Pace or, indeed, any record keeping at all. Further, the failure by Pace to provide Ms Neru with a compliant employment agreement meant it was not possible to objectively assess its compliance with any express provisions of such an agreement dealing with restructuring and redundancy. Ultimately, I find the process adopted by Pace was at variance with its good faith obligations to Ms Neru.

[27] I further find that Pace did not comply with s 103A of the Act in effecting Ms Neru's dismissal on 23 March 2018 and this was unjustified for the following reasons.

[28] The restructuring proposal was effectively finalised before the process commenced. Even if that was not the intention of Pace, it was the practical effect of its actions (or inactions). The proposal was accompanied by insufficient information, including any real financial information, to give the consultation process meaning. Further the failure to provide sufficient information to affected employees effectively rendered the identification of alternatives to the proposal effectively meaningless. That said, given the perfunctory way Ms Neru's proposal to reduce her hours to stave off redundancy was dispatched, this may well have been the case even if further information was, in fact, provided.

[29] The selection process for redundancy and the criteria giving rise to it was not disclosed to affected employees and, indeed, on the evidence was determined after the first "heads up" meeting with employees was undertaken. This criteria was not subsequently consulted on including how it would be applied to employees and how affected employees could respond to any preliminary conclusions when applied. When, on the evidence, this criteria was changed again by Pace towards the end of the process, it was also not consulted on.

[30] Much was made by Pace during the investigation meeting about the further information, in the form of Mr Wilkinson's letter referred to above, that was provided during the process to Ms Neru. However, it was clear from the evidence the letter was inadvertently provided to Ms Neru and then not even by Pace. Further, the short letter was not simply drafted and contained the vernacular of business. It did not provide any further financial information than that already provided in the process letter and it did not make clear how the part of business Ms Neru worked in was chosen for a reduction in 100 hours of deployed labour.

[31] Ultimately, given the flaws in the process including the failure to properly justify the proposed restructuring and identify, maintain and consult about an objective criteria for assessing affected employees, it cannot be said how Ms Neru's position was ultimately identified for redundancy beyond Mr Lynch's own evidence to the Authority that a key reason for her redundancy was that Pace needed "staff who were able to commit long term". Unfortunately for Ms Neru, despite her direct evidence to the contrary, she was not seen by Pace as an employee who fell into this category. This is not the action of a fair and reasonable employer.

[32] Further, even if Mr Lynch's account is accepted that the decision to make Ms Neru redundant was not communicated to her during their discussion on 6 March 2018, it was clearly communicated to her very soon afterwards. For, on 7 March 2018 Mr Lynch emailed Ms Neru – who was now on sick leave – a letter making her redundant with effect from 23 March 2018. The haste here was unnecessary, unfortunate and ultimately not to Pace's credit. Making an employee redundant while on sick leave clearly, on the evidence, arising out of affect on them of a redundancy process is not the actions of a fair and reasonable employer. For this reason and those elsewhere explained above, Ms Neru was unjustifiably dismissed by Pace.

## **Remedies**

[33] As Ms Neru has been found to have a personal grievance, she is entitled to an assessment of remedies.

### *Lost wages*

[34] Having found Ms Neru was unjustifiably dismissed by Pace, the Authority is required to award her, even if it provides no other remedies, the lesser of a sum equal to her actual lost wages or three months ordinary time wages. After consideration of all relevant factors, I have decided that awarding Ms Neru three months ordinary time wages is the most appropriate outcome.

[35] Subject to any contribution, Pace must calculate and pay Ms Neru three months' pay including any applicable holiday pay and KiwiSaver contributions within 28 days of the date of this determination.

### *Compensation for hurt, humiliation and injury to feelings*

[36] Ms Neru sought compensation for hurt, humiliation and injury to feelings arising out of the termination of her employment by Pace. She did not specify a compensatory figure in her statement of problem.

[37] Ms Neru said her dismissal had a major impact on her life. She said she was extremely upset and failed to comprehend what had happened as she believed Pace regarded her as a good machinist and a dedicated worker. An aggravating factor was that Ms Neru was made redundant while on sick leave.

[38] Ms Neru said her dismissal made her feel sad, ashamed and embarrassed that she was not good enough to keep her job. Ms Neru said she had to attend a doctor because she was so affected by her dismissal. She was prescribed sleeping tablets and referred to a counsellor, who assisted her a little bit. Ms Neru said she wanted to choose when she retired and this was taken away from her by Pace.

[39] Taking these matters and other surrounding circumstances into account, including recent and comparable cases, it is appropriate for Pace to pay Ms Neru \$20,000 under s 123(1)(c)(i) of the Act.

### *Contributory conduct by Ms Neru?*

[40] Having found that Ms Neru was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act, despite this being a redundancy situation, to consider whether she contributed to the situation giving rise to her grievance.

[41] There was no evidence before the Authority of any conduct by Ms Neru which contributed to the termination of her employment by Pace. Consequently, no deduction for contribution was needed.

### **Summary**

[42] Pace must settle Ms Neru's personal grievance for unjustified dismissal by paying her the following amounts within 28 days of the date of this determination:

- (i) Three months' pay including any applicable holiday pay and KiwiSaver contributions; and
- (ii) \$20,000 compensation for hurt, humiliation and injury to feelings.

### **Costs**

[43] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Neru has 28 days from the date of this determination in which to lodge and serve a memorandum on costs. Pace has a further 14 days in which to lodge and serve a memorandum in reply.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.<sup>6</sup>

Andrew Dallas  
Member of the Employment Relations Authority

---

<sup>6</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.