

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA153

3144848

BETWEEN

STUART PHILLIPS  
Applicant

AND

CRAIG MCLEOD EUROPEAN  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Robert Morgan, advocate for the Applicant  
Rose Alchin, counsel for the Respondent

Investigation Meeting: 10 February 2022 by Zoom

Submissions Received: 14 February 2022 from the Applicant  
16 February 2022 from the Respondent  
18 February 2022 from the Applicant

Date of Determination: 21 April 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Craig McLeod European Limited (CME) is a car dealership in Hamilton. Craig McLeod is CME's sole director and effective owner (as Trustee via his family trust).

[2] Stuart Phillips was employed by CME as the Sales Manager from November 2019 until 30 April 2020. Mr Phillips was made redundant and he has claimed that was an unjustified dismissal. Mr Phillips withdrew a wage arrears claim relating to four unpaid days in lieu he had worked over the December 2020/January 2021 period.

[3] CME said that Mr Phillips' redundancy dismissal was justified. CME said the disestablishment of his position was a genuine business decision that was necessary due to issues CME was facing as a result of Covid-19 and the 2020 lockdowns.

### **Authority's investigation**

[4] The Authority held an investigation meeting on 10 February 2022 that was conducted by Zoom. Mr Phillips and Mr McLeod filed witness statements and they were both questioned and cross-examined about their evidence. The parties also filed submissions after the investigation meeting.

### **Background**

#### *Lockdowns*

[5] In March 2020 New Zealand went into a nationwide lockdown due to Covid-19. A Level 4 lockdown commenced on 25 March 2020 that lasted four weeks and five days. During that time CME could not trade.

[6] On 27 April the country moved to a Level 3 lockdown, that permitted CME to do contactless sales only. That meant CME's gates remained locked, as face to face contact with members of the public was not permitted. On 13 May 2020 New Zealand moved to a Level 2 lockdown.

#### *Staff meetings*

[7] On 25 March 2020, in response to notice from the Government about the Level 4 lockdown, CME had a meeting with all staff. The purpose of the meeting was to discuss the lockdown and staff wages during the lockdown period.

[8] As a result of that staff meeting CME and its employees agreed that they would be paid their full wages for the four week Level 4 lockdown, and staff would use one week of their annual leave during those four weeks. CME also applied for and received the Government wage subsidy of \$585.50 per week per employee.

[9] Although Mr Phillips initially was reluctant to use one week of his annual leave, after further discussions between the parties, he did agree to that.

[10] When the Government announced that the Level 4 lockdown would be extended, CME advised staff it could no longer afford to keep paying their full wages, so they would receive the wage subsidy only.

[11] Employees who were struggling to pay their bills were invited to speak to Craig McLeod personally, so arrangements could be made to support them. As a result of that, one minimum wage employee who was unable to earn commission during the lockdown, and who was dependent on his wages, had an individual arrangement made for them.

#### *Impact of lockdown on CME*

[12] CME made no profit over the lockdown periods and it did not receive any sales enquiries at all. In addition to a lack of inquiries and sales, CME had also purchased approximately 150 vehicles in Japan in February 2020 before a law change affecting those vehicles came into force in New Zealand in March 2020.

[13] CME had to pay for the imported vehicles as well as the normal costs associated with importing vehicles, such as customs fees and shipping. In addition, CME had to increase its limit relating to foreign exchange, as the New Zealand dollar to the Japanese yen rate (which it had purchased vehicles in) was falling significantly due to the Covid-19 global risk.

#### *CME's attempt to renegotiate Mr Phillips' remuneration*

[14] Mr Phillips remuneration consisted of a salary of \$100,000 per annum plus the use of a company vehicle, a fuel card and a mobile phone. He did not receive commission.

[15] Mr McLeod identified that Mr Phillips's salary was a fixed outgoing that CME could not continue to incur in the face of the lockdowns, lack of sales activity and ongoing Covid-19 uncertainty. Mr McLeod believed that \$100,000 salary was unsustainable when no sales were being made, the gates to the business were kept shut and there were no customer appointments.

[16] Mr McLeod said that, with the aim of keeping Mr Phillip and all other staff employed, he raised the option with Mr Phillips of renegotiating his remuneration. They met to discuss the situation on 30 April 2020. Mr McLeod told Mr Phillips that CME needed to restructure his position and that if he wanted to remain employed he would need to agree to changes to his remuneration.

[17] Mr McLeod proposed to Mr Phillips that a new remuneration structure be put in place for him, initially for three months, to enable CME to re-evaluate its financial situation in light of the lockdowns, Covid-19 issues, the economy and how the business was performing after the lockdowns had ended.

*Proposed new remuneration structure*

[18] CME proposed:

- (a) Lowering Mr Phillips' base salary from \$100,000 to \$31,200 per annum;
- (b) Increasing his hours of work by one day per fortnight;
- (c) Paying him commission of \$250 per vehicle he sold when under the current remuneration he was not paid any commission.
- (d) Mr Phillips would retain his benefits such as the use of a company vehicle, fuel card and phone.

*Mr Phillips' response to proposed changes*

[19] Mr Phillips' initial reaction was that he was not attracted to the proposed changes to his remuneration. However, he agreed to discuss it with his wife and then provide his response.

[20] Mr Phillips discussed it with his wife and they worked out he would need to sell six to seven vehicles a week for the commission he would receive under the proposed new remuneration structure to make up for the base salary he would have lost. Mr Phillips and his wife decided that was not acceptable.

[21] Mr Phillips told the Authority he was prepared to take a 20 percent reduction to his income. Mr Phillips said he made a counter-offer to that effect but Mr McLeod did not recall that occurring and there are no documents to support that counter-offer was made.

[22] The Authority concluded it was more likely than not that the counter offer did not occur. The Authority's view is that if a counter offer had been made it would have been referred to in the text messages the parties exchanged on 29 and 30 April 2020.

[23] However, none of the text messages Mr Phillips sent referred to a counter offer or a 20% deduction in salary being agreed and there was no evidence of other communications

between the parties over that period, outside the exchange of text messages. Nor did any of Mr McLeod's texts refer to it.

[24] After Mr Phillips declined to agree to the proposed remuneration changes, Mr McLeod texted him back in an attempt to get Mr Phillips to change his mind. Mr McLeod's text said:

[...] I believe with your ability and the large level of stock we carry you would potentially earn annually around \$75-\$80,000+ car etc. If unacceptable then unfortunately your current position is untenable and will be made redundant. I thank you for work done and wish you all the best. I can arrange collection of keys and car or you can drop off. Let me know.

[25] Mr Phillips said that he viewed that text from Mr McLeod as a dismissal, because it seemed final in terms of he either accepted the pay decrease or he would be dismissed.

[26] Mr Phillips therefore responded to Mr McLeod by saying his family could not afford that drop in income along with a request to work extra hours, so he was unable to accept any change to his current salary. Mr Phillips ended his text by saying:

Can you please email me how much annual leave I have accrued and also could you please remove my cell phone from the company plan so that you no longer have that bill. I am happy to drop the keys and car off for you. [...]

## **Issues**

[27] The following issues are to be determined:

- (a) Was Mr Phillips' dismissal justified?
- (b) If not, what if any remedies should he be awarded?
- (c) What, if any, costs and disbursements should the successful party be awarded?

## **Was Mr Phillips' dismissal justified?**

### *Justification test*

[28] Justification is to be assessed in accordance with the statutory justification test in s 103A of the Employment Relations Act 2000 (the Act).

[29] Section 103A(2) of the Act requires the Authority to objectively assess whether the way in which CME acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Phillips was made redundant. That means

justification is to be assessed based on the information that was available on 30 April 2020, being the date Mr Phillips was made redundant.

[30] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. This includes the good faith requirements imposed by s 4(1A) of the Act and each of the four minimum procedural fairness tests in s 103A(3) of the Act. Failure to do so may fundamentally undermine an employer's ability to meet the requirements of the s103A(2) justification test in the Act.

[31] In assessing justification the Authority may have regard to other factors it considers appropriate, in accordance with s 103A(4) of the Act. Section 103A(5) of the Act prevents the Authority from finding that a dismissal is unjustified solely because of minor process defects that did not result in unfairness to the employee.

#### *Good faith*

[32] Section 4(1A) of the Act requires an employer that is proposing to make a decision that may adversely impact an employee's ongoing employment to provide the employee with access to relevant information and an opportunity to comment on it, before a final decision is made.

[33] CME failed to adequately comply with its good faith obligations under s 4(1A) of the Act. Although Mr McLeod had spoken to Mr Phillips about changing his remuneration, these were informal discussions that were not documented. CME failed to put a proper restructuring proposal to Mr Phillips to respond to.

[34] The text messages were insufficient to constitute a restricting proposal that Mr Phillips could have taken to get advice on, had he wanted to do so. The text Mr McLeod sent Mr Phillips that said if the proposed changes to his remuneration was "[...] *unacceptable then unfortunately your current position is untenable and will be made redundant*" fell short of the level of detail s 4(1A) of the Act required an employer to give an employee whose job was potentially at risk.

[35] The failure by an employer to provide the employee with a copy of the relevant information the proposal was based on makes it difficult for an employee to be able to meaningfully respond to the proposal.

*Section 103A(3) procedural fairness tests*

[36] The Authority was satisfied that CME sufficiently investigated its need to make Mr Phillips' role redundant, so therefore met its obligations in s 103A(a) of the Act. However, CME did not properly raise its concerns with Mr Phillips before dismissing him for redundancy, contrary to the requirement in s 103A(3)(b).

[37] CME never put a restructuring proposal to Mr Phillips, it just verbally asked him to agree to a change in his remuneration structure and then when he indicated that he did not agree he was advised via text that he would be made redundant. That text was insufficient for CME to have adequately raised its concern (i.e. the proposed disestablishment of his position) with Mr Phillips in terms of what s 103A(3)(b) of the Act required.

[38] CME's failure to put a restructuring proposal to Mr Phillips meant it also failed to give him a reasonable opportunity to respond to its concerns (namely its proposal that his position needed to be disestablished to ensure the financial viability of CME), contrary to the requirement in s 103A(3)(c) of the Act for CME to do so.

[39] The statement in the 30 April 2020 text Mr McLeod sent to Mr Phillips (that his position was untenable and he would be made redundant) was not a proposal, it was an already decided outcome.

[40] It follows that CME did not genuinely consider Mr Phillips' explanation to the proposed disestablishment of his position because that proposal was never properly put to him to respond to, in breach of s 103A(3)(d) of the Act.

[41] The outcome of this failure can be seen in the dispute between Mr Phillips and Mr McLeod about whether or not Mr Phillips counter offered a 20% reduction to his salary. Had there been a proper restructuring proposal, and had Mr Phillips been given an opportunity to respond to that, then this feedback of a 20 percent salary decrease to avoid his redundancy could and would have likely been properly considered.

*Other appropriate factors – s 103A(4) of the Act*

[42] Mr Phillips' claim that he was not provided with a written employment agreement at any time during his employment was disputed by CME. CME provided the Authority with a template employment agreement it said all employees were required to sign. CME said that

Mr Phillips had signed an employment agreement based on the template, that had been adapted to his situation, but that his signed agreement had gone missing.

[43] The template CME provided to the Authority contained the following redundancy clause:

**Redundancy**

Redundancy is when an employee's role is no longer needed.

If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in ending employment. They will not receive redundancy compensation or other redundancy entitlements.

[44] CME did not comply with the contractual obligations it said applied to Mr Phillips. CME failed to follow a good faith restructuring process and it failed to give Mr Phillips two weeks' contractual notice, or pay in lieu, before making him redundant.

*Section 103A(5) of the Act*

[45] The Authority finds that s 103A(5) of the Act does not apply. The process defects in this case were pervasive, serious and fundamentally undermined the procedural fairness of Mr Phillips' dismissal.

*Finding on procedural fairness of the redundancy*

[46] CME's dismissal of Mr Phillips was procedurally unfair. CME breached its contractual and good faith obligations and it only met one of four the minimum procedural fairness tests required by s 103A(3) of the Act.

*Substantive justification*

[47] The Authority accepted Mr McLeod's evidence that he was genuinely very worried about the future of CME. It was facing a black swan event at the same time it was carrying an unusually high level of stock. The global outlook at the time was grim and future sales, and therefore income, for CME were highly uncertain.

[48] By 30 April 2020 CME was highly exposed, so it was understandable that Mr McLeod genuinely believed he had to reduce outgoings as much and as quickly as possible to ensure the ongoing viability of the business. A fair and reasonable employer would also have acted to reduce its costs in such circumstances.

*Unusually high stock levels*

[49] Despite having no profits for an extended period CME had a larger than normal number of vehicles both at its dealership and ones it had financed for another car dealer. CME had over 150 Toyota Hiace vans that traditionally sold to tradespeople such as plumbers, builders, electricians.

[50] The market that the recently purchased Toyota HiAce vans had been aimed at was uncertain due to Covid concerns, and it was predicted that the economy would go into decline, thereby dramatically reducing demand for the type of vehicles that CME held.

[51] Due to Covid-19 this stock was not being moved, so there were no profits being generated while at the same time CME still had to cover its normal outgoings such as wages, rent, debt servicing, utilities, phones, overheads, as well as paying for the 445 vehicles that had been purchased in Japan in February 2020.

[52] CME had purchased 150 vehicles in Japan in February 2020 ahead of a law change in March 2020 that affected what vehicles could be imported into New Zealand. That meant CME was carrying total stock numbers of approximately 360 units.

[53] In addition to its own high levels of stock, part of CME's business was to provide financial floor plan facility to another car dealer. CME funds that other dealer's stock. That other dealer was also in Japan the week before Mr McLeod was, where it purchased 295 vehicles, in addition to the 300 vehicles it already had in stock. All of the other dealers unusually high levels of stock had also all been funded by CME.

*Steps taken to address costs*

[54] To reduce CME's outgoings Mr McLeod stopped receiving a wage and instead chose only to be paid the wage subsidy for 12 weeks. Mr McLeod also applied for a multiple seven figure loan to ensure that CME could cover its overheads and for the government subsidy to help it pay its employees' wages.

[55] CME attempted to retain Mr Phillips' position by renegotiating his remuneration but when that was not successful it restructured the business by disestablishing his position. That decision resulted in Mr Phillips being made redundant. Mr McLeod absorbed Mr Phillips' duties himself within his existing role, without being paid. That decision meant the work was

covered at no extra cost by Mr McLeod working 7 days a week in order to ensure CME's business survived.

*Genuineness of the restructure*

[56] Mr McLeod was really worried for the future of the business because the whole situation was such an unknown. CME was concerned about the economic outlook for New Zealand and about how sales would go after the lockdowns. Those concerns resulted in CME restructuring its business by disestablishing the Sales Manager role in order to keep the business afloat and to keep other staff employed.

[57] The restructure generated savings of \$100,000 per annum plus the cost of the benefits Mr Phillips received. That was significant and resulted in immediate cost savings of almost \$2,000 per month.

[58] Mr Phillips' position was selected because he was the highest paid employee, his salary was not linked to him generating income (in the way the other commission based role was) and Mr McLeod could absorb Mr Phillips duties himself by working longer hours.

[59] There was no other way for CME to have achieved such significant and immediate cost savings. It made sense for CME to cut its fixed costs as much as possible to ensure its survival in the face of such uncertain times.

*Finding on substantive justification*

[60] The Authority accepts that CME had genuine commercial reasons based on reasonable grounds for disestablishing Mr Phillips' position. CME had an unusually large amount of stock to sell at the same time as being financially exposed to levels of risk and uncertainty that Mr McLeod had never encountered in all his many years of business.

[61] The Authority is satisfied that CME has discharged its onus of establishing that the disestablishment of Mr Phillips' Sales Manager, that resulted in his dismissal on the grounds of redundancy, was substantively justified.

[62] CME had good reasons to disestablish Mr Phillips' role. CME faced the stark reality of needing to make immediate cost reductions to ensure the financial viability of its business. It

was a time of real financial crisis for CME, so it was understandable it decided to disestablish the Sales Manager role.

[63] The Authority finds that was a decision that was open to a fair and reasonable employer in all the circumstances.

*Outcome of dismissal grievance*

[64] CME's dismissal of Mr Phillips on the grounds of redundancy was substantively justified but it was carried out in a procedurally unfair manner. CME's failure to comply with its contractual and good faith obligations or with all of its minimum procedural fairness requirements made his dismissal procedurally unjustified.

[65] The 20% salary reduction Mr Phillips said he had proposed (but which the Authority was not satisfied to the required standard of proof had actually occurred) would not have achieved the required level of immediate savings.

[66] The Authority therefore finds that even if a fair and proper process had been undertaken, and CME had complied with its contractual and good faith obligations to Mr Phillips, its decision to disestablish the Sales Manager position, resulting in Mr Phillips' redundancy would still have occurred.

**What, if any, remedies should be awarded?**

*Lost remuneration*

[67] Mr Phillips is not entitled to lost remuneration. The Authority considered it more likely than not that, even if a fair and proper process had been followed, Mr Phillips' position would still have been disestablished so he would still have been made redundant.

[68] Because Mr Phillips' dismissal was substantively justified but procedurally unfair, he is not entitled to an award of lost remuneration. His claim for lost remuneration therefore did not succeed.

*Distress compensation*

[69] Mr Phillips is entitled to an award of distress compensation. He gave evidence to the Authority about the impact his dismissal had on him. Mr Phillips described the strain that he

and his family had been under and the uncertainty he had faced in seeking alternative employment.

[70] Because of the lockdown issues, he said employers were reluctant to take on staff until the wage subsidy had finished after the Queen's Birthday weekend. Mr Phillips was left feeling empty and while he did not seek medical help, his self-esteem and self-confidence were at the lowest they had ever been.

[71] Mr Phillips has turned things around now, with a job with a supportive employer that he really enjoys. However, he told the Authority that he still feels hurt and is suffering the financial consequences of his redundancy.

[72] In assessing the appropriate level of distress compensation the Authority noted that Mr Phillips had other factors in his personal life that were creating considerable stress for him around the time he was made redundant.

[73] Bearing that in mind, Mr Phillips is awarded \$8,000 distress compensation under s 123(1)(c)(i) of the Act to compensate him for the hurt, loss of dignity and injury to feelings he suffered because he was made redundant in a procedurally unfair manner.

#### *Notice pay*

[74] Under the terms of the employment agreement that CME said Mr Phillips had signed (but which could not be located) he was entitled to two weeks' contractual notice. He has not received that notice pay he was contractually entitled to.

[75] CME's submission that, because Mr Phillips did not specifically plead a "notice pay" claim in his statement of problem, he is not entitled to any paid notice, did not succeed.

[76] Mr Phillips's statement of problem included a claim for "*lost wages*". The notice pay was a contractual entitlement that is in effect 'lost wages'. CME is therefore ordered to pay Mr Phillips two weeks' salary in lieu of notice.

#### **Summary of outcome**

[77] Within 28 days of the date of this determination CME is ordered to pay Mr Phillips:

- (a) \$8,000 under s 123(1)(c)(i) of the Act to compensate him for the distress he suffered because his redundancy was undertaken in a procedurally unfair manner;
- (b) \$3,846.15, being two weeks' salary as the required contractual notice; and
- (c) \$307.69 being 8% holiday pay on the notice pay he has been awarded.

**What costs should be awarded?**

[78] Mr Phillips, as the successful party, is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs by agreement. However, if that is not possible then Mr Phillips has 14 days within which to file a costs application and CME has 14 days within which to file its response.

[79] Costs will not be considered outside of this timetable, except with the prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**