

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 322
3121992

BETWEEN MAURICE ROCHE
Applicant

AND CRESWICK GARAGE (2004) LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Matt Belesky, counsel for the Applicant
John Goddard, counsel for the Respondent

Investigation Meeting: 26 July 2021 at Wellington

Submissions Received: At the investigation meeting

Date of Determination: 27 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Maurice Roche, claims he was unjustifiably dismissed by the respondent, Creswick Garage (2004) Limited (Creswick), in May 2019.

[2] Mr Roche also claimed, albeit only in the alternate, that Creswick unlawfully repudiated the employment contract and that it breached the duty of good faith. That said, Mr Roche accepts the last claim is integral to the dismissal allegation and as a result it was agreed it not be treated as a separate matter.

[3] Creswick accepts it dismissed Mr Roche but contends the decision was justified on the grounds of redundancy.

[4] Creswick also raised two additional defences but both have now been withdrawn. They were that Mr Roche's claims had not been raised within the required 90 days by reason of a lack of specificity and that he was a casual employee.

Background

[5] Mr Roche was employed by Creswick as an Accounts Administrator on 7 June 2016. The employment agreement states the engagement was casual but both parties now accept this subsequently changed and the arrangement became permanent. Mr Roche was engaged to work 20 hours a week and normally attended on all five days. That said it is agreed the hours varied and for a period he worked as many as 35 a week but it is also accepted that at the time of dismissal Mr Roche's hours had reverted to the original 20.

[6] It is Creswick's position Mr Roche's engagement was attributable to the fact the business had expanded by way of the purchase of a second garage, Pembroke Motors (Pembroke). Prior to that the accounts administration function had been performed by Creswick's sole director and majority shareholder, Rajesh Parbhu. That said, it is accepted this was not made clear to Mr Roche and is not apparent from the employment agreement.

[7] While Creswick has expressed some concern about the way in which Mr Roche performed his duties, nothing of significance occurred till April 2019. On an unspecified date that month there was a meeting attended by Mr Roche, Mr Parbhu, the mechanic responsible for Pembroke Motors and Mr Parbhu's father who retained various functions and interests in the business. Mr Parbhu states various concerns were discussed, particularly the fact there were financial issues with respect to Pembroke. This included a lack of money in the current account which was being propped up by transfers from Creswick, and issues with respect to unpaid creditors and unpaid suppliers.

[8] Mr Roche says the meeting was nothing more than a discussion about various operational issues and takes offence at what he now sees as criticism of his performance. He says that while he accepts there were some issues a number of them were historic and predated his presence and none were critical or even major.

[9] Mr Parbhu disagrees about the significance of the issues but accepts he never raised the possibility they constituted a threat to Mr Roche's continued employment.

[10] It was around that time the mechanic at Pembroke resigned. Mr Parbhu says he made a number of attempts to find a replacement but having been unsuccessful and on the advice of his accountant, decided to cease operating Pembroke. He says this totally undermined the rationale for having engaged Mr Roche, namely to cope with work generated by the expanded business which was no longer extant. He says when he combined that with a desire to reduce costs and the advice from his accountant, he concluded Mr Roche was surplus to requirements and his employment should be discontinued.

[11] That that was to occur was imparted to Mr Roche via a letter dated 6 May 2019. It was simply left on the keyboard of Mr Roche's computer and reads:

Dear Maurice,

Due to company financial pressure I can no longer afford to keep you as an employee.

I am giving you 3 weeks redundancy notice from this date.

Your final working day will be 24th May 2019.

Regards,

Raj Parbhu
OWNER

[12] The parties agree there was no discussion or consultation about this proposed course of action though Creswick argues Mr Roche had enough knowledge of its finances that this should not have been a surprise. Mr Roche disagrees and says it *blindsided* him.

[13] Shortly after Mr Roche received the letter, Mr Parbhu telephoned and asked Mr Roche to pick him up from a place to which he had delivered a vehicle. Mr Roche did so saying he thought this might provide an opportunity for Mr Parbhu to raise the issue and discuss it with him. The parties agree that did not happen with Mr Parbhu saying he felt a discussion inappropriate till Mr Roche had had time to digest the letter and its import.

[14] The parties agree neither attempted to raise the issue between then and Mr Roche's departure, by agreement, a day earlier than originally planned on 23 May.

[15] A week later Mr Roche raised his personal grievance and on 17 June 2019 he commenced work with a new employer. While that job paid more than Mr Roche received at Creswick it was intended to be temporary but as events transpire he has remained in employment since.

Discussion

[16] As already said Mr Roche claims he was unjustifiably dismissed. Creswick accepts the fact of dismissal and therefore accepts it must justify the dismissal. The justification relied upon is redundancy.

[17] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[18] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of s 103A are enshrined in statute and a number have a procedural focus.¹

[19] Reiterating the onus is on Creswick to justify its decision I have to note its evidence with respect to substantive justification was sparse. Essentially it amounted to an assertion that a need to reduce costs as a result of financial issues with Pembroke and its closure meant Creswick had been advised to revert to the previous practice of having Mr Parbhu perform the accounts administration role though again I note the link between Mr Roche's employment and Pembroke was never made clear. In support of the assertion this was necessary Creswick produced its financial accounts. Unfortunately for Creswick those for the year ending only a few weeks prior to the decision to dismiss Mr Roche show a relatively comfortable situation. The company had a high gross surplus margin (over 45%), was profitable and capable of paying a significant shareholder salary.

[20] Creswick's argument the next years accounts (those for the year ending 31 March 2020) should be used fails to convince. They are not contemporaneous to the decision to dismiss Mr Roche but in any event they also fail to show a parlous situation. Indeed the profit improved despite paying a significantly enhanced shareholder salary that year.

[21] Additional, and as far as the substantive defence goes fatal, problems arise as Mr Parbhu attributes Mr Roche's termination to the situation at Pembroke.² Pembroke, while an

¹ Employment Relations Act 2000 at ss 103A(3)(b) to (d)

² Mr Parbhu's brief of evidence at [32]

associated company, was not Mr Roche's employer. As already said it was never made clear his employment was dependent on Pembroke's success and in any event Creswick produced absolutely no evidence about Pembroke's financial state.

[22] While I accept the employer is entitled to make reasonable business decisions³ that right is fettered. The fetter is the procedural requirements enunciated by both ss 4(1A)(c) and 103A(3).

[23] Section 103A(3) requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, that the employer put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind. In a redundancy setting that means consult.

[24] Creswick concedes its process fell well short of meeting the above requirements though it attempts to justify its failure to consult by referring to its small size and a lack of experience in matters such as these. For three reasons this argument fails to convince.

[25] First, Creswick conceded it could have sought advice but chose not to in order to curb spending.

[26] Second, I question whether the resource defence can apply in a redundancy setting. That is because there is a further statutory overlay. Section 4(1A)(c) of the Act requires an employer who is considering an action which might have an adverse impact on the employees' continued employment give that employee access to relevant information and an opportunity to comment before the decision is made. It is well accepted this requirement has a special meaning in a redundancy setting, namely mandatory consultation, and I note the resource defence is not cited in this section.

[27] Even if that were not the case a lack of resource only excuses a deficiency if its effect is minor and did not result in the employee being treated unfairly.⁴ Dismissal is not minor and given the total absence of consultation I must conclude Mr Roche was treated unfairly.

[28] Finally I note two further arguments tendered by Creswick. The first is that Mr Roche should have had some inkling of a potential redundancy given the April meeting and his

³ For example *Simpson Farms Limited v Aberhart* [2006] ERNZ 825 at [67]

⁴ Section 103A(5) and *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013] NZEmpC 152 at [94] and [95]

knowledge of the accounts. Mr Parbhu's admission he never suggested the possibility the situation could result in redundancy undermines the submission regarding the April meeting and again I note Pembroke was not Mr Roche's employer. With respect to the accounts, I accept Mr Roche's assertion he was an administrator and not the accountant with that role being performed by an external provider. In any event the evidence makes it clear he would not have had a complete picture as he had no knowledge of the affairs of associated companies.

[29] The second is a submission Mr Roche failed to raise his concerns during the notice period and had he done so a reconsideration might have occurred. For two reasons I disregard that. The duty to consult is Creswick's, not Mr Roche's and in any event it was Mr Parbhu's evidence that ... *if I had followed a proper process, the outcome would have been the same...*⁵

[30] Given an admitted failure to comply with the procedural requirements and an unproven substantive justification I conclude Creswick has failed to justify Mr Roche's dismissal.

[31] Given that conclusion the alternate claim of unlawful repudiation need not be discussed.

[32] The conclusion the dismissal is unjustified leads to the question of remedies. Mr Roche seeks lost wages and a compensatory payment.⁶

[33] With respect to lost wages s 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. In this case the actual loss is 3 weeks and 1 day. That must, given s 128(2), be payable with the amount being \$1,382.40.

[34] No specific amount was pleaded with respect to compensation and a very broad range, \$10,000 to \$40,000, was cited in submissions.

[35] In support of his claim Mr Roche gave evidence of the physical manifestations of the impact of the dismissal as well as the hurt and disappointment caused by Creswick's actions. Included there-in was reference to the fact Creswick has, in various statements before the Authority, criticised Mr Roche's performance⁷ and stated Pembroke's demise was *largely due* to Mr Roche's failures.⁸ While Mr Parbhu tried to distance himself from these claims when giving oral evidence and denied such beliefs played any part in the decision to dismiss, I accept

⁵ Above n 2

⁶ Section 123(1)(c)(i) of the Employment Relations Act 2000

⁷ For example Statement in Reply at 2(f)

⁸ Statement in Reply at 2(g)

the fact of these largely unsubstantiated accusations increased the hurt felt by Mr Roche and this he expressed rather strongly.

[36] There was also evidence about a strong sense of injustice which remains and a feeling of worthlessness which impacted his drive, motivation and relationship with family who he felt he had let down. Mr Roche also evidenced stress which resulted from the loss of ongoing income, albeit temporarily as it turned out, and here I have to note his evidence has to be balanced, to some extent, by the fact he recovered quickly and attained replacement employment with alacrity.

[37] Having considered the evidence and current award levels, I consider \$15,000 appropriate.

[38] Having concluded Mr Roche was unjustifiably dismissed and remedies accrue I must also consider whether they should be reduced due to contributory conduct.⁹ The answer must be no. Creswick's justification is redundancy which is, by definition, a no-fault situation.

Conclusion and Orders

[39] For the above reasons I conclude Mr Roche has a personal grievance in that he was unjustifiably dismissed. As a result I make the following orders the respondent, Creswick Garage (2004) Limited, pay Maurice Roche:

- (i) \$1,382.40 (one thousand, three hundred and eighty two dollars and forty cents) gross as recompense for wages lost as a result of the dismissal; and
- (ii) A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[40] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

⁹ Section 124 of the Employment Relations Act 2000