IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2024] NZERA 307
3212279

	BETWEEN	RICK TASKER Applicant
	AND	PARKERS BEVERAGE COMPANY LIMITED Respondent
Member of Authority:	Rowan Anderson	
Representatives:	Hayley Johnson, advocate for the Applicant No appearance for the Respondent	
Investigation Meeting:	4 April 2024 in Napier	
Submissions received:	At the investigation meeting from the Applicant 23 April 2024 from the Respondent	
Determination:	24 May 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rick Tasker was employed by Parkers Beverage Company Limited (PBCL) as a Production Supervisor commencing on 25 August 2021.

[2] On 16 December 2022, Mr Tasker was provided a letter informing him that PBCL was undertaking a review that might result in a restructuring of the business, including the disestablishment of his role. Mr Tasker contends that he was dismissed from his employment on 20 December 2022 at a meeting during which he provided feedback as to the proposed restructuring.

[3] Mr Tasker claims that he was unjustifiably dismissed and that PBCL failed to provide information relevant to its proposal and the purported reasons it, that to the

extent it consulted that the consultation was inadequate and that his feedback was not genuinely considered, and that PBCL failed to act in good faith. Mr Tasker also claims that he was unjustifiably disadvantaged by a failure by PBCL to make payment of wages and holiday pay. He contends that PBCL also breached obligations owed in relation to the provision of wage and time records and holiday pay and seeks that penalties be imposed upon PBCL.

[4] PBCL denies that Mr Tasker was unjustifiably dismissed and says that a final decision was not made until the week after the meeting on 20 December 2022. It also denies Mr Tasker's claim that wages are owed and denies the breaches claimed.

Issues

(a) Was Mr Tasker unjustifiably dismissed (considering both the substantive basis for redundancy and procedural requirements)?

(b) Was Mr Tasker unjustifiably disadvantaged in his employment having regard to:
  - (i) Any breach of good faith; or
  - (ii) Any failure by PBCL to make payment of wages and holiday pay or to provide wage and time record.

(c) If PBCL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - (ii) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

(d) Has PBCL breached s 130(2) of the Act by failing to provide Mr Tasker's wages and time records as required? If so, should a penalty be imposed upon PBCL?

(e) Has PBCL breached s 27 of the Holidays Act 2003 by failing to make payment to Mr Tasker of holiday pay as required? If so, should a penalty be imposed upon PBCL?

(f) Should either party be required to contribute to the costs of representation of the other party?

The Authority's Investigation

[5] An investigation meeting was scheduled to take place in Napier on 28 July 2023. Doug Speedy, Managing Director of PBCL attended the venue advising that PBCL had been put into voluntary administration. A review of the Companies Register at that time did not indicate that that was the case. However, after being provided an opportunity to make enquiries, Mr Speedy confirmed that the change was being made. The investigation meeting was adjourned and a Minute issued noting that the Companies Register confirmed that Parkers Beverage Company Limited was placed in voluntary administration from 28 July 2023.

[6] A review of the Companies Register on 17 January confirmed PBCL was no longer in voluntary administration. As such, I advised the parties of my view that s 239ABE of the Companies Act 1993 no longer operated such as to prevent the continuation of the Authority's investigation. The investigation meeting was rescheduled to take place on 4 April 2023 in Napier.

[7] PBCL lodged a statement in reply of sorts but did not provide any written witness statements and did not otherwise provide the Authority with details of any defence to the claims made prior to the investigation meeting. Directions issued by the Authority as to the lodgement of written statements and provision of information were not complied with by PBCL.

[8] Mr Speedy, a director of PBCL and the individual on record for PBCL having lodged the statement in reply communicated with the Authority by email, including as to the following:

(a) asserting on 17 January 2024 that he was not going to participate in the Authority's process because of alleged blackmail and stress;
(b) asserting, on the same date, that he was no longer employed by PBCL;
(c) on 24 January 2024, asserting that he would be overseas and could not attend on the date of the investigation meeting; and
(d) taking issue as to whether Mr Tasker had requested the proceedings be continued.

[9] PBCL were, by way of a Minute issued on 21 March 2024, put on notice of the following:

(a) that it had not complied with the directions of the Authority and had not otherwise provided information relevant to the Authority's investigation. Any attempt to do so without leave would have cost implications (for example, if documents are produced, or evidence is sought to be given, at a late stage requiring further delays);

(b) that, by operation of s 239ABE of the Companies Act 1993, the Authority's investigation had been unable to proceed previously but that the applicant had not requested that the proceedings be discontinued, and that notice that it wished to progress the proceedings was not required in order for the Authority's investigation to proceed;

(c) that no application for adjournment had been received from PBCL, nor any information received which would satisfy the Authority that an adjournment was necessary in the circumstances.

(d) that Mr Speedy, prior to asserting unavailability, had communicated that he would not participate in the Authority's investigation.

(e) That it was a matter for PBCL to decide who or how it would be represented and that it had had amble opportunity to make relevant arrangements and to communicate with the Authority;

(f) that Mr Speedy's current employment status with PBCL had no bearing on the Authority's investigation; and

(g) that any request for an adjournment, or variation of the date for the investigation meeting would need to be supported by substantive reasons and, where applicable, evidence of unavailability and/or exceptional circumstances.

[10] PBCL were provided a further opportunity to provide any written statements and documents by 26 March 2024. It did not do so, nor did it seek an adjournment or provide information in support of Mr Speedy's overseas travel having been pre-planned. As such, PBCL were put on notice that the investigation meeting would proceed as scheduled on 4 April 2024.

[11] Written witness statements were received from Mr Tasker and Jesse Ryder in support of Mr Tasker's claims. The written statements were lodged in accordance with directions issued and in advance of the investigation meeting. Both witnesses attended the investigation meeting and answered questions under oath or affirmation.

[12] There was no appearance for PBCL at the investigation meeting.

[13] At the investigation meeting, Mr Tasker provided written submissions. A copy of those submissions was served on PBCL. Notwithstanding its lack of participation, PBCL was provided an opportunity to provide any submissions in response. It did not do so within the timeframe initially directed and later sought an extension to that timeframe. PBCL lodged written submissions on 23 April 2024 by way of email to the Authority.

[14] 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 of evidence and submissions received.

Was Mr Tasker unjustifiably dismissed from his employment?

[15] Mr Tasker claims that he was unjustifiably dismissed from his employment.

[16] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether PBCL's actions, and how PBCL acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.[1]

[17] Justification requires the consideration of both substantive and procedural fairness. The onus is on PBCL to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[18] Mr Tasker's evidence is that he received a letter on 16 December 2022 advising of a possible redundancy situation and inviting him to a meeting to discuss any ideas as to how to help PBCL as it was struggling.

[19] The letter of 16 December 2022 recorded that PBCL were undertaking a formal review that might result in a restructuring. Mr Tasker's role, along with many others, was identified as one that might be disestablished. The letter cited a several reasons for the review and possible restructuring. Those reasons included cashflow issues, quality

[1] Employment Relations Act 2000, s 103A.

issues, labour costs, and the economic outlook generally. The letter also noted that while some steps had already been taken to address the financial pressures, that they had not been sufficient to address the issues.

[20] The proposal involved the possible disestablishment of all roles except for a Sales Administration & Logistics role and the General Manager and Managing Director roles. The letter claimed that the matter was confidential and that Mr Tasker was not to discuss it with his colleagues. Mr Tasker was invited to attend a meeting on 20 December 2022 and the letter stated that no final decisions would be made until all of the feedback had been carefully considered.

[21] Mr Tasker said that he attended a meeting on 20 December 2022 for that purpose, meeting with Mr Speedy and Campbell Johnstone, General Manager. He said he provided feedback so far as he could, making several suggestions as to possible changes including that they should focus on their core products. He said that Mr Campbell's response at the meeting was that they were looking at that but that they did not explain why his suggestions would not work.

[22] Mr Tasker said that the meeting lasted approximately 10 minutes and he was told at the end of the meeting that he, and the other production workers, should finish the job that was being done and then could leave. He said he was not expecting to be made redundant given his role despite some of the other production workers having been told there was no job for them in meetings shortly before his. Mr Tasker said that he then asked Mr Speedy and Mr Johnstone whether he would have a job when he returned from leave and that Mr Speedy said "no". He said Mr Campbell then came and asked him for his keys before he left.

[23] Mr Tasker's evidence was that he never received a letter confirming the termination of his employment. He said Mr Campbell called him on 22 or 23 December 2022 confirming that he was being made redundant and saying he would be paid.

[24] Mr Ryder's evidence is that he was also dismissed from his employment by reason of redundancy. He said he attended a similar meeting on 20 December 2022 at which he provided feedback. He said he was told at the meeting that he was losing his job and that that there wouldn't be any work for him after the Christmas break.

[25] In submissions, PBCL referred to having obtained external professional advice and having conducted a fair and proper process in good faith. It contends no decisions were made on 20 December 2022 and that the final decision as to Mr Tasker's employment was not made until the following week when communicated to him by telephone.

[26] PBCL took issue with the evidence of Mr Tasker, asserting that it was disappointing that they weren't offered the opportunity to defend themselves. As set out above, that is entirely incorrect and PBCL were given every opportunity to participate in the Authority's investigation. PBCL's engagement with the Authority's investigation was extremely limited, in effect comprising of email correspondence only, and no witnesses gave evidence in support of its position.

[27] I am not satisfied that PBCL has discharged the onus of proving there was a justification for the dismissal. PBCL did not attend the investigation meeting and provided no witness evidence establishing that the dismissal was justified.

[28] Having regard to the available evidence, I am satisfied that PBCL failed to genuinely consider any feedback given prior to making the decision to dismiss Mr Tasker. Prior to hearing his feedback, other employees had already been told that there would be no further work for them. While the "formal" dismissal may have occurred over the phone a few days later, that was a forgone conclusion. On 20 December 2022, Mr Tasker was told to stop work, was told he would not have a job when he returned from holiday and was asked to return his keys. I find that PBCL could not have genuinely considered Mr Tasker's feedback prior to making a decision on this employment given that context.

[29] Section 4(1A)(c) of the Act required PBCL to provide access to Mr Tasker to all information relevant to any decision that was likely to have an impact on the continuation of his employment and to provide him an opportunity to comment on the information prior to any decision being made. While the letter of 16 December 2022 addressed several concerns that PBCL had, the detail contained in that letter was minimal. No information was provided such as would have allowed, for example, Mr Tasker to provide meaningful feedback as to savings that might be made having regard to the stated cashflow or quality issues.

[30] PBCL's approach did not comply with s 4(1A)(c) of the Act. While redeployment or retraining was mentioned in the letter of 16 December 2022, there is no evidence that PBCL actively considered those options. The dismissal was not otherwise justified having regard to the test at s 103A of the Act.

[31] I find that the dismissal was both substantively and procedurally unjustified and that Mr Tasker was unjustifiably dismissed from his employment.

Was Mr Tasker unjustifiably disadvantaged in his employment?

[32] Mr Tasker claims that he was unjustifiably disadvantaged in his employment on the basis that PBCL deducted his accrued annual holidays in making payment for the relevant notice period.

[33] Clause 23 of Mr Tasker's IEA, dealing with redundancy, provided that PBCL could elect to pay wages in lieu of all, or part, of the notice period. The relevant notice period is found at clause 18 of the IEA which deals with termination of employment:

> Except in the case of a trial period where the Company will give notice as provided in the relevant clause, either you or the Company shall give two weeks' notice of termination in writing.
>
> The Company may elect to pay wages in lieu of you working out all or part of the notice period. This will not constitute summary dismissal….

[34] Mr Tasker's evidence was that he had a planned holiday overseas during the Christmas break. Mr Parker sent a text message to Mr Johnstone on 28 December 2022 asking, in effect, when he would receive his final pay. Mr Johnstone responded stating that he would be paid two weeks' redundancy starting from 21 December 2022, and that "[H]oliday pay would be in the 2 weeks, not on top".

[35] Mr Tasker's IEA required PBCL to provide him two weeks' notice of termination. The two-week notice period related to a period of time, not necessarily to payment of wages. Mr Tasker had annual holidays planned during that period and was paid for that period from his accrued annual holidays.

[36] I conclude that Mr Tasker's accrued annual holidays were not used to pay notice, but rather that Mr Tasker was paid annual holidays while taking annual holidays. That coincided with the period of notice given to him, but he was not entitled to additional payment for that period. I find that no condition of Mr Tasker's employment was affected to his disadvantage. As such, I need not consider the issue of justification.

[37] I find that Mr Tasker was not unjustifiably disadvantaged in his employment.

Is Mr Tasker entitled to remedies?

Is Mr Tasker entitled to compensation for humiliation, loss of dignity and injury to feelings?

[38] Mr Tasker seeks compensation for humiliation, loss of dignity and injury to feelings.

[39] Mr Tasker's evidence as to hurt and humiliation focused on his being stressed as a result of having to find another job, additional strain given the holiday that had been planned and the timing of his dismissal, and the loss of income. Mr Tasker was able to find alternative employment relatively quickly and there was no evidence of significant impact in the form of medical evidence or otherwise. I consider that only a modest award is appropriate in the circumstances.

[40] I order PBCL make payment to Mr Tasker, within 28 days, of $15,000 as compensation for humiliation, loss of dignity and injury to feelings relating to his unjustified dismissal claim.

Is Mr Tasker entitled to compensation for lost wages?

[41] Mr Tasker seeks payment of $5,460 as compensation for lost wages. His evidence was that he secured alternative work on 17 January 2023 but that he continued to work 10 hours less per week than he did at PBCL. He also said his new role was at a reduced hourly rate of $27.00. His claim is based on the difference between his earnings from his new role and the sum he would have been paid at PBCL, where he was paid $30 per hour.

[42] I accept the calculations provided, and that basis for them, and order that PBCL make payment to Mr Tasker of $5,460 as compensation for lost wages.

Contribution

[43] Section 124 of the Act requires that the Authority consider the extent to which Mr Tasker's actions contributed towards the situation that gave rise to his personal

grievance, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.[2]

[44] I do not consider there is any basis on which Mr Tasker's actions could be said to have contributed to the situation that gave rise to his personal grievance. I decline to make any reduction on account of contribution.

Mr Tasker's penalty claims

Section 130(2) of the Act – wage and time records

[45] Mr Tasker claims that PBCL failed to provide, upon request, a copy of the wage and time records relating to his employment. The request for those records was made by Mr Tasker through his representative by letter dated 30 January 2023. That letter requested that the time and wage records be provided by return email.

[46] Mr Tasker's written statement did not address the matter of wage and time records, although it was submitted that the wage and time records sought were not provided. It is apparent that Mr Tasker was provided, through the course of his employment, payslips reflecting at least some of the information. There was no attendance on behalf of PBCL at the investigation meeting and no evidence that the requested records were provided. I am satisfied that a request was made for the purposes of s 130(2) of the Act, and that PBCL did not provide the records, or access to them, in accordance with the requirements of s 130(2) of the Act.

[47] I am not satisfied that the failure by PBCL has significantly impact Mr Tasker and there is no substantial evidence of that, albeit that it was addressed briefly in submissions. In cases involving such failures an applicant's ability to ensure that payments and entitlements have been paid correctly may be impacted. I am not satisfied that that is the case here having reviewed the evidence. I decline to impose a penalty.

Sections 4 and 4A of the Act – good faith

[48] Mr Tasker claims that PBCL's actions amounted to a breach of its good faith obligations under s 4 of the Act and that PBCL's conduct was unconscionable. The conduct said to be relevant to that alleged breach was a failure to provide access to

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[2] Employment Relations Act 2000, s 124.

relevant information in circumstances where PBCL were proposing to make a decision that might have an adverse effect on the continuation of Mr Tasker's employment.

[49] For the reasons stated in relation to Mr Tasker's dismissal, I find that PBCL failed to provide the information that its good faith obligations required. While I accept that that led to non-compliance with s 4 of the Act, I am not satisfied that the failure was deliberate, serious, and sustained for the purposes of s 4A. As such, I decline impose a penalty. I also consider that Mr Parker's unjustified dismissal claim, and the remedies awarded in relation to that claim, have adequately addressed the issue.

Section 27 of the Holidays Act 2003

[50] Mr Tasker claims that PBCL breached s 27(2) of the Holidays Act 2003. That claim relates to what was, in Mr Tasker's submission, PBCL's deduction from Mr Tasker's accrued annual holiday balance to make payment to him of the notice period relating to the termination of his employment.

[51] Subsection 27(2) of the Act, as it applies to Mr Tasker's circumstances, required PBCL to make payment of his annual holiday pay in the pay that related to his final period of employment. For the reasons explained in relation to Mr Tasker's unjustified disadvantage claim, I find that Mr Tasker was not due any additional payment. I decline to issue a penalty in relation to s 27 of the Holidays Act 2003.

Summary of orders

[52] Parkers Beverage Company Limited is ordered, within 28 days of the date of this determination, to make payment to Mr Tasker of:

(a) $15,000 as compensation for humiliation, loss of dignity, and injury to feelings; and

(b) $5,460 as compensation for lost wages;

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[54] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Tasker may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that

memorandum PBCL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[55] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[3]

Rowan Anderson
Member of the Employment Relations Authority

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[3] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1