

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 745  
3289639

BETWEEN

RAY WITANA  
Applicant

AND

JAYU DEVELOPMENTS  
LIMITED  
Respondent

Member of Authority: Sarah Blick

Representatives: Mike Harrison, advocate for the applicant  
No appearance for the respondent

Investigation meeting: 12 December 2024 by audio visual link

Information and submissions received: At the investigation meeting from the applicant  
None for the respondent

Determination: 16 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] At 17 years old, Ray Witana began working part time for Jayu Developments Limited (JDL), a building construction company trading as Virgo Homes in Whangārei. Still aged 17, Mr Witana was offered a full-time job and started work as an apprentice carpenter in January 2023. He says he was consistently given positive feedback by JDL's director Neihana Pickering about his job performance and reliability.

[2] Things abruptly changed for Mr Witana in January 2024 when he received an email from Mr Pickering saying Virgo Homes was short of work, it needed to make cuts to the team and Mr Witana's position was no longer viable. The email said his two weeks' notice of termination came into effect that day. Mr Witana says he was confused because he had worked with Mr Pickering the day before and he made no mention of

issues with the business. He found out Virgo Homes was advertising for an apprentice the next day.

[3] Mr Witana brings a claim of unjustified dismissal and seeks remedies.

[4] JDL responded to the application by lodging a statement in reply in the Authority. It said staff were kept regularly updated on the state of the business, that JDL had been under immense strain, and he did his best to mitigate its losses but ended up having to let go of a number of staff members including Mr Witana. Mr Pickering said he asked many builders if they would take on Mr Witana, but none wished to do so. He believed he had done the best he could for Mr Witana and treated him kindly and fairly. The statement in reply stated JDL stopped trading not long after Mr Witana's employment was terminated. Mr Pickering referred to the hardship he has experienced following JDL's failure.

### **The Authority's process**

[5] Mr Pickering participated in a case management conference with the Authority in August 2024 and indicated he would attend and give evidence at the investigation meeting. The date for the investigation meeting in Whangārei was agreed along with timetabling directions for the lodging of witness statements and further documents. Written directions and a notice of investigation meeting were issued confirming what was discussed.

[6] A witness statement was received for Mr Witana, but JDL did not comply with the timetabling directions when it came time to file its witness statement. When contacted by the Authority Mr Pickering advised he had no witness statement to provide.

[7] A few days prior to the investigation meeting, after being contacted by the Authority regarding the investigation meeting venue, Mr Pickering emailed advising that he had moved cities and was too far from Whangārei to attend. He said he did not have the time or resources to attend the investigation meeting, referring to his difficult financial circumstances. He also said he did not have the time or energy to deal with the Authority matter generally.

[8] The Authority further contacted Mr Pickering about the possibility of him attending the meeting by audio visual link. He expressed reluctance about attending

remotely also. In the circumstances the Authority proposed to Mr Witana's representative that the investigation meeting take place by audio visual link, which was agreed to. Links to the online meeting were sent to the parties' email addresses along with advice regarding the meeting. The start of the investigation meeting was delayed by around 15 minutes and an attempt to phone call Mr Pickering was made and a voicemail was left regarding the meeting starting. The Authority proceeded with the meeting in JDL's absence as it had notice of the time and date of the investigation meeting, and elected not to respond to the Authority or participate.<sup>1</sup>

[9] Mr Witana attended the investigation meeting, supported by his mother and representative. Mr Witana confirmed the contents of his witness statement under affirmation and answered the Authority's questions. His representative made brief closing submissions, including on the issue of costs.

[10] The Authority has brought to Mr Witana's representative's attention the fact the Companies Register states JDL is overdue in its obligation to file an annual return, and if it is not filed immediately the Registrar will initiate action to remove the company from the register. Mr Witana's representative indicated he or Mr Witana would likely make contact with the Companies Office regarding this.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **The issues**

[12] The issue for investigation and determination is whether Mr Witana has a personal grievance for unjustified dismissal, and if so, whether remedies should be awarded to him.

### **Background**

[13] Mr Witana started working full time for JDL as an Apprentice Carpenter on 9 January 2023. He has provided a copy of his written employment agreement which

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<sup>1</sup> Employment Relations Act 2000, Schedule 2, clause 12.

stated he would work 40 hours a week on a pay rate of \$22 per hour. The agreement provided for two weeks' notice in writing of termination, with the ability for JDL to pay out the notice period instead of Mr Witana working it out. It did not provide for any redundancy entitlements.

[14] After securing full-time employment, Mr Witana said he felt confident in his job performance and bought a ute for work to transport his tools. He was given a fuel card and had responsibilities such as opening worksites and transporting tools and colleagues. He says over the year he worked for JDL, Mr Pickering consistently provided him with positive feedback, thanking him for his reliable work and upskilling, and telling him he was a valuable member of the team. During his employment he received a pay rate increase to \$24 per hour. This all led Mr Witana to believe he was doing a good job.

[15] When asked about JDL's comment in the statement in reply that regular meetings were held with staff updating them on the state of the business, Mr Witana acknowledged JDL held meetings but says a number of them took place at a venue serving alcohol. He did not attend because he was under the legal drinking age (not being accompanied by a parent or guardian). He says he was not aware of issues with the state of the business.

[16] On 16 January 2024, Mr Pickering sent Mr Witana the following email:

Kia ora Ray

As you know, [a named] contract has all but disappeared in terms of work, our group housing contracts are not making any money so we are dropping the group housing contracts also

this means virgo homes is short of work and needs to make cuts to the team

I regret to advise you that your position is no longer viable, as of today, January 16th your 2 weeks notice comes into effect

its been a real pleasure to have you on our team, I wish you all the best for the future

please do contact me if you have any issues [phone number]

Nga mihi  
Neihana Pickering

[17] Mr Witana recalls being confused at this because he had worked with Mr Pickering the day before, and there was no mention of any issues with the state of the business or the need to let him go.

[18] After being informed of his termination, Mr Witana says he looked on the Trademe website to search for a new job and was shocked to see that Virgo Homes was advertising for “at least one more APPRENTICE AND we need at least one more QUALIFIED carpenter” to work on two storey new builds. The advertisement, which has been provided to the Authority, is dated 17 January 2024, the day after Mr Witana received notice of termination due to a shortness of work and cuts to the team.

[19] In JDL’s statement in reply it explains the advertisement as follows:

as for the ad online. after getting involved with these outside projects I saw there was no money in them and wanted out. The main contractors pressured me into commitment and told me I have to find someone else for them. Now i actually dont have to, but out of good faith i advertised for a builder and apprentice combination who I was wanting to pass the contract to. as I cannot make money, why would i take the contracts

[20] On 17 January 2024, Mr Witana went to Mr Pickering’s home to collect his tools and says he was told he could stop working immediately and would be paid in lieu of working out his notice.

## **Discussion**

### *Justification*

[21] When the Authority considers justification for the actions of JDL, it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of JDL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal or other action.

[22] When considering redundancy, the law requires that the position must be superfluous to the needs of the business and this can arise where the employer is seeking to make the business more efficient.<sup>2</sup> In assessing this, a solid foundation of evidence or paper trail can be an important indicator of whether the decision on redundancy was

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<sup>2</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

for genuine commercial reasons. Providing insufficient information about the rationale for a proposed redundancy decision has been found to fall below what is expected of a fair and reasonable employer.<sup>3</sup>

### *Good faith*

[23] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act. This includes a positive disclosure obligation of providing an affected employee with access to information supporting the reason for the redundancy and the detail of how it is proposed it will be implemented. Crucially, an employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised.<sup>4</sup>

### *Finding*

[24] The evidence shows Mr Witana was clearly dismissed by JDL on 16 January 2024. If JDL was unable to provide work to Mr Witana, then it was required to undergo a fair and proper process. JDL did not give Mr Witana any notice or fair warning of its intention to make changes to the business or that he could possibly lose his employment. Mr Witana was not given any information about JDL's financial situation or the pressures it was under. JDL's explanation of why it advertised roles the day after giving notice to Mr Witana is unclear and if it was information relevant to the decision not to continue Mr Witana's employment, he should have been given access to that information.

[25] There is no evidence JDL considered any alternatives to termination which could have maintained the employment relationship through redeployment. Mr Witana says he was aware that JDL employed other staff on other sites but was not given any information on how the situation affected them or if his skill could be used elsewhere in JDL. The only alternatives JDL refers to are its approaches to other potential employers about hiring Mr Witana, about which Mr Witana was not made aware.

[26] Mr Witana was entitled to have his employer put its concerns to him and to be provided a fair opportunity to respond and have any response fairly considered before the decision to terminate employment was made. The defects in the process followed

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<sup>3</sup> *Tan v Morningstar Institute of Education Limited* [2013] NZEmpC 82.

<sup>4</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZLR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.

were significant and resulted in Mr Witana being treated unfairly. JDL is unable to show it discharged its obligations under s 103A and s 4 of the Act. His dismissal was clearly unjustified.

## **Remedies**

[27] Mr Witana is entitled to a consideration of remedies.

### *Compensation under s 123(1)(c)(i) of the Act*

[28] Mr Witana gave evidence about the effects of his dismissal. Losing his job was hard on his mental health in a number of respects and caused him embarrassment. He did not believe the reason given to him by his employer was the real reason for terminating the employment, because JDL advertised an apprentice role to replace him just after his termination.

[29] Since losing his job, Mr Witana says he has been unable to keep up with payment obligations on his ute and is currently in arrears. He has had to sell some of his building tools, making it harder to find another building position as tools are generally required.

[30] I have considered the extent of the harm Mr Witana suffered, where it sits when compared with other cases, then stepped back and assessed what I consider a fair and just amount in the circumstances. JDL is ordered to pay Mr Witana \$15,000 under s 123(1)(c)(i) of the Act, to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his unjustified dismissal.

### *Reimbursement of lost income under s 123(1)(b) of the Act*

[31] I consider it reasonable to award the equivalent of three months ordinary time remuneration in the circumstances. Mr Witana's penultimate payslip records his hourly rate as \$24 per hour with 8.5 hour days. Calculating his lost wages at \$1,020 per week, this amounts to \$13,260. This amount is to be paid in terms of s 123(1)(b) of the Act.

### *Contribution*

[32] The unjustifiability of Mr Witana's dismissal was well-established in JDL's failure to follow statutory requirements. These obligations were not Mr Witana's, and it is not appropriate to make deduction from the monetary remedies for reasons of contribution. No reduction is made.

## **Outcome**

[33] Jayu Developments Limited is ordered to pay the following amounts within 21 days of the date of this determination to Ray Witana:

- (a) \$15,000 as compensation under s 123(1)(c)(i) of the Act;
- (b) \$13,260 in lost wages under s 123(1)(b) of the Act.

[34] JDL has not sought an order that payment be made by instalment in light of its financial circumstances, nor has it provided any supporting documentation relevant to them. Payment by instalment is not appropriate.

## **Costs**

[35] Mr Witana seeks a contribution towards the costs of representation he has incurred. The Authority has discretion to award costs, and may order any party to pay costs and expenses as it thinks reasonable. The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.<sup>5</sup> The daily tariff is usually taken as a starting point, although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

[36] Mr Witana was successful in his claim. The investigation meeting took nearly half a day, attracting half the daily tariff amount of \$2,250.

[37] He seeks an uplift from that taking into account what was said to be an effective Calderbank offer made through his representative on 10 December 2024, two days prior to the investigation meeting. The Authority has seen the offer and Mr Pickering's response to it the same day. Mr Pickering made it clear he was not accepting the offer on behalf of JDL and would not be responding further. While the offer proposed was reasonable and substantially less than the Authority's awards, it was not made well enough in advance of the investigation meeting to allow a reasonable time for it consideration, and would not have avoided the costs of briefing Mr Witana or preparing his witness statement. An uplift to the daily tariff is not warranted.

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<sup>5</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

[38] Taking account of relevant costs principles applicable to the Authority, \$2,250 is an appropriate amount. Accordingly, within 21 days of the date of this determination Jayu Developments Limited must pay Ray Witana \$2,250 in costs, and \$71.55 being the Authority application fee.

Sarah Blick  
Member of the Employment Relations Authority