

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 121  
3065672

BETWEEN

ADAM GRANT  
Applicant

A N D

MAELSTROM DESIGN LIMITED  
(IN LIQUIDATION)  
Respondent

Member of Authority: David G Beck

Representatives: Anselm Williams, counsel for the Applicant  
No appearance from Respondent

Investigation Meeting: 25 February 2020

Submissions Received: 13 March 2020 from the Applicant  
None from the Respondent

Date of Determination: 16 March 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Adam Grant was employed by Maelstrom Design Limited (in liquidation), a furniture manufacturer, as a CNC Machine Programmer/Operator for six years until he was provided with a letter of 28 December 2018 declaring his position to be “disestablished”. Mr Grant was subsequently offered ongoing employment as an independent contractor - an arrangement that was unilaterally imposed by the respondent’s director/owner, James Turner. Mr Grant left his employment on 8 February 2019 and by way of a letter of 11 February he raised a personal

grievance alleging that he had been unjustifiably dismissed as no written notice of his employment terminating had been given.

### **The Authority Process**

[2] The respondent filed a statement in reply but no briefs of evidence and did not participate in the investigation meeting. Prior to the hearing the company was in the process of liquidation. The Applicant's counsel gained permission from the liquidator to proceed but the liquidator declined to appear. In accord with clause 12, Schedule 2 of the Employment Relations Act 2000 ("the Act") the investigation proceeded without the Respondent.

[3] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

### **Issues**

[4] The issues to be decided are:

- a) Was Mr Grant unjustifiably dismissed or was the employment relationship ended by reason of a redundancy situation.
- b) If an unjustified dismissal is found what remedies should be awarded.
- c) If remedies are appropriate the issue of any contributory conduct is to be assessed.
- d) An assessment of the level of costs to be awarded to the successful party.

### **Background**

[5] Mr Grant commenced employment with Maelstrom Design Limited in March 2013 as a full time programmer and operator of a computer numerically controlled (CNC) machine used in the manufacture of furniture sold to local retailers. He worked alongside a Factory Manager to oversee production; both positions reported to the CEO/Owner James Turner. Mr Turner was actively engaged in the business and had an on-site office. Mr Grant described Mr Turner's role as akin to an Operations Manager who took care of orders and customer relations.

[6] Mr Grant indicated that he took no part in the financial side of the business and he was rarely briefed on such matters other than being allocated targets for the output of specific customer orders. Mr Grant enjoyed his role, found it creative and described his relationship with Mr Turner as amicable and professional; although he said Mr Turner was sparing of individual praise and feedback on how the business was going. Mr Grant rarely socialised with others after work as he does not drink alcohol. The business was small with at times 10-12 employees. Mr Grant regularly, up until the end of 2018, worked 40-45 hours per week with occasional weekend work. Mr Grant described the business as being busy and he was unaware of any declining orders.

[7] In 2018, Mr Grant took four weeks annual leave and recalls sometime after returning in late August, a general staff meeting being convened by Mr Turner (Mr Grant described this as a very unusual occurrence). Mr Grant recalls 8-9 employees being present and Mr Turner in a short address, explaining in general terms, that “things needed to change” or he would be “looking at redundancies”. Mr Grant described no discussion of anything specific but being surprised by the discussion as up until that point he could not recall any concerns being expressed by Mr Turner.

[8] Further, in October 2018 Mr Grant recalls Mr Turner asking him for a “chat” in his office and that they discussed production being down whilst Mr Grant was on leave and Mr Turner said that there would be redundancies if production did not pick up. Mr Grant describes feeling unfairly targeted and having to explain that his absence may have been the cause of a temporary slump in production. Mr Grant was not apprised of any specific matters on how production could be increased but also recalled Mr Turner saying that he had taken out a loan to cover overheads. Mr Grant conceded he did indicate to Mr Turner at this meeting, that he was thinking of a career change and was interested in working for the Customs Department. Mr Grant specifically denied a suggestion (made in the respondent’s Statement in Reply) that he said that he planned to leave in 3 months’ time and that he had briefed his co-workers about this.

[9] Mr Grant recalled no further discussion between October and December 2018 and he thought production seemed to be carrying on as normal. However, in mid-December 2018 he described some significant unease when Mr Turner was not specific about when employees

should return from the annual Christmas/New Year closedown (Mr Turner suggesting that he would be in contact with staff when he needed them to return).

[10] Mr Grant took leave from around 24 December and on Friday 28 December 2018 he received a letter via email that indicated:

- a) A restructuring of the business was necessary due to a protracted dispute with the landlord that had led to a need to immediately relocate the business;
- b) two permanent positions of upholsterer and CNC Programmer/operator “are to be disestablished”;
- c) That on Monday 31 December, Mr Turner could meet “to discuss the restructure” and Mr Grant was “welcome to bring a support person if you wish”.

[11] Mr Grant accessed the email described on 28 December whilst on leave and responded by text agreeing to meet on the following Monday. In the interim, he discovered that only he and a co-worker (an upholsterer), had received letters about the restructuring.

[12] At the meeting on Monday 31 December, Mr Grant recalled Mr Turner immediately telling him that due to the financial state of the company “a couple of you would have to be let go.” Mr Grant was adamant that no mention was made of when he would have to leave or any detailed discussion of the reasons for the redundancy. Mr Grant described approaching the meeting expecting him to be given notice of his job ending and he conceded that he asked few questions of clarification. He described the meeting as amicable but little discussion of why he had been chosen to go and when. The subject then shifted on to a move to new premises in January. Mr Grant offered to assist and Mr Turner indicated that he would contact him about this. Mr Grant rejected the suggestion made in the respondent’s Statement in Reply, that he indicated at this meeting that he intended to resign and he understood the reasons for the restructure.

[13] Mr Grant described afterwards, being confused as to whether his employment was actually ending, as no discussion of who would take on the CNC operating role ensued. At this time, Mr Grant was aware that a co-worker capable of some CNC work had recently left citing no wish to take on this task. Mr Grant said he resolved to just wait and see what

happened next in the hope that Mr Turner would change his mind and perhaps realise that Mr Grant was needed to operate and programme the CNC machine on an ongoing basis.

[14] After being texted by Mr Turner, Mr Grant returned to work on Monday 7 January 2019 and assisted in setting up the CNC machine that he commenced operating in the new premises. For the first week, Mr Grant was paid his normal weekly wage. As no further mention was made of the restructuring, Mr Grant described still hoping that he could carry on working - an assumption bolstered by him noticing that the upholsterer had also returned to work and seemed to be carrying on working as normal.

[15] However, on Thursday 10 January 2019, whilst Mr Grant accompanied Mr Turner in his delivery van, he was asked: would he like to be an independent contractor at a higher hourly rate? Mr Grant recalls responding saying that he would have to think about that and get back to him. The following week, Mr Turner pressed him for an answer and Mr Grant said he needed more time to get advice – he recalls Mr Turner telling him that he needed to hurry up with a decision.

[16] Mr Grant says no further dialogue occurred on the contractor proposal. However, on Thursday morning, 7 February, Mr Grant found that his weekly pay was \$220 and not the normal \$770. He approached Mr Turner on the same day and was told that he was now a contractor and the \$220 was payment of accrued holiday pay owed. Mr Grant left the workplace and obtained legal advice on his situation. On his lawyer's advice, Mr Grant resolved to not return until his employment status was sorted (he texted Mr Turner the next day apologising for his non-appearance).

[17] In a letter of 11 February 2019, Mr Grant's counsel raised a personal grievance claiming that he had been unjustifiably dismissed. By contrast, a 15 February email from the respondent's counsel, claimed Mr Grant's position had been properly disestablished on 28 December and four weeks' notice had been given (no documentary evidence of this notice was provided) the offer of Mr Grant continuing as a contractor was reiterated and it was stated that the employer had "at least 3 weeks' work available, which could amount to around \$4,200".

[18] Mr Grant did not return to the workplace and later attempts to resolve the situation including mediation, proved unsuccessful. The last communication Mr Grant had from

Mr Turner was an email assuring him that contract payments would be made to him in a timely manner (monthly). Mr Grant did not respond.

### **Unjustified dismissal or a genuine redundancy?**

[19] Mr Grant claimed that his employment was not brought to an end by reason of the proposed redundancy as no notice was issued. He essentially claims that the unilateral action of imposing an independent contracting arrangement brought the employment to an end in an unjustified manner.

[20] In order to justify the termination of employment the respondent must meet the requirements set out in s103A of the Act commonly referred to as the justification test. This test requires the Authority to undertake an objective assessment of whether the respondent's actions and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time of the ending of the employment relationship. In applying the test, the Authority must consider a number of factors including: the resources available to the employer. Here as no discipline or performance issues arose, relevant factors included: whether the respondent gave the applicant an opportunity to comment on the proposal to end the employment relationship and whether that comment was genuinely considered by the respondent.

[21] If the employment relationship is found to have ended due to a redundancy, that decision must also meet the requirements of s103A. To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations apply, as set out in s4 of the Act - these include a positive disclosure obligation to provide access to information supporting the reason for the redundancy and detail of how it is proposed it will be implemented. Further and crucially, an employee must be afforded an opportunity to comment on any redundancy proposal, prior to a decision being finalised. The Court of Appeal in *Grace Team Accounting v Brake*<sup>1</sup> has ruled that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons and when looking at applying the s103A tests has said at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

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<sup>1</sup> [2014] NZCA, [2015] NZLR 494.

### ***The process of the ending of the employment relationship***

[22] I find that even if the redundancy was genuine and procedurally fair (a premise unlikely given that a position that Mr Grant was capable of being redeployed into was advertised at the same time), the respondent did not finalise such by issuing, as per clause 10.4 of the individual employment agreement (IEA), notice of termination in writing (consistent with cl 11.1 of IEA).

[23] The point that the employment relationship ended was Mr Turner's unilateral imposition of an independent contracting relationship by ceasing to pay wages to Mr Grant on 7 February 2019 and instead paying out Mr Grant's accumulated holiday pay. I find that this breach constituted a dismissal that was effected in an unjustified manner. Mr Grant signalled by a prompt lodging of a personal grievance that this action had effectively repudiated his entire employment agreement.

[24] When the matter of the change in employment status was brought to Mr Turner's attention, he took no steps to rectify the breach and reiterated that any ongoing engagement of Mr Grant would be as an independent contractor.

[25] For completeness, had I found otherwise and accepted that this was a redundancy situation, the process followed to make the applicant redundant was manifestly flawed with no prior consultation or sharing of relevant information and the applicant was provided with no real opportunity to comment on the decision with no selection criteria being provided or redeployment alternatives discussed (the independent contracting option was simply imposed). These procedural defects were not minor and the respondent thus failed to meet the considerations set out in s4 of the Act and this would have also resulted in Mr Grant being unjustifiably dismissed in terms of s104A.

[26] Mr Turner did not attend the hearing, so the Authority was not provided with his wider explanation as to the reasons for the redundancy and the disestablishment of Mr Grant's position. I observe that the ongoing need for the work to be carried out was evident, albeit on a contracting basis and, that the vacancy created by the other worker capable of operating the CNC machine leaving also suggested that Mr Grant's position was not redundant.

## ***Finding***

[27] The decision to unilaterally impose an independent contracting arrangement during what was a flawed and incomplete redundancy process, ended the employment relationship in a manner that did not fall within the parameters of what a notional, fair and reasonable employer could have done in all the circumstances at the time. I find this decision to be an unjustified dismissal.

## **Remedies**

### ***Lost wages***

[28] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Grant should I find that he has established a personal grievance and, s128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[29] Here I find Mr Grant's lost remuneration was attributed to his personal grievance. Mr Grant provided documentary evidence that he secured alternative employment commencing on 25 February 2019 as a cabinet maker and now CNC programmer/operator, in a similar furniture manufacturing business and I find that he properly mitigated his loss in a relatively short period between jobs.

[30] The respondent is ordered to pay Mr Grant seven weeks' lost wages, based on a calculation of 40 hours per week at \$28 per hour, in the sum of \$8,740 gross. This is a sum lesser than three months but reflecting the actual loss in the intervening period of three weeks between his employment ending and new employment commencing but includes an extra four weeks' contractual notice not paid in lieu and \$900 that Mr Grant was short paid in his last week of employment.

### ***Section 123(1)(c)(i) Compensation***

[31] Mr Grant gave evidence of the impact of his dismissal and the uncertainty it created at a difficult time to find immediate alternative employment. He explained that he was confused by the initial proposal and the timing of such, to make him redundant and no formal written notice period being provided. This led to great uncertainty over the Christmas period and

Mr Grant was unable to enjoy his leave period that was initially of an unknown duration (in itself, causative of anxiety and a breach of the Holidays Act).

[32] Upon returning to work, Mr Grant described a hope that his employer would abandon the redundancy proposal. Mr Turner's actions appeared consistent with this level of hope when he offered ongoing work (albeit as a contractor). Mr Grant described a loss of sleep, anger and confusion and an impact on his relationship with his partner, as at the time they were trying to conceive their first child and they had the financial stress of only one income earner servicing a mortgage and other outgoings.

[33] Mr Grant was upset that his six years working for Mr Turner appeared to be ignored and he now understands that Mr Turner has continued trading under a different name manufacturing the same products. Mr Grant described a loss of confidence in his abilities and that he had never left a previous employer on bad terms. He described good family support and has now moved on to a job he enjoys and feels supported in and recently his partner gave birth to their first child.

[34] I am convinced that at the time, Mr Grant suffered humiliation, loss of dignity and injury to feelings but has now moved on with no lasting ill effects of this experience. Taking into account the circumstances and awards made by the Authority in similar circumstances, I consider Mr Grant's evidence warrants moderate compensation in the sum of \$12,000.00 under s123 (1)(c)(i) of the Act and the respondent is ordered to pay this sum.

### **Contribution**

[35] Section 124 of the Act states that I must consider the extent to what, if any, Mr Grant's actions contributed to the situation that gave rise to the personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no reason to reduce the remedies awarded above as Mr Grant was not engaged in a wrongful action and he did not act in a blameworthy or culpable manner.

### **Costs**

[36] Mr Grant claims legal costs and counsel affirmed that a costs submission was not necessary and, given that the respondent company is in liquidation, I felt it prudent that

neither party be put to the further cost of making a submission and I deal with costs in this determination.

[37] In the circumstances, this was a half day hearing with few complex legal issues and I award scale costs of \$2,250.

### **Outcome**

[38] I have found that:

- a) Adam Grant was unjustifiably dismissed from his employment with Maelstrom Design Limited (in liquidation).
- b) Maelstrom Design Limited (in liquidation) must pay Mr Grant the sums below:
  - 1. \$8,740.00 gross lost wages;**
  - 2. \$12,000 pursuant to s 123(1)(c)(i) of the Act;**
  - 3. \$2,250 for costs.**

### ***Certificate of Determination***

[39] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Grant will be provided with a certificate of determination with an affixed Authority seal. This will record that Maelstrom Design limited (in liquidation) must pay Mr Grant the sums referred to paragraph [38].

David Beck  
Member of the Employment Relations Authority