

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 293
3082832

BETWEEN HANSHENG LIU
 Applicant

AND NAVIGATOR ACCOUNTING
 NZ LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Michael Kim, counsel on behalf of the Applicant
 Scott Russell, counsel on behalf of the Respondent

Investigation Meeting: 9 July 2020

Submissions and further 13 July 2020 from the Applicant
Information Received: 13 and 28 July 2020 from the Respondent

Date of Determination: 30 July 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Navigator Accounting (NZ) Limited operates a small, single-principal accounting practice. Simon Griggs is the sole director of that company. At material times, Navigator operated offices in Auckland and the Hawkes Bay.

[2] Navigator employed Hangsheng Liu on 13 May 2019 as an intermediate-level accountant to work in its Auckland office. Mr Liu and Mr Griggs were the only Navigator employees who operated from these offices.

[3] On 30 October 2019, Mr Liu's position was disestablished and he was made redundant. He claims his dismissal was unjustified and he suffered an unjustified disadvantage when he was suspended from 8 to 30 October 2019.

[4] Navigator denies Mr Liu's claims. It maintains Mr Liu was not suspended and, in terms of his dismissal, the process it followed was fair and the decision reached was genuine.

[5] 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 but has not recorded all evidence and submissions received.

The Issues

[6] The issues identified for investigation and determination are:

- a. Did Mr Liu suffer an unjustified disadvantage to his employment arising from an alleged suspension?
- b. Was Mr Liu unjustifiably dismissed?
- c. If Mr Liu was unjustifiably disadvantaged, or unjustifiably dismissed, what remedies should be awarded?
- d. If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Liu that contributed to the situation giving rise to his personal grievance?
- e. Should either party contribute to the costs of representation of the other party?

Background

[7] The parties' relationship was relatively harmonious until 7 October 2019. At the end of this day, Mr Griggs asked Mr Liu to have a quick meeting with him. After taking Mr Liu into a meeting room, Mr Griggs proceeded to read out a letter. This letter advised Mr Liu of cash flow difficulties that Navigator was experiencing and the steps it had taken to mitigate these issues.

[8] The letter went on to outline a proposal to save costs. This proposal involved disestablishing Mr Liu's role, Navigator closing its Auckland office, consolidating its office requirements to its Hawkes Bay office, and absorbing Mr Liu's senior accounting duties within the Managing Director's role.

[9] Within the letter, Mr Griggs also requested feedback and any alternatives to redundancy, asked Mr Liu if there was anything else he thought Navigator should take into consideration, and advised Mr Liu that he was entitled to bring a representative to any further meetings.

[10] Mr Liu responded by email the following day, advising he would be meeting with his lawyer on 10 October. Mr Griggs responded suggesting a meeting on Friday 11 October or Monday 14 October and advising “I am also happy for you to continue on paid special leave until the end of this week”.

[11] On 11 October, Mr Liu’s lawyer emailed Mr Griggs suggesting a meeting on 16 October. Mr Griggs did not reply.

The events on 14 October

[12] On Monday 14 October, Mr Liu returned to work. Upon his arrival, he noticed that his computer was missing. Mr Griggs’ evidence was that, as he did not have access to a laptop, he had taken Mr Liu’s work desktop computer home in order to carry out his work after hours. Mr Liu was not aware of this at material times.

[13] Mr Griggs then approached Mr Liu and asked why he was back at work as he understood he was on paid special leave until things were sorted out. Mr Liu responded with words to the effect that he had only agreed to take special leave until the end of the week before, which he understood meant he was to return to work that day.

[14] The conversation went back and forth for several minutes. Mr Griggs then suggested they leave the building and discuss over a coffee to which Mr Liu agreed. Once outside, Mr Griggs stated that Mr Liu should remain on special leave until their feedback meeting on 16 October. Mr Liu refused and repeated that there was no agreement for him to remain on special leave after 11 October. He advised Mr Griggs that if he wanted to talk about HR matters then he needed to talk to Mr Liu’s lawyer. He then went back into the office.

[15] Mr Griggs then tried to phone Mr Liu’s lawyer. After making a number of attempts he finally managed to reach him. The outcome of that conversation was an agreement that Mr Liu would remain on special paid leave until “everything was sorted”. After speaking with his lawyer, Mr Liu left the office.

The feedback meeting

[16] On 16 October 2019, Mr Griggs met with Mr Liu and his lawyer.

[17] During this meeting, Mr Griggs clarified the reasons that had led him to consider restructure and presented Mr Liu with financial information to support the restructuring proposal. He also confirmed that Mr Liu had been placed on special leave because he felt it would be awkward for him to return to work while the redundancy proposal was being considered.

[18] Mr Liu's lawyer then instigated a without prejudice settlement discussion.

[19] Later that day, Mr Griggs sent a letter to Mr Liu's lawyer confirming the reasons for the proposed restructure including the compounding of increased Xero subscriptions, lower than expected sales, and an increasing aged receivables list. He also attached copies of the documentation he had presented at the meeting and discussed his view in terms of alternative options. He requested feedback from Mr Liu by 18 October and advised he was happy for Mr Liu to remain on special paid leave until that time.

The raising of a personal grievance

[20] On 18 October, Mr Liu raised a personal grievance for unjustified disadvantage, alleging that Navigator had failed to have "due regard to your procedural and substantive obligations as a fair and reasonable employer".

[21] The letter raised concerns about how Mr Liu had been told of the proposed redundancy, how his computer had been removed from the office, how he had been treated on 14 October, and how he was suspended because Mr Griggs felt awkward having him in the office.

[22] The letter went on to raise concerns that Mr Griggs had not undertaken a proper financial assessment before proposing the redundancy, had not undertaken a proper assessment of Navigator's staffing needs, and was taking into account rental savings when rental was a fixed overhead and not a variable expense. Lastly, the letter stated:

We would expect from you as a fair and reasonable employer to fully address our client's concerns as stated above by the close of business on Friday, the 25th of October 2019. It is our understanding that our client will remain on paid leave until then..."

[23] On 29 October, Navigator responded advising, in summary:

- a. That it had undertaken a significant financial assessment prior to making the decision to propose redundancy.

As a small business, in order to grow it is necessary to take on staff before the business is necessarily large enough to sustain them. At the point in time when we recruited Hans, the business was growing, and had grown beyond the capacity that we were, at that time, able to manage effectively. Unfortunately, as previously stated, subsequent to Hans recruitment the Xero subscriptions increased, we achieved lower than expected sales, and there was an ever-increasing aged receivables list. There was no specific figure assessed at the time of Hans recruitment, that is correct, however, there has been significant financial assessment done prior to making he decision to propose redundancy.

- b. Its office rental was not a fixed overhead. If “we give notice on that office space there will be no on-going costs related to that space”.
- c. There was no entitlement in Mr Liu’s employment agreement to special paid leave. Mr Liu had been paid special leave until 18 October but thereafter was on unpaid special leave.
- d. It wished to meet with Mr Liu on 29 October to conclude the process.

The dismissal

[24] On 30 October 2019 the parties met. At this meeting Mr Griggs read out a letter that advised of Navigator’s decision to terminate his employment on the ground of redundancy.

Issue one: Unjustified disadvantage - “Special leave”

The law

[25] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee’s employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[26] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the

employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Analysis

[27] There is no provision in Mr Liu's employment agreement that provided for him to be placed on special leave in circumstances such as occurred in this case. Accordingly, "special leave" could only occur with the consent of both parties.

[28] Having considered the evidence I find on balance:

- a. The parties agreed to Mr Liu being on special leave from 8 October until 30 October 2019. This is evident from the text messages exchanged between Mr Liu's solicitor and Mr Griggs on 14 October 2019, the discussions between the parties at the meeting on 16 October 2019, and the correspondence exchanged between the parties on 16, 18 and 29 October.
- b. Mr Liu's agreement to remain away from work on special leave was contingent on him being paid during the period he was away.
- c. Navigator's decision not to pay Mr Liu for the period from 21 October to 30 October disadvantaged him.
- d. Navigator's actions were not what a fair and reasonable employer could have done in the circumstances and were unjustifiable. Navigator's decision not to advise Mr Liu until 29 October that his special leave would be unpaid, some 11 days after he had expressed his understanding that he was to be paid whilst on special leave, did not accord with its obligations of good faith and particularly its obligation to be responsive and communicative and not to do anything that is likely to mislead or deceive.

[29] I find Mr Liu suffered an unjustified disadvantage to his employment when Navigator failed to pay him his wages for the period from 21 to 30 October 2019.

Issue two: Unjustified dismissal

The law

[30] In order for Mr Liu's redundancy to be justified, Navigator must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether its actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[31] Part of this assessment involves a consideration of Section 4(1)(A)(c) of the Act.

¹ Under s 4(1A)(c) the law requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision. In addition, it is required to provide the employee with an opportunity to comment on the information to the employer before the decision is made.

[32] The key requirements of consultation were summarised in *Stormont v Peddle Thorp Aitken Limited*.²

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[33] The genuineness of the redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes that an employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.³

Was the decision to terminate genuine?

[34] In *Michael Rittson-Thomas t/a Totara Hills Farm v Hamish Davidson*, Chief Judge Colgan stated:

¹ *Simpson Farms v Aberhart* [2006] ERNZ 82.

² [2017] NZEmpC 71 at [54].

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [89].

It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to simply say that this was a genuine business decision and the Court (or Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances. Therefore, while it is still true that the Court cannot substitute in its own judgment, s 103A does require the Court to assess what the fair and reasonable employer could (previously would) have done in the circumstances.

[35] I am satisfied, on balance, that there were genuine reasons for Navigator making Mr Liu's position redundant. Whilst its final decision followed deterioration in the relationship arising from the redundancy process, I accept the primary motivation for the termination of Mr Liu's employment was Navigator's dire financial position and particularly its need to improve its cash flow in order to ensure the viability of its business. This finding is supported by Navigator's profit and loss reports, its monthly staff updates and its Aged Receivables schedule.

[36] By making Mr Liu redundant, Navigator was able to reduce its outgoings in terms of Mr Liu's salary. In addition, it was able to vacate its Auckland offices following the provision of notice and thereby save monthly rental costs of \$3,067.21 per month. The savings that Navigator achieved resulted in it starting to break even by January 2020.

[37] For completeness, I acknowledge that shortly after Mr Liu was terminated a company associated with Navigator advertised for a position similar to that performed by Mr Liu. However, I was not persuaded that this role was to replace Mr Liu's position. Having heard from the witnesses, it was apparent that the associated company had been advertising for a person for some time and this advertisement was a continuance of that search and/or to fill a temporary position left vacant due to a staff member going on maternity leave. The evidence was that the position was not filled for a period of some 5 months after Mr Liu had been made redundant when the pregnant staff member commenced her maternity leave.

Was a fair procedure followed?

[38] Although, there were genuine reasons for Mr Liu's position to have been made redundant, I find the procedure that was followed by Navigator was flawed, even having regard to the small size of the company.

[39] Navigator failed to provide Mr Liu with all information upon which it relied in making its decision to make his position redundant and, in doing so, failed to provide him with an opportunity to provide feedback.

[40] Before Navigator made the decision to make Mr Liu's position redundant, Mr Griggs undertook a significant financial assessment of the business. Mr Griggs said this involved reviewing Navigator's profit and loss reports up to and including October 2019, reviewing Navigator's current and historic costs and expenses, preparing a schedule of forecasted costs and expenses, looking at Navigator's sales pipeline and average revenue decreases, assessing cash reserves and reviewing cost savings measures.

[41] Although Navigator told Mr Liu, in its letter of 29 October, that it had undertaken a significant financial assessment of the business, it failed to provide him with information as to what this entailed. Nor did it provide him with copies of all of the documentation sourced during this assessment upon which it relied when making its decision to dismiss him. This included failing to provide him with the following relevant information:

- a. Navigator's profit and loss records for October 2019. While I accept that the profit and loss reports for October were not finalised by the time the decision to terminate was made, I understand the information contained therein was available in other forms and could have been provided to Mr Liu.
- b. The current and forecasted costs and expenses.
- c. The average revenue figures for September and October 2019.
- d. Xero monthly subscription costs summary.

[42] Navigator's failure to provide this information, and its failure to provide Mr Liu with a reasonable opportunity to respond to its letter of 29 October prior to his dismissal, denied Mr Liu the opportunity to query, and to provide feedback on, Navigator's proposal. It is likely that Mr Liu may not have been able to say anything to prevent Navigator from making the decision that it did, however this was not certain. Mr Liu said he came to the meeting on 30 October with his lawyer prepared to provide a

response to the redundancy proposal but was not provided with an opportunity to respond or make inquiries before the decision to terminate was delivered.

[43] Navigator's failures were not minor and did result in Mr Liu being treated unfairly.⁴ The procedural failings undermined the justification for the dismissal. A decision to dismiss in all the circumstances known at the time was not therefore one that a fair and reasonable employer could have made.

[44] I find Mr Liu was unjustifiably dismissed from his employment with Navigator.

Issue three: remedies

Lost remuneration for unjustified disadvantage

[45] Mr Liu claims unpaid wage arrears and holiday pay for the period from 21 October to 30 October 2019 (8 working days). During the Authority's investigation, Navigator agreed to make payment of the amount due to Mr Liu for this period. I have been told that payment has now been attended to.

Lost remuneration for unjustified dismissal

[46] In a situation where there is a flawed consultation process, but the substantive outcome is justified; the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right.⁵

[47] In this case, I estimate a further two weeks would have been sufficient to complete the consultation process correctly. Therefore Mr Liu is entitled to two weeks' lost remuneration pursuant to s 123(1)(b) of the Act.

[48] Mr Liu was paid \$60,000 per annum. This equates to a weekly gross amount of \$1,153. Multiplying this sum by two I reach a figure of \$2,306 gross.

[49] Navigator is ordered to pay Mr Liu the sum of \$2,306 gross within 14 days of the date of this determination.

⁴ Employment Relations Act 2000, s 103A(5).

⁵ *Waitakere City Council v Ioane* [2004] 2 ERNZ 294 (CA).

Compensation s 123(1)(c)(i)

[50] Even if the procedural requirements had been followed by Navigator, the result would, on balance, have been the same. In terms of compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act I therefore limit any award to the humiliation, loss of dignity and injury to feelings which arose as a result of the procedural failures associated with Mr Liu's dismissal. As these feelings overlap with those created by the unjustified disadvantage, it is appropriate that I consider a global award of compensation.

[51] Mr Liu gave evidence that he felt hurt and disrespected by Navigator's procedural failings. He also gave evidence of the impact the non-payment of wages had on his relationship with his partner and how he was embarrassed when he had to borrow money from his parents and his partner.

[52] In the circumstances, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$5,000.

[53] Navigator is ordered to pay Mr Liu the sum of \$5,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue four: Contribution

[54] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁶

[55] I am satisfied that Mr Liu did not contribute to his personal grievances and for this reason I make no deduction to the remedies I have awarded.

Issue five: Costs

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

⁶ Employment Relations Act, s 124.

[57] If they are not able to do so and an Authority determination on costs is needed Mr Liu may lodge, and then should serve, a memorandum on costs by 5 pm on 31 July 2020. Navigator will then have until 5 pm on 3 August 2020 to lodge any reply memorandum.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Outcome

[59] The overall outcome that I have reached is:

- a. Hansheng Liu suffered an unjustified disadvantage to his employment.
- b. Hangsheng Liu was unjustifiably dismissed from his employment with Navigator Accounting NZ Limited.
- c. Navigator Accounting NZ Limited is ordered to pay the following amounts to Hansheng Liu within 14 days of the date of this determination:
 - i. A sum of \$2,306 gross for lost wages;
 - ii. A sum of \$5,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act.
- d. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].