IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 322
3082792

BETWEEN	JOHN BUTLER Applicant
AND	OHOPE CHARTERED CLUB INCORPORATED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Stan Austin, advocate for Applicant Stephen Franklin, counsel for Respondent
Investigation Meeting:	4 and 10 August 2020
Submissions Received:	4 August 2020
Determination:	14 August 2020

DETERMINATION OF THE AUTHORITY

A. Mr Butler was unjustifiably dismissed by reason of redundancy. In resolution of his personal grievance the Ohope Chartered Club Incorporated is ordered to pay the following sums within 28 days of the date of this determination:

a) $761.90 under section 123(1)(b) of the Employment Relations Act 2000;

b) $7,000 under section 123(1)(c)(i) of the Employment Relations Act 2000.

B. **Costs are reserved.**

Employment relationship problem

[1] Mr Butler worked for the Ohope Chartered Club Incorporated (the Club) as a Driver/Door person for approximately 13 years until his employment ended by reason of redundancy in September 2019. The terms and conditions of Mr Butler's employment were set out in a written employment agreement signed by the parties on 22 April 2009.

[2] Mr Butler's principal duties and responsibilities were to drive the Club's van to transport club members to and from the club. This was a courtesy van provided by the Club at a minimal cost to members.

[3] In June 2019 Mr Butler agreed with his manager to reduce his hours of work in an effort to save costs. It was common ground that the van never made a profit and it was never intended that it should. However, the Club was in financial difficulty and needed to take steps to reduce its costs. Mr Butler agreed to reduce his hours by removing the Wednesday night from the van operations and reducing the hours of use on a Saturday with Mr Butler taking annual leave to top up his wages.

[4] At a meeting of the Club Committee on 26 August 2019 the President of the Club moved a motion that by the end of September the van driving duties be carried out by a pool of volunteers. The motion was seconded and passed.

[5] On 3 September 2019 Mr Butler was advised his position had been disestablished. His employment ended on 27 September 2019. Mr Butler challenges his dismissal which he says was unjustified.

Issues

[6] In order to resolve Mr Butler's application I must determine whether his dismissal by reason of redundancy was justified and if not, what if any remedies should be awarded.

[7] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the submissions and evidence received I have carefully considered everything.

The nature of Mr Butler's employment

[8] In the statement in reply the Club asserts that the nature of the employment relationship was casual. At the investigation meeting the Club abandoned that position and accepted Mr Butler's employment was permanent and ongoing.

The dismissal

[9] There is no dispute that Mr Butler's employment ended by reason of redundancy.

[10] In order for a redundancy to be justified the Club must demonstrate the decision to dismiss was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether the Club met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[11] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake.*[1] That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.[2] This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[12] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

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[1] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.
[2] *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

[13] The requirements in relation to consultation have been summarised by the Employment Court:[3]

> Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and 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 a 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.

[14] The genuiness of a redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes an employee is surplus to its needs, the Authority is not to substitute its business judgement for that of the employer.[4]

[15] Mr Butler's employment agreement defined redundancy as a situation where Mr Butler's position is deemed superfluous to the Club's requirements because of a reorganisation or a decision is made not to conduct work of the type carried out by Mr Butler, or for other similar reasons.

Was the redundancy for genuine business requirements

[16] It was common ground that during 2019 the Club faced significant financial difficulties. Mr Butler was at the Annual General Meeting in May 2019 having previously received the full financial statements for the Club. The financial state of the Club was discussed at the meeting including its precarious position.

[17] The van service operated at a loss and this was expected. This is because it was a service to encourage members to attend the Club. It was hoped that not having to drive, club members would attend the Club more frequently and stay at the club longer resulting in a bigger spend at the bar or in the dining room.

[18] Ms Karen Pocock, the Club President at the time these matters arose, told me the service did not deliver the expected results. Numbers of members attending the Club and the Club's income both continued to decline.

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[3] *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352 (2017) 14 NZELR 789

[4] Above n 1 at [98].

[19] In June 2019 Mr Butler met with the Club Manager and after discussing the financial state of the Club agreed to reduce his hours of work to assist the Club to reduce its ongoing costs relating to the driving of the van. It was agreed the van would no longer operate on a Wednesday night and would not operate after about 6.30 pm on a Saturday. Mr Butler offered to take annual leave to top up his hours each week. This offer was accepted by the Club and by agreement the amended van schedule commenced at the beginning of July.

[20] The Club Manager reported on the agreement with Mr Butler in an email to Ms Pocock and the Club's accountant on 26 June 2019. In his email the Club Manager reports that Mr Butler was happy to work the reduced hours and noted:

> ….[Mr Butler] did indicate he will give it a couple of months otherwise he has other options up his sleeve to move on.

[21] The Club Manager and Mr Butler both recall having had a discussion about the use of volunteer drivers for the van but neither of them could recall when those discussions took place. What was clear from the evidence is that Mr Butler made it known to the Club Manager that he did not believe using volunteer drivers would work for the club in the long term.

[22] I have been provided with comprehensive information regarding the financial state of the Club for 2019 and 2020. This information supports the evidence from the Club that it suffered its largest ever loss for the financial year ending 31 January 2020. The most significant contribution to that loss were the costs associated from the operation of the van services during 2019 including Mr Butler's wages.

[23] On 26 August the Club made the decision to utilise volunteer drivers for the van service. In accordance with the definition of redundancy set out in the employment agreement the decision by the Club to move to volunteer drivers meant his position was surplus to the Club's requirements.

[24] I am satisfied the decision to disestablish Mr Butler's role was based on genuine business requirements.

Was a fair process followed?

[25] The Club Manager often used the van for club business during times when it was not being used to convey members to and from the club. The Club Manager

returned the van to Mr Butler at his home on the days Mr Butler was to carry out his driving duties.

[26] On 3 September 2019 the Club Manager, while dropping the van back to Mr Butler, advised him he would be finishing at the end of the month. Mr Butler told me he had no opportunity to ask any questions at that time because the Club Manager simply turned and walked away.

[27] The Club Manager told me the two of them had a reasonable discussion around the decision to disestablish Mr Butler's role. He recalls this because he was leaving the following day on holiday and he wanted to have arrangements for Mr Butler's departure confirmed before he left. The Club Manager told me that during his discussion with him about a notice period Mr Butler advised him his wife was having an operation at the end of September. They then agreed on a finish date to take this into account.

[28] For the following reasons the procedure followed by the Club before making the decision to disestablish Mr Butler's position was unfair. Mr Butler never had the opportunity to discuss the impending redundancy with the Club Committee before the decision was made on 26 August or to properly consider whether there were other ways of configuring the service to reduce costs. He was entitled to an opportunity to engage with the Club before the final decision was made, to be provided with relevant information and an opportunity to provide feedback.

[29] While the Club Manager and Mr Butler discussed the possible use of volunteer van drivers these discussions could not be considered consultation about an impending redundancy.

[30] These process failures were not minor and resulted in Mr Butler being treated unfairly.[5] 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 a fair and reasonable employer could have made.

[31] Mr Butler was unjustifiably dismissed and is entitled to a consideration of remedies.

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

Remedies

[32] Mr Butler seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings in resolution of his personal grievance.

Lost wages

[33] At the investigation meeting Mr Butler told me he was offered a position in October but declined the offer as he wished to look after his wife. The position would require him to travel and that did not fit with his need to be available at home. Mr Butler told me he also applied for jobs with two other employers but these were not successful.

[34] I am not persuaded by the Club's submissions that Mr Butler did not take adequate steps to mitigate his loss and as a consequence there should be no award for lost wages.

[35] Mr Butler's rejection of the October offer of employment was reasonable given his wife's health situation and his need to be available to assist her. Given the region in which he was seeking work opportunities it is hardly surprising Mr Butler had few opportunities to apply for work.

[36] 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.[6]

[37] In this case, I estimate a further two weeks would have been sufficient to complete the consultation process correctly.

[38] Based on the wages and time records provided by the Club I have concluded Mr Butler worked an average of 20.05 hours each week and was paid $19 per hour for that work totalling $380.95 gross per week. Two weeks wages therefore is $761.90 gross.

[39] Within 28 days of the date of this determination the Ohope Chartered Club Inc. is ordered to reimburse Mr Butler lost earnings under s 123(1)(b) of the Act of $761.90 gross, representing my calculations of his lost wages.

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

Compensation

[40] Mr Butler seeks an award of $25,000 under s 123(1)(c)(i) of the Act. If the procedural requirements had been followed by the Club, the evidence shows the result would, on balance, have been the same. That is, Mr Butler's position would have been disestablished. Accordingly I have limited any award to the humiliation, loss of dignity and injury to feelings which arose as a result of the procedural failures associated with Mr Butler's dismissal.

[41] In his written witness statement Mr Butler told me he was blindsided by the decision to disestablish his position. He told me he had no forewarning that the decision could be made. He told me that as a result of his dismissal his sleep patterns were adversely affected for at least three months. Mr Butler told me he became withdrawn, cutting himself off from social contact until about Christmas time when he began going to the Club socially again.

[42] I have not been persuaded by Mr Butler's written evidence. At the investigation meeting Mr Butler confirmed that he was at the May Annual General Meeting where the parlous financial position of the club was discussed and he was aware for between 15-18 months that there was talk of removing the van service.

[43] At the investigation meeting Mr Butler confirmed that when he met with the Club Manager in June they discussed the financial state of the Club and he had been expecting the decision to stop the van operations.

[44] Mr Butler's evidence about cutting himself off from social contact changed throughout the course of the investigation meeting. I am satisfied Mr Butler returned to the club on a number of occasions after the employment relationship ended and have accepted the evidence of those he socialised with that he did not appear to be upset or otherwise adversely affected.

[45] The evidence from the Club including its accountant, is that it does not have the financial capacity to pay compensation. The financial capacity of an employer is not a consideration that is relevant to the exercise of discretion when setting the compensation for non-pecuniary loss.[7]

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[7] *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40 at [38].

[46] 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 $7,000.

[47] The Ohope Chartered Club Inc. is ordered to pay to Mr Butler the sum of $7,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[48] I pause here to record that the Club has not applied for any orders that monetary awards made under s 123(1) (b) or (c) of the Act be paid by instalment which was a mechanism available to it under s 123(2) of the Act.

Contribution

[49] 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.[8]

[50] I am satisfied Mr Butler did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

Costs

[51] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Butler shall have seven (7) days from the date of this determination in which to file and serve a memorandum on the matter. The Club shall have a further seven (7) days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[52] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

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[8] Employment Relations Act 2000, s 124.