

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 500
3098073

BETWEEN WAYDE VERMUELEN
Applicant

AND MIKES TRANSPORT
WAREHOUSE LIMITED
First Respondent

MODERN TRANSPORT
ENGINEERS LIMITED
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Adam Mapu & Nadia Tu'itahi, advocates for Applicant
Truc Tran, counsel for Respondents

Investigation Meeting: 16 September 2020

Submissions Received: 23 September 2020 from Applicant
25 September 2020 from Respondents

Determination: 3 December 2020

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Vermuelen's employment were affected to his disadvantage by the unjustified actions of Mikes Transport Warehouse Limited.**
- B. To resolve Mr Vermuelen's personal grievance Mikes Transport Warehouse Limited is ordered to pay to Mr Vermuelen the sum of \$3,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) within 14 days of the**

date of this determination.

C. Mr Vermuelen was unjustifiably dismissed from Modern Transport Engineers Limited.

D. To resolve Mr Vermuelen's personal grievance Modern Transport Engineers Limited is ordered to pay the following amounts within 14 days of the date of this determination:

\$13,747.50 under section 123(1)(b) of the Act; and

\$10,000 under section 123(1)(c)(i) of the Act.

E. The application for penalties is declined.

F. Costs are reserved.

Employment relationship problem

[1] Mr Vermuelen was employed by Mikes Transport Warehouse Limited (MTW) as a sales representative from 7 January until 5 March 2020. From 6 to 12 March 2020 Mr Vermuelen worked for Modern Transport Engineers Limited (MTE) in its finishing bay. MTW and MTE are both part of a wider group of Modern Transport companies that operate out of different premises and under separate legal identities. Messers Robin Ratcliffe and Zane Ratcliffe are directors and shareholders of both MTW and MTE.

[2] Mr Vermuelen is from South Africa. His employment in New Zealand was subject to him holding a valid work visa.

[3] Mr Vermuelen says he was dismissed from his employment with MTW on 5 March 2020 and then from MTE on 12 March 2020. In both cases Mr Vermuelen says the dismissals were unjustified.

[4] MTW and MTE deny Mr Vermuelen was dismissed. MTW says he resigned from his role as a sales representative on 5 March 2020 and the parties mutually agreed he would work in the finishing bay for Modern Transport Engineers Limited (MTE) from 6 March 2020.

[5] MTE says that because of Mr Vermuelen's visa conditions he was unable to work for MTE and the employment relationship ended because of the lack of a valid work visa.

[6] This determination deals with Mr Vermuelen's substantive claims that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of MTW and/or MTE and that he was unjustifiably dismissed by MTW and/or MTE. In addition to his personal grievance claims Mr Vermuelen has asked the Authority to impose a penalty for various breaches of the employment agreement.

Proceedings

[7] Mr Vermuelen lodged an application with the Authority on 26 March 2020 seeking an urgent order that he be reinstated on an interim basis to his position with MTW. The application for urgency was granted on the interim application.

[8] In a determination dated 9 April 2020 I declined Mr Vermuelen's application for interim reinstatement.¹ Following the issue of that determination Mr Vermuelen has returned to South Africa and advised the Authority on 10 August 2020 that he no longer sought permanent reinstatement.

Issues

[9] In order to resolve Mr Vermuelen's employment relationship problems I must determine the following issues:

- a) Did Mr Vermuelen suffer an unjustified disadvantage to his employment or conditions of employment by MTW?
- b) Was Mr Vermuelen unjustifiably dismissed by MTW and/or MTE?
- c) If Mr Vermuelen was unjustifiably disadvantaged, and/or unjustifiably dismissed, what remedies should be awarded?
- d) Should penalties be imposed on MTW and/or MTE?

[10] 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

¹ *Vermuelen v Mikes Transport Warehouse Limited* [2020] NZERA 145.

necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[11] On 14 November 2019 Mr Vermuelen was living in New Zealand and looking for work. He walked into the offices of MTW and asked whether there were any job openings. He was introduced to Mr Robin Ratcliffe (Mr Ratcliffe) and the two had a general conversation about Mr Vermuelen's work history.

[12] During the meeting Mr Ratcliffe asked Mr Vermuelen about the process for getting a work visa. Mr Vermuelen advised he needed to secure a position before he could apply for a work visa.

[13] Following the meeting with Mr Ratcliffe, Mr Vermuelen was interviewed by Mr Zane Ratcliffe (Zane Ratcliffe), Mr Ratcliffe's son.

[14] Mr Vermuelen had provided MTW with a copy of his curriculum vitae. This document records Mr Vermuelen's work experience and skills which, in relation to sales, includes roles as:

- a) Assistant General Manager in Sales overseeing daily business operations, development, researching, identifying and implementing growth strategies and opportunities, and improving revenue;
- b) Business Development Manager involved in new business sales, making contact with potential clients, researching organisations and individuals to find new opportunities and finding and developing new markets and improving sales; and
- c) Key Accounts where he expanded the relationships with existing customers by proposing solutions to meet their objectives.

[15] While MTW had no vacancies at the time, Mr Ratcliffe, impressed by the way Mr Vermuelen sold his capabilities in sales, created a role for him in the sales team as a sales representative. MTW had a product range that was undersold. It was envisaged the products could be sold to a different customer base than MTW's usual

customer base and Mr Vermuelen was seen as someone who could sell these undersold products into the building industry.

[16] Mr Vermuelen was offered the role and provided with a copy of the proposed employment agreement which he accepted and signed on 15 November 2019.

[17] Mr Vermuelen applied for a New Zealand Essential Skills work visa. A one year work visa was granted on 14 December 2019.

[18] Mr Vermuelen started working for MTW on 7 January 2020. On his first day he was provided with a desk in the purchasing office and issued with a laptop, mobile phone and a company vehicle.

[19] Mr Vermuelen was introduced to Mr Kerry Thompson, a long standing employee who was valued by MTW for his product knowledge and sales ability. Mr Thompson was to provide assistance and guidance to Mr Vermuelen in carrying out his role.

[20] Mr Ratcliffe instructed Mr Vermuelen to focus on selling MTW's plywood products, workbenches and other products such as LED lighting.

[21] On 31 January 2020 Mr Vermuelen met with Mr Mark Flyger, Group Accountant and Human Resources Manager. During that meeting Mr Vermuelen raised his one year work visa which he had been granted based on his role being described as a sales representative role. Mr Vermuelen told Mr Flyger that what he was actually doing was a business development role. Mr Vermuelen asked Mr Flyger to change the job description to better reflect the role he was carrying out so that he could apply for a three year work visa. Mr Flyger agreed to change the job description and did so by adding "develop sales" at the beginning of the job description. No other changes were made to the job description.

[22] Mr Vermuelen then used the amended employment agreement to support an application to Immigration New Zealand for a variation to the conditions of his work visa from twelve months to three years. The application was declined by Immigration New Zealand. Mr Vermuelen was told the new job would need to be advertised to demonstrate the position could not be filled by New Zealanders before any changes to his visa conditions would be approved.

[23] Mr Vermuelen informed Mr Ratcliffe of the decision by Immigration New Zealand. Mr Ratcliffe declined to advertise because MTW did not want to advertise a role that was not vacant and which would possibly attract a number of applicants who MTW had no intention of interviewing.

[24] On 5 March 2020 Mr Vermuelen was out of the office cold calling on prospective clients when Mr Thompson rang him and asked him to attend a meeting with Mr Ratcliffe.

[25] There is a dispute about what happened during this meeting which I have addressed later in this determination. What is not disputed, is that Mr Vermuelen became upset during the meeting which ended when Mr Vermuelen accepted an offer to work for MTE in its finishing bay.

[26] The discussions about the new role resulted in an agreement that Mr Vermuelen would retain his current rate of pay and work 50 hours each week. Mr Ratcliffe acknowledged Mr Vermuelen would no longer have access to the company vehicle. He offered to purchase a vehicle for Mr Vermuelen and Mr Vermuelen agreed he would pay for the vehicle as a deduction from his pay until the vehicle had been paid for in full.

Employment by MTE

[27] Mr Vermuelen started working for MTE in the finishing bay on 6 March 2020. At that time Mr Vermuelen was in breach of his work visa which limited him to working as a sales representative for MTW.

[28] Concerns about the work visa were raised with Mr Vermuelen on 12 March during a meeting with Mr Smith and Mr Flyger. Mr Vermuelen left the workplace on 12 March 2020 and did not return.

The law

[29] Under s 103(1)(b) of the Act 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 or the employee has been unjustifiably dismissed.

[30] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage or that there was a dismissal. The burden then shifts to the employer under s 103A of the Act 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 employment or condition(s) of employment being affected, or for the employee to have been dismissed and that it was handled in a procedurally fair manner.

Unjustified disadvantage

[31] Mr Vermuelen claims one or more conditions of his employment were affected to his disadvantage when MTW:

- a) Misrepresented the role he was to undertake;
- b) Unilaterally altered his role so that it was no longer in line with his work visa conditions;
- c) Gave him contradictory instructions by different managers as to how to perform his role;
- d) Failed to provide him the necessary support to be successful in the role;
and
- e) Failed to act in good faith

Misrepresentation of the role

[32] Mr Vermuelen alleges the position offered to him before he started working for MTW was different to the position he undertook for MTW. Mr Vermuelen says he believed the role he had been offered and accepted was a role working in the parts department and he never expected to have to sell building products out on the road.

[33] MTW disputes the conclusion reached by Mr Vermuelen was reasonable. I have preferred the evidence of Mr Ratcliffe and Zane Ratcliffe that during their interviews with him they explained to Mr Vermuelen what the products were that needed to be sold and he seemed relaxed about that. Further he was given a company vehicle and mobile phone which indicated an intention that he would be out on the road.

[34] Mr Vermuelen relies on an advertisement he was provided by MTW and the job description in his employment agreement to support his claim that the role was misrepresented to him.

[35] Mr Vermuelen was provided with a copy of an advertisement that had been placed by MTW on Trademe prior to Mr Vermuelen approaching MTW, seeking applications to fill the role of a Parts Salesperson. The advertisement was necessary because MTW had to demonstrate to Immigration New Zealand that there were no qualified New Zealanders who could fill the role before Mr Vermuelen could be granted a work visa.

[36] The job description set out in the employment agreement includes duties normally associated with a person working in a parts department and not a sales representative out of the road. By way of example:

- Assist in keeping parts department clean and orderly;
- Assist Parts Manager in merchandising displays;
- Maintain the retail sale floor and displays to meet or exceed standards;
- Control showroom inventory to ensure maximum sales and customer satisfaction;
- Perform routine housekeeping tasks that maintain and enhances the cleanliness of products and the retail sales area;
- When working the parts counter, follow prescribed cash, credit and check processing procedures;
- Perform other tasks as required by Parts Manager;
- Follow up on shortages and expedite by reporting to the Parts Manager;
- All and any duties associated with the employers business of selling truck and trailer parts.

[37] Mr Vermuelen told me that after he started work his duties were changed from those contained in the job description in his employment agreement, to require him to cold call potential new customers and sell building products rather than make sales calls to existing customers. He said he found this challenging because he was new to both New Zealand and the products sold by MTW.

[38] At the investigation meeting Mr Thompson confirmed there was a vacancy in the parts department but it was never intended that Mr Vermuelen be put into that role. Mr Thompson told me Mr Vermuelen presented as someone who could have worked on the counter, but MTW considered he was better than that. He then told me MTW would not put Mr Vermuelen into a counter sales role because transport parts are a specialised area and he did not have the expertise to work in the parts department.

[39] Mr Vermuelen has an argument that he was misled into believing the offer of employment was for a parts sales person because the description in the employment agreement and the advertisement provided by MTW to support Mr Vermuelen's work visa application was that of a parts salesperson. Further, Mr Flyger completed the Employer Supplementary Form on behalf of MTW on 15 November 2019 to support Mr Vermuelen's application for a work visa. In this form Mr Flyger confirms the title of the position is "Sales Representative MV Parts".

[40] Standing back and considering the evidence objectively, I am satisfied Zane Ratcliffe discussed with Mr Vermuelen before the offer of employment was made, that he was seen as a prospect to sell product into the building industry. The difficulty for MTW is that this was not clarified in the employment agreement, was not the role set out in the advertisement used by Mr Vermuelen to support his visa application and was not the role specified by MTW in the supplementary form provided to Immigration New Zealand.

[41] I have no doubt MTW was looking to help Mr Vermeulen into a job and at the same time saw this as an opportunity to move product that was proving difficult to sell. However, MTW failed to ensure the role to be undertaken was made clear by correctly describing the work to be performed.²

[42] As I have found later in this determination, this factor has contributed to a finding that one or more conditions of Mr Vermuelen's employment were affected to his disadvantage. The action in failing to properly meet the requirements of s 65 of Act was unjustified.

² Employment Relations Act 2000, s 65(2)(a)(ii).

Unilateral changes to Mr Vermulen's role

[43] Mr Vermuelen maintains the role he accepted and the role he was required to undertake were two different roles and that MTW unilaterally altered the role after he accepted employment. MTW denies the role was changed and says it was always intended that Mr Vermuelen would sell building products.

[44] As discussed above, I am satisfied that the description of the work to be performed by Mr Vermuelen in the employment agreement, the description of the role set out in the advertisement and the information provided by MTW to Immigration New Zealand combined to leave Mr Vermuelen with a genuine belief that the role he had accepted and the role he was required to undertake when he started work were different.

[45] Unfortunately Mr Vermuelen was not successful in the role MTW required him to undertake. MTW's dissatisfaction in Mr Vermuelen's performance and Mr Vermuelen's unhappiness with his own performance is what lead to the events on 5 March 2020. This resulted in Mr Vermuelen leaving his employment with MTW and starting work with MTE.

[46] I am satisfied one or more conditions of Mr Vermulene's employment were affected to his disadvantage when he was unable to meet MTW's expectations of him in the role he was required to undertake after he started employment. As set out earlier, the failure by MTW to be clear in the employment agreement about the work to be performed by Mr Vermuelen was an unjustified action.

Contradictory instructions

[47] Between January and March 2020 Mr Vermuelen undertook the tasks of sales representative but says he received conflicting instructions on how to carry out his role and was limited in the type of products he was allowed to sell and as a consequence his performance suffered.

[48] Mr Vermuelen was told early on in his employment to focus his sales on high value products such as the plywood and lighting. Mr Ratcliffe said those items tended to be sold in bulk and a single sale could be worth thousands of dollars.

[49] Mr Vermuelen told me he was very confused about what was expected of him. He said he asked Zane Ratcliffe what he should concentrate on and was told just to sell product. It was not until February that he was told what products to focus on.

[50] Mr Vermuelen then started phoning customers off a customer list asking if they wanted to see a sales representative. He said Mr Thompson told him he could not call customers off the list because other sales representatives were working in the area and using the same list.

[51] Mr Vermuelen says he received conflicting instructions on the one hand from Mr Thompson to be in the office and contact procurement managers from building firms and on the other by Mr Ratcliffe that he wanted him on the road.

[52] Mr Thompson says he did suggest to Mr Vermuelen that he make telephone contact with the procurement managers of local building companies before arranging to meet with them but this was not intended to be an instruction to stay in the office. It was intended to provide guidance to assist him.

[53] Mr Ratcliffe had developed expectations about Mr Vermuelen's abilities based on the interviews and information provided during the pre-employment stage. He expected Mr Vermuelen to be out on the road which is why he was provided with a company vehicle and a mobile phone.

[54] Mr Vermuelen reported to Mr Thompson. Any contradictory advice received about what and how he should be undertaking his role could have been clarified by talking with Mr Thompson. I am not satisfied Mr Vermuelen has established one or more conditions of his employment were affected to his disadvantage by receiving conflicting instructions.

Failure to provide support

[55] Mr Thompson told me the plan for Mr Vermuelen during his initial employment was for him to spend the first week gaining product knowledge. There is no dispute Mr Vermuelen was provided with a catalogue of company products which he was expected to review.

[56] During the first weeks of his employment Mr Vermuelen met with at least one other sales representative to talk about MTW's products and to gain some product

knowledge. Mr Vermuelen was also told to arrange a meeting with the Auckland based sales representative. However Mr Vermuelen was unable to connect with him before his employment with MTW ended.

[57] Both Mr Ratcliffe and Mr Thompson told me they spent time talking to Mr Vermuelen about his role and making suggestions to him about how he could improve. Mr Thompson told me Mr Vermuelen's desk was set up in his office so he could be available to provide guidance and assistance. Mr Thompson met with Mr Vermuelen almost daily.

[58] Mr Vermuelen has failed to establish one or more conditions of his employment were affected to his disadvantage as a result of the level of support he received in his role with MTW. Mr Vermuelen worked for MTW for just over eight weeks and during that time he was provided with the guidance and support one would expect for a sales representative with Mr Vermuelen's skills and experience.

Failure to act in good faith

[59] Mr Vermuelen claims MTW breached its statutory obligations of good faith and this has led to one or more conditions of his employment being affected to his disadvantage.

[60] The Act requires parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.³

[61] Mr Vermuelen has not identified any conduct on the part of MTW or MTE that could be said to have breached the statutory obligations of good faith.

Conclusion

[62] One or more conditions of Mr Vermuelen's employment were affected to his disadvantage when MTW failed to comply with the requirements of s 65 of the Act. This failure was not an action an employer acting fairly and reasonably could have taken in all the circumstances of this case and Mr Vermuelen is entitled to a consideration of remedies to resolve his personal grievance.

³ Above n2, s 4.

Unjustified dismissal

[63] Mr Vermuelen alleges he was dismissed on 5 March 2020 when he failed to meet MTW's expectations. He says he was forced to accept a role as a factory worker for MTE before then being dismissed again.

[64] A dismissal occurs when there is a "sending away" of a worker so that the termination of the employment occurs at the initiative of the employer.⁴ The context and content of the communication between the worker and the employer are considered on an objective standard to discern what was more likely than not to have occurred in the facts of any particular case.

Dismissal from MTW

[65] Mr Ratcliffe was concerned about Mr Vermuelen's lack of progress in selling the product range given to him. He told me Mr Vermuelen had been given plenty of time and had achieved no penetration into the market. Given these concerns, on 5 March 2020 Mr Ratcliffe instructed Mr Vermuelen to return to the office to meet with him. Mr Ratcliffe told me the purpose of the meeting was to try and provide further guidance to Mr Vermuelen to help him become successful in the role.

[66] There is a dispute about what happened at that meeting. Mr Vermuelen says he became upset during the meeting and was dismissed. Mr Ratcliffe says Mr Vermuelen resigned when he told Mr Ratcliffe he could not do the job.

[67] Mr Ratcliffe says he told Mr Vermuelen he was not succeeding in the role and that with his experience and the products at his disposal he would expect Mr Vermuelen to be achieving great results. Mr Ratcliffe says he outlined how he would go about the sales process and how he would find new leads. Mr Ratcliffe says Mr Vermuelen became upset and conceded that he could not do the job.

[68] Mr Vermuelen agrees he was told he was not achieving, but says Mr Ratcliffe told him his services were no longer needed. Mr Vermuelen says he asked if he was being dismissed and was told "yes".

⁴ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* ERNZ Sel Cas 95, at 102-103.

[69] Mr Smith was in the meeting on 5 March 2020 and told me Mr Ratcliffe discussed Mr Vermuelen's progress with him, his expectations and the sales process generally. Mr Smith confirmed Mr Ratcliffe's evidence that during the discussion Mr Vermuelen said he felt he could not do the job required of him.

[70] Mr Robert Pasley, Business Development Manager, also confirms Mr Ratcliffe's evidence that the meeting was about trying to help Mr Vermuelen meet sales expectations. He entered the office while the meeting was in progress and observed Mr Vermuelen becoming agitated.

[71] It was common ground that Mr Vermuelen became upset during the meeting and was in tears. MTW says this was because he was concerned about how he would tell his partner that he could not do the job or continue in the sales role and the impact leaving MTW would have on his immigration status.

[72] All of the witnesses for MTW agree Mr Vermuelen asked if there were any other roles available. Mr Smith was asked about a possible role in the finishing bay working for MTE. Mr Smith confirmed he had a vacancy and it was agreed Mr Vermuelen would take up this role the next day.

[73] It is common ground Mr Vermuelen wanted to retain his current terms and conditions of employment including his current salary level. This was because he wished to protect his work visa. It was agreed Mr Vermuelen would receive an hourly rate equivalent to his annual salary based on a 50 hours per week.

[74] In addition Mr Ratcliffe offered to purchase a vehicle for Mr Vermuelen which Mr Vermuelen agreed he would pay off through regular deductions from his wages.

[75] I have concluded on balance that Mr Vermuelen was not dismissed by MTW on 5 March 2020. He was not "sent away". Rather there was a discussion about Mr Vermuelen's performance, an acceptance that he could not do the job and an agreement that he move to a different job with MTE, a separate legal entity under the group of Modern Transport companies.

The end of the relationship with MTE

[76] In accordance with the agreement reached the previous day with Mr Ratcliffe and Mr Smith, Mr Vermuelen started working for MTE on 6 March 2020. During the day he approached Mr Flyger about an employment agreement for his new role. At that stage Mr Flyger was not aware of the change in the employment relationship and so no employment agreement had been prepared.

[77] Mr Vermuelen also says Mr Flyger and he discussed his work visa and Mr Flyger agreed to keep Mr Vermuelen on the books of MTW as a sales representative despite him working for MTE in the finishing bay. This was intended to be a holding pattern until Mr Vermuelen could arrange for a variation of conditions for his work visa.

[78] When the employment agreement had been prepared Mr Vermuelen met with Mr Flyger to go through the agreement. There was a disagreement about the hourly rate which Mr Vermuelen believed was not in line with the agreement he had reached with Mr Ratcliffe. As a result of the disagreement Mr Vermuelen refused to sign the employment agreement.

[79] Unbeknown to Mr Vermuelen, Mr Flyger had received a letter from Immigration New Zealand that week relating to another employee. This led to Mr Flyger becoming concerned that until Mr Vermuelen had a new work visa he would be working illegally for MTE because his work visa required him to work as a sales representative exclusively for MTW.

[80] Mr Flyger shared his new found concerns with Mr Smith. This led to the meeting which was held at about 5 pm on 12 March 2020. During the meeting Mr Flyger, Mr Smith and Mr Vermuelen discussed Mr Vermuelen's immigration status. Mr Flyger suggested Mr Vermuelen contact Success Personnel, a company with experience in making applications for variations of conditions for work visas.

[81] Mr Smith told Mr Vermuelen that if he could get a change to the work conditions on his visa he could continue to work with MTE but until that happened it would be unlawful for MTE to continue employing him. Mr Vermuelen says he was dismissed at this point and he left the workplace.

[82] Mr Vermuelen sent a text to Mr Flyger on 13 March 2020 requesting the reasons for his dismissal and asking what he had done wrong. Mr Flyger responded that same day. In his text Mr Flyger explained to Mr Vermuelen that he had done nothing wrong, but that when the agreement was reached about moving him to MTE the visa conditions requiring Mr Vermuelen to work exclusively for MTW were not known and so it was not possible to employ Mr Vermuelen in the finishing bay.

[83] Mr Flyger explained that the companies within the Group employed a large number of visa holders and the company must be seen to be upholding the legal requirements of Immigration New Zealand.

[84] At the investigation meeting Mr Flyger confirmed he was aware of the visa conditions and knew Mr Vermuelen had to file an application for a variation to the conditions attached to his work visa. He told me he was aware on Mr Vermuelen's first day of employment with MTE that he would require a variation to his visa conditions.

[85] I find Mr Vermuelen was dismissed from his employment with MTE on 12 March 2020. He was "sent away" with no intention that he continue to be employed by MTE until such time as he had resolved his change of conditions for his work visa.

Was the dismissal from MTE justified?

[86] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of MTE, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[87] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[88] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.⁵

[89] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) of the Act provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[90] For the reasons that follow, I find MTE has failed to discharge the onus of proving that its actions in dismissing Mr Vermuelen were justified.

[91] It is well-established that where dismissal is a possible outcome, the employee is entitled to have the issues of concern clearly identified, details of the evidence the employer intends to rely on in support of the concerns raised and a proper opportunity to respond before any decision is made. Those requirements are encompassed in the statutory obligations of good faith.⁶

[92] MTE did not meet these obligations. MTE failed to disclose to Mr Vermuelen prior to the 12 March 2020 meeting, what its concerns were. Consequently no opportunity was afforded to Mr Vermuelen to consider the concerns before he was asked to respond. MTE through Mr Flyger was fully aware of Mr Vermuelen's visa situation before it engaged him and allowed him to start work.

[93] MTE's actions were unfair. When Mr Vermuelen attended the meeting on 12 March 2020 he had no understanding of the seriousness of the meeting. It is apparent from the evidence before me that MTE did not consider alternatives to dismissal.

[94] MTE's failings were not minor and resulted in Mr Vermuelen being treated unfairly. I am satisfied in all the circumstances Mr Vermuelen's was dismissed from his employment with MTE on 12 March 2020 and that action was not the action an employer acting fairly and reasonably could take in all the circumstances.

⁵ Above n2, s 103A(5).

⁶ *Hoff v The Wood Lifecare (2007) Ltd* [2015] ERNZ 669 at [34].

Remedies

[95] Having established personal grievances for unjustified disadvantage and unjustified dismissal I may award any of the remedies provided for under s 123 of the Act. In this regard Mr Vermuelen seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

Lost wages

[96] Section 123(1)(b) of the Act provides for the reimbursement by MTE of the whole or any part of wages lost by Mr Vermuelen as a result of his personal grievance. Section 128(2) provides that I must order MTE to pay Mr Vermuelen the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.⁷

[97] Mr Vermuelen has not stated the period for which lost wages are claimed and no submissions have been made about this point.

[98] Mr Vermuelen accepted the offer of employment with MTE on the basis that he would receive an hourly rate equivalent to the \$55,000 per annum salary he received at MTW based on a 50 hour working week. I have calculated the hourly rate as \$21.15. This calculation is based on 50 hours being worked each week over 52 weeks of the year equating to 2,600 hours. Dividing the 2,600 hours by \$55,000 equates to \$21.15 per hour.

[99] Mr Vermuelen was unable to secure alternative employment following his dismissal. This was largely due to the Covid-19 situation that forced New Zealand into a complete lockdown.

[100] I am satisfied Mr Vermuelen has lost wages as a result of his personal grievance for unjustified dismissal. Mr Vermuelen is entitled to a sum equal to three months' wages which I have calculated as amounting to \$13,747.50 gross.

[101] Modern Transport Engineers Limited is ordered to pay Mr Vermuelen the sum of \$13,747.50 under s 123(1)(b) of the Act within 14 days of the date of this determination.

⁷ Above n 2, s 128(3).

Compensation

[102] Mr Vermuelen claims compensation of humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. I have found Mr Vermuelen was unjustifiably disadvantaged in his employment with MTW and unjustifiably dismissed from his employment with MTE.

[103] Mr Vermuelen has given very little evidence of the hurt and humiliation suffered as a result of his unjustified disadvantage grievance. I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$3,000.

[104] Mike's Transport Warehouse Limited is ordered to pay Mr Vermuelen the sum of \$3,000 pursuant to s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

[105] In respect of his dismissal Mr Vermuelen told me he was left stranded in New Zealand with no income and no ability to feed his family or pay his rent. He was left without transport and with no ability to provide for his young child. Because he was an immigrant Mr Vermuelen did not qualify for emergency government support. Mr Vermuelen and his young family eventually had to leave New Zealand and return to South Africa where they now reside.

[106] I am satisfied Mr Vermuelen suffered humiliation, loss of dignity and injury to his feelings. Taking into account the evidence he provided, his inability to source an income following his dismissal, and the duration of his employment, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$10,000.

[107] When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i) of the Act.

[108] Modern Transport Engineers Limited is ordered to pay Mr Vermuelen the sum of \$10,000 pursuant to s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Contribution

[109] Where the Authority determines 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

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

Penalties

[111] Mr Vermuelen has asked the Authority to impose a penalty on MTW and/or MTE for a breach of the employment agreement, specifically for a failure to act in good faith, protect the safety of its employees and failure to follow problem solving procedures.

[112] Mr Vermuelen has not provided any evidence to support his application for a penalty. Accordingly, I am not satisfied MTE has breached the employment agreement in the way asserted by Mr Vermuelen.

[113] If I am wrong, I consider any breaches have been captured by the personal grievance claims and wish to avoid the prospect of Mr Vermuelen double dipping for grievance remedies and penalties. In the event that I had to consider penalties the issues raised by Mr Vermuelen cannot be described as deliberate, serious and sustained in such a way as to justify a penalty under s 4 of the Act.

[114] The application for penalties to be imposed is declined.

Costs

[115] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the parties shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must

⁸ Above n 2, s 124.

include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[116] 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