

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 270
3102595

BETWEEN	YONGNAN KANG Applicant
AND	ONE PURE INTERNATIONAL GROUP LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Mere King, counsel for Applicant
Rob Towner, counsel for Respondent

Investigation Meeting: 14, 15, 16 and 21 April 2021

Submissions Received: 5 and 21 May 2021 from Applicant
19 May 2021 from Respondent

Determination: 24 June 2021

SECOND DETERMINATION OF THE AUTHORITY

- A. One or more conditions of his employment were affected to Mr Kang's disadvantage by the unjustified actions of One Pure International Group Limited.**
- B. Mr Kang was unjustifiably dismissed.**
- C. One Pure International Group Limited is ordered to pay to Mr Kang the following remedies within 28 days of the date of this determination:**

(a) \$16,094.05 gross under s 123(1)(b) of the Employment Relations Act 2000; and

(b) \$25,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

D. Costs are reserved.

Interim non-publication orders

[1] On 26 May 2020 I made interim non-publication orders prohibiting the publication of the following information:¹

- a) Any information relating to the November 2018 share valuation and purchase price of One Pure International Group Limited (One Pure);
- b) Any financial information relating to One Pure, including financial performance, sales figures, profits and losses and income;
- c) Any information related to customer and supplier arrangements; and
- d) Any information related to the specific quantum of the remuneration received by Mr Kang and any other One Pure employees.

[2] Except to the extent necessary for this determination I confirm those orders are now permanent.

Employment relationship problem

[3] On 22 May 2020 Mr Kang's employment at One Pure ended after he was given notice of dismissal as a result of a restructuring. Mr Kang claims his dismissal was unjustified on the grounds that there was no genuine commercial rationale to substantiate the disestablishment of his position and the consultation process was not fair or reasonable. In addition, Mr Kang claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of One Pure.

[4] One Pure denies the claims and says the Authority lacks jurisdiction to determine the claims for disadvantage as they were not raised within the statutory 90-

¹ *Kang v One Pure International Group Limited* [2020] NZERA 211 at [4].

day period. One Pure does not consent to the disadvantage grievances being raised out of time.

Background

[5] On 31 August 2012 Mr Kang incorporated One Pure International Group Limited. At that time Mr Kang was the sole director and shareholder of the company. One Pure operates a water bottling business. At the time this employment relationship problem arose, One Pure had its head office in Auckland and its manufacturing facility in Napier.

[6] On 1 August 2014 Mr Kang signed an employment agreement with One Pure recording his position as Chief Executive Officer (CEO). Mr Kang describes his key duties as including managing all aspects of the business with a particular focus on driving sales, marketing and profitability.

[7] On 29 November 2018 Mr Kang sold 75 per cent of his shares to Mr Jianping Wang. Mr Wang and his family have an ownership interest in 17 other companies in New Zealand which operate under the Huadu Group and provide services in the construction and development, English language teaching and tourism industries.

[8] On the date of the sale Mr Kang retained a 25 per cent shareholding in the company, his position as a director and his employment as CEO. The Shareholders Agreement entered into by Mr Kang and Mr Wang on 29 November 2018 recorded:

D The parties also intend this Agreement to record the manner of administration, management and operation of the Company and the rights and obligations of each Shareholder.

...

4.2 Mr Kang shall have authority to make decisions about the operations of the Business within New Zealand for 1 year from the Commencement Date, including all aspects of running the bottling plant in Napier, as well as the overseas markets other than China. The New Shareholder shall have the authority to make decisions about the operations of the Business within China.

...

6.1 The Shareholders acknowledge that the Board will delegate day-to-day responsibility for the operation of the Company and for overseas markets (excluding China) to Mr Kang for one (1) year from the Commencement Date and the operation of the Company in China to the New Shareholder or the Director(s) it appoints...

[9] On 7 December 2018 two additional directors were appointed including Mr Wang and Mr Michael Geng. Mr Geng is also a director of companies operating under the Huadu group of companies.

Appointment of Global President/CEO

[10] At a meeting of the Board on 7 June 2019 the directors, including Mr Kang, unanimously agreed to appoint Mr Baoyu Guo as the Global President of One Pure. His duties included the establishment and organisation of One Pure's systems and processes, supervision of production management and the organisation of sales tasks. A written employment agreement was signed by Mr Guo and One Pure on 8 June 2019 confirming Mr Guo's appointment as One Pure's Global President.

[11] Mr Paul Kim, the then General Manager for One Pure, emailed the directors and set out a summary of notes from the Board meeting. In his email Mr Kim records Mr Guo's position as Global CEO. I have concluded that the terms Global President and Global CEO are used interchangeably to describe Mr Guo's role from 8 June 2019.

First proposal to restructure

[12] At a meeting of the Board of directors on 1 November 2019 the directors, including Mr Kang, unanimously agreed to separate the responsibilities for the management of the business into two areas. Operations and Sales. Mr Kang was, together with Mr Guo, Ms Lisa Guo and Mr Verry, to be responsible for sales.

[13] Prior to the meeting an information pack was circulated to the directors. The pack included a number of documents and proposals to be discussed at the Board meeting. The pack included an organisation chart showing the proposed new structure for the sales team. The proposal would see a shift for Mr Kang to taking responsibility for sales in South East Asia.

[14] As events transpired Mr Kang was not appointed to the South East Asia Sales role, however, in all other respects the proposed company structure was implemented. This included Mr Guo taking a lead role in the organisation as Global CEO.

[15] The minutes of the meeting record Mr Kang as indicating he was very confident in the operation and management team under the leadership of Mr Wang. He undertook to work out a sales layout and proposals to lay the foundation for the following year's sales performance.

[16] After the meeting Mr Kang refused to confirm the minutes as being accurate. He required more information about the proposed new position of South East Asia Sales. In his email Mr Kang did not dispute that he and the two other directors had voted to accept the proposed new structure.

Second proposal to restructure

[17] In preparation for the February 2020 Board meeting, a meeting pack was circulated to the directors. This pack included a further proposal to restructure the company. The proposed organisation chart which was included in the pack did not identify a position for Mr Kang. After he pointed this out a new copy of the proposed organisation chart was circulated. The proposed structure remained the same but all names attributed to specific positions had been removed.

[18] As with the earlier proposal aspects of the second proposal affecting Mr Kang did not proceed.

[19] Mr Kang told me that after the Board meeting Mr Guo approached him and told him he was under instructions from Mr Wang to seek his [Mr Kang's] resignation as CEO. Mr Kang refused to resign and Mr Guo left to return to China on 26 February 2020. Mr Wang denies he gave Mr Guo any instructions to seek Mr Kang's resignation.

Third proposal to restructure

[20] On 3 April 2020 One Pure provided Mr Kang with a document setting out a further proposal to restructure the management of the business including a proposal that the role of CEO be disestablished. One Pure's reasons for the proposal included:

- a) A surplus of senior management positions for the size of the company - the company had management employees filling positions as the Global CEO, CEO, and Operations Manager. The company is a small employer with a total of 16 employees working out of two locations. Five employees worked in Auckland where Mr Kang was located and 11 employees work at the bottling plant in Napier.

- b) The requirement for tasks to be undertaken in Auckland had reduced significantly as a result of the Human Resources and Finance and Sales functions being undertaken independently.
- c) There was long-term market uncertainty owing to the Covid-19 situation.

[21] Following a consultation process Mr Kang was given notice that the proposal to disestablish his position would proceed and in the absence of any redeployment options his employment would end on 22 May 2020.

Issues

[22] The issues for determination are:

- (a) Were one or more conditions of Mr Kang's employment affected to his disadvantage?
- (b) Did Mr Kang raise those disadvantage personal grievances within the statutory 90-day period?
- (c) Were the actions of One Pure in relation to the disadvantages unjustified?
- (d) Was Mr Kang's dismissal by reason of redundancy unjustified?
- (e) If the answers to (a) and/or (b) is yes, what if any remedies should be awarded?

[23] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated relevant 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 evidence, documents and submissions received I have carefully considered all relevant material lodged with the Authority.

Unjustified disadvantage

[24] Mr Kang claims one or more conditions of his employment were affected to his disadvantage by the following actions of One Pure:

- (a) The appointment of Mr Guo in June 2019;

- (b) The proposed new organisation chart distributed to Board Members for the November 2019 Board meeting;
- (c) The appointment of Ms Lisa Guo;
- (d) The appointment of Mr Verry;
- (e) Mr Kang being removed from the organisation chart presented to the February 2020 Board meeting;
- (f) Being requested to resign;
- (g) Being excluded from a strategic management meeting;
- (h) The departure of Mr Kim;
- (i) Being relocated to a smaller office;
- (j) Being instructed to report to Mr Guo.

[25] 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.

[26] The onus will initially be with Mr Kang to establish that his employment condition(s) have been affected to his disadvantage. The burden then shifts to One Pure under s 103A to establish that its actions, and how it 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 there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[27] One Pure says the Authority does not have jurisdiction to investigate and determine Mr Kang's disadvantage personal grievance because he did not raise them within 90 days as required under s 114 of the Act.

[28] I have set out below the actions Mr Kang says gave rise to his disadvantage. This is followed by a consideration of what, if any of those actions, were raised within

the statutory 90-day period. I have then determined whether those actions that have been raised within 90 days were justified or not.

Appointment of Mr Guo

[29] Mr Kang claims Mr Guo's appointment resulted in the following aspects of his role being removed from him without any consultation:

- (a) Recruitment;
- (b) Managing the supply chain;
- (c) Managing international sales and marketing.

[30] Under the terms of the Shareholder's Agreement Mr Kang had full authority over the running of the New Zealand operation for one year from 25 November 2018 to 24 November 2019.

[31] One Pure says this arrangement was varied by agreement with Mr Kang at a meeting of the Board on 23 April 2019 where Mr Kang and other Board members resolved:

General Wang has the absolute discretion/decision making rights in finance, HR, production, procurement, sales and other company management aspects.

[32] I am satisfied Mr Kang understood Mr Guo's focus would be on the Hong Kong and China markets initially. However, by 1 November 2019 this focus changed to include a wider role as Global CEO, a change endorsed by Mr Kang at the November 2019 Board meeting. Prior to this, in April 2019, Mr Kang as a director of the Board had agreed to Mr Wang taking on full responsibility for aspects of the New Zealand operation.

[33] Each of the topics set out above took place after the 23 April 2019 Board meeting and/or after the clause in the Shareholder's Agreement ceding responsibility for the management of the New Zealand operations had lapsed.

[34] Mr Kang has not established one or more conditions of his employment were affected to his disadvantage as a result of Mr Guo taking over more responsibility for

the New Zealand operations. Rather, the changes affecting Mr Kang's role were made with his approval as a result of resolutions of the Board.

November 2019 proposed organisation chart

[35] Mr Kang says the organisation chart produced for the November 2019 Board Meeting removed him from the organisation and the Board attempted to put him into a new position of South East Asia sales and marketing.

[36] Mr Kang was not appointed to the South East Asia role, however, other aspects of the structure were implemented including Mr Guo taking a lead role in the organisation as Global CEO. At the time this decision was made Mr Kang's temporary role in having full control over the New Zealand operation was coming to an end.

[37] Mr Kang has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage by Mr Guo taking on more responsibility of the New Zealand operations at a time when Mr Kang's rights under the Shareholders Agreement were coming to an end.

Appointment of Ms Lisa Guo

[38] Prior to Mr Guo's appointment, Mr Kang had full responsibility for recruitment. In January 2020 Ms Lisa Guo was appointed as the Deputy General Manager Global Supply chain to work on projects for One Pure. Mr Kang says he was not consulted over Ms Guo's appointment or the reasons for her being appointed. One Pure does not dispute that Mr Kang was not consulted over Ms Guo's appointment.

[39] However, while Mr Kang remained in the CEO role in New Zealand he was entitled to be consulted about all appointments. This does not mean Mr Wang's absolute discretion to make such decisions as agreed at the 23 April 2019 Board meeting would be circumvented. Consultation does not require agreement.

[40] In not consulting Mr Kang about Ms Guo's appointment One Pure undermined Mr Kang's role as CEO. Mr Kang has established one or more conditions of his employment were affected to his disadvantage when he was not consulted about Ms Guo's appointment.

[41] However, for the reasons set out later in this determination, this action was raised outside the 90 day period in which Mr Kang is able to raise a personal grievance

and accordingly it is not necessary to consider whether the action was justified or unjustified.

Mr Verry's appointment

[42] On 15 January 2020 Mr Verry was employed as Director of Sales Australia and New Zealand. Mr Kang says he only became aware of Mr Verry's appointment when Mr Verry introduced himself when he arrived to work in the Auckland office.

[43] Prior to Mr Verry's appointment Mr Kang had been responsible for directing sales and marketing in Australia and New Zealand.

[44] Mr Kang says that despite his extensive experience and success in marketing One Pure, compared to Mr Verry's lack of industry experience or trade relationships Mr Verry's salary was higher than Mr Kang's salary as CEO of One Pure.

[45] Further Mr Kang was instructed by Mr Guo that he should consider Mr Verry as holding a role parallel to the CEO role and that Mr Verry did not report to Mr Kang.

[46] As with Ms Guo's appointment, Mr Kang was not consulted about Mr Verry's appointment. While Mr Kang remained in the CEO role in New Zealand he was entitled to be consulted about all appointments and the failure to do so undermined his role as CEO.

[47] Mr Kang has established one or more conditions of his employment were affected to his disadvantage when he was not consulted about Mr Verry's appointment.

[48] However, for the reasons set out later in this determination, this action was raised outside the 90 day period in which Mr Kang is able to raise a personal grievance and accordingly it is not necessary to consider whether the action was justified or unjustified.

February 2020 organisation chart

[49] Mr Kang was not included in any roles set out in the organisation chart circulated as part of the February 2020 Board meeting papers.

[50] However, as noted earlier, the February proposed organisation chart was not implemented. It was a proposal put to the Board for discussion.

[51] Mr Kang has not established one or more conditions of his employment were affected to his disadvantage as a result of the February 2020 proposed organisation chart. His role as CEO remained unaffected.

Request for resignation

[52] Mr Kang says that following the February 2020 Board meeting he met with Mr Guo on 24 and 25 February 2020. At those meetings Mr Kang says Mr Guo sought Mr Kang's resignation. He says Mr Guo told him he [Mr Guo] had been instructed by Mr Wang to secure Mr Kang's resignation before he [Mr Guo] returned to China. Mr Guo told Mr Kang if he resigned he could retain his salary payments which would be recorded as Director's fees.

[53] Mr Kang declined to resign from his employment and no further action was taken at this time. Mr Kang has failed to establish that one or more conditions of his employment were affected to his disadvantage as a result of Mr Guo's approach to him seeking his resignation.

Exclusion from management meeting

[54] Mr Kang was excluded from the list of management employees invited to attend a strategy meeting in Christchurch scheduled to take place on 28 February 2020. No satisfactory explanation has been received from One Pure about why Mr Kang was not included on the invitation list to attend the meeting.

[55] Given the proximity to the February 2020 Board meeting where a new organisation chart had been proposed which had no position for Mr Kang, and Mr Guo's approach to Mr Kang on 24 and 25 February 2020, I have drawn an inference that it was not expected when the invitation was emailed on 24 February 2020, that Mr Kang would continue to be employed in the CEO role at the time of the meeting. This is the most probable explanation for the omission.

[56] I am satisfied one or more conditions of Mr Kang's employment were affected to his disadvantage as a result of the failure to include him in the strategic planning meeting on 28 February 2020.

Departure of Paul Kim

[57] Despite holding the role of CEO Mr Kang says he was not involved in the departure of Mr Kim, an employee Mr Kang considered to be a key member of staff. Mr Kang was excluded from an email dated 26 March 2020 sent to all staff announcing Mr Kim's departure.

[58] No satisfactory explanation has been provided by Pure One for the failure of One Pure to consult with Mr Kang about the departure of one of his direct reports or for the failure to include him in the all staff email announcing Mr Kim's departure.

[59] I am satisfied one or more conditions of Mr Kang's employment were affected to his disadvantage as a result of the failure to consult with him about Mr Kim's departure and the failure to include Mr Kang in the all staff email dated 26 March 2020 announcing Mr Kim's departure.

Office relocation

[60] Mr Kang says that without any prior consultation he was moved to a smaller office in One Pure's office premises.

[61] The reorganisation of the Auckland office was discussed at the June 2019 Board meeting. At that meeting it was agreed Mr Kang would retain his office, which was a sizeable corner office, and all other employees would share space to save costs. The minutes also record that Mr Kang would be in charge of the office renovations in Auckland.

[62] In January 2020 Mr Kang's office had been reorganised from his previous large office to a smaller office in the left-hand corner.

[63] Terms and conditions of employment include the environment in which an employee works. I am satisfied one or more conditions of Mr Kang's employment were affected to his disadvantage when One Pure failed to consult with him about his office space and failed to adhere to the agreement of the Board for Mr Kang to retain his office.

Instruction to report to Mr Guo

[64] On 20 April 2020 Mr Guo advised Mr Kang that he was his direct manager and Mr Kang was required to report to him on a daily basis. Mr Kang was surprised at this instruction as he had previously always reported directly to the Board.

[65] It should not have come as a surprise to Mr Kang that he was required to report to Mr Guo. Mr Kang had been involved in Board meetings where Mr Guo's role had been discussed and extended to include the New Zealand operations.

[66] I am not satisfied Mr Kang has established that one or more conditions of his employment were affected to his disadvantage as a result of Mr Guo's instruction to him that he report to him [Mr Guo].

Did Mr Kang raise his personal grievances for unjustified disadvantage within the statutory 90-day period?

[67] Under s 114(1) of the Act a personal grievance must be raised within 90 days. Time begins to run on the date on which the action alleged to amount to a personal grievance occurred or came to the employee's notice, whichever is the later event. The section contemplates two situations where a personal grievance may be raised beyond the 90-day limitation. One of them is where the employer consents. The other is where the Authority grants leave because it is satisfied that the delay was occasioned by exceptional circumstances and that it is just to do so.²

[68] Mr Kang has not applied to have his disadvantage grievances raised outside the 90-day period. Mr Kang says the actions were part of an established course of conduct to undermine his position, influence and leadership in One Pure but in any event he raised his concerns with One Pure when he became aware of the issues.

[69] Mr Kang says he did not become aware of the true scope of Mr Guo's appointment and the impact it would have on his position until he received the restructure proposal on 3 April 2020. He raised his concerns through his lawyer's letter on 9 April 2020.

[70] The 9 April 2020 letter raised significant issues on behalf of Mr Kang in relation to the proposed restructuring. The focus of the letter was on that proposal and does not

² Employment Relations Act 2000 (the Act), s 114(5).

raise personal grievances for unjustified disadvantage. In the letter Mr Kang requests further information and raises the prospect of a future personal grievance for unjustified dismissal only.

[71] Mr Kang says he raised concerns about the organisation charts produced for the November 2019 and February 2020 Board meetings which effectively raised personal grievances with respect to those actions. While Mr Kang raised concerns about the organisation charts at the time, no action was taken to implement the proposals except with respect to extending Mr Guo's role. This was done with Mr Kang's agreement as a Board member and was in line with the terms of the Shareholder's agreement that Mr Kang's role was guaranteed for a limited period of time.

[72] The first date on which Mr Kang could be said to raise a personal grievance for unjustified disadvantage for each of the actions set out above is through his statement of problem lodged with the Authority and served on One Pure on 1 May 2020.

[73] The 90-day period runs from 2 February to 1 May 2020. The actions giving rise to a personal grievance within that period are:

- (a) Exclusion from 28 February 2020 full staff meeting;
- (b) Mr Kim's departure; and
- (c) Office relocation.

Were the disadvantageous actions justified?

[74] One Pure relies heavily on the 23 April 2019 Board minutes where the Board, including Mr Kang ceded absolute discretion to Mr Wang for all decisions relating the New Zealand operations. It also relies on the minutes from the 1 November 2019 Board meeting where it says the Board, including Mr Kang agreed to extend Mr Guo's role to include all aspects of the New Zealand operation.

[75] While Mr Kang may have agreed through his participation in the Board meetings, to decisions being taken away from him, his role of CEO had not been disestablished and it was still incumbent on One Pure, either through Mr Wang or Mr Guo, to consult with Mr Kang on all matters that may impact on his role including Mr Kim's departure. The failure to consult with him is an unjustified action.

[76] In the absence of any suitable explanation I find Mr Kang's exclusion from the strategic meeting in Christchurch on 28 February 2020 meeting was unjustified.

[77] The failure to consult Mr Kang regarding the change of office space, while it may have caused him hurt feelings, it was not unjustified. He retained his own office and while it may have been smaller, it is open for an employer to determine the best use of its office space. The evidence given by Mr Kang at the investigation meeting indicates that he was aware that the office space would be altered but that he would retain his own office.

Conclusion

[78] Mr Kang has established one or more conditions of his employment were affected to his disadvantage by the unjustified actions of One Pure when it failed to consult with him about the departure of Mr Kim and excluded him from the strategic planning meeting in Christchurch on 28 February 2020.

[79] Mr Kang is entitled to a consideration of remedies for his personal grievances.

Redundancy

[80] In order for a redundancy to be justified One Pure 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 One Pure 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.

[81] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.³ 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.⁴ This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[82] The genuineness of a redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes an employee is

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

⁴ *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

surplus to its needs, the Authority is not to substitute its business judgement for that of the employer's.⁵

[83] 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.

[84] The requirements in relation to consultation have been summarised by the Employment Court as being:⁶

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.

[85] Mr Kang's employment agreement did not define redundancy. In the absence of a definition I have used the commonly understood meaning. What is required is that the employee is superfluous to the needs of the business.⁷ The employment agreement did however, set out the following procedural requirements:

In the event that the employer considers employee redundancies, the employer shall:

- 15.1 consult with the employee to seek their view of proposed restructuring and discuss with them the implications of changes and solicit their opinion and input.
- 15.2 Consider employee suggestions.
- 15.3 Consider redeployment or retraining options.
- 15.4 Encourage representation to be present at all consultation meetings.
- 15.5 In the event of redundancy becoming the option selected, discuss that intention with the employee to be affected before giving notice of termination of employment.
- 15.6 Give at least four weeks warning, if possible, of impending redundancy.
- 15.7 Give the employee such reasonable time off while working out the period of termination as may be necessary to enable the employee to seek alternative employment.

⁵ *Grace Team Accounting Ltd v Brake*, above n 3, at [43].

⁶ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352 (2017) 14 NZELR 789

⁷ *Grace Team Accounting Ltd v Brake*, above n 3, at [47].

15.8 In the event of redundancy there will be no entitlement to compensation of any kind.

Was the redundancy for genuine reasons?

[86] Mr Kang alleges One Pure's decision to disestablish his role was unjustified because there were no surplus senior management positions. One Pure failed to consider other roles as part of its restructuring process and procedural deficiencies, which were not minor, led to him being treated unfairly.

[87] One Pure submits that the reality was that by early 2020 Mr Kang's role of CEO was nothing more than a shell. Duties previously performed by him as CEO no longer existed or were being performed by others. Mr Kang had rejected the offer of redeployment to the South East Asia sales role which was the only redeployment opportunity available.

[88] Further, the disestablishment of Mr Kang's role was in accordance with what he and Mr Wang had agreed through the Shareholder's Agreement and was consistent with the reallocation of duties which the Board, including Mr Kang, had unanimously agreed between April and November 2019.

Genuine business requirements?

[89] Mr Kang submitted there were no surplus senior management positions. He says he is still not clear about why Mr Verry's role of Director of Sales was not identified or considered as being part of the surplus of senior positions. All of the duties performed by Mr Verry were duties he himself had completed prior to Mr Verry's appointment.

[90] The fact that Mr Verry and Mr Kang undertook the same or similar roles was confirmed by Mr Verry at the investigation meeting when he told me Mr Kang's position of CEO was a duplication of his role and was unnecessary.

[91] In its 3 April 2020 written proposal document setting out the rationale for the proposed restructuring of the CEO role, One Pure states that the purpose is to continue to "...restructure the senior management positions within One Pure". Mr Guo was unable to explain what the other senior management positions were that had been restructured. He told me his understanding was that a senior management position would be above Mr Kim's role. Mr Kim had responsibility for the manufacturing plant.

[92] I have accepted the evidence given on behalf of Mr Kang that both Mr Kim and Mr Eugene Coe's positions were, and continue to be important senior management roles within the One Pure structure. After Mr Kim had left Mr Verry took over the role of managing the manufacturing plant until an operations manager was appointed. Mr Verry was then appointed as General Manager and has been undertaking the duties previously performed by Mr Kang. Since Mr Coe's termination, his duties have been undertaken by a contractor.

[93] Another reason given for the restructuring in the 3 April 2020 proposal document is the long term market uncertainty owing to the global Covid-19 situation. No relevant financial information was provided to support this assertion. In his communications to One Pure as part of the consultation process Mr Kang set out several cost saving options available to One Pure.

[94] I find on balance, that One Pure embarked on a restructuring in April 2020 in order to remove Mr Kang from the organisation. This was part of a process initiated in November 2019 when the first restructuring proposal was presented to the Board for consideration. In this proposal Mr Kang was asked to consider redeployment to a new South East Asia sales role.

[95] When the November 2019 proposal did not eventuate, a new proposed organisation structure was presented to the Board in February 2020. As with the November 2019 proposal this reorganisation did not eventuate. By the time the February 2020 proposal was put to the Board Mr Verry had been employed and was working as the Director of Sales for Australia and New Zealand. His role duplicated some of the tasks being undertaken by Mr Kang.

[96] When Mr Guo's approaches to Mr Kang in February 2020 seeking his resignation were rebuked, it is apparent One Pure embarked on a further and final attempt to secure Mr Kang's exit from the organisation.

[97] I have concluded Mr Kang's role of CEO was not surplus to One Pure's requirements. After Mr Kang left the organisation Mr Verry took over his tasks and in his own words Mr Kang's role was "duplicative" meaning that as General Manager Mr Verry was undertaking all of the tasks previously undertaken by Mr Kang. In this case,

the tasks undertaken by Mr Kang remained important to the operation of One Pure's business.

[98] After the decision to dismiss Mr Kang by reason of redundancy One Pure claimed Mr Kang's redundancy was predictable and unsurprising given the agreement set out in the Shareholder's Agreement that Mr Kang would have authority to make decisions from 25 November 2018 to 24 November 2019. Mr Kang disputes this and says the Shareholder's Agreement did not relate to his role of CEO, but rather, related to his authority as a Director and he could continue to be involved in the operations of the business as CEO after the one year had lapsed.

[99] I agree with Mr Kang's view and have concluded his redundancy was not for genuine commercial reasons, but was a mechanism used to exit Mr Kang from the day to day operations of the business.

Was a fair process followed?

[100] In the event that I am mistaken in my conclusions that the redundancy was not genuine and for the sake of completeness, I have considered whether One Pure has met the minimum standards of procedural fairness.

[101] As stated earlier in this determination s 4 of the Act required One Pure to provide to Mr Kang access to information relevant to the continuation of his employment and an opportunity to comment on that information before a decision was made. While an employer is entitled to have a working plan in mind it must provide sufficiently precise information, in a timely manner before an employee can be expected to give their view on it.⁸

[102] Mr Kang claims the process followed by One Pure did not meet these obligations. He says he did not receive full information in a timely manner as required and One Pure did not properly consider redeployment options for him.

[103] During the period of consultation Mr Kang requested a number of documents and other information to enable him to fully consider the impacts the restructuring would have on his role and enable him to provide constructive feedback. Despite its legal obligations to do so, One Pure refused to provide the information sought.

⁸ *Stormont v Peddle Thorp Aitken Limited*, above n 6..

[104] One response received from One Pure indicated that the reallocation of Mr Kang's duties would be determined by Mr Guo. I agree with the submissions lodged on behalf of Mr Kang that this demonstrates no decision or conclusions about how Mr Kang's duties would be distributed, had been made at that time. This made it difficult, if not impossible, for Mr Kang to make any suggestions with respect to redeployment options that may have been available to him.

[105] In his written evidence Mr Wang set out six factors that informed the decision to disestablish Mr Kang's role. These factors were never put to Mr Kang for his response and were not included in the restructuring proposal dated 3 April 2020.

[106] In a letter to the Board dated 18 February 2020 Mr Guo set out the reasons behind the proposed February restructuring. All of the reasons set out in that letter relate to the market in China and reducing costs. None of these reasons were included in the 3 April 2020 proposal.

[107] From the correspondence exchanged between the parties during the consultation process, I have concluded One Pure failed in its obligations to provide information relevant to Mr Kang's ongoing employment. This is despite Mr Kang making several requests for the information.

[108] Mr Kang also questioned who the final decision maker would be. During the consultation process Mr Kang was dealing with a representative of One Pure. During the investigation meeting it became apparent that an HR consulting firm was providing input to One Pure's representative and the actual decision maker, Mr Guo, was largely out of the picture, although Mr Kang was never advised Mr Guo would be making the final decision.

[109] During the investigation meeting it became apparent that it is likely Mr Guo never fully considered Mr Kang's extensive feedback on the proposal to restructure. Mr Kang presented a seven page document detailing his feedback. Mr Kang received the final decision and notice of dismissal 47 minutes after his seven page document had been delivered to the HR consultant.

[110] The HR Consultant gave evidence that Mr Guo had fully considered Mr Kang's feedback. I have not accepted her evidence in this regard. It is not credible that in 47 minutes she translated the document for Mr Guo so that he could consider Mr Kang's

feedback, collated Mr Guo's views and response and provided these to One Pure's representative who then prepared the letter which had to be approved by Mr Guo. This would require further translations and a confirmation to the representative to send the letter to Mr Kang.

[111] In her oral evidence the HR Consultant had told me it took at least 30 minutes for her to translate a previous six page letter from Mr Kang which would leave only 17 minutes for the rest of the procedure to unfold. When Mr Guo was asked about the process used on 24 April 2020 he was unable to recall any details.

[112] One Pure has failed to adhere to the terms of the employment agreement between it and Mr Kang. Importantly, no attempt was made to arrange a meeting between the decision maker, Mr Guo, and Mr Kang together with their representatives. I accept this took place during the Covid-19 lockdown period, however, alternative meeting arrangements that did not require a face to face meeting could have been arranged. There was no attempt by One Pure to make such arrangements.

[113] The HR Consultant told me she was dealing with the matter and while Mr Kang did have a right to speak directly to Mr Guo, he was a very busy person. The HR Consultant told me she was in a position good enough to represent Mr Guo.

[114] Clause 15 of the employment agreement required One Pure, in the event that redundancy was the selected option, to discuss that intention with Mr Kang before giving notice of termination of employment. This did not occur and has contributed to the unfairness of the decision to dismiss by reason of redundancy.

[115] For the foregoing reasons I have concluded the decision to dismiss Mr Kang by reason of redundancy was unjustified and was not a decision an employer acting fairly and reasonably could make. The procedural deficiencies were not minor and resulted in Mr Kang being treated unfairly.

Remedies

[116] 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 Kang seeks permanent reinstatement, reimbursement of lost remuneration, compensation in the sum of \$50,000 for humiliation, loss of dignity and injury to feelings and special damages for legal fees.

[117] I have taken a global approach to remedies for all grievances.

Reinstatement

[118] Reinstatement is the primary remedy in proceedings for unjustified dismissal and must be awarded unless it is impracticable or unreasonable to do so.⁹

[119] Mr Kang submits his permanent reinstatement is both practicable and reasonable. He remains willing and able to return to work and as the founder and former CEO of One Pure, he is proficient in all areas of the business.

[120] Mr Kang submits he is willing to work productively with Mr Wang and that while there is currently a separate shareholder dispute underway, this should not be treated as a barrier to reinstatement.

[121] One Pure is a very small company with only five employees in the Auckland office where Mr Kang would be located. Mr Kang has suggested Mr Guo and Mr Verry could be removed from their roles to accommodate his reinstatement. This is not practicable. Both employees were employed prior to Mr Kang's dismissal and Mr Guo has now left the organisation.

[122] In reaching my conclusions regarding the question of reinstatement I have taken into account the small number of employees employed by One Pure, that Mr Verry had been employed prior to Mr Kang's dismissal and between them Mr Wang, who is now working in the business himself (Mr Wang has replaced Mr Guo as Global CEO), and Mr Verry have taken on all of those duties and responsibilities previously undertaken by Mr Kang. Given those circumstances it is difficult to see how Mr Kang could be reintegrated into the senior management structure of One Pure.

[123] Standing back, I am satisfied that reinstatement is not practicable and reasonable and I have declined to make an order.

Lost remuneration

[124] Section 123(1)(b) of the Act provides for reimbursement by One Pure of the whole or any part of wages lost by Mr Kang as a result of his personal grievances. Section 128(2) of the Act provides for an order of the lesser of a sum equal to his lost

⁹ Employment Relations Act 2000, ss 123(1) and 125(2).

remuneration, or to three month's ordinary time remuneration. I have a discretion under s 128(3) of the Act to order a greater sum reflecting the lack of earnings for a period longer than three months.

[125] Mr Kang seeks a sum greater than three months lost earnings and has given evidence of the steps he has taken to mitigate his loss. Between 15 June and 30 September 2020 Mr Kang worked as the CEO and director of a company in Auckland. His salary was \$120,000 per annum which was less than his salary at One Pure. Mr Kang stepped down from his role in in September 2020 to make way for a general manager with the skills required to grow the business.

[126] I am not minded to exercise my discretion to award a greater sum than the three months. This is because some of the loss suffered by Mr Kang can be attributed to his decision to stand down from his new role in September 2020 to make way for a general manager with skills required to grow this business. These are skills Mr Kang was at pains to impress upon me, he held himself, in relation to One Pure.

[127] Taking into account Mr Kang's earnings during the three month period, his actual loss is equivalent to \$16,094.05. One Pure International Group Limited is ordered to pay to Mr Kang the sum of \$16,094.05 gross for lost wages within 28 days of the date of this determination.

[128] In submissions Mr Kang seeks the payment of interest on the sum for reimbursement of lost wages. It is not appropriate to raise new claims in submissions. One Pure has not been on notice that this was a claim by Mr Kang and I accordingly I have declined to award interest.

Compensation

[129] Mr Kang claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act in the sum of \$50,000.

[130] Mr Kang told me he has found the actions of Mr Wang deeply embarrassing and humiliating. He was the founder and CEO of One Pure and his dismissal has affected him on a cultural level. In his community it is not acceptable for employment to end the way his has ended and Mr Wang's and Mr Guo's actions have been visible to all staff of One Pure and this has exacerbated his sense of being disrespected.

[131] Mr Kang told me he has suffered from stress, he has put on weight and has a higher than normal blood pressure. He has avoided talking to others about One Pure which is unusual for him given the pride he took in establishing and growing the company.

[132] I am satisfied Mr Kang suffered humiliation, loss of dignity and injury to his feelings. I consider the evidence warrants an award of compensation in the sum of \$25,000. When setting this sum I have been mindful of the need not to keep compensatory payments artificially low and have taken into account decisions from the Employment Court on compensation levels.¹⁰

[133] One Pure International Group Limited is ordered to pay to Mr Kang the sum of \$25,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[134] 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, 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.¹¹

[135] I am satisfied there was no conduct by Mr Kang that was blameworthy such that his remedies should be reduced.

Special damages

[136] Mr Kang claims special damages for legal fees he incurred prior to lodging his statement of problem in the Authority. Special damages may be available on occasions, however there needs to be a “bright line” between costs incurred in quantifying time owed and money lost as a result of a breach of the employment agreement and party costs associated with legal representation to recover the loss.¹²

[137] The claim for special damages amounts to a claim for pre-litigation costs and such claims have been consistently rejected by both the Employment Court and the

¹⁰ *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

¹¹ Employment Relations Act 2000, s 124.

¹² *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [96].

Authority. It is not appropriate to classify costs incurred prior to the filing of a statement of problem as special damages.¹³

[138] Mr Kang's claim for special damages is declined.

Costs

[139] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Kang shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. One Pure shall have a further seven 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.

[140] 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.

[141] The investigation meeting for this substantive determination took three days with comprehensive submissions being lodged by the parties.

[142] Also to be taken into account are the costs associated with the determination of Mr Kang's application for interim reinstatement. That matter was dealt with on the papers following receipt of comprehensive submissions from the parties. Costs were reserved to be dealt with when costs for this substantive determination are dealt with. The parties will recall that Mr Kang was not successful in his application for interim reinstatement.

Vicki Campbell
Member of the Employment Relations Authority

¹³ *George v Auckland Council* [2013] NZEmpC 179 at [128].