

What is the Employment Relationship Problem?

[1] Susan Vile was a long serving employee of Marilyn Sainty Limited (MSL or the company). MSL operated two Scotties stores. Ms Vile worked in the Herne Bay store until she was made redundant in mid-2020.

[2] Ms Vile brought claims that she was disadvantaged by changes to her employment agreement and wage payments during the 2020 Covid-19 Level 4 lockdown, a warning received and the redundancy. MSL responded that it had acted justifiably.

[3] At the investigation meeting on 30 March 2021 I heard evidence from Ms Vile and her sister in law, from Marilyn Sainty and co-owner of MSL Sonja Batt and from an MSL client.

[4] The Authority indicated that, given the similarity of issues regarding wage changes in lockdown, it appeared preferable for the determination in this matter to await the Court of Appeal decision on appeal from the Employment Court's *Gate Gourmet New Zealand Limited v Sandhu* judgment.¹ Ms Vile then withdrew her claims for unjustified disadvantage from unilateral variation of terms of employment and breach of the Wages Protection Act 1983 for unlawful deductions.

[5] I have considered all the material provided by the parties. As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[6] Ms Vile's remaining issues are whether:

- (a) She was disadvantaged by an MSL unjustified action regarding:
 - (i) the warning; and/or
 - (ii) the restructuring;
- (b) She was unjustifiably dismissed; and
- (c) If a grievance is established, what remedies (if any) she should receive.

¹ *Gate Gourmet New Zealand Limited v Sandhu* [2020] NZEmpC 237.

What was Ms Vile and MSL's history?

[7] Ms Vile started out with MSL as a retail sales assistant in 1992. Seven years later she became Sales and Administrator of the Recycle Department of MSL when that Department was established. The role included processing all second-hand garments coming into the store and dealing with the customers selling those garments. Ms Vile was then responsible for closely examining garments and arranging any cleaning or mending needed. In the store she dealt with the purchasers of garments and maintained a consignment period process.

[8] In addition to working predominantly in the recycle section, Ms Vile spent around two hours a day covering the whole store for other staff members' lunch breaks or assisting customers who sought her help. There was evidence provided from customers who held her in high regard.

[9] Over her time with MSL Ms Vile fluctuated between full and part time work. From September 2019 onwards she worked 34 hours a week.

[10] Ms Sainty originally owned Scotties, designing and manufacturing clothes sold there. In more recent years she has stepped back from the business somewhat. Ms Batt has also had a long involvement in the business and in recent years taken more of an operational role, running the stores.

What happened with lockdown?

[11] On 23 March 2020, the Prime Minister Jacinda Ardern announced New Zealand was to go into an Alert Level 4 lockdown two days later as a result of the COVID-19 pandemic.

[12] About a day later Ms Batt phoned Ms Vile to tell her that at Level 4 the Scotties stores would be closed. MSL did not require Ms Vile to undertake any work tasks during Level 4. Ms Batt describes herself as being in panic mode.

[13] On 30 March 2020 MSL's administrator emailed staff noting that Scotties would face cash flow issues if normal pay continued and would be following the Ministry of Social Development COVID-19 guidelines. A payslip was attached, showing Ms Vile receiving 27.2 hours' pay which was 80% of her usual 34 hours. Pay later continued at this rate.

What happened leading up to the warning?

[14] There was relatively little communication from MSL to Ms Vile during late March and early April 2020. Ms Batt sent a message unrelated to the store. At least some other staff initiated contact with Ms Batt or Ms Sainty during the lockdown, whereas Ms Vile did not. Some offered to reduce their hours to help MSL's financial position.

[15] Ms Batt and Ms Sainty describe this as a very stressful and frightening time. They were concerned about the business's future as well as their personal financial situations. The store had received a shipment of new clothes just before lockdown which MSL had paid for but were unable to sell.

[16] On 27 April 2020, the day before the country moved to Alert Level 3, another employee phoned Ms Vile, asking her to come into work on 29 April to complete a stocktake. Ms Vile agreed. She then received a text from Ms Batt moving the stocktake to 30 April.

[17] There was no written advice to MSL staff about a return to work at Levels 3 or 2. Ms Vile had arranged for her new puppy to be dropped off on the 30th of April so messaged Ms Batt asking to change the date due to a "delivery". It was agreed that the stocktake could be completed on 1 May.

[18] Ms Vile was not impressed with the arrangements for the stocktake as she did not identify any personal protective gear or information about steps to be taken. It appeared others had been in recently and not tidied up. Ms Batt had tried to keep the groups going in small and in bubbles. There were masks and cleaning equipment available although Ms Vile was not directed to where these were.

[19] That situation seems reflective of a wider lack of communication by both parties. It seems other staff who contacted Ms Sainty or Ms Batt were getting information but as Ms Vile did not do that, she was not told very much. She did not inform the owners particularly quickly about her situation, either regarding the puppy or her medical condition, referred to below.

[20] On 5 May 2020 Ms Batt texted then emailed Ms Vile, requesting that she work from 6 to 8 May to process recycled clothes. The email included Ms Batt indicating that she would appreciate it if Ms Vile not bring her dog into work.

[21] Ms Vile's puppy chewed through her charger cable at her home so she was unable to charge her phone until a friend dropped around a replacement. She had no email access for a period as her phone was her only means of connecting to email, although her landline was working.

[22] On 6 May 2020 Ms Vile emailed, explaining the phone problem and providing some information about the puppy's visit. She asked why the extra work was not raised by Ms Batt when they spoke the previous Friday. She said she would be at work on Tuesday (the 12th). Although not specified by Ms Vile, the date appears to relate to an anticipated move to Alert Level 2.

[23] Ms Batt messaged that there was a lot of recycled clothes to be processed and so Ms Vile needed to come in on Thursday and Friday. Further, those days were noted as being Ms Vile's regular ones, which she was being paid for.

[24] Ms Vile responded the same day explaining that she was unable to come in until the following week as she had a compromised immune system. This related to a fluctuating white blood cell count. Ms Vile recalls mentioning it in passing to Ms Sainty and Ms Batt some time earlier although one or both did not recall this. Ms Vile did not raise it with them once COVID was known about. Ms Vile was in her mid-60s and felt vulnerable, at her age and with her condition, coming into the store at Level 3.

[25] Ms Batt messaged that Ms Vile was expected to work the following day unless she had a medical certificate confirming immune compromise.

[26] Ms Vile found it shocking to be asked for a certificate, having never been asked before in all her years at Scotties. She provided a certificate to MSL on 7 May 2020 which indicated that her white blood cell count was slightly reduced and she should stay away from work until Level 2.

What was the warning for?

[27] On 6 May 2020 Ms Batt emailed Ms Vile issuing her a formal written warning for:

- (a) Bringing an animal to work, without any notice to Scotties and without seeking permission;
- (b) Refusing to come into work when requested; and

- (c) Failing to provide a valid reason for refusing to come to work, noting that expecting a delivery was not a valid reason and private business should be conducted in private time.

[28] There was room for confusion on the face of the warning whether the second item related to the stocktake or the current request but the parties all saw it as relating to the stocktake. Ms Vile decided to give some explanation and feedback, emailing on 11 May 2020. The email included her concerns about the lack of process and her:

- a) lack of awareness of pets being an issue at work before but offering to seek permission in future;
- b) concerns about returning to work at Level 3 particularly when there was no communication from MSL or evidence of precautions for staff;
- c) view that the change of stocktake date had been agreed;
- d) disagreement that the conduct involved was serious misconduct; and
- e) confirmation of return to work on 14 May when Level 2 began.

[29] MSL did not initially acknowledge the email or respond. It was only some six days after a personal grievance was later raised by Ms Vile's lawyer that, on 27 May 2020, MSL's lawyer wrote noting that MSL had withdrawn the warning. Ms Sainty describes Ms Vile's feedback as leading to the decision to withdraw. It seems that decision was made earlier but it was not implemented by Ms Batt.

Does Ms Vile have a grievance regarding the warning?

[30] For MSL, it was suggested that as the warning had been withdrawn there was no grievance. I do not agree. The warning was in place for over three weeks. The fact that it was later withdrawn could be taken into account in terms of remedies but it does not change history. The disadvantage continued for at least that three week period.

[31] There was no formal process leading up to the warning being given. There were only some message and email exchanges about working arrangements. MSL did not do what was required of a fair and reasonable employer, as outlined in s 103A(3) of the Act, by

adequately investigating their concerns, raising them with Ms Vile, giving her a chance to comment and then genuinely considering her replies.

[32] In terms of the substantive issues, it is not evident that a warning was justified. As regards the puppy, Ms Vile had taken her previous dogs in to the store occasionally and was not aware of any instruction to seek permission. There was an outdoor area behind the store. This time there was a requirement to attend work at short notice. Her puppy had arrived the day before and given the need for people to stay in their own bubbles it would have been difficult to arrange for someone else to look after it. She kept the puppy in a cage in the store.

[33] The issue about when the stocktake was to occur was negotiated, seemingly without any particular difficulty and would not warrant a warning. A more fulsome explanation from Ms Vile about the nature of the delivery and the reason she needed to stay home may have assisted. Of course Ms Batt could also have asked.

[34] Regarding not coming in at Level 3, Ms Vile was asked to provide a medical certificate on the same day she got the warning and did provide it the next day. Again a warning was not justified.

[35] I conclude that Ms Vile was disadvantaged by MSL's unjustified action in giving her a warning.

[36] Ms Vile was shocked to receive the warning, then humiliated and hurt. She found it extremely upsetting that her long time employer regarded her as resentful and unco-operative. The hurt at receiving a warning was exacerbated by its receipt out of the blue without any opportunity for her to explain.

[37] Ms Vile found it difficult to get out of bed. She suffered from anxiety and sleeplessness. She reports seeking help from her doctor although no medical evidence was provided. Ms Vile's sister in law, with whom she is close, describes Ms Vile as distraught and in a state of shock when passing on that she had received a warning.

[38] I have considered making a separate award for this grievance. However, the withdrawal of the warning came after the redundancy process started and only two days

before Ms Vile was told she was redundant. The effects of the two matters are overlapping and one award covering both is more appropriate.

[39] For the sake of completeness, I have considered whether Ms Vile's actions in the situation leading to the warning can be seen to have contributed to the situation giving rise to it. I do not assess her actions as being blameworthy and so would make no deduction.

What was the restructuring process?

[40] Ms Vile headed into the store for her first usual day back at work on 14 May 2020. Ms Sainty met her on arrival and handed over a letter including a proposal to disestablish the "back room" at Scotties. In order to reduce costs MSL was considering making Ms Vile's role redundant.

[41] The proposal set out some information about what had happened at different alert levels including the store rental situations, some steps taken, revenue concerns and a broad figure for loss of turnover. Comments were sought by 19 May 2020.

[42] Ms Vile recalls Ms Sainty saying repeatedly that she was sorry. Ms Vile took this as a sign that the decision was already made. Ms Sainty says she told Ms Vile that they were in a desperate situation with money. She acknowledges saying sorry as she had never done this (proposed to make someone redundant) before. I do not regard Ms Sainty's apologies as proof of predetermination.

[43] The digital administrator's role was also proposed to be made redundant. Ms Vile does not consider that it was clear why the two roles were chosen, although they were both roles with a large behind-the-scenes component. The digital administrator had decided during lockdown that she no longer wished to continue working for the company.

[44] Ms Sainty did not think the situation with Ms Vile would turn out the way it did. She had constructive communications with the digital administrator back and forth about how things could work out. There was an agreement about the administrator providing some on-going photography on a freelance basis. Other staff had offered to give up a day's work each.

[45] Ms Vile initially continued working on 14 May but Ms Sainty said she could leave. Ms Vile was finding it overwhelming being there. She never returned to work.

[46] I recognise that after more than 25 years of working for the same organisation this must have been a very difficult way for her time at Scotties to finish. Ms Vile describes experiencing an overwhelming sadness at the sense of having been badly treated after such a long period of work.

[47] Ms Vile contacted the client who gave evidence at the Authority's investigation meeting. Ms Vile asked her for the name of an employment lawyer and sent her the redundancy proposal letter.

[48] A short time later Ms Vile was contacted by the client, who reported having been at a hairdressing salon chatting to Ms Batt. Ms Batt told the client that MSL's business was difficult and had struggled in lockdown.

[49] The client says Ms Batt told her that a number of staff were willing to come in at Level 3 but Ms Vile was not and "Sue's gone" or words to that effect. The client accepts it was a casual conversation, not a conversation where the parties remember the exact words used. She agreed under cross examination that it was possible "gone" could have mean currently away from the business waiting for Level 2. However, given the levels restrictions the conversation almost certainly occurred at Level 2 when hairdressers opened. The client recalls saying it was a shame Ms Vile had gone, as she had been there such a long time.

[50] Ms Batt accepts that she made a statement to the client meaning that two jobs were gone but does not agree that MSL had already made up its mind. She acknowledges that she may have said that Ms Vile did not want to come in (at Level 3). I find it more likely than not that Ms Batt said Ms Vile did not want to come in at Level 3 and was gone from MSL. This indicated that in Ms Batt's mind at least a decision was already made.

[51] Hearing this from the client intensified Ms Vile's sense that the decision to make her redundant was predetermined. Ms Vile instructed lawyers. They raised several personal grievances, including about the restructuring. This included assertions that insufficient information had been provided about finances and cost saving measures and that there was no commercial justification for redundancy. MSL's lawyers provided some further information. The time for responding to MSL's proposal was extended to 28 May 2020.

[52] By 29 May 2020 letter MSL advised that Ms Vile's role was being made redundant. She was given four week' notice as required by her agreement, which she was paid for rather than required to work out.

[53] After Ms Vile finished the other Scotties sales staff took over her recycling work on top of their own tasks. There was no evidence that her role was filled again.

Was Ms Vile's role redundant?

[54] MSL provided some information to the Authority on its financial position including a letter from its accountants but this was largely not information which had been provided to Ms Vile. The company's position was clearly not strong coming into March 2020 and it then faced an extended period without any income as it was unable to trade at all at Level 4 in 2020 and had only very limited prospects of earnings at Level 3.

[55] The company sought the wage subsidy, a bank loan and a government loan.

[56] There had been no suggestion about redundancies being necessary before lockdown. However, in the absence of income, the company's accountants advised a potential restructuring as a further cost cutting measure.

[57] Ms Vile describes her Scotties' job as a big job which required focus and doubts that it could simply be absorbed in to the roles of other retail assistants. The substantial majority of Ms Vile's role was organising the recycling business. While she may not see the splitting of the role as the best way to operate, that was a decision which was open to the employer to make. I accept that MSL decided that it no longer needed the recycling role and the role was not replaced.

Did MSL follow a proper process?

[58] On the basis of Ms Batt's comments to the client I find that she had already decided that Ms Vile's role was to disappear. While there was a financial and operational basis on which to make the role redundant, Ms Batt was partially influenced by Ms Vile's lack of willingness to come in at Level 3. The company did not come to the consultation with an open mind.

[59] Ms Sainty was hoping that Ms Vile might come up with a proposal as other staff had, such as reducing her hours. Ms Sainty understood that that could not be imposed on Ms Vile so did not mention it herself. While I understand that MSL was conscious that it could not force a change of hours on Ms Vile, the duty of good faith meant that it should have gone further to explore the possibility of some agreement to a reduction, rather than simply hoping Ms Vile would come up with the idea herself. There was room for exploration with a long serving employee which would have been better undertaken at a meeting. In these particular circumstances with Ms Vile not in the workplace, MSL should have arranged a meeting as part of the process, rather than suggesting a meeting or a written response. That being said Ms Vile may not have agreed to reduce her hours.

[60] Ms Vile's lawyers indicated that they did not think sufficient information had been provided about the financial impact on the business and other cost saving measures. No more specific information was requested. The letter from Ms Vile's lawyers led to further information being sent and a short additional feedback opportunity provided.

[61] It is suggested that the 12 May 2020 letter does not clearly say how duties would be divided. I do not accept that that was a flaw. The letter refers to her duties being absorbed by existing sales staff and the owners increasing their involvement in the business. That was sufficient for Ms Vile to provide feedback that a different reorganisation of work should be considered. She did not do so although that is not unsurprising, having heard from the client that Ms Batt had said she was gone.

[62] I am unable to conclude that MSL had not, by the later stage of the process, provided sufficient information to meet its obligations.

[63] Having found that MSL had predetermined the decision to make Ms Vile redundant with one of the decision makers influenced by other matters, I cannot accept that this was a minor matter which did not result in any unfairness. Ms Vile was unjustifiably dismissed by MSL.

What remedies should Ms Vile receive?

Lost wages

[64] Ms Vile claims lost wages at her ordinary weekly rate of \$969.00 gross per week for an extended period. She remained without paid work at the time of the investigation meeting.

[65] Ms Vile received pay from MSL covering the period until 25 June 2020. She looked for other work, unsuccessfully applying for a retail sales assistant role with another recycled clothing store. Ms Vile stopped seeking work from August 2020 in order to care for a close friend diagnosed with a terminal illness. Her friend died in November 2020. Ms Vile then assisted with preparing her friend's house and describes herself as not being in a position to look for further work until around the time of the investigation meeting in March 2021.

[66] Ms Vile therefore had five weeks of lost wages before she stopped attempting to find other work, totalling \$4,845.00 gross. After that she did not attempt to mitigate her loss. Had she remained at Scotties she was unlikely to have had that time off on pay and would rather have had choices between remaining at work or taking unpaid leave. Also, I do not consider that this is a situation where I should exercise my discretion to grant more than three months' lost wages.²

Compensation

[67] Ms Vile was a very long serving employee who was intensely upset by the warning and dismissal. The dismissal has caused her considerable worry financially. She had to temporarily alter her mortgage to an interest free arrangement. She predicts, if she cannot find other work, having to sell her house and move away from Auckland where her friends and family are located.

[68] Ms Vile's sleep has been severely affected with an extended period of only sleeping a few hours a night due to an overwhelming sense of anxiety and hurt as a result of the way she was treated.

² The Act, s 128(3).

[69] I recognise the deprivation of contact and company with long term customers was a big loss for Ms Vile. She clearly enjoyed working with them and providing advice.

[70] Ms Vile's sister in law describes Ms Vile as having been in extreme distress; feeling depressed for an extended period, losing her self-confidence, her energy and her sense of purpose.

[71] Ms Vile was further stressed to find out that someone connected with Ms Batt had contacted Ms Vile's doctor in a way that, on the face of it, seems very inappropriate. Ms Batt provided some information to that person. However, she says she had no knowledge that contact with Ms Vile's doctor was to be made and did not encourage it. In the absence of any evidence to the contrary I accept that.

[72] The appropriate award for both grievances is \$23,000 before looking at contribution.

Contribution and award

[73] I have looked at whether Ms Vile's behaviour can be seen to be blameworthy and causative to the situation leading to the dismissal.³ There were occasional moments of not being especially forthcoming in communications however, I do not consider these to have got to the point of being said to be blameworthy, particularly in the difficult circumstances that she, MSL and others were coping with at the time. I therefore make no reduction for contribution by Ms Vile.

[74] I order MSAL to pay Ms Vile the following sums within 28 days of the date of this determination as remedies for her grievances:

- (a) \$4,845.00 gross as lost wages; and
- (b) \$23,000 as compensation.

Costs

[75] As Ms Vile has been largely successful in her remaining claims, she is likely entitled to a contribution by MSL towards her costs of representation. The parties are encouraged to reach an agreement on costs. If they are unable to do so Ms Vile shall have 21 days from

³ The Act, s 124. *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 (Full Court) at [175].

the date of this determination to file a memorandum seeking costs. MSL will then have 14 days from receipt to file its memorandum in reply.

Nicola Craig
Member of the Employment Relations Authority