

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 476
3119514

BETWEEN	YOUNGCHEOL CHO Applicant
AND	TGH MT EDEN LIMITED First Respondent
AND	TGH BOTANY LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: Seungmin Kang, counsel for the Applicant
Andrew Steele, counsel for the Respondent

Investigation Meeting: 6 August 2021

Determination: 29 October 2021

DETERMINATION OF THE AUTHORITY

- A. Youngcheol Cho was unjustifiably disadvantaged by how TGH Botany Limited decided his dismissal for redundancy. Within 28 days of the date of issue of this determination TGH Botany Limited must settle Mr Cho's personal grievance by paying him \$7,000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- B. Costs are reserved. A timetable has been set for lodging memoranda if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] TGH Botany Ltd gave Youngcheol Cho notice of dismissal on the grounds of redundancy on 16 May 2020. A letter from the company advised his role as Central

Kitchen Support Team Leader had been disestablished and there was no position available for him in its central kitchen.

[2] The company is part of a larger business producing and selling cakes and other baked goods. While the business, including its component companies, has had various names over the years it is referred to in this determination simply as TGH.

[3] Mr Cho's employment began in 2009. He worked as a pastry chef at what was then TGH's main factory in Mount Eden. In late December 2016 all cake production staff, except Mr Cho, moved to a new factory in East Tamaki. Mr Cho remained at the Mount Eden store, primarily making sponge bases.

[4] In March 2017 Brian Kim, TGH's chief executive, decided that arrangement was not viable. Mr Cho agreed to move to work at the East Tamaki site. He signed a new employment agreement. The employing entity identified in that agreement was a company later renamed TGH Mt Eden Ltd. The agreement described Mr Cho's position at East Tamaki as a "delivery driver and pastry chef". The job description attached to the agreement included both driving and kitchen functions and tasks.

[5] During a performance review in April 2018 Mr Cho complained to Brian Kim that he was working only in delivery driving and wanted to return to the cake production team. By September 2018 no change had been made to his delivery duties. Mr Cho then raised a personal grievance about being excluded from the cake production team. He said this related to an earlier incident in October 2016, when they were still all working at the Mount Eden site, where he said he was bullied by two team leaders and one other team member. Some other staff were interviewed about the complaint raised in his grievance. Notes from those interviews referred to conflict between Mr Cho and some other team members, including instances where he was said to have left work when other workers still had tasks to complete and they considered he should have stayed to help. This conflict was one reason Mr Cho initially stayed at the Mount Eden site instead of moving with other staff to East Tamaki in December 2016.

[6] No change to Mr Cho's duties was made as a result of that complaint and investigation. In March 2019 Mr Cho again asked Brian Kim about returning to work in cake production but by August 2019 was still doing only delivery work. When Mr Cho then asked again about working as a pastry chef, the company's general manager,

John Kim, arranged for him to begin working in the kitchen for two days a week. He was to continue with delivery duties during the remainder of his working hours each week. John Kim proposed a review of that arrangement after two months to see if it suited the business and Mr Cho. He sent Mr Cho a letter setting out that proposal. His letter referred to previous conflict with other staff, said all staff had to work respectfully and collaboratively with one another and said Mr Cho was expected to do all tasks he was reasonably requested to do.

[7] Mr Cho did not agree with the proposal or the reasons given for it. He began working under that arrangement but raised a grievance about it. He said he was being excluded from the cake team because Brian Kim had “accepted the unfair opinion of an employee who hated to work with me”.

[8] The parties agreed to attend mediation about Mr Cho’s grievance but this was delayed when he had to travel to Korea due to the death of his father.

[9] When Mr Cho returned to New Zealand from his bereavement leave, he met with Brian Kim and John Kim. In their discussion Mr Cho referred to wanting to put previous work problems behind him. Following that discussion Brian Kim and John Kim decided to offer Mr Cho promotion to a position as Central Kitchen support team leader with a wage increase. While accounts later differed on whether this arrangement resolved his previous grievances, Mr Cho signed a new employment agreement for the role on 13 December 2019. In that agreement TGH Botany Ltd was identified as the employer.

[10] Mr Cho’s employment then continued without incident until operation of the business was interrupted by the Covid-19 Alert Level 4 lock-down and State of National Emergency declared on 25 March 2020. The company applied for a government wage subsidy and paid that amount to Mr Cho and its other employees during the following weeks of lockdown.

[11] On 11 May 2020 TGH advised employees of a proposal to reduce the number of positions in its Central Kitchen team from 28 down to 20. Letters sent to those employees, including Mr Cho, said the proposal was necessary due to decreased sales and forecasts of an ongoing business downturn. The letter to Mr Cho, sent after a telephone call in advance from TGH’s human resource manager, said his role as support team leader was to be disestablished. The letter told Mr Cho he would be

given notice of redundancy if there were no alternative positions available within the company. He was told he could seek professional advice about the proposal and to provide any feedback within 48 hours.

[12] During that 48-hour period Mr Cho spoke by telephone to John Kim about his prospects. John Kim suggested Mr Cho ask to be redeployed as a chef. Following that conversation Mr Cho sent an email to TGH's human resources manager asking the company "to offer me a position that I can work based on my experience".

[13] On 16 May Mr Cho was told his position was confirmed as disestablished. He was given four weeks' notice of redundancy. He was paid for the notice period and was not expected to work during it. His employment ended on 12 June 2020.

The Authority's investigation

[14] Mr Cho's application to the Authority pursued three issues – whether his dismissal for redundancy was justified, whether TGH had fairly and properly dealt with concerns he raised between 2016 and 2019, and whether he had been properly paid for some public holiday and alternative holiday entitlements.

[15] During preparations for the Authority investigation meeting the respondents paid the sum of \$516.12 said to have been short paid on five public holidays, rather than contest the issue. Whether penalties should be imposed for breaches of record keeping and holiday pay requirements that had led to that shortfall remained an issue for determination.

[16] The two respondent companies said TGH's redundancy process and decision, made during the Covid 19 national emergency in 2020, was carried out fairly and the earlier issues Mr Cho had raised in 2018 and 2019 had been resolved when he took up a new position on a higher pay rate in December 2019.

The Authority's investigation

[17] For the Authority's investigation written witness statements were lodged from Mr Cho, Brian Kim and John Kim.

[18] At the investigation meeting they each answered questions, under oath, from me and the parties' representatives. Mr Cho and Brian Kim were assisted in

answering questions by an interpreter of the Korean language. The representatives also gave oral closing submissions.

[19] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[20] The issues requiring determination were:

- (a) Was Mr Cho unjustifiably disadvantaged by the arrangements for his move to work at the East Tamaki factory, how his employer dealt with his request to return to work as a pastry chef and how his employer responded to his concerns over conflict with other staff?
- (b) Was Mr Cho's dismissal on the grounds of redundancy, and how the decision was made and carried out, what a fair and reasonable employer would have done in all the circumstances at the time?
- (c) If his employer is found to have acted unjustifiably (in respect of disadvantage to and/or dismissal of Mr Cho), what remedies should be awarded to him, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Cho that contributed to the situation giving rise to his grievance?
- (e) Was TGH Botany Limited liable to a penalty for breaching obligations to provide information and consult with Mr Cho about the prospect of his employment being terminated for redundancy?
- (f) Was TGH Mt Eden Limited liable to a penalty for failing to keep compliant records for wages and time and compliant records for holiday and leave, and/or failing to pay public holiday and alternative holiday entitlements?
- (g) Should either party contribute to the costs of representation of the other party?

The grievances over conflict with other workers and working on deliveries

[21] Although Mr Cho's written witness statement said he had not understood why he was not included in the December 2016 move of production staff to the East Tamaki factory, it also said Brian Kim had talked with him at the time about the reason for that decision. Mr Cho had fallen out with other members of the cake production team because they considered he did not pitch in when they needed to work longer to get their tasks completed. He was aware of that conflict and was content to stay at the Mount Eden store, working alone making cake sponges. He lived near the store so it was more convenient for him to get to work there than travelling each day to the East Tamaki factory.

[22] He also accepted Brian Kim's decision some three or so months later that having Mr Cho making sponges at Mount Eden was not efficient or cost effective. Their evidence differed on whether Mr Cho had then agreed he would work as a delivery driver once he moved to the East Tamaki factory. On the balance of probabilities it was likely Mr Cho had asked about the prospects of also working in the cake team because the employment agreement he was provided with, and signed, referred to both delivery work and cake production, as did the job description. However, it was also not likely Brian Kim gave any firm undertaking Mr Cho would be assigned to work in the cake production team. He had left the prospect open but not promised it would happen. This conclusion was consistent with a reference made in an email Mr Cho wrote in September 2018 where he referred to Brian Kim offering him a delivery job in March 2017 and Mr Cho having accepted it.

[23] When Mr Cho later became dissatisfied with doing only delivery work and made a formal complaint about not being permitted to work in the cake team, the company investigated the grievance he raised. His complaint, by email on 18 September 2018, said he had been bullied by a team member and two team leaders on 1 October 2016 and his manager had "acted irresponsibly".

[24] John Kim, who at that time had only recently taken up the role of general manager of the company, arranged for interviews of three other employees referred to in Mr Cho's complaint. All three confirmed a disagreement had occurred that day in October 2016 over working late to finish tasks and that ill-feeling resulted from Mr Cho not being prepared to stay on and help. One of those interviewed, who was by then production manager of the kitchen, held strong views that Mr Cho did not work

well with others. He considered Mr Cho was disruptive and did not want him working in the kitchen he managed.

[25] John Kim and the company's human resources manager discussed the information and views from Mr Cho and the other employees. They did not accept Mr Cho's description of events as an instance of bullying and did not agree to his request to move to a post in the kitchen. In reaching that view they weighed both his expressed wish and the production manager's concerns about its potential effect on the kitchen team. It was, in the circumstances at the time, within the range of responses that a fair and reasonable employer could have made.

[26] The concern Mr Cho had was fairly investigated and his views considered. John Kim told him of the concerns expressed by the production manager. When Mr Cho asked about the issue again in March 2019 John Kim had a further discussion with the production manager about the prospect of Mr Cho working in the kitchen. Consistent with his good faith obligations, John Kim frankly reported to Mr Cho that the manager remained opposed to that idea because he considered Mr Cho had continued to be critical and uncooperative in working with others. John Kim told Mr Cho he could not move to work in the kitchen until the production manager was happy for that to occur. When the production manager left the company a few months later, in August 2019, John Kim arranged for Mr Cho to move back in to the kitchen.

[27] While he began working in the kitchen on two days a week from 2 September under that arrangement, Mr Cho also raised a further grievance by email on 9 September 2019. In his email Mr Cho said he had been told in a "face-to-face talk" with John Kim in March that he had been excluded from the cake team because "there is an employee who hates to work with me". He said he had asked for but not been given that information in writing. He said the company had breached its duties of good faith and as a good employer. He asked for a pay rise because he was "joining back to cake team".

[28] The company had agreed to attend mediation about this grievance but this was postponed due to Mr Cho's bereavement leave.

[29] What remained at issue was the extent to which, if at all, the arrangements made with Mr Cho in December 2019 about his work and future with the company

effectively resolved or settled the two disadvantage grievances he had raised, one in 2018 and one in 2019.

[30] Mr Cho considered both grievances remained unresolved because he had asked Brian Kim in December 2019 whether the promotion and pay rise he was offered were meant to compensate him for what had happened over the last two years. Brian Kim answered no. Mr Cho argued this meant the company understood those grievances, and compensation for them, remained open. Objectively, however, the reason for Brian Kim's answer was that he did not accept any compensation was due. Rather he had agreed to address and resolve Mr Cho's grievances by promoting him.

[31] Brian Kim's view was reasonable in the context of the discussion he and John Kim had with Mr Cho on his return from Korea in early December 2019. Mr Cho spoke of having had a change of heart and wanting to put the work problems of the past behind him. They understood him to be wanting to resolve his grievances and they responded with the offer to promote Mr Cho to the position of Kitchen Support Team Leader, with an associated pay rise. This placed him back in the kitchen, in a better paid and more senior position than he had initially asked for when he raised his grievances. It was, on the objective standard of what a fair and reasonable employer could have done, an action which did resolve the grievances as they were raised with the company at the time.

[32] The purpose of raising a grievance is having an employer address it.¹ In this case TGH did so by promoting Mr Cho. There were no grounds for any further award of compensation for his 2018 and 2019 grievances. They were already resolved. This was apparent from the fact that Mr Cho did nothing after December 2019 to pursue them, until after he was dismissed for redundancy in May 2020. In the meantime he had, as all witnesses agreed, been working productively and without rancour, in his Team Leader role in TGH's kitchen.

Flaws in the redundancy process and decision in May 2020

[33] TGH made some significant flaws in the process it followed in making decisions that led to the termination of Mr Cho's employment.

¹ Employment Relations Act 2000, s 114(2).

[34] There was clearly a reasonable commercial basis for the decision Brian Kim and John Kim made in May 2020 to assess what number of positions TGH's operation could sustain in the economic environment at that time. Production and sales had ceased during the lockdown. Forecasts for rebuilding sales once business could resume were, at that time, grim. They decided to focus resources on directly productive roles, such as pastry chefs, bakers, dispatch staff and delivery drivers. They identified supervisory roles, such as the team leader role held by Mr Cho and a production manager role, as not immediately necessary to continue.

[35] This view was reflected in the letter on the proposed restructure sent to Mr Cho. It told him that his position had been "disestablished from our structure". It was therefore a decision already made, without consulting him about it before doing so. This was the first significant flaw.

[36] While consulting Mr Cho on that point may not have resulted in a different decision about the future of the position, given the business rationale for preserving productive roles and reducing supervisory ones, discussion with him on that point may have avoided the second significant flaw. The letter sent to Mr Cho did not include a section put in the letters sent to other staff. The missing section identified what positions were proposed to be retained and invited staff to "reapply" for them.

[37] Brian Kim accepted this was an error in TGH's process. He said this had occurred because TGH relied on templates prepared by external human resources advisors. His evidence was, however, that Mr Cho would not have been appointed to any of the other available, retained positions anyway. He said this was because each position was already held by an existing staff member who had the most up-to-date experience of carrying out those roles, including the technical knowledge of the intricacies of making the cakes and other baked products sold by TGH. This view missed the point of what is required by the standards of fairness and good faith imposed by the Act on employers in going about making such decisions. It requires a fair process, which may or may not result in different outcomes, rather than acting on an assumed outcome without providing an affected employee with an opportunity to seek redeployment or other outcomes.

[38] The letter sent to the other workers said they could apply for positions that were available and included a box to tick indicating they were interested. The letter

sent to Mr Cho did not because, as it turned out, TGH managers had already reached the view that his skill level at that time were not suitable to appointment to one of those production roles.

[39] The unfairness of that approach was partly offset because Mr Cho talked to another person in a supervisory role, a production manager, and learned of the opportunity to “reapply” for some available positions. He was then able to contact John Kim who suggested he apply for a chef role and Mr Cho did send the human resources manager an email indicating an interest in being considered.

[40] He did not however have the opportunity to address the specific criteria TGH applied in making its decisions. This was the third significant flaw in TGH’s process. Those criteria were referred to in later, final letters sent to other workers who were also made redundant. They included skill and efficiency, productivity of each team, overall performance and attitude, and feedback from colleagues and supervisors.

[41] Three other elements of what TGH did during this process were also submitted to have been unfair. On examination none were sufficient to amount to a further significant flaw in the circumstances of this case.

[42] The first was a suggestion that the decision to dismiss Mr Cho for redundancy was motivated by the previous history of rancour in his employment. While the managers involved were aware of that background, the evidence did not establish this was a predominant purpose in their decision about disestablishing his role and retaining others in the remaining roles. By the time those decisions were being considered, the evidence suggested those managers and Mr Cho were content with his work and contribution to the company.

[43] The second concerned the limited time frame of 48 hours given to respond to the proposal. While in many circumstances this would be insufficient, Mr Cho’s evidence established he actively sought advice and contact with colleagues and managers during those two days. Nothing stopped him also seeking advice by telephone from an independent advisor if he chose to seek it. His correspondence with the company in 2018 and 2019 showed he had an astute awareness of relevant obligations in the employment relationship and the confidence to pursue information or points when he wished to do so.

[44] The third concerned whether TGH's managers were sufficiently responsive and communicative when he sought to contact them by telephone during that two day period. Brian Kim did not respond to a telephone message left by Mr Cho but he was able to speak with John Kim, who provided him with some practical advice about responding to the redundancy proposal, and with the company's human resources manager. In the context of dealing with a difficult situation for the business and a restructuring proposal involving around 30 employees, TGH was sufficiently responsive and communicative with Mr Cho.

[45] However the flaws identified as significant had resulted in Mr Cho being unjustifiably disadvantaged in the process at that time. He did not have a sufficient opportunity to respond to TGH's proposal in a way that specifically addressed the positions available and the criteria applied to selection for them. But this did not mean the outcome of that process amounted to an unjustified dismissal.

[46] The evidence of Brian Kim and John Kim established that the employees who were retained in the available positions were largely those who were already carrying out those roles. Those employees were favoured for reasons which did not make TGH's decision in respect of the future of Mr Cho's employment unreasonable. While Mr Cho had experience as a pastry chef, this was not as recent and practised as the employees already doing those jobs. To redeploy him into one of those positions, displacing someone already doing it satisfactorily, would have required TGH to bear the cost of the time needed for Mr Cho to refamiliarise himself with the recipes and techniques involved. In the context of a need to reduce business costs, it was not unreasonable to prefer employees already doing the job who did not need that time and effort. Brian Kim's evidence confirmed he gave preference to those employees. It was an approach reasonably open to a fair employer in the circumstances at the time. The result was that, even if Mr Cho had been given more information and opportunity for input, the outcome for him would not on the balance of probabilities have been any different. For that reason he had not established a personal grievance on the grounds that his dismissal was unjustified. He had however established TGH did unjustifiably disadvantage him in how it went about reaching that result.

Remedies

[47] Mr Cho was entitled to an award of compensation for humiliation, loss of dignity and injury to feelings arising from TGH's failure to properly provide him with information and the opportunity to fully respond to its restructuring proposal.

[48] As he had not established a grievance of unjustified dismissal he was not entitled to an award of lost wages. The amount that could have been granted on that account was relatively small as he had, very soon after his dismissal, gained new employment in a similar cake business operated by Brian Kim's brother.

[49] Mr Cho's evidence established he was understandably anxious and upset during the redundancy process that led to the termination of his employment. Compensation cannot, in light of the finding of disadvantage only, be awarded for distress caused by the dismissal itself. An appropriate level of compensation for the distress caused by the failure to provide adequate information and the opportunity to fully respond during the redundancy process was \$7,000. This is the amount that TGH Botany Limited must pay under s 123(1)(c)(i) of the Act to Mr Cho within 28 days of the date of this determination.

[50] Under s 124 of the Act the Authority must also consider whether any remedy awarded in settlement of a personal grievance should be reduced due to any blameworthy conduct by the employee which contributed to the situation giving rise to the grievance.

[51] In this case the grievance concerned a redundancy situation caused by the economic effects of public health measures implemented in response to a pandemic. Mr Cho did not contribute to that situation or to TGH's failure to provide him with adequate information and an adequate opportunity to respond during its redundancy process. No reduction of the remedy awarded to him was required.

No penalty for breach of good faith

[52] The evidence established TGH fell short of meeting the good faith obligations to provide access to information and an opportunity to comment where an employer was proposing to make a decision affecting the continuation of the employment.² A penalty is available where such breaches are deliberate, serious and sustained or

² Employment Relations Act 2000, s 4(1A)(c).

otherwise intentionally undermine an employment relationship. In this case the wrong done has been adequately addressed by the award of compensation made to Mr Cho. No penalty was necessary to mark it.

No penalty regarding penalties and holiday pay

[53] In his statement of problem Mr Cho identified four days in 2015 and 2016 where he had been short paid for work on public holidays in those years. The payments made omitted the 50 per cent loading required for work on those days. By the time of the investigation meeting TGH had paid the shortfall but Mr Cho asked for penalties to be imposed on TGH for failing to keep proper wage records and for failing to pay correct holiday entitlements.

[54] Brian Kim accepted those failures had occurred and said this happened before the business had someone specifically assigned to properly attend to payroll matters. As I understood his evidence the business now had systems in place so payments due were properly recorded and made. No sufficient purpose was served by imposing a penalty for the limited historical failures identified by Mr Cho.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Cho may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum TGH Botany Ltd and TGH Mt Eden Ltd would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[56] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].