

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 508
3109552

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| BETWEEN | TEJINDER SINGH Applicant |
| AND | MA SERVICES GROUP PTY LIMITED Respondent |

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| Member of Authority: | Claire English |
| Representatives: | Warwick Reed and Rachel Rolston, advocates for the Applicant Respondent in person by Zoom |
| Investigation Meeting: | 16 September 2021 |
| Submissions received: | 16 September, 27 September, and 22 October 2021 from Applicant 16 September, 29 September, and 18 October 2021 from Respondent |
| Determination: | 17 November 2021 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed as a security guard by the respondent, which is a company based in Australia.

[2] On 11 April 2020, the applicant's manager sent him a text message, advising that his last day of work would be on 15 April 2020, and wishing him the best for the future.

[3] The applicant raised a personal grievance for unjustifiable dismissal.

[4] The respondent employer, through its Australian-based General Manager of Human Resources, (Mr Lind), stated that it was entitled to end the applicant's employment by providing contractual notice, and that it had done so because one of the respondent's clients had cancelled its contract with the respondent, meaning there was no work for the applicant. Mr Lind argued for the respondent employer that in such circumstances, the tests for justification, including the requirements for consultation and engagement with employees set out in section 103A of the Employment Relations Act 2000 did not apply.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from the applicant, and from Mr Lind on behalf of the respondent. The applicant and Mr Lind answered questions under oath or affirmation from me and the parties' representatives. The parties also gave oral closing submissions, and written submissions.

[6] 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

[7] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably dismissed by the respondent?
- (b) If the respondent's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act.
- (c) Should either party contribute to the costs of representation of the other party.

Facts:

[8] The applicant commenced working for the respondent as a security guard on 30 December 2019.

[9] The applicant was provided with an individual employment agreement, headed “NZ Employment Contract”. The agreement contained a clause stating that it was to be interpreted in accordance with New Zealand law.

[10] The applicant was to be paid at the rate of \$20/hour, in New Zealand dollars, and to work 40 hours per week.

[11] The place of work was not stated, but the employment agreement required the applicant to work across various client sites.

[12] There were two termination provisions in the employment agreement. Clause 55 provided for “Termination Due to Discontinuance of Business”, stating:

In the event that the Employer will discontinue operating its business at the location where the Employee is employed, then, at the Employer’s sole option, and as permitted by law, this Agreement will terminate as of the last day of the month in which the Employer ceases operations at such location with the same force and effect as if such last day of the month were originally set as the Termination Date of this Agreement.

[13] A separate clause provided a general notice period of 2 weeks, with the option of payment in lieu of working.

[14] The applicant commenced work as a security guard at a store in The Base, Hamilton, as of 30 December 2019. He worked 40 hours per week, according to a roster. His rostered days of work each week were communicated to him by way of an app on his mobile phone.

[15] In addition, his manager would contact him by text message, or sometimes email.

[16] On 8 April 2020, unbeknownst to the applicant, the store where the applicant worked cancelled its contract with the respondent, giving 1 weeks’ notice of cancellation to the respondent.

[17] On Saturday 11 April 2020, the applicant's manager became aware of the cancellation. He then immediately texted the applicant, terminating his employment as of 15 April 2020. The same message was also sent to the applicant by email.

[18] The message stated that the client had cancelled the guard services, "so officially 15th April will be our last day". The email offered to provide references and wished everyone the best for the future.

[19] The applicant was shocked, and engaged in a text message conversation with his manager asking if there was other work available, and mentioning Tauranga, where the applicant knew the employer had contracts with other stores.

[20] The manager advised the applicant that he would see if there was any other work available.

[21] The respondent provided security services to 21 other stores in New Zealand at that time. However, the manager did not contact the applicant again after this.

[22] The respondent now says that there were no other available openings, and it relied on the manager to be aware of any available openings at any given time, so there was nothing that could have been done.

[23] None of this was communicated to the applicant at the time. Both parties are clear that the respondent didn't consult in any way with the applicant before ending his employment, or take any steps to demonstrate or explain the lack of alternative work to the applicant, or explore with him if he would have been willing to work at other stores either during or immediately after the contractual notice period.

[24] The applicant worked until 15 April as directed, and was paid up to that date.

[25] When he did not receive a notice payment, he texted his manager inquiring about being paid two weeks' notice. The manager said he would look into it, but no payment was made.

[26] The applicant then sought advice.

[27] His representative raised various claims on his behalf, including that he had been made redundant without consultation, and making a claim for unpaid notice.

[28] There was a short delay in response from the respondent. The applicant believes that his claim was raised with his former manager on 27 April 2020 by email, and notes that his former manager texted him back on that date to say he had received the applicant's personal grievance claim and would be passing it on to an appropriate person who would respond.

[29] It appears that the applicant's former manager took no such action, as again, the applicant received no further communication.

[30] The respondent states that the personal grievance claim was not raised until some 8 days later, on 5 May 2020, when the claim was re-sent to the Managing Director, and from the respondent's perspective, was received for the first time. In response, the Managing Director authorised payment of the applicant's 2 weeks' notice period, although this was not in fact paid until 14 May 2020.

[31] In the end, nothing hinges on this as there is no dispute that the applicant's claim was made, and was responded to by the respondent.

[32] The applicant began applying for other jobs by updating his resume, and applying for jobs advertised on Trade Me.

[33] The applicant provided print-outs of some 35 jobs he says he applied for over the three and a half months following his dismissal. He says he applied for more jobs than this, but did not receive printable confirmations for all of the jobs he applied for.

[34] The respondent takes issue with this, and suggested that not all of the jobs applied for were genuine, and that at least one of the print-outs had been created by the applicant. The applicant firmly denied this.

[35] Despite his job search, the applicant was unsuccessful in finding other employment, and says that he believes this was due in part to the disruption caused by Covid-19, and that many others were similarly seeking work at this time.

[36] In early to mid-August, the applicant obtained two weeks casual employment as a security guard. This was the only job that he was offered. This did not turn into ongoing work. He and his wife then developed a business plan to set up their own cleaning business, and sought financial assistance from the Ministry of Social

Development. Although they did not receive any business funding, they went ahead and started their own business in November 2020, and were successful in it.

Findings:

[37] When the respondent terminated the applicant's employment on 11 April 2020, it did so due to redundancy. There is no dispute that the termination was immediate, and without any process.

[38] Although there is no definition of what might constitute a redundancy situation in the applicant's individual employment agreement, the commonly accepted definition is a situation where a:

... worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer¹.

[39] There is no dispute that the applicant's employment came to an end as a result of the lack of work available due to the store where the applicant worked cancelling its contract with the employer, effectively rendering the applicant's services superfluous.

[40] The respondent states that this creates a genuine economic reason for its termination of the applicant's employment, and that in addition, it has paid the applicant all that he was entitled to under the terms of his individual employment agreement, being the payment of 2 weeks' notice, albeit this was paid late. The respondent goes further and points out that the 2 weeks' notice payment was calculated from the applicant's last day at work, being the 15th of April, rather than from the date he was notified of the termination of his employment, being the 11th of April, so in fact, it has paid the applicant for 4 days more than it was contractually obliged to. For these reasons, the respondent submits that the applicant's dismissal was justified.

[41] The respondent does not accept that it failed to meet its obligations to consult with the applicant, or that there were any procedural flaws in its termination of the applicant's employment.

¹ *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).

[42] The respondent was represented by its National General Manger of Human Resources, Mr Lind. Mr Lind was able to clearly and succinctly outline what he considered to be a normal consultation process, which included notifying affected staff, meeting with them on a one-on-one basis, including via Teams or Zoom if necessary, discussing alternatives to the ending of employment, assisting employees to re-examine their skill sets in preparation for job search, and seeking to re-deploy and reassign where possible. He described how, if these steps were not successful and did not result in internal redeployment, then affected staff would receive whatever contractual entitlements were set out in their employment agreements.

[43] Mr Lind accepted that none of these steps were taken in the applicant's case. He said that this was because the client "pulled the rug", and gave the respondent itself only 7 days' notice of the cancellation of contract. In addition, he expressed the view that it would not have been appropriate to engage in a consultation process if that process could offer only "false hope", as there was no other work available. He said that the situation was made more difficult by the impact of Covid-19.

[44] Mr Lind further argued that the test of justification set out in section 103A of the Employment Relations Act 2000, and in particular, the process steps which the Authority must consider as set out in subsection (3), did not apply, as this was not a situation where the termination of employment arose from allegations against the employee. And in any event, the respondent's actions had been those of a fair and reasonable employer, and did not result in any unfairness to the applicant.

[45] The termination of employment by reason of redundancy is a dismissal². It must be carried out for genuine economic reasons. It must also be carried out in a fair manner, which includes following the usual requirements to consult and provide notice and other supports. The test for justification of a dismissal under s 103A of the Act applies to redundancies as well as all other forms of dismissal, with the necessary modifications of the statutory language³.

² See for example *New Zealand King Salmon Co Ltd v Slotemaker*, [2017] NZEmpC 99.

³ The Court of Appeal has confirmed that "it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.", in the case of *Grace Team Accounting v Brake* [2014] NZCA 541, at [77].

[46] In the present case, the respondent appears to have genuine reasons for redundancy, in that the store where the applicant worked no longer wished to engage security services.

[47] However, the process used to dismiss the applicant was fatally flawed, in that there was no process. The respondent dismissed the applicant without giving him any notice, and without considering whether there were any alternatives. When the applicant's manager contacted him on 11 April, he had already made up his mind that the applicant's employment was at an end, and the only purpose of his contact was to bring the applicant's employment to an end as quickly as possible. His lack of further contact or consultation was consistent with his mind already being made up.

[48] I do not accept that the respondent's ability to fairly or reasonably consult with the applicant was significantly hampered by Covid-19 restrictions. This is because Mr Lind specifically indicated that the respondent was already using tools such as Teams and Zoom to carry out such consultations as an alternative to face-to-face meetings, and even prior to Covid-19 restrictions, the respondent had already established remote communication with the applicant via text, email, and a dedicated app, which were used to communicate with the applicant on a regular basis. There was no barrier to the respondent consulting with the applicant using these tools, apart from the fact that the applicant's manager had already made the final decision to terminate his employment.

[49] In particular, the respondent could have worked with the applicant to offer him the types of support that Mr Lind indicated were "normally" offered to other staff, including a meeting with the applicant to discuss (even if virtual), rather than merely sending decisions by text message, discussing alternatives to the ending of employment, assisting the applicant to re-examine his current skill set in preparation for job search, and seeking to re-deploy and reassign where possible, including for the duration of the contractual notice period. Although the respondent urged the Authority to accept that the applicant's employment would have ended regardless and no other work was available or would have become available in a reasonable time, none of these steps occurred, so this remains speculative. The lack of any fair process means that the decision to dismiss was unjustified⁴.

⁴ The Court of Appeal has held that in a redundancy situation, "the decision to dismiss was in breach of s 103A and therefore unjustified. The fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore, "genuine") did not alter the fact that s 103A was breached." *Ibid*, at [105].

[50] As a result of the applicant's unjustified dismissal, he becomes entitled to claim remedies including lost remuneration, and compensation payments for humiliation, loss of dignity, and injury to feelings.

[51] In the present case, there was no contractual provision for redundancy compensation payments, or any other lost benefits, so these matters do not arise.

[52] The applicant has claimed for three month's lost remuneration, calculated as \$9,627.29 after some minor earnings from sporadic work⁵ were taken into account.

[53] This is an appropriate claim, as the applicant was out of work for approximately 3 and a half months before he was offered and accepted casual employment as a security guard (he was unable to recall the exact dates).

[54] The respondent suggests that the applicant did not do enough to mitigate his losses, on the grounds that (as already mentioned), he did not apply for as many jobs as he said he had, or that some of the jobs he claimed to have applied for were not genuine job opportunities. In particular, the respondent pointed to a certain job that the applicant said he had applied for with the title of "Sales Person – Beds and Furniture", which appeared to have been advertised by the security company Armourguard, and questioned whether a security company would in reality have been advertising for a furniture sales position. The respondent suggested these job details, and perhaps others, had been fraudulently created by the applicant.

[55] The applicant explained that he recalled this to be a security guard position, and that he did not think it unusual for a furniture store to need a guard.

[56] The applicant's explanation about this job application is plausible. But more importantly, the applicant gave consistent and credible evidence as to what he did to apply for jobs, including updating his resume and expanding his job search to include roles other than security guard as it became apparent to him that his earlier job applications were unsuccessful. The increasing volume of job applications that he made to as the weeks went by is also consistent with this. I am satisfied that the applicant

⁵ The applicant sought work as a driver, and performed a small number of single deliveries, with payments being on a piece-rate basis and no employment resulting.

made reasonable efforts to find alternative employment, including accepting the casual work that was offered to him.

[57] The employer also raised concerns that the applicant had not properly taken into account his earnings from his casual work during this time. While this is a fair concern to raise, I note that the applicant provided a break-down of his lost earnings claim, and this was supported by his underlying bank records which were later supplied to the Authority.

[58] For the sake of completeness, I also note that it is my view that the respondent did not overpay the applicant by 4 days wages, as suggested by the respondent. This is because clause 55 of the individual employment agreement entitles the applicant to be paid to the end of the month.

[59] The applicant has also claimed compensation for hurt and humiliation. The impact on the applicant was considerable. He states he was shocked at having his employment end by text, and had not anticipated this in any way. He said that he found his unemployment stressful, depressing, and frustrating. He describes having to tell his children to keep out of the pantry because the family were rationing food to make ends meet, and how he needed to accept financial assistance from his mother in law, and in the end, from his own parents as well who sent money from India.

[60] The applicant is entitled to compensation in the middle of the range, being \$12,000.

[61] Finally, during the course of the investigation, it became clear that there were systemic irregularities in the way the applicant had been paid for public holidays.

[62] A total of 6 public holidays fell during the course of the applicant's employment.

[63] Of these 6 public holidays, the applicant was overpaid for work done on one, underpaid for work done on another, not paid at all for a public holiday on which he did not work, not paid for an alternative holiday that remained untaken at the end of employment, and the respondent has ignored the respondent's entitlement to a public holiday on the provincial anniversary day⁶, which for the applicant was Auckland Anniversary Day. The respondent has pointed to 2 payments made to the applicant

⁶ Section 44(1)(k) of the Holidays Act 2003.

during his employment that are marked on the applicant's payslips as "Lieu Days", to demonstrate that the applicant was paid for some alternative holidays. The payslips show that payment to the applicant has not been calculated in accordance with the provisions of the Holidays Act 2003, which requires payment to be calculated at not less than the employee's relevant daily pay or average daily pay⁷.

[64] The respondent accepts that these errors have occurred because its payroll system has been set up incorrectly, and it has advised the Authority that it is now undertaking a payroll audit and is engaging a New Zealand consultant to review this audit. These concessions are appropriate in the circumstance. In respect of the applicant in particular, the respondent points to the overpayment to the applicant for work done on one public holiday, as removing any need for an award of arrears.

[65] The respondent has breached various sections of the Holidays Act 2003, specifically:

- a. Section 49, being the requirement for payment if an employee does not work on a public holiday.
- b. Section 50, being the requirement to pay for work done on a public holiday at the rate of time-and-a-half.
- c. Section 55, being the requirement as to when payment for work done on a public holiday must be made.
- d. Section 56 being the requirement for an alternative holiday if an employee works on a public holiday.
- e. Section 60(1), being the requirement to pay for alternative holidays at the rate not less than the employee's relevant daily pay or average daily pay.
- f. Section 60(2), being the requirement to pay for alternative holidays that are untaken at the end of employment in the pay that relates to the employee's final period of employment.

⁷ Section 60 of the Holidays Act 2003, noting that relevant daily pay is defined in section 9 of that Act, and average daily pay is defined in section 9A of that Act.

[66] Section 75 of the Holidays Act provides that an employer is potentially liable to penalties for these breaches. The requirements of the Holidays Act 2003 are minimum entitlements that all employees should be able to rely on their employer to provide. It is appropriate that the respondent should pay a penalty for these breaches of statute⁸.

[67] The considerations in regard to penalties⁹ are as follows:

- a. The object of the Act – the Holidays Act sets out minimum entitlements, and the applicant has been denied the benefit of his entitlements to both leave and money;
- b. The nature and extent of the breach – the breach is systemic, affecting all aspects of entitlement to public holidays, including the correct identification of the public holidays themselves¹⁰;
- c. Whether the breach was intentional, inadvertent, or negligent – the breach was more than inadvertent, in that the employer did not take the necessary care to comply with a fundamental aspect of New Zealand law;
- d. The nature and extent of any loss or damage – the applicant suffered loss of both time away from work and wages properly due;
- e. Compensation or other steps in mitigation – the respondent has undertaken to audit its systems to remediate the underlying problems which lead to the breach;
- f. The circumstances of the breach, including the applicant’s vulnerability – the respondent is a large employer, with the resources and internal knowledge necessary to set up its systems correctly, however, this was not done;
- g. Any similar conduct – there is no issue of past similar conduct;

⁸ *Nicholson v Ford*, [2018] NZEmpC 132, at paragraph [44].

⁹ *Nicholson v Ford*, [2018] NZEmpC 132.

¹⁰ The respondent did not identify nor provide for the provincial anniversary day as a public holiday, as required by section 44(k) of the Holidays Act 2003.

- h. Deterrence – there is a need for deterrence on a general basis, as it cannot be enough for an employer to implement systems without checking if these comply with established laws;
- i. Degree of culpability – it is relevant that the respondent has promptly taken responsibility for the breaches once drawn to its attention;
- j. Consistency – the present case is at the lower end of the range of previous awards;
- k. Ability to pay – the respondent is a large international company, with on-going operations throughout New Zealand;
- l. Proportionality – although the total amounts involved are relatively small, the breaches are on-going and affect more than just the applicant;

[68] Taking all the above matters into account, a penalty of \$6,000 is awarded; half of this penalty is to be paid to the Crown account, and half to the applicant.

[69] The applicant is awarded:

- a. Three months' lost wages, being the sum of \$9,627.29 gross, plus \$770.18 in holiday pay calculated at the rate of 8%.
- b. Compensation for hurt and humiliation, in the sum of \$12,000.00.
- c. Reimbursement of the filing fee, being \$71.56.
- d. Half of the penalty amount, being \$3,000.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[71] If they are not able to do so and an Authority determination on costs is needed the applicant 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, the respondent will 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.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate.¹¹

Claire English
Member of the Employment Relations Authority

¹¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].