IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 166
3098112

	BETWEEN	MCKALEB ROZON Applicant
	AND	WAGSTAFF PILING NZ PTY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	David Prisk, advocate for the Applicant Adam Darby, for the Respondent
Investigation Meeting:	20 April 2021
Determination:	27 April 2021

DETERMINATION OF THE AUTHORITY

A. Wagstaff Piling NZ Pty Limited (Wagstaff NZ) failed to follow a fair process in making and carrying out its decision to dismiss McKaleb Rozon on the grounds of redundancy.

B. In settlement of Mr Rozon's personal grievance for unjustified dismissal, Wagstaff NZ must pay him the following sums within 28 days of the date of this determination:
(a) $1,485 for lost wages; and
(b) $10,000 as compensation for humiliation, loss of dignity and injury to his feelings.

C. Costs are reserved. A timetable is set for memoranda if an Authority determination of costs is needed.

Employment Relationship Problem

[1] Wagstaff Piling NZ Pty Ltd (Wagstaff NZ) dismissed McKaleb Rozon on 10 December 2019 on the grounds of redundancy.

[2] He had worked for Wagstaff NZ from 21 August 2019 on a ground improvement project on the Auckland waterfront (the Auckland project). Wagstaff NZ's letter of offer of employment described his position as an operator. Its employment agreement with him described the position as a labourer.

[3] A letter of dismissal given to Mr Rozon on 10 December 2019 said the company had decided to provide him with "a more generous notice provision of three days" than the one day's notice set in his employment agreement. The notice was paid in lieu.

[4] Mr Rozon applied to the Authority for a finding he was unjustifiably dismissed. He said he was not consulted about the prospect of redundancy, he had been promised other work when the Auckland project finished and other workers from the site did get more work with Wagstaff NZ or its Australian parent company, Wagstaff Piling Pty Limited (Wagstaff Australia).

[5] In reply Wagstaff NZ said it complied with the requirements of the Employment Relations Act 2000 (the Act) and with the terms of its employment agreement with Mr Rozon in terminating his employment. It said that at the time of laying him off Wagstaff NZ did not have another project running in New Zealand for Mr Rozon to work on and it was not required to offer him work with its Australian parent company. It said two workers from the Auckland project who were later employed to work for Wagstaff Australia, in Australia, had particular skills or qualities that Mr Rozon did not have.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Mr Rozon and the following four personnel of Wagstaff Australia:

- Adam Darby, managing director of Wagstaff Australia;
- Arash Judi, a project engineer with Wagstaff Australia who was seconded to Wagstaff NZ in June 2019 to work on the Auckland project;
- Mark Smith, a site supervisor employed by Wagstaff Australia who was seconded to Wagstaff NZ in June 2019 as site supervisor for the Auckland project;

- Norman McNeilly, Wagstaff Australia's national construction supervisor who made several visits to the Auckland project and was involved in hiring local staff for the project.

[7] Mr Darby, Mr Judi, Mr Smith and Mr McNeilly each participated in the Authority's investigation by audio visual link from various locations in Australia. They and Mr Rozon answered questions under affirmation from me and the parties' representatives. The representatives also had an opportunity to give oral closing submissions.

[8] As permitted by s 174E of 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.

Context

[9] The following findings of fact, made from assessment of the written and oral evidence of all five witnesses, summarise the context in which Wagstaff NZ dismissed Mr Rozon and some relevant subsequent events.

[10] Wagstaff Australia is a privately-owned company employing around 180 staff to provide specialised construction services for infrastructure projects. In June 2019 it registered Wagstaff NZ as its local legal entity to seek and carry out similar projects in New Zealand. The Auckland project was its first subcontract here. Mr Judi and Mr Smith came from Australia to lead the work. Mr McNeilly also came to carry out the task of hiring local operators and labourers for the work.

[11] Through 2019 Wagstaff NZ was also seeking subcontracts for further work in Nelson and Napier.

[12] Over the months of working on the Auckland project Mr Rozon and other workers, including their supervisor Mr Smith, talked about the prospects for working on a Nelson project and what arrangements might be made for that. Wagstaff NZ hoped it would secure the subcontract for that project with an anticipated start date in January 2020. This date would have dovetailed neatly with the expected end of the Auckland project, enabling Wagstaff NZ to move machinery and crew from one site to another with little down time between. Mr Smith visited Nelson in October to scope out local suppliers of materials they might need and accommodation for the workers. Wagstaff

NZ also planned for Mr Smith to remain in New Zealand, where he had relatives, to supervise the Nelson project.

[13] However engineering and design issues in the Nelson project delayed the main contractor's plans for letting the subcontract Wagstaff NZ hoped to win. It did eventually secure that subcontract but this was not confirmed informally until March 2020. Formal documentation for the Nelson project was not signed until early May 2020, with work starting soon after. And throughout 2019 and 2020 Wagstaff NZ made no progress in gaining a possible subcontract for a Napier project.

[14] By early December 2019 Wagstaff's senior managers realised the Auckland project would end with no firm prospect of further work in Nelson going ahead. At best they faced an uncertain period of delay for several months. They made plans for packing up the machinery and other equipment for storage on the Auckland site and for ending the employment of their crew there. By 14 December all employees were laid off. Mr Jude returned to Australia on 13 December. Mr Smith returned there on 16 December.

[15] Mr Rozon was the first worker laid off from the Auckland project. He was unexpectedly called to the site office on 10 December. Mr Judi gave him a letter of dismissal prepared and signed by Wagstaff NZ's Australian-based human resources manager, Justin Bindman. Mr Judi had instructions to hand over the letter but was given no directions or guidance from Mr Bindman to first talk with Mr Rozon about the prospect of dismissal or about assistance that might be offered to him.

[16] Mr Rozon was one of three labourers in Wagstaff NZ's crew on the Auckland project. One, who was also directly employed by Wagstaff NZ, was laid off on 14 December. The other, who worked through a labour hire agency, was laid off on 13 December.

[17] In the weeks shortly before he was dismissed Mr Rozon understood that the labour hire worker had been told about work prospects on the Nelson project. At that time he contacted Mr McNeilly by telephone to ask what was happening but felt he was brushed off with a promise to get back to him. Mr McNeilly did not call him back.

[18] In January 2020 Mr Rozon found out that the labour hire worker, who went by the nickname "T", was working in Australia for Wagstaff Australia. Another worker

from the Auckland project, who was a skilled piling rig operator, was also working for Wagstaff Australia in Australia by then. In early February Wagstaff sent both of those two men back to Auckland to move equipment from where it had been stored on the Auckland project site to a site in the South Island. Wagstaff NZ hoped the equipment would thereby be more conveniently placed if work on the Nelson project was confirmed.

[19] Mr Rozon accepted that Wagstaff had good reasons to offer the rig operator further work, either in New Zealand or Australia. The rig operator had skills and experience he did not have.

[20] However Mr Rozon considered he was unfairly treated, at the end of his employment on the Auckland project, by not being offered the same kind of additional work provided to T, first in Australia during January and then back in New Zealand in February. Mr Rozon believed this was because he had taken some days off work in late November when his partner suffered an ectopic pregnancy and had to go into hospital for emergency surgery.

[21] Mr Smith's evidence confirmed he had, as the site supervisor, formed a low opinion of Mr Rozon as a worker. This was not because of time Mr Rozon took off due to his partner's health emergency, but because Mr Rozon had taken some other days off during his 16 weeks of employment and Mr Smith had chastised him a number of times about using a mobile phone on the site and not being attentive to his work. One of those day's absence was to attend court in relation to a criminal charge. Mr Rozon said he had told Mr Smith his reason for being away on that day but Mr Smith said he had only found out the reason second hand from other workers.

[22] Mr Smith did not recall any specific conversations with any Wagstaff senior manager about the relative merits of the workers on the Auckland project but believed he had passed on his view that, compared to Mr Rozon, T was a worker with good timekeeping and a good attitude to work.

[23] Mr Darby confirmed that T, who was laid off from the Auckland project on 14 December, was later offered and took up work that had become unexpectedly available at short notice with Wagstaff Australia during mid-January. T had worked at a site in Queensland from 13 January. In early February he returned to New Zealand to work,

under an employment agreement with Wagstaff NZ, on moving the stored equipment from the Auckland project to a South Island site.

Issues for resolution

[24] From those findings the main issue for resolution was whether Wagstaff NZ had done what a fair and reasonable employer could have done, in all the circumstances, at the time it decided to dismiss him on the grounds of redundancy, and in how it made and carried out its decision.[1] This includes consideration of the reason for its decision, the process followed and whether Mr Rozon was treated unfairly over the prospect of future work. The question of future work includes whether Wagstaff NZ was under any obligation to consider what work might be available for Mr Rozon with its parent company in Australia.

[25] If Wagstaff NZ is found to have acted unjustifiably, remedies for consideration include lost wages and compensation for humiliation, loss of dignity and injury to his feelings that may have resulted from his dismissal.

[26] The last issue is whether either party should be awarded a contribution to its costs of representation.

Statutory and contractual obligations

[27] The test of justification, set by s 103A of the Act as the measure of an employer's actions, required Wagstaff NZ to show its decision to end Mr Rozon's employment on the grounds of redundancy was genuine and it had complied with the notice and consultation requirements of s 4 of the Act. In this context genuine means making a decision on business requirements and not as a pretext for dismissing a disliked employee.[2]

[28] An employer proposing to make a decision likely to have an adverse effect on the continuation of a worker's employment must give the worker information about that prospect and, before making a decision, give the worker an opportunity to comment.[3]

[29] If any defects in the process Wagstaff NZ followed in considering the future of its employment relationship with Mr Rozon were more than minor and had resulted in

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[1] Employment Relations Act 2000, s 103A.
[2] *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].
[3] Employment Relations Act 2000, s 4(1A)(c).

him being treated unfairly, the Authority may determine his dismissal for redundancy (including how it was made and carried out) was unjustified.[4]

[30] The following provisions from Mr Rozon's written employment agreement with Wagstaff NZ were relevant to the assessment. His employment was described as starting on 21 August 2019 and to "continue until either the employer or the employee ends this relationship". It was therefore not fixed-term employment of the type permitted under s 66 of the Act, tied to the length of a specific project. Its continuous nature was consistent with a term headed "Place of Work". This term said "the employee will work at multiple locations within the North and South Island of NZ, as required by the employer". It also said" "[t]he employee agrees to travel outside the area stated above for work from time to time, which may include being away overnight. This will be within New Zealand". The letter of offer which accompanied Mr Rozon's employment agreement said his positon was "based at Auckland".

[31] However the employment agreement also provided for a very short notice period. A term headed "Ending Employment" said that "unless otherwise set out in this agreement, either the employer or the employee can end employment by giving one day's notice in writing".

[32] In the event of redundancy, the following term applied:

> Redundancy is when an employee's role is no longer required. If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in Ending Employment. They will also get redundancy compensation based on this formula: one week's pay for each full year worked for the employer, up to a maximum of 12 weeks' pay. Partial years will be paid pro rata.

Genuine business reasons

[33] Through discussion with Mr Smith and with his co-workers Mr Rozon had formed a strong expectation he would continue to be employed by Wagstaff NZ to work in Nelson. This was consistent with the continuous term of his employment agreement, not tied to just the Auckland project, and the reference in the place of work clause to working anywhere in New Zealand. However he was given no verbal or written indication from any manager or other authorised person of Wagstaff NZ that such work would definitely be available in Nelson or that he would be kept on the payroll until it

[4] Employment Relations Act 2000, s 103(5).

was. For him, as with the company, it was a hope not a certainty that work would be available there.

[34] By early December 2019 Wagstaff NZ had a genuine business reason to terminate its employment of Mr Rozon and its other employees on the Auckland project. The project was near completion and the prospect of further work on the Nelson project, still uncertain, was at least several months away. Wagstaff NZ had no other work available for those workers anywhere in New Zealand. In those circumstances, as they were at that time, a fair and reasonable employer could have terminated its employment relationships.

Failure to follow a fair process

[35] However Wagstaff NZ plainly failed to follow a fair process in carrying out its decision to dismiss Mr Rozon on the grounds of redundancy. What it did and how it did it breached its statutory obligation under s 4 of the Act and its own contractual obligation that any notice for redundancy would be given "after following a good faith restructuring process". Consequently, the actions comprising that failure were unjustified.

[36] Although there may have been smoko room chat between crew on the site about whether or not there was work available at the end of the Auckland project, Mr Rozon was provided no direct information from the company's management about the prospect his employment would come to an end at that time or how it would end. Instead he was called unexpectedly to the site office and given the letter of dismissal without prior discussion. As a result Wagstaff NZ could not have considered any comments Mr Rozon might have had before the company made that decision and advised him of it.

[37] The Australian managers who ran Wagstaff NZ were new to the New Zealand business and labour environment. Its Australian-based HR manager had drafted its employment agreement using a database provided by the Ministry of Business but the company sought no local advice on how to carry out its redundancy process. The letter of dismissal, also drafted by Mr Bindman in Australia, gave a somewhat highhanded description of the company as providing Mr Rozon with "a more generous" provision of three days' pay in lieu of working out his notice. This overlooked his entitlement in the redundancy clause to a part-year payment of redundancy compensation. His length

of service was only a little over 16 weeks long so his entitlement was very modest, equivalent to 1.56 days' pay. This meant the three days' notice he was supposedly paid in lieu really comprised the one day's notice allowed in his agreement, a further 1.56 days for redundancy and less than half a day's "more generous" pay.

[38] The dismissal was abrupt and carried out in a site office where personnel of the client and main contractor were within earshot. Although Mr Judi said he was quiet and respectful in delivering the news, it was still embarrassing for Mr Rozon to be unexpectedly dismissed in an open rather than private space.

[39] And because Mr Judi was delegated only with the task of handing over the dismissal letter, there was no discussion with Mr Rozon about the prospects of future work or what assistance might be offered to help him minimise or mitigate the impact of his immediate dismissal. Mr Darby said Wagstaff NZ had made some inquiries of the site's main contractor about whether it might have work for the Wagstaff NZ crew being laid off, without success. Mr Rozon was not told about that inquiry being made or given any suggestions or support in starting a search for another job. Such measures are something a fair and reasonable employer could have been expected to at least discuss with a worker, even in situations where the dismissal itself is inevitable.

[40] Undertaking prior consultation with Mr Rozon was unlikely to have changed the outcome of dismissal given the business situation but the potential use of such discussion were not entirely abstract. It may have led to some change in the timing of when his employment ended. It would also have been an opportunity to discuss what help might be given to find other work, including using business contacts Wagstaff NZ might have with other employers. And it would have provided an opportunity to address whatever reasons there were for him not getting to stay to the end of the job in the following week and to talk about why he might, or might not be, considered for future work if Wagstaff NZ was able to re-employ workers in the coming months.

Considering future work in New Zealand or Australia

[41] Wagstaff NZ was technically correct in its submission that Mr Rozon had no right to be considered for redeployment to any jobs that might be available with its parent company, Wagstaff Australia. The employment was in New Zealand and with the New Zealand company. If work had been available with Wagstaff NZ in New

Zealand and Mr Rozon was not fairly considered for it, he would have had sounder cause for complaint.

[42] However there was one aspect in which the prospect of work in Australia was relevant. As the Auckland project was wound up in mid-December 2019, and accepting Mr Darby's evidence on this point, a brief downturn in the construction market in Australia meant Wagstaff Australia had no work available there even if it had wanted to bring some Auckland workers across the Tasman. By mid-January 2020 this situation changed and the skilled rig operator, referred to earlier, and T were both provided with work there. This in turn led to them being available when two workers were required to return to the Auckland site to move equipment to the South Island.

[43] The importance of that point is not whether Mr Rozon had any right to future work if and when it arose, either in New Zealand or with the parent company in Australia. There was no contractual or statutory obligation to suggest he did. However it is likely, accepting Mr Rozon's albeit hearsay evidence on that point, that T had been told before their employment ended in Auckland that he would be favourably considered for future work. This was based on the favourable impression T had created, while working for Wagstaff NZ through a labour hire agency. Conversely Mr Smith's evidence established that Mr Rozon was viewed unfavourably but he was not told of that assessment at the time of his dismissal or prior to it. Consequently he did not have a proper opportunity to address that view before his employment ended and that was a disadvantage to him. He had received what Mr Smith described as verbal warnings about his performance on the job from time to time but had not been subject to any formal disciplinary process. Whatever doubt there may or may not have been about the reason for, and validity of, days he had been away from work had not been formally addressed with him either.

[44] Those were points that could have cleared up with a fair, brief and straight forward discussion before he was told of his dismissal. However, while there was a degree of disadvantage to Mr Rozon in not having the chance to least openly address those negative impressions of him before his employment ended, any doubt or mixed motive in relation to his work performance was not the predominant reason for his dismissal.[5] The overwhelming reason was a genuine commercial decision that his

[5] *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310 at [49].

position, like those of the other workers laid off in the same short period, were superfluous to the business needs of Wagstaff NZ at that time. It was not an instance of disparity sufficient to call into question the substantive reason for his dismissal. Mr Rozon had established the grounds of a personal grievance on the failures in the consultation process alone.

Remedies

Lost wages

[45] Mr Rozon was entitled to an assessment of remedies for his personal grievance.

[46] As the business reason for the dismissal was sound, albeit made and carried out in a way that was a failure of fair process, Mr Rozon was not entitled to an award of lost wages for the time it took him to find a new job, which was in February 2020. This is because, if Wagstaff NZ had acted fairly, its decision would have almost certainly been the same.[6] However a fair process would likely have taken a slightly longer period and Mr Rozon should be reimbursed for the loss of wages he would have earned in that time. This likely would have needed no more than one week so one week's wages was the appropriate measure of the loss. His employment agreement provided for a 45 hour week at $33 an hour so Wagstaff NZ must pay Mr Rozon $1,485 as reimbursement of lost wages under s 123(1)(b) of the Act.

[47] He was also hit hard by the abrupt nature of his dismissal. He was embarrassed and humiliated by how news of it was delivered to him and subsequently by needing to borrow from wider family members to provide for his partner and children in the following months. The dismissal occurred close to the Christmas break and while, as known to Wagstaff NZ representatives at the time, he was still dealing with the personal upset of his partner's recent health emergency. While Wagstaff NZ was not fully in control of its timing, this did mean the dismissal occurred at a time he was more vulnerable to upset and more deeply affected by it. Considering the particular circumstances, and the general range of awards in similar cases, $10,000 was an appropriate amount to award as compensation for the humiliation, loss of dignity and injury to feelings Mr Rozon experienced as a consequence of how unfairly Wagstaff NZ decided and carried out its dismissal of him.

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[6] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at [81].

[48] Mr Rozon did not contribute to the situation giving rise to his personal grievance. Termination of employment on the grounds of redundancy is typically a 'no fault' dismissal. He was not responsible for Wagstaff NZ's failure to meet its statutory and contractual good faith obligations. He did react angrily to the news of his dismissal, throwing down his safety helmet and swearing as he left the site office that day but this was not conduct that contributed to his personal grievance, which was for the dismissal that had already occurred. Accordingly, no reduction of remedies awarded are required under s 124 of the Act.

Costs

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

[50] If they are not able to do so and an Authority determination on costs is needed Mr Rozon 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 Wagstaff NZ 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.

[51] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[7]

Robin Arthur
Member of the Employment Relations Authority

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