

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 35
3118493

BETWEEN	TING MAO Applicant
AND	FRANKLIN PLUMBERS & BUILDERS SUPPLIES LIMITED Respondent

Member of Authority: Nicola Craig

Representatives: Cherie Holland, counsel for the applicant
Garry Pollak, counsel for the respondent

Investigation Meeting: 3 and 9 November 2021 by audio-visual link

Submissions (and further information) received: At the investigation meeting from the applicant
At the investigation meeting from the respondent

Date of determination: 10 February 2022

DETERMINATION OF THE AUTHORITY

- A. Ting Mao was unjustifiably dismissed by Franklin Plumbers & Building Supplies Limited (Franklins).**
- B. Within 21 days of the date of this determination Franklins is to pay Mr Mao:**
- (a) \$15,692.28 gross lost wages; and**
 - (b) \$13,000.00 as compensation for his grievance.**
- C. Costs are reserved and a timetable set if the parties cannot reach agreement.**

Employment relationship problem

[1] Ting Mao (also known as Martin Mao) was a sales representative for Franklin Plumbers & Builders Supplies Limited (Franklins or the company) in Hamilton. Franklins is a family owned company of long standing, selling plumbing, building and drainlaying products.

[2] In May 2020 Franklin made Mr Mao redundant. He challenges his redundancy. Franklins responds that it was genuine decision made using a fair process.

[3] An investigation meeting was held on 3 and 9 November 2021. By agreement the meeting was held via audio-visual link as Auckland was in Covid-19 Alert Level 3. Evidence was heard from Mr Mao, Stephen Smith (Franklins' managing director) and Ross Henderson (human resources and employment relations consultant). Assistance was provided by an interpreter of the Mandarin language.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings, expressed conclusions, and specified orders made as a result.

Issues

[5] The issues for investigation and determination are:

- (a) Was Mr Mao unjustifiably dismissed by Franklins;
- (b) Alternatively, was he subject to disadvantage as a result of unjustified action by Franklins?
- (c) If a grievance is established what remedies (if any) should Mr Mao receive?

[6] Mr Mao initially claimed that he had only been paid 80% of his wages for his final pay. His understanding was that pay had been reduced during lockdown to 80% and that was reflected in his final pay. Franklins asserted that Mr Mao's final pay was calculated at the full rate. During the investigation meeting Franklins sought another assessment by its financial controller, provided written information and concluded that it had paid the final pay at 100%. Mr Mao and his representative advised that this claim would not be pursued.

What was Mr Mao's work?

[7] Since 2013 Mr Mao had been in the buildings supplies industry. He started with Franklins at its Hamilton branch in 2017.

[8] Mr Mao predominantly sold building supplies but for about eight months early in his Franklins' time, he sold both plumbing and building products. He describes himself as the top performing salesperson in the region, who worked very hard to improve his customer base and sales achievements.

[9] There is no indication that Franklins' managers expressed concerns to Mr Mao about his performance prior to the restructuring process. Mr Mao received salary increases, including a 10% increase in 2019.

[10] Mr Mao had responsibilities to Mr B, the national sales manager and Mr D, the branch manager. A year or two after Mr Mao started, Ms C began work at the Hamilton branch as a sales representative focused on plumbers' sales. I did not hear evidence from Mr B, Ms C or Mr D.

[11] Mr Mao won first place in Franklins' 2019 national sales competition.

What happened in the 2020 lockdown?

[12] From the evidence before the Authority, Franklins was seriously affected by the 2020 lockdown. Sales almost came to a halt with overheads continuing to be incurred.

[13] The company went through a process of assessing its business and decided to make around 15 and 20% of staff redundant. Franklins was described as being in survival mode, with pressure on cash flow. Mr Smith was taking no salary on top of the wage subsidy. He speaks of having to make credit arrangements with the bank, closing a branch and considering the closure of others.

[14] On 23 April 2020 Mr Smith emailed staff at length regarding the "extraordinary times" the company was facing. He refers broadly to government and financial experts predicting the country would enter the biggest recession in its history.

[15] Franklins engaged its long-serving human resources consultant Mr Henderson to assist with employment issues. A number of staff were made redundant and others resigned. The Hamilton branch was identified as a site of potential cost savings. It was

not seen as generating very high returns and the question arose whether one or two sales representatives were needed.

How did Franklins begin its process with Mr Mao?

[16] At the investigation meeting Mr Smith described himself as the ultimate decision maker although he was not involved in the meetings with Mr Mao. Mr Smith was copied into emails by Mr B, who was running the process directly. Mr Smith describes Mr B as the primary decision-maker.

[17] On 6 May 2020 Mr Mao received a letter and proposal document from Franklins advising that due to the company's poor financial performance and the Covid pandemic, it was likely to downsize the Hamilton branch from two sales representatives to one.

[18] During the Authority process it became apparent that there were two versions of the 6 May letter and proposal. The first, lodged in the Authority with the statement of problem is referred to as version A. This is the version Mr Mao believes he was given at the time. Franklins provided a second version, B. Neither letter is signed.

[19] The differences between the letters and proposals are not insignificant. Version A's letter is twice as long as the B version. Version B states explicitly that there "will be" a new combined Builders and Plumbers role and proposes an interview and assessment process to determine who is the best candidate. Version A refers to a potential restructuring only and to selection criteria. Version B lead to questions for Mr Mao about why he had not made an application for the new role, whereas this was not the process outlined in version A.

[20] Unfortunately Franklins was unable to establish which letter Mr B sent. Given that Mr Mao had version A it seems likely, in the absence of another explanation, that he was given version A by Mr B. That version proposes a meeting, as did occur, whereas B just asks for a responses. No formal application was made by Mr Mao although it was evident from the emails that he very much wanted the job. I conclude that version A was sent to Mr Mao.

[21] The proposal includes the following statement:

In Hamilton ...we have two sales representatives working in an area that has never produced particularly good returns. Our preliminary assessment is that due

to the aforementioned pressures we will only have the work for one moving forward.

I will have to make a decision between you and ...[Ms C] about who stays in their position in the branch.

[22] The selection criteria, specified with detail, are then set out:

- Relationship-building skills
- Leadership
- Communications
- Culture Fit
- Administration
- Attitude
- Design Skills (advantageous but not essential).

[23] Mr B then states:

Having considered a preliminary assessment of these criteria against you and ...[Ms C] , my preliminary proposal would be to absorb your role into ...[Ms C's] role and thus your role would be surplus to requirements should this proposal move forward.

[24] Franklins provided Mr Mao with no financial information as part of the process. Mr Mao was concerned that these criteria did not, on the face of them, include any sales or financially based criteria. He provided some figures and argued strongly that that should be considered. Discussion occurred at the meetings below.

[25] The proposal specified three meetings; explanation of the proposal, consultation and an outcomes meetings.

[26] It appears the first meeting was held on 12 May 2020 between the national sales manager Mr B and Mr Mao. Mr Mao describes this as providing general information only.

[27] It is apparent from an email from Mr B that he had spoken to the branch manager Mr D about his views on Mr Mao. Mr B then sought an email setting out the branch manager's comments. Mr D's email contains a number of very negative comments suggesting Mr Mao lacked product knowledge, struggled with cultural fit and involvement in social/client events in the organisation, and had low motivation and energy. By contrast Mr Smith says that he knew Mr Mao reasonably well and there was nothing in his employment that he could be critical of, as Mr Mao was well regarded and undertook his job well.

[28] The branch manager's email was shown to Mr Mao at the second meeting on about 13 May 2020 and he was given the opportunity to respond. Mr Mao spoke about not seeing eye to eye with the branch manager Mr D. Others in the organisation were aware of these differences. The discussion on Mr D's comments and Mr Mao's responses took up the majority of this consultation meeting.

[29] Emails were exchanged between Mr B and Mr Mao about the content of their meetings and further comments by both.

[30] On about 15 May 2020 Mr B met with Mr Mao to tell him that his position was disestablished.

Does Mr Mao have a grievance claim?

[31] Franklins faced some difficulty in the absence of Mr B's evidence. Mr Smith had some involvement in the process but given the size of the business and the number of proposed redundancies he was unsurprisingly not involved in all the meetings with individuals.

[32] One might have thought that Mr Henderson might have been involved in close monitoring of the process but was not at the meetings and was unable to provide detailed evidence of some matters.

Was the redundancy genuine?

[33] Mr Mao did not accept that his redundancy was genuine. This view appears to have been based on two factors; firstly that he had not seen documents regarding its wider financial position and secondly that he felt there was another, possibly hidden, reason why the other employee, Ms C, was picked to remain as sales representative. The information issue is focused on further below.

[34] There was no dispute that there were two sales jobs previously and only one continued, at least for a time after Mr Mao was made redundant. There was an obvious cost savings in terms of the salaries paid.

[35] Mr Mao saw himself as having significantly better sales than Ms C, doing most of the work in the branch, having a wide geographical spread of sales, focusing on high end products and having longer experience in the industry and at Franklins, than Ms C. His evidence regarding his own work was largely unchallenged.

[36] Mr Mao could not understand why he was chosen for redundancy when he saw himself as the far superior salesperson. This led him to suspect that there must be other reasons for his dismissal.

[37] Mr Mao believes that being Chinese was a factor in his not fitting in with Franklin's culture. He thought he was the company's first Chinese employee although Mr Smith says this was not the case. It has not been established that Mr Mao's nationality was a ground for the decision.

[38] Mr Mao presented Facebook messages regarding other jobs at Franklins which he felt showed his role was not genuinely redundant. In September 2020 the branch manager job was advertised. The incumbent moved to another position. At the same time a new business development manager was appointed in Auckland. In 2021 the company opened more branches and advertised for staff in various stores. I do not see any of these as indicating that as at May 2020 there a decision to make one of the sales representatives in the Hamilton branch redundant.

[39] In conclusion the removal of sales representative role was a genuine financial decision. Mr Mao was not replaced and his work was taken over by the other sales representative. The question about which sales representative was chosen is covered below.

What were the selection criteria?

[40] In the absence of criteria for selection in an employment agreement or policy, employers have some discretion about what they choose as criteria. They should however inform workers of the criteria being used and give them the chance to have input.

[41] Here there was no criteria in Mr Mao's employment agreement and seemingly no relevant policy. Franklins did not chose a simple criteria such as length of service or the highest sales figures. Rather the company initially adopted a criteria which it described as objective but which in reality was largely subjective. Similarly, Franklins did not accept that the criteria were performance based, where as they were really assessed on the basis of how Mr Mao, and presumably Ms C, had been undertaking their jobs. These elements presented difficulties, as outlined below, particularly in the absence of a comprehensive performance appraisal system.

[42] Mr Henderson described the need for a measuring stick leading to the creation for the criteria in the proposal. However, Franklins were unable to provide any written information showing a comparison between the two candidates.

[43] However, despite these difficulties, the use of leadership, communication etcetera cannot be seen as unreasonable criteria in themselves.

Assessment of Mr Mao against initial criteria

[44] Mr Mao's employment agreement required the employer to undertake periodic performance reviews. That had not occurred in almost three years. This became problematic when criteria which drew on performance were adopted.

[45] The branch manager Mr D's comments were seriously prejudicial to Mr Mao.

[46] Mr Mao was provided with the email but only at the consultation meeting. He had not previously been made aware of many of the concerns. For example, he had not been told that his product knowledge was seen as not being strong.

[47] Mr D's comments dominated that consultation meeting. Mr B's notes of the second meeting make multiple references to Mr D's feedback and views and I accept Mr Mao's evidence that more than half the consultation time was spent dealing with Mr D's comments.

[48] Mr Henderson's evidence was that Mr Mao was well-regarded and the redundancy was not a reflection on his work performance. It is hard to see how that can be the case in light of Mr B's 15 May 2020 emails, including the email to Mr Mao confirming his redundancy, saying:

Performance for me is also closely associated with the selection criteria submitted and ...[Ms C] is outperforming you in most of these areas. ...[Mr D's] consultation and statements strengthen these arguments.

[49] Mr Smith says that he did not take the branch manager Mr D's comments into account at all. In that case how he formed the view against the criteria is not certain given that his own experiences lead him to provide positive comments about Mr Mao.

[50] It seems likely that Mr B also had negative views of Mr Mao although this is not evident from Mr B's notes of the consultation meeting which focus very much on the branch manager's views. It was not evident from the email that Mr B's views of Mr

Mao in terms of the initial criteria were put to Mr Mao or explored with him. During the investigation meeting Mr Henderson said Mr B's views were the same as Mr D's views.

[51] I find it unlikely that both Mr B and Mr D's views were entirely set aside, as suggested by Mr Henderson, when Mr Smith previously had a positive impression of Mr Mao.

Sales figures

[52] It is surprising for a sales role that the initial criteria on the face of them included no assessment of sales results. There is no difficulty with other elements being considered but it seems unusual that in a job where financial outcomes are regularly monitored, those would seemingly not be considered. This added to Mr Mao's sense that Ms C was being favoured for some unspecified reason.

[53] Mr Smith and Mr Henderson refer to the sales becoming a focus, in addition to the initial criteria, after Mr Mao raised the topic. Mr Henderson went so far as to say the majority of the decision was based on the sales data. He did not know whether that was conveyed to Mr Mao.

[54] Unfortunately Mr Mao does not seem to have been clearly told that sales figures were now to be included as part of the criteria, nor that it was seemingly all about trajectory rather than past sales performance.

[55] Mr Mao described his sales as being substantially higher than Ms C's sales. He provided figures to Mr B which supported that view. On Mr Henderson's evidence Mr Mao's sales had been 30% higher than Ms C's sales. Mr Mao thinks more. Obviously it depends somewhat on the period picked for comparison and what element of sales is analysed.

[56] Franklins' witnesses said what Mr B was focused on was forward projections rather than past results. Mr Henderson referred to Mr B's view that Ms C was "outperforming" Mr Mao in the sense of closing the gap between them.

[57] Reference was also made to sales momentum drifting from builders to plumbers. There were no figures provided to the Authority regarding this and no evidence that that proposition was put to Mr Mao during the consultation.

[58] There had been limited discussion with Mr Mao previously on the forward projections for him and Ms C prior to the restructuring arising. He could not see how when he was at least 30% ahead of Ms C in early 2020, he could end up with lower than her. The figures in an email from Mr B to Mr Henderson still show Ms C having projected earnings as less than Mr Mao, albeit with the difference closing. No projections showing her taking over from him were offered.

[59] Mr Smith, who saw himself as the final decision-maker, did not appear to have seen any future projection figures but rather relied on Mr B's perception.

Other factors

[60] There was evidence at the investigation meeting of driving factors behind the decision being expressed differently to the initial criteria outlined in the proposal. Mr Smith referred to the ability to deal well with the plumbing customers Ms C dealt with, as weighing heavily. It is not evident whether this consideration was taken into account by Mr B. It does not appear to have been discussed with Mr Mao and is not explicitly in the proposal, although communication was one criteria and it may have come within that.

[61] Mr Smith says that Ms C had more experience on dealing with three customer groups; builders, plumbers and drainlayers. He was not particularly aware that Mr Mao had covered sales to all customers for some eight months before Ms C started.

Conclusion on selection

[62] The initial criteria are not of themselves unreasonable. Difficulties arose with the provision of assessments against those criteria. Mr Mao was disadvantaged by not having had the contractually specified periodic performance reviews which should have identified concerns and given him the chance to change.

[63] There was some lack of clarity regarding what selection criteria were ultimately adopted and whether Mr Mao was informed of the changes. This did not meet Franklins' good faith obligations.

[64] The introduction of sales criteria was fair, particularly in light of Mr Mao's concerns. However, the basis for the conclusion that Ms C met that criteria better was

well evidenced or explained, particularly in light of Mr Mao's seemingly superior sales figures.

[65] There were elements of unfairness in Franklins' employer as regards selection process.

What other concerns about the process were identified?

[66] There was a lack of financial information provided to Mr Mao. This was particularly important regarding when it was Ms C's financial projection which was a significant factor in the decision making but there were no projection figures provided by Franklins. They may have assumed that Mr Mao could see that on the basis of the information that he received as part of usual operations but it was clear from the meetings that that was not the case. Franklins should have done more. Mr B's absence from the Authority process did not assist with understanding his views about projections.

[67] For the investigation meeting additional material was created, such as average monthly sales figures for Mr Mao and Ms C. Those figures show Ms C as slightly higher. Mr Mao disputes those figures and I give them little weight as they were not made available to him during the investigation meeting.

[68] The process also looks to have been unreasonably speedy. Mr Mao was given a few days after receiving the proposal. However, the first meeting was on 12 May, the second for 13 May and the consultation was to be closed at 10am on 15 May.

[69] The sense of a rushed process was not assisted by the collapsing of what might under other circumstances have been a two stage process with an initial consultation about whether a sales representative role was to go followed by a second stage of consultation about selection. Here the proposal indicated not only that one role was to go but also a preliminary proposal to absorb Mr Mao's role into Ms C's role. Mr Henderson agreed that it was unusual to specify a preference in this way.

Was Mr Mao unjustifiably dismissed?

[70] On the evidence before the Authority the decision to make Mr Mao redundant was a genuine one. However, there were significant flaws in the process, particularly as regards the selection process which was critical in terms of whether Mr Mao kept a job or not.

[71] This is not to substitute my opinion as to who was the better candidate of the two. However, Mr Mao was entitled to a fair process and he did not get one.

[72] I have considered whether these flaws should be seen as minor and without effect of treating Mr Mao unfairly.¹ Whilst some aspects could be seen in that light, when examined together they are not of that nature.

[73] In conclusion Franklins did not act as a fair and reasonable employer could have done in the circumstance. Mr Mao was unjustifiably dismissed by Franklins.

What remedies should Mr Mao receive?

[74] Mr Mao seeks lost wages at a weekly rate of \$1,307.69 gross. He seeks it for an extended period as he was unable to obtain work for a long time and eventually in 2021 started paying himself form a company he expanded.

[75] For Franklins it was suggested that Mr Mao's primary focus was trying to develop his own business, rather than find other work. Having been asked for more evidence of job applications, Mr Mao produced further evidence of job applications made. Clearly May 2020 was not an easy time to find work. Mr Mao made sufficient efforts to mitigate his loss by trying to find other jobs.

[76] Although there is a discretion to award more than three month's lost wages, I do not make such an award. There was a prospect that even if Franklins had undertaken a reasonable process, Mr Mao could have been the person who was chosen for redundancy. His employment may not have continued for an extended period.

[77] There is no suggestion that Mr Mao acted in a blameworthy way which would justify a deduction for contribution to the situation giving rise to the dismissal.

[78] Franklins is to pay Mr Mao twelve weeks' lost wages, totalling \$15,692.28 gross, within 21 days of the date of this determination.

[79] Compensation under s 123(1)(c)(i) of the Act should also be paid. Mr Mao describes going through the darkest period of his life. He felt humiliated by the way he was treated and was under a large financial burden from mortgage. Being unable to find another job was difficult for him. He reports his health deteriorating, although no

¹ The Act, s 103A(5).

medical evidence was provided. Franklins is to pay Mr Mao \$13,000 as compensation for humiliation, loss of dignity and injury to feelings within 21 days of the date of this determination.

Costs

[80] Costs are reserved. The parties are to discuss resolution on costs between themselves. If they are unable to reach agreement, Mr Mao shall have 21 days from the date of this determination to lodge a memorandum on costs, including supporting documents. Franklins shall have a further seven days within which to provide a reply.

Nicola Craig
Member of the Employment Relations Authority