

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 4
3117895

BETWEEN STEVEN FRATER
 Applicant

AND PREMIUM MOBILITY
 SERVICES LIMITED (previously
 known as AERO DRIVE
 RENTALS LIMITED)
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Allen Goldstone, advocate for the Applicant
 Bryn McGoldrick, representative for the Respondent

Investigation Meeting: 11 November 2021 (by Zoom)

Submissions [and further 11 November 2021 and from the Applicant
Information] Received: 18 November 2021 from the Respondent

Date of Determination: 17 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Steven Frater was employed by Premium Mobility Services Limited (PMS) as its Branch Manager, Wellington Airport from 25 June 2018 until 1 May 2020 when he says the Chief Executive, Bryn McGoldrick, telephoned him and advised him that his employment was terminated by reason of redundancy. He says he was paid one month’s salary in lieu of notice together with holiday pay on 4 June 2020.

[2] He says his final pay did not include payment of two days in lieu that were owing to him because of him working Christmas Day 2019 and Waitangi Day 2020. He says that

without proper consultation and without consent, PMS reduced his salary by 20 percent starting with the pay period ending 23 March 2020. He says that his dismissal on the grounds of redundancy was unjustified because PMS did not appropriately consult with him nor was he given an opportunity to provide feedback.

[3] Mr Frater claims lost salary of \$1,269.23 (caused by the 20% reduction in salary for a six week period), payment for working on Christmas Day 2019 and Waitangi Day 2020 totalling \$423.08, and damages of \$10,000 for hurt, humiliation and injury to feelings pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (The Act).

[4] PMS through Mr McGoldrick denies the allegations and says it sought agreement from all staff including Mr Frater that they would accept a reduction of 20 percent in their salaries and that if the action caused hardship to let them know. It says that Mr Frater did not approach the company about any hardship, nor did he indicate he was not in agreement with the 20 percent deduction. Mr McGoldrick confirmed that he rang Mr Frater on 1 May 2020 advising him that because of the dire situation in the Wellington branch he would be made redundant. He says that Mr Frater was aware of the situation from previous discussions and that the decision would not have come as a surprise to him. He says the survival of the business depended on them reducing their cost base very quickly and people were a major expense. In essence therefore PMS say that whilst it accepts that it dismissed Mr Frater, this was attributable to a justifiable redundancy. Mr McGoldrick acknowledged that Mr Frater may be owed for the two days in lieu he has claimed.

[5] The parties agreed that it was appropriate under the circumstances, that the investigation meeting be held by way of Zoom.

The investigation

[6] The Authority heard from two witnesses namely Mr Frater and Mr McGoldrick. Both parties affirmed the evidence they gave to the Authority was the whole truth and nothing but the truth. Both parties filed briefs of evidence together with supporting documentation which were lodged with the Authority prior to the investigation meeting.

Background

[7] Mr Frater commenced his employment as a branch manager with PMS on 25 June 2018. Prior to commencement, he signed an employment agreement with the then styled

Aerodrive Rentals Limited. The company is a car rental business. Clause 19 of the employment agreement defined redundancy as:

A situation where the employee's (sic) is liable to be terminated wholly or mainly to the fact the employee's position is or will become, superfluous to the needs of the employer. If redundancies are required, the employer may select employees from any affected positions on the basis that those fairly judged to be able to make a greater contribution to the employer's operations will be selected last. The employee will be given one month notice in writing, or payment in lieu of such notice by mutual agreement with the employer.

[8] In other words, apart from any other requirements, PMS was required to reach a conclusion as to the contribution Mr Frater made to its operations before selection for redundancy and contractually at least, could only make a payment in lieu of notice by mutual agreement.

[9] It is clear that business was adversely affected by the Covid level 4 lockdown. Mr Frater's pay was reduced by 20 percent for a six-week period. It is this reduction which forms the basis for Mr Frater's disadvantage claim.

[10] On 24 April 2020, PMS sent an email to Mr Frater advising it intended opening business locations in a limited fashion as of Tuesday April 28. The email further advised:

Over the next few days we will be communicating with you all. For some you will be asked to remain working from home. Others will be asked to return to work, some of which may be on a job-share basis, to ensure distancing is observed. For others there may be less opportunity to attend your workplace, some of you may be asked to continue the project work that has been being shared around.

[11] The email then went on to advise:

It is with a heavy heart though that I have to tell you that in due course, and sooner rather than later, we are going to have to make some tough decisions, as we seek to right-size the business. Tourism has suffered a near mortal blow from the Covid-19 pandemic. Borders are likely to stay closed until towards the end of the year, and even then the number of people travelling will be greatly reduced. Inbound tourism will take several years to get back to 2019 levels.

[12] The email also stated:

We will do everything we can to keep everyone in a job, but there will be losses. I will communicate with you all again early next week and provide further updates and a date by which our final job numbers will be known.

[13] On Friday 1 May 2020, Mr McGoldrick telephoned Mr Frater advising him that his employment was terminated by reason of redundancy. He was advised he would be paid one month salary in lieu of notice. Although there was some uncertainty, it seems Mr Frater received written notice of the termination of his employment by email on 4 June 2020. Although the notice was dated 30 April 2020. When he received the notice, Mr Frater has confirmed he received payment of this one month notice period together with holiday pay and a personal reference also dated 30 April 2020.

[14] The notice of termination of employment dated 30 April 2020 stated amongst other things:

Because of extreme market conditions we have concluded that there are not viable options than to make your position redundant. The Covid-19 pandemic has crippled the tourism industry in general and had similar devastating effects on the car rental business. Yours in one of many redundancies we have made today, and whilst we appreciate the feedback from many, they do not provide an outcome that would mean we could avoid these actions.

For clarity, the pandemic has caused a drop in revenues in the last two months of more than 85 percent, and we see no end in sight to this situation.

[15] By 4 June, Mr Frater had also received a certificate of employment certifying he had been employed with Aerodrive Car Rental Limited from 25 June 2018 to 30 April 2020. Mr Frater also received an email from Mr McGoldrick dated 4 May 2020 stating amongst other things:

I'm deeply sorry to have been the bearer of bad news on Friday and I hope you are feeling okay and looking positively towards the future.

As I said to you on the phone our decision is not a reflection of your work with us, rather it was driven by our immediate need to reduce costs for survival. You can hold your head up and be proud of the contribution that you have made. As promised I now attach your reference.

[16] Mr Frater says that this email was not received until 4 June 2020.

[17] Mr McGoldrick's evidence on behalf of PMS did not contradict Mr Frater's evidence to any great degree. As indicated above, Mr McGoldrick's view was that he would have thought Mr Frater received his correspondence when it was written and dated, not a month later. However, he accepted he could not dispute Mr Frater's claim as to when it was received.

[18] In respect of the 20 percent reduction in salary for the six-week period, Mr McGoldrick's evidence was that this was something that had been proposed and that Mr Frater had agreed to.

Analysis and discussion

The 20 percent deduction

[19] PMS acknowledges it made the 20 percent deduction for the six-week period to Mr Frater's salary. It says however it put the proposition to staff including Mr Frater but made it clear that if they weren't happy with this or it was going to cause hardship, then they should let the company know. Mr Frater acknowledged he did not take a proactive step to let his employer know he wasn't happy with the deduction. He says he felt he didn't have the right to say no, and says he accepted the deduction at the time but wasn't happy.

[20] The employment agreement in paragraph 29 provides that any variation to it be put in writing. Clearly the 20 percent reduction in salary albeit for a short period, was a variation. Further, if PMS was seeking Mr Frater's consent to the 20 percent reduction, then that consent would need to be expressly given and be in writing. This did not occur in this case.

Payment in lieu of in respect of working Christmas day 2019 and Waitangi Day 2020

[21] During the hearing PMS accepted there was a process in place for a payment in lieu when an employee worked on a statutory holiday. PMS accepted that if Mr Frater had worked on those two days, he was entitled to the payment in lieu and that that had not occurred. Mr McGoldrick said that this was likely to be because of poor systems and poor recording. Mr Frater gave evidence that payment had not been made and accordingly under these circumstances it should have been. Mr McGoldrick had noted that he had not been aware of the claims, nothing had been recorded and accepted that there could have been a communication breakdown. He said process was not perfect. Mr Frater is owed the two days in lieu as claimed.

The redundancy

[22] PMS acknowledged that in normal times it would have undertaken a more robust consultation process. Mr McGoldrick made it clear that the company was reacting to the dire circumstances caused by the Covid outbreak and lockdown. The company had five branch managers and three were made redundant. Mr McGoldrick said that the company considered

several factors including the impact on the business if the person wasn't there, the cost of the employee and the need to have the appropriate infrastructure in place for when clients returned. None of these criteria were raised with Mr Frater. Mr McGoldrick submitted it was important for the Authority to understand the unprecedented situation created by Covid. With flights being cancelled, the effect on the rental car business was massive and Mr McGoldrick says that the company was required to make decisions for the survival of the business. He commented that the company's intentions were good although its execution of redundancies may not have been.

[23] There are several problems with the process the company followed in respect of the redundancy. First, there is clause 19 of the employment agreement which as I have noted earlier, provides that the employer may select employees for redundancy on the basis that those fairly judged to be able to make a greater contribution to the employer's operations will be selected last. Further, there is Mr McGoldrick's acknowledgement that other factors were considered including the cost of the employee and the impact on the business if the person wasn't there.

[24] There was no consultation with Mr Frater. He was not able to contribute to the discussion regarding his redundancy in any meaningful manner. No business case was presented. Rather, Mr Frater was rung on 1 May and advised his employment ended on that day although a payment in lieu of notice would be made. The decision to make Mr Frater redundant was made at least a day earlier. The notice of termination sent to Mr Frater was prepared on 30 April 2020 the day before Mr McGoldrick's telephone conversation.

[25] Mr Frater had no ability to have any meaningful input into the decision to terminate his employment. There were five branch managers employed by PMS three of which were made redundant including Mr Frater. There was a clear need to involve Mr Frater in the selection process. He needed to have the chance to be involved through a consultation process. The urgency caused by the Covid-19 lockdown does not excuse PMS from following proper process.

[26] Mr Frater gave evidence of the effect of the redundancy on him. He says he was caused significant distress in having to approach his bank to refinance his mortgage. His stress levels rose to the extent he needed to seek medical advice. He felt his relationship with his wife also suffered as a result of the stress he suddenly felt himself under. He said the

termination of his employment in this way, and the delay in providing the written confirmation, caused him significant hurt, loss of dignity and injury to feelings.

[27] Because Mr Frater's dismissal was unjustified and remedies accrue, S124 of the Act requires me to consider whether they should be reduced due to any contributory conduct. As PMS seeks to justify the dismissal on the grounds of redundancy and as redundancy is, by definition, a no-fault situation, Mr Frater did not contribute to his personal grievance.

Conclusion and orders

[28] PMS was not entitled to make the 20 percent reduction in salary for the six-week period from 23 March 2020. It needed Mr Frater's express consent, and this it did not have.

[29] Under the circumstances, PMS was required to pay Mr Frater two days salary in lieu of him working on Christmas Day 2019 and Waitangi Day 2020.

[30] Mr Frater's dismissal on the grounds of redundancy was unjustified. No proper process was undertaken, the matter appears predetermined with a total absence of the expected consultation. This means that the dismissal was both procedurally and substantively unjustified.

[31] Premium Mobility Services Limited is ordered to make the following payments to Mr Frater:

- (a) Reimbursement of salary for the six-week pay period from 23 March 2020 equalling \$1,269.23.
- (b) Payment for the two days salary in lieu in respect of Christmas Day and Waitangi Day equalling \$423.08.
- (c) The sum of \$10,000 pursuant to s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Mr Frater because of his unjustified dismissal.

[32] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority