

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 44
3121132

BETWEEN ZELDA GOW
Applicant

AND PREMIUM MOBILITY
SERVICES LIMITED
(previously AERODRIVE
RENTALS LIMITED)
Respondent

Member of Authority: Peter Fuiava

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

Investigation Meeting: 7 October 2021 (By audio-visual link)

Submissions and further 13 September 2021, 27 October 2021, 11 January 2022,
information received: and 1 and 3 February 2022 from the Applicant

13 January 2022 and 3 February 2022 from the
Respondent

Determination: 18 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zelda Gow brings a claim of unjustified disadvantage and unjustified dismissal against her former employer, Premium Mobility Services Limited (PMSL) which at the material time this employment relationship problem arose, was registered with the Companies Office as Aerodrive Rentals Limited.

[2] Ms Gow's unjustified disadvantage claim concerns PMSL's decision to reduce her wages by 20 percent, effective from 23 March 2020 to 1 May 2020. The unjustified

dismissal claim concerns Ms Gow's dismissal from employment by reason of redundancy on 1 May 2020.

The Authority's investigation

[3] Ms Gow's Statement of Problem was lodged with the Authority on 7 October 2020. The remedies sought by Ms Gow was payment in the sum of \$1,153.85 in wage arrears and compensation for hurt and humiliation in the amount of \$10,000. No Statement in Reply from PMSL was ever filed. Following a case management conference on 6 April 2021, the matter was set down for an in person investigation meeting in Auckland on 18 August 2021. However, as fate would have it, at 11.59 pm, 17 August 2021, the country was placed into COVID-19 Alert Level 4 in response to a case of the Coronavirus Delta variant in the community.

[4] On the morning of 18 August 2021, the Authority emailed both parties in an effort to conduct an investigation meeting by audio-visual link via Zoom. At that point, there had been no engagement by PMSL with the process.

[5] Surprisingly however, Mr McGoldrick, PMSL's chief executive officer, responded and attended, as did Mr Goldstone, the Zoom video conference. There was no appearance by Ms Gow. It is understood that she may not have anticipated the investigation meeting taking place given the swift move into Alert Level 4.

[6] As it turned out however, Mr McGoldrick was not in a position to represent PMSL because he stated his file notes were still at his office which he was not able to physically access. Consequently, the investigation meeting was adjourned to 7 October 2021. Given PMSL's recent engagement with the process, time tabling directions were made for the filing of witness statements and a case synopsis from each of the parties.

[7] Witness statements from Ms Gow and her husband, Kurt Gow, were duly provided, and these were supplemented with submissions from Mr Goldstone in which he sought a modest uplift in compensation somewhere between band 1 (\$0-\$10,000) and band 2 (\$10,000-\$40,000). No witness statements or submissions in response were forthcoming from PMSL.

[8] By 7 October 2021, Auckland remained at Alert Level 3 and at that level, in person investigation meetings could not take place. However, both parties agreed to participate remotely via Zoom. The Authority heard oral evidence under affirmation from Ms Gow and her husband. For PMSL, Mr McGoldrick gave evidence as a witness and made submissions as its representative. At the end of the investigation meeting, the Authority heard oral closing submissions from the representatives.

[9] 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.

Background

[10] On 28 November 2016, Ms Gow, a former resident of South Africa, signed an individual employment with PMSL. She was to be employed as a Senior Customer Service Agent and was later promoted to manager of PMSL's Auckland City branch. As branch manager, she worked full-time (40 hours per week) and was paid a salary of \$50,000 per annum.

[11] PMSL traded as a car rental business that rented vehicles to overseas and domestic tourists. Mr McGoldrick joined the company in September 2019 and was tasked with turning around a struggling business and was successful in that regard until New Zealand closed its international border and went into COVID-19 Alert Level 4 lockdown for the first time in late March 2020.

[12] On 23 March 2020, PMSL staff, including Ms Gow were required to work from home. While she was limited in what she could do from home, Ms Gow attended staff Zoom meetings, responded to customer queries, returned vehicles, and undertook office-related tasks.

[13] On 23 March 2020, Mr McGoldrick held a staff meeting by Zoom in which he proposed and sought consensus to reduce salary and wage payments by 20 per cent in response to the anticipated financial fall out the lockdown would have on PMSL. Mr McGoldrick believed from that meeting that he had Ms Gow's tacit agreement to reduce her wages by 20 percent.

[14] The amount owing to Ms Gow in wages arrears for the six-week period from 23 March to 1 May 2020 was \$1,153.85. This was eventually paid by PMSL on 3 February 2022, which has delayed the release of this determination.

[15] On 24 April 2020, Ms Gow received from Mr McGoldrick a group email which stated:

As you know we have applied for the Government Wage Subsidy that is being paid for 12 weeks... we have been able to retain our full staff, despite having 6 % of our cars on rent.

It is with a heavy heart though that I have to tell you that in due course, 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 hugely reduced, inbound tourism will take several years to get back to 2019 levels.

That means that our business has to change to meet the market. Fleet reductions are ongoing and will continue apace as we step into Level 3. Because of the crippling of the airlines, our hours of operation will reduce at once. Our rental activity unfortunately will be just a shadow of the business we were doing before lockdown. We now have to cut our cloth to the new market size.

Unfortunately this means we are going to lose some really valuable people assets, and some good friends from our business.

This is a difficult email to write, but I want us all to be prepared for the pain that is ahead. We are continuing to work through all options as we try to retain as many of our people as we can. 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.

[16] On 1 May 2020, Ms Gow received a telephone call from Mr McGoldrick advising that she had been made redundant. The telephone conversation lasted approximately seven to eight minutes. Ms Gow had tried to change Mr McGoldrick's mind by suggesting that she could take a lower position, but she was told that there was nothing further he could do for her because of the financial impact the pandemic had on the business.

[17] On 4 June 2020, Mr McGoldrick emailed Ms Gow a letter (30 April 2020) notifying her of her redundancy. She was paid four weeks' notice and was provided a

certificate of employment that recorded that she had worked for the company from 28 November 2016 to 30 April 2020,

Unjustifiable disadvantage

[18] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act which states that an employee may have a personal grievance where the employee's employment or one or more of the conditions of their employment have been affected to the employee's disadvantage by some unjustifiable action by the employer.

[19] The onus will initially be on the employee to establish that their employment condition(s) have been affected to their disadvantage. Once established, the burden shifts to the employer to demonstrate that, under s 103A, their actions were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[20] PMSL has recently reimbursed Ms Gow the wage arrears it owed her. In explanation for reducing her wages, Mr McGoldrick stated that, from the Zoom meeting of 23 March 2020, he believed she had tacitly agreed to the reduction.

[21] When wages become payable, an employer must pay the entire amount of those wages to the worker without deduction.¹ If wages are to be deducted, this must be for a lawful purpose and with the written consent of the worker or on the written request of the worker.²

[22] Mr McGoldrick accepted that nothing by way of written consent from Ms Gow was obtained. It follows that the company's action in reducing her wages was unjustified because a fair and reasonable employer would have obtained something in writing from Ms Gow. PMSL's action disadvantaged Ms Gow who had to make do with only 80 percent of her salary for a period of approximately six weeks.

[23] While it is laudable that PMSL has paid Ms Gow the shortfall with her wages, payment comes long after she has tried to seek redress; initially by raising a personal

¹ Wages Protection Act 1983, s 4.

² Section 5.

grievance on 8 July 2020, requesting mediation on 21 August 2020, and commencing proceedings in the Authority on 7 October 2020. It is only appropriate that she now be awarded interest for having to wait for PMSL to pay her what she is entitled.

[24] The Authority has the power to award interest under clause 11 of the second schedule to the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. Using the civil debt interest calculator, interest on the sum of \$1,153.85 from 23 March 2020 to 3 February 2022 amounts to \$33.94 which PMSL is required to pay.³

Unjustifiable dismissal

[25] It is common ground that Ms Gow was dismissed from her employment by reason of redundancy on 1 May 2020. In her witness statement to the Authority, Ms Gow acknowledged that her employer may have had a valid business reason to restructure its business. The acknowledgment is well made given the financial impact the coronavirus has had on many businesses like PMSL which rely on overseas tourists.

[26] Mr McGoldrick described the time of the first Alert Level 4 lockdown in 2020 as “extremely bleak” and as a “deep dark place” with no one knowing what was going to happen. There was no road map ahead at the time and the borders were closed. PMSL was not able to operate at the time as an essential service and the company had 100 cars on lease with no one interested in buying them. The company’s lenders were only offering debt deferral as an option which was not a permanent solution for the business. In response to a statement by Ms Gow that she knew of at least eight people who had lost their jobs, Mr McGoldrick stated that the number was higher with approximately 25 percent of PMSL’s staff being let go.

[27] I am satisfied that there was a genuine business reason for PMSL to restructure its business given the financial circumstances at the time. However, even in times of global pandemic, the legal requirements, particularly section 103A of the Act, continued to operate as normal.

[28] Mr McGoldrick stated that, at the time, he was not able to proceed on a consultative basis with his staff. While I accept that this was an unprecedented situation

³ www.justice.govt.nz/fines/civil-debt-interest-calculator (accessed 13 February 2022).

for PMSL, Mr McGoldrick could have consulted with Ms Gow remotely via Zoom. Allowing her an opportunity to comment on information adverse to the continuation of her employment would have gone a long way in negating or at least minimising the emotional harm she would later experience as a direct consequence of there being no proper process in place.

[29] To ensure a redundancy process is procedurally fair, employers must comply with their good faith obligations contained in s 4 of the Act. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[30] In terms of section 4(1A)(c) of the Act, Ms Gow was not given access to information relevant to the continuation of her employment such as the selection criteria. She had joined PMSL in November 2016 and reasonably believed that affected staff would be let go of on a last on, first off basis. Ms Gow was not given an opportunity to comment on information to her employer before the decision was made. The email she received from Mr McGoldrick on 24 April 2020 was not addressed to her personally but to all staff. It would not have been possible for Ms Gow to know, until it was too late, that her position in the company was at risk.

[31] While I accept that the Mr McGoldrick's staff email of 24 April 2020 would have put Ms Gow on notice that there would be some job losses in the company, as a branch manager, Ms Gow was in senior position and was well-established in PMSL, having worked for the organisation for the better part of three and a half years. Further, Mr McGoldrick stated that he enjoyed working with Ms Gow and she had been commended for her work.

[32] The first Ms Gow heard that she was being made redundant was on the day she was dismissed (1 May 2020). The telephone call she had with Mr McGoldrick was relatively short. By then however the decision had been made and it was too late for Ms Gow to dissuade Mr McGoldrick to take a different approach such as to redeploy her in a more junior role. Ms Gow stated that she knew of a customer service agent that

had joined the company long after she had and that person still worked for PMSL. I find that Ms Gow's dismissal caught her completely by surprise.

[33] The process failures here were not minor and resulted in Ms Gow being treated unfairly.⁴ The procedural failings undermined the justification for her dismissal. A decision to dismiss in all the circumstances known at the time was not one a fair and reasonable employer could have made.

[34] Ms Gow was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[35] I have not considered lost wages in this case because these have not been sought by Ms Gow either in her personal grievance letter or Statement of Problem. Payment of Ms Gow's wage arrears claim has recently been made by PMSL and I have awarded her interest as noted above. There remains however the issue of compensation which is for the effects on the employee of the grievance. It is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct.

[36] Ms Gow's evidence regarding the emotional impact the lack of process had on her was persuasive. As stated above, her selection for redundancy had caught her unaware and she was not prepared for the financial repercussions for her and her family. As a coping mechanism, she turned to food which caused her blood pressure to spike and her to develop chest pains. After seeing her family doctor, she was diagnosed as having suffered a minor stroke.

[37] Kurt Gow, Ms Gow's husband, confirmed that his wife was stressed and that she had high blood pressure and a minor stroke as a result. While a letter (22 September 2020) from a general practitioner was provided to the Authority stating that Ms Gow was stressed after losing her job, no other medical information was provided.

[38] Despite the lack of corroborating medical evidence regarding Ms Gow having experienced a minor stroke, I accept that she experienced significant loss of dignity and

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

injury to feelings as a direct consequence of her not being given an opportunity to comment on information that affected the continuation of her employment. It was Ms Gow's evidence that she had worked in the car rental industry for 20 years, that she enjoyed her job, and that she had never been out of work in the last 30 years. When combined with her senior position in PMSL, the emotional harm suffered by Ms Gow as consequence of there being no proper process with her redundancy was significant.

[39] In all the circumstances, I consider an award of award of compensation to Ms Gow in the sum of \$13,500 under section 123(1)(c)(i) of the Act to be warranted.

Contribution

[40] Where the Authority determines that an employee has a personal grievance, it must, in deciding both the nature and extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁵

[41] I am satisfied Ms Gow did not contribute to her personal grievance and for this reason I make no reduction to the remedies I have awarded.

Costs

[42] Clause 15 Schedule 2 of the Act enables the Authority to order any party to a matter to pay to any other party such costs and expenses it considers reasonable.

[43] Ms Gow has been successful with her claim. Costs generally follow the event and I find no reason for this not to be the case here. The current tariff for a one-day investigation meeting is \$4,500. I consider this amount an appropriate costs award in this case. It is only a contribution towards Ms Gow's legal costs.

⁵ Employment Relations Act 2000, s 124.

[44] Ms Gow also paid a filing fee of \$71.56 to lodge her Statement of Problem with the Authority which she can reasonably recover from PMSL.

Summary of orders

[45] The Authority makes the following orders. PMSL is ordered to pay the following sums to Ms Gow no later than 4 pm Friday 18 March 2022:

- (i) interest of \$33.94;
- (ii) compensation under s 123(1)(c)(i) of the Act of \$13,500 for unjustified dismissal;
- (iii) filing fee of \$71.56; and
- (iv) costs of \$4,500 for the investigation meeting.

Peter Fuiava
Member of the Employment Relations Authority