IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 47
3124696

	BETWEEN	PAUL PRENDERGAST Applicant
	A N D	MM CABLES NZ LIMITED First Respondent
	AND	MAMMOTH GROUP HOLDINGS LIMITED Second Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Paul Matthews, advocate for the Applicant Rogan Nordmeyer, for the Respondents	
Investigation Meeting:	9 November 2021 at Christchurch	
Submissions Received:	9 November 2021 from the Applicant 23 November 2021 from the Respondent	
Date of Determination:	21 February 2022	

DETERMINATION OF THE AUTHORITY

A. The claim against Mammoth Group Holdings Limited is dismissed.

B. MM Cables NZ Limited is to pay Paul Prendergast $12,500.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, by Monday 21 March 2022.

C. I reserve costs in accordance with the timetable set for submissions if required.

Employment relationship problem

[1] Paul Prendergast was dismissed by Rogan Nordmeyer on 16 July 2020. Mr Nordmeyer is the director of MM Cables NZ Limited and Mammoth Group Holdings Limited. In an email to Mr Nordmeyer on 18 August 2020, Mr Prendergast's representative raised a personal grievance claim that the dismissal was unjustified. Compensation and reimbursement were sought.

[2] The present claim lodged in November 2020 followed mediation. The respondents were identified as "MM Cables Limited" and Mammoth Group Holdings Limited. A case management conference resulted in a direction to further mediation, with back-up arrangements for an investigation meeting. Matters were not resolved by mediation.

[3] "MM Cables Limited" does not appear on the register of companies. Properly, that respondent should be shown as "MM Cables NZ Limited". By consent, I amend the proceedings to show the company by its correct name.

[4] This determination resolves the employment relationship problem. The issues are:

(a) Who employed Mr Prendergast?

(b) Was Mr Prendergast justifiably dismissed?

(c) If not, what remedies are established?

Who employed Mr Prendergast?

[5] Mr Prendergast signed an employment agreement in July 2017, to start work on 1 September 2017. The agreement lists "THE PARTIES" as "MM CABLES NZ LTD, THE EMPLOYER" and "PAUL PRENDERGAST, THE EMPLOYEE".

[6] The printed agreement includes as a header "Mammoth Group Holdings Ltd" above the Auckland address and contact details for that company and Mr Nordmeyer. The

agreement is signed by Mr Nordmeyer above printed text showing his name and position as "DIRECTOR MAMMOTH GROUP HOLDINGS LIMITED".

[7] Mammoth Group Holdings Ltd is the ultimate holding company and owner of 2/3rds of the shares of MM Cables NZ Limited. However, that alone does not make it an employer of the employees of a subsidiary company.

[8] A company must ensure that its name is clearly stated in every document that evidences its legal obligations.[1] Every individual employment agreement must include the name of the employer. [2] MM Cables NZ Limited expressly complied with these statutory obligations. The inclusion of the holding company name and address in a header on the agreement did not detract from that. Equally, Mr Nordmeyer's signature above the printed line showing his position as the director of the holding company cannot be taken as creating the legal relationship of employment between Mr Prendergast and the holding company when the identity of the employer party was clearly stated at the start of the agreement. I am reinforced in the view that only MM Cables NZ Limited was Mr Prendergast's employer by the evidence produced by him showing that company as the payer of his PAYE tax deduction to IRD. I also note also that Mammoth Group Holdings Limited did not receive any Covid-19 wage subsidies, according to the MBIE search feature. That supports the respondents' position that the holding company was not Mr Prendergast's employer. I agree.

[9] A personal grievance is a statutory claim by an employee against their employer. A controlling third party, who is not the employer, can now be joined to a personal grievance claim. However, Mr Prendergast performed work for the benefit of MM Cables NZ Ltd, not Mammoth Group Holdings Limited. The controlling third party provisions are not relevant here, as no circumstance brought the latter company within that definition. As there was no employment relationship between Mr Prendergast and Mammoth Group Holdings Ltd, that claim must be dismissed.

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[1] Companies Act 1993 s 25.
[2] Employment Relations Act 2000 s 65.

Was Mr Prendergast justifiably dismissed?

[10] There is little dispute about what happened. Helen Ellis is MM Cables NZ Ltd's national customer services manager, located in Christchurch. Mr Nordmeyer is based in Auckland. On 16 July 2020, Mr Nordmeyer rang the Christchurch office. Ms Ellis answered, using the speaker phone facility, as usual. Mr Nordmeyer asked to speak to Mr Prendergast. Mr Prendergast came to the phone. It remained on speaker phone and Ms Ellis remained in the vicinity. Her evidence, which I accept, is that after a friendly greeting, Mr Nordmeyer told Mr Prendergast that he was very sorry but would have to let him go. It is common ground that Mr Nordmeyer mentioned that sales were down. Mr Prendergast responded "Fuck!". Ms Ellis prompted Mr Prendergast to ask when Mr Nordmeyer expected him to finish up.

[11] There is a dispute in the evidence about whether Mr Nordmeyer told Mr Prendergast to finish immediately, or offered him the opportunity to finish up immediately. Mr Prendergast's recollection is that it was the former, while Mr Nordmeyer and Mrs Ellis say it was the latter. Often employers as part of redundancy dismissals offer affected employees the opportunity not to work but to be paid during their notice period. I am satisfied that is what happened here.

[12] Mr Prendergast declined the offer and finished work the following Friday, at the end of the notice period. He sent an email with the subject line "Final Day" to Mr Nordmeyer that day. Mr Prendergast thanked Mr Nordmeyer for the job, said he had enjoyed working there and expressed his wish to return if "MM" can "pull through okay". The tone of the email is more consistent with Mr Prendergast declining the opportunity not to work out his notice period, rather than the employer reluctantly letting him work out his notice period.

[13] Good faith requires an employer who is proposing to make a decision that would have an adverse effect on the continuation of an employee's employment to provide access to relevant information and an opportunity to comment before a decision is made. A fair and reasonable employer would comply with good faith obligations. They must also give the employee a reasonable opportunity to respond and genuinely consider the response before dismissing the employee.

[14] Mr Prendergast's advocate drew attention to an employer's need to prove procedural as well as substantive justification. It is perhaps better to refer to the statutory test requiring the Authority to determine objectively whether the employer's actions and how it acted were what a fair and reasonable employer would have done at the time.[3] However, I take from the submissions that it is accepted that the decision to make Mr Prendergast redundant was genuine. Submissions for the respondents were lodged by counsel. It is conceded that the "procedural aspects of the test of justification in s 103A of the Act were not wholly satisfied". I find that the dismissal was genuinely for redundancy, that this was a decision open to a fair and reasonable employer at the time, that MM Cables NZ Ltd complied with the notice requirement in the employment agreement, but the company did not meet its obligation to disclose relevant information, consult with Mr Prendergast and consider his responses at the time.

[15] Mr Prendergast was unjustifiably dismissed and he has a personal grievance.

What remedies are established?

[16] The claim for reimbursement of lost wages was withdrawn at the investigation meeting. I need only consider the claim for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. $21,000.00 is sought.

[17] Mr Prendergast's evidence is that the phone call on 16 July ended with him in a state of shock, heart racing and hands shaking. His evidence is that it was "especially shocking" because Mr Nordmeyer had said several days earlier "Business as usual guys" when asked about the state of the company. Mr Prendergast says that the Christchurch manager (Bruce Morton) came into work later that day and told him that he did not know that Mr Nordmeyer was going to give him notice and could not understand why it had happened. Mr Prendergast's evidence is that he was very upset, when he called his wife to tell her what had happened. Mr Prendergast says he did not receive any written confirmation from the company after the phone call, so was in a state of anxiety. Mr Nordmeyer did not respond to the "Final Day" email.

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[3] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

[18] Mr Prendergast says that the effects of being laid off were devastating mentally for him. He had several "anxiety attacks/mini meltdowns" which left him shaken and angry. He was abrupt and surly with household members, causing tension not previously seen in his house before. His relationship with his wife was affected. Mrs Prendergast gave evidence reinforcing these points. However, Mr Morton in a statement says that he told Mr Prendergast that he was surprised that the whole Christchurch office was not shut down, having learnt of Mr Prendergast's dismissal after the fact. He says that Mr Prendergast appeared confident that he could pick up work elsewhere. He also states that he passed on to Christchurch staff updates about the business, given its financial position.

[19] In evidence is an email dated 23 June 2020 from Ms Ellis to Christchurch staff, with the subject line "Bank wants its money!!!". The email followed from a phone call from Mr Morton to Ms Ellis. It says "…the end feels very real now. In Bruces words we are in our final gasp. Probably a matter of days. Just so you are aware. Im still now giving up hope….lol".

[20] I will set out only some of the sworn evidence given by Ms Ellis, but I accept overall it represents an accurate recollection of what she observed. Ms Ellis says that Mr Nordmeyer acknowledged Mr Prendergast's contribution to the company in a sincere manner. Ms Ellis did not see Mr Prendergast "physically shaken" after the call. Mr Morton came in to work, even though he was on leave, to see Mr Prendergast. Ms Ellis' evidence is that Mr Morton had told Christchurch staff over the 6 months prior that "jobs were on the line" as a result of the company's "financial hardship". That reflects the tone of her 23 June email. Ms Ellis helped Mr Prendergast update his CV and to apply for several jobs. I accept Mr Ellis' evidence that Mr Prendergast told her that he had been offered but turned down a higher paying job, expecting to take up a different opportunity. Ms Ellis did not observe any signs of anxiety in Mr Prendergast after the call for the last week.

[21] There is no evidence that Mr Prendergast required or sought any professional assistance as a result of the humiliation, injured feelings and lost dignity he described. I accept that Mr Prendergast would have been surprised about the lack of any specific forewarning before the call from Mr Nordmeyer. He should have been given an opportunity to consider and respond to the concerns that caused Mr Nordmeyer to dismiss him and is

aggrieved because he was not given that opportunity. Mr Prendergast was entitled to be consulted and advised in private. Mr Prendergast was (and remains) angry about how Mr Nordmeyer handled the dismissal. Mrs Prendergast's evidence is that her husband was "in shock" when he called her after the dismissal, that he was angry about what had happened, and was quiet and sullen thereafter. It affected household relationships.

[22] The respondent refers me to *Butler v Ohope Chartered Club Incorporated* and *Gafiatullina v Propellerhead Limited*[4] in support of counsel's submission that compensation can only relate to the flawed process, not to those consequences which can be seen as the inevitable result of a dismissal for redundancy. There is also a submission that an employer's subsequent conduct, no matter how egregious, after the grievance has accrued should have no effect on the level of compensation awarded.[5]

[23] The latter submission is directed at Mr Prendergast's evidence that he experienced heightened stress levels because he did not receive his holiday pay until several weeks after the dismissal. Delayed payment is said to be subsequent conduct by the employer and unrelated to the procedure by which the dismissal was effected. I disagree with the submission that delayed payment does not relate to the procedure of the dismissal. One would expect a fair and reasonable employer, as part of dismissing an employee for redundancy, to ensure that wages and holiday pay were paid when the employment terminated, in accordance with legal obligations. Timeliness of final pay would be important for employees. The delay in payment to Mr Prendergast formed part of the employer's action and how it acted at the time of the dismissal. The aggravating effect on Mr Prendergast is relevant but is a minor part of the overall assessment.

[24] For the most part, Mrs Prendergast's evidence is about the harm to Mr Prendergast caused by Mr Nordmeyer's actions and how he acted on 16 July 2020. I put aside Mrs Prendergast's evidence about the direct effects on her and other family members. I also put aside Mrs Prendergast's evidence about Mr Prendergast now having to work away from Christchurch to ensure an income. The former evidence does not prove harm to

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[4] *Butler v Ohope Chartered Club Incorporated* [2021] NZEmpC 80 and *Gafiatullina v Propellerhead Limited* [2021] NZEmpC 146.
[5] *Cornish Truck & Van Ltd v Gildenhuys* [2019] NZEmpC 6. See also *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Mr Prendergast and the latter evidence concerns an inevitable consequence of a genuine redundancy. Overall however, there is no reason to doubt Mrs Prendergast's evidence. Mrs Prendergast would have a more complete understanding of the effects on Mr Prendergast than those he interacted with at work before the employment ended. Mr Prendergast suffered humiliation, loss of dignity and injury to his feelings as a result of his personal grievance.

[25] Counsel for MM Cables refers me to *Smartlift Systems Ltd v Armstrong* in support of a submission that the range of compensation here should be between $6,000.00 and $10,000.00.[6] For Mr Prendergast, it is submitted that the award should be set by reference to the "Middle Band". I am referred to *Innovative Landscapes (2015) Limited v Popkin*.[7] In that case, the Employment Court assessed compensation at $15,000.00, an award the Court described at [22] as "towards the bottom of Band 2". I consider the proven harm to Mr Prendergast is better characterised as "mid-range loss/damage" than as "low level loss/damage". However, it sits near the bottom of the mid-range. I assess $12,500.00 as the amount required to remedy the proven loss caused to Mr Prendergast as a result of his personal grievance.

[26] Mr Prendergast did not contribute in a blameworthy way to the circumstances giving rise to his personal grievance.

[27] MM Cables seeks an order that any compensation ordered be subject to payment by monthly instalments spread over 24 months. The Authority has power to order payment by instalments, but only if the financial position of the employer requires it. There is no evidence such as accounting information to show that MM Cables financial position requires payment by instalments.

Costs

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

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[6] *Smartlift Systems Ltd v Armstrong* [2021] NZEmpC 66.
[7] *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40.

[29] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve a memorandum in reply.

Philip Cheyne
Member of the Employment Relations Authority