

NOTE: This determination contains an order prohibiting publication of certain information at [3].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 11
3138423

BETWEEN	ROGER TEAGUE Applicant
AND	PYROCLASSIC FIRES LIMITED now PYRO FIRES LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Ira White, advocate for the Applicant Dave Robb and Greg Millard, advocates for the Respondent
Investigation Meeting:	20 September 2022 at Napier
Submissions Received:	27 September 2022 from the Applicant 27 September and 3 October 2022 from the Respondent
Date of Determination:	12 January 2023

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] Pyroclassic Fires Limited (Pyro Fires) sought an order prohibiting publication of a subset of the evidence it considered to be commercially sensitive. This information was provided to the Authority's investigation in order for Pyro Fires to justify the decision to dismiss Mr Teague for redundancy. Mr Teague did not object to the order being granted.

[2] I was satisfied it was appropriate to make the order on the basis it would not normally be information available to competitors in the same or similar industries and I agree it would be commercially sensitive information and potentially damaging if it were in the hands of a competitor.

[3] Under Clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) I make an order for non-publication of Pyro Fires' business information noted as "commercially sensitive" in the documents filed in the Authority and given in oral evidence at the investigation meeting.

Employment Relationship Problem

[4] Roger Teague was dismissed for redundancy by Pyro Fires on 14 October 2020. Mr Teague says the decision to disestablish his role of Business Development Manager resulted in an unjustified dismissal because the redundancy was not genuine in that his role was not superfluous and he had insufficient information to understand the business rationale.

[5] Mr Teague was employed by Pyro Fires from August 2015 initially as the shop manager in a sales position and then after March 2019, as the Business Development Representative. His title was later changed to Business Development Manager. Mr Teague was dismissed for redundancy and approximately five months later he saw what he says was his previous position advertised as a vacancy on an employment website, but with a different title. He unsuccessfully applied for the role and raised a personal grievance challenging the termination of his employment.

[6] Pyro Fires says its actions were justified because it went through a genuine restructure process. In the context of the impact of the Covid-19 pandemic on business viability plus advice about advancing and growing his business, Richard Chalmers, as the managing director of both Pyro Fires and an associated company, Fourth Estate, having invested in a new product line, exercised his option to take on a national sales role that was in essence the same as Mr Teague's role, but involved a new product – Green Mountain Grills (GMG). Having two employees managing key accounts and wholesale sales was considered to be a double up and not economically viable. Pyro Fires says it provided information, consulted with Mr Teague and gave him opportunities to provide information and feedback. Dismissal came at the end of the consultation period and after genuine consideration of Mr Teague's feedback.

[7] Mr Teague's personal grievance was raised outside the statutory 90-day timeframe. A preliminary determination heard on the papers issued on 10 March 2022¹ concluded Mr Teague's substantive matter could proceed in the Authority.

[8] Mr Teague seeks compensation for hurt and humiliation and loss of dignity in the amount of \$15,000, a contribution to representation fees, reimbursement of the application fee and penalties.

The Authority's investigation

[9] For the Authority's investigation, written statements were lodged from Roger Teague, Richard Chalmers and Stuart Taylor, Business Advisor. The witnesses answered questions under affirmation from me and the parties' representatives. By agreement oral submissions were heard on 27 September 2022 by audio visual technology. Both parties filed written submissions and Pyro Fires filed supplementary submissions on 3 October 2022.

[10] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[11] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Who is the employer?

[12] Pyro Fires Limited is a duly incorporated company with its registered office in Hastings and Richard Chalmers is the sole director and majority shareholder. The individual employment agreement between the parties is not signed but it records Pyroclassic Fires Limited as the employer, having changed its name in February 2022.

[13] Mr Chalmers is also the sole director and shareholder of Fourth Element Limited (Fourth Element) with its registered office in Hastings. Mr Chalmers original intention was to have Pyroclassic operate the manufacturing business and Fourth Estate handle marketing for

¹ *Roger Teague v Pyroclassic Fires* [2022] NZERA 84

the manufacturing and retail businesses, but he accepts initially all business including employment contracts were conducted by Pyro Fires.

[14] The businesses were described by the business advisor as follows:

The company Pyroclassic Fires operates three distinct divisions of the business, 1) Fourth Element Retail (FER) store – a retail store based in Hastings specialising in BBQ, Heating and Outdoor living; 2) Pyroclassic Fires – specialising in the manufacture and sale of Pyroclassic fires; and 3) Fourth Element Distribution (FED) – focused on the sales and distribution of wood fires throughout a nationwide dealer network and some parts of Australia.

[15] Mr Chalmers controls and manages all the businesses and uses the companies and the businesses interchangeably. The new business venture leading to the restructure proposal was acquired by Fourth Estate. The advertisement causing Mr Teague to have concerns about whether his dismissal was justified was for a position at Fourth Estate.

[16] I am satisfied Pyro Fires was Mr Teague's employer. Mr Chalmers was the managing director of both companies and used both to conduct different parts of what was his overall business. However, Fourth Estate is relevant to the employment relationship problem raised by Mr Teague because of the interconnectedness of the businesses and companies and Mr Chalmers central role across the entire business.

What caused Mr Teague to raise a personal grievance?

[17] On 4 March 2021, Mr Teague saw what he considers to be his previous position advertised as a vacancy despite having a different title of National Account Representative:

Here at Fourth Element Distribution we are the home of Pyroclassic Fires and Green Mountain Grills ... Due to the expansion in the business we are looking for a driven individual who has a passion for sales to grow our Fourth Element distribution brands ... The role is a full-time position based in the Hawke's Bay and includes regular travel around New Zealand.

[18] Mr Teague unsuccessfully applied for the advertised role. The job description was so similar to his previous Business Development Manager role, marketing the three original products, including Pyroclassic Fires, he believed the purpose of the redundancy decision made by Mr Chalmers was to remove him from the business and employ someone younger at a lesser rate.

[19] Mr Taylor, Mr Chalmer's business adviser, gave evidence about the background to the decision to advertise the role. He said in February 2021, at a planning meeting with the digital

marketing team, they discussed where to next for GMG and the team felt consideration should be given to the key account manager role to deal with the growth being experienced with the addition of GMG and to help link the online presence with a human face more regularly. At the same time, a new administration manager was appointed and changes to the retail store were requiring more of Mr Chalmers attention so after some discussion with the team, it was decided to go to market so Mr Chalmers could shift his focus again to where it was needed.

[20] Mr Chalmers provided business information confirming GMG was a successful business decision. That information is subject to the non-publication order above. Mr Chalmers also said the barbeque and fire business was about to get busier with winter and while it was his intention to carry on in the role he had created for himself, a combination factors, plus the feedback from the team and business advice, meant that he reconsidered. He agreed to create and recruit a new National Account Representative role that would focus specifically on GMG but also encompass the needs of the Pyroclassic dealers. I understood Mr Chalmers evidence to be that the other products were being scaled back and that GMG had been far more successful than anticipated allowing him to rethink the business model once more.

How did Mr Teague come to be dismissed?

[21] Mr Teague started employment at Pyro Fires as the shop manager. Mr Chalmers said Mr Teague was employed by Pyro Fires because Fourth Element was a shell company at the time and all business was conducted via Pyro Fires. When the business relocated to a bigger show room Mr Teague became the Business Development Representative in the wholesale marketing Pyroclassic Fires and the Esse and Thermalux cooker brands. In November 2019, when Mr Chalmers purchased distribution rights for Green Mountain Grills (GMG), he did so using his other company, Fourth Element, which he referred to as his “distribution business”.

[22] Clause 13 of the employment agreement between Mr Teague and Pyro Fires provides for redundancy as follows:

A redundancy occurs where the employment is terminated because the position filled by the employee has or will become superfluous to the needs of the employer.

[23] Mr Chalmers described the background and lead up to the decision to develop the proposal for consultation. With the assistance of his business adviser, Mr Taylor, an initial strategic business plan was created with a proposed draft framework designed to meet the

business needs based on his intention to grow the business and then, after Covid-19, to shore up business viability in difficult times.

[24] The key opportunities to take the business forward were listed in the plan as:

- The opportunity to develop a network of clients beyond the FER store with Hawkes Bay by having a resource to physically visit businesses throughout Hawkes Bay.
- The opportunity to advance the Australian business by periodic visits to the Australian businesses to align them with the NZ strategy.
- The opportunity to purchase the New Zealand distribution rights for GMG, a wood pellet BBQ brand, and import and distribute these through dealers throughout New Zealand.

[25] It was also noted that currently Mr Chalmers, the owner and manager, acts as the FER store manager as well as maintaining his oversight of the rest of the business. Previously this did not allow for enough time to spend on the rest of the business to develop it further. It also did not allow him enough time to develop the recently acquired GMG distribution business. Because the current Business Development Manager role was largely focused on Pyroclassic fires and maintaining that network of dealers, it was proposed the management structure would be changed to accommodate the opportunities and facilitate the planned growth.

[26] The first iteration of the strategic plan was dated March/April 2020, coinciding with a period just before the Covid-19 national lockdown in New Zealand. The second iteration of the proposal followed lockdown and was finalised in approximately August or September 2020. The proposals were confidential and not shared with staff. Mr Chalmers considered it insensitive in a small business to involve everyone and then later on when it became clear Mr Teague's was the only role considered for disestablishment, while he did not provide Mr Teague with the business plan itself, he says he provided the rationale from the business plan to Mr Teague both in writing and at the meeting they had. He says it was not complicated and was about his desire to grow his businesses be more involved at that level as well as to manage a new product. He noted that Mr Teague did not ask for any further information at the time.

[27] After Mr Chalmers invested in the new product line GMG in November 2019, Fourth Estate had distribution rights in New Zealand for GMG. Mr Chalmers said GMG is quite a different product to his original product lines because it is a pallet grill barbecue and these had become the fastest growing product in the barbecue sector over the last three to five years

globally. This meant Mr Chalmer's business, Fourth Element, was able to get in early before this growth took off in New Zealand. Mr Chalmers says he paid a large sum of money to purchase the GMG distribution licence for New Zealand and he needed to make sure this product was successful and fully part of Fourth Element. As a condition of purchase he had to be very familiar with the new product range and had already become knowledgeable about the brand and the products his company was to market, sell and distribute.

[28] Mr Chalmers says after the Covid-19 lockdown he had a major back operation and he spent considerable time away from work. What he realised during this time was his team managed the day-to-day operations in his absence very well. It became quite apparent to him they could operate without his direct day-to-day operational input, and this was a revelation to him. This led him to think about and then review his role in the business and reconsider his business structure that he had been working on prior to the Covid-19 lockdown to find the best structure for the business. This was particularly so given the uncertainty the pandemic was having on the business and where he felt he could best advance and secure the future of his business in trying economic times for small business owners.

[29] Initially, with the incorporation of GMG as a product line for the company, Mr Chalmers was aware he would have to review the Business Development Manager role which was focused significantly on the foundation product being Pyroclassic Fires, along with the other two other products Esse and Thermalux cookers.

[30] Having reached a position where he felt he could now leave the current day-to-day operational aspects of the business in safe hands and there were reasons why he did not think anyone else should be promoting the GMG products he was confident in his decision to take over business development role for all the products. He says the main difference between the job advertised in March 2021 and Mr Teague's previous Business Development Manager role was the addition of the new product line, which was a different type of product in the BBQ market and the geographical areas Mr Chalmers wanted coverage of. He wanted to expand coverage.

[31] Mr Chalmers position was if GMG were not successful, there was the question of the significant financial investment and if it failed then it needed to be him that failed. He sought advice on how to manage consultation about the restructure proposal. Mr Teague was the only employee whose position it was proposed to terminate.

[32] On 14 September 2020, they met and the proposal was outlined to Mr Teague and he was handed a letter. The letter recorded Mr Chalmers' preliminary view that with the addition of GMG, which he was managing, he could include the account management and business development for Pyroclassic Fires in New Zealand, as part of a new GMG role he proposed for himself. He said he now had increased capacity and this would keep him close to the market for both Australia and New Zealand and cut the travel costs in time as many of the distributors for the different ranges were in the same location. Mr Chalmers went on to state: "*On this basis I am proposing to disestablish the Business Development Manager role and exercise my rights as the owner to more actively work in the business*"

[33] Mr Teague provided feedback by email and asked a number of questions in response to the proposal. He pointed out the Fourth Element key account role (for GMG) together with responsibility for distribution of the three existing brands was a large role and suggested he move to part-time until retirement to assist Mr Chalmers with the new role. Although he thought the role was too big, he agreed there was merit in having the owner engaged with the customers so he supported the proposal in that regard.

[34] Mr Chalmers responded by email and conveyed he was confident he could manage the existing product range with the new one, having managed the existing product lines before. He declined the option of Mr Teague continuing in a part-time capacity because that still meant two employees travelling to the same locations to meet with agents for all the products amounting to a double up.

[35] In evidence Mr Chalmers also said he took advice about Mr Teague's feedback from Mr Taylor who had been advising Mr Chalmers since October 2018 and whose advice Mr Chalmers had sought regarding how best to grow the business. The advice he received from Mr Taylor was the business only needed one person to develop the business and manage the key accounts. The strategic plan had recorded "*The business cannot justify having both a Business Development Manager for Pyroclassic Fires and a Key Account Manager role.*"

[36] Based on all the information a final decision was made by Mr Chalmers. An alternative was offered but turned down by Mr Teague and he was advised his employment was to be terminated with his final day being 14 October 2020. The entire process that Mr Teague was aware of took less than 16 days.

Redundancy and the justification test

[37] The Authority does not substitute its own judgement for that of the employer when called upon to assess decisions by an employer that a position has become superfluous to its business needs and that the worker holding the position had to be dismissed because there were no suitable alternative roles for that person in the business. Rather, when considering whether such decisions were justified, the Authority must determine whether the employer's actions, and how the employer acted, met the objective statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time.²

[38] Where questions are raised about the commercial rationale for the employer's decision, or ulterior motives are alleged for the selection of a position and a worker for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".³

[39] The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the particular employer.⁴

Was there a genuine business reason to disestablish Mr Teague's role?

[40] The Court of Appeal has accepted an employer is entitled to make their business more efficient for example by abandoning unprofitable activities, re-organisation or other cost-saving measures and a worker does not have the right to continued employment if the business could not run without them.⁵ With that in mind Mr Chalmers business planning and investment in the new product plus advice from his business adviser that the business could not sustain

² Employment Relations Act 2000, s 103A.

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

⁴ Employment Relations Act 2000, s 4.

⁵ *GN Hale & Son Ltd v Wellington Caretakers etc. IUOW* (1991) 1 NZLR 151 (CA) at 155.

two key account managers, is evidence the restructure was for genuine business reasons and not personal to Mr Teague.

[41] In these circumstances, so long as there is no suggestion the redundancy was made for some ulterior motive, and so long as the redundancy was made for genuine business reasons and was not a pretext for dismissing a disliked employee, it is likely the Authority will consider the dismissal for redundancy was justified.

[42] Mr Teague was clearly very taken aback by the decision to disestablish his position. He gave evidence he had no idea he was not fit for purpose or that he would not be considered to be part of the business going forward. He found it very difficult to get work and in fact he had turned 65, hence his suggestion to continue working part-time and look at a retirement plan. He has not been able to find subsequent employment. On seeking advice after seeing the advertisement for what looked to him to be his old role, he was very hurt, injured and upset about the fact he wasn't considered for the role and in hindsight he considers there was an ulterior motive to his dismissal.

[43] The main reason for disestablishing the Business Development Manager role was twofold. Mr Chalmers as the Managing Director wished to be more involved in developing the business rather than the day-to-day running and administration of the company, and secondly because of the significant investment in the new product line, Mr Chalmers wanted to take on the responsibility for this role himself.

[44] Mr Chalmers gave evidence of his clear desire and the reasons why he wanted to get involved in the marketing and managing the key accounts for GMG, which he says was his baby and the significant financial investment meant he did not want it to be someone else's responsibility in case it failed.

[45] Mr Chalmers was also working with his business advisor post-Covid to streamline the business to make it as sustainable as possible. He now says with hindsight he could see five months later was evident he was needed again in the administrative and retail side of the businesses. An office administrator resigned so he was required in the showroom, and it then became evident to him the Business Development Manager role could be done by someone other than him and would include the original products and GMG, which of course was what Mr Teague was perplexed about in the first place because he could not understand why he couldn't have taken on the extra product line.

[46] The key piece of information satisfying me there was no ulterior motive is the significant investment in GMG and secondary to that, the fact that Covid had happened so the context at that time was a particularly acute financial landscape for many small businesses and a very difficult and stressful period. Mr Chalmers said GMG became his plan to get ahead as they came out of lockdown and he revised his business model and planned accordingly. I also take into account the fact there was no evidence of any animosity between the parties or any concerns about Mr Teague's performance.

[47] I accept Mr Chalmers was attempting to shore up the viability of his business into the future and there was a need to travel further including Australia while managing the marketing for GMG.

[48] However, the advertisement some five months later does raise questions about the genuineness of the initial dismissal decision particularly when the job descriptions were very similar. Mr Chalmers accepted the advertisement very similar but pointed out two key differences, it was a national role and the new product line. He also said some of the existing product lines had phased out and wider coverage with travel.

[49] I accept that Mr Chalmers' rationale to advertise was closely associated with the success of the new product range and the business information he provided confirmed that together with other factors that had changed in the time since Mr Teague was dismissed. In these circumstances, although it is understandable Mr Teague formed the view he did, that redundancy was personal to him, the evidence did not establish that.

Was Mr Teague nevertheless unjustifiably disadvantaged by what Pyro Fires did and how it carried out its redundancy process and decisions?

[50] The part of the process involving Mr Teague was short but it was consistent with the requirements on employers to consult and to allow consideration of an employee's feedback when making an employee redundant.⁶

[51] Mr Teague says he was not involved or aware of the business review taking place at the time and believed involvement in this review should have been made known to him given the nature of his role, his experience and the national network relationship he had built up.

⁶ Employment Relations Act 2000, s 4(1A).

[52] In a redundancy situation because there is no fault on the part of the employee, there is a need for information to be sufficiently detailed so that there is a meaningful opportunity to comment on it and this has been stressed by the Court in *Brake v Grace Team Accounting Ltd*.⁷ I find that the information provided was not sufficiently detailed for Mr Teague to be able to understand fully four particular things about the rationale to disestablish his role – Mr Chalmer’s financial commitment to GMG grills and desire to take responsibility should it fail, the need to increase geographical coverage for wholesale marketing to ensure GMG succeeded, that there was a level of comfort about phasing out the other product lines if GMG was successful and that business could not justify two business development managers.

[53] The Act sets out explicit requirements for disclosure and consultation that apply in redundancy situations and the Court has held that most restructuring will require consultation to take place at two points at least: first, when a review takes place that leads to a decision that restructuring is necessary and when decisions about implementation of a restructure are made.⁸

[54] In this case I find that Pyro Fires should have provided further information to allow Mr Teague to fully understand the initial review and then the rationale for the restructure proposal. This would have given him a full opportunity to have influence and genuine input into the decision making. This would not have changed the outcome, but I find this was a process flaw and did disadvantage Mr Teague which was why he was perplexed when what seemed to be his old position was advertised.

[55] It was also open to Mr Chalmers to decline Mr Teague’s proposal to remain with the business in a part-time capacity because the rationale for Mr Chalmers taking on the role was in part to prevent doubling up on travel two account or business development managers travelling to the same locations to market different product lines. There were only four products, two of which appear to have been phased out as GMG became a significant part of the business and the business advice at the time was that Mr Chalmers’ business could only sustain one person that role.

[56] Mr Chalmers gave conflicting evidence about when he made the decision to make the role redundant. In answer to a question from the Authority he said the decision to make Mr Teague’s role redundant was made in August and that was before the proposal had been put

⁷ *Brake v Grace Team Accounting Ltd* (2013) NZEmpC 81.

⁸ *HP Industries (New Zealand) Ltd v Davison* (2008) ERNZ 514.

to Mr Teague. In re-examination Mr Chalmers said the decision was in fact made in September, after consultation with Mr Teague. Given that all the documentary evidence referred to the later date, I do not find there was predetermination.

[57] Accordingly for the reasons given, Pyro Fires did not act unjustifiably in reaching its decision that Mr Teague's position was redundant and dismissing him but it did disadvantage him in failing to provide sufficient information for Mr Teague to fully understand that a business review was being undertaken and proposal to disestablish his position.

Orders

[58] Having been partially successful in bringing his claim for a personal grievance Mr Teague is entitled to an assessment of remedies and I consider that payment of compensation in the amount of \$7,000.00 under s 123(1)(c) of the Act to be appropriate.

Costs

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Fourth Element may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Teague 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.

[60] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Sarah Kennedy
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1