

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 145
3161321

BETWEEN JOHN HERRETT
 Applicant

AND FRAME AND MIRROR
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Andrew McInnes, advocate for the Applicant
 Graeme Patching for the Respondent

Investigation Meeting: 13 September 2022

Submissions Received: 23 September 2022 from the Applicant

Date of Determination: 23 March 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Herrett was employed as picture framer with Frame and Mirror Limited. In October 2021 Frame and Mirror disestablished Mr Herrett's position as part of a restructuring and his employment was terminated.

[2] Mr Herrett says the termination of his employment was an unjustifiable dismissal. He says Frame and Mirror did not have a substantive basis, that is a commercial reason, for its restructuring and subsequent disestablishment of his role nor did Frame and Mirror follow a fair process in dismissing him.

[3] Frame and Mirror says there was a commercial basis for it considering and ultimately effecting a business wide restructuring. It also says Mr Herrett was consulted over this, with other employees. This consultation included discussions over the reason for the restructure with all employees and considerations of alternatives to the proposed restructure. In relation to Mr Herrett there were discussions around job opportunities and/or proposals for alternative employment for him, with this being done in the context of Mr Herrett leaving Frame and Mirror's business by the end of the year in any event.

The Authority's investigation

[4] Mr Herrett lodged a statement of problem in the Authority claiming unjustifiable dismissal and it is this claim that I investigated.

[5] I investigated Mr Herrett's claim by receiving written evidence and documents, holding an investigation meeting on 13 September 2022 and assessing written submissions.

[6] In my investigation meeting, under affirmation, Mr Herrett confirmed his written statement and gave further oral evidence. Graeme Patchett and Robyn McIlroy, under oath, gave oral evidence for Frame and Mirror.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[8] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the

Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

What happened?

[9] Mr Herrett started work with Frame and Mirror in February 2006; he was employed as a picture framer. In 2021 Mr Herrett was the only picture framer employed by Frame and Mirror.

[10] It appears that Frame and Mirror's business suffered, as many businesses did, during the COVID-19 lockdown and restrictions. Whilst I received limited evidence about what occurred during this period of time there is some email correspondence that shows Frame and Mirror had staff working part time and it received the COVID-19 wage subsidy for parts of 2020.

[11] By mid-2021, Frame and Mirror had financial difficulties. Mr Patchett, the shareholder and director of Frame and Mirror and the CEO of its business, describes the situation as being one that all staff were aware of as work was put on hold due to stop credit and supply issues; cash flow was limited and there was obvious stress on everyone in terms of business operations. These are matters that were discussed with staff.

[12] As a result of ongoing financial difficulties arising out of COVID-19 restrictions and supply chain issues, Frame and Mirror was looking at options for consolidating its business and/or selling it.

[13] It was in this context as well as some concerns about Mr Herrett's health that Mr Herrett had been engaging with Mr Patchett about him retiring.

[14] All of these factors culminated in Mr Patchett sending Mr Herrett an email on 3 August 2021 which stated, amongst other things, that Frame and Mirror would not be able to employ Mr Herrett from 24 December 2021.

[15] Mr Herrett began looking for new employment almost immediately after receiving the 3 August 2021 email. As part of this he spoke to a gallery and picture framing business in Christchurch. A manager at that business then called Leanne Haglund-Holland of Frame and Mirror to discuss the conversation it had just had with Mr Herrett.

[16] I did not receive any direct evidence regarding what was discussed between Ms Haglund-Holland and the other business but when Mr Patchett was told about the conversation by Ms Haglund-Holland he sent a text message to Mr Herrett stating:

Good morning John, I would like to ask you not to come into work today, please. As Robyn and I got told yesterday that last Thursday you went to [gallery and framing business] in town here. You were there to do 2 things, put your cv forward for consideration. According to the manager ... you mostly wanted to discredit and start a nasty rumour about [Frame and Mirror]. Stating [Frame and Mirror] don't pay there (sic) bills [Frame and Mirror] financially broke – owner ... is crazy and has gone mad ... I don't think it's a good idea for you to return to [Frame and Mirror] until we have a meeting or something. Would you consider going on annual leave right away. I've looked up the holidays owed to you, it's been 2 years since you had a break.

....

[17] What followed was an exchange of text messages, in which Mr Herrett said people were just spreading rumours about him and that he would prefer to save his annual leave, but he was happy to meet to discuss further.

[18] Mr Herrett and Mr Patchett then met on 13 August 2021. Mr Herrett described that meeting as being quite amicable and said a number of things were discussed. By the end of the meeting Mr Herrett and Mr Patchett had agreed that Mr Herrett would go on leave, although Mr Herrett only accepted this reluctantly, and that by the end of the year Mr Herrett would leave Frame and Mirror's business.

[19] Whilst Mr Herrett was on annual leave Frame and Mirror's accountants advised it that it would have to reduce costs in its business. Mr Patchett discussed this with other management of Frame and Mirror's business, Ms Haglund-Holland and Ms McIlroy. The end result of these discussions was that they decided that they should look at restructuring the

business to reduce employee costs and that Ms Haglund-Holland and Ms McIlroy should conduct this process.

[20] Ms Haglund-Holland and Ms McIlroy took advice from Frame and Mirror's accountants and employment advisors and then commenced a restructuring consultation process with all of Frame and Mirror's employees.

[21] The restructuring consultation process, which Mr Herrett participated in, along with other employees, involved:

- (a) Employees were invited to a meeting on 7 September 2021. The purpose of the meeting was to announce the commencement of the restructuring process and give the employees information. As Mr Herrett was not at work he was sent a text message advising him of the meeting and its purpose, encouraging him to come in for it.
- (b) The first consultation meeting on 7 September 2021 was used to advise employees of a possible restructuring and have a discussion about the reasons for it and look at initial thoughts about restructuring – i.e., what change might be implemented in terms of the business and roles. Mr Herrett attended this meeting and provided some information.
- (c) A second consultation meeting was held on 10 September 2021 so that employees could give their feedback on the restructuring. Mr Herrett attended this meeting and provided feedback.
- (d) A third consultation meeting was held on 23 September 2021. Mr Herrett was unable to attend this meeting.
- (e) On 11 October 2021 Frame and Mirror sent a letter to Mr Herrett advising him that it was proceeding with the restructuring, as a result his role was being disestablished and his employment would terminate on 29 October 2021.

Frame and Mirror invited him to meet with it to discuss the restructuring, as it impacted him, further. Mr Herrett did not ask for a further meeting.

[22] Then, on 19 October 2021 Mr Herrett sent a form, so that he could claim redundancy insurance from his bank, to Frame and Mirror asking it to complete and sign the declaration as his employer. Frame and Mirror completed this form on 27 October 2021.

[23] Finally, on 29 October 2021 Mr Herrett received notification of his final pay from Frame and Mirror.

Mr Herrett's claim

[24] Mr Herrett's claim of unjustified dismissal relates to the restructuring process undertaken by Frame and Mirror. Mr Herrett claims that the consultation process was flawed and there was no justification for his dismissal.

[25] In terms of the process Mr Herrett says Frame and Mirror did not provide information as it was required to. He says he did not receive any information including a proposal for the restructuring and information to support the need to restructure. Mr Herrett also says Frame and Mirror did not consider any input he was able to give, as it was obliged to; in fact, he says the decision to dismiss him was predetermined.

[26] In terms of substantive justification Mr Herrett says the restructuring was a sham, with his dismissal predetermined on the basis that Frame and Mirror had concerns about his conduct and performance. He says there was no basis for the restructuring; the business is still operating and no information was provided to show that the financial situation was such that a restructuring was required. And he says there was no objective basis for his selection for redundancy.

Analysis of Mr Herrett's claim

[27] On the face of the limited evidence and simplistic response initially proffered by Frame and Mirror, Mr Herrett's narrative and his allegations appeared compelling and credible. However, a closer analysis of the oral evidence from both Mr Patchett and Ms McIlroy and a review of all of the communications that were provided indicate that there was more substance to Frame and Mirror's position. Also, the overall relationship between Mr Herrett and Frame and Mirror and the circumstances before and during the consultation period were, on reflection, very influential on my views of what occurred.

Key observations

[28] There are two important points to note about the events that occurred as they relate to Mr Herrett's claim for unjustifiable dismissal:

- (a) Mr Herrett did not raise any concern about the email he received on 3 August 2021 advising him his employment would end on 24 December 2021. He did not raise a personal grievance and it was not the basis on which he says his dismissal was unjustified.

- (b) Mr Herrett did not raise any concern about the events of early August 2021 as that related to him being placed on leave and agreeing in the meeting on 13 August 2021 that he would remain on leave and that his employment would end by the end of the year (which would be 24 December 2021 given the closure of the business over the Christmas break). Mr Herrett did not raise a personal grievance and these events are not the basis on which he says his dismissal, or any action of Frame and Mirror was unjustified.

[29] On the basis of these two points, it is clear to me that Frame and Mirror proceeded with the restructuring of its business as that impacted Mr Herrett on the understanding that his

employment would otherwise end on 24 December 2021 and that any issues it had about his actions in early August 2021 were resolved.

Substantive basis

[30] Turning to the substantive basis for Frame and Mirror's decision to restructure, disestablishing Mr Herrett's role and then terminating his employment, I am satisfied that this was not predetermined and there was a basis for the decisions made:

- (a) Frame and Mirror was not motivated by other concerns about Mr Herrett as these matters had been resolved. And the clear evidence from both Mr Patching and Ms McIlroy was that the proposed restructure and what flowed from it was in response to the accountant's advice.
- (b) It does not make sense that Frame and Mirror would put all of its employees through a restructuring process if its only goal was to remove Mr Herrett.
- (c) Frame and Mirror's financial situation was such that restructuring was necessary. Three related points of evidence support this: the evidence is that the accountant's advice was that this was necessary; the financial accounts provided in the investigation show the business was operating at a loss; and the oral evidence, which I have no reason to doubt, from Mr Patchett and Ms McIlroy was clear on the revenue and financial concerns resulting from work issues. As an aside, that Frame and Mirror's business may still be operating is not retrospectively evidence that a restructuring was not required – it may in fact reflect savings made as a result of restructure.
- (d) Once a decision was made to disestablish the framing role then what followed was the termination of Mr Herrett's employment, subject to redeployment. There is no issue about selection criteria and Mr Herrett's selection over other employees as he was the only employee in the framing role.

Process

[31] In terms of process, I will consider the two areas of complaint, the information provided and how Frame and Mirror dealt with any feedback.

Process - Information provided

[32] I do not accept that the provision of information to employees, including Mr Herrett, in the consultation process was as simple and non-existent as Mr Herrett described it. Overall, there was information provided but it was not presented succinctly or comprehensively in one package.

[33] There are, from my perspective three questions about the information provided:

- (a) Did Frame and Mirror set out adequately what gave rise to its concerns and the need to restructure?
- (b) Did Frame and Mirror provide a basis for restructuring so that employees could provide feedback on the disestablishment or redefining of their roles?
- (c) Did employees know their jobs were at risk as a result of the restructuring?

[34] The need to restructure was brought about by business slow down, cashflow issues and the overall financial state of the business. The financial information that supported this was provided both in the process but equally before the process - I accept evidence from Ms McIlroy that staff were provided with information both as part of the process and before that. Employees knew about financial concerns and cashflow worries because it had been discussed (an example is a message to staff in May 2021 about paying down debt in order to keep afloat). And the financial state of the business was discussed in consultation meetings, which included advice to them that Frame and Mirror was having difficulty paying wages. I accept that Frame and Mirror did not provide a summary of accounts itemising its losses but I do not consider this was necessary in context of small business where it was clear to all

staff what its operations were, where its revenue was generated, and that savings were needed across the board.

[35] There was no proposal for restructuring that was fully formed. Frame and Mirror did not consult over a set idea that certain parts of the business would cease or be reduced or that certain roles would be disestablished or be refined. Rather it consulted over options available, considering what parts of the business could close down and what parts could operate differently, which included things such as layout of its operations and the process so that efficiencies might be gained. This consultation also included discussions about reducing or ceasing Mr Herrett's work in framing, particularly memorabilia related work and discussions about reducing other aspects of the business such as photography.

[36] What follows from the failure to set out a full proposal for restructuring is that it was possible that employees did not know their jobs were at risk as part of the restructuring; this was Mr Herrett's evidence. This point became a focus in my investigation meeting as I was surprised by Mr Herrett's evidence that he did not know his job was at risk as a result of the restructuring and by Frame and Mirror's evidence that they did not tell employees they could lose their jobs. Mr Patchett was very clear that the advice they received was not to tell employees this information but rather consult over possible steps to reduce costs and increase revenue, focussing on the different parts of the business. Frame and Mirror did not tell employees they would or could lose their jobs because they had not decided that. However, Ms McIlroy's evidence was that they did identify roles that might be disestablished.

[37] The reality was all employees' jobs were at risk because all options to increase efficiencies and improve revenue and cashflow were being considered. Employees were being asked to comment on what could be done knowing this might mean a change to their role or even the end of employment for some. On balance, all employees knew their jobs were at risk because by its very nature this proposed restructure was about this and it is what was discussed when considering whether various aspects of business could be shut down.

[38] In the case of Mr Herrett, the evidence shows there was consultation about discontinuing the framing part of the business and there was consultation over options for Mr Herrett to take on the framing business separately, particularly the memorabilia framing work. This consultation included discussions about Mr Herrett simply taking that part of the business and operating it on his own account, improving the efficiencies by reducing overheads and fixed costs that Frame and Mirror had. Mr Patchett also referred to this working in with the discussions and agreement they already had over Mr Herrett leaving the business by the end of the year.

[39] I am satisfied that whilst a fully formed proposal was not put forward at the commencement of consultation but by the end of its consultation with Mr Herrett, Frame and Mirror had identified discontinuing the framing part of its business and disestablishing Mr Herrett's role as a viable option and it had consulted with Mr Herrett over this.

Process – Feedback

[40] Mr Herrett says he did provide feedback to Frame and Mirror in the course of the restructuring consultation but Frame and Mirror did not take this seriously. In contrast Ms McIlroy evidence was that she knew what the consultation process was about and what was required of her – she had been involved in a prior restructuring process and she had advice on how to conduct this one. I am satisfied that Ms McIlroy and Ms Haglund-Holland did consider the feedback they received and that consultation was a constructive process.

Redeployment

[41] There was an obligation on Frame and Mirror to consider redeployment for Mr Herrett, once it had made the decision to disestablish his role. This aspect of the process was not comprehensive and was potentially problematic. However, the context of the prevailing circumstances is highly relevant here – Mr Herrett was leaving the business by the end of 2021, the work he did was being discontinued and his role was going to be disestablished and Frame and Mirror had already committed to helping him find alternative employment in the

industry. In these circumstances considering redeployment within Frame and Mirror's business for only two months work, potentially with an impact on other employees, appeared moot. Rather Frame and Mirror's focus with Mr Herrett was on alternatives for him such as taking on the memorabilia framing work.

[42] In the circumstances I am prepared to accept that Frame and Mirror acted as a fair and reasonable employer could have done.

Additional points

[43] Before I set out my conclusion on Frame and Mirror's actions and justification there are two additional points that arose in the evidence that I note:

- (a) Mr Herrett said in his evidence that the decision to terminate his employment, set out in a letter of 11 October 2021 came completely out of the blue and was a shock to him. This is not consistent with contemporaneous documents and his own evidence that he was involved in the consultation process. In particular Mr Herrett sent an email on 2 October 2021 asking Frame and Mirror to provide him with a reference. In response, as well as providing that reference, Mr Patchett suggested to ring others in the industry to see if there were any jobs available. Mr Herrett then responded on 3 October 2021 accepting the offer. So by 2 October 2021 Mr Herrett knew his role was at risk and was involved in discussions about Frame and Mirror helping him find other employment – this is consistent with Mr Patchett and Ms McIlroy's evidence.
- (b) Mr Herrett did not raise any issue with the termination of his employment based on the restructuring at the time. In fact, he appeared to accept it by seeking to claim redundancy insurance and requesting Frame and Mirror's assistance with his application.

[44] These two things are significant to me:

- (a) Mr Herrett's evidence in which he simply dismisses Frame and Mirror's efforts to consult over the restructuring is inaccurate and an overly simplified account – most likely as a result of confirmation bias because it suits his claim. The reality of what occurred is, in my view more credibly and consistently set out by the oral evidence of Ms McIlroy and the contemporaneous documents.
- (b) At the time, and perhaps given the decision about him leaving the business in any event, Mr Herrett accepted Frame and Mirror's decision to make him redundant. Mr Herrett claimed insurance on the basis of being made redundant and this was approved – he now wants to say the redundancy was not genuine and he was dismissed for alternative reasons. This does not sit well with me and I believe it is problematic for an individual to claim genuine redundancy for one purpose and then claim it is a sham for the purposes of an Authority claim.

Conclusion

[45] I find that Mr Herrett:

- (a) Had been told and accepted he was leaving Frame And Mirror's business by the end of 2021 and this was a significant contextual factor when Frame and Mirror began its consultation over possible restructuring of its business.
- (b) Was informed about the possible restructure of Frame and Mirror's business and the reasons for it.
- (c) Was involved in consultation over the need to restructure of Frame and Mirror's business, looking at and discussing options to make the business more efficient.

- (d) Knew what was proposed about the framing part of the business and that his role might be disestablished and if this occurred he might lose his job before the end of 2021.
- (e) Was involved in consultation over the disestablishment of his role and possible termination of his employment – this involved discussions about him taking over that part of the business Frame and Mirror and looking for other opportunities in the industry.

[46] On reflection, Frame and Mirror's actions over the possible restructuring of its business were not perfect but there was a substantive basis for a restructuring and, given the circumstances including the resources of Frame and Mirror, consultation was adequate; every employee at risk knew of what was happening and what might happen, provided feedback and this was considered.

[47] Overall, I am satisfied that Frame and Mirror acted as a fair and reasonable employer could in all of the circumstances in coming to the conclusion to restructure its business, disestablish Mr Herrett's role and then dismiss Mr Herrett.

[48] Mr Herrett's claim for unjustified dismissal is declined.

Costs

[49] Costs are reserved.

[50] As Frame and Mirror was successful in defending Mr Herrett's claim it might be entitled to costs, however, as it was not represented in the Authority it appears that there is no basis to award it costs. For these reasons it would seem that no order for costs should be made.

[51] Notwithstanding my observation, if either party thinks it might still be entitled to costs, then it 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 the other party will have 14 days to lodge any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority