

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 56
3169762

BETWEEN

PAUL LAURSEN
Applicant

AND

COLDRITE REFRIGERATION
& AIR CONDITIONING
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Michael McAleer, advocate for the Applicant
Doug Abraham, advocate for the Respondent

Investigation Meeting: 22 November 2022 at Napier

Submissions Received: 28 November and 2 December 2022 from the Applicant
30 November 2022 from the Respondent

Date of Determination: 7 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Paul Laursen, claims he was unjustifiably dismissed by the respondent, Coldrite Refrigeration & Air Conditioning Limited (Coldrite), on 12 January 2022. Originally the Statement of Problem also contained allegations of unjustified disadvantage, but these were withdrawn prior to the investigation leaving only the issue of dismissal.

[2] Coldrite is of the view it can justify the dismissal on the grounds of redundancy.

Background

[3] Mr Laursen was engaged by Coldrite as an air conditioning installer in October 2016. In that capacity he would regularly speak to the Installation Manager, Stephen Ward, who assessed new jobs, liaised with customers, considered the resources and timeframes required then allocated staff to the jobs.

[4] It is Coldrite's evidence, with which Mr Laursen essentially concurs, that 80 percent of its work is for builders or contractors who subcontract Coldrite to do the air conditioning and heat pump work. It is also their evidence that in this capacity they do the majority of air conditioning work for the Ministry of Education in the Hawke's Bay and the bulk of this work is performed during the December/January school holidays with Coldrite keeping those dates free for that purpose.

[5] In early 2020 the COVID-19 pandemic became an issue in New Zealand. Amid the various measures introduced to address that was the COVID-19 Public Health Response Act 2020 under which public health response orders could be made. One that was subsequently promulgated in the latter part of 2021 was an order that from 16 November 2021 people who worked on school sites had to have received their first dose of COVID-19 vaccine and from 1 January 2022 only workers who were fully vaccinated would be permitted in a school.

[6] This approach reflected that being adopted by various firms for whom Coldrite performed work at the time, with a number advising Coldrite that only vaccinated workers could perform the subcontracting work they required. Similarly requests for vaccinated workers were also coming from private clients. Indeed, the situation became such that Mr Ward had on his desk, visible to all, a folder labelled "Vaxed jobs only".

[7] At this time, around October/November 2021, either five or six of Coldrite's staff were unvaccinated. While Coldrite's management is of the view non-vaccination was a valid personal choice it was creating issues with the allocation of work given an increasing inability to send unvaccinated workers to various jobs.

[8] In an attempt to keep employees informed of the situation, Coldrite disseminated notices from its clients to staff via an internal email system. It is, however, Mr Laursen's evidence he was not receiving those emails. He says he had had problems with his Coldrite email address for some years and when he raised it with one of the administrative staff he had

been told she would add his private email address to her distribution list. He says what he then received he received that way.

[9] It would be fair to say this evidence came as a surprise to Coldrite's management who were unaware that Mr Laursen was not receiving its general communications to staff. Notwithstanding Mr Laursen's claim this had been an issue for some years, neither party could offer any evidence to either support or contradict that. That said, and for reasons neither party could explain, there is evidence that as Mr Laursen claims some of the staff wide communications were being copied to his private email address at least as of 9 November 2021. This, however, did not apply to all of them and that was to become an issue.

[10] It is also Coldrite's evidence there were numerous discussions between management and staff over the growing issues with job allocation and this included advice to non-vaccinated workers that it was becoming increasingly difficult to assign work to them. This, Coldrite says, ultimately encouraged all but two workers to get vaccinated. One of the two was Mr Laursen.

[11] Mr Laursen claims that he had no knowledge of any attempts to advise him of the situation. On this I prefer the company's evidence given documentary evidence of the issue being promulgated, including advice from various clients they required vaccinated workers, which was distributed to e-mail addresses including Mr Laursen's private one. There is also evidence the issue was raised at staff meetings which Mr Laursen attended.

[12] On 10 January 2022 work resumed after a Christmas shutdown and it was then events came to a head. Mr Ward says the only work available was at schools and he had to send vaccinated staff to those jobs. He accepts there were other minor tasks but not enough to occupy Mr Laursen on anything approaching a full time basis. Mr Ward therefore approached Coldrite's Managing Director, Jim Bullock, and explained the situation.

[13] The two decided they would have to meet with Mr Laursen and to that end Mr Bullock sent an email reading:

Good afternoon, Paul,

As you are aware, our clients have advised us that they require proof of vaccination for contractors coming on to their sites.

Since you have already told me you don't intend being vaccinated, I need to meet with you to discuss the situation. I have looked at whether there is any other work at Coldrite which doesn't involve interaction with clients but there

doesn't appear to be any. This then raises the possibility of redundancy, which I wish to discuss with you.

I would like to meet with you on Wednesday morning at 8 am in my office at work.

This is only a preliminary meeting to determine what your intentions are and you will have the opportunity to raise any questions or anything else you might want me to consider before I make any final decision.

Because this is a meeting where your future with Coldrite will be discussed, you are most welcome to bring along a support person/representative to attend with you.

Regards.

[14] The email was sent to Mr Laursen's Coldrite email address and he is adamant he never received it. While there are questions about that assertion, Coldrite cannot confirm the letter was received. That said, the meeting proceeded. On the Wednesday morning Mr Laursen spoke with Mr Ward about that day's work at which point, according to Mr Laursen, Mr Ward said, "*Before you go do this job I think Jim Bullock wants to see you in his office*". Mr Laursen says he then went and stood in Mr Bullock's doorway and asked if he wanted to see him. The answer was yes, come in and sit down. Mr Ward then joined the discussion.

[15] The parties agree it opened with Mr Bullock asking why Mr Laursen didn't have a support person present and Mr Laursen replied he didn't need one. The parties also agree Mr Laursen asked what the meeting was about, to which Mr Bullock said "*You know, I sent you an email*".

[16] The opinions about what then happened diverge but it is agreed that the meeting became fractious. Mr Laursen says Mr Bullock went on to comment that he (Laursen) and the other unvaccinated employee were the only two in the company not vaccinated, that they were brainwashed and read too much bullshit on the internet. He says Mr Bullock also blamed him as being behind the other employee's choice not to get vaccinated. Mr Laursen says Mr Bullock then told him that because of this many other workers were upset at the fact he refused to have the vaccine while they chose to comply. He goes on to say, "*Jim then told me I have two weeks' notice of my termination, I could work it out or leave now*".

[17] Mr Laursen says he questioned that to which "*Jim said that he is not mandating vaccinations, he was terminating my employment because he has no work for me*".

[18] Mr Laursen says that Mr Bullock then said that he (Laursen) needed to write a letter about terminating his job. To that Mr Laursen replied "*I'm not resigning, you're sacking me*".

so you need to write the letter of termination". He says Mr Bullock advised he could have it typed in half an hour but complains he never received such a letter. Mr Laursen says he replied that's fine, he would leave now and take the work van home to remove his tools and someone could pick it up tomorrow. He says he then left.

[19] Mr Bullock's evidence, supported by Mr Ward, is that after the discussion about whether a representative should be present or not he (Bullock) raised the issue of vaccinations and the fact Mr Laursen was telling "*everyone that he was against vaccinations*", that he didn't believe in them and they were causing too many deaths. Mr Bullock says he went on to explain they were having difficulties finding ongoing work for him as he was unvaccinated and there was a brief discussion about what else he could do which did not amount to much. Mr Bullock says, "*My only reference to the internet was telling him not to read too much into what he sees on the internet*".

[20] Mr Bullock says he asked what are you going to do and if Mr Laursen had said he would get vaccinated that would have been that. That said, Mr Bullock concedes it was Mr Laursen's right not to do so but he had to allow an opportunity to think about it. Mr Bullock says Mr Laursen didn't give him a chance to do that as:

During the meeting Paul got a phone call from his wife. He told her he was being sacked. That was pretty much it, he stood up and said so you're sacking me now.

I said no, you're not sacked, I want to talk about this. All I wanted to do is find out from him what he wanted to do and how we could sort it all out. I didn't call the meeting to sack him but I did want to talk about the issue of redundancy with him.

[21] Mr Laursen agrees he received the call from his wife and says that was toward the end of the meeting.

[22] Mr Bullock goes on to say it is not true that he gave notice of termination of employment during the meeting. He says that when he talked about redundancy he said that if it happened the notice period would be whatever was in the employment agreement which was two weeks. Despite that, he accepts Mr Laursen clearly thought he had been sacked as he clearly reiterated that view before addressing some obscenities at Mr Bullock and then leaving. It is Mr Bullock's evidence that as Mr Laursen was leaving he again said "*You are not sacked, sit down and talk about this*" but that did not occur.

[23] Shortly thereafter Mr Laursen sent a text, apparently to all staff. It reads:

Thanks for spreading the lies Jim you gave me an ultimatum get vaccinated or leave with 2 weeks' pay I could work it out or leave now you told me that everyone else was upset that I was not vaccinated you and Steve can stand by your lies you should have allowed me to have a support person there your van is on te awa Ave the phone is in my letterbox

[24] According to Mr Bullock's evidence that was in fact the straw that broke the proverbial camel's back and made him realise that no discussion was possible with Mr Laursen and it was essentially time to call it a day. In his own words "I reached the decision that I would give him notice that he was being made redundant in accordance with his employment agreement".

[25] Mr Bullock then sent the following to Mr Laursen:

Hi Paul

I received a copy of the text you sent to the staff and I am surprised with your blatant lie. You were not sacked. If you had stayed in the meeting and listened to what I had to say instead of losing your temper and storming out, you would properly understand the situation.

As I told you in the meeting, because builders and clients want to see a vaccine pass from their contractors, we are obliged to comply with what they want. If they don't want unvaccinated people on their sites, that is their right. You told me and you confirmed in your text to everyone that your choice is not to be vaccinated. That's your right and I accept that, but I don't have any other position available for you at Coldrite. In those circumstances, I am giving you 2 weeks' notice of redundancy, effective today. This means your employment with Coldrite will terminate on 26 January 2022.

I intend talking to staff and setting the record straight.

[26] Once again Mr Laursen is adamant that email, sent to his Coldrite address, was never received. That this is highly likely I accept given there were demands from his representative as late as July stating that neither he nor his client had the letter and requiring a copy be forwarded.

[27] Notwithstanding that it is however clear that for whatever reason Mr Laursen acted on the belief he had been sacked, as did Coldrite. A final pay was subsequently furnished and Mr Laursen questioned the two weeks' notice on the grounds he understood the Government directive had mandated four weeks notice for those dismissed due to a lack of vaccination. Coldrite subsequently paid a further two weeks' notice.

[28] The dismissal was then challenged, leading to this investigation.

Analysis

[29] As already said Mr Laursen claims he was unjustifiably dismissed. Coldrite accepts a dismissal occurred but contends it can be justified "...by reason of redundancy based on conditions outside the employers control".

[30] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[31] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of s 103A of the Employment Relations Act (the Act) are enshrined in statute and a number have a procedural focus.¹

[32] While there is no legal definition of redundancy it has long been accepted it is a situation that requires two essential elements. The first is that the employer has a position(s) that is potentially surplus to its requirements and the second is that, as a result, that surplus results in the termination of specific individuals employment.

[33] That such an approach may be applied here is confirmed by the content of Mr Laursen's employment agreement. Contained therein is a provision, headed Redundancy, that reads:

In the event of the employer restructuring its business or operations, or any other circumstances arising that may result in the employee's position becoming surplus to requirements, the employer shall consult the employee before any final decision is made on staff surpluses.

[34] In other words a final decision on a staff surplus is dependant on there first being a position, in this case occupied by the employee, that is surplus to the employer's requirements.

[35] The evidence must lead to a conclusion that the preliminary requirement there be a surplus position cannot be met. That is because Mr Bullock openly accepted, when questioned, that Coldrite had work available and there was no need to shed staff or otherwise downsize.

¹ Employment Relations Act 2000 at ss 103A(3)(b) to (d)

[36] What therefore appears to have happened here is that the two elements required for a redundancy have been conflated and Mr Laursen immediately targeted due to his inability to perform work as opposed to the fact that his position was surplus. That is not a redundancy in either accepted parlance nor in the terms of Mr Laursen's employment agreement and I must therefore conclude it is substantively unjustified.

[37] Furthermore, and even if that were not the case, a redundancy requires prior consultation. That is once again reflected in the employment agreement and also an express requirement of s 4(1A)(c) of the Act. That consultation requires that as a minimum the employer advise the affected employee of the imperatives that may see the removal of his/her position and allow the employee a chance to respond or otherwise provide input as to how the issue may be addressed. The employer must then consider those responses before deciding how to act.

[38] In this instance the only meeting was that of 12 January and it is fair to say that that could not, having degenerated into a standoff, have complied with those requirements. It is clear and agreed that the meeting was truncated with Mr Laursen leaving in anger and in the belief he had been dismissed. It was for the employer to then allow a cooling period,² make it abundantly clear dismissal had not yet occurred then give Mr Laursen an opportunity to complete the consultation process. It didn't and for that reason I must conclude Mr Laursen's dismissal was not only substantively unjustified but also procedurally so.

[39] Even if that were not the case Coldrite would face a difficulty. It was Mr Bullock's evidence that was the final straw; the event which made him conclude there was no option but to abandon the discussion about potential redundancy and dismiss was the text. Its content, and the sending of an injudicious email is more akin to a disciplinary infraction as opposed to something that might confirm a possible redundancy. A disciplinary infraction would again require a discussion prior to the decision to dismiss yet there is no suggestion these concerns were raised let alone discussed. No relief is therefore available to Coldrite as a result of these events.

[40] Two further points need be made. The first relates to the fact I have referred to the Government's provision that employees who refuse vaccination in the face of a requirement

² *Kostic v Dodd* NZEmpC Christchurch CC14/07, 11 July 2007, Judge Couch

their job requires it may be dismissed with four weeks notice.³ That does not assist Coldrite as the limitation on employment in school grounds did not automatically preclude Mr Laursen from working for Coldrite elsewhere. A decision in that regard required either a process which led Coldrite to determine Mr Laursen must be vaccinated⁴ or a process, essentially a procedurally correct redundancy process, as required by the Schedule 3A s (3)(4) of the Act. Neither occurred.

[41] The second is a response to Coldrite's submission that in the event I find the redundancy decision flawed there can be no award of compensation as that would be the result of procedural failures as the substantive rationale was legitimate. This submission fails to recognise the statutory requirements of s 4(1A)(c) of the Act and cannot therefore succeed.

[42] The conclusion the dismissal is unjustified leads to the question of remedies. Mr Laursen seeks lost wages, a compensatory payment⁵ and costs. Originally he also sought an order the notice of dismissal be withdrawn and a certificate of service but these claims were withdrawn.

[43] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. While Mr Laursen seeks three months lost wages his actual loss was less. That is because he was ultimately paid four weeks in lieu of notice and commenced in replacement employment on 2 May 2022. The actual loss is therefore 11.4 weeks and it follows recompense for that period shall be ordered.

[44] Turning to compensation. Mr Laursen did not specify an amount in the statement of problem though something in the order of \$15,000 to \$20,000 was suggested in submissions. In support of his claim he spoke of financial difficulties, a feeling of segregation and depression. He says this left "us" feeling desperate and say he felt emotions ranging "...from total despair and anxiety to total boiling rage".

[45] It is the word "us" that raises issues with Mr Laursen's evidence regarding hurt being primarily expressed in the plural. This reflected the fact his wife also dismissed as a result of not being vaccinated. It was difficult to separate his angst from that felt jointly which detracts

³ Schedule 3A to the Employment Relations Act 2000

⁴ N 3 above at 3(1)(b)

⁵ Section 123(1)(c)(i) of the Employment Relations Act 2000

from the evidence as I cannot hold Coldrite responsible for Mr Laursen's partners hurt. Having considered the evidence I consider \$10,000 appropriate.

[46] Finally the conclusion Mr Laursen has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁶ The answer is no. The dismissal is essentially attributable to Mr Laursen's decision not to be vaccinated. As Mr Bullock conceded that was a choice open to Mr Laursen him and he (Bullock) was not mandating vaccination. Contribution cannot result from the exercise of a valid choice.

Conclusion and Orders

[47] For the above reasons I conclude Mr Laursen has a personal grievance in that he was unjustifiably dismissed. As a result I order the Coldrite Refrigeration & Air Conditioning Limited pay Paul Laursen:

- (a) \$14,774.40 (fourteen thousand, seven hundred and seventy four dollars and forty cents) gross as recompense for wages and holiday spay there-on lost as a result of the dismissal; and
- (b) A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mr Laursen may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Coldrite will 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.⁷

Michael Loftus
Member of the Employment Relations Authority

⁶ Section 124 of the Employment Relations Act 2000

⁷ www.era.govt.nz/assets/Uploads/practice-note-2.pdf