

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 31  
3112492

BETWEEN                      MARK AITKEN  
Applicant

AND                              WELDING TECHNOLOGY  
LIMITED  
Respondent

Member of Authority:              Peter van Keulen

Representatives:                      Tony Barrow, advocate for the Applicant  
Russel Drake, advocate for the Respondent

Investigation Meeting:              24 March 2021

Submissions and further  
information received:              Up until 23 December 2021 from the Applicant  
Up until 4 May 2021 from the Respondent

Date of Determination:              8 February 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Mark Aitken was employed by Welding Technology Limited (WTL) from 2002 as a Sales Representative.

[2]     On 23 March 2020, when New Zealand entered into Alert Level 3 lockdown in response to the Covid-19 pandemic and with the move to Alert level 4 pending, WTL temporarily closed its operations except for any work supporting essential businesses.

[3] As a result of that temporary closure Mr Aitken was not required to attend work, he left his work car and mobile phone with WTL and was then paid only the Government subsidy of \$585.00 per week from 25 March 2020.

[4] Then on 17 April 2020, before Mr Aitken returned to work WTL commenced consultation over a potential restructure. That consultation culminated in Mr Aitken's employment being terminated on 12 June 2020, on the basis of redundancy.

[5] Mr Aitken had three areas of complaint arising out of these events:

(a) That he was entitled to keep and use the company car and mobile phone during the temporary closure and that he should have been paid more than the Government subsidy during this time.

(b) That the restructure and his subsequent dismissal was predetermined as evidenced by, amongst other things, the removal of his company car and mobile phone, and his dismissal was not justified as the restructure was just a sham and failed to properly account for or consider all of the work he undertook in his role.

(c) That his holiday pay had not been calculated correctly at the end of his employment for that financial year.

[6] Mr Aitken raised personal grievances, a holiday pay claim and a wage arrears claim with WTL based on these complaints.

[7] WTL responded to the personal grievances and claims by denying liability. In particular its position was:

(a) Mr Aitken's holiday pay had been calculated correctly and nothing was owing to him.

- (b) Mr Aitken had agreed to being paid only the Government subsidy during the temporary closure so there was no basis for the unjustifiable disadvantage grievance and wage arrears claim relating to that issue.
- (c) Mr Aitken had no contractual right and/or no business reason, to use the company car or mobile phone during the temporary closure so there was no disadvantage to him by it taking those from him at the time, and therefore there was no basis for his unjustifiable disadvantage grievance relating to those issues.
- (d) The restructure and resulting redundancy for Mr Aitken was substantively justified and was implemented through a procedurally fair process, so there was no basis for the unjustifiable dismissal grievance.

### **The Authority's investigation**

[8] The parties were unable to resolve the personal grievances, the holiday pay claim and the wage arrears claim so Mr Aitken lodged a statement of problem in the Authority based on these.

[9] I investigated Mr Aitken's claims set out in his statement of problem by receiving written evidence and documents and holding an investigation meeting on 24 March 2021.

[10] In my investigation meeting the witnesses who had provided written evidence swore an oath or gave an affirmation, they confirmed their statement and then gave oral evidence in answer to questions from myself and the parties' representatives.

[11] I then received and assessed written submissions and further information from the parties' representatives up until 4 May 2021.

[12] As a result of the investigation meeting and the exchange of further information the parties entered into negotiations. I understand this included an audit of Mr Aitken's holiday

pay entitlements and payments, and discussion around the outcome of that audit and any resulting payment to Mr Aitken.

[13] In the end the parties resolved Mr Aitken's holiday pay claim and advised Authority of this on 23 December 2021.

[14] The parties did not resolve Mr Aitken's other claims that I had investigated, and therefore this determination deals with those claims.

[15] As permitted by 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.

### **Unjustifiable action causing disadvantage and wage arrears**

#### *Issues*

[16] Mr Aitken's unjustifiable action causing disadvantage personal grievances and the wage arrears claims that I investigated are:

- (a) The unjustifiable disadvantage grievance and wage arrears claim based on Mr Aitken only being paid the government subsidy during the temporary closure of WTL's business.
- (b) The unjustifiable disadvantage grievance based on Mr Aitken not being able to use the company car and mobile telephone during the temporary closure of WTL's business.

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

[18] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

(a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?

(b) If so, were the employer's actions unjustified and did they cause any disadvantage to the employee's employment or a condition of employment?

[19] Mr Aitken's wage arrears claim is based on him not being paid the full amount of his wages during the temporary closure of WTL's business under Alert Level 4. The issue arising in this claim is whether WTL breached Mr Aitken's terms of employment relating to his wages by the payments it made to him during the temporary closure of WTL's business.

*The events giving rise to Mr Aitken's unjustified action causing disadvantage grievances and wage arrears claim*

[20] On 23 March 2020, Prime Minister Jacinda Ardern announced that New Zealand was moving into Covid-19 Alert Level 3 lockdown immediately and then Alert Level 4 in 48 hours.

[21] Wayne Whittaker and Ruth Whittaker, the shareholders and directors of WTL and the operators of WTL's business, decided they had to close WTL's workshop and various welding operations as the business was not an essential service. It transpires that WTL's workshop and the business were shut down from 25 March 2020 during the Alert Level 4 (the Lockdown Closure).

[22] Notwithstanding this, Mr and Mrs Whittaker believed there might be some work that could be completed from home such as answering customer queries and some work that could be deemed as essential such as providing supplies or parts to essential businesses if required. However, they believed that work could be undertaken by them and their son who was an employee of WTL and lived at the same house as them.

[23] This meant WTL employees would not be required to work during the Lockdown Closure as there was no work for them to do from home and they would not be allowed to attend at the workshop. So immediately after the Alert Level announcement on 23 March 2020 Mr Whittaker met with the WTL employees and discussed the implications of the Alert Level changes on the WTL business.

[24] Mr Whittaker explained to the employees that the WTL business would have to shut down at Alert Level 4 and employees would be at home and not working. Mr Whittaker discussed two aspects in particular:

- (a) That employees could go home that afternoon and not return to work during the two-day period of Alert level 3 in order that they could prepare for going into Alert Level 4.
- (b) That during Alert Level 4 there would be reduced income for WTL (as it would only be undertaking support work for essential services) and this could mean reduced wages being paid to the employees subject to the Government requirements and assistance – at that stage there had been an indication of a subsidy being paid by the Government but no details had been provided.

[25] WTL employees discussed and agreed to leaving work that afternoon and not returning during the two days until Alert Level 4. WTL agreed to pay WTL employees full wages for these two days. In Mr Aitken's case it transpired that WTL inadvertently paid his wages for these two days out of his annual leave – but it rectified this when it became aware of the issue, reinstating two days of annual leave to Mr Aitken.

[26] WTL employees all appeared to accept the prospect of reduced wages during the Lockdown Closure with all of them signing a form to show they accepted that wages would be paid at a reduced rate to reflect the closure of the business. It is clear from the evidence that at the time of signing neither WTL nor the employees knew what that rate would be as there was limited information on the Government subsidy and employers' obligations in respect of the

subsidy. So, the form signed by WTL employees on 23 March 2020 was not an agreement to be paid at a particular rate during the Lockdown Closure, rather it was an indication that employees accepted that reduced payments would be made during that period but it remained the position that WTL would need to consult and get agreement to payment at any specific rate.

[27] After meeting with the employees, Mr Whittaker met Mr Aitken separately and told him WTL would need the company car and mobile phone during the Lockdown Closure – this was because Mr Aitken would not be required to work and Mr Whitaker (or the two members of his family) would attend to dealing with any customer queries and/or deliveries during this time.

[28] Mr Aitken says he was unhappy with this proposal as he could have dealt with any customer queries during the Lockdown Closure and because the company car and mobile phone were not only for work purposes but also personal use outside of work albeit at his own cost (although he says he never had to pay for personal calls on the mobile phone, but he did pay for some petrol in the company car). But Mr Aitken handed over the mobile phone and left the company car at WTL's workshop.

[29] On 8 April 2020 WTL sent a letter to all of its employees in relation to wages for the two weeks of Alert Level 4 that had been completed (25 March 2020 – 8 April 2020) and the next two weeks (9 April 2020 – 22 April 2020). In that letter WTL referred to the temporary closure of the business arising out of Alert Level 4 and then stated:

To reduce the impact this closure will have on our company and the considerable loss of revenue. We are asking you to assist in the continuity of our business, by accepting the government subsidy being offered for the period of the lockdown.

WE are asking that you accept the subsidy the government is offering of gross \$585.00 per week for the coming fortnightly pay ending Wednesday the 8<sup>th</sup> of April and this will be paid into your accounts on Thursday 9<sup>th</sup> of April.

For the fortnight ending the 22<sup>nd</sup> of April, we will be offering everyone the government subsidy of gross \$585.00 per week, this will also include the two statutory days of Good Friday 10<sup>th</sup> of April and Easter Monday 13<sup>th</sup> of April be paid into your accounts on Thursday the 23<sup>rd</sup> of April.

[30] The letter concluded by offering the employees the opportunity to speak to Mr Whittaker to discuss the proposal if they wished, otherwise WTL invited them to confirm their acceptance of the proposal to pay them only the Government subsidy for the first four weeks of the Lockdown Closure.

[31] Mr Aitken responded to this letter by text message to WTL advising:

Yes, I understand, very challenging times, I accept the government subsidy of \$585 per week. Hope everyone is coping, we are all in the same boat on this, stay safe, cheers

[32] WTL then paid Mr Aitken \$585.00 (gross) for the two fortnights work until 22 April 2020.

[33] Mr Aitken's complaints are that WTL:

(a) Only paid him the Government wage subsidy for the two fortnightly pay periods of 25 March 2020 – 8 April 2020 and 9 April 2020 – 22 April 2020.

(b) Did not allow him to have the company car and mobile phone for personal use during the Lockdown Closure.

[34] Both of these actions occurred – WTL does not dispute this but says the actions did not cause a disadvantage to Mr Aitken and/or were justified.

*Were WTL's actions unjustified and did they cause a disadvantage Mr Aitken's employment?*

[35] The question of whether there was a disadvantage to Mr Aitken's employment because he did not have the company car and mobile phone for personal use during the Lockdown Closure is less straight forward. The starting point is to establish what Mr Aitken's terms and conditions were in relation to the company car and the mobile phone.

[36] Mr Aitken says both the company car and the mobile phone were provided to him for work and personal use. He says he used them for personal calls and travel including when on holiday and never had to pay for personal phone calls – although it appears the cost of ay

personal calls was covered by the mobile plan that WTL had so there was never any additional cost to be passed for personal calls – and on occasion he would pay for petrol in the company car such as when he had used the car for holiday trips.

[37] Mr Aitken says that Mr Whittaker told him he could use the mobile phone and the company car for personal use so long as he did not “go silly on it” i.e., not abuse the personal use aspect by using them too often. Mr Aitken also relies on an unsigned employment agreement from August 2016, which he says reflects the terms of his employment notwithstanding that it was not signed by him. And the relevant clauses in that agreement provide both the mobile phone and company car can be used for personal use with the cost of personal calls and petrol for personal driving being paid by him.

[38] WTL says Mr Aitken had a limited right to use the mobile phone and company car for personal use, this being at its discretion based on cost, amount of use and whether the phone and car would be required by others when Mr Aitken was not working. It says Mr Aitken cannot rely on the 2016 draft employment agreement as this was never agreed. WTL says a later 2019 draft employment agreement represented the contractual right more appropriately as it recorded the car was only for work purposes and WTL could require it to be returned for periods of two or more days if Mr Aitken was absent from work.

[39] So clearly there is a dispute between the parties as to the terms and conditions of employment relating to the mobile phone and company car – and this dispute creates a problem for Mr Aitken’s personal grievance.

[40] Section 103(3) of the Act provides:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[41] This means where there is an action by an employer, which an employee claims is unjustified, but that action arises out of an employer acting on the application of a contractual

right, with that application being the product of a disputed interpretation, application or operation of the term of employment then that cannot form the basis of an unjustifiable action causing disadvantage personal grievance. And that is what arises in this personal grievance. The fact that I must resolve the interpretation of the contractual term relating to Mr Aitken's right to use the mobile phone and the company car in order to determine if there is a disadvantage to Mr Aitken and/or whether WTL acted justifiably highlights that.

[42] This means there cannot be an unjustifiable disadvantage arising out of WTL's actions in relation to the company car and mobile phone that Mr Aitken had been provided.

[43] Turning to the payment of the Government subsidy, the facts show that WTL had a substantive basis for doing this, it consulted over it (albeit briefly) and it had agreement from Mr Aitken to do as it did. On this basis WTL's actions are justified and they did not cause any disadvantage to Mr Aitken's employment.

[44] It also follows that paying Mr Aitken only the Government subsidy during the Lockdown Closure WTL did not breach Mr Aitken's contractual rights – he had agreed to being paid the reduced rate, so there was not breach.

### *Conclusion*

[45] Mr Aitken's unjustifiable action causing disadvantage personal grievances and the wage arrears claims are dismissed.

### **Unjustifiable dismissal**

#### *Issues*

[46] Mr Aitken's unjustifiable dismissal grievance is based on WTL's restructure and his dismissal for redundancy.

[47] The question for an unjustifiable dismissal personal grievance is simply was the dismissal justified? Assessing justification involves applying s 103A of the Act, the test for

justification. In *Grace Team Accounting v Brake*, the Court of Appeal considered s 103A in a redundancy situation and said at [85]:<sup>1</sup>

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[48] So, the question of whether a dismissal, in a redundancy situation, meets the justification requirements of s 103A of the Act turns on whether an employer can show that its decision to restructure and then dismiss an employee for redundancy was genuine and in coming to those decision the employer met the notice and consultation requirements of the Act.

*Was the restructure and decision to dismiss Mr Aitken genuine?*

[49] I am satisfied that based on the evidence I heard, the decision to restructure WTL's sales operations was based on a decision to move sales operations away from in person sales to an on-line business model. This was a business structure that had evolved for WTL over time; it began through use of a website and online sales through e-portals in conjunction with the normal sales function and it was expanded and developed during the Lockdown Closure with WTL increasing its marketing, creating a stronger social media presence and improving its platform for online sales.

[50] Once these workstreams reached a critical point WTL began thinking about restructuring its sales roles to dispense with having sales representatives on the road. That process informed the possible restructuring of roles which would disestablish the sales representative roles; WTL formulated a proposal based on this and then consulted over the proposal. This is what informed the decision to restructure and the decision to terminate Mr Aitken's employment for redundancy.

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<sup>1</sup> See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541.

[51] Based on this I find that Mr Aitken's dismissal for redundancy was genuine; it followed from a business decision to change the marketing and sales approach and then the sales function with WTL adopting an online presence and sales platform.

*Was the process of consultation a fair one?*

[52] Whilst WTL's restructure was genuine I must still consider whether Mr Aitken's dismissal was justified. In *Grace Team Accounting*, the Court of Appeal confirmed that the other aspect of the justification of a dismissal in a redundancy situation is whether the process by which the consultation over the restructuring and dismissal for redundancy was a fair one. And, in this regard, the requirements of s 4 of the Act are relevant.

[53] In *Stormont v Peddle Thorp Aitken Limited*<sup>2</sup> Judge Inglis summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[54] Based on s 4 and s 103A of the Act and the guidance in *Stormont* I need to consider:

- (a) Did WTL set out its proposal with sufficiently precise information for Mr Aitken to be able to respond to it, i.e., did Mr Aitken properly know what was proposed before he gave his views on it?
- (b) Did WTL provide the necessary information in a timely manner?

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<sup>2</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

- (c) Did Mr Aitken have an appropriate opportunity to respond to the proposal before any decisions were made by WTL?
- (d) Did WTL consider Mr Aitken's responses before making conclusions on the proposal?
- (e) Overall, did WTL have an open mind such that consultation was not a charade?

[55] WTL's obligations in regard to consultation do not stop with consultation over the restructure. Once consultation on the restructure was completed and WTL decided to move forward and disestablish the sales representative roles, it needed to consult with Mr Aitken over alternatives to dismissal.<sup>3</sup> I will therefore also consider if WTL met this obligation.

[56] I am satisfied that:

- (a) WTL set out its restructuring proposal clearly and adequately for Mr Aitken and in a timely manner – this was in a written proposal provided to Mr Aitken on 17 April 2020. In answer to cross examination questions Mr Aitken conceded he understood what was being proposed based on the WTL document and that he was able to respond to the proposal.
- (b) Mr Aitken did have an opportunity to respond to WTL's restructuring proposal – Mr Aitken set out his response to the proposal and his potential dismissal for redundancy in two undated fulsome documents.
- (c) WTL did consider Mr Aitken's responses before coming to any decisions.
- (d) WTL did have an open mind and any decisions on the restructure and redundancy were not pre-determined.

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<sup>3</sup> Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102.

[57] In the investigation meeting Mr Aitken placed a lot of emphasis on his role and the additional tasks he did at WTL, including electrical work and various tasks in the workshop. The argument being WTL's decision was not substantively justified as there was additional work for him to do and WTL did not follow a fair process because it did not properly consider this aspect in particular.

[58] I do not accept this argument. I am satisfied that WTL considered what Mr Aitken said about his tasks both in terms of how that might impact the restructuring proposal and Mr Aitken's continued employment either in his sales role, with a focus on these other aspects or in a redeployed workshop role. At the end of that the conclusions WTL reached about Mr Aitken's role and the need to restructure and then terminate his employment for redundancy were ones that a fair and reasonable employer could have reached in all of the circumstances.

#### *Conclusion on unjustifiable dismissal*

[59] Mr Aitken's dismissal for redundancy was justified and his personal grievance for unjustifiable dismissal is dismissed.

#### **Conclusion**

[60] Mr Aitken's claims are dismissed.

#### **Costs**

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In this regard I note that whilst Mr Aitken was not successful with the claims that I determined, he did also lodge a holiday pay claim that I investigated but it was resolved prior and did not require me to determine it; the holiday pay claim would appear to have been successful in part and would likely have been successful on my determination if it had that been required.

[62] If the parties are not able to resolve costs between them then any party seeking an order for costs may lodge and serve a memorandum on costs within 14 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 any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority