



Employment Court of New Zealand

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Drivesure Limited v McQuillan [2022] NZEmpC 176 (22 September 2022)

Last Updated: 28 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 176](#) EMPC 45/2022

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN DRIVESURE LIMITED

Plaintiff

AND MATTHEW MCQUILLAN

First Defendant

AND SACHIN RAJ

Second Defendant

AND MOHAMMED RAFIQ

Third Defendant

Hearing: 12-13 July 2022 (Heard at Auckland)

Appearances: N Tetzlaff, counsel for plaintiff

R Narayan, advocate for defendants

Judgment: 22 September 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] The defendants were employed by Drivesure Limited (Drivesure), primarily at its Penrose site (PCC), until they were made redundant on 8 April 2020.

[2] The Employment Relations Authority (the Authority) found there were flaws in the redundancy process that amounted to unjustifiable actions causing disadvantage.

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It ordered Drivesure to pay each of the defendants \$8,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).¹

[3] In a subsequent costs determination, the Authority ordered Drivesure to pay the defendants a total contribution to costs of \$8,000, to be divided between them in equal share, and to reimburse them total disbursements of

[4] Drivesure challenges the substantive determination on a non-de novo basis. It also challenges the costs determination.

[5] The parties identified the key issues as:

(a) whether Drivesure unfairly and unjustifiably constrained its consultation process, disadvantaging the defendants:

(i) by not shifting the meeting scheduled for 24 March 2020; and

(ii) by not consulting with the defendants regarding its reduction in the notice period from the originally proposed four weeks to the contractual two weeks;

(b) whether any flaws in the consultation process were more than minor and resulted in the defendants being treated unfairly;

(c) whether the Authority was correct to set compensation at \$8,000 for each defendant without reduction for contribution; and

(d) whether the Authority was correct to require Drivesure to pay costs of

\$8,000 and disbursements to the defendants (jointly) based on the ordinary tariff, minus one day.

[6] In the Authority, the defendants had claimed their dismissal was unjustifiable. The Authority found their claims were best considered as disadvantage grievances rather than dismissal grievances.³ The defendants have not challenged that finding.

[7] For the reasons set out in this judgment, Drivesure's challenge is unsuccessful.

¹ *McQuillan v Drivesure Ltd* [2021] NZERA 445 (Member Urlich).

² *McQuillan v Drivesure Ltd* [2021] NZERA 490 (Member Urlich).

³ *McQuillan*, above n 1, at [49].

Drivesure's services contract was cancelled

[8] The case involves a restructuring that ran into the nationwide lockdown in March and April 2020. That timing was unfortunate for all concerned.

[9] Drivesure provides vehicle testing services at various sites. It had a contract with Penrose Compliance Centre Ltd to carry out such services at PCC. By letter dated Friday, 6 March 2020, Penrose Compliance Centre Ltd unexpectedly terminated that contract, effective from 8 May 2020 (or an alternative agreed date within the two-month notice period). Mr Greg Ranson, the director of Drivesure, attempted to get Penrose Compliance Centre Ltd to reconsider the termination and discuss options, but it was not open to negotiation, unless it was to bring the termination date forward.⁴

[10] On Tuesday, 10 March 2020, Drivesure advised the defendants of the termination of the contract with Penrose Compliance Centre Ltd.

[11] In letters dated 17 March 2020, Drivesure wrote to each of the defendants proposing that all the positions at PCC would be made redundant. Drivesure said it had considered redeployment to other sites, but that was not possible. It proposed that if the redundancy was implemented, the defendants would receive four weeks' notice of the termination of their employment, but that no redundancy compensation would be payable. The defendants' employment agreements provided for two weeks' notice on redundancy, so the four weeks in the proposal would have been an enhancement of their contractual entitlements.

[12] At the time the proposal was advised to the defendants, Drivesure expected that they would be able to work out their notice.

[13] Drivesure wanted to meet with the defendants to receive feedback on the proposal, with a meeting suggested to take place at 10 am on Tuesday, 24 March 2020.

[14] There was some correspondence between Mr Ranson and the defendants after the letter of 17 March,

including a request from Mr McQuillan on Sunday 22 March

4 The contract was extended to 10 July 2020, but that did not happen until 6 May 2020.

to defer the meeting until Thursday 26 March as his legal advisor was busy on the Tuesday. Drivesure was not prepared to defer the meeting until the Thursday but offered to meet any time on the Monday or Tuesday, including before work and in the evening. Mr McQuillan responded the following morning, Monday, 23 March 2020, suggesting a meeting time of 5 pm on Tuesday, 24 March 2020.

[15] As is well known, at approximately 1.30 pm on Monday, 23 March 2020, the Prime Minister announced that New Zealand was immediately moving to Alert Level 3 under the Government Alert Level Framework established to address the COVID-19 Pandemic, and would move to a strict Alert Level 4 lockdown two days later. It was after that announcement that Mr Ranson advised that he intended to make a decision on the redundancy proposal by Wednesday morning, 25 March 2020.

[16] The defendants sent an email at 4.02 pm on 23 March 2020, advising that:

... due to current circumstances we all feel we are not in the right frame of mind to have a meeting and we have all decided we will not agree to have the meeting at this stage with the current situation.

Thanks the team at pcc.

[17] The following morning the defendants sent a note to Mr Ranson:

Hi Greg, the team here at PCC wish to inform you that we're not prepared to have our meeting today for the following reasons.

- Due to current COVID19 situation here in NZ, we're not in the right frame of mind.
- Health and safety reasons as the meeting will be held in a small room with many people.
- Our legal advisor is unable to attend today's meeting and a fair and reasonable employer will defer the meeting until our legal advisor is available.
- The government has agreed to freeze no cause termination, which redundancy is a no cause termination.

[18] However, Drivesure considered that because of the lockdown, it was critical to act quickly to preserve the whole Drivesure business. Mr Ranson responded to the defendants on 24 March, in a letter sent to the third defendant, Mr Rafiq, addressing the points made but saying Drivesure wished to proceed with a meeting. He asked the defendants (through Mr Rafiq) whether they would like to arrange a meeting that day, either in person or remotely. He said that if the defendants did not wish to meet that

day, then they were to provide any further feedback on the proposal in writing by 10 am on Wednesday, 25 March 2020, after which Drivesure would consider all feedback received and make a decision.

[19] Each of the defendants responded:

(a) Mr McQuillan asked some questions around the selection process for staff affected and then raised a number of objections around the process and decision-making of Drivesure, concluding by asking if Drivesure would be prepared to attend mediation.

(b) Mr Raj questioned the rationale for the proposed redundancy, including the assessment that PCC was his fixed site.

(c) Mr Rafiq advised that he believed the decision to make his position redundant was unfair and asked Drivesure to consider his history and experience with Drivesure. He proposed making changes to his current contract: either changing his workplace to another Drivesure site in South Auckland, reducing his working hours or days, or helping other business aspects where possible until the business had recovered to a stable position.

[20] On 25 March 2020, at around 2.45 pm, Mr Ranson emailed each of the defendants advising that the proposal was not affected and remained the same, but that an update was being provided in relation to the defendants' notice period being:

...if the proposal goes ahead, [the notice period] will remain at 2 weeks in accordance with your employment agreement

rather than the 4 weeks which was originally proposed on the basis you would be working out that notice.

This is because circumstances have obviously changed dramatically since 17 March whereby all compliance services will now cease (including at the PCC site) from close of business today as a result of the government lock down.

[21] Mr Ranson did this as he thought that, in the circumstances, it would be “unwise, imprudent and perhaps even bordering on negligent”, for Drivesure to offer to pay out more than the contractual period of notice. Mr Ranson confirmed that the

defendants would not be required (and not able) to work out their notice period but would be paid in full for that two-week period.

[22] The email concludes:

In terms of the decision on the proposal itself, we understand we have now received all feedback and we will be making a decision later today when the management team are able to meet virtually.

[23] On receipt of that email, Mr Raj requested mediation and asked to work out his two weeks’ notice. Mr McQuillan repeated his request for mediation and also said he wanted to work out his notice, which he said he was entitled to do.

[24] The defendants’ employment was terminated by letter dated 25 March 2020, with the termination effective on 8 April 2020. The defendants received their final pay on 15 April 2020.

Unjustifiability – the principal question

[25] The key issue for the Court is whether Drivesure’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.⁵

[26] Relevantly, the Court must not determine an action to be unjustifiable solely because of defects in the process followed by Drivesure, if the defects were minor and did not result in the defendants being treated unfairly.⁶

[27] The Court is also required to consider the extent to which the actions of the defendants contributed towards the situation that gave rise to any personal grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded accordingly.⁷ In considering contribution, the Court looks at causation, proportionality and justice. For conduct to require reduction, it not only must be causative of the outcome, it must also be blameworthy.⁸

⁵ [Employment Relations Act 2000, s 103A\(2\)](#).

⁶ [Employment Relations Act 2000, s 103A\(5\)](#).

⁷ [Employment Relations Act 2000, s 124](#).

⁸ [Goodfellow v Building Connexion Ltd t/a ITM Building Centre \[2010\] NZEmpC 82](#) at [49].

The process ended up being rushed

[28] One cannot help but have some sympathy for Drivesure in the circumstances it found itself. The termination of its contract with Penrose Compliance Centre Ltd was unexpected. The staff affected were advised of the termination within two working days of the letter from Penrose Compliance Centre Ltd, and the redundancy proposal was set out a week later in the letter of 17 March 2020.

[29] The time then allowed for responding to the letter of 17 March 2020 was not unreasonable. The defendants responded; Mr Ranson engaged with the issues that were raised and gave considered responses to each of the defendants.

[30] The request for a meeting on 24 March 2020 would, in normal circumstances, have been an appropriate step. When the time suggested did not suit Mr McQuillan, Drivesure offered to change the time, and Mr McQuillan suggested a new time that fitted Drivesure's timeframe.

[31] Neither the letter of 17 March nor the emails in the days following that letter suggested that the decision on the proposed redundancy would be made immediately following the meeting. As the contract with Penrose Compliance Centre Ltd was ending on 8 May, it might reasonably have been expected that the decision would be made and communicated on or around 10 April, being 4 weeks before the termination date.

[32] The announcement from the Prime Minister on 23 March 2020 changed the landscape. While I acknowledge that Drivesure was facing uncertainty from that time, so were the defendants who would have realised that they would be unlikely to obtain new employment during the lockdown.

[33] In the circumstances, Drivesure should have allowed more time for a meeting to occur (presumably remotely); it was unreasonable to expect the defendants to meet on 24 March 2020.

[34] The change from four weeks' notice to two weeks' notice was significant in the circumstances. The defendants were only advised of this change to the proposal mid-

afternoon on 25 March 2020, with their employment being terminated shortly thereafter. There was simply no time for them to properly consider the issue and take advice.

[35] Even taking account of the circumstances that Drivesure was facing, the last part of the process was unduly rushed. It was not a process that was open to a fair and reasonable employer in all the circumstances.

The flaws were more than minor

[36] The Authority did not find that the dismissal was unjustifiable. It found that the actions of Drivesure were unjustifiable, leading to a disadvantage to the defendants.

[37] It is clear that the process was upsetting to the defendants. It caused them more than minor injury to their feelings. While some distress over the redundancies was inevitable, that was exacerbated by the rushed process.

[38] Compensation is properly payable.

The defendants did not contribute to the situation

[39] I do not consider that there was any blameworthy conduct on the part of the defendants or that they failed to act in good faith, as alleged by Drivesure. They engaged with Drivesure throughout the process. On 22 March 2020, after Mr McQuillan first raised concerns about the timing of the meeting, he readily agreed to a date in the period suggested by Drivesure. It was only after the lockdown was announced that the defendants pulled out of the 24 March 2020 meeting. However, they were seeking a deferment of the meeting (and/or mediation) rather than refusing to meet at all.

[40] In my view that was not surprising. There were a number of things going on at the time, even apart from any personal issues that the defendants may have had. There were issues with obtaining advice from their legal advisor, and there was

uncertainty around what the Government was proposing by way of protections and support.

[41] It is not inconsistent with good faith for the defendants to have wanted to have the meeting deferred, including so they could obtain legal advice to clarify the situation.

[42] It follows that I do not consider any reduction in compensation under [s 124](#) of the Act is warranted.

Authority remedies appropriate

[43] The compensation awarded by the Authority was \$8,000 for each defendant. It is a relatively modest order for compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act. The award is appropriate for the finding of unjustifiable disadvantage. I see no basis to reduce that award.

No basis to reduce costs

[44] The challenge to the Authority's determination on costs flowed from the challenge to the substantive determination. Drivesure accepted that if the Court decided wholly in favour of the defendants, there is no basis to change the Authority's costs determination. That is the position here.

[45] The Authority reduced the costs from those usually awarded for a three-day investigation of \$11,500 to \$8,000, which reflected that the defendants were not wholly successful and that the unsuccessful part of their claim extended the hearing time. There is no dispute over the reasonableness of the disbursements.

[46] The costs awarded were reasonable in the circumstances and stand unchanged.

Conclusion

[47] In conclusion:

- (a) Drivesure is to pay each of the defendants \$8,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act;
- (b) Drivesure is to pay the defendants a total contribution to costs in the Authority of \$8,000, to be divided between them in equal share, and to reimburse them total disbursements of \$284.68.

[48] These payments are to be made within 28 days of the date of this judgment.

The defendants are entitled to costs in the Court

[49] The parties agreed that this matter is appropriately allocated category 2A for costs purposes under the Practice Directions Guideline Scale.⁹ The defendants are entitled to costs, which ought to be able to be agreed.

[50] If that does not prove possible, the defendants may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. Drivesure is to respond by memorandum filed and served within 14 days thereafter, with any reply from the defendants filed and served within a further seven days. Costs then will be determined on the papers.

J C Holden Judge

Judgment signed at 2.30 pm on 22 September 2022

9 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.