IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2021] NZERA 139
3114452

	BETWEEN	DAVID HEDGMAN Applicant
	AND	WARNER CONSTRUCTION LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Dave Cain, advocate for the Applicant Susan Hughes QC, counsel for the Respondent
Investigation Meeting:	9 April 2021 at New Plymouth
Submissions Received:	At the investigation meeting
Date of Determination:	12 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, David Hedgman, claims he was unjustifiably dismissed by the respondent, Warner Construction Limited.

[2] Warner accepts it dismissed Mr Hedgman but considers it attributable to a justifiable redundancy.

Background

[3] Mr Hedgman was engaged by Warner as a truck driver/labourer commencing 9 March 2020. While the company is New Plymouth based, he was engaged to work in Whanganui.

[4] Work ceased during the COVID level 4 lockdown with Mr Hedgman returning to work after the national change to level 3. The change occurred with effect 28 April but the parties agree the return was delayed by a few days while various arrangements were made.

[5] Mr Hedgman says that on Friday 22 May 2020 he returned to his depot, parked his truck and spoke to his foreman who, he says, … *told me that I was going to be terminated and that the boss was coming in Monday to give me the paperwork and that he was pre-warning me for Monday.* Mr Hedgman says that when he asked *why me* the foreman said it was his (the foreman's) choice as to which driver he let go and *I chose you*.

[6] As events transpired, Mr Hedgman was not approached on the Monday. He says he asked the foreman what was going on and was simply told *we're here to work* which he accepted. He says he made a further query of the Project Manager the next day and was told the Manager didn't know what was happening and *that everything was coming from the top*.

[7] Mr Hedgman says nothing further was said till the following Friday when he was having a post work drink and the foreman simply said *See you later, don't come Monday.* While not referred to when giving oral evidence Mr Hedgman's written statement says he was also told this was because he *didn't have a job from that point onwards.*

[8] Mr Hedgman says he returned home where he found he had received an email from Warner that day. It contained a letter which reads:

> Dear David
>
> **Staff Redundancies due to Economic Downturn form Covid 19**
>
> As discussed at our last toolbox meeting when we returned to work from lockdown and the text sent to you on the 24th May 2020, we are presently having to restructure some areas within the company.
>
> This is due to a significant downturn in income, the economy and the substantial fallout from COVID 19 which has resulted in the company having to make some serious financial decisions for its survival.
>
> With this in mind we confirm that we are making your role and others redundant from the end of the 12 week Covid 19 lockdown period.
>
> We will continue to do everything we can to get the viability of the Company back to where we might be in a position to revisit this at a later time, but we cannot promise anything as we don't know what the future will bring.

> We thank you for your support and are sorry that the current Economic climate has driven us to this position. As a Company we have tried very hard to keep all staff employed which is now just not possible.
>
> We hope by giving you this time in advance notice that it may help in giving you the opportunity to find employment before the 12 week Covid 19 payments stop.
>
> We will happily give verbal references if you wish us to and wish you all the best in the future.

[9] Mr Hedgman denies he received a text of the kind referred to in the letter though one did come the following Tuesday. It read:

> You last day of work was Friday so you do not need to come in any more. The subsidy ends on the 14th of June so you will get $585.80 for the next two weeks plus you holiday pay in the last week.

[10] Mr Hedgman says he was unaware of the possibility he might be made redundant as a result of a toolbox meeting as stated in the letter. He says the only potentially relevant toolbox meeting he attended was one he joined in New Plymouth by chance and having been directed to go from Whanganui to collect some equipment. He says once he arrived he saw staff at a toolbox meeting which he chose to join. He says when he joined the team was talking about new protocols and how they would operate under lockdown level 3. He accepts he signed a form to say he had been present even though he was not there at the start of the meeting and, if it was discussed, he heard nothing about potential redundancies.

[11] Mr Hedgman did not return to work though he received the wage subsidy Warner had applied for on his behalf till 14 June which was the expiry date initially determined by government.

[12] With one exception to which I shall return, Warner does not dispute Mr Hedgman's evidence.

[13] Warner's position is it simply had no choice but to make staff redundant. It says the organisations with which it would normally contract, particularly local authorities, put a hold on all new civil work as a result of being uncertain as to the effect of covid and the need to be fiscally prudent. As a result it had some 60% of its contracts cancelled almost immediately and its initial response was to address what it saw as an excess of staff. That said it held a hope things would improve and adopted what turned out to be a piecemeal approach trying to retain as many staff as possible.

[14] The initial group laid off numbered 16 and Mr Hedgman was one of those. It is here the factual disagreement arises and this relates to the claim the foreman selected Mr Hedgman, who was then one of two drivers engaged in Whanganui, for redundancy. Warner says the decision was made by a group of senior staff meeting to address what was considered a crisis. It says the choice of Mr Hedgman was attributable to an application of the "last on/first off" principle. Warner also says it firmly believed he would easily get another job as its experience was heavy vehicle drivers were hard to come by.

[15] As events transpire, it is also clear the situation did not improve with the contracting division, within which Mr Hedgman was employed, now having shed 95% of its pre-covid staff.

Discussion

[16] As already said Mr Hedgman claims he was unjustifiably dismissed. Warner accepts the fact of dismissal and therefore accepts it must justify the dismissal.

[17] It is well established an employer considering an action which might have an adverse impact on an employees' continuing employment must give that employee access to relevant information and an opportunity to comment before the decision is made. Indeed, these requirements are enshrined in statute.[1]

[18] It should also be clear from the uncontested portion of the factual outline above that Warner failed to comply with the procedural requirements specified in [17] and it concedes that is so. The only thing that might possibly excuse the admitted deficiencies is an argument their effect was minor and did not result in Mr Hedgman being treated unfairly. That has not been argued but I have to add such a submission would not have succeeded had it been tendered. That is because the argument is moot with the *minor* exception applying to the test of justification in s 103A of the Employment Relations Act 2000 (the Act) but not mentioned amidst the mandatory requirements of s 4(1A)(c). In any event, the outcome was neither minor nor can it be said Mr Hedgman was not treated unfairly. That is because he was entitled to be told of the situation and have some input, especially on the question of selection given there were two drivers in Whanganui.

[1] Section 4(1A)(3) of the Employment Relations Act 2000

[19] The conclusion, indeed concession, Warner failed to comply with the requirements of s 4(1A)(c) of the Act means it cannot establish it acted fairly and reasonably. Mr Hedgeman's dismissal must be found unjustified.

[20] The conclusion the dismissal is unjustified leads to the question of remedies. Mr Hedgman seeks lost wages and a compensatory payment.[2]

[21] With respect to lost wages s 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser.

[22] Mr Hedgman's final pay day with Warner was 14 June and he seeks the difference between what he would have earned with them and what he received from other sources for the three months following that date. The claim totals $8,797.24. The main source of income during that period resulted from the fact Mr Hedgman commenced with a new employer on 13 July 2020, albeit at a rate less than he had enjoyed at Warner. Here I add Mr Hedgman should be congratulated for mitigating his loss with alacrity.

[23] To me the issue here is whether or not the difference between what Mr Hedgman might have earned with Warner and what he did earn once he had obtained the replacement job is compensable. When questioned, Mr Hedgman accepted Warner's situation was such that his redundancy was both inevitable and substantively justified. It was the process and lack of communication with which he took issue and which led him to conclude his dismissal was unfair. He said that more than once and the complaint about process was also the emphasis of his written evidence.

[24] Warner's owner, Alan Warner, gave evidence about the company's situation which went completely unchallenged. That evidence made it clear Mr Hedgman's concession redundancy was inevitable was warranted. The only question was when and the evidence leads me to conclude the failure to consult, especially about selection, would not have altered the outcome.

[25] That is because, as already said, Mr Hedgman was selected on the basis of *last on/first off*. Historically this was a regularly applied selection criteria in unionised workforces as this once was – indeed it was often demanded of employers. Here, and while the failure to consult occurred, Mr Warner's evidence convinces me there would have been nothing Mr Hedgman

[2] Section 123(1)(c)(i) of the Employment Relations Act 2000

could have done or said to have altered the outcome. Nor could Mr Hedgman offer evidence of anything he could have said which might have altered the outcome. He was, I'm afraid, going anyway and this leads me to conclude the compensable period is not three months but the lesser period during which Mr Hedgman was unemployed.

[26] Even if that were not the case there would then be the issue of what Mr Hedgman would have been paid at Warner given the claim for the difference between that and what he earned with his new employer.

[27] Here I note that while Mr Hedgman averaged over 40 hours a week his employment agreement only guarantees 32 hours. I also note Mr Warner's evidence which leads me to conclude the previous hours would not have been worked had Mr Hedgman been retained with reduced hours being the quid-pro for attempts to retain as many staff as possible. Records provided by Mr Hedgamn show he earned an average $821.58 a week for the first 14 weeks with his new employer. This exceeds the pay he would have received for 32 hours with Warner. In other words it is highly likely there would have been no differential in any event.

[28] The period 14 June to 13 July is four weeks. While actually working for Warner Mr Hedgman earned, on average, $980.46 gross per week (I have not included the final two weeks when he only received the Government wage subsidy. $980.46 times 4 weeks is $3,921.84 gross and for the reasons given above I consider that appropriate recompense for lost wages.

[29] With respect to compensation Mr Hedgman has mentioned two sums. He claimed $20,000 in his statement of problem, while the sum of $15,000 was cited as appropriate in submissions.

[30] While Mr Hedgman gave evidence about the dismissal's effect it failed to justify an award of the magnitude sought. Mr Hedgman's oral evidence had two key elements. The first was the effect his dismissal had on his wife. The second related to financial difficulties and the embarrassment of deferring bills and talking to creditors.

[31] The first of these issues faces the problem that while I accept Mr Hedgman's evidence this put pressure on him I have to reiterate this is a personal grievance and I cannot compensate Mrs Hedgman. The problem with the embarrassment argument is that already discussed – Mr Hedgman accepts his dismissal was a substantive fait-accompli. This means a number of the

points he uses to support his compensatory claim are ones he accepts he would have faced in any event and in a situation the employer could justify but for procedural defects.

[32] That said I accept hurt and humiliation must emanate from an unjustified dismissal, especially given the lack of discussion. There was nothing about Covid that entitled Warner to make a unilateral decision and I can understand Mr Hedgman's dissatisfaction and the angst this caused. Finally I also Mr Hedgman's evidence about stress and sleepless nights. Having considered the evidence and current award levels, I consider $10,000 appropriate.

[33] Having concluded Mr Hedgman was unjustifiably dismissed and remedies accrue I must also consider whether they should be reduced due to contributory conduct.[3] The answer must be no. Warner's justification is redundancy and redundancy is, by definition, a no-fault situation.

Conclusion and Orders

[34] For the above reasons I conclude Mr Hedgman has a personal grievance in that he was unjustifiably dismissed. As a result I make the following orders:

(a) The respondent, Warner Construction Limited, is to pay David Hedgman:

(i) $3,921.84 (three thousand, nine hundred and twenty one dollars and eighty four cents) gross as recompense for wages lost as a result of the dismissal; and

(ii) 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.

[35] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

[3] Section 124 of the Employment Relations Act 2000