

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 396
3030592

BETWEEN KDO
 Applicant

AND UFG
 Respondent

Member of Authority: Nicola Craig

Representatives: Alex Kersjes for the Applicant
 Cheryl-Anne Laird for the Respondent

Investigation Meeting: 31 July 2018 at Auckland

Submissions received: At the investigation meeting from both parties
 1, 8, 13 August and 7 September 2018 from the
 Applicant
 6, 8 and 15 August 2018 from the Respondent

Date of determination: 10 December 2018

DETERMINATION OF THE AUTHORITY

- A. Mr KDO was unjustifiably dismissed by UFG.**
- B. Within 28 days of the date of this determination UFG is ordered to pay Mr KDO the following sums:**
- (a) \$16,250.00 gross in lost wages; and**
 - (b) \$20,000.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

C. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] The Applicant employee Mr KDO was employed by UFG (UFG or the company), a New Zealand company owned by Mr M. Mr M is an Australian based individual who also owns, or part owns, a company in Australia running the same business as UFG does in New Zealand.

[2] Mr KDO was employed by UFG as its New Zealand Account Manager for several years.

[3] In October 2017 Mr KDO requested a substantial pay rise on several grounds including that he had worked very hard and felt like he deserved it. He was not granted that pay rise. In December 2017 UFG told Mr KDO that his position was redundant.

[4] Mr KDO claims that he was dismissed because he had sought a pay rise. UFG says that Mr KDO was dismissed because his position was redundant and he has not been replaced.

[5] An investigation meeting was held on 31 July 2018 and I heard in person from Mr KDO, Ms T (Mr KDO's wife), Mr S and Mr O (Mr KDO's friends), Mr M (UFG's owner and director). I also heard by telephone from Ms A (Mr M's assistant). I was assisted by an interpreter of the language spoken by several of the witnesses.

[6] Information regarding earnings and income was provided after the investigation meeting, and an application for non-publication made, which resulted in further submissions from the parties.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions necessary to dispose of the matter, and specified orders made as a result.

Non-publication

[8] The Applicant applied for a non-publication order of his name on the basis of that there is information regarding his mental health which he is concerned could impact negatively on his ability to find other work. The Respondent consented on the condition that its name also not be published. Under other circumstances I may not have granted the Respondent name suppression. However, as Mr KDO was at times UFG's only permanent employee in New Zealand, it is likely that the publication of UFG's name would have led to Mr KDO identity becoming known.

[9] Medical evidence has been filed which supports that Mr KDO's emotions and interactions with people are negatively affected by discussion about his redundancy. Receipt of correspondence regarding this case triggers memories and causes him to suffer from symptoms. Mr KDO has been diagnosed with severe anxiety and moderate depression, for which he has sought assistance from several health professionals.

[10] I am satisfied that the Mr KDO's condition and the possible effects of publication outweigh the principles of open justice in this case. Under clause 10 of Schedule 2 of the Act, I make a non-publication order for the Applicant's name and the Respondent's name. The Applicant has been given identifying initials unrelated to his own. Likewise the Respondent has been given initials unrelated to its own company name.

Issues

[11] The issues for determination are:

- (a) Was Mr KDO subject to an unjustified action by UFG to his disadvantage, or alternatively, was unjustifiably dismissed by it?
- (b) If so, what remedies (if any) should Mr KDO receive?

[12] A claim for unpaid wages and holiday pay was withdrawn.

Employment History

[13] Mr KDO was attracted to the type of work which UFG undertakes. He accepted a lower base salary for this role than he had received in his previous job as

he was new to this industry and also because he liked UFG's work and its people, particularly Mr M.

[14] Mr KDO was responsible for UFG's New Zealand operations, with some support provided over the phone and by email from Australia. Mr KDO was involved in business development, logistics, administration and communications with clients, partner organisations and contractors. For some of his employment he was one of two or three staff. For a period he was the only employee. Mr KDO reported to Mr M in Australia and was involved in phone conferences with Australia. Mr M also came to New Zealand a few times a year.

[15] Mr KDO considers that he worked very hard in the role, working longer hours than what was required by the employment agreement, sometimes late at night. UFG says that it did not ask him to work late at night and suggests that he undertook some tasks of his own accord.

[16] Mr KDO became dissatisfied with some aspects of UFG's approach to him. He felt that comments during the appointment process about travel opportunities to Australia and a bonus system did not eventuate in the way he had been led to believe. Mr M does not consider that any promises had been made in regards to those issues.

Pay rise request and Mr M's plan

[17] On 8 October 2017 Mr KDO sent Mr M a long email asking for a pay rise, providing extensive and detailed reasons for that and also mentioning the bonus issue. Mr KDO asked for an increase of \$550 gross per week, but was flexible about whether this was delivered through a salary increase and/or a bonus arrangement. The amount sought would have amounted to an approximately 40% pay rise. Mr M replied that they could talk about it in a few days when he was in New Zealand.

[18] Mr M says that he was intending to come to New Zealand to discuss with Mr KDO the future of the latter's role with the company given the company-wide roll out of electronic data capture, the lack of face to face clients and the lack of success in the area of business development. At least some of Mr KDO's job functions would be replaced by the electronic process or be managed from the Australian office.

October meetings

[19] The two men met on 11 October 2017. Mr KDO's memory is of Mr M saying that he could not provide a pay rise as he was concerned his assistant would find out. Mr KDO could not understand this and felt like he was being brushed off. Mr M also said that he could not offer a bonus.

[20] Mr M says that he advised Mr KDO that it was not possible to pay him a \$500 per week increase as his role would never attract that level of remuneration. I find Mr M's evidence more credible as it was unclear why Mr M would have mentioned not wanting his assistant to find out about any pay rise.

[21] At the meeting Mr M asked Mr KDO if he had tried looking for other jobs, including contacting his previous company. Mr M offered to help him find a new job. Mr M says that Mr KDO had explained that he needed a large increase to sponsor his parents coming to New Zealand and Mr M thought that Mr KDO needed to look elsewhere for work if that was the kind of money he needed.

[22] Although Mr M says that he talked about the situation of the New Zealand business, I find that he did not give a clear indication that Mr KDO's position was at risk of being made redundant or that a restructuring was on the cards. Any discussion about that became side-tracked or obscured by the discussion about Mr KDO finding other work to achieve the level of salary needed to sponsor his family to come to New Zealand.

One day off a week proposal

[23] Mr M raised the prospect of Mr KDO only working four days a week, but earning the same amount of money. On the extra day Mr KDO could look for other work or develop his own business. Mr KDO accepted the proposal, but Mr M said he needed approval from the other board members.

[24] The following day, 12 October 2017, at another meeting Mr M told Mr KDO that the board had rejected the four day a week idea as an on-going situation, but they would allow it for a month so that he could spend time looking for another job. Mr KDO says he did not accept the offer of working four days a week only, as it was only for a month. This was in keeping with other evidence regarding Mr KDO's refusal on

principle to accept modest offers which others might have accepted as being better than nothing.

[25] Having discussed things with his wife, Mr KDO called Mr M and told him that he did not want to stop working for UFG, that he was simply asking for a pay rise and was concerned by Mr M's response and that they needed to talk further on his return from a scheduled holiday. Mr KFO and his wife went on holiday on 21 October and returned in mid-November 2017.

December announcement

[26] On 12 December 2017 Mr M phoned Mr KDO and asked how the job-hunting was going. The latter replied that he was not job-hunting and was happy in his role. Mr KDO's impression was that Mr M seemed frustrated. Mr M indicated that Mr KDO should be looking. Mr KDO became upset.

[27] An issue arose about whether Mr KDO was seeking legal advice to claim large amounts of overtime pay, but there was no evidence to support this being causative of what then happened.

[28] On 15 December 2017 Mr KDO was home sick and had notified Mr M and others of that by email. Mr KDO noticed a missed call from Mr M so rang him back. Mr M said that he had his assistant with him. He proceeded to tell Mr KDO that they were making him redundant immediately.

[29] Mr M refused Mr KDO's offer to work for another week so he could tidy things up in the office and with his emails, as well as say goodbye. The company paid Mr KDO two weeks' notice. It allowed him to tidy up his emails, but limited his return to the office.

Reason for the dismissal

[30] Mr KDO believes that he was dismissed because he sought a pay increase. However, the evidence does not support that, particularly as regards the timing of events.

[31] Mr KDO's evidence implied that there was a quick jump from the pay rise discussion to him being told he was redundant. However, that was not the case. The

pay rise claim was made in early October 2017 whereas Mr KDO was only told he was being made redundant in mid-December.

[32] While Mr M may have wanted to have some discussion in October 2017 about Mr KDO's position being on the way out, he did not make that clear. Rather the discussion focused on the prospects of Mr KDO finding other more well paid work which would allow him to sponsor his parents. That discussion makes sense in light of Mr M's wanting to start discussion about restructuring. He wanted to give Mr KDO a chance to find other work before he was made redundant, but he did not articulate that clearly to Mr KDO.

[33] There was evidence at the investigation meeting of a decline in sales and even Mr KDO accepted that a component of his role was being done away with due to electronic data capture. He says that work took about 5 to 15% of his time. There was no evidence of Mr KDO's role being replaced by another employee after he was made redundant. Most of his work was absorbed into existing roles in Australia.

[34] Mr KDO's view that he was dismissed for raising a pay issue does not fit well with the evidence. I conclude that the reason for Mr KDO's dismissal was UFG's decision that Mr KDO's role was redundant.

Restructuring obligations

[35] I move now to look at whether UFG met its obligations to Mr KDO. The employment agreement defines redundancy as a situation where the employee's position is or will become surplus to the requirements of the business.¹ The agreement then sets out the process to be adopted:

In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, **except in exceptional circumstances**, consult with the Employee regarding the possibility of redundancy, and before a decision to proceed with redundancy is made, whether there are any alternatives to redundancy (such as redeployment to another role). In the course of the consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position redundant. **Nothing**

¹ Clause 12.4 of the employment agreement

in this clause limits the legal rights and obligations of the parties.
(*Emphasis added*)²

[36] UFG relies on the proviso to the consultation obligation that consultation shall occur “except in exceptional circumstances”. It says that the fact that there were clearly no other positions, at least in New Zealand, which Mr KDO could have been redeployed into, was an exceptional circumstance.

[37] I do not accept that argument, which focuses on redeployment prospects, as the reason for consultation. Consultation is at least partially about whether there needs to be a redundancy to begin with. It is possible that the employee may come up with cogent reasons why his or her position should not be made redundant, or other ways to structure the role so as to avoid the role being made redundant.

[38] There was a possibility of a role existing for Mr KDO in the Australian business and that too should have been consulted on. Consultation gives the employee the comfort of knowing that they have been involved in exploring prospects, even if ultimately those prospects are not adopted by the employer.

[39] My view is reinforced by the last sentence of the clause which states that legal rights and obligations are not limited by the clause. Under s 4(1A)(c) of the Act the duty of good faith requires an employer proposing to make a decision having an adverse effect on an employee’s continuation of employment, to provide the employee with access to information about the decision and an opportunity to comment before the decision is made.

[40] It was UFG’s legal obligation to comply with that aspect of the duty of good faith and Mr KDO’s right to have it complied with. The clause itself acknowledges that such rights cannot be limited by the clause.

Failure to act as a fair and reasonable employer

[41] In addition to failing to meet the requirements of its own agreement to consult, UGC failed to provide Mr KDO with the requirements in s 4(1A)(c) of the Act to provide information to the employee and give them an opportunity to comment. There was no consultation. Had Mr KDO been consulted it is possible that other alternatives to his position being made redundant with no redeployment offered, could

² Clause 12.5 of the employment agreement

have been identified. By way of example, UFG says that a couple of hours of Mr KDO's weekly work were outsourced and yet there was no discussion with him about the possibility of him providing that service.

[42] Further, the process of notification to Mr KDO was far from ideal. UFG decided to inform Mr KDO of his redundancy when he was off work sick. The decision to tell him over the phone, rather than in person is questionable although Mr M may not have planned to be in New Zealand any time soon. The refusal to allow Mr KDO to work out any of his notice period and have an opportunity to say good bye to the few people he worked with was unfair. There was no indication that Mr KDO would have taken any disruptive action had he been allowed to return. I do not consider his reference to taking legal advice justifies such an exclusion, as he was entitled to do so.

[43] UFG says that it was its normal practice to pay out the notice period, as this allows the employee time to look for paid work. However, here the employee requested to work some of the notice period.

[44] UFG failed to meet the test under s 103 A of the Act of what a fair and reasonable employer could have done in all the circumstances. Mr KDO was unjustifiably dismissed by UFG.

Remedies claimed

[45] Having found that Mr KDO was unjustifiably dismissed I now consider remedies. Mr KDO seeks lost wages and compensation for hurt and humiliation.

Lost remuneration

[46] On the basis that this was not a genuine redundancy lost wages up until the day of the hearing were sought for Mr KDO. This amounted to 32 weeks' pay. Obviously this is substantially more than the three month period set out in s 128(2) of the Act. Three months' lost wages totals \$16,250.

[47] While I am required to award three months' lost wages³ I am not satisfied that I should award more. I cannot be confident that Mr KDO's employment at UFG would have continued in the long term. Not only was it possible that, even after

³ S 128 of the Act, *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] ERNZ 55 EC at [84] and *Grace Team Accounting Ltd v Brake* [2014] ERNZ 129 CA at [105-107]

proper discussion, his position would have been made redundant. There is also some possibility that the absence of the large pay rise needed to fund his parents' migration, would have caused Mr KDO to seek and find other more well remunerated work, even though this was not his preference. He could also have left to pursue his immigration business. He did describe his parents' migration as his long held dream.

Mitigation

[48] There is substantial evidence of Mr KDO applying for other positions after his employment at UFG finished. However, he was unsuccessful.

[49] Mr KDO had set up a company some time before his dismissal, initially for his fledgling immigration business. From November 2017 Mr KDO had undertaken Uber driving to supplement his income. After he was dismissed he continued to use that company to pursue the immigration business as well as to receive the earnings from his Uber driving work.

[50] IRD records for Mr KDO's company showed a loss in the year ended 31 March 2018. That company's revenue and expenses spreadsheet and Mr KDO's own tax records show no earnings for him in the period from January to March 2018.

[51] Mr KDO provided a spreadsheet of the weekly earnings from his Uber work and advised that Uber doesn't produce an invoice for the month.

[52] UFG suggested that the level of earnings from working for Uber whilst employed could not possibly have been the same as after he was no longer employed by the company. I considered whether to deduct Mr KDO's Uber earnings from the lost wages to be awarded. However, I am not satisfied that the Uber earnings were received in mitigation of Mr KDO's loss of wages from UFG as he had been earning that additional Uber income whilst employed. Also, the Uber earnings were on average less per month for the period from when Mr KDO finished at UFG than they had been when he was still employed.

[53] After the investigation meeting UFG sought to obtain the raw data regarding the individual trips which Mr KDO had undertaken for Uber and offered to collate this if Mr KDO or his representative did not wish to. It was clear that this information was partially sought to check whether Mr KDO was undertaking Uber work during working hours. I did not see that as relating to the issues which I was investigating. As far as its relevance to mitigation was concerned I was influenced in my decision

not to order Mr KDO to provide such data, by the statements in *Xtreme Dining Ltd t/a Think Steel v Dewar* that the Authority should not be too stringent in its expectations of a dismissed employee, as far as mitigation is concerned.⁴

Conclusion on lost wages

[54] I make no deduction for earnings post-employment. I order UFG to pay Mr KDO the sum of \$16,500.00 in lost wages within 28 days of the date of this determination.

Compensation

[55] Mr KDO seeks \$30,000 compensation under s 123(1)(c)(i) of the Act. Mr Kersjes submits that this was a case justifying a high level of award, in light of the evidence given by his wife and friends and the medical evidence.

[56] Mr KDO's dismissal had a very significant negative effect on him. It came completely out of the blue from an employer which he considered he had gone above and beyond what was required of his position for. He felt like he had given his life to the company and says that this is the most damaging thing that has happened in his life.

[57] Mr KDO was shocked and angry when initially told he was dismissed, as well as already being sick at the time. Longer term he was profoundly affected by the dismissal. He was unable to get enough or good quality sleep, as he was thinking about how he was going to get out of his financial hole. He had nightmares including some about arguing with Mr M. His nightmares continued until at least mid-2018.

[58] Ms T, Mr KDO's wife, confirms that he started having nightmares and sometimes reported them as relating to Mr M. His emotions have been intensified by his lack of sleep. Mr KDO says that he has felt weary, anxious and irritated almost every day since his dismissal. Ms T confirms his irritation and defensive attitude. She describes him as isolating himself from people and seeming deeply wounded.

[59] Mr KDO provided medical evidence confirming that he has been diagnosed with moderate depression and severe anxiety. Although he had a history of anxiety,

⁴ *Xtreme Dining Ltd t/a Think Steel v Dewar*[2016] NZEmpC 136 at [103]

he did not see himself before as someone who would have depression. He has also seen a psychologist and a counsellor.

[60] On a personal level Mr KDO feels betrayed by UFG and Mr M. He felt stupid for having not been able to assess people and his confidence in his sense of judgment has deteriorated. He feels that he has totally wasted the last four years of his life. His faith in employers and sense of his future work experience has been destroyed.

[61] Mr KDO is also upset about not being able to fulfil his dream of bringing his parents to live in New Zealand as a consequence of being unemployed and thus not meeting the sponsorship requirements. Whilst upsetting for him, I do not rely on this matter as Mr KDO appears not to have been in a position to sponsor his parents on the basis of his salary at UFG without a very large increase, well beyond what there was any likelihood of him getting.

[62] My impression is that some of Mr KDO's level of distress is related to his belief that UFG dismissed him as a result of him asking for a pay rise and the connected loss of faith or belief in Mr M as a good person. While I accept that Mr KDO genuinely held the view that he was dismissed due to his pay rise request, I did not find that that was the reason for the dismissal. I therefore do not take those matters into account in assessing what harm Mr KDO suffered as a result of the dismissal.

[63] There was substantial evidence in support of the impact on Mr KDO from his wife and friends, some of which I have already referred to. Mr KDO's wife describes him previously as being a very optimistic person who was actively involved at church and enjoyed socialising with people. Whereas now she sees him getting into arguments with people and being battered and exhausted

[64] Friends Mr S and Mr O had previously found Mr KDO to be very sociable. The men used to go to church together regularly, but Mr KDO stopped doing so. Mr KDO withdrew from contact with the other two men. When Mr S invited Mr KDO to a group dinner, the latter replied that he was tired of talking in a crowd and Mr S thought it sounded like he was trying to avoid people. Mr KDO stopped being a teacher at church. Mr S described him as very unhappy and upset.

[65] UFG suggests that Mr KDO's response to being made redundant was outside of the norm and not something which it should be responsible for. Mr KDO certainly

presents as having suffered greatly. His sense of the high moral value of UFG's business and that of Mr M, as well as of having worked extremely hard for the business, meant that the effects of a dismissal, even had he accepted it was a redundancy, was likely to be significant. He saw Mr M as being like a family member or a friend. Mr KDO described himself as very sensitive. It seems highly unlikely that the company was not aware of this after having employed him for four years.

[66] These circumstances are reminiscent of the recognition in *Richora Group Ltd v Cheng* of a working relationship of significant importance to the employee with high levels of reliance, respect and trust.⁵

[67] Had I not had to set aside the impact of the issue about Mr KDO's parents and his belief that asking a pay rise caused his dismissal, I would have considered the amount sought for Mr KDO to be reasonable. However, a lesser amount is appropriate without those factors. I order UFG to pay Mr KDO \$20,000.00 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[68] I have considered whether Mr KDO can be said to have contributed to the situation leading to his dismissal and find that he did not.

Costs

[69] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr KDO shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. UFG shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

⁵ *Richora Group Ltd v Cheng* [2018] NZEmpC 113 at [58]

[70] The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis unless particular circumstances or factors require an adjustment upwards or downwards

Nicola Craig

Member of the Employment Relations Authority