IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2023] NZERA 376
3170447

	BETWEEN	TIHEI KEREOPA-RAREKURA Applicant
	AND	CRUZ BAR LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Lawrence Anderson, advocate for the Applicant Mr Williamson, for the Respondent
Investigation Meeting:	9 March 2023 at Christchurch
Submissions received:	21 March 2023 from the Applicant 13 April 2023 from the Respondent
Determination:	17 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Kereopa-Rerekura (Tihei) was employed to work as a security guard at a nightclub operated by the respondent (CB) from 12 August 2020 until March 2022 when his employment was unilaterally ended by CB. This happened when Tihei was isolating at home due to being a household contact of someone with Covid-19 and then contracting the virus himself.

[2] Mr Bruce Williamson is a co-director and sole shareholder of CB.

[3] Tihei says he was initially told by Mr Williamson that the reason his employment was to end was because he had ‘abandoned’ his employment by staying home to isolate, something Mr Williamson did not agree was a requirement because he told Tihei he had tested negative and was able to come in to work with a mask on.

When Tihei tested positive, CB then confirmed that Tihei had been made redundant due to the financial impact of Covid-19 government restrictions on its business. CB did not pay Tihei his notice period also due, it said, to economics. Tihei did not return to work for CB after he was able to come out of isolation.

[4] Tihei says the termination of his employment was unjustified either due to a summary dismissal outright for 'abandonment' or for a redundancy that was not genuine and or failed to follow a fair process of consultation including considerations for redeployment.

[5] CB's position is that Tihei was justifiably made redundant because Mr Williamson had explained to Tihei prior to making him redundant that there was the potential for this to happen given the economic climate with Covid-19; that had Tihei not 'become unavailable' due to isolating at home he would have been made redundant anyway in a few weeks after this but that Tihei not coming into work 'triggered' the redundancy process.

[6] Tihei claims lost wages as the difference between the amount he earnt post-employment and what he would have earnt had he continued to work at CB, payment for the notice period, compensation, and costs. In an Amended Statement of Problem, he added a request for penalties to be awarded in part to him (75%) for CB not keeping and then not providing as requested a copy of his signed employment agreement and employment records.

The Authority's investigation

[7] An investigation meeting was held. Briefs of evidence were lodged before the meeting by Tihei, and for CB by Mr Williamson and Mr Clegg, an employee of CB. Written submissions were provided after the investigation meeting.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination are:

a. Was CB justified to end Tihei's employment in the way it did and for the reasons it did?
b. If so, what remedies if any should be awarded for:
    i. compensation under s 123(1)(c)(i) of the Act
    ii. lost earnings under s 123(1)(b) of the Act
    iii. lack of notice paid
c. Did Tihei do anything that contributed to the situation that led to the grievance and if so, should any remedies be reduced accordingly?
d. Should penalties be awarded?
e. Should there be an order for costs?

What caused the employment relationship problem?

[10] On Saturday 5 March 2022 Tihei told Mr Williamson he could not come to work because he had to isolate at home as a household contact. His evidence appears to be that he had initially talked about this with Mr Williamson in a phone conversation and that he had in fact worked the night before due to Mr Williamson saying if he was testing negative, he did not have to isolate and could wear a mask. The 5 March 2022 messaging started in the evening before Tihei was due to work:

Tihei:	Bruce, I can't come in. [C, Tihei's partner] is paranoid and she's told everyone about the kids.
Mr Williamson:	There's no reason for you not to. You are not positive and even if you were its still quite legal to work as long as you are masked
Tihei:	She reckons I need an exemption to work. And a negative every shift to be able to work. Household contact have stricter rules to close contacts she says.
Mr Williamson:	She's about 20% as clever as she thinks she is T You have abandoned your job which brings the usual consequences You confirmed you have tested and do not have covid

Tihei:	No, I'm following covid restrictions. If you think that's abandoning my job, you're the one that 20% clever as you think you are
Mr Williamson:	I'm not going to waste time explaining how she is complete [sic] wrong Restrictions have all changed
Tihei:	Don't then, our isolation ends on the 15th
Mr Williamson:	Have a good evening
Tihei:	You too

[11] At the time of this messaging the government restrictions were in fact as Tihei pointed out to Mr Williamson. He was a household contact and had to isolate for 10 days. [1]

[12] On the morning of Friday 11 March 2022 Mr Williamson emailed Tihei about his 'final' pay citing an issue about incorrect timesheets. Tihei responded in surprise and said he thought he would return to work after isolating. When I asked Tihei why he was surprised if his evidence is that he was 'fired' on 5 March 2022, he explained that he knew how Mr Williamson was, that he liked working at CB and everyone all got on, that Mr Williamson had been a 'good boss' to him and he just thought it would all 'blow over'.

[13] At 11.59pm on 11 March 2022 the time for isolation required for a household contact was reduced from ten days to seven.[2] Effectively, Friday 11 March 2022 was Tihei's seventh isolation day and CB would have opened its bar that night, a night Tihei would have ordinarily worked. Mr Williamson further emailed Tihei during 11 March 2022. By then he appeared to have become fully acquainted with the isolation rules noting the requirement to test on day 3 and 7 of the isolation. He asked Tihei whether if he tested negative (Tihei said he was about to test) he would come into work that night. Tihei said 'Oh yeah, 100% lol'. As it turned out just after this, Tihei and another child in his household tested positive and Tihei needed to extend his isolation period. Tihei suggested Mr Williamson apply for an exemption for him to work.

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[1] https://covid19.govt.nz/about-our-covid-19-response/history-of-the-covid-19-protection-framework-traffic-lights/#timeline-of-important-events.

[2] As above.

[14] Mr Williamson's reply was to say:

> I am afraid that means your position will have to be made redundant, as I suggested last week, we will either close or I will work the door myself. We cannot bear the costs of poorly thought-out systems put in place by a government that is determined to destroy the economy.

[15] Tihei's response was to offer to get someone else to work for him over the weekend until he could then return a negative test the following week. Mr Williamson replied within minutes with,

> No thanks. We cannot carry on trying to stay open when this stuff could come round again every other week and every time it has the potential to close us down.

[16] Tihei replied simply with, 'Fair enough. Sorry Bruce' and asked for a redundancy notice or letter so he could 'sort some stuff out.' Mr Williamson agreed to do that and then asked if Tihei had symptoms. When Tihei responded that he just had an 'irritated throat' Mr Williamson emailed the following to him:

> You have to make your own decisions in life based on common sense and your own eyes and ears tell you. Do not let government's make them for you, as much as possible. It is no surprise to you to hear me say that.

[17] On the afternoon of 12 March 2022 Tihei asked again for the 'redundancy letter' and a reference. Mr Williamson emailed he was working out the final pay first and pointed out errors in timesheets filled in by Tihei and that CB claimed a past over payment because of this.

[18] Tihei emailed saying it was urgent that he get some form of letter saying he was made redundant 'cos I need it to give to MSD, so I can get some assistance until I've finished my isolation.' Tihei also asks for a copy of his 'employment contract' because he had lost his.

[19] Mr Williamson's reply less than one hour later was to attach a template employment agreement (not the one signed by Tihei that was not supplied until these

proceedings on 20 January 2023) and say, ‘other matters will be attended to next week in normal business hours.’

[20] On Monday 14 March 2022 Tihei emailed Mr Williamson asking his availability for a video conference call on the upcoming Wednesday to ‘discuss the state of my employment’ because ‘it’s been implied that I’ve been made redundant.’ Tihei raised concerns about the reason for his termination and the process leading to that, noting that there had been no serious misconduct. Tihei indicated he would bring a support person.

[21] Again, on 14 March 2022, Mr Williamson replied by providing a lengthy email including ‘confirmation of the notification of redundancy that was delivered to you during our phone conversation of 8.45pm on Saturday 5 March 2022.’ The reasons followed and included that ‘you were advised and pre warned on several occasions’ about the potential for redundancy due to the impact on CB’s business due to Covid-19 restrictions. The letter included that ‘there was no option but to inform you that your position was disestablished, and in accordance with clause 1.81 of your Employment Contract that was conveyed to you on 5 March.’ The letter includes that paid notice would not be paid ‘due to the final and dramatic collapse of profitability over the course of just a few days.’ The letter included that Tihei had not been replaced and that ‘the manager has now taken over the security role as his own.’ The letter included suggestions for other employment options at supermarkets and that Tihei ‘should easily be able to find another position without delay.’

[22] The above letter concluded with Mr Williamson saying he would be available to meet in person at the CB bar on Wednesday at 8.00pm. A meeting did not occur. Tihei sought assistance. He could not have attended a meeting in person because he was in isolation.

[23] On 24 March 2022 Mr Anderson for Tihei raised a personal grievance on his behalf for unjustified dismissal.

[24] On 24 March 2022 Mr Williamson emailed Tihei saying:

> We write to record your failure to respond in any manner at all to Cruz Bar Limited having extended an offer to you by email on 14 March 2022 to meet in person to further discuss your redundancy at Cruz. This offer was made in response to your own email of the same day in which you requested such a meeting. In addition to the above, the writer needs to point out to you that in the event that you should wish any other individual to act for you in employment related matters, it is beholding on you first to advise Crus bar Limited formally of that appointment, otherwise discussing your affairs with any other party would be quite inappropriate and a breach of The Privacy Act
>
> Faithfully
> Mr Williamson H Williamson
> (Director)
> Cruz Bar Limited.

[25] A further email shows that Tihei forwarded the above to Mr Anderson.

Was CB justified to end Tihei's employment in the way it did and for the reasons it did?

[26] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to end an employee's employment was justified based on what a fair and reasonable employer could have done in all the circumstances at the time this occurred.

[27] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a reasonable employer could have done in the circumstances.

[28] In relation to the decision to terminate Tihei's employment instantly (he was not paid notice) I do not find CB acted in a way that a fair and reasonable employer could have done in the circumstances at the time. My reasons follow.

Redundancy

[29] There is no statutory definition of redundancy. A redundancy arises where a specific position is superfluous to the needs of an employer's business, and it is important that the position and not the person is made redundant.

[30] The Employment Court has outlined basic consultation principles for an employer to follow when proposing redundancy.[3] This involves the employer:

a. consulting about a proposal relating to redundancy that is not already decided which involves getting feedback from employees

b. genuinely consulting and not doing so as a charade

c. must provide employees with sufficiently precise information to employees in a timely manner so they know what is proposed before they can be expected to give their views on it.

d. 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.[4]

Was the redundancy genuine?

[31] CB's reasons for redundancy focus heavily on an economic downturn due to Covid-19 which Mr Williamson communicated to Tihei would mean either the bar would close, or he would continue to do Tihei's role. While CB's position is that this was a genuine redundancy, I do not agree. The bar did not close, and CB continued to advertise for a bar person beyond the time Tihei left. Even if it may be said that Tihei was not suitable for redeployment in the bar, he was never given that as an option to consider if his security officer role was genuinely no longer needed. Therefore, continuing to advertise for staff in such a small business seems inconsistent with this reasoning. I found Mr Williamson's reason for this advertisement as a 'continual' advert to just see what is out there, to be implausible.

[32] Even if I am wrong about the advertisement, Mr Williamson's letter dated 14 March 2022 indicates he would take over the role held by Tihei. However, Mr

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[3] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZILR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.

[4] *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].

Clegg's evidence confirmed that he himself obtained a security guard certificate after Tihei left, to give Mr Williamson a break, and that while Mr Williamson did the role after Tihei left, the role was then filled by someone from an on-hire agency.

[33] As noted above it is the role that is redundant and not the person. It has been submitted for Tihei that his role continued to be required after CB ended his employment and therefore did not cease to exist. I agree. I find that Tihei's role was not genuinely disestablished which as a matter of substance must defeat CB's claim that this was a genuine redundancy.

Was the process towards deciding the redundancy justified?

[34] For the sake of completion, I will deal with this issue. I find that the process towards a decision to make Tihei's employment redundant was also far from that set out above at [30]. I am satisfied that CB followed none of these things. Tihei's email to Mr Williamson on 14 March 2022 responded to the lengthy email from CB that set out economic reasons for the redundancy decision that by then had been made. Tihei asked for a remote meeting to clarify the state of his employment due to the 'implication' of redundancy. It had to be remote due to him isolating. An employee who has been consulted about reasons before the redundancy decision is unlikely to have emailed such a concern.

[35] Further, Tihei gave oral evidence that he was aware of general discussion about the business not making any money and something of Mr Williamson's concerns about this. It has been submitted for Tihei that if there was a genuine reason for redundancy of Tihei's role then CB would have been expected to provide some form of financial information to review or comment on how Tihei's role was economically impacted. I agree with this submission and that it is part of the obligation of good faith to do so before an employer makes an adverse decision about the continuity of an employee's employment.[5] It would seem particularly important given the claim by CB in the letter dated 14 March 2022, written after the decision of 'redundancy' was already made, includes that Tihei's wages were the 'biggest single overhead' for the business.

[5] Employment Relations Act 2000, s4(1A)(c).

[36] I find while Mr Williamson considers his discussions with Tihei met a threshold to consult (or that there was nothing else he could have said) I do not find it met the threshold for what a fair and reasonable employer could have done both under s 103A of the Act and under its duty of good faith. I find that the lack of procedure further supports my above finding the redundancy was not genuine.

If not a genuine redundancy, then what was the reason for dismissal and was it justified?

[37] While it is very plausible that times were challenging financially for a business to run an inner-city bar during the time of Covid restrictions, as explained by Mr Williamson, I find the 11 March 2022 emails show that he may have had a change of heart. I find he likely needed Tihei to work that night even though he had, as CB later stated, made him 'redundant' on 5 March 2022 and was in the process of calculating his final pay.

[38] Tihei's evidence is that he then thought he must have still had a job and agreed to work that night if he tested negative. When Tihei then unfortunately tested positive for Covid-19 soon after this interchange, there was a firm and immediate response from Mr Williamson that Tihei was 'redundant' based on the decision on 5 March 2022.

[39] I find it likely that the communications on 5 March 2022 related to Mr Williamson considering that Tihei had 'abandoned' his employment as a reason to dismiss. I accept the submission for Tihei that Mr Williamson tried to downplay his use of the word 'abandoned' at the investigation meeting by saying it may not have been a good use of wording. I find the wording on 5 March 2022 was quite clear and carried an aggressive tone of saying there would be consequences for the abandonment which did then result in dismissal. This was clear because Mr Williamson continued to process a final pay claim between then and the 11 March 2022 when he emailed to clarify about timesheets for the final pay calculation. I find that after this, the 'redundancy' was then given as a reason to terminate but the emails delivering that message show Mr Williamson's decision making was to do with his dissatisfaction with the way the government had made rules about isolating with the outcome of making Tihei unavailable to work. In other words, the same reason Mr

Williamson appeared to have on 5 March 2022 when he said Tihei had ‘abandoned’ his employment.

[40] This type of moveable feast in decision making was far from what a fair and reasonable employer could have done. It is consistent with a reactive approach by Mr Williamson that is best described in his own words towards the end of the investigation meeting being that he was simply ‘pissed off’ with Tihei. I find it likely given his messaging on the 5 and 11 March 2022 that the ‘pissed off’ bit was because Tihei was following the rules of isolation that Mr Williamson objected to and because this in turn meant he himself had to work as back up in the security guard role, a role that required a licence. I understand CB did not have any other back up to Tihei’s role at the time, a risk it took if Tihei was unavailable due to any good reason like for example sickness.

[41] It is submitted for Tihei that an employer who is ‘pissed off’ at its employee still needs to raise its concerns in an active, constructive, and communicative way. In other words, the hallmarks of good faith.[6] I agree. I also accept the further submission that a reason to dismiss based on the employer being ‘pissed off’ about the requirement for an employee isolating at home due to Covid -19 would not meet the substantive test of justification to dismiss.

[42] In summary, I find that CB unjustifiably dismissed Tihei, and I will now consider remedies.

Remedies

Compensation under s 123(1)(c)(i) of the Act

[43] Tihei claims $20,000.00 in compensation. The compensation claimed is awarded under the Act for ‘humiliation, loss of dignity, and injury to feelings of the employee’.[7]

[6] Employment Relations Act 2000, s4(1A).
[7] Employment Relations Act, s123(1)(c).

[44] Tihei's evidence is that the effect of having his employment suddenly ended by CB caused him embarrassment and caused him distress particularly due to a sudden inability to support his family at a time he could not leave home to do this.

[45] Tihei says that he struggled emotionally after he lost his job in the manner that he did. I accept his evidence that he enjoyed the job at CB and thought Mr Williamson was a 'good boss' to him. I accept his explanation that this made it even harder for him to understand the way he was then terminated so suddenly and unfairly when he isolated at home due to Covid-19.

[46] I find it entirely plausible in these circumstances that Tihei thought it might all 'blow over'. It is hard to see how Tihei would not have felt humiliated when it did not blow over. Mr Williamson seems to say that Tihei could not have been humiliated by a redundancy, but I have found that this was not a redundancy. It was an unjustified dismissal. I accept that Tihei felt he was being treated unfairly. There is a loss of dignity to a person in being treated unfairly by a boss they had respected and felt loyal towards.

[47] Tihei says the sudden loss of his job caused immediate financial pressures due to ongoing living expenses which spilled over into tension in his homelife and caused him to smoke more. CB want me to accept that Tihei was already a 'chain smoker' and already had tensions in his homelife. Tihei clarified in his oral evidence that things got worse for a while after he lost his job with CB. I accept this as likely given the circumstances of his dismissal.

[48] Standing back from the above and accepting the helpful submissions on Tihei's behalf that the unjustified dismissal warrants a more than minor level of compensation, I find that $15,000.00 is an appropriate compensatory award.

Lost earnings under s 123(1)(b) of the Act

[49] It has been submitted that a calculation in relation to lost earnings for Tihei should be a total of $1,893.86 being the difference between his earnings for 13 weeks after termination and what he could have earnt based on an average 27 hours per week up to termination. This amount includes an 8% for holiday pay and a 3% contribution

to KiwiSaver. I find this a reasonable claim and note that Mr Williamson had checked the amounts and did not disagree with these calculations.

[50] Accordingly, I find that Tihei is to be paid $1,893.86 as a reimbursement for likely lost earnings because of his grievance.

Payment of notice period

[51] There was no justification for the dismissal and any termination under the IEA should have included a notice period. Mr Williamson at the investigation meeting accepted in hindsight that this was reasonable. Based on the same methodology used by Tihei in his submissions I award a further two weeks income which is $1,350.00 plus 8% ($108.99) holiday pay being $1,458.00 gross.

Did Mr Tihei do anything that contributed to the situation that led to the grievance and if so, should any remedies be reduced accordingly?

[52] In the circumstances before me I do not consider Tihei contributed to the situation that led to the grievance.

Penalties

[53] Penalties for breaches of various sections of the Act open a company to liability to a maximum amount of $20,000.00 per penalty.

[54] In deciding whether to impose a penalty, and if I decide to, I would need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court.[8] This includes a consideration of the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are 'just in all the circumstances.'

[8] *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].

[55] Penalties are punitive and a reason to award them is to support compliance with employment standards and not primarily to compensate employees individually. The Employment Court has observed that there can be a risk of doubling up of penalties in relation to things that effectively arise from the same facts that give rise to the grievances claimed.[9]

[56] I am not satisfied that I should award penalties as claimed in the Amended Statement of Problem with 75% to be awarded to Tihei. I accept CB did not supply, when requested by Mr Anderson, the signed individual employment agreement (IEA) and records. I also do not find CB's reason for not providing that information to Mr Anderson reasonable, being that it was Tihei's fault for not signing a written authorisation that Mr Anderson was to act for him. At the very least it would have been apparent that Mr Anderson was authorised at the time of the mediation when both Tihei and Mr Anderson would have attended, if not before.

[57] However, I note that penalties have a focus of deterrence and I have no information about CB's past conduct in relation to the lack of keeping or the non-provision of records or IEAs. I am also not satisfied that in the circumstances, penalties are appropriate given my findings and hopefully learnings that CB will take from the outcome of the grievance claim. I also note that the IEA and the records were provided by CB on 20 January 2023. This was the date I directed for the records to be provided[10]. In making this assessment, I rely generally upon s 160 (3) of the Act.

Summary of orders

[58] Cruz Bar Limited is ordered to pay Tihei Kereopa-Rerekura the following amounts:

a. $1,893.86 gross under s 123(1)(b) of the Act
b. $1,458.00 gross for lack of notice period under s 123(1)(b) of the Act
c. $15,000.00 in compensation under s 123(1)(c) of the Act.

Should there be an order for costs?

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on

[9] *Xu v McIntosh* [2004]2 ERNZ 448 at [43] – [45]
[10] Directions of the Authority 11 August 2023.

costs is needed Tihei may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum CB would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[60] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances required an upward or downward adjustment of that tariff.[11]

Antoinette Baker
Member of the Employment Relations Authority

[11] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].