Employment Court of New Zealand

Mikes Transport Warehouse Limited v Vermuelen [2021] NZEmpC 197 (17 November 2021)

Last Updated: 23 November 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 197
EMPC 406/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MIKES TRANSPORT WAREHOUSE LIMITED First Plaintiff
AND	MODERN TRANSPORT ENGINEERS LIMITED Second Plaintiff
AND	WAYDE VERMUELEN Defendant

Hearing:	27 July 2021 (Heard at Hamilton)
Appearances:	T Tran and J Heinstman, counsel for first and second plaintiffs A Mapu, advocate for defendant
Judgment:	17 November 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Vermuelen came to New Zealand from South Africa looking for work. He approached the Modern Transport group of companies, which includes Mikes Transport Warehouse Limited (MTW Ltd) and Modern Transport Engineers Limited (MTE Ltd). He was employed by MTW Ltd, commencing on 7 January 2020. He sought, and obtained, a work visa from Immigration New Zealand (INZ). The work visa was tied to his role with MTW Ltd.

[2] Issues arose about a lack of sales and, following discussions, Mr Vermuelen commenced work in the finishing bay of MTE Ltd on 6 March 2020. He left work on 12 March 2020, just prior to the commencement of New Zealand's first Level 4 lockdown. Mr Vermuelen returned to South Africa shortly after that. He subsequently notified a personal grievance against both companies.

[3] In summary, his claim against MTW Ltd was that:

(a) he was employed in a role which differed from the one he was required to perform;
(b) he was inadequately supported;
(c) he was given contradictory instructions on how to perform the role.

[4] In respect of MTE Ltd, he claimed that the company employed him in a role which was non-compliant with the terms of his visa and failed to take adequate steps to remedy the situation. He also claimed that he had been unjustifiably dismissed from MTE Ltd.

[5] The Employment Relations Authority found that Mr Vermuelen had been unjustifiably disadvantaged by MTW Ltd and unjustifiably dismissed by MTE Ltd.[1] The companies challenged the Authority's determination. The challenge was pursued by way of a hearing de novo. The plaintiff's position remained as it was before the Authority.

[6] Resolution of the matters at issue between the parties largely boils down to factual findings.

Factual (and legal) analysis

MTW Ltd

1 *Vermuelen v Mikes Transport Warehouse Ltd* [2020] NZERA 500 (Member Campbell).

[7] Mr Vermuelen approached the Modern Transport group to enquire about employment opportunities and spoke to Mr Flyger. Mr Flyger works across both MTE Ltd and MTW Ltd as Group Accountant and Human Resources Manager. It is clear that Mr Vermuelen made a positive first impression - Mr Flyger immediately introduced him to Mr Robin Ratcliffe, a Director of both MTE Ltd and MTW Ltd.

[8] Mr Ratcliffe decided that Mr Vermuelen would be an asset and arranged for him to speak to his son, Mr Zane Ratcliffe, with a view to creating a role for him. Mr Zane Ratcliffe is also a Director of MTW Ltd and MTE Ltd. Mr Zane Ratcliffe met with Mr Vermuelen on 14 November 2019 and discussed matters. Mr Vermuelen says he was told at that meeting that the company hired employees based on "appearance and attitude" and that Mr Zane Ratcliffe did not need to see his curriculum vitae. Despite this Mr Vermuelen sent a copy through later that day, in the event that it might be helpful.

[9] The next day Mr Flyger rang Mr Vermuelen and asked him to come into the office to sign an offer of employment. The employment agreement named MTW Ltd as the employer. Both Mr Vermuelen and Mr Flyger signed the agreement on 15 November 2019. It stated that the position was "Sales rep" and set out a long list of tasks and duties, including those focussed on the parts counter, assisting with maintaining the retail sales area, product displays, keeping the parts department clean and orderly, and following up on shortages.

[10] In addition to the employment agreement Mr Flyger prepared documentation for Mr Vermuelen to provide to INZ to support a work visa application. The documentation included an "Employer Supplementary Form" which noted Mr Vermuelen's role as "sales representative"; "full-time sales".

[11] Mr Vermuelen provided the relevant documentation to INZ. INZ raised issues with the contents of the agreement. As a result, a revised agreement was prepared (although not signed by either party) and provided to INZ. Mr Vermuelen was granted a one-year work visa on 24 December 2019.

[12] Mr Vermuelen commenced work with MTW Ltd on 7 January 2020.

[13] Mr Vermuelen was not physically located in the parts department as he had thought he would be; rather his workstation was located in the head office of the company, in close proximity to an employee, Mr Thompson, who had been with the company from the outset and who had a wealth of experience in sales. Mr Thompson was the person who Mr Vermuelen was told to go to if he had any queries or concerns, but he was not Mr Vermuelen's manager. Mr Zane Ratcliffe, who Mr Ratcliffe described in evidence as making "all the decisions", was not co-located in the office and did not give evidence. Mr Thompson did not give evidence either. The scope of the evidence has had repercussions, as will become apparent.

[14] Mr Vermuelen's employment with MTW Ltd got off to a bad start. Mr Zane Ratcliffe was on leave when Mr Vermuelen arrived at work and there was considerable uncertainty as to what he should be doing. That uncertainty continued when Mr Zane Ratcliffe returned.

[15] It is apparent that at some point in time a view was formed that Mr Vermuelen would be well placed to take on the sales of a product range that was not selling as well as it could, by developing new customer bases. It remained unclear when precisely this idea was alighted on, or when it was communicated. What is clear is that sometime after 7 January, Mr Ratcliffe instructed Mr Vermuelen to concentrate on selling the company's plywood products, work benches and other products such as LED lighting, and Mr Vermuelen set about trying to do so. Mr Vermuelen says that this focus on business development, by way of the sale of a few select products, was at odds with the role he had been employed to do and created significant difficulties for him.

[16] The company submits that it was clear from the outset that Mr Vermuelen was employed to do sales, as reflected in the position description for the role and the fact that he was given a car and a cell phone as part of this remuneration package. This, it is said, was consistent with him being expected to be out on the road meeting potential customers.

[17] There are a number of difficulties with the company's submission that the role was firmly focused on sales and that this was established, and accepted, in advance of

the employment agreement being signed. First, it is clear that there was a distinct lack of certainty as to what Mr Vermuelen was meant to be doing once he started, and this uncertainty continued for some weeks. Second, evidence about what was discussed in terms of the nature of the role prior to acceptance was limited and Mr Zane Ratcliffe did not give evidence. Mr Vermuelen was very clear about what he understood the role to entail, and that it was not what he ended up doing. Third, the position description expressly referred to a much broader range of tasks, including those which were only indirectly related to sales and which were located in the plant department, consistent with where Mr Vermuelen thought he would be located to undertake his work.

[18] The company put much emphasis on the contents of Mr Vermuelen's curriculum vitae and his employment history, which included business development and sales, as supporting the sales focussed nature of the role which it says Mr Vermuelen had accepted. That emphasis does not sit well with Mr Vermuelen's unchallenged evidence as to Mr Zane Ratcliffe's disinterested attitude towards his curriculum vitae at the relevant time.

[19] I accept Mr Vermuelen's evidence that he was led to believe that the role he was being offered and which he accepted was in the parts department and that he would not be focussed predominantly on sales. The role MTW Ltd ultimately required him to do was however focussed predominantly on sales, of a limited number of building products to new customers. Mr Vermuelen was unjustifiably disadvantaged as a result, compounded by the difficulties that then arose.

[20] Mr Vermuelen was told to go to Mr Thompson for guidance but, when he did, he received conflicting messages from Mr Zane Ratcliffe. Other witnesses disputed this but they were not in a position, having not participated in the conversations, to provide any particular assistance to the Court. I accept Mr Vermuelen's evidence that he was largely left at sea; that he was not given any structured, cohesive assistance; and the guidance that he did receive was unhelpfully confused.

[21] Around a month after he had started, Mr Vermuelen approached Mr Flyger and asked whether his position title could be changed to Business Development Manager.

Mr Flyger agreed to this proposal. His evidence was that he understood Mr Vermuelen to be seeking the change to enable an extension to his visa, and that he was happy to accommodate that. He did not accept that the change made any substantive difference to the role Mr Vermuelen had been employed to perform. Mr Vermuelen gave evidence that the change arose out of a discussion about his hours and pay rate and that while an extension to his visa would have been a bonus he felt that the change in job title would more accurately reflect the nature of the role he was doing.

[22] The position description was altered to refer to "Business development manager"; and the associated tasks/duties to refer to "Develop sales." No other changes were made to the position description. Mr Vermuelen provided the new position description to INZ to support a variation to the conditions of his work visa. That application was declined. INZ raised concerns about the position not having been advertised. Mr Vermuelen told Mr Flyger about this turn of events and requested that the role be advertised. Mr Flyer declined to do so. His evidence was that he refused to advertise the role because he did not want the hassle associated with that step.

[23] I do not accept that the way in which the company handled the visa variation issue gave rise to an unjustifiable disadvantage. The job that Mr Vermuelen was doing differed from the one he had been employed to undertake; it was a full-time sales role. If Mr Vermuelen had requested the company to take steps to ensure that his employment agreement accurately reflected that role, and it declined to do so, that would have supported a disadvantage claim. I am not satisfied that this is what occurred, particularly given that the part of the position description which dealt with the range of tasks and duties that had nothing to do with sales remained intact.

[24] I now move to the next stage of the chronology of events. There is no dispute that Mr Vermuelen struggled to make sales. It was not long before concerns started being raised with him, including by Mr Thompson, Mr Ratcliffe, and Mr Smith. Mr Vermuelen found the way in which the company approached dealing with its concerns demoralising. While Mr Ratcliffe gave evidence that he spent much time mentoring Mr Vermuelen and explaining to him how he himself had managed to secure sales during the course of his career, there was a distinct lack of concrete support that was offered to Mr Vermuelen. There was no direct evidence as to what steps Mr

Vermuelen's manager, or person he was told to seek guidance from, took. Mr Smith shed no light on the support that was given to Mr Vermuelen, and Mr Flyger's evidence was necessarily vague, given the nature of his role.

[25] I am satisfied that it is more likely than not that there was a failure to provide adequate support and assistance to Mr Vermuelen during his time with MTW Ltd and that he was unjustifiably disadvantaged as a result.

[26] On 5 March 2020 Mr Vermuelen was out cold-calling prospective customers when he received a request to return to the office to attend a meeting. Mr Ratcliffe says that he directed the meeting. The meeting occurred against the backdrop of

concerns reported to him about the lack of sales being generated by Mr Vermuelen. Mr Vermuelen was given no notice as to what the meeting was about, and Mr Ratcliffe made it clear in answer to questions in cross-examination that he could see no purpose in doing so.

[27] Mr Ratcliffe, Mr Smith and Mr Thompson were present. The Group Business Development Manager, Mr Pasley, arrived uninvited mid-way through the meeting.

[28] There was a conflict in the evidence as to what was said. Mr Ratcliffe gave evidence that he discussed Mr Vermuelen's progress, feedback he had received about his work from Mr Smith and Mr Thompson, and the company's expectations. He said that he made it clear that he understood that Mr Vermuelen was new to New Zealand and that he wanted to help him find his feet. He says that he shared some advice as to how Mr Vermuelen might go about making sales and that Mr Vermuelen responded by saying that he could not do the job and that he was resigning.

[29] Mr Vermuelen says that Mr Ratcliffe made it clear that he was no longer wanted at the company and that he should leave.

[30] Discussion at the meeting turned to the possibility of alternative work.

[31] Mr Mapu, advocate for Mr Vermuelen, invited me to draw an inference that it was unlikely that someone who had relocated from South Africa, with his family, and

had a job tied to his work visa, would resign without a job to go to. I agree that it seems odd, but I need to weigh that inference with other direct evidence that was before the Court. Mr Smith and Mr Pasley both gave evidence about what occurred at the meeting. They supported Mr Ratcliffe's evidence that it was Mr Vermuelen who made it clear that he wanted to resign, and their evidence was unshaken in cross- examination. And it would be odd, in my view, for Mr Ratcliffe to tell Mr Vermuelen that he was no longer wanted at the company and in the same meeting discuss an alternative role.

[32] I conclude that it is more likely than not that Mr Vermuelen told Mr Ratcliffe that he was struggling and that he was resigning. Mr Pasley gave evidence, which I accept, that he intervened at this point and raised the prospect of alternative work with MTE Ltd. Mr Smith agreed that this was an option, and Mr Vermuelen indicated that he was keen to explore it. It was agreed that Mr Vermuelen would work in the finishing bay of MTE Ltd, for 50 hours per week. Mr Vermuelen raised concerns about having to return the company vehicle. Mr Ratcliffe agreed to provide Mr Vermuelen with a replacement vehicle, which Mr Vermuelen would pay off over time.

[33] The fact that Mr Vermuelen announced his resignation is not determinative of the claim of unjustified dismissal against MTW Ltd. Two judgments of the Court illustrate why this is so.

[34] In *Boobyer v Good Health Wanganui Ltd*,2 Chief Judge Goddard referred to circumstances where an employee has told the employer that they are resigning but promptly resiled from that. The Court held that such "resignations" could not safely be relied upon. His Honour further noted:3

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties."

2 *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC3/94, 24 February 1994.

3. At 3; citing *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502 (LC) at 507.

[35] That approach was followed in *Kostic v Dodd* where the employer claimed an employee had resigned during an expletive-laden argument.4 The employee called later that day in an attempt to have a discussion about what had occurred and his future employment. The employer refused to engage and made it clear that the employee was not welcome to return. Judge Couch stated that whatever the employee had said during that conversation was clearly the product of anger or emotion. The Judge found that it was not consistent with the standard of "a fair and reasonable employer" to insist on giving effect to what had been said without any sort of "cooling off" period.5

[36] On the face of those authorities, an obligation would appear to have arisen for MTW Ltd to allow for a "cooling off" period. However, I prefer to approach the issue on the following basis.

[37] Resignation is a unilateral act. It does not involve the employer's agreement or disagreement. An employer cannot, for example, decline to accept a resignation and require the employee to continue to work for them. It follows that the key question is not whether advice of resignation was given by the employee in a moment of distress, anger or frustration. Nor is the key question what a fair and reasonable employer would do in response to a resignation given in the heat of the moment. Rather the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances.

[38] A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner or which are plainly not meant to be taken seriously.6

[39] Four related points might usefully be made. First, the Act does not legislate for how a resignation is to be communicated; it may be verbal, in writing, or in some circumstances, by conduct. A resignation will ideally comply with the contractual provisions regarding notice but may also be given on a "summary resignation" or "resignation without notice" basis, where an employee resigns on the spot and does

4 *Kostic v Dodd* EmpC Christchurch CC14/07, 11 July 2007.

5 At [87].

6 The latter being one of the examples referred to in *Boobyer*.

not return to work. The employer may, in such circumstances, have a claim against the employee for breach of the notice period. The employer does not, however, have a claim that the employment remains on foot and the resignation is of no effect.

[40] Second, while an employer's decision to dismiss must be justified and meet the standard of what a fair and reasonable employer could do in all the circumstances, an employee does not need to justify their decision to resign; nor does the decision need to be demonstrably sensible or well thought through. And where a resignation has, on an objective assessment, occurred it remains open for the employer to re- engage an employee on the same terms if that is what the parties choose to do after a period of reflection.

[41] Third, the way in which the law has developed around dismissals bears reflection. It is well established that the test is objective - would someone in the employee's shoes consider that their employment had been terminated?7 For example, in a heated discussion an employer tells the employee that their employment is terminated. Someone in the employee's shoes may well consider that a summary dismissal had occurred; but much will depend on the surrounding circumstances. A dismissal may not have occurred where, for example, the employer's words and/or actions taken in context were equivocal. The point is that the objective assessment of the key issue (has the employee been dismissed) would not be informed by consideration of whether the employee should have given the employer a "cooling off" period to confirm (or otherwise) the position.

[42] Finally, while there are obvious policy concerns which arise in cases involving pressured "resignations", or those stemming from the employer's misconduct or breach, those concerns are appropriately addressed via the developed caselaw relating to constructive dismissals.

[43] I return to the facts of this case. The witnesses for MTW Ltd gave evidence that Mr Vermuelen became upset and agitated during the early stages of the meeting. This was when his lack of sales was being discussed and attempts were being made to provide some support to assist him in lifting his performance in that area. Mr

7 *Cornish Trucks & Van Ltd v Gildenhuys* [2019] NZEmpC 6 at [45].

Vermuelen acknowledged that he was having difficulties with the job and made it clear that he was resigning. He went on to express concern about the consequences on his immigration status and how he would inform his family. He asked for another opportunity to be made available to him within the company, I infer an opportunity that he was more comfortable with. It was in this context that a role in the finishing bay with MTE Ltd was raised and enthusiastically agreed upon. It is apparent that Mr Vermuelen was relieved and positive about this turn of events.

[44] I am satisfied that, when viewed objectively, Mr Vermuelen resigned from MTW Ltd.

[45] It was unfortunate that Mr Vermuelen was not aware of the subject of the meeting he was called in to attend. However, he was well aware of the concerns around his sales performance; they had been raised previously and it could not have come as a surprise when Mr Ratcliffe broached the subject during the course of the meeting. An employer is entitled to have frank and robust conversations about performance with their staff.8 I accept, based on the evidence before the Court, that Mr Ratcliffe and the other staff members present were solely intending to provide support and sales advice to Mr Vermuelen. There was no threat (implied or otherwise) that Mr Vermuelen would be dismissed if he did not resign, there was no course of conduct with the deliberate or dominant purpose of securing his resignation, and there was no significant breach of duty.9

[46] Mr Vermuelen was not unjustifiably dismissed by MTW Ltd, and this aspect of his claim is accordingly dismissed.

[47] There is a question as to whether Mr Vermuelen was disadvantaged either in the way the meeting was called, or in how it played out. It would have been preferable for Mr Vermuelen to be advised of the purpose of the meeting. However, I do not consider that he suffered an unjustifiable disadvantage by the failure to do so. The purpose of the meeting was to

provide advice and support to Mr Vermeulen; it was not

8 *Greetham v Lawter (NZ) Ltd* [2020] NZEmpC 174 at [66].

9. *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374 and 375.

to put him on a performance management plan or to question his future with the company. And while a failure to provide a "cooling off" period in meetings where serious decisions are being made and an employee is becoming emotional may give rise to a grievance for unjustifiable disadvantage,10 that is not what occurred here.

[48] I conclude that Mr Vermuelen did not suffer an unjustifiable disadvantage as a result of the company's actions in respect of the meeting.

MTE Ltd

[49] The next day Mr Vermuelen attended work in the finishing bay of MTE Ltd. Difficulties later arose when it was realised that Mr Vermuelen's conditional visa required him to work for MTW Ltd, not MTE Ltd.

[50] Mr Smith (who Mr Vermuelen was to report to) discussed matters with Mr Flyger. A meeting on 12 March 2020 followed between Mr Flyger, Mr Smith and Mr Vermuelen. Mr Flyger's evidence was that he discussed the visa issue with Mr Vermuelen, explained that the company would be in breach of its legal requirements if he continued working for it, suggested that he obtain a change to his conditions so that he could continue to work for the company, and recommended an agency which might be able to assist. Mr Vermuelen gave evidence that he was dismissed and that he was not advised to take steps to obtain a variation to his visa, but does accept that Mr Flyger left the possibility of him returning to the company open.

[51] I understood Mr Flyger to say that he considered that Mr Vermuelen remained employed with the company. That was at odds with the contemporaneous correspondence which was exchanged the day after Mr Vermuelen's departure. In this regard Mr Vermuelen emailed Mr Flyger saying he was very confused about why he had been "let go", and Mr Flyger responded by stating that the company "cannot employ you in the role" given the status of Mr Vermuelen's visa conditions. Mr Flyger's email made it clear that, from the company's perspective, Mr Vermuelen's employment had been terminated.

10 See further *Ellish v Network Service Providers Ltd* [2021] NZEmpC 175 at [34].

[52] MTE Ltd says that it acted fairly and reasonably in relation to the issues that arose in respect of Mr Vermuelen's work visa. The difficulty for the company is that it had offered to employ him at the 5 March meeting, and Mr Vermuelen had accepted that offer after terms had been agreed. I infer that the company was well aware of applicable work visa requirements, including those relating to Mr Vermuelen, having already been through the exercise with him. Mr Vermuelen's employment with MTE Ltd commenced on 6 March and it purported to bring his employment to an end a week later.

[53] The approach adopted by the company (namely terminating Mr Vermuelen's employment) was at odds with its earlier approach to visa conditions when employing Mr Vermuelen to MTW Ltd - offering him the role, entering into an employment agreement once he had accepted the role, and then supporting a visa application. And it remained unclear why, for example, Mr Vermuelen could not have continued to work for MTW Ltd while the issues in respect of his visa for work with MTE Ltd were addressed.

[54] I do not overlook that fact that Mr Vermeulen himself went into the role with MTE Ltd knowing the constraints that applied because of his immigration status. I return to this issue under remedies. However, I accept that Mr Vermuelen could reasonably have expected that the company would take steps to deal with the visa issue, given the circumstances and earlier events.11 That did not prove to be the case. Rather the company simply advised Mr Vermuelen that his employment was being terminated.

[55] I agree that the failure to do more in relation to the situation that arose with MTE Ltd was unjustifiable in the circumstances. I prefer to see it as part and parcel of the claim of unjustified dismissal, rather than dealing with it separately as a disadvantage grievance.

[56] Mr Vermuelen's evidence that he was dismissed by MTE Ltd is also consistent with Mr Smith's response at the meeting, telling Mr Vermuelen that he must get his

11. See *Restaurant Brands Ltd v Gill* [2021] NZEmpC 186 for further discussion of the expectations of a fair and reasonable employer with respect to immigration issues.

possessions out of the work vehicle, hand over the keys and leave the premises. When Mr Vermuelen asked how he was to get home Mr Smith told him that there was a bus stop outside the building. None of this is consistent with an ongoing employment relationship.

[57] Mr Vermuelen left as requested. He did not take steps to amend his visa conditions. Less than two weeks later the first COVID-19 lockdown was imposed and he found himself without work, with very little prospect of finding new employment, and with a young family to support. He decided to return to South Africa with his family.

[58] I did not understand MTE Ltd to be submitting that if it dismissed Mr Vermuelen the dismissal was justified, and there was no suggestion that (for example) the employment agreement had been frustrated. Mr Vermuelen was given no notice of what would be discussed at the meeting; he was given no opportunity to be supported at it; and the decision to dismiss appears to have been made prior to the meeting and simply communicated to him, with no engagement and a failure to consider alternatives.

[59] Mr Vermuelen was effectively summarily dismissed. The company's actions fell well short of what a fair and reasonable employer could have done, and decided, in the circumstances. His dismissal was unjustifiable.

Summary of findings

[60] It follows from the foregoing that I accept that Mr Vermuelen has an unjustified disadvantage claim against MTW Ltd in relation to the nature of the role. The support given to him was not sufficient to help him bridge the gap and resulted in conflicting instructions and guidance which undermined his efforts.

[61] I do not accept that MTW Ltd unjustifiably disadvantaged Mr Vermeulen by failing to do more in relation to the Business Development Manager role to support a change to his visa, or in relation to the conduct of the final meeting with MTW Ltd, and I do not accept that it failed to comply with its obligations of good faith. Nor do

I accept that Mr Vermuelen was unjustifiably dismissed by MTW Ltd. I consider it more likely than not that he resigned.

[62] I accept that MTE Ltd unjustifiably dismissed Mr Vermuelen from his role on 12 March 2020.

Remedies

[63] Lost wages under s 123(1)(b) and compensation under s 123(1)(c)(i) are sought in respect of Mr Vermuelen's unjustifiable dismissal by MTE Ltd. Compensation under s 123(1)(c)(i) is sought in respect of MTW Ltd's unjustifiable disadvantages. It is appropriate, given the liability of each of the companies and their individual breaches, to deal with remedies against them separately.

Lost wages

[64] Mr Vermuelen was blindsided by the decision to dismiss him from his employment with MTE Ltd. He did not immediately start looking for alternative work and the country went into Level 4 lockdown shortly thereafter. Mr Vermuelen decided, in the circumstances, to return to South Africa. He subsequently found work.

[65] Section 128 of the Employment Relations Act 2000 provides that:

128 **Reimbursement**

...

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[66] I understood MTE Ltd's position to be that Mr Vermuelen had failed to take adequate steps to find alternative work and that ought to be reflected in any lost wages

ordered against it. I do not accept the company's argument in relation to this point. Given the impact of the decision to dismiss, it would be unrealistic to expect that Mr Vermuelen would immediately set about finding alternative employment. While it is true, as the company points out, that he could have sought advice about a change in the conditions attached to his work visa, that too would be

unrealistic. By the end of the final meeting Mr Vermuelen felt that he had no future with the company. Mr Smith's reaction would have reinforced the point to him. And while lockdown was out of the company's control, the unjustified dismissal was not. What flowed from the company's unjustified actions, and the steps that Mr Vermuelen could reasonably be expected to take to minimise his losses, is the relevant inquiry. Mr Vermuelen could not reasonably have been expected to find alternative work in New Zealand immediately after his dismissal and a short time later, during the lockdown.

> [67] The evidence in support of the claim for lost wages in excess of three months was thin. I am not persuaded, on the evidence before the Court, that there is a proper basis for exercising my discretion in the defendant's favour, and I decline to do so. I am however satisfied that Mr Vermuelen lost wages as a result of his unjustifiable dismissal from MTE Ltd and that an award equivalent to three months' lost wages is appropriate, subject to contribution which I deal with below.
>
> [68] At this point it is convenient to deal with an issue in the evidence as to the rate or method by which Mr Vermuelen's wages at MTE Ltd were to be calculated. Mr Robin Ratcliffe, Mr Pasley and Mr Smith gave evidence that the agreement was that Mr Vermuelen would work a 50-hour week and that his gross earnings would equate or approximate to what he had been earning in his salaried position with MTW Ltd. They say the motivation behind this was to prevent any negative impact on his immigration status.
>
> [69] Mr Vermuelen contends that it was agreed he would be remunerated at the hourly rate of $30.55 which he says he was paid at MTW Ltd. He said he was told he would be earning more money because of the increase in hours from 40 per week to

50. I am not satisfied that Mr Vermuelen was paid at an hourly rate, and the documentation that was before the Court points to an annual salary. I find that the

agreement was that Mr Vermuelen would be remunerated on a salary of $55,000. The award of lost wages is to be calculated accordingly.

Compensation for humiliation, loss of dignity and injury to feelings

> [70] The Act provides that, where the Court has determined that an employee has a personal grievance, it may provide remedies. Any remedies awarded are to be directed at addressing losses sustained as a result of the breach giving rise to the grievance.
>
> [71] It is said on Mr Vermuelen's behalf that the $10,000 awarded in relation to the finding of unjustifiable dismissal by MTE Ltd in the Authority was "extremely low". The Authority did not indicate how it had arrived at that figure. While that may be relevant on a non-de novo challenge, it is not in the context of a de novo challenge. I approach the question of compensation under s 123(1)(c)(i) afresh.
>
> [72] The Court generally applies a five-step approach to determining compensation under s 123(1)(c)(i). The purpose of the five step approach is to inject a degree of structure into what has previously been regarded by some as an unsatisfactorily uncertain and subjective exercise.12 The five steps involve identifying what harm was suffered under s 123(1)(c)(i); the extent of that harm; where the harm sits in relation to other analogous cases; which band the case sits in terms of quantum of compensation; and what a fair and just amount is in the particular case.
>
> [73] I am satisfied that Mr Vermuelen experienced humiliation, loss of dignity and injury to feelings as a direct result of both MTW Ltd's and MTE Ltd's unjustifiable actions.
>
> [74] In relation to the disadvantage suffered as a result of MTW Ltd's actions, he felt inadequate and unable to satisfactorily perform. He felt anxious and as though he had been thrown in the deep end without adequate support. This impacted adversely on his sense of self and on his personal life. The impact was felt during much of his time with MTW Ltd. In relation to the unjustified dismissal by MTE Ltd, termination

12. *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; *Waikato District Health Board v Archilbald* [2017] NZEmpC 132.

came as a surprise and without any discussion as to what the potential options might be. He was left without work not long after his arrival in New Zealand, unable to financially support his young family and facing a humiliating return to South Africa. His evidence as to the significant impact of the dismissal on him was reinforced by correspondence sent shortly after his dismissal and corroborated by his partner's evidence, which was not materially challenged.

> [75] Having regard to the range of injury identified in other cases, I would place the injury sustained in relation to both the unjustified disadvantage by MTW Ltd and the unjustified dismissal from MTE Ltd in the middle band.

[76] In terms of quantum, I have had regard to the range of compensatory awards made in both the Authority and the Court in respect of both disadvantage and dismissal grievances.13 The focus when determining the quantum of such an award is not on the type of grievance but on the impact of the employer's unjustified actions on the employee.14 I would place the case against MTW Ltd, in terms of appropriate quantum, at $15,000; and, in terms of the unjustified dismissal by MTE Ltd, in the mid-range of band 2, at $22,000.

[77] I have considered whether awards of this quantum reflect awards that are just in the circumstances and have concluded that they are, subject to any factors justifying a reduction.

Contribution

[78] I must consider whether any relief ought to be reduced for contribution. The failure to approach an immigration consultant following the 12 March meeting is not relevant, as it post-dated termination. In any event, I have already explained why I do not accept that Mr Vermuelen could reasonably have been expected to have gone down this route in the circumstances surrounding his departure from the company.

13. See Liz Coats and Geoff Davenport "Remedies and Costs" (paper presented to the Employment Law Conference, Wellington, October 2020).

14 *Richora*, above n 2, at [56].

[79] While not argued for on behalf of the company, I have nevertheless considered whether a reduction for contribution ought to be made on the basis of Mr Vermuelen's knowledge of the requirements attaching to his visa, and of the process more generally, at the time he entered into an employment agreement with MTE Ltd. Mr Vermuelen was aware that his visa was tied to MTW Ltd but nevertheless agreed to be employed by, and undertook work for, MTE Ltd. This then led to the problems which emerged. I have concluded that a reduction would not be appropriate. Mr Vermuelen, as the company was well aware, was desperate to work. He could reasonably have assumed, because of his prior experience with MTW Ltd, that MTE Ltd would support and assist him in taking steps to sort out his visa situation.15 In the circumstances I do not consider that Mr Vermuelen's conduct was sufficiently blameworthy, in the sense required by s 124, to warrant a reduction for contribution.

[80] I see no other basis for reducing the amounts I would otherwise award in Mr Vermuelen's favour on the basis of contribution.

Summary of orders

[81] In summary:

- Mr Vermuelen was unjustifiably disadvantaged in his employment with MTW Ltd.
- MTW Ltd is ordered to pay to Mr Vermuelen the sum of $15,000 by way of compensation under s 123(1)(c)(i).
- Mr Vermuelen was unjustifiably dismissed from his employment with MTE Ltd.
- MTE Ltd is ordered to pay to Mr Vermuelen the equivalent of three months' lost wages and $22,000 by way of compensation under s 123(1)(c)(i).

15 See above at [9]-[11] and [53].

[82] Costs are reserved. The parties are reminded that these proceedings were provisionally assigned category 2B for costs purposes. If costs cannot be agreed I will receive memoranda, with Mr Vermuelen filing and serving within 20 working days; MTW Ltd and MTE Ltd filing and serving within a further 10 working days; and anything strictly in reply within a further five working days.

Christina Inglis Chief Judge

Judgment signed at 2.30 pm on 17 November 2021

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