

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 30
5590338

BETWEEN MICHAEL SHAUN PARSONS
Applicant

AND PING LIMITED trading as
ESQUIRES COFFEE
Respondent

Member of Authority: Michele Ryan

Representatives: Jessica Bergseng, Counsel for Applicant
Yuping (Cindy) Lee, on behalf of Respondent

Investigation Meeting: 29 August 2016 at Wellington

Determination: 28 April 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] All medical information concerning the applicant that is held by the Authority is prohibited from publication unless the applicant consents otherwise.¹ There is no reference to the applicant's medical information in this determination and no restriction on the publication of this document.

Employment relationship problem

[2] Michael Parsons was employed as a general shop worker by Ping Ltd trading as Esquires Coffee (the café) at North City shopping mall in Porirua. On 25 October 2015 Mr Parsons was made redundant. He claims he was simply replaced and therefore his redundancy was substantively unjustified. He further says he was not properly consulted about the decision to make him redundant. He seeks 10 months' wages (beginning from the date of his dismissal until the Authority's investigation),

payment of two weeks' wages in lieu of notice, compensation for distress, and costs associated with his personal grievance.²

[3] Ping Ltd resists the claims. It says Mr Parsons' redundancy was a necessary commercial decision in response to the café's financial difficulties and Mr Parsons was selected for redundancy using the "*last on-first off*" principle.

The investigation

[4] I have not referred to all the information lodged by the parties but have referred to evidence furnished to the extent necessary to make findings of fact and law and determine Mr Parsons' claim.³

[5] Mr Parsons was represented by a solicitor. Ping Ltd was represented by Ms Yuping (Cindy) Lee, the sole director and shareholder of the company.

[6] This determination has been issued outside the 3 month statutory period after the last information was received by the Authority. In accordance with s 174C(4) Employment Relations Act the Chief of the Authority decided that exceptional circumstances exist to allow a written determination of findings later than the latest date specified at s 174C(3).

The issues

[7] The test for determining whether a dismissal is justified, including one made on the grounds of redundancy, is whether the decision to dismiss an employee was what a fair and reasonable employer could have done in all the circumstances at the time.⁴

[8] In this case the assessment requires the Authority to examine Ping Ltd's actions, and in particular:

- (a) whether there were genuine grounds for the café's restructure or was Mr Parsons made redundant for ulterior reasons,

¹ cl. 10(1) of Schedule 2 Employment Relations Act 2000

² Mr Parson's claim for holiday pay was withdrawn during the course of the Authority's investigation meeting when it became clear from the evidence that Mr Parsons' entitlement to holiday pay had been paid.

³ s. 174E(b)(i) Employment Relations Act 2000

⁴ s. 103A(2) Employment Relations Act 2000

(b) whether the process taken by Ping Ltd when it made Mr Parsons redundant was fair,

(c) if Mr Parsons was unjustifiably dismissed, what remedies should be awarded.

Brief summary of background information

[9] Mr Parsons is in his early to mid-twenties. He had initially worked for the previous owner of the café for 6-7 months before the café was sold to Ping Ltd on 1 April 2015. All employees, comprising 4 full time shop workers, plus 3 part-time staff who worked one shift each on weekends, transferred to Ping Ltd following the sale and purchase.

[10] Mr Parsons did not have a written employment agreement with either employer.

[11] When his employment began with Ping Ltd Mr Parsons worked Thursdays through to Mondays inclusive. Sometime in June 2015 his hours of work altered whereby every second week he would begin his shift pattern on a Friday.

[12] Ms Lee says that relatively soon after the café was purchased she realised the business was struggling financially and she was unable to pay herself at the end of each week. She says she held off from making changes as some full-time staff indicated they were looking for alternative employment.

[13] By mid-October 2015 no resignations had been forthcoming. Ms Lee says the café could not continue as it was and outgoing expenditure needed to be reduced, she considered the only means to achieve that end was to reduce staffing costs. Ms Lee sourced information from the Ministry of Business, Innovation and Employment (MBIE) website to obtain information as to what was required to restructure the business.

[14] On Thursday 22 October 2015 Ms Lee spoke to the Mr Parsons and another full-time employee advising that the wages bill was too high. Ms Lee informed the other two full time employees of the concern earlier that morning or the day before. She asked full-time staff members to discuss amongst themselves whether anyone was willing to reduce his or her hours of work. She said if no one volunteered to do so or

if no alternative resolution was suggested then she would need to make someone redundant and would advise on that decision the following Monday, 26 October 2015.

[15] No alternative solutions were advanced and neither Mr Parsons nor any other member of staff agreed to reduce his or her hours of work.

[16] Mr Parsons says he immediately considered it likely that he would be chosen for redundancy. Over the course of that afternoon he asked Ms Lee “*multiple times*” whether he was going to be made redundant. Ms Lee says she felt extremely pressured by Mr Parsons’ persistent questioning. Her evidence intimates that she felt worn down by repeated inquiries and advised him that he would be redundant. Mr Parsons concedes he told Ms Lee at the time that he understood it was a business decision but says he later considered the decision to be unfair.

[17] Although it was unclear from the evidence whether the parties revisited the issue later that day or the next, it is common ground that Mr Parsons asked Ms Lee why he had been chosen for redundancy and that she advised it was because he was “*last on*”. They dispute however whether Ms Lee told Mr Parsons that she would distribute his rostered duties to other employees.

[18] On Sunday 25 October 2015 Mr Parsons urged Ms Lee to make a final decision as to when he would be made redundant and when that would be announced. Ms Ping provided Mr Parsons with a letter dated the day before. The letter states, amongst other things, that:

... Based on your length of service our notice period is 2 weeks. In lieu of receiving that notice you will be paid the sum of \$270.

You will also be paid your accrued entitlements and any outstanding pay including holiday pay one day in lieu and including your last day of employment.

...

[19] The pair discussed Mr Parsons’ notice period and Ms Lee calculated the sum of Mr Parsons’ final pay. What exactly was discussed and agreed between them on these matters remains unclear despite questioning. On balance I do not accept that Ms Lee offered to pay Mr Parsons two weeks’ wages in lieu of notice in exchange for his agreement not to take legal action. Ms Lee was yet to be informed that Mr Parsons wished to raise a personal grievance and I consider it unlikely she would have referred

to the possibility of legal action independently. I consider it likely however that Mr Parsons was upset by how Ms Lee quantified his final pay.

[20] Approximately two hours later Mr Parson's mother, Kathryn Mansell, arrived at the workplace. She brought with her a letter she had drafted. Amongst other things the correspondence advised that Mr Parsons' employment had been unfairly terminated and he had a personal grievance.⁵ Having provided Ms Lee with the letter Mr Parson's accepts he then left the café's premises without informing her and did not return to work thereafter. He says he felt too distressed to continue working.

[21] Ms Lee says Mr Parsons did not keep his "*promise*" to work out his final shift and she decided not to pay the agreed notice period. She says the café now operates with 3 full time employees and 2 part time staff.

[22] The parties subsequently attended mediation but were not been able to resolve their differences.

Were there were genuine grounds for the restructure or was Mr Parsons made redundant to ulterior reasons?

[23] If the primary motive to terminate Mr Parsons' employment was for a reason other than a genuine redundancy then the dismissal will be unjustified.

[24] Mr Parsons' written and oral evidence referred to two separate events which he believes demonstrates his selection for redundancy was because he was less favoured than other employees. He says Ms Lee had formed a negative view of him stemming from health issues which he says did not impact on his work.

[25] Firstly, he points to the appearance of Ms Lee's nephew at the café on his last day of work and also to a photo of the nephew working at the café on a subsequent weekend to establish he was replaced. Ms Lee agreed that her nephew had occasionally helped out in the café on Sundays but says Mr Parsons was aware of the arrangement.

[26] I am not persuaded that Mr Parsons was replaced by Ms Lee's nephew particularly where Mr Parsons' written evidence records that prior to any suggestion that the café would be restructured, he had encouraged Ms Lee to have her nephew assist. There is no evidence that the nephew worked during the week or in a full time

capacity. Submissions on behalf of Mr Parsons assert that Ping Ltd also employed another individual soon after his dismissal but that allegation was not supported by evidence and I attach no weight to it.

[27] Next, Mr Parsons refers to Ms Lee's decision to alter his hours of work from June 2015 (or thereabouts) onwards. Ms Lee accepts that in June she removed Mr Parsons from the afternoon shift on Thursdays. She says there was insufficient work for herself and two staff on that shift. Mr Parsons does not dispute that business was slow on Thursday afternoons and that staff "*could hang around and chat*" during the shift. An arrangement was later made whereby between Mr Parsons and another employee shared the shift by working every second Thursday. No claim was made in respect of the alteration to Mr Parsons' hours of work in June 2015 and I do not need to decide that matter. This evidence was furnished to establish that Mr Parsons' redundancy was predetermined.

[28] On balance I am unwilling to conclude that the decision to select Mr Parsons for redundancy was motivated by bias or undisclosed reasons. When Ms Lee informed full-time staff of her concerns about the wages bill, her request to have someone reduce their hours of work (or to receive an alternative solution) was not targeted towards any particular employee. This approach leads me to conclude that it is more likely that Ms Lee was indifferent to which staff member would be affected by the restructure. I do not accept Mr Parsons' redundancy was predetermined.

[29] At the Authority's request Ms Lee produced a document containing financial data that detailed the café's gross monthly income between the purchase of the café and 15 November 2015. Set out in that material was a summary of the café's weekly outgoings including food costs, rent, franchise fees, wages, power etc. over the same period. Submissions on behalf of Mr Parsons criticise Ms Lee for not providing source documents to support her information.

[30] The data reflects the café's monthly expenditure as generally exceeding its income. The café was running at a loss although there appears to have been occasional intervals where revenue increased marginally. I note that those instances appear to correspond with the 2015 school holidays and tends to undermine the suggestion that the information has been fabricated or exaggerated.

⁵ The letter advised Mr Parsons had been constructively dismissed.

[31] I consider it unlikely that an in-depth analysis of the café's systems was undertaken before the restructure was initiated but I am satisfied that by October 2015 the café was in financial strife. I accept that terminating one or all of the weekend part time staff would not have addressed the café's concerns and would likely have created an understaffing problem during its most commercially productive shifts. I find Ms Lee's decision to reduce its full-time staffing level was a reasonable commercial response to the financial difficulties it faced and a decision that a fair and reasonable employer could have made in all the circumstances at the time.

Was the process fair?

[32] The law requires an employer who is proposing to restructure its business to not only have genuine reasons for undertaking the restructure, but it must conduct a fair procedure and act in good faith towards employees affected by the restructure. Amongst other matters good faith obliges an employer who is proposing to make an employee or employees redundant to provide those individuals access to information relevant to the decision and an opportunity for the employee to comment on the information before the decision is made.⁶

[33] I am unwilling to conclude that there was a complete absence of consultation as was submitted. I accept that the way Ms Lee introduced the restructuring proposal was clumsy but I consider her concurrent invitation for alternative solutions satisfies, at least in part, Ping Ltd's obligation to provide employees an opportunity to comment on a restructuring proposal. I am also persuaded that Ms Lee's request for someone to reduce hours of work demonstrated an open mind to how the café's financial problems could be addressed and was a genuine attempt to avoid imposing a redundancy.

[34] Mr Parsons said if he had been allowed to respond to the redundancy proposal he would have suggested that one or all of the part-time weekend staff be made redundant and he could have undertaken the work. His testimony on this matter was problematic; Mr Parsons already worked weekend shifts. I consider it unlikely that he would have been able to perform his own tasks as well as others when, by his own evidence, the weekends required further staffing. It remains unclear in any event why Mr Parsons did not canvas that possibility with Ms Lee when she had asked for solutions.

[35] It was clear from the evidence that staff worked in close proximity to each other. That environment appears to have fostered informal conversations between Ms Lee and the café's employees. Mr Parsons voluntarily deposed that in two months leading up to the restructuring proposal Ms Lee "*was always complaining*" about the cost of staffing and her concern that the café could not afford to pay staff. On balance I consider it likely that Mr Parsons (and most likely the other employees) had been well aware for some time, albeit informally, of the nature of Ping Ltd's financial difficulties. I note however that neither Mr Parsons (nor any of the other employees) were provided with any specific financial information other than Ms Lee's general assertion as to the wages bill, that may have assisted each or all of them to make useful comment on the financial concerns.

[36] Mr Parsons does not challenge the last on first off principle as a legitimate means to select employees for redundancy. At the heart of his claim is that he was not given any opportunity to comment on that methodology.

[37] The criteria by which an employer assesses who should be selected for redundancy is another example of information that is relevant within the meaning of s 4(1A)(c). Ms Lee should have advised Mr Parsons that she intended to select an employee for redundancy using a 'last on, first off' methodology and allowed him an opportunity to comment on the selection criteria before she made a final decision.

[38] I accept that even if Mr Parsons been able to present his views on the selection criteria he may not have been able to dissuade Ms Lee from proceeding with a selection for redundancy on the basis of a last on first off principle. However the failure to allow him an opportunity to do so precluded any possibility for him to alter the outcome. Those omissions were a breach of Ping Ltd's statutory good faith obligations and were not the actions of a fair and reasonable employer in all the circumstances.

Summary of findings

[39] I have found that Mr Parsons' dismissal was substantially justified in that his position was genuinely redundant. The procedure to determine Mr Parsons' position was redundant was flawed and I am unwilling to find that the deficiencies were minor. It follows that Mr Parsons has a personal grievance and is entitled to remedies.

⁶ Section 4(1A)(c) Employment Relations Act 2000

Remedies

Contribution

[40] I have considered whether Mr Parsons' requests to know whether he would be selected for redundancy contributed to the procedural flaws that resulted in his dismissal. When faced with the possibility of redundancy it is not unusual for employees to want to know the outcome of an employer's decision as soon as possible. While I accept that Ms Lee felt uncomfortable by Mr Parsons' ongoing questions I am not satisfied that his inquiries can be characterised as so blameworthy or causative that remedies should be reduced.

Wages

[41] Section 128 of the Employment Relations Act provides that where an employee has lost remuneration as a result of the personal grievance the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or 3 months' ordinary time remuneration.

[42] I have found Mr Parsons' redundancy to be genuine. In the event that proper consultation had occurred it is likely that Mr Parsons would have been made redundant and the dismissal justifiable. These findings lead me to conclude that Mr Parsons' remedies flow not from the loss of his position but from the failure of Ping Ltd to consult properly. In these circumstances I do not consider it appropriate to award wages for a period of time beyond what Mr Parsons could have reasonably expected had Ms Lee conducted a procedurally fair process. I estimate that a procedurally fair consultation process would have taken a further 2 weeks. Mr Parsons is entitled to remuneration equal to the amount of wages he would have received for a period of two weeks.

[43] I do not accept Ms Lee was able to withhold payment of the sum equal to the two week notice period the parties had agreed. Mr Parsons is further entitled to payment of two weeks' notice.

Hurt and humiliation

[44] Having assessed Mr Parsons' evidence on the effect the dismissal. I find that that a significant feature of his distress related to his financial circumstances flowing from his dismissal. Those concerns are a consequence of the loss of his position for which I am unable to compensate him.

[45] I accept however that the speed by which he was made redundant in circumstances where he had no substantive input into that decision was upsetting. I consider an award of \$4,000 as compensation for his distress associated with the defects in the consultation process is appropriate.⁷

Costs

[46] Mr Parsons is entitled to a contribution to his costs. The investigation meeting lasted approximately 4.5 hours inclusive of two relatively short comfort breaks. There were no complex procedural issues or matters of law that arose during the investigation, nor was the matter progressed before the Authority in anything other than in the usual and accepted ways. Applying the Authority's daily tariff of \$4,500 proportionally to the length of time required to investigate this matter I consider an appropriate award of costs is \$2,500.

Orders

[47] Ping Ltd trading as Esquires Coffee is ordered to pay Michael Parsons the following;

- (i) \$2,160 (gross) pursuant to s. 123(1)(c)(ii) comprising 2 weeks' wages associated with the estimated period consultation period and 2 weeks' wages in lieu of notice;⁸ and
- (ii) \$4,000 as compensation for distress pursuant to s. 123(1)(c)(i); and
- (iii) \$2,500 as a contribution towards costs and \$71.56 for the filing fee.

Michele Ryan
Member of the Employment Relations Authority

⁷ section 123(1)(c)(i)

⁸ 72 hours per fortnight at \$15.00 per hour equals \$1,080.