

Authority received a brief of evidence from its sole company director Michael Ensor. The parties' representatives filed written closing submissions both of which have been considered.

[3] All witnesses answered questions under oath or affirmation from me and the parties' representatives. 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.

What were the issues?

[4] Two days before the investigation meeting took place, Mr Singh advised that he was withdrawing his claim for lost wages given that he continued to receive financial support from ACC in the months following the termination of his employment. As a result, the issues the Authority (now) needed to investigate and determine were as follows:

- (i) What was said in Mr Ensor's telephone call with Mr Singh on 7 March 2024 and how long was that call?
- (ii) Was Mr Singh's redundancy substantively and procedurally what a fair and reasonable employer could have done in the circumstances at the time?
- (iii) What efforts were there to have Mr Singh redeployed?
- (iv) Was he unjustifiably dismissed?
- (v) Has there been a breach of s 130 of the Act and if so,¹ should a penalty be imposed against the company?
- (vi) Is Mr Singh owed compensation for hurt and humiliation under s 123(1)(c)(i) of the Act?
- (vii) If any remedies are awarded for unjustified dismissal, should this be reduced (under s 124 of the Act) for blameworthy conduct by Mr Singh that contributed to his own grievance?
- (viii) Should either party contribute to the costs of representation of the other?

¹ Section 130 concerns the obligations of employers to hold and maintain a wages and time record for their employees.

What are the relevant facts?

[5] Mr Singh commenced employment with TSL as a full-time CNC operator in November 2022. TSL operates as a shop-fitting business that manufactures and installs shop cabinetry, counters, and the like. As a CNC operator, Mr Singh used a machine to convert large sheets of material into specified shapes ready for assembly.

[6] On 7 February 2024, Mr Singh injured his wrist in a non-work-related incident and was medically unfit to work from 19 February 2024 onwards. During this period, he received financial support from ACC.

[7] It was Mr Ensor's evidence that six months before the end of 2023, TSL was experiencing significant financial distress due to a downturn in sales and a decline in revenue earnings. While the business had grown from one employee to a staff of 65, profits had fallen consecutively in 2022 and 2023 culminating in a loss of \$1.1M in 2024. Mr Ensor had been advised by his accountant in November 2023 that he would need to start cutting costs. However, not wanting to let go of staff before Christmas, Mr Ensor borrowed a further \$500K using his home as security to keep the business afloat.

[8] A major contributing factor to TSL's decline in revenue was the loss of its largest client, The Warehouse Group, which resulted in the immediate cancellation of all pending projects TSL had with the client. Mr Ensor stated that by 1 March 2024, he closed two other facilities and that staff were sweeping the shop floor because there was no work for them to do. He subsequently sought employment law advice regarding redundancies in order to cut costs.

[9] In early March 2024, there was a company-wide staff meeting to discuss TSL's financial difficulties and the need to restructure. Because Mr Singh was not at work at the time due to him being on ACC, he was neither invited nor present at the meeting. When I asked Mr Ensor whether Mr Singh was notified about the meeting, he acknowledged that TSL had no evidence to that effect. Mr Ensor also conceded that it could not be shown that Mr Singh had been provided with a redundancy proposal from the company.

[10] On 6 March 2024, Mr Singh received a text message from Mr Ensor who wanted to talk to him about some “changing situations” at work. The relevant text messages between the pair are set out below:

Hi Navjot,
We have some changing situations at threesixty ltd which I would like to discuss with you, preferably face to face but we can do over the phone if required. Would be available between 9 and 10 am tomorrow?

Can you attend in person?

Okay lets chat on ph

Sure sir
I will call you or you can call me.
Thanks

I can do uber as I cannot drive that far.

Sure

[11] On 7 March 2024, Mr Ensor telephoned Mr Singh to explain that the company was struggling and losing money and would need to restructure and that his job as a CNC operator was at risk. News of the restructure caught Mr Singh by surprise as he thought Mr Ensor was calling to talk to him about his wrist injury and how that could be accommodated upon return to work.

[12] The telephone conversation lasted some 10 to 15 minutes during which time Mr Singh mentioned that if he was made redundant he would drive for Uber to help financially support his family until he got a new job. While Mr Singh had previously worked as a part-time Uber driver, he had not done so since his wrist injury and was medically unfit to work from 19 February to 9 July 2024.

[13] After the telephone call, Mr Singh did not hear back from Mr Ensor for a week and assumed that he had not been selected for redundancy. To be sure, he texted Mr Ensor on 15 March 2024 for an update and received the following reply from him that his role was being made redundant:

Hi Navjot, I am at appointment this afternoon but can confirm we will be closing your position. This is regrettable and not an easy decision but the current climate is very grim.

I have informed all staff affected that it must happen by mid-April as per my accountant's advice. I am happy to help you find employment so that the transition is manageable for you. Please call me Monday to discuss.

[14] Three days later, Mr Singh received a letter from Mr Ensor (18 March 2024) that confirmed his redundancy:

Following our previous correspondence and discussions held on March 7th, 2024, we regret to inform you of the necessary measures undertaken by Three Sixty Limited in response to the prevailing challenges within our industry.

As articulated during our meeting, the downturn in our industry and subsequent reduction in workloads have compelled us to take decisive action in reducing overheads and implementing a company restructure. Regrettably, these circumstances have led to some difficult decisions being made regarding our staffing and operational expenses.

The restructure has necessitated the closure of certain divisions within Three Sixty, as part of a strategy to reduce overhead costs. Furthermore, reducing our staff levels has become imperative to align with the current economic climate and to safeguard the long-term sustainability of our business.

We understand the impact that these decisions may have on our employees and their livelihoods, and we deeply appreciate the dedication and contributions of each member of our team. However, it is essential for us to adapt to these challenges proactively to prevent the risk of business closure.

We assure you that every effort has been made to manage this transition, and tough decisions made for those affected.

Regrettably your employment will be terminated on the 25th April 2024

Letters of reference will be made available to you and prospective employers are welcome to call us for personal recommendations.

[15] Mr Singh received his final pay from TSL on 5 April 2024 which included redundancy pay of 30 days; seven days more than he was entitled to under his individual employment agreement with the company.

[16] On 26 April 2024, Mr Singh raised a personal grievance of unjustified dismissal with TSL and commenced proceedings in the Authority by way of a statement of problem lodged on 21 June 2024. A statement in reply from TSL was subsequently filed and although the parties attended mediation, the matter did not resolve there.

Was Mr Singh unjustifiably dismissed?

[17] The test for whether a dismissal is justified is set out in s 103A of the Act. It requires an objective assessment of whether the employer's actions, and how they were carried out, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:²

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[18] Mr Ensor's brief of evidence records issues with Mr Singh's attendance and punctuality at work that were "disruptive" to the work place and that other employees had issues with his behaviour and attitude. Quite why Mr Ensor now needed to comment on Mr Singh's performance given the issues in this investigation is unclear and unhelpful. But be that as it may, there can be "mixed motives" in the case of a redundancy situation provided genuine business reasons are the predominant motive.

[19] I am satisfied that at the time of Mr Singh's dismissal, TSL was struggling financially. The company had lost a significant customer which resulted in the cancellation of future work almost "overnight". A personal cash injection of \$500K by Mr Ensor to keep staff employed through the Christmas and New Year period while noble, was against his accountant's advice to start the restructuring process in November 2023. When TSL's financial position did not improve in March 2024, the need for it to restructure became a matter of urgency but the speed in which the company acted came at a cost.

[20] Under s 4 of the Act, an employer is required to act in good faith when proposing decisions that may adversely affect an employee's continued employment including that of a redundancy. Mr Cain referred me to *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 in which the Employment Court emphasised that consultation must

² *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

be meaningful and genuine. However, there was no real consultation in Mr Singh's case.

[21] The all-workers meeting that TSL had in early March 2024 took place without Mr Singh's involvement or participation due to an oversight by management. During that company-wide meeting, for which there are no minutes, those who attended would have had the business case for restructuring explained to them so that they could provide further comment, if any.

[22] In contrast, Mr Singh received a 10-15 minute telephone call with Mr Ensor on 7 March 2024. Although TSL's representative, Mr Browne, referred in his closing written submissions to a 2019 Forbes article that telephone calls can provide a more focussed mode of communication,³ Mr Singh's telephone call fell far short of meeting the consultation requirements of s 4 of the Act. Specifically, Mr Ensor failed to establish a framework in which Mr Singh could be given a real opportunity to provide input before a final decision was made. As it was, it was Mr Singh who had to approach his employer for an update because there had been radio silence from Mr Ensor for over a week following their telephone discussion. In the end, Mr Singh was mistaken that his job may have been spared because on 15 March 2025, Mr Ensor texted that he would be closing his position, a decision which was later confirmed in a formal letter from TSL three days later.

[23] Mr Singh was afforded no real opportunity to consider TSL's redundancy proposal because he had not been invited to the company-wide meeting in early March 2024 when this was presented to staff. Consequently, he would not have been in a position to understand properly the urgency with which the company now needed to restructure especially when he had been absent from work on ACC since early February 2024. The first time he appears to have been made aware of his employer's predicament was in the above telephone call with Mr Ensor by which time his co-workers had known of the company's financial difficulties for at least a month.

[24] Mr Browne submits that Mr Singh had mentioned in his telephone conversation with Mr Ensor on 7 March 2024 that he could start earning income as an Uber driver,

³ Liz Kislik "Surprising Reasons To Switch From Video-Conference To the Phone" (28 January 2019) Forbes <www.forbes.com>.

signalling his understanding of his employer's changed circumstances. However, this was not feedback to a redundancy proposal when no information was provided to Mr Singh during the telephone call regarding selection criteria and redeployment opportunities.

[25] During the investigation meeting, Mr Ensor advised that Mr Singh was one of eight employees who were let go during that first round of redundancies (there have been approximately six other redundancies since then) and of the eight chosen for redundancy, two were re-employed. Mr Singh was denied the opportunity to make a case for himself, evidently because he was on ACC and could find alternative work for Uber. However, this misses the point as Mr Singh was entitled under s 4(1A)(c)(i) and (ii) of the Act to information relevant to the continuation of his employment and an opportunity to comment on that information before a decision was made.

[26] It may be noted that the selection criteria that was adopted by TSL was that of first on, last off. However, this was never shared with Mr Singh who learned of it for the first time during this investigation process. To his credit, Mr Ensor admitted that he had not told Mr Singh what the selection criteria was.

Conclusion on unjustified dismissal

[27] While I accept that TSL had genuine commercial reasons to restructure, the speed in which the company acted resulted in a truncated redundancy process for Mr Singh that did not comply with s 4 of the Act. These obligations are designed to ensure fairness and transparency especially in a redundancy process.

[28] In the present case, there was no real consultation and no information provided to Mr Singh concerning selection criteria and alternatives to redundancy. The failings cannot be described as minor procedural flaws. TSL's failure to undertake a fair process was not what a fair and reasonable employer could have done in the circumstances rendering its redundancy of Mr Singh procedurally unfair and substantively unjustified.

Remedies

[29] Mr Singh gave evidence that he found himself in a very dark place following his dismissal. His wife was on paid parental leave having recently given birth at the

time. Mr Singh's parents both reside in India and the loss of his primary source of income meant that he could not support them financially which was important being the only son in the family. Mr Singh further stated that he wanted to have a conversation with Mr Ensor about how he could save his job because while he was receiving ACC at the time, he knew that he could not rely on that income in the long term. As it would turn out, Mr Singh's entitlement to receive ACC support payments ended in July 2024.

[30] Mr Singh's wrist injury was such that it affected his ability to drive for Uber and work in his own handyman and repair business. That business has returned only a modest profit and has since been sold. The impact of the dismissal affected Mr Singh's ability to study for his PRINCE2 (project management) certification which he did not pass. He had funded the course himself and could not afford to pay the extension fee of \$2,500 to sit the test at a different time.

[31] Mr Browne submitted that Mr Singh received redundancy payments that exceeded his contractual entitlement which ought to mitigate any claim for additional compensation for non-pecuniary loss. I agree. Taking into consideration the Employment Court's banded approach for hurt and humiliation, an appropriate award to compensate Mr Singh for the effects his grievance has had on him is \$15,000 which I reduce to \$13,366.9 on account of the overpayment made by TSL. I make no further reduction under s 124 of the Act for contribution as by definition, a redundancy is a no-fault dismissal for which Mr Singh is wholly without fault.

Other matters

[32] On Mr Singh's behalf, Mr Cain sought a penalty for TSL's failure to immediately provide its wages and time record when this was requested in April 2024 when the personal grievance was raised. However, given Mr Singh's withdrawal of his lost wages claim, a penalty for a breach of s 130 of the Act would be unduly harsh.

Reasonable expenses

[33] Given the outcome of this investigation in which Mr Singh has been successful, it is appropriate that he be reimbursed the filing fee of \$71.55 for lodging his statement of problem with the Authority.

Summary of orders

[34] The Authority orders Three Sixty Limited to pay Navjot Singh \$13,369 without further deduction in compensation for hurt and humiliation. Payment is to be made by in three instalments as follows:

- (i) first instalment of \$4,456.33 and the filing fee of \$71.55 by Friday 29 August 2025;
- (ii) second instalment of \$4,456.33 by Tuesday 30 September 2025;
and
- (iii) the third and final instalment of \$4,456.34 by Friday 31 October 2025.

What about costs?

[35] Costs are reserved.

[36] The parties are encouraged to resolve the issue of costs between themselves. If they are unable to do so and an Authority determination on costs is required, Mr Singh may lodge a memorandum on costs 21 calendar days from the date of this determination. From the date of service of that memorandum, TSL shall file its reply 14 calendar days later.

[37] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁴ I can indicate that given the investigation meeting ended before 1 pm, \$2,250 or one half of the notional tariff for the first day of an investigation meeting would be the starting point.

Peter Fuiava
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.