IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 39
EMPC 105/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WILSON-GRANGE INVESTMENTS TRADING AS THE GRANGE BAR AND RESTAURANT Plaintiff
AND	RICHARD GUERRA Defendant

Hearing: 10 November 2022

Appearances: JD Turner, counsel for plaintiff
S Greening and K Hudson, counsel for defendant

Judgment: 14 March 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Guerra was employed as Front of House Staff by the plaintiff company at its restaurant, The Grange, from October 2019 to 31 August 2020. His time with the company coincided with the COVID-19 pandemic, a downturn in business and two lockdowns.

[2] From a relatively early stage in his employment Mr Guerra raised issues as to whether he was receiving the number of hours he was entitled to under his employment agreement. These issues were not, from Mr Guerra's perspective, satisfactorily resolved. The company's director/owner, Mr Wilson, subsequently raised issues about

Mr Guerra's conduct at work, including historic concerns raised by unidentified third parties.

[3] In the event, Mr Guerra was dismissed. He pursued a claim in the Employment Relations Authority contending that he had been unjustifiably disadvantaged and unjustifiably dismissed. The Authority concluded that Mr Guerra had not been unjustifiably dismissed but had been unjustifiably disadvantaged.[1] The Authority's determination as to unjustified disadvantage centred on the following matters. First, the reduction of Mr Guerra's hours of work to less than the minimum 35 hours a week provided for in his employment agreement (disadvantage 1: rostered hours of work).[2] Second, the reduction of his wages by 20 per cent at the outset of the pandemic, breaching the Wages Protection Act 1983 and/or by unlawfully varying his employment agreement (disadvantage 2: reduction in wages).[3] Third, the company retrospectively seeking to rely on a force majeure clause in the employment agreement to justify a reduction in wages (disadvantage 3: force majeure).[4]

[4] The Authority ordered the company to pay Mr Guerra compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 of $9,000, comprising $1,000 for the failure to provide him with, or pay him for, his contractual minimum 35 hours work per week; $2,000 for the 20 per cent reduction in his wages; and $6,000 compensation for the way in which the company dealt with the "inappropriate conduct" allegations. The Authority declined to reduce the remedies ordered in Mr Guerra's favour for contribution.

[5] The company filed a challenge, which was pursued way of non-de novo hearing.

Alleged errors of law and/or fact

[6] The plaintiff contends that the Authority made four errors of fact and/or law, which can be summarised as follows:

---

1 *Guerra v Wilson-Grange Investments Ltd* [2022] NZERA 70 (Member Larmer).
2 At [9].
3 At [22].
4 At [33].

Rostered hours of work – shortfall in pay

- The Authority erred in law in treating the rostered hours of work claim as a personal grievance. That is because the claim had been pursued by the defendant as a breach of the Wages Protection Act or a breach of contract, not as a personal grievance. The Authority had given the company no notice that it was intending to investigate the claim as a personal grievance; any personal grievance in respect of the rostered hours of work issue was not raised within time; the company had not consented to it being raised out of time; and it had, in any event, gratuitously paid the alleged short fall prior to the Authority issuing its determination.

Shortfall in wages – level 4 and level 3 lockdowns

- The Authority erred in fact and law in finding that Mr Guerra had suffered an unjustified disadvantage by the reduction in his wages by 20 per cent at the outset of the lockdowns. That is because Mr Guerra was unable to work and the company was permitted to take steps to reduce his pay in the circumstances. The Authority also erred in holding that the company bore the onus of justifying the alleged shortfall in wages and in substituting its own view of the procedure adopted by the company, rather than determining what a fair and reasonable employer in the company's position could have done.

Unfair disciplinary process

- The Authority erred in law in determining that a third party complaint gave rise to an unjustified disadvantage without first determining whether there had been any effect on Mr Guerra's employment or his conditions of employment. In these circumstances the justification or otherwise for the process the company adopted was irrelevant. It is also said that the Authority erred in finding that no reduction should be made for contribution.

Costs

- The Authority erred in fact and law in ordering the company to make a contribution to Mr Guerra's costs, having earlier indicated in its substantive determination that it was inclined to allow costs to lie where they fell, and in later concluding in its costs determination that Mr Guerra was the successful party.

[7] Before turning to consider each limb of the company's challenge, it is convenient to set out some further factual context.

The factual context

[8] Mr Guerra was employed on a full-time basis (cl 5.1). Clause 6 of the agreement set out the hours and days of work. The hours of work (generally not exceeding 40 hours, five days per week) could be varied by agreement. Schedule A to the agreement set out a summary of Mr Guerra's terms and conditions of employment. It provided that Mr Guerra was to be paid at a rate of $22 per hour and that the "(Minimum Guaranteed) Hours of work" was 35 hours; he could be requested to work in excess of these hours but was free to decline and there was to be a minimum engagement of two hours per shift.

[9] Mr Guerra was appointed to his position in October 2019 by Ms Wilson, who was initially his line manager. From December 2019, Mr Roux took over this role. Throughout the relevant period Mr Wilson (Ms Wilson's father) was the managing director of the company.

[10] Shortly after his arrival Mr Guerra raised concerns with Mr Roux and Mr Wilson about the number of hours he was being rostered to work. He said that the hours were less than he was contractually entitled to and he wanted them increased. He says that he continued to raise issues relating to his work hours with Mr Roux and, until just prior to Alert Level 4 lockdown, did not receive any substantive response.[5]

---

[5] The evidence disclosed that there was one occasion when he received an apology and an increase in hours. Then the lockdowns started. Mr Roux did not give evidence.

[11] On 17 March 2020 Mr Wilson convened a meeting with staff. The meeting took place against the backdrop of a downturn in business. There was a dispute about what was said at the meeting. In evidence-in-chief Mr Wilson said that at the meeting he asked for voluntary concessions to be made. In this regard he said that the business was suffering a sharp downturn and if it had to shut it would receive no income; it was unclear how the Government would respond to COVID-19; it was possible that there might be a wage subsidy and if so The Grange would apply for it; that while The Grange was still able to operate staff would only be paid 80 per cent of their normal pay or 80 per cent of their normal hourly rate including with any wage subsidy; and if The Grange was forced to close its business then staff would not be working and so would not be paid. He gave evidence that he told staff that these steps were necessary to avoid redundancies and that if there was any issue staff should contact him directly. Mr Wilson said that at this point staff unanimously decided that they would all accept a 20 per cent reduction to their normal hourly rate as a variation to their employment terms. He gave evidence that Mr Guerra attended the meeting and orally agreed to what he had proposed.

[12] It is common ground that Mr Guerra attended the meeting. Mr Guerra gave evidence that no mention was made of possible redundancies and that Mr Wilson had not sought feedback from staff about the possibility of reducing hours and pay. Rather, he says that Mr Wilson expressed uncertainty as to what was happening, or might happen, including in respect of wage subsidies. He was adamant that staff, including himself, had not voluntarily agreed to have their terms and conditions varied.

[13] The meeting took place some time ago. No one other than Mr Wilson and Mr Guerra gave evidence. No notes of the meeting were before the Court. A written update to staff sent out by Mr Wilson around two weeks after the meeting notably made no mention of an earlier agreement by staff to vary their terms and conditions. And no variation was recorded in writing, as required under cl 21 of the employment agreement. These factors support the conclusion that it is more likely than not that no variation was agreed to, including by Mr Guerra, at the meeting of 17 March 2020. I note, in any event, that on Mr Wilson's evidence (referred to above) it is difficult to characterise what he said to staff as a proposal on which he was seeking feedback, and his evidence in response to questioning reinforces those difficulties.

[14] A week after the meeting, on 23 March 2020, the Prime Minister publicly announced that the country would immediately be going into Level 3 lockdown. That meant that The Grange had to close; staff had to clean the restaurant and leave the premises. It was plainly a very stressful and difficult time for Mr Wilson. It was also a very stressful and difficult time for staff, including Mr Guerra (he described it in cross-examination as the "worst experience in my life"). The country went into Level 4 lockdown with effect from 25 March 2020. In the event, the restaurant remained closed until 14 May 2020, when Auckland returned to Level 2.

[15] On 30 March 2020, Mr Wilson sent out an update to all staff, advising that the impact of the lockdown on the business was significant and that the company would not be in a position to top up wages to 80 per cent, as previously indicated. He went on to advise that:

> On Saturday, Grant Robertson, the Minister of Finance announced that he would rather employees just be paid their subsidy, than lose their jobs due to employers not being able to top up wages.
>
> Unfortunately, we are now in a position that we are only able to pay you each the subsidy amount each week until we start generating revenue again.
>
> I am sorry it has got to this, but unfortunately there is no other option for us at the moment.
>
> If you would like to discuss this further, please contact me directly…

[16] During this period (25 March 2020 to 13 May 2020) Mr Guerra received a 20 per cent reduction in pay.

[17] Consideration was given to moving to a takeaways operating model when the Alert Level reduced to 3, but Mr Wilson ultimately decided against it. In anticipation of a move to Alert Level 2, he wrote to staff on 24 April 2020 updating them and advising them that some would be rostered to come in to the restaurant to prepare for opening. He clarified that any hours of work done up to the subsidy level would be covered by the subsidy, with the company topping up any hours in excess. He went on to say that: "Originally there was discussion about a top up to 80% of your normal wage, however that was before we were forced to stop trading completely, and losing the ability to generate any revenue."

[18] The restaurant re-opened on 14 May 2020. Mr Wilson wrote to staff the preceding week advising that operations would be severely impacted. He said that:

> We will inform you of changes that will need to take place, which will more than likely include reduced staff hours, changes to your regular duties, and unfortunately, maybe some positions being made redundant.
>
> We are doing everything in our power to generate revenue, and in turn retain staff, but this situation is largely out of our control.

[19] Mr Guerra again raised concerns about his rostered hours, noting the minimum entitlement to 35 hours per week under his employment agreement, and that he had been rostered for substantially less (around 23 hours). He asked that this be rectified. Mr Roux responded in the following way:

> Due to the current situation post Covid 19 lockdown, and subsequent to [Mr Wilson's] staff meeting 2 weeks ago, we've asked all staff to be flexible with their hours, both in terms of when they work and how many hours they work.
>
> We've been very open and transparent about it so I am a little surprised to receive this e-mail.

[20] Mr Guerra replied saying that he had no problem being flexible but that since the staff meeting temporary staff had been employed and they were being given more hours than he was. Mr Guerra continued to raise concerns about his rostered hours of work, including via text message with Mr Roux. On 19 June 2020, Mr Guerra texted Mr Wilson to arrange a meeting on 22 June 2020. The meeting took place on that date. During the course of the meeting the discussion moved beyond Mr Guerra's hours and into Mr Guerra's alleged performance and behaviour issues. Mr Guerra's evidence, which I accept, was that he was not given warning about the allegations being raised at the meeting and was not given an opportunity to respond to them.

[21] On 13 July 2020, Mr Wilson received what he described as an unsolicited email from a businessperson. The email identified historic issues about Mr Guerra and information the writer said they had obtained from "very reliable sources".

[22] On 12 August 2020 Mr Wilson emailed staff advising that, as Auckland was going back into Alert Level 3, the restaurant would not be opening.

[23] On 25 August 2020 Mr Guerra's then lawyer wrote to Mr Wilson on Mr Guerra's behalf, raising a number of concerns. The letter referred to a personal grievance claim in respect of an unlawful deduction from his wages, said to be in breach of the Wages Protection Act and/or his employment agreement, both before and during the lockdown period, and an unjustified disadvantage in respect of the way in which concerns were raised with him at the meeting on 22 June 2020.

[24] Shortly afterwards, on 28 August 2020, Mr Wilson emailed Mr Guerra asking him to attend a disciplinary meeting, warning that his employment was in jeopardy and advising him that he was welcome to bring a support person with him.[6] A further email followed later the same day, reiterating the request for a meeting and noting the importance of Mr Guerra attending the proposed meeting, as his employment was in jeopardy.[7] These communications prompted a written response from Mr Guerra's lawyer noting, amongst other things, that Mr Wilson had given no indication as to what the meeting was about; that it appeared that the company was taking retaliatory steps against Mr Guerra for raising a personal grievance three days earlier; and advising that Mr Guerra would not be attending the meeting because his lawyer was unavailable at the time identified by Mr Wilson and because the reasons for the meeting had not been particularised.[8] Further details were requested of the concerns that Mr Wilson wanted to discuss, along with a response to the issues raised in Mr Guerra's letter of 25 August 2020.

[25] A substantive response was provided through the company's lawyer later that day. The letter set out the company's position that, as Mr Guerra had not actually worked the hours contracted for, there was no valid claim under the Wages Protection Act and he (along with other staff) had consented to reductions in his pay during the COVID lockdown periods. The letter referred to the proposed misconduct meeting, prompted by a number of matters that were said to have been brought to Mr Wilson's attention and concerns passed on to Mr Wilson by unnamed patrons.

---

6 Email of 28 August 2020 at 8.47am.
7 Email of 28 August 2020 at 2.47pm.
8 Letter of 28 August 2020.

[26] The meeting went ahead on 31 August 2020. Later that day the company wrote to Mr Guerra summarily terminating his employment.

[27] Against this backdrop, I return to the grounds for the challenge, in respect of particular findings of the Authority.

Rostered hours of work – shortfall in pay

[28] The Authority dealt with this aspect of the claim as a personal grievance, rather than a claim under the Wages Protection Act and/or a breach of contract. The company says that this amounted to an error of law.

[29] An employee may pursue a claim for lost wages under the Wages Protection Act, pursuant to a breach of contract claim and/or via a personal grievance. Different procedures are associated with each, and each involves different timeframes for pursing a claim. A personal grievance must be raised with an employer within 90 days, and, if it is not, it can only be pursued by leave or with the employer's consent. The essence of the plaintiff's claim is that, having referred to the Wages Protection Act and breach of contract in the letter of 25 August 2020, the defendant was subsequently out of time for pursuing a personal grievance in respect of his rostered hours of work. If he was going to pursue such a claim, he needed leave or for the plaintiff to consent. Leave was not sought and the plaintiff did not consent. In these circumstances, the Authority could not unilaterally deal with the claim as a personal grievance.

[30] It is true that the letter of 25 August 2020 referenced an alleged breach of the Wages Protection Act and/or a breach of Mr Guerra's contractual terms. However, the Act makes it clear that an unduly technical approach is not to be adopted when determining whether an employee has raised a personal grievance – the key point is whether the employee has done enough to alert the employer to a grievance that they wish the employer to address.[9] The letter did this. In any event, the letter specifically stated that Mr Guerra *was* raising a personal grievance in relation to his rostered hours

---

9 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [33]-[38]; *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

of work, referring to having been rostered on for less than his minimum contracted hours resulting in a shortfall in pay for him. And it is apparent from the subsequent communications that the company was well aware of the core nature of Mr Guerra's complaint.

[31] The plaintiff contends that it was caught off-guard by the Authority proceeding to deal with the shortfall in pay issue as a personal grievance, referring to the way in which a case management minute was couched. The minute (dated 23 June 2021) set out the matters to be investigated and the issues for determination as follows: was there a reduction in wages? If so, did the plaintiff breach the employment agreement? Did the plaintiff breach its good faith obligations to the defendant?

[32] As counsel for the plaintiff says, no reference was made to an alleged underpayment of wages prior to 25 May 2020, or prior to 29 March 2020; or for the period from 24 November 2019 to 22 March 2022. The minute did, however, make it clear that the Authority would be investigating whether there had been an unlawful reduction in Mr Guerra's wages, encapsulating the core inquiry the Authority was undertaking.

[33] Against this backdrop, and to the extent that a failure to expressly draw a timeframe issue to the plaintiff's attention may amount to a challengeable error of law,[10] I am not satisfied that the Authority did make an error of law.

[34] The company made payment of the shortfall prior to the Authority issuing its determination. I have already found that the Authority did not err in treating the shortfall issue as a personal grievance. That means that it was open to the Authority, having found that the personal grievance was made out, to consider what relief may appropriately be awarded. I do not see the fact of payment as undermining the Authority's ability to deal with the residual claim for non-pecuniary loss under s 123(1)(c)(i). It follows that I am not satisfied that the Authority erred in this regard.

---

[10] Employment Relations Act 2000, s 179(5).

Shortfall in wages – level 4 and level 3 lockdowns

[35] There is no dispute that Mr Guerra's wages were reduced by 20 per cent for the pay periods ending 29 March 2020 to 10 May 2020. He received only the government subsidy during this time of $585 gross per week, rather than the $840 he would have received for the minimum 35 hours of work provided for in his employment agreement.

[36] The Authority concluded that while the plaintiff had a good reason for wanting to decrease its wages bill because of the significant slow-down in trade prior to the lockdowns and because it was unable to trade during Alert Levels 3 and 4,[11] it had failed to establish that the pay cut was done in a procedurally fair way that was consistent with its good faith and contractual obligations.[12]

[37] The plaintiff submits that the Authority erred in its finding of procedural unfairness. It is said that the parties entered into a voluntary agreement in respect of reduced hours of work and pay on 17 March 2020; that (in any event) The Grange did adequately engage with Mr Guerra over the pay cut proposal having regard to the pressing circumstances it was operating under at the time; and that it acted in accordance with its contractual obligations.

[38] I have already found that no agreement was reached with Mr Guerra at the 17 March 2020 meeting. I agree with counsel for the plaintiff that the context is important in determining whether the requirements of procedural fairness have been met for the purposes of s 103A (test for justification). The context in this case was a lockdown imposed by the government, within tight timeframes and under which Mr Guerra could not work (because of the lockdown) and The Grange could not operate (because of the lockdown). But this context, albeit pressing and challenging for all concerned, did not obviate the need for The Grange to engage with Mr Guerra before making decisions which impacted on him. Simply advising him by letter dated 30 March 2020 that it would only pay him the subsidy amount fell short of the minimum procedural requirements in the circumstances, as the Authority member observed.

---

11 At [11].
12 At [13].

[39] The point is underscored by the provisions in the agreement which the plaintiff sought to rely on, namely cls 8.3 and 20. Clause 8.3 provides for deductions from wages in certain circumstances, including for agreed absences. Clause 20 is a "Force Majeure" clause, enabling the parties to suspend their contractual obligations in the event of a circumstance beyond their reasonable control. While each enables reduction of pay/the non-performance of contractual obligations in certain circumstances, each also makes it clear that consultation is required prior to them being triggered. And those requirements are themselves overlaid by the statutory obligation of good faith and common law obligations. In this latter regard s 4(1A) makes it clear that the duty of good faith is wider than the implied obligation of trust and confidence and requires parties to an employment relationship to be active and constructive. While I accept that the level of engagement which might reasonably be expected in normal circumstances would have been seriously truncated, I do not accept that the evidence discloses that the base threshold of engagement was met.

[40] The plaintiff further says that the Authority erred in placing the burden on the company to establish that the disadvantage was justified and in substituting its own view of what was fair and reasonable. It is well established that the test for justification is objective. It is also well established that, where an employee has been dismissed or disadvantaged, the onus then shifts to the employer to justify their actions.[13] The Authority adopted this approach,[14] and it does not give rise to an error of law.

[41] An employer's actions are to be measured against those that a notional fair and reasonable employer could have taken. That may usefully be conceived of as a target. The bullseye of the target is "employer best practice" and the outer circles of the target comprise "acceptable action". Towards the outer edges of the target lie the danger zones. Anything off the target is not what a fair and reasonable employer could have done. The size of the target will depend on "all of the circumstances at the time", as s 103A(2) expressly states.

---

13 Employment Relations Act 2000, s 103A(2); *Restaurant Brands Ltd v Gill* [2021] NZEmpC 186 at [105].

14 At [111].

[42] It will generally be helpful to adopt a multi-layered approach to an assessment of what the relevant circumstances are in any particular case and, accordingly, where the outer edges of the target lie. Plainly "all" of the circumstances covers more than external pressures on an employer, and circumstances change over time. In this case, the pandemic and its impact, including the impact of government-imposed lockdowns and the speed with which things were happening, were relevant to the target the plaintiff was required to hit if it was found to be acting as a fair and reasonable employer. Also relevant to the target the plaintiff was required to hit was the impact on Mr Guerra of a substantial reduction in his pay – he too had financial obligations to meet. And, in terms of timing, by the second lockdown there had been more of a breathing space, and time for a more considered approach. In other words, what could be regarded as fair and reasonable at the outset changed over time.

[43] I return to the Authority's approach. The Authority member was plainly alive to the pressures that the plaintiff company was under, and the speed at which things were moving. These considerations were expressly referred to in the determination, and were clearly considered relevant to an assessment of the reasonableness or otherwise of the way in which The Grange approached the wages issue at the time. As the Authority member noted, other options were available, including the ability to take accrued annual leave or annual leave in advance, or to agree a period of unpaid leave. These were all options that could have been explored (albeit at speed) but were not. I can detect nothing in the Authority's analysis to support the argument that the member substituted their own view for the assessment process required by s 103A. Indeed a broader approach than the one adopted by the Authority, including one which expressly weighed Mr Guerra's interests, may be said to be aligned to the approach required by s 103A(2).

Unfair disciplinary process

[44] The plaintiff contends that the Authority erred in law in determining that a third party complaint gave rise to an unjustified disadvantage without first determining whether there had been any effect on Mr Guerra's employment or his conditions of employment, rather moving straight to an assessment of justification.

[45] While the Authority member did not expressly state that Mr Guerra's employment was adversely impacted by the third party complaint, the conclusion clearly emerges from the Authority's analysis and the material before the Authority (notably the correspondence and the evidence Mr Guerra gave). The third party complaints were referred to as a matter of concern in the company's letter outlining the issues to be discussed at the scheduled disciplinary meeting; the issues (of which the third party concerns were expressed to be part of) were said to be serious and that Mr Guerra's employment was in jeopardy. Mr Wilson sought to give the third party complaints, and the reason why he wished to talk to Mr Guerra about them, a benign characterisation in evidence, but that was not reflected in the contemporaneous correspondence. The Authority did not err in its approach to this part of the claim; the groundwork for assessing justification was made out.

[46] The plaintiff also contends that the Authority erred in not making a reduction for contribution for this personal grievance. It is argued that no harm was done until Mr Guerra reacted as he did. As I have said, I disagree with the plaintiff's characterisation of the allegations and the process that followed. It follows that no error has been established in respect of the Authority's approach to contribution.

Costs

[47] The Authority concluded its substantive determination by expressing the preliminary view that costs might appropriately lie where they fell but provided the parties with an opportunity to make submissions if agreement could not be reached. The parties could not reach agreement and the Authority member was accordingly required to determine costs.

[48] The plaintiff says that the Authority member erred in concluding that Mr Guerra had been the successful party overall and was entitled to a contribution to his costs. As the plaintiff points out, Mr Guerra did not succeed on his unjustified dismissal claim.

[49] The Authority has a broad discretion as to costs.[15] Mr Guerra succeeded in his unjustified disadvantage claim. It is apparent from the Authority's determination that the evidence in respect of that claim was relatively substantial – certainly the analysis of the disadvantage claims consumed significantly more air time in the determination than the unjustified dismissal claim. While it may have been open to the Authority to let costs lie where they fell, it has not been established that the member made an error in awarding a contribution to Mr Guerra's costs, in light of the measure of success he did achieve.[16]

Outcome

[50] The plaintiff's challenge is dismissed.

[51] The defendant is entitled to costs. The parties are reminded that the proceedings were provisionally assigned category 2B for costs purposes. If costs cannot be agreed I will receive memoranda, with the defendant filing and serving within 15 working days of the date of this judgment; the plaintiff within a further 10 working days; and the defendant strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 2.45 pm on 14 March 2023

---

15 Employment Relations Act 2000, sch 3 cl 15.
16 *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156, [2017] ERNZ 885.