

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 390
3048132

BETWEEN LARRY THOMPSON
 Applicant

AND B L RAYNER LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mary-Jane Thomas, counsel for the Applicant
 Matthew Dearing, counsel for the Respondent

Investigation Meeting: 21 June 2019 at Invercargill

Date of Determination: 1 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Thompson) alleges that he suffered a disadvantage as a consequence of unjustified actions taken against him by his employer (Rayner) and further contends that he was unjustifiably dismissed for redundancy by Rayner.

[2] Rayner deny both contentions.

[3] Mr Thompson was employed as a labourer by Rayner at its Invercargill branch and commenced in that role on 9 January 2017.

[4] On 14 July 2017 a co-worker, Ms Gayle Clearwater, complained to Rayner that Mr Thompson had commented to two other colleagues that Ms Clearwater “had her tits out” on her Tinder profile.



[5] The previous day, Ms Clearwater had confronted Mr Thompson with the same allegation which he vehemently denied.

[6] Because of the absence of staff overseas, the complaint was eventually forwarded to Mr Bill Potter the financial controller of Rayner for investigation. Mr Potter was at no time working directly in Rayner's Invercargill branch office, but he had general management oversight of the operation.

[7] Mr Potter took advice on the appropriate way forward from an EMA consultant and interviews with the protagonists commenced on 18 July 2017. Mr Potter established to his satisfaction that in fact only one of the two co-workers had heard any relevant comment by Mr Thompson. Moreover, Mr Thompson remained adamant that he had never uttered the offending words.

[8] In the result, Mr Potter reached the conclusion that he was unable to confirm that Mr Thompson had said what he was alleged to have said.

[9] Mr Potter wrote to Mr Thompson by letter dated 24 July 2017 in which he made these observations:

“...I have decided the allegations are not conclusive in favour of one side or the other. The allegation is therefore unsubstantiated.

However, because the allegation of harassment was a serious misconduct issue, it does raise some serious concerns and I am hopeful that our discussions and this letter make our expectations of your future behaviour very clear.

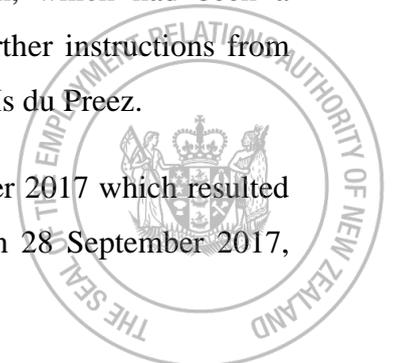
We do not expect that you will:

1. Make any comments of a sexual nature about any employee (suggestive or blatant), whether at work or outside of work, or
2. Comment on any dating profile or pictures of any employee.

You need to be careful that any banter is well clear of the line whereby it may be interpreted as such.”

[10] The relationship between Ms Clearwater and Mr Thompson, which had been a friendly one, continued to deteriorate and Mr Thompson received further instructions from Rayner either from Mr Potter or from the on-site operations manager Ms du Preez.

[11] There was a mediation held between the parties on 5 September 2017 which resulted in still further correspondence to Mr Thompson from Rayner and on 28 September 2017,



Mr Thompson caused a personal grievance for unjustified disadvantage to be raised with Rayner.

[12] There was a further event notified to Rayner by Ms Clearwater on 4 October 2017 and further inquiries were undertaken by Mr Potter but in the midst of those inquiries, Rayner announced an intention to restructure its Invercargill business and both Ms Clearwater and Mr Thompson were in positions that were identified as potentially being surplus to requirements.

[13] A consultation process commenced on 9 October 2017 and despite information being submitted by Mr Thompson's counsel to resist the effect of the restructure as it affected Mr Thompson's position, on 20 October 2017 Mr Thompson was advised that his position would be disestablished and a subsequent personal grievance was raised in respect to this alleged unjustified dismissal for redundancy.

Issues

[14] I propose to investigate this employment relationship problem by considering the two personal grievances separately. To that end, I intend to consider and respond to the following two questions:

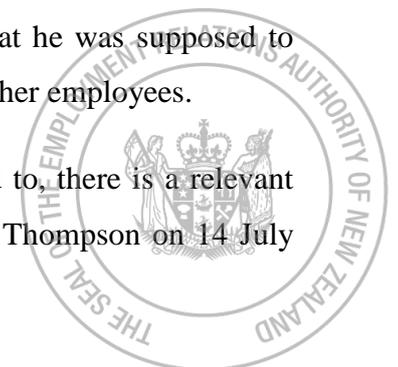
- (a) Was Mr Thompson unjustifiably disadvantaged in his employment; and
- (b) Was Mr Thompson unjustifiably dismissed?

Was Mr Thompson unjustifiably disadvantaged in his employment?

[15] I conclude that Mr Thompson was unjustifiably disadvantaged in his employment by reason of unjustified actions which Rayner took in respect to the investigation into the allegation made by a co-worker against Mr Thompson.

[16] The first point that needs to be made is that Mr Thompson himself filed a complaint with the employer and this is dated as received by the employer on 14 July 2017. Mr Thompson's complaint is about the behaviour of Ms Clearwater in confronting him (as she did) the previous day to complain to him about the allegation that he was supposed to have referred to her as "having her tits out" on her Tinder account to other employees.

[17] In addition to the written complaint which I have just referred to, there is a relevant meeting between Rayner's operations manager Ms du Preez and Mr Thompson on 14 July



2017 as well. This is referred to in an email from Ms du Preez to Mr Potter dated 18 July 2017 and appears to cover much of the same material as was traversed in the original written complaint from Mr Thompson. There is however one additional matter and that is Ms du Preez's recording that Mr Thompson was "intending to give a formal complaint through for both Daniel and Gayle (Daniel for slander and Gayle for the way she approached him in the workshop)."

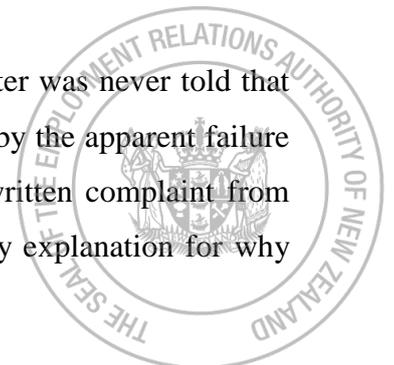
[18] The significance of this just quoted portion of Ms Du Preez's email is that Mr Potter took that email reference as evidence for the mistaken view that Mr Thompson had not in fact formally complained whereas of course he had. Ms du Preez does not refer to the formal complaint in her email either; this may be because she did not know about it or was not the recipient of the original formal complaint. Whatever the cause, Ms du Preez was not a witness before me and so I was unable to take the matter any further.

[19] What is clear is that Mr Thompson himself formally complained to the employer about the behaviour of Ms Clearwater and it is a significant point in his sense of grievance that he says, with some justice, that while Rayner investigated Ms Clearwater's complaint about him, they never actually investigated his complaint about Ms Clearwater.

[20] When I put that allegation to Mr Potter during my investigation meeting, he denied that and said that he had in fact asked Ms Clearwater about the allegation that she had confronted Mr Thompson, that she pleaded to it, agreed that it was inappropriate, and that was where the matter ended. Mr Potter's explanation for how he conveyed this intelligence to Mr Thompson was that he recorded that in notes of his interview with Ms Clearwater and these were passed to Mr Thompson.

[21] As with most of this sort of material in these circumstances, these notes are voluminous and even for an experienced reader, may be daunting to consider and assimilate. What is particularly relevant in this case is that Mr Thompson can neither read nor write. Without assistance from a third party, any written material provided to Mr Thompson would have been completely unable to be accessed by him.

[22] For reasons that I am unable to find an explanation to, Mr Potter was never told that Mr Thompson could not read or write, and so that fact contributed to by the apparent failure of the Invercargill office to tell Mr Potter that there was a formal written complaint from Mr Thompson about Ms Clearwater's behaviour, seems to be the only explanation for why



Rayner failed to formally investigate Mr Thompson's allegation. No doubt his sense of grievance would have been far less significant if he thought that he was being treated equally as between himself and Ms Clearwater.

[23] What makes the situation more difficult for Mr Thompson though is that in addition to feeling his own complaint was ignored, he also was confronted with the curious way in which the 24 July 2017 letter was put together for Rayner. On the one hand the letter is absolutely clear that there was no substantiated allegation against him.

[24] Set against that is the way the letter proceeds to say that notwithstanding that, "the allegation of harassment was a serious misconduct issue" and then proceeds to set out rules for Mr Thompson's future behaviour.

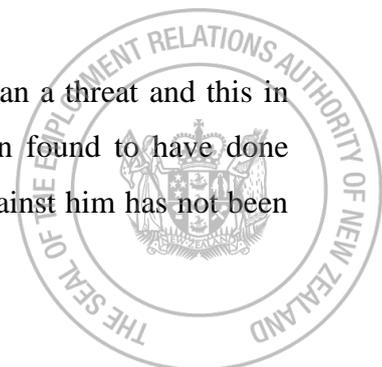
[25] Given the finding that it could not be demonstrated on the balance of probabilities that he had done what he was alleged to have done, to then proceed to set out rules of engagement for him seems a bridge too far.

[26] Put very shortly, the finding of fact that Mr Potter made was that he could not substantiate the claim made by Ms Clearwater that Mr Thompson talked to other staff about seeing pictures of her on her Tinder account "with her tits out".

[27] One of the matters that presumably influenced Mr Potter to reach this conclusion apart entirely from the vehement denials of Mr Thompson himself, who admitted to referring to Ms Clearwater having a Tinder account but no more than that, would have been the fact that there is no way that a Tinder profile would disclose pictures of an unclad person. Certainly, Mr Potter was clear that he was told that was the position.

[28] But fundamentally the 24 July 2017 letter is fatally flawed because, while it makes clear that there is no substantiated finding against Mr Thompson, and it seeks to require him to conform to certain behaviour modification practices. More than that, it then proceeds to say that "if there was to be a future example of behaviour that was deemed to be sexual harassment, this would almost certainly result in your dismissal".

[29] It is hard not to see that last sentence as no more or no less than a threat and this in circumstances where, as I keep emphasising, Mr Thompson has been found to have done nothing wrong. To put that point another way, the allegation made against him has not been



made out and that should have been an end of it. At the very most, what I would have expected a fair and reasonable employer to do in this circumstance was seek to try to repair the relationship between these two protagonists by encouraging them to engage in mediation. That at least would have been an even-handed process which might have resulted in resolution of the issue for the benefit of both parties, but to attempt to manage the situation by requiring Mr Thompson to somehow modify behaviour when he has been found to have done nothing wrong, goes too far.

[30] I am satisfied that a fair and reasonable employer could not have properly concluded that Mr Thompson ought to have been treated in that way and therefore that he has suffered a disadvantage (that is undoubted given the fact that he has been asked to modify his work behaviour so as to effectively avoid seeing the complainant).

Was Mr Thompson Unjustifiably Dismissed for Redundancy?

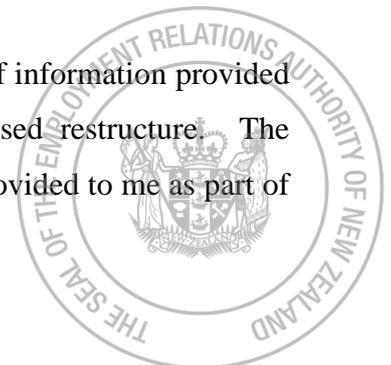
[31] Contemporaneous with the investigation of another set of complaints brought against Mr Thompson by Ms Clearwater in October 2017, Rayner initiated a restructure proposal the effect of which would have been that Mr Thompson (and others, ironically including Ms Clearwater) would have their positions disestablished.

[32] The evidence by Rayner suggests that I find there was a conventional consultation process resulting in a proper decision to disestablish positions, including Mr Thompson's.

[33] It is true that the employer had been sustaining heavy losses for the previous two years trading and that the position was deteriorating. It is also true that Rayner's owners had put in significant capital to try to steady the ship. Equally importantly, Invercargill orders were down 70% year on year. Redundancies had already been undertaken in the year prior to Mr Thompson being employed in the business.

[34] In a letter dated 17 October 2017 from Mr Thompson's counsel to Rayner, the point is made that Mr Thompson's view of the proposed restructure is that its bona fides is questionable.

[35] Moreover, counsel for Mr Thompson also refer to the paucity of information provided to Mr Thompson (and presumably others) in respect to the proposed restructure. The information, for instance, that I rely on in this determination was all provided to me as part of



my investigation but the majority of it does not seem to have been available to Mr Thompson at the time he was being asked to comment on the possible restructure.

[36] The legal position is clear enough. Section 4(1A) (c) of the Employment Relations Act 2000 (the Act) requires an employer to provide an employee with all relevant information that might impact on a decision that employer contemplated making in respect to that employee. This is particularly pertinent in redundancy situations where the employer is under a clear statutory duty to furnish to the affected employee any relevant material which will assist the employee to participate in the consultation process. I am not persuaded that Rayner did all that was required of them in that regard.

[37] That said, the need for this business to take out cost would appear to be self-evident but by failing to communicate adequately the extent of the problem in the consultation process, they have successfully created an environment where it is easy for Mr Thompson to argue, as he does, that the redundancy is a sham.

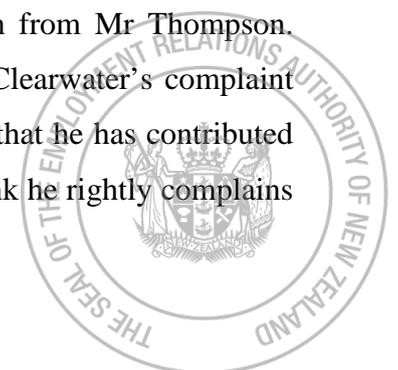
[38] On balance, I conclude that the redundancy is genuine and that the dismissal of Mr Thompson because of that redundancy can stand, notwithstanding the fact that I consider Rayner has failed absolutely to provide to Mr Thompson all of the relevant particulars which seem to me to absolutely justify the need for a restructure.

[39] Had Rayner properly addressed those matters with Mr Thompson, they might well have avoided this particular part of the claim that he makes.

Conclusion

[40] I have decided that Mr Thompson has suffered a personal grievance by reason of having been unjustifiably disadvantaged in his employment and before I turn to consider what remedies might be applied to that grievance to remedy the employer's default, I must consider whether has done anything to contribute to the circumstances giving rise to his personal grievance.

[41] In that regard, it is difficult to find any level of contribution from Mr Thompson. After all, the employer's own investigation did not substantiate Ms Clearwater's complaint against Mr Thompson and therefore it is difficult for me to conclude that he has contributed in any way to the employer's subsequent treatment of him which I think he rightly complains about.



[42] Accordingly, I now turn to consider compensation to remedy the wrong. Mr Thompson seeks compensation in the sum of \$15,000 for the unjustified disadvantage. I think the nature of this default should attract compensation in the sum of \$10,000. That seems to me to place this particular grievance in the middle of the middle band for unjustified disadvantage claims.

[43] However, in respect to Mr Thompson's claim that he has been unjustifiably dismissed for redundancy, I have not found that allegation made out for reasons I have already explained.

[44] It follows from that conclusion that Mr Thompson is not entitled to any lost wages because wages that he has lost are by virtue of the legitimate decision to dismiss him which extinguishes any entitlement at law.

[45] There is also a claim for legal costs. Costs are reserved and the parties are urged to resolve them on their own terms. Should that not be possible, Mr Thompson's counsel is to initiate by memoranda a request for this Authority to fix costs and Rayner is to respond with their memoranda within fourteen days of the date of receipt of Mr Thompson's memorandum. I will then deal with the matter promptly on the papers.

[46] I remind counsel that my warrant as a Member of the Authority expires by the effluxion of time on 21 August 2019 and any memoranda in relation to costs needs to be with me for determination well before that date.

[47] In summary then, Mr Thompson is to be paid \$10,000 by way of compensation under s 123(1)(c) of the Act to compensate him for the unjustified disadvantage personal grievance which I have decided he has sustained in this matter.

[48] Rayner is also to pay to Mr Thompson the cost of the Authority filing fee of \$71.56.

[49] Costs are reserved on the basis already set out.



James Crichton
Chief of the Employment Relations Authority

