Reviewing a redundancy decision

ASSIGN BUSTER

It is well established that when reviewing a redundancy decision the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it was carried out. The enquiry into each factor is carried out separately (Coutts Cars Ltd v Baguley [2001] ERNZ 660 (CA)).

Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss. 103A(3)(b) to (d)).

That these requirements remain in the form of a consultation process in a redundancy setting is confirmed by s. 4(1A)(c) of the Act. The relationship was confirmed by the Court in Jinkinson v Oceana Gold (NZ) Ltd [2010] NZEmpC 102.

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The Court recently affirmed in Rittson-Thomas t/a Totara Hills Farm v Davidson1 that it is not for the Court (or the Authority) to substitute its own view as to whether a position should be considered redundant (or not). Rather the inquiry should be in accordance with the statutory requirements, that is: whether what was done (the dismissal and the substantive reasons for it), and how it was done (the process undertaken), was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. 2 Section 103A Employment Relations Act 2000

Substantive

Justification for dismissal is addressed in s. 103A of the Employment Relations Act 2000 (the Act), which states:

S103A Test of Justification

i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2). ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[63] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[64] In the Employment Law case Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson1 Unrep [2013] NZEmpC 39 20 March 2013 (Rittson) his Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] … the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of

what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

It is well established that when reviewing redundancy decisions the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it is carried out. The inquiry into each factor is carried out separately (Coutts Cars Ltd v. Bageley [2001] ERNZ 660 (CA)).

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[27] Regarding the justifiability of a dismissal on grounds of redundancy, the starting point is to enquire whether the decision to make a position redundant was made for proper business purposes so as to ensure a purported redundancy is not an attempt to legitimize a dismissal where the predominate reason for termination of employment is for other reasons.

[28] As with any allegation of unjustified dismissal, the onus is on the employer to demonstrate that its decision to terminate an employee’s employment was justified. 3 Section 103A Employment Relations Act 2000

[29] In Rittson-Thomas [2013] NZEmpC 39 the Employment Court recently stated: It will be insufficient under s. 103A, where an employer is challenged to justify dismissal or a disadvantage in employment, for the employer to say that this was a genuine business decision and the Court (or Authority) is not entitled to enquire into the merits of it. 4

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[60] The Court of Appeal statement of the law regarding the genuineness of a redundancy in GN Hale & Son Ltd v Wellington Caretakers IUOW [1991] 1 NZLR 151 (Hale) was that: An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[61] However since Hale was decided, justification for dismissal is now as stated in the Employment Relations Act 2000 (the Act), which at s 103A of the Act sets out the Test of Justification as being:

S103A Test of Justification i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

ii. The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[62] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[63] The Employment Court has issued recent decisions in this area which have reexamined the statement of the law in Hale in light of s 103A of the Act.

[64] In Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson Unrep [2013] NZEmpC 39 20 March 2013 (Rittson) the Court referred to Hale and its previous comments about Hale in Simpsons Farms Limited v Aberhart [2006] ERNZ 825, 842 . His Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however: [54] … the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[65] In that case, the Court was critical of the lack of information provided to the employee, and held that the employer had not adequately explained why the money saved by the disestablishment of the employee's position justified the position being made redundant. The Court found upon analysis that the employer had been mistaken in concluding that there would be a wage saving of 10% per annum, when in fact it was 6%. This " threw into doubt" the genuineness of and, therefore, the justification for, the dismissal.

[66] In Brake v Grace Team Accounting Limited [2013] NZEmpC 81 13 May 2013 (Brake) Travis J firmly endorsed Rittson, finding in that case that

although the employer claimed that its financial position had deteriorated over the six months the employee had been employed requiring a reduction in salaries, in fact analysis by the Court concluded that the employer's figures were incorrect and there had been no sudden deterioration.

[67] On this basis it was held that the employer's justification for the dismissal was mistaken, with the consequence that the dismissal of the employee was unjustified.

[68] In Catherine Tan v Morningstar Institute of Education Ltd T/A Morningstar Preschool Ltd [2013] NZEmpC 82 16 May 2013 the Court adopted a similar approach. As in the case of the employee in Brake, Ms Tan had been provided with factually incorrect information about the employer's financial position. She had been misled into thinking that the redundancy of her position was inevitable when it was not; the cost savings were relatively minor and insufficient to have satisfied the employer's requirements.

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[26] In its submissions, Checkmate refers to a decision of the Authority BodePatterson v Hammond-Smith and Smith t/a I Love Merino Limited [2013] NZERA Auckland 294 (Member Anderson). In that decision, the Authority sets out an excellent summary of the law in respect to redundancy and for the purposes of the present decision, the analysis in Bode-Patterson is adopted without amendment.

[27] For present purposes, it is enough to say that the law requires the Authority to enquire into the genuineness of a redundancy so as to ensure

that the redundancy is being activated for proper business purposes and not being undertaken for base motives.

[28] Further, it is important to note that it is not enough for a business owner to simply claim the necessity to make structural changes; they must be prepared to demonstrate that necessity to the satisfaction of the Authority.

[29] In broad terms then, there are two enquiries that the Authority must make to satisfy itself about the genuineness of the redundancy. The first is to establish whether the evidence supports the employer's contention that there were genuine business reasons for the redundancy and the second is to ensure that there is no base motive underpinning the decision to dismiss for redundancy such as, for instance, a conviction on the part of the employer that the business would be better off without the incumbent of the role to be made redundant. Attached as it were to that last consideration is an examination of whether there is evidence of " mixed motives".

[30] Dealing first with the underlying genuineness of the decision to declare redundancy, it is appropriate to remember Chief Judge Colgan's observations in Michael Rittson-Thomas t/a Totara Hills Farm v Hamish Davidson [2013] NZEmpC 39 (Rittson-Thomas) wherein His Honour had this to say:

It will be insufficient under s. 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to say that this was a genuine business decision and the Court (or Authority) is not entitled to enquire into the merits of it. The Court (or Authority) will need to do so to determine whether the decision, and how it was reached, were what

a fair and reasonable employer would/could have done in all the relevant circumstances.

Procedure

[67] An employer who is proposing to restructure its business or any part of its business must not only have genuine reasons for undertaking the restructuring, but must follow a fair procedure in respect of affected employees.

[68] Provisions of the Act govern questions of justification for dismissal and, in particular, dismissal by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[69] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in Simpsons Farms Limited v Aberhart2 [2006] ERNZ 825, 842

noted that this compliance with good faith dealing includes consultation “ as the fair and reasonable employer will comply with the law”

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Turning to process. Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss. 103A(3)(b) to (d) of the Act). That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s. 4(1a)(c) of the Act and the relationship between the two sections is confirmed by the Court in Jinkinson v. Oceanagold (NZ) Ltd [2010] NZEmpC 102.

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The Court of Appeal in Aoraki Corp v McGavin [1998] 1 ERNZ 601 stated at page 619, the following proposition. What is crucial, however, is to recognise that the remedy can relate only to the particular wrong, to what has been lost or suffered as a result of the particular breach or failure. In this case the personal grievance is not that the employment was terminated, but that the manner of implementation of the decision to terminate was procedurally unfair.

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Consultation

In Simpsons Farms Limited v Aberhart6 Simpsons Farms Ltd and Aberhart [2006] ERNZ 825 the Chief Judge noted Consultation does not require agreement between the parties however genuine efforts must be made to reasonably accommodate the views of the employees and there should be a tendency to achieve consensus7 .

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[37] Section s. 4(1A)(c) of the Employment Relations Act places an obligation on an employer proposing to make a decision that may affect an employee's ongoing employment, to provide to a potentially affected employee access to information relevant to its decision and an opportunity to comment on that information before making a final decision.

[38] Further, where an employer is contemplating dismissal on grounds of redundancy, good faith requires an employer to consult with a potentially affected employee about the possibility of redundancy5 . Simpsons Farms Ltd and Aberhart [2006] ERNZ 825

[39] The requirements for an employer to provide information, and to act in good faith also assists the Authority in its assessment as to whether the employer's decision was what a fair and reasonable employer could have done in all the circumstances.

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Provide information

[55] It is a truism that employers in a restructuring environment are obligated to provide affected staff with “ access to information, relevant to the continuation of the employee’s employment, about the decision; and … an opportunity to comment on the information to their employer before the decision is made”: s. 4(1A)(c) of the Act.

[56] Those precepts were emphasised in a decision of the Full Bench of the Employment Court in Vice Chancellor of Massey University v. Martin Wrigley & Ors [2011] NZEmpC 37 (Wrigley).

[57] In para.[48] of the judgment, the Court says: When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer’s final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

[58] And again at para.[55] of the judgment, the Court says: The purpose of s. 4(1A)(c) is to be found in para.(ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer. [emphasis added]

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Consultation

[77] The law on consultation in a redundancy setting is well settled. An employer contemplating a restructure which affects an employee or employees must engage with those employees in good faith such that the employee has a straightforward opportunity to engage in the process, be aware of the issues driving the employer, and, amongst other things, suggest alternatives that the employer may not have thought of or may not have fully worked up.

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Good faith

[38] Even if a redundancy is decided upon for genuine business reasons if the justification for the redundancy is challenged by an employee the employer must be able to prove to the Authority that the decision made and how it was reached was what a fair and reasonable employer could have done in the circumstances that existed at the time3 Section 103A Employment Relations Act 2000.. In applying the tests under s. 103A of the Employment Relations Act 2000 (the Act), Chief Judge Colgan of the Employment Court has recently explained that:

[54] It will be insufficient under section 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to enquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer

would/could have done in all the relevant circumstances. 4 Michael Rittson-Thomas trading as Totara Hills Farm v Davidson [2013] NZEmpC 39

[39] Genuine consultation with an affected employee is required.

Remedies

Section 123(1)(a) to (c) of the Act provides as follows: (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies: (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee: (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance: (c) the payment to the employee of compensation by the employee's employer, including compensation for- (i) humiliation, loss of dignity, and injury to the feelings of the employee; and (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

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Contribution

Section 124 of the Act, requires that where the Authority has determined that an employee has a personal grievance, the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and remedies are to be

withheld or reduced where there has been contribution or fault on the part of the employee.

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Loss of rem

Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee “ as a result of the grievance”.

In Aoraki Corporation v McGavin9 the Court of Appeal held that in the absence of a contractual stipulation, the general practice as to the period of notice does not support fixing notice in excess of one month.

If a redundancy is found to be genuine as I have in this matter, and a personal grievance for unjustified dismissal is upheld on grounds of procedural unfairness, remedies are confined to the distress caused by the way the redundancy was handled, rather than the loss of the job itself

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Reimbursement of Lost Wages

[52] Employees are under a duty to mitigate their loss and in this case there was insufficient evidence presented to the Authority to support the fact that Ms Whaanga had made a real effort to mitigate her loss. As Chief Judge Colgan made clear in Allen v Transpacific Industries Group Ltd (t/a “ Mediasmart Ltd”) (2009) 6 NZELR 530, par 78:

… dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[53] Ms Whaanga has not established evidence to support her efforts to mitigate her loss and in these circumstances I find that there is no compensation for lost wages is payable to her.

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