

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 163
3255679

BETWEEN MARK BROWN
 Applicant

AND TPS NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Jonothan Whyte, counsel for the Applicant
 Geoff Bevan and Gerrad Brimble, counsel for the
 Respondent

Investigation Meeting: 29, 30 and 31 May 2024 in Auckland

Submissions: From the respondent on 13 June 2024, from the
 applicant on 26 June 2024 and, in reply, from the
 respondent on 5 July 2024.

Determination: 18 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] TPS New Zealand Limited (TPS) dismissed Mark Brown from his position as its Human Resources and Compliance Manager on 24 March 2023. The dismissal was on the grounds of redundancy.

[2] In a process changing several senior roles in its commercial cleaning business TPS had resolved to split Mr Brown's position into two new positions – a People and Culture Manager (PCM) for the human resources work and a Health, Safety and Compliance Manager (HSCM) for safety and standards work.

[3] TPS managing director Ash Taylor had told Mr Brown that the HSCM role “would be yours, if you wanted it” or Mr Brown could apply for the human resources role but might not be “the right fit”.

[4] Mr Brown considered both roles would be a demotion as they had a lower salary range and TPS should have adopted an alternative proposal he had developed. His proposal would have enhanced Mr Brown’s existing role, increased his salary and provided more administrative and technical support in his team. He considered the changes he proposed would then enable him to focus on more strategic aspects of the human resources, health and safety and compliance needs of the business.

[5] Mr Brown raised a personal grievance after he was dismissed on the grounds of redundancy. He alleged the restructuring decisions were not for genuine reasons and were not made fairly because Mr Taylor had not first addressed some performance concerns about how Mr Brown had been carrying out his existing role.

[6] In reply to Mr Brown’s personal grievance application, TPS said it has followed a fair process to restructure the role and made those decisions for genuine business reasons.

[7] The parties’ differences were not resolved in mediation and proceeded to an Authority investigation.

The Authority’s investigation

[8] For the Authority’s investigation Mr Brown, Mr Taylor and the following seven witnesses lodged written witness statements:

- Elu Mailata, TPS’s former IT manager who was also made redundant in the same restructuring process;
- TPS chief financial officer Kenny Harris;
- TPS human resources co-ordinator Tania Green;
- TPS national account manager Joanna Woodhatch;
- TPS building manager Steve Watling;
- Louise Gardner, a former TPS account manager; and
- Louise Brown, Mr Brown’s wife.

[9] A witness statement from TPS national cleaning operations manager Colin Cambier was put aside because he was on leave and did not attend the investigation meeting.

[10] All witnesses answered questions under affirmation from me and the parties' representatives. The representatives gave some initial closing submissions orally at the investigation meeting. They later lodged detailed submissions in writing on the facts and application of relevant legal principles.

[11] 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.

[12] This determination has been issued outside the usual statutory period since the receipt of the last information from the parties as the Chief of the Authority decided exceptional circumstances existed for the delay.¹

The issues

[13] From Mr Brown's statement of problem and TPS' statement in reply the following issues were identified for investigation:

Personal grievance

- (a) Was the dismissal of Mark Brown by TPS on 24 March 2023 on the grounds of redundancy, and how it was decided, what a fair and reasonable employer could have done in all the circumstances at the time, considering whether:
 - (i) The proposal was made for genuine business reasons, not an ulterior purpose;
 - (ii) Notice and consultation on the proposal was sufficient;
 - (iii) Responses from Mr Brown were fairly considered before any decisions were made, without pre-determination;
 - (iv) Alternatives, including redeployment to another position, were considered fairly;

¹ Employment Relations Act 2000, s 174C(4).

- (b) If the actions of TPS were not justified (in disadvantaging and/or dismissing Mr Brown), what remedies should be awarded, considering:
- Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Brown that contributed to the situation giving rise to his grievance?

Arrears

- (d) Is Mr Brown owed arrears of wages for bonus payments and, if so, of what amounts?
- (e) If arrears are owed, should interest be awarded?
- (f) If arrears are owed, was TPS also liable to a penalty under s 4 of the Wages Protection Act 1983 (the WPA) and, if so, of what amount?

Good faith obligations

- (g) Did TPS breach its duty of good faith in how it carried out and decided its redundancy proposal and/or payment of bonuses? If so, should a penalty be imposed?

Costs

- (h) Should either party contribute to the costs of representation of the other party?

Mr Brown's employment and how it came to end

[14] Mr Brown's employment as HR & Compliance Manager began on 17 March 2016. The terms of his written employment agreement provide "an all-inclusive salary", medical insurance, a mobile phone, a work carpark and a laptop computer.

[15] In May 2018 Mr Brown took up a newly-formed and larger role as National Operations Manager of TPS. This role added operational responsibilities to his existing human resources and compliance work. The written agreement for the role described the terms provided as:

- 40 hours per week,
- Annual Salary of \$120K
- Bonus scheme \$20K (TBC)
- Company Car and the use of a Company Car Park, Mobile Phone, Laptop

No measures set for bonus pay entitlement

[16] At the time of this change Mr Taylor had said the bonus was conditional on Mr Brown achieving key performance indicators (KPIs) but did not specify what those indicators were. This was the reason for adding the letters “TBC”, meaning “to be confirmed” to the bonus term in the employment agreement. Mr Taylor had said they would discuss and set those KPIs at a later date but this did not occur.

[17] In September 2019 Mr Brown asked about the bonus for the 2018-2019 financial year. Mr Taylor agreed to pay the bonus amount for that year.

[18] Mr Brown said he had also asked in September 2020 about a bonus payment in for that year but Mr Taylor had deferred his question for later discussion. Mr Taylor denied Mr Brown had asked him.

[19] In the 2021 and 2022 years Mr Brown did not ask about payment of a bonus. The topic was not mentioned again until after he was dismissed and it was raised in correspondence to TPS from his lawyer.

[20] In February 2022 Mr Brown reverted to his earlier role as HR and Compliance Manager. He and Mr Taylor had agreed to that arrangement because changes in the business, including from the effects of the COVID-19 pandemic, had expanded the workload of the National Operations Manager role.

[21] Mr Cambier, who had been working as national service delivery manager, took over the National Operations Manager role. TPS also appointed an Auckland operations manager to deal with regional needs.

April review and pay rise

[22] On 29 April 2022 Mr Taylor and Mr Brown met to review Mr Brown’s work and the needs of his role. As recorded in an email Mr Taylor wrote that day, he agreed to increase Mr Brown’s base salary to \$133,000. He also asked for “a one-page plan for the next 12 months” defining goals for compliance and human resources for each of the three divisions into which TPS staff teams worked. Relevant to later developments Mr Taylor’s email included the following comments or observations about future plans for Mr Brown’s role:

Do we eventually need to split the portfolios of HR and Compliance at either the Senior management level (ie have one SM for each area) or can we build this under your leadership?

...

And lastly, I want to review and update your job description – can you review the attached *Manager – People & Culture [job description]* and edit it to add in Compliance part of the role, and see if anything else is missing.

I believe your greatest contribution to TPS can be the leadership you can provide around People & Culture, and as discussed you are sometimes more comfortable in being a highly effective Compliance Manager, which is a unique combination of skills. Let's use this 12 months to better define and work together on that contribution and ensuring the resource is right so you are not bogged down with admin, and given the room to lead.

[23] As mentioned in his email, Mr Taylor had attached a document labelled “General Manager – People Culture Job Description March 2022 (DRAFT)”.

Consultant's report identifies criticisms

[24] In early May 2022 TPS held some ‘have your say’ workshops for its staff. Their feedback in those workshops identified problems those staff members had doing their jobs. This included comments about culture, the induction process, training and safety. Mr Taylor held a full staff meeting to discuss that feedback. He also arranged for an external consultant to meet some TPS customer service managers (CSMs) and client account managers (ACMs) to discuss their concerns.

[25] Tracy May, from a business consultancy firm called The Diversitas Group, met with selected staff on 30 June and 1 July. Ms May then provided written reports to Mr Taylor. Her reports described “challenges expressed by CSMs” as including a “lack of HR support”, “lack of training/development opportunities” and “negative perception of certain senior managers”. Her report on interviews with ACMs referred to a “perception ... that HR is too compliance driven” and specifically criticised Mr Brown for not providing them with adequate support and being “aloof”.

[26] This determination refers to one of those “certain senior managers” only by the initials AB. Those are not the initials of that person's name. Because the Authority's investigation primarily concerned the substance of Mr Brown's case and circumstances, not any criticisms made of AB, it was not necessary or appropriate to use AB's actual name in this publicly available determination.

[27] Ms May's reports referred to “a prevailing view” among ACMs that:

... there is a lack of alignment between senior leaders, with a perception that there is a group that is attached to the 'old' way of doing things ([AB], [Mr Brown] and [Mr Mailata]) and then a faction that is committed to expanding and growing the business ([Mr Taylor], [Mr Harris][Mr Cambier]). The impact of this is that ACMs receive conflicting information from these different groups with, for example, change and initiative being encouraged by one group, whereas it is discouraged by the other.

[28] A section of her report referring to risks for the business said:

The current perceived lack of internal support from senior managers, their line manager and support services (IT and HR) is perceived as having a negative impact on their ability to effectively service their customers, especially in the current climate of staff shortages.

[29] In another section, headed "hold leaders accountable", Ms May listed the following recommendations (italic emphasis added):

Look to appoint strategic leaders who are constantly in touch with the business. *Look to appoint leaders within your support services (IT and HR) with strategic insight and experience in leading change in addition to key technical skills.* Transition HR from being compliance focussed to being focussed on optimizing the employee/internal customer experience ... Tap into strategic HR skills to create a shift towards HR being an active business partner and support rather than just a compliance burden.

[30] The reports' reference to two 'factions' within TPS management became important after Mr Brown raised his personal grievance. The employment of the three managers referred to as being in the 'old way' faction ended during the nine months following those reports. Mr Brown argument, paraphrased, was that this showed the restructuring process was a deliberate 'purge' of particular personnel rather than motivated by genuine business needs of TPS.

[31] AB resigned in August 2022 following discussion with Mr Taylor about the criticism made in the Diversitas report about AB's work as a manager.

[32] Mr Mailata's role was disestablished on 17 March 2023 following a decision to contract out IT functions. He was dismissed for redundancy in the same restructuring process as Mr Brown. Mr Mailata had also raised a personal grievance but this was resolved by the parties without proceeding to an Authority investigation.

[33] Mr Taylor did not provide copies of the Diversitas reports to the managers in July or August 2022. Some of the text of those reports was disclosed to Mr Brown after his lawyer asked for them in February 2023. The copies of the reports provided to Mr Brown were heavily redacted. The redactions removed references to other managers

but, as subsequently revealed in the Authority investigation, also some specific references to the HR position. From the sections of the reports quoted earlier in this determination, the most significant redaction was a recommendation that read: “Look to appoint leaders within your support services (IT and HR) with strategic insight and experience in leading change in addition to key technical skills.” This appeared to contemplate a change of personnel by referring to *appointing* leaders, rather than changing how the incumbents worked.

[34] In his evidence to the Authority investigation Mr Taylor said he has raised only “general themes of the feedback” in those reports during a senior management team meeting in mid-2022.

[35] He also referred to those reports in a senior management team meeting in August, soon after AB had left TPS’ employment. Mr Brown alleged that Mr Taylor, after referring to the Diversitas reports as contributing to AB’s departure, went on to say that “HR and IT” should “watch out” as he “only just got started”. Mr Brown said the terms “HR and IT” were meant to refer to him and Mr Mailata.

[36] Mr Taylor denied making those comments. In his oral evidence Mr Taylor said he recalled talking in that August meeting about the Diversitas reports. He said he referred to “comments in there about IT and HR and there are things in there that we need to talk about”. When Mr Brown and Mr Mailata asked him for the “specific feedback” Mr Taylor said he had responded by saying they needed to meet one-on-one to discuss it.

[37] Mr Taylor did meet with Mr Brown later in August. Mr Brown said he had asked for specific examples of concerns referred to in the reports but Mr Taylor had not provided them. Mr Taylor declined to provide what he referred to as dates, times and people because he considered the reports were about perceptions and themes rather than focussing on specific instances or incidents.

Performance review meeting

[38] On 8 September Mr Taylor held a performance review meeting with Mr Brown. He also held review meetings with Mr Harris, Mr Cambier and Mr Mailata around this time.

[39] Mr Taylor set no performance measures or goals for Mr Brown in that review. Asked at the Authority investigation meeting why, in light of concerns referred to in the Diversitas report, none were set, Mr Taylor said he felt that it was “not fair to beat [Mr Brown] up on performance” as he considered the real problem what that the “role was too big”.

[40] As became apparent from later developments Mr Taylor was, around this time, continuing to consider the notion of splitting the HR and Compliance Manager’s role into two separate positions – one focusing on human resources as a People and Culture role and one focussing on safety and compliance requirements.

[41] In his board report for 1 September 2022 Mr Taylor wrote that he was “still consulting around a change in the HR department and splitting HR/Compliance functions – targeting September for this process”. In his 1 December 2022 report Mr Taylor wrote that he had:

a process underway to consider splitting roles to create a separate HR Manager and Compliance Manager to meet some of the gaps being experienced in leading behaviours in HR practices across managers etc.

Mr Brown’s proposal for change

[42] In December 2022, shortly before the Christmas holidays, Mr Brown talked to Mr Taylor about the prospect of reorganising some training and administration roles in his team. An administrator had resigned so Mr Brown thought it was an opportunity to look at all roles in the team. They agreed Mr Brown would prepare a proposal over the summer break.

[43] Mr Brown sent his proposal to Mr Taylor on 5 January 2023. He suggested two roles be enhanced – one for himself and one for Ms Green – and an administrator position be created to provide support to two other roles in his team. Mr Brown suggested his own position be retitled GM – People, Culture & Sustainability with a \$10,000 increase in his salary. He proposed a role presently held by Ms Green be expanded to include work as a dedicated training manager, also with an increased salary. The higher salaries he suggested for those two roles added no overall cost because Mr Brown proposed funding the increase by paying the three junior roles in the team less than in its current structure.

[44] Mr Brown provided a draft job description for his proposed role, based on the draft document Mr Taylor had given him in April, and job descriptions for the other four roles. He asked to meet Mr Taylor promptly to discuss his proposed changes.

[45] On the morning of 13 January Mr Taylor sent Mr Brown a meeting request for that afternoon. The request, headed “Catch up on HR team”, included the following message: “Can we catch up please on your proposal around the HR team”. This message referred to Mr Brown’s proposal but did not mention that Mr Taylor had also firmed up his own proposal for changes to the management structure and intended telling Mr Brown about it at their afternoon meeting.

TPS proposal for change

[46] In a meeting lasting around ten minutes on 13 January 2023 Mr Taylor said he did not think Mr Brown’s proposal did enough to address concerns about providing better support to TPS’ operational divisions, that is the parts of its business that provided cleaning and other services to its customers.

[47] Instead, Mr Taylor revealed his own proposal to split the role held by Mr Brown into two. Mr Brown later described himself as being shocked and blindsided by hearing of the proposal on 13 January.

[48] Later that day Mr Taylor sent Mr Brown an email outlining his proposal and a detailed four-page letter setting out details of “a potential restructure”, explaining its rationale. He attached a job description for the proposed two new roles of PCM and HSCM.

[49] Mr Taylor’s email said he did not think Mr Brown’s proposal of “a GM level position sitting over the top is the right answer”. Mr Taylor said the business did not have GM level managers and, although Mr Brown was “strong on compliance and processes”, he did not see Mr Brown currently operating at a GM level. Mr Taylor said actual and potential growth in the business needed “more resource at senior level leadership” and Mr Brown’s role was “too big” so he thought splitting it was the right approach.

[50] The accompanying letter to Mr Brown repeated Mr Taylor’s view that the portfolios of human resources, health and safety and compliance had become too much for one person to handle effectively. Under the heading of “potential impact on you”

Mr Taylor said his current view was that Mr Brown was better suited to the proposed HSCM role. He said he had not seen Mr Brown able to form good relationships with ACMs, particularly after their criticism of HR in the feedback surveys, or with other senior people across the business. He wrote that those factors suggested Mr Brown “may not be the best fit for the People and Culture Manager position” but Mr Taylor said he would be willing to discuss that view if Mr Brown wanted to express interest in the role.

[51] Mr Taylor’s letter went on to tell Mr Brown that the HSCM role “would be yours, if you wanted it” but would require discussion on “some changes to the way you do things”. Mr Taylor also advised that he expected that role would be paid around \$110,000 to \$120,000 a year but was “open to discussion” about the salary.

[52] Mr Taylor then referred to the prospect of suitable alternative options if Mr Brown was not appointed to either position, “either because you were not interested in either the H&S position or I decided that you are not the right fit for the People and Culture position”. He doubted any other options were available but said he was open to Mr Brown comments. He also said Mr Brown would receive one month’s notice if his employment ended due to redundancy, with some additional paid notice if he needed more time to look for another position.

[53] Mr Taylor also added that he was looking at the prospect of creating a dedicated recruitment position in the HR team, replacing someone who was leaving that month, and noted that was a change Mr Brown had also suggested in his own proposal.

[54] In response to a subsequent email query from Mr Brown a few days later, Mr Taylor advised he was looking at a salary range of \$125,000 to \$130,000 for the PCM role.

Parallel process for Mr Mailata

[55] Mr Mailata was also called to a meeting on 13 January and told of a proposal to contract out his position and potential for his employment to end by redundancy.

Sick leave

[56] In the following week Mr Brown and Mr Mailata both took sick leave. Neither subsequently returned to work.

[57] On 18 January Mr Brown sent a doctor's note saying he was not fit to resume work until 29 January. Between 18 and 25 January Mr Taylor sent Mr Brown three emails asking when he would be able to meet to respond to the restructuring proposal.

[58] In the third email Mr Taylor extended the time for feedback to 3 February, but advised he was likely to "proceed to make decisions" if he did not hear from Mr Brown by then.

[59] On 3 February a lawyer acting for Mr Brown wrote to Mr Taylor. The letter stated Mr Brown was "not obligated to reply or perform any work while he is on sick leave" but would "correspond via counsel regarding the proposal at the earliest opportunity".

[60] On 7 February Mr Brown got a further doctor's note advising he was not fit to resume work until 6 March. It was not clear from the evidence in the Authority investigation whether this note was ever sent to the company or, if so, when.

[61] On 8 February Mr Brown's lawyer wrote again to Mr Taylor. This letter described TPS's restructuring proposal as lacking information and said the demand for a response while Mr Brown was on sick leave indicated the outcome was predetermined. It said Mr Brown would, in good faith, "provide a fulsome response while he is on sick leave" once he was provided with a range of background documents also requested in that letter.

[62] From 15 February onwards correspondence the restructuring proposal was conducted between lawyers for TPS and Mr Brown. On that day counsel for TPS provided some documents related to the proposal. Those documents included an explanation from Mr Taylor of the rationale for the proposal, the heavily redacted copies of the Diversitas reports referred to earlier in this determination, extracts from some board reports referring to the HR and Compliance role and a table setting out a financial analysis of the costs of changing from one role to two.

[63] Mr Taylor's explanation said he did not accept the proposal would inevitably result in a redundancy situation and said, "in fact, I have been very clear with [Mr Brown] that I see a place for him in the new structure, if the proposal proceeds". He said the proposal was not about saving costs. Rather, introducing another senior level position would increase TPS' costs. And those additional costs, he said, were justified

by what was expected to be a resulting improved performance of the functions of those roles.

[64] His financial analysis identified an additional cost of around \$103,000 for the TPS payroll by creating the roles of PCM and HSCM. Neither person appointed to those roles would, however, receive a motor vehicle allowance of around \$13,000 and fuel costs of around \$7,500 paid to Mr Brown in his position as HR and Compliance Manager. Mr Taylor's outline of the costs showed both proposed new roles would each get same amounts for an employer contribution to KiwiSaver, carparking and medical insurance as were provided for Mr Brown's existing role.

[65] If Mr Brown accepted redeployment under the restructuring proposal to the proposed HSCM role, the effect on his remuneration would, therefore, have been a reduction from a salary of \$133,000 to up to \$120,000 and removal of just over \$20,000 for the motor vehicle and fuel allowances.

[66] Mr Brown also understood that taking up that role would mean his separate office would have to be given to the new PCM and Mr Brown would have to work in a shared workspace with other members of the human resources team.

[67] By 6 March Mr Brown, through his counsel, had not responded to the proposal. By email message that day TPS counsel asked for Mr Brown's response by no later than 13 March. This message said Mr Taylor would likely go ahead with a decision if no feedback was received by then on that basis that "TPS assumes that Mr Brown's ongoing absence is directly related to the restructure proposal". It continued that, if the assumption was "incorrect and/or there is anything else you wish to tell us about the reason for this absence", Mr Brown's counsel should advise the company. It also said that Mr Brown "need not continue to provide weekly sick leave notifications to the business" and "the business is aware that he is on long term sick leave until further notice".

[68] In a 16-page letter responding to the company's proposal sent on 9 March, Mr Brown's counsel criticised TPS for not sufficiently considering the proposal he had made and having predetermined the outcome intended for its proposed restructuring. It said the TPS proposal lacked a genuine business reason, lacked a financial rationale and, in not offering him the PCM role, TPS had failed to offer him an alternative position that he was already performing.

[69] In a letter of response sent to Mr Brown, through his counsel, on 17 March Mr Taylor denied those allegations. He said he was clear that the responsibilities of Mr Brown's current role were too much for one person to manage effectively and there were clear benefits from splitting the functions. He confirmed his decision to proceed with the proposal. He repeated his previous indication that the HSCM role was "yours if you wish to accept it". He said he was "less certain that you are the right fit for the People and Culture Manager position" but remained "open to considering your perspective" if Mr Brown did want to discuss that role. Mr Taylor asked for a response on the offer of the HSCM role by 23 March and advised that, otherwise, he would "confirm your termination due to redundancy".

[70] On 23 March Mr Brown, through his counsel, rejected the offer of the alternative position because he "consider[ed] this position a demotion and TPS has offered this position with less remuneration than his current position, therefore, this offer is not a genuine offer of an alternative position".

[71] The following day, by letter through his counsel, Mr Taylor confirmed notice of redundancy, with one month's notice to be paid in lieu. Arrangements were made for return of company equipment and data, along with the offer of a farewell function.

[72] Claims for a personal grievance and unpaid bonuses were formally raised on 28 April 2023. A statement of problem was first lodged in the Authority on 5 October 2023. An amended statement of problem was lodged on 22 April 2024.

Legal principles

The statutory test of justification

[73] Mr Brown's personal grievance about his dismissal, including disadvantages said to have occurred during TPS's restructuring process, had to be assessed against the statutory test of justification set by s 103A of the Act. This test measures the actions of TPS in making the decision to dismiss Mr Brown for redundancy, and how it went about reaching that decision through its restructuring process, against an objective standard. This standard considers what a fair and reasonable employer could have done in all the circumstances at the time.

[74] A dismissal for redundancy will not be found to have been unjustified solely because of defects in the restructuring process, unless those procedural flaws were more than minor and resulted in the employee being treated unfairly.²

[75] Throughout that process the actions of TPS are also assessed against its good faith obligation to be active, constructive, responsive and communicative in its employment relationship with Mr Brown.³ Because a restructuring process could result in the end of his employment, the company's actions engaged its obligations under s 4(1A)(c) of the Act to provide access to relevant information and an opportunity to comment on that information before any decision was made.

[76] Principles developed in case law confirm a dismissal on the grounds of redundancy may justifiably be made for the purpose of making the operations of a business more efficient or more effective. An employer is not required to prove such measures were commercially necessary for survival of its business.⁴ Those principles also confirm that an employer may be called on to prove that whatever financial information is relied on for taking those efficiency measures is carefully and accurately calculated.⁵ The employer must then make its decisions for those genuine business reasons, not for any predominant and ulterior purpose of removing someone regarded as unpopular or unsuitable for other reasons.

[77] The Court of Appeal has summarised the application of the statutory test of justification in a redundancy situation in this way:⁶

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. ...

² Employment Relations Act 2000, s 103A(5).

³ Employment Relations Act 2000 s 4(1A)(b).

⁴ *Grace Team Accounting v Brake* [2014] ERNZ 129 (CA) at [47].

⁵ *Grace Team Accounting*, above n 8, at [94] and [97].

⁶ *Grace Team Accounting*, above n 8, at [85]. See also *Rittson-Thomas (t/a Totara Hills Farm) v Davidson* [2013] NZEmpC 39 (EC) at [53].

Mixed motives

[78] The law recognises the reality that some restructuring processes and redundancy decisions will occur in a context where the employer has concerns about an employee's performance or conduct as well as considering what number and types of positions it needs for the efficient and effective operation of its business. This may mean an employer has what are described as 'mixed motives' for the decisions made about which positions are disestablished, who is selected for dismissal by redundancy and who is appointed to remaining positions.

[79] In circumstances of 'mixed motives' in making those decisions – comprising both genuine business reasons and underlying concerns about a person's performance – the employer bears the burden of persuading the Authority that the reasons were genuine and *those* reasons were the predominant motive or reason for dismissal on the grounds of redundancy. If, on the evidence, this burden is met, the dismissal will be justified, if carried out in a fair manner.⁷ If the predominant motive was some other reason, reached without the employee having a fair opportunity for input before negative conclusions about them were reached, the dismissal will be unjustified. An indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show "a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation".⁸

Obligations to consider redeployment

[80] An employer acting fairly, and in keeping with its good faith obligation to be active and constructive in maintaining a productive employment relationship, will consider what alternative positions may be available if an employee's current position no longer meets the needs of the business and is to be disestablished.⁹ This obligation to consider redeployment requires the employer to consult with the employee about what potentially available and reasonable prospects exist for an alternative position in the business and to then provide sufficient information for the employee to be able to discuss those prospects. It is not an obligation to provide an alternative position in

⁷ *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310 at [49] (EC).

⁸ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC).

⁹ Employment Relations Act 2000, s 4(1A)(b) and *NZ Steel Ltd v Haddad* [2023] NZEmpC 57 at [81] and [84].

every case. Rather, it is an obligation to explore what that particular employer could reasonably do in the circumstances at the time.¹⁰

The parties' submissions

[81] In closing written submissions Mr Brown said TPS had not treated him fairly or reasonably because:

the termination was both predetermined and predominantly motivated by a desire to remove [Mr Brown] personally from his incumbent roles and responsibilities, rather than for any genuine reasons of superfluity of his role and continued employment”.

[82] Mr Brown submitted TPS had an array of concerns with “[his] performance or suitability for his role which it had not addressed with him in any detailed, structured or formal manner”. Instead, he said, TPS had:

concocted a disingenuous restructure proposal, apparently motivated primarily by perceived performance-related rather than position-related concerns, designed to engineer the termination of [his] employment.

[83] And, further, Mr Brown submitted TPS unfairly misled him because:

[Mr Taylor] sent [Mr Brown] away to waste his time over Christmas on a proposal to restructure the HR Team which [Mr Taylor] had no intention of considering (as he had drafted his own fait accompli proposal ...).

[84] He submitted the proposal from TPS amounted to a “demotion” and “an enormous and humiliating fall from grace” because he faced “a \$34,000 to \$44,000 reduction in his total remuneration package, being removed from the SMT after 7 years of loyal service and losing his office and having to sit with his former subordinates”.

[85] Mr Brown described the decisions made by TPS and the termination of his employment as resulting from a “complete lack of process and substantive justification”.

[86] The company’s submissions summarised its response to the central allegation of an ulterior motive in this way:

- (a) there *were* concerns that could be characterised as performance matters. These issues were raised at various points throughout 2022 (they were not hidden).

¹⁰ *Haddad*, above n 9, at [75]. See also *Idea Services Ltd v Wills* [2025] NZEmpC 28 at [45]-[51].

- (b) However, the root of the problem was that [Mr Brown]'s role was too big. This was common ground – [Mr Brown]'s previous lawyer submitted that his duties were excessive, and unable to be performed 'optimally'.
- (c) Therefore, and even if he wanted to, [Mr Taylor] could not have fairly or legally addressed the performance issues on a formal basis ...
- (d) Because the size and breath of the role was the real problem, the respondent was justified in proposing that the role be split. It is accepted that there were mixed motivations, but [TPS] has met the burden in [case law].

[87] The case law referred is the burden on an employer, as noted above, to persuade the Authority that the predominant motive for the decision was a genuine business reason, not some ulterior purpose such as dismissing a poorly performing employee.¹¹

Assessment

[88] For reasons explained further below, I have reached the following conclusions from an assessment of the evidence of the witnesses and what relevant documents show:

- (i) The predominant reason for TPS's decision to disestablish the role held by Mr Brown was for genuine business purposes, not an ulterior purpose related to his personal performance;
- (ii) Notice and consultation for the restructuring proposal was sufficient;
- (iii) Mr Brown's responses were fairly considered before any decisions were made, without predetermination; and
- (iv) Alternatives, specifically redeployment to another position, were considered fairly.

Mixed motives

[89] Mr Taylor's evidence established there were genuine business needs for the restructuring proposal he put to Mr Brown for response in January 2023. The proposal clearly had a rational commercial purpose. The reports on concerns of CSMs and ACMs identified a need for arrangements to provide them better human resources support. It was not a situation where a position was being cut, without replacement, in order to reduce salary costs. Rather, splitting the role was intended to create additional capacity to manage the HR and compliance work within the business. That change would increase, not reduce, the overall salary cost. Closer examination of the financial rationale for the change was not needed in this case.

¹¹ *Forest Park*, above n 7.

[90] Mr Brown's own evidence confirmed his role as HR and Compliance Manager had grown beyond his capacity to reasonably meet all its responsibilities, despite his efforts through long hours and weekend work. His own proposal required additional capacity in his team, just not at the same level in the hierarchy as that proposed by the company.

[91] TPS' closing submissions did, however, concede the company had mixed motivations for its restructuring proposal. Mr Taylor had criticisms of how Mr Brown had attempted to meet the demands of the role. He considered Mr Brown focussed too closely on compliance requirements at the expense of delivering the human resources support that managers of staff working in the business had reported they needed but were not getting. Those concerns had been discussed with Mr Brown in April, August and September 2022.

[92] Mr Taylor recognised, however, that the situation was not solely a matter of performance but arose from the demands of a business that was recovering from the economic and business effects of the Covid-19 pandemic. This placed additional demands for recruiting, training and safely deploying staff to provide services to the company's clients.

[93] Two points favoured TPS's denial of Mr Brown's allegation that the changes had the predominant purpose of dismissing him over performance concerns.

[94] Firstly, as Mr Taylor described in his oral evidence, it was not fair to "beat [Mr Brown] up on performance" because Mr Taylor accepted the role was too big. This was consistent with Mr Taylor having agreed in April 2022 to increase Mr Brown's salary to \$133,000. If he viewed problems in those portfolios as due to poor performance by Mr Brown, it was not likely Mr Taylor would have agreed to the increase.

[95] Secondly, the offer of automatic appointment to the HSCM role was not consistent with Mr Brown's allegation that TPS wanted to get rid of him.

[96] TPS, in its submissions, accepted the offered role was "a step down in terms of scope and remuneration". Mr Brown described the offer as disingenuous. He submitted that Mr Taylor knew him "more than well enough after seven years working together

to know that it was almost inconceivable that he would take the demotion from the SMT and massive associated pay cuts”.

[97] This submission was not persuasive because Mr Brown had not sufficiently tested two offers made in Mr Taylor’s 13 January letter about the proposed change. Firstly, while Mr Taylor told Mr Brown he might “not be the right fit” for the PCM role, Mr Taylor had said he was willing to discuss this view with Mr Brown and was open to considering his perspective. Secondly, while Mr Taylor said that he expected the HSCM role to have a salary range up to \$120,000, less than Mr Brown’s \$133,000 current salary, Mr Taylor also told Mr Brown he was “open to discussion with you about that”. Both points were clear signals that there was still room for negotiation about which role and what salary Mr Brown would get if the proposal went ahead.

[98] On balance, the changes proposed appeared to provide Mr Brown with ongoing and secure employment in an important role, with some room still left to influence both which role he took up and on what salary. Assessed on all the circumstances at the time, Mr Brown had not established the predominant motive for the proposed change was to dismiss him over personal performance concerns rather than to address genuine business needs.

Notice and consultation

[99] How TPS went about its restructuring process had to meet the interrelated procedural requirements set out in s 103A(3) and s 4 of the Act.

[100] Review of the extensive documentation lodged by the parties for the Authority investigation showed TPS, with legal advice, had followed the formal requirements. Its restructuring process was clearly set out, with an explanation of its aims and purpose. Requests from Mr Brown for further information and documents were responded to, including by providing details of the estimated cost for the two proposed new positions. Mr Brown was offered one of the new roles with an explanation by Mr Taylor of his thinking about why that position and not the other one was suitable for Mr Brown, with the opportunity left open for discussion on that view.

[101] This went some way to meeting the good faith obligations not to be misleading, to be constructive in maintaining a productive employment relationship, to provide

access to relevant information and to provide a real opportunity to comment about that information before decisions about the restructuring were finalised.

[102] From the extensive evidence and submissions provided for the Authority investigation, four specific concerns arose for more detailed consideration of whether TPS had met the procedural standards of fairness and good faith behaviour:

- (i) Asking Mr Brown to develop his own proposal over the Christmas break about changes to the human resources and compliance team;
- (ii) Giving Mr Brown a misleading description of the purpose of the 13 January meeting called to tell him about the restructuring proposal;
- (iii) Redacting some information from copies of the Diversitas reports given to Mr Brown which referred to the future of the HR position and was relevant to the continuation of his employment; and
- (iv) Contacting Mr Brown while he was on sick leave to seek his response to the restructuring proposal.

[103] Not every defect in the process will amount to an unjustified action. It must be more than minor and have resulted in the employee being treated unfairly.¹²

(i) Request to develop own proposal not misleading

[104] Mr Taylor had talked to Mr Brown in April 2022 about the notion of splitting the HR and Compliance role into two positions. His evidence showed he gave that prospect closer thought from at least September 2022. It was referred to in notes of TPS board discussions in September and December. Mr Taylor said he had also talked with TPS owner Glen Gordon about his thoughts on that idea in November 2022 and they had agreed to look into doing so.

[105] Mr Taylor, in his witness statement, said he started work on preparing the consultation documentation in early December 2022, drafting jobs descriptions and considering what they should be paid.

[106] He said the proposal was not ready to present to Mr Brown prior to the end of year shutdown for the Christmas break.

¹² Employment Relations Act 2000, s 103A(5) and *NZ Food Processing IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582, at 595.

[107] During a meeting with Mr Brown on 19 December, about another matter, Mr Brown mentioned some ideas he had for changing tasks within his HR team following the resignation of an administrator. Mr Taylor said he was not convinced by Mr Brown's suggestion but they had agreed Mr Brown would write up his proposed structure for Mr Taylor to consider when they returned to work in the New Year.

[108] Mr Brown said he spent more than 40 hours during the holiday break developing his proposal. He emailed the proposal to Mr Taylor on 5 January, asking to discuss it in the following week.

[109] Against that background Mr Brown alleged he was misled by Mr Taylor in December, agreeing to consider a proposal from him without Mr Taylor disclosing he was, at that time, firming up his own proposal for a substantial change to the HR roles.

[110] The evidence did not establish, however, that Mr Taylor had closed his mind to considering Mr Brown's proposal. It was not a breach of TPS' good faith obligations for Mr Taylor not to mention his own proposal before it was ready and the time to do so was appropriate. He did not mislead Mr Brown at that time or subsequently about being prepared to look at Mr Brown's proposal.

(ii) Misleading description of 13 January meeting

[111] TPS conceded Mr Taylor misled Mr Brown about the purpose of the 13 January meeting. Mr Brown was told in the message setting up the meeting that it was to discuss his own proposal for changes to the HR roles. He was not told its primary purpose, from Mr Taylor's point of view, was to tell Mr Brown of the restructuring proposal. It was, in that sense, a breach of the good faith obligation not to directly or indirectly mislead him.

[112] Mr Brown was, therefore, surprised to hear Mr Taylor's news. It was not, however, a meeting of the type that required notice of its topic and the right to bring a representative or a support person. He was told of the proposal. He was not expected or required to respond to it immediately. Those opportunities were set out in the correspondence sent to him later that day.

[113] Viewed in context, the breach was minor and did not then cause any unfairness to Mr Brown. He was not pressed to provide responses to the proposal at that time and had adequate opportunities later.

(iii) Redaction of relevant information

[114] As noted earlier in this determination,¹³ the heavily redacted copy of the Diversitas reports disclosed to Mr Brown in February 2023 omitted a significant recommendation that related directly to “leaders” in the company’s IT and HR services. It suggested appointing leaders with particular insight, experience and skills. The restructuring proposal eventually adopted appeared to act on that recommendation. On Mr Taylor’s preferred outcome, a new PCM role was created, enabling appointment of a leader with the required attributes.

[115] This recommendation either could potentially, or did in fact, influence TPS’ decisions in the restructuring process, removing incumbents by disestablishing some positions and allowing for the appointment of replacements into two new positions with what the company saw as having the necessary insights and skill. The redacted recommendation could, therefore, have had an adverse effect on the continuation of Mr Brown’s employment so was within the scope of the statutory good faith requirement to provide access to that relevant information and the opportunity to comment on it.¹⁴

[116] On that view, TPS did breach its good faith obligations by redacting that recommendation from the report copy provided to Mr Brown. It was not as clear, however, that this defect in the process of providing relevant information could be determined to be an unjustified action. Accepting it was more than a minor defect, it would need to have resulted in Mr Brown being treated unfairly to be held to be unjustified. The question, in this context, is one of substance, not mere form.

[117] Here, if the recommendation did influence the proposal, Mr Brown had got information about what was then proposed and the opportunity to comment on it. He was not unfairly treated by being denied a fair chance to respond to what such a recommendation would amount to if put in practice. In its full context, the breach was not an unjustified action requiring compensation or a penalty.

¹³ Above at [33].

¹⁴ Employment Relations Act 2000, s 4(1A)(c).

(iv) Contact during sick leave

[118] Mr Brown submitted the pressure put on him to respond to the restructuring proposal and answer questions about other workplace matters, through three email queries from Mr Taylor between 18 and 25 January 2023, was a further instance of unfair treatment.

[119] On the morning of 18 January Mr Brown sent a doctor's note to Mr Taylor saying he would be unfit to return to work until 29 January. Mr Taylor responded by email in the afternoon that he appreciated Mr Brown was not well enough to attend work but wanted to know when Mr Taylor thought he would be able to provide feedback on the proposal. Mr Taylor also asked whether there were any urgent matters he needed to attend to in Mr Brown's absence and for the dates of an upcoming ISO audit and the auditor's contact details. Mr Taylor wanted to postpone the audit, which was an expense for the company, while Mr Brown was unwell. Mr Brown did contact the auditor that day to postpone the audit but did not tell Mr Taylor he had done so.

[120] In the absence of a response Mr Taylor again emailed Mr Brown on 20 January asking about whether he planned to give feedback on the restructuring proposal and a response about the ISO audit.

[121] On 23 January Mr Taylor advised Mr Brown that, in the absence of responses from him, the company had made arrangements to access his work emails but also asked, again, if Mr Brown intended to give any feedback on the proposal.

[122] On 25 January Mr Taylor sent Mr Brown another email saying he appreciated Mr Brown was unwell and extended the time for feedback to 3 February. At that time, based on Mr Brown's doctor's note of 17 January, the 3 February date was five working days after Mr Brown was expected to be fit to resume work.

[123] Mr Taylor stopped making direct requests to Mr Brown once he received an email from Mr Brown's legal representative on 3 February asking that all contact be through her.

[124] While an employee would not usually be expected to attend to work-related queries while on sick leave, the evidence in this particular case did not show Mr Brown was, in fact, unfairly treated by the contact made.

[125] There had been a practice of TPS senior managers answering work emails while they were on sick leave, such as passing on information about urgent matters to attend to. Mr Brown had, in fact, been able to contact the ISO auditor to postpone their upcoming session. He told his lawyer about having done so, by an email on 8 February, but chose not to tell Mr Taylor. Viewed realistically, that omission by Mr Brown was an indirect way of expressing his displeasure about what the company was doing but was not consistent with his own good faith obligations in the circumstances.

[126] Mr Brown's evidence was that he had been experiencing some mental health issues since at least September, related to his concerns about work and which had required treatment with anti-depressant medication. This meant he felt hit hard by the unexpected news of TPS's restructuring in January. He said his stress and anxiety were compounded by getting Mr Taylor's emails seeking a response.

[127] Mr Brown had not, however, disclosed those health difficulties to Mr Taylor and his doctor's note gave no indication of why he was unfit to resume duties. While Mr Brown was entitled to keep the exact nature of his health issues private, he could not fairly complain Mr Taylor had acted insensitively over something of which he had not been made aware.

Responses fairly considered, without predetermination

[128] Mr Brown did formally respond to the restructuring proposal, two months after he was told about it, through a 16-page letter from his lawyers. Part of the delay related to a request for extensive background documentation about the proposal, made by his lawyers on 8 February. TPS, through its lawyers, had provided the requested material the following week.

[129] Another aspect of the delay related to whether it was reasonable to expect any response from him while he was on sick leave. In their 8 February request his lawyers had, however, advised that "in good faith, Mr Brown will provide a fulsome response while he is on sick leave" once he had received and reviewed the requested documents and information.

[130] The response, dated 9 March, set out a number of criticisms that subsequently became the basis of Mr Brown's personal grievance. This included the allegation that the outcome of the restructuring proposal was "predetermined".

[131] Two aspects of the evidence were said to support this allegation.

[132] Firstly, from the outset, the proposal and Mr Taylor's explanation of it referred to Mr Brown being suitable for the HSCM role. This was said to show Mr Taylor had already made firm decisions about splitting the current role into two and the unsuitability of Mr Brown for the PCM role.

[133] Secondly, Mr Taylor was alleged to have told other staff during January and February 2023 that the employment of Mr Brown and Mr Mailata would end shortly. This indicated, if that evidence were accepted, Mr Taylor had already decided the outcome before getting any substantive response from Mr Brown, which did not come until March.

[134] On the first aspect, a close reading of Mr Taylor's correspondence and explanation of the proposal, and his view of which role was suitable for Mr Brown, did not support a conclusion that he had already decided the outcome.

[135] His 13 January letter, for example, explained to Mr Brown that the proposed PCM role was expected to have a focus that "does not really play to your strengths", so might not be attractive to Mr Brown, but he believed Mr Brown was capable of performing the HSCM role and could do it well. Neither proposition was put as the last word. Rather, Mr Taylor said he was open to discussing this view and had explained some details of what he expected might result because he "wanted to be upfront with you about my thinking here".

[136] Asked at the Authority investigation meeting Mr Brown accepted that it was "fair enough" for Mr Taylor to have a view that Mr Brown was "naturally more inclined" to meeting the requirements of the HSCM role.

[137] In making a restructuring proposal, an employer is entitled to have a working plan already in mind, provided they have an open mind and are ready to change that plan.¹⁵ Mr Taylor's explanation of his thinking, assessed on the balance of probabilities and in the context of the evidence as a whole, was an instance of the good faith obligation to be 'upfront' rather than exposing any unfairly fixed thoughts. If Mr Taylor had taken the opposite approach, by not being honest and instead kept those views to

¹⁵ *Simpson Farms Limited v Aberhart* [2006] ERNZ 825 (EC) at [62].

himself, he would have unfairly denied Mr Brown the opportunity to comment on the full picture.

[138] The second aspect of predetermination said to have occurred arose from the evidence of Mr Watling and Ms Gardner about comments made by Mr Taylor after Mr Brown and Mr Mailata both went on sick leave and were away from work from mid-January onwards.

[139] Mr Watling said he had been emailing Mr Mailata and Mr Brown with queries about work matters but kept receiving out-of-office replies saying they were sick. He said that he asked Mr Taylor about this and was told he “needed to stop emailing [them] because they were both on sick leave and wouldn’t be responding to me as there was a restructure going on”.

[140] In closing submissions Mr Brown referred to Mr Watling saying, in his oral evidence, that Mr Taylor gave him the strong impression neither Mr Brown nor Mr Mailata would be coming back. However Mr Watling’s evidence, as I heard it, was that this impression was Mr Watling’s own inference, rather than what Mr Taylor implied or told him. And there was a good reason for Mr Taylor to ask Mr Watling to stop sending work queries to Mr Brown. Mr Brown’s lawyer had asked TPS to stop messages being sent to Mr Brown while he was on sick leave.

[141] Ms Gardner also gave evidence about what Mr Taylor had said to some other TPS personnel about Mr Brown and Mr Mailata being away from work. She said Mr Taylor had mentioned during a meeting with ACMs in late January that there would be a restructure of the SLT which involved the HR team and the IT team. Ms Gardner said that as Mr Brown and Mr Mailata were the only two members of the SLT on sick leave, “we all left the meeting knowing exactly who this involved” and that Mr Brown and Mr Mailata “were on the chopping block”. She said that another ACM, Ms Woodhatch asked Mr Taylor “are they okay” and he had replied: “you don’t need to worry about them because they are not going to be around for much longer”.

[142] Ms Woodhatch, in her evidence, denied Mr Taylor made that comment.

[143] Mr Taylor said he did talk to the ACMs about the restructuring proposal and asked them not to talk to other staff about it. However, he said he:

did not get into specifics about role changes or individual people. ... I was conscious that gossip about restructuring processes can be very disruptive and unsettling so I did ask for gossip to be minimised and if anyone had questions or concerns to come to me.

[144] The evidence confirmed there was workplace gossip and speculation among TPS personnel about what was happening at the time. It was not, however, sufficient to confirm to the necessary standard of the balance of probabilities that Mr Taylor had made comments to staff which inappropriately revealed details of the situation or indicated the outcome was pre-determined.

Redeployment

[145] Three propositions arose from the evidence and the submissions concerning whether TPS had acted justifiably in what it did to consider redeploying Mr Brown to another role after deciding to adopt the restructuring proposal.

[146] Firstly, there was the notion that the offer of automatic appointment to the HSCM role was an elaborate ploy, designed by Mr Taylor to be rejected by Mr Brown.

[147] Secondly, TPS should have offered Mr Brown the PCM role, or at least done more to explore placing him in that position.

[148] Thirdly, the HSCM was not a genuine alternative position because it was not offered at the same level of salary and benefits as his previous role.

(i) Offer not proven to be calculated for rejection

[149] Mr Brown submitted that the offer of appointment to the HSCM role was carefully calculated by Mr Taylor to be rejected. He said Mr Taylor knew him “more than well enough after seven years of working together to know that it was almost inconceivable that he would take the demotion from the SLT and massive associated pay cuts”.

[150] It was an allegation easy to make but hard to prove Mr Taylor had deliberately structured the proposal in a way calculated to provoke Mr Brown’s refusal of the offer of ongoing employment.

[151] Mr Brown’s submissions described the offer as part “an enormous and humiliating fall from grace” because he was being removed from the SLT, “losing his office and having to sit by his former subordinates”. There were two problems with

that argument. Firstly, the HSCM position remained part of the SLT. Secondly, Mr Brown had chosen not to engage in discussion about the parameters of the offer, including the question of what level of salary would be paid, whether he could still have a separate office and whether there could be a transition period to ease the effect of changes to his overall salary and benefits.

[152] Rather than being calculated for rejection, the offer appeared to have room to move that was sensitive to how Mr Brown might react to it.

(ii) No automatic redeployment to PCM role

[153] Mr Brown submitted TPS should have offered him redeployment to the PCM role, so there was a choice between that and the HSCM role, if the key problem was the size of his existing job. Once split in two, on that argument, Mr Brown would have the time to address strategic issues in whichever role he continued to work.

[154] The problem with that argument was two-fold.

[155] Firstly, Mr Taylor had been ‘upfront’ about the PCM role not simply being half of the previous role. The restructuring proposal envisaged what Mr Taylor called “a shift in focus toward a people-centred approach to HR” rather than its current “compliance focus” which he considered was “not meeting all the needs of the business or our team”. The purpose of the restructuring was to have the work carried out differently.

[156] This was the reason that the letter to Mr Brown about the proposal had explained Mr Taylor’s “current view” that Mr Brown “may not be the right fit” for the PCM role and was “probably better suited to the [HSCM] role”.

[157] The second problem with Mr Brown’s view that he should also have been given the option of taking the PCM job was that he did not take up Mr Taylor’s offer to discuss that prospect. It was an offer repeated as late as 17 March, some nine weeks after Mr Brown was first told of the restructuring proposal. During a time when Mr Brown had access to legal advice and support, he chose not to engage in the discussion that Mr Taylor offered to test his opinion on whether Mr Brown would be able to “really drive organisational culture” and “engage more effectively with the business” if he was appointed as PCM.

(iii) Redeployment not limited to roles with same salary

[158] Mr Brown, through his counsel, responded on 23 March 2023 to that last offer of further discussion by rejecting the HSCM job. The reasons given were that he considered the job was “a demotion” and was “not a genuine offer of an alternative position” because it had “less remuneration than his current position”.

[159] In a redundancy situation an employer is obliged, as part of fairly implementing those changes reasonably, to consider whether other positions are available as an alternative to dismissal. This is not limited to positions with the same remuneration. Roles with different pay and conditions may still be an acceptable option for an employee who would otherwise lose their job.

[160] TPS’ offer of redeployment to the HSCM role met that obligation, although it came with a lower base salary and the removal of some benefits.

[161] It was also likely that, if Mr Brown had engaged in discussion on it, the gap in salary may have been less and not necessarily in effect immediately. Mr Taylor’s evidence suggested he expected Mr Brown would be on at least the top end of the proposed salary band for the HSCM role and, if discussed, may have included a further margin to retain him rather than have a new person come in. Mr Taylor said he had expected a counterproposal from Mr Brown but none was made.

Conclusion on restructuring

[162] Ultimately Mr Taylor’s view that the responsibilities of Mr Brown’s current job were too much for one person to manage effectively, and there were clear benefits to be gained from splitting the functions into the PCM and HSCM roles, was one he could have reasonably reached in management of the business. Mr Brown might not agree with that view but Mr Taylor’s evidence was sufficient to establish there were sound reasons for it.

[163] Concerns about how Mr Brown had carried out the existing role were part of TPS’ motivation for proposing change. TPS had, however, established that addressing genuine business needs remained the predominant purpose of the proposal.

[164] Having reached those conclusions on the substantive rationale for change, the law still required TPS to act fairly by providing information, by taking account of Mr

Brown's views and, once deciding to proceed with splitting the management roles, by offering redeployment to available roles.

[165] The offer of the HSCM role reasonably reflected Mr Brown's experience and TPS's assessment of his strengths. Mr Taylor's opinion that Mr Brown was not suitable for what TPS wanted from the person appointed to the PCM role was expressed openly, so fairly disclosed his view in a way that was consistent with the company's good faith obligations. He left open too the prospect that Mr Brown could seek to change his opinion but Mr Brown opted not to try. Mr Brown asserted doing so would not have made any difference but had not tested that allegation. His assertion was not sufficient to displace the conclusion that TPS had acted reasonably and fairly.

[166] For those reasons Mr Brown had not established personal grievances of unjustified dismissal or grievances of unjustified disadvantage arising from the restructuring proposal and how it was decided and carried out. His personal grievance application to the Authority is declined. On that basis, no consideration of remedies was needed.

No entitlement to a bonus payment

[167] In March 2023 Mr Brown, through his lawyers, raised the question of whether he was owed a bonus for the years 2020, 2021 and 2022.

[168] The letter said a bonus of \$20,000 a year was agreed in a written variation to his terms of employment when he took on the "additional role" of National Operations Manager, adding to his existing human resources and compliance duties. It said he was paid a \$10,000 bonus in 2019, but no bonus since then. It said that "when the Operations Manager position was given to another senior manager, there was no discussion about losing this bonus and his salary and other benefits remained the same".

[169] The agreement for taking up the National Operations Manager role had included a term providing for a "bonus scheme \$20K (TBC)". It also said other terms remained as in his existing employment agreement. That agreement stipulated "any variation to the agreement shall be recorded in writing, signed by both parties and annexed to this agreement".

[170] Later evidence established Mr Brown was, in fact, paid a bonus of \$20,000 in 2019, made up of two payments of \$10,000.

[171] Mr Brown submitted that no specific KPIs were ever agreed and remained “tbc” but, having been paid it once, an annual bonus remained “simply payable as a matter of course”.

[172] TPS agreed no KPIs were formally recorded but submitted the parties had talked about the “gist” of KPIs, linking them to achievement of a target profit margin. Mr Taylor had paid a bonus to Mr Brown in 2019 despite that target not being met. Mr Taylor said he did so, on a discretionary basis, to recognise Mr Brown’s hard work at the time.

[173] For the following two reasons, the evidence and Mr Brown’s submissions did not establish an entitlement to be paid the bonus he claimed for the additional years.

[174] Firstly, payment in a single year, on a basis that was not linked to any criteria set in his agreement for the role of National Operations Manager role he held at the time, did not amount to a waiver of the need to meet some agreed criteria or standard for subsequent years.

[175] Secondly, the parties’ conduct in 2020, 2021 and 2022 was a helpful indicator of whether there was any mutual understanding of an agreement or expectation around payment of a bonus.

[176] Mr Brown said he had mentioned the prospect in 2020, without result, but did not mention it again in 2021 and 2022. This indicated he understood there was no entitlement at all by then or, if there had been some tacit understanding that any bonus was tied to the business achieving a certain profit target, he knew the target had not been met, so no entitlement was triggered.

[177] A further instance concerning conduct of the parties, as a guide to their mutual understanding, was Mr Brown’s discussion with Mr Taylor in April 2022 about a salary increase from \$120,000 to \$133,000. If Mr Brown understood at that time that he was also entitled to a bonus payment, it was likely he would have also raised that point when discussing his remuneration.

[178] Mr Brown’s claim for an order requiring payment of a bonus amount for the years 2020, 2021 and 2022 is declined. Consequently, he also fails in his application

for a penalty under the WPA, related to that bonus not being paid, and for an award of interest.

No penalty for good faith failures

[179] Mr Brown said TPS breached good faith obligations by not paying him an annual bonus of \$20,000, by calling him to “a formal meeting on false pretences” on 13 January, by not providing access to sufficient information during the restructuring process and by “offering a disingenuous alternative position”. He called for penalties to be imposed for those breaches.

[180] The concerns regarding the bonus and the alternative position, as addressed earlier in this determination, did not amount to breaches of the good faith obligation.

[181] There were, however, failures of good faith conduct in the notice calling him to the 13 January meeting and the redaction of some information from copies of the Diversitas report.¹⁶

[182] Both instances needed to be considered in the context of the restructuring process and its outcome as a whole. Other aspects of the company’s communications, particularly Mr Taylor disclosing his thoughts and views on likely steps, were consistent with meeting the good faith requirement to be honest and frank.

[183] While both identified failures were deliberate, neither ended up with Mr Brown being denied the opportunity to comment on and otherwise take part in the restructuring proposal and process. They were not sustained breaches or intended to undermine the employment relationship in a way that would warrant a penalty. The claim for a penalty under s 4A of the Act is declined.

Summary

[184] For reasons summarised in paragraphs [162]-[166] above, Mr Brown’s personal grievance application is declined.

[185] Mr Brown did not establish an entitlement to outstanding bonus payments. His claim for an award of arrears is also declined.

¹⁶ See above at [111]-[113] and [116]-[117].

[186] Two breaches of good faith obligations during the restructuring process did not warrant the award of a penalty.

Costs

[187] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[188] If they are not able to do so and an Authority determination on costs is needed TPS may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Brown would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[189] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁷

Robin Arthur
Member of the Employment Relations Authority

¹⁷ See www.era.govt.nz/determinations/awarding-costs-remedies.