

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jason Conquer (Applicant)

AND Status Produce Limited (Respondent)

REPRESENTATIVES Jane McTavish Butler, Advocate for Applicant
Penny Swarbrick, Counsel for Respondent

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 5 & 6 December 2005

SUBMISSIONS RECEIVED 19 December 2005 (Applicant), 23 December 2005 (Respondent); and
6 January 2006 (Applicant in reply)

DATE OF DETERMINATION 2 February 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant says that the termination of his employment on the grounds of redundancy on 20 May 2005 was unjustified. He says the redundancy of his position of Grading Manager was a ruse to remove him for other reasons, that a new job created was really his old job renamed, and that the process which resulted in him not being selected for the new job or being redeployed to another suitable job was unfair. He seeks remedies of lost wages, compensation and costs.

[2] The respondent, Status Produce Limited ("SPL"), says more efficient operation of its packhouse business was the genuine commercial reason for redundancy of the position. SPL says the decision was made after properly advising the applicant of the proposal and taking his views into account; that the decision to select another worker for the new job was fairly made, with the applicant offered counselling and the opportunity to apply for other jobs with SPL; that the applicant opted for redundancy and his contractual entitlements have been paid. SPL seeks dismissal of the application and its costs.

[3] During an investigation meeting over one-and-a-half days, evidence was heard from the applicant ("Jason Conquer"); the applicant's father Trevor Conquer ("Trevor Conquer") who is also a manager in SPL's business; SPL's chief executive officer Piers Gascoine ("Mr Gascoine"); SPL's operations manager Paul Anderson ("Mr Anderson"); a human resources consultant for SPL's parent company Turners & Growers Limited, Veronica Evison ("Ms Evison"); SPL's grader production supervisor and former grader operator Benetti Schwalger ("Mr Schwalger"); and Turners & Growers national produce manager Glen Booth ("Mr Booth"). Mr Booth's evidence was taken by telephone from Tauranga. Counsel had the opportunity to put additional questions to the witnesses after they had answered the Authority's questions. Closing submissions were provided in writing after the meeting.

Background

[4] SPL grows hothouse tomatoes. It packs and markets its own produce. It also packs for independent growers supplying fruit to the domestic and export markets.

[5] SPL's present operation is the result of the purchase and amalgamation of three growing and packing businesses over the last three years.

[6] In 2003 SPL acquired a packing business run by Beekist Services Limited and a license to use the "Beekist" brand for marketing of tomatoes. Beekist was the Conquer family business – Jason Conquer, his father Trevor Conquer and his mother Cherie Conquer all worked in it. After SPL bought the business, all three members of the family were employed by SPL.

[7] From February 2003 Jason Conquer worked as packhouse manager of SPL's Mangere packhouse under the terms of an individual employment agreement dated 20 March 2003.

[8] In February 2004 SPL merged packing operations at Mangere and Tuakau onto one site at Mangere. Trevor Conquer was the general manager of packhouse operations. Jason Conquer was the packhouse manager. The former Tuakau packhouse manager Mr Anderson became the operations manager at Mangere.

[9] During the 2004 mandarin season – from around mid April to late July – when the packhouse was grading fruit for an SPL client, there were a number of problems in the arrival, sorting and despatch of mandarins. This resulted in complaints from the client. SPL feared it might lose that client's custom. Jason Conquer, Trevor Conquer and Mr Anderson have different views on the cause of the problems during that mandarin season.

[10] In late 2004 Trevor Conquer's formal role changed to that of General Manager – Beekist brand. This reduced his involvement in the packhouse which was now directly under the control of Mr Anderson as Operations Manager. By this time Cherie Conquer – Trevor Conquer's wife and Jason Conquer's mother – was ill with what was to be a terminal illness and Trevor Conquer was away from work for some periods.

[11] In November 2004 Jason Conquer was presented with a revised employment agreement. It proposed renaming his position to that of Grading Manager. It included a new position description and a set of performance standards referred to as Key Performance Indicators ("KPIs").

[12] There is a conflict between the evidence of Jason Conquer, Ms Evison and Mr Anderson as to whether Jason Conquer expressed any concerns about the KPIs and whether he did not sign the revised agreement for that reason. Under the heading of "Key Expectations/Measures" some items require "100% compliance" and "100% accuracy" on particular production requirements. Jason Conquer says he queried whether all the requirements were within his control.

[13] The parties do agree that they operated from November 2004 under the terms of the revised agreement, including the position description setting out the responsibilities and typical activities, relationships and required attributes of the role of Grader Manager. However Mr Conquer did not sign and return the agreement and Ms Evison did not pursue this with him. Jason Conquer says that this was because she knew of his objection to some of the KPIs. Ms Evison says that he had gone on pre-arranged annual leave until 27 November after being presented with the revised agreement, then his mother was ill and she did not want to pressure him in any way.

[14] Jason Conquer was on extended leave from SPL during the period from 24 January through to

14 March 2005 during which time his mother died.

[15] On 22 March 2005 SPL provided a restructuring proposal for the grading/operations area to Jason Conquer and Mr Schwalger. The proposal was to make redundant the positions of Grader Manager and Grader Operator. New positions of Grader Production Supervisor (“GPS”) and Grader Inwards were to be created. No redundancies of any other positions were proposed.

[16] The proposal referred to gaining efficiencies by refining old systems and procedures in the production area, introducing KPIs and “elimination of duplication of functions, roles and processes”.

[17] The proposal advised that they could apply for new positions and that “*applicants will be assessed against the requirements for the role, taking into account the interview and past performance*”. If the applicant was unsuccessful, the proposal stated that:

[a]t that stage, we will look to see if there are any suitable alternative positions for you within the Status Produce Ltd/Turners and Growers Group. Should we be unable to secure a suitable alternative position for you then you will be advised of the disestablishment of your current role.

[18] Jason Conquer and Mr Schwalger provided written responses to the proposal, both suggesting that two positions were needed to carry the work then done by the manager and operator.

[19] On 1 April Mr Gascoine, Ms Evison and Mr Anderson met with Mr Schwalger and Jason Conquer. Minutes of the meeting made by Ms Evison record that Mr Gascoine expressed concern “over whether both staff members had grasped what the company was trying to achieve with the restructure of the production area”. Some responsibilities for quality, purchasing and tomato washing would be shifted to other roles.

[20] After the meeting SPL confirmed its restructuring proposal. Both Jason Conquer and Mr Schwalger were given the opportunity to apply for the GPS role and did so.

[21] SPL has decided that the assessment of candidates for the role would be conducted by an external recruitment consultant. The applicants completed a personality profile questionnaire and were interviewed by the consultant.

[22] The consultant recommended the appointment of Mr Schwalger.

[23] Jason Conquer was advised on 29 April that he was unsuccessful in his application. He was told he would be advised of any suitable roles in the organisation that he might like to apply for and would need to go through the recruitment and selection process to determine his suitability for any role. Ms Evison told him that there were vacancies for a grader’s job (an operative-level position) and a logistics co-ordinator (a supervisory position at the same level as the GPS job he had unsuccessfully applied for). She also said there were jobs available as a truck driver in the Turners & Growers Group. He was asked whether he was interested in applying for any of those roles or had any suggestions. He was offered the opportunity to take annual leave to consider what to do and told of counselling services. He told the company representatives that he would not be responding until he had taken legal advice.

[24] He did not attend work from 2 May. Negotiations between his lawyer and Ms Evison did not resolve the issues between the parties, including whether the redundancy was genuine and whether there was a suitable alternative role for him. On 18 May Jason Conquer’s lawyer advised that he intended raising a personal grievance if he were made redundant. On 20 May Ms Evison advised in writing that the role held by Jason Conquer was redundant. In accordance with his employment

agreement he was to be paid four weeks' wages in lieu of notice, any outstanding annual leave, and redundancy compensation of ten weeks' wages. He was also to be provided with a certificate of service.

[25] An issue arose in the negotiations between the parties over whether Jason Conquer had or would be offered a customer representative role with Turners and Growers. Mr Booth, a manager in another part of the group, had met with Jason Conquer and discussed prospects for this. The company had a policy providing that people made redundant could not be appointed to new roles in the Group for at least two years. The company had agreed to waive the normal two year stand-down period if the role were fully developed.

[26] Jason Conquer filed a personal grievance application with the Authority on 30 May.

Issues

[27] The overriding issue is whether the dismissal for reasons of redundancy was justified in all the circumstances. To determine that issue, the following issues need to be addressed:

- Whether the redundancy was for genuine commercial reasons or motivated by ulterior purposes; and
- whether, even if for genuine commercial reasons, the redundancy was nevertheless for mixed motives, and if so, what was the predominant reason for the redundancy; and
- whether, in any event, the redundancy proposal and implementation was carried out in the manner of a fair and reasonable employer; and
- if the dismissal were unjustified, whether any remedies are warranted, after considering any mitigation required of the applicant, and any contribution to the problem made by the applicant.

Legal framework

[28] The applicant's employment agreement defined redundancy as "*a situation where your position is wholly or partly surplus to the Company's needs.*" It provided for one month's notice on termination of the employment and redundancy compensation on a '6+2' formula.

[29] The agreement incorporated a "position profile" setting out the duties required "at the commencement of this agreement". It also stated:

Due to the changing nature of the business, you may also be required to undertake any other reasonable duties within your capabilities in addition to those specified. Such a change shall not be a variation of this agreement, unless it constitutes a substantial change in the nature of the employment.

[30] In addition to its contractual obligations, the respondent had a statutory duty to act in good faith in making its redundancy proposal and dismissing the applicant for redundancy, including providing access to relevant information and an opportunity to comment on the information before the decision was made.

- *Genuineness of redundancy*

[31] An employer is entitled to make its business more efficient and a worker does not have a right to continued employment if the business can be run more efficiently without that position.¹ Where an employer decides as a matter of commercial judgment that there are too many employees in a

¹ *GN Hale and Son Ltd v Wellington Caretakers and Cleaners IUW* ERNZ Sel Cas 843, 848 (CA)

particular area, it is for the employer as a matter of business judgment to decide on the restructuring strategy, what positions should be dispensed with and whether an employee whose job has disappeared should be offered another position elsewhere in the business.²

[32] While the Authority or Court does not substitute its view for the business judgement of the employer, the genuineness of any redundancy determination can be reviewed. If it is not one an employer acting reasonably and in good faith could have reached, it may be impeached.³

[33] An employer must provide an adequate commercial explanation for the course adopted.⁴ The usual rule, subject to any contractual duties, is that an employer justifying the disestablishment of an existing position must show that the work being done by the holder of the position is no longer needed by the employer. The inquiry is not as to whether there is merely a rearrangement or renaming of functions but whether the work to be performed has disappeared. The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant. Whether a job is the same with a change of focus or emphasis or is a different position, requiring different work, different skills or a different kind of worker, is a question of fact and degree to be determined exclusively and conclusively by the evidence.⁵ The test developed by the Courts to assist in making this assessment asks the question: *Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [worker], consider that there was sufficient difference to break the essential continuity of employment?*⁶

[34] In the present case, the contractual obligation required that the employer show that the position was “wholly or partly surplus to the Company’s needs”. The duties or work to be done was set out in the position profile with a contractual provision that these could be altered by the employer to meet the changing nature of its business provided that the altered duties were not a “substantial change” in the nature of the job.

[35] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.⁷ However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.⁸

- *Alleged ulterior purpose or mixed motive*

[36] Redundancy is determined in relation to the position not the incumbent.⁹

[37] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is “tainted by some inappropriate motive” and the redundancy is “masking another and different reason”, the worker will have a valid grievance.¹⁰

[38] The grievant raising an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

² *Aoraki v McGavin* [1998] 1 ERNZ 601, 618 (CA)

³ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA)

⁴ *GN Hale*, above, at 851 (CA)

⁵ *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378, 390-2 (EC)

⁶ *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597, 604 (CA)

⁷ *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd*, above, at 747

⁸ *NZ Fasteners*, above, at 747

⁹ *NZ Fasteners*, above, at 747

¹⁰ *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC)

[39] Where the Authority finds “mixed motives” – such as genuine business reasons but with underlying personality or performance concerns¹¹ – the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for another reason, the dismissal will be unjustified.¹² An important 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”.¹³

- *Procedural fairness*

[40] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.¹⁴ This requires more than “going through the motions” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.¹⁵

Alleged ulterior motivation for redundancy

[41] While the burden of justification ultimately lies with the employer, having raised the allegation of ulterior motives, the applicant has the burden of establishing that the redundancy was motivated by a desire of the employer to remove him.

[42] The applicant relies on five sets of circumstances or events to support the allegation:

- (i) antagonism between Mr Anderson, (who developed the restructuring proposal in which Jason Conquer’s job was to be made redundant) and the Conquer family members;
- (ii) his refusal to accept KPIs proposed in November 2004;
- (iii) a conversation between Mr Schwalger and Mr Gascoine in late November 2004 in which Mr Schwalger was allegedly asked if he would like to do the Grader Manager’s job;
- (iv) exclusion of his name from a contact list provided to a key client in February 2005; and
- (v) not being included in training seminars held by SPL.

Conflict between Conquers and Mr Anderson

[43] I find there were significant tensions in the working relationships between Mr Anderson and each of the Conquer family which arose during the integration of three formerly-independent packhouses onto one site at Mangere.

[44] In January 2004 Mrs Conquer, who was responsible for quality assurance, and Mr Anderson had a “shouting match” in front of packhouse staff. I accept Trevor Conquer’s evidence that this resulted in a meeting that he conducted and warned both Mrs Conquer and Mr Anderson regarding the behaviour expected of them.

¹¹ The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw)

¹² *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC)

¹³ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC)

¹⁴ *Aoraki*, above, at 619 and 631 (CA)

¹⁵ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA)

[45] That there was a warning from Trevor Conquer to Mr Anderson is confirmed by the text of a written letter of warning prepared by Ms Evison in April 2004. It refers to the letter being a “second warning”. An email at that time from Ms Evison to Trevor Conquer, recounting a conversation with Mr Anderson, suggests that he did not regard a previous warning from Trevor Conquer as an “official” warning.

[46] However there is no doubt that Mr Anderson did receive a final written warning from SPL in April 2004. This followed a disciplinary meeting instigated by Trevor Conquer and conducted by Mr Gascoine. It concerned the way in which Mr Anderson dealt with a worker who had left the packhouse unlocked. The final written warning described Mr Anderson’s behaviour as “totally inappropriate and unacceptable”.

[47] Mr Anderson’s evidence was that he believed that incident arose from failures by Trevor Conquer and Jason Conquer. He had similar views on the cause of problems in the 2004 mandarin season.

[48] Jason Conquer’s evidence was that those problems were caused by fruit quality being lower than expected, variations in expected volumes and equipment breakdowns. Mr Anderson, however, saw Jason Conquer as being responsible for organisational problems which included the arrival of trucks not being properly co-ordinated, poor counting and reconciling of bins and crates and incorrect orders being sent out.

[49] The concerns of the client – a ‘big player’ – were made known at the highest levels of the Turners and Growers Group. The Group’s managing director made enquiries of Mr Gascoine who, in turn, delegated the task of addressing and solving the problems to Mr Anderson as Operations Manager.

[50] Ms Evison, in evidence which she said resulted from her discussions with Mr Gascoine and Mr Anderson, saw the problem with the packhouse as being that:

all communications were being funnelled through Jason, which resulted in slow and inconsistent passing of information and messages to relevant floor supervisors and team leaders. It impeded packhouse performance and created operational errors.

[51] Although Mr Anderson clearly had concerns about what he regarded as poor performance by Jason Conquer during 2004, there was no evidence that he attempted to address them directly with Jason Conquer. Mr Schwalger did, however, give evidence of “two or three arguments in the packhouse” between Jason Conquer and Mr Anderson.

Proposal of KPIs in November 2004

[52] It is in this context that the KPIs proposed in November are to be considered. They set out expectations of “100% compliance” with targets for efficient use of the grading machine, the production schedule and quality standards. They included a requirement for “100% compliance with staff following security procedures”. Other items referred to “zero downtime” and “zero unhandled discrepancies” and “zero validated negative feedback”.

[53] Jason Conquer was the only person in the packhouse presented with proposed KPIs. Ms Evison’s evidence was that while he was the first person presented with KPIs, the company planned to develop KPIs throughout the packhouse. However, by the time of the investigation meeting, more than 12 months later, no other packhouse staff have been presented with KPIs.

[54] I prefer Jason Conquer’s evidence, contrary to that of Ms Evison, that he did raise concerns

with her and Mr Anderson about the job description and KPIs and told them he would not sign a revised employment agreement until those concerns were resolved. The details of his evidence on this point were consistent with the dates on available documents. I would have expected Ms Evison, as a human resources professional, to have made some notes or record of her discussion with Jason Conquer at the time – which, if taken and produced in the investigation might have assisted SPL's case – but she did not. Jason Conquer's explanation of having expressed reluctance, is also consistent with the uncontested evidence that he was at work from 27 November 2004 to 24 January 2005 but was not asked to discuss his concerns about the KPIs or to sign and return the agreement.

[55] From these events I find that it is more likely than not that the company representatives formed the view that what they saw as performance issues with Jason Conquer running the grading operation would not be resolved through a revised job description and KPIs.

Alleged job offer to Mr Schwalger

[56] Trevor Conquer's evidence was that Mr Schwalger told him in late November 2004 of a conversation with Mr Gascoine and Mr Anderson in which Mr Gascoine asked Mr Schwalger how he would like Jason's job. At the time Jason Conquer was on annual leave and Mr Schwalger was acting as Grader Manager.

[57] Mr Schwalger's evidence was that he had talked to Trevor Conquer about the conversation but that he had not said that Mr Gascoine had asked if Mr Schwalger *would* like to run the packhouse. Mr Gascoine's evidence was that he asked Mr Schwalger how he *liked* running the packhouse because Mr Schwalger had been acting as the grader manager in Jason Conquer's absence on annual leave and that Mrs Conquer's terminal illness would most likely result in Jason Conquer needing to be away for further periods.

[58] I am not satisfied that the evidence is sufficiently reliable to conclude that Mr Gascoine did suggest to Mr Schwalger at that time that he would get Jason Conquer's job and run the packhouse. It is clear, however, that Trevor Conquer took that implication following his conversation with Mr Schwalger and passed that view on to Jason Conquer.

Exclusion from contact list

[59] In February 2005 Mr Anderson provided a key client with contact details for SPL staff that the client would need to deal with in preparation for and during the upcoming mandarin season in April. He did not include Jason Conquer's name but provided Mr Schwalger's instead.

[60] I do not accept the applicant's submission that this was an indicator of a pre-determined plan by SPL to have Jason Conquer removed by April. Rather I accept Mr Anderson's evidence that he left out Jason Conquer's name because at the time of preparing the list, Jason Conquer was on extended bereavement leave. The list was easily updatable on his return.

Non-inclusion in training seminars

[61] I accept the evidence of SPL witnesses that the seminars that Jason Conquer considered he was excluded from were training sessions intended for staff working at other levels in the organisation.

Conclusion

[62] While such matters are inherently difficult to prove, having considered the evidence as carefully as I can, I find that the applicant has not met the burden of establishing that the redundancy was motivated *solely* by an ulterior motive. However it is clear that Mr Anderson and Mr Gascoine had concerns about the performance of the packhouse during the 2004 mandarin season and saw the performance of Jason Conquer in the role of Grader Manager as, at least, a major part of that problem. While Mr Anderson described it as an organisational issue, it was clear from his evidence, and that of the other SPL witnesses, that Mr Gascoine and Mr Anderson were concerned about the personal performance of Jason Conquer. Mr Anderson had clashed with each of the Conquer family and he was the manager charged with dealing with ‘the problem’. By late November 2004, following Jason Conquer’s response to proposed KPIs, Mr Anderson more likely than not formed the view that the applicant was resistant to change and that solutions to the packhouse problems would need to be achieved in other ways.

[63] While the performance concerns with Jason Conquer may not have amounted to a sole ulterior motive for the redundancy proposal, I am satisfied they may have contributed to a “mixed motive”. If that motive were the predominant reason for the redundancy, the resulting dismissal may be unjustified. However before considering that issue, it must be established that there were genuine commercial reasons for making the position of Grader Manager redundant. The burden for establishing that rests with the employer.

Genuine commercial reason for redundancy proposal

[64] The evidence of SPL witnesses was that the redundancy of the Grader Manager and Grader Operator positions was for the genuine commercial reasons of removing duplication between roles and to improve communication and organisational efficiency in the packhouse.

[65] They emphasised that the redundancy was not a “cost cutting exercise”. For that reason I have not taken into account a submission of the respondent that the lower pay rate offered to the GPS should be considered as part of the relevant difference between the roles.

[66] The process of considering the genuineness of a redundancy was put this way in *Wilkinson v Wairarapa Crown Health Enterprise Limited* [1999] 2 ERNZ 133, 144 (EC):

A genuine redundancy can justify a dismissal. Before there can be a genuine redundancy, there must be a redundancy. The general test asks whether the job content has gone. If the job content substantially remains but the employer wants to give the position to somebody else, then it cannot justifiably dismiss the incumbent but must either negotiate a consensual exit package or, if dismissing the employee against the employee's will, pay compensation as for an unjustifiable dismissal. This is because it is ordinarily unnecessary to displace the incumbent when all that is required is that she should upgrade her skills or accept a change in focus or emphasis. [...]

However, it is open to the parties to an employment contract to agree upon a wider definition of redundancy, permitting the displacement of employees even where their job function has not disappeared. [...]

Does the particular contract authorise an approach more liberal to the employer than the general rule? This is primarily a question of fact and of construction of the contract. ... In particular, whether a position is new or the same does not depend on how skilful may have been the art of the person composing the job descriptions — it is a question of whether what has happened amounts to a redundancy situation either generally or under any special wider definition in the contract.

[67] The present applicant's employment agreement provided that redundancy was "*a situation where your position is wholly or partly surplus to the Company's needs*". As a matter of construction of the agreement I do not consider that the use of the word "partly" allows any small superfluity in the role to fall within the redundancy definition. That clause must be considered in the context of the whole agreement, which in this case included a change of duties clause. This provided that changes of duties would not amount to a variation of the agreement unless they constituted "a substantial change in the nature of the employment". In this context, the partial superfluity provided for in this particular redundancy definition, I find, needed to be such as to amount to a substantial, albeit not entire, change to the job content.

[68] On this basis, I turn to consider the issue of whether the job content differed substantially between the position of Grader Manager and the GPS job.

[69] Ms Evison's evidence was that she and Mr Anderson drafted the GPS job description using existing wording from position descriptions for the Grader Manager and the logistics co-ordinator. There was no job description for the grader operator role and they relied on Mr Anderson's understanding of what the job entailed at the Mangere shed and the previous Tuakau shed.

[70] I examined the Grader Manager and GPS job descriptions on a line-by-line basis with witnesses for each party. They run over three pages. Responsibilities are set out under the same headings in each job description. There are some administrative tasks, and health and safety duties not transferred from the Manager's role to the GPS role. The required personal and technical attributes and experience are virtually identical. The key differences are under the "Production" heading. Four responsibilities to "co-ordinate" with various team leaders are specified. There is nothing to suggest that these were not existing requirements of the Manager's role, however well Jason Conquer may or may not have met those expectations in the 2004 mandarin season.

[71] Under the same "Production" heading there are three tasks relating to the operation of the grading and labelling equipment which Jason Conquer accepted were primarily tasks of the Grader Operator rather than Manager. However I do not consider that those tasks amounted to more than a change of focus if required of Jason Conquer and were within the scope of the change of duties clause in his employment agreement.

[72] The only other significant change was one of titular status – the GPS role was to be described as a supervisor rather than a manager. However the stated "staff management" responsibilities are identical in every key respect to that of the Grader Manager job description. The GPS role was also still in the same relative level of the hierarchy of the organisational structure and reports directly to the Operations Manager, as had the Grader Manager.

[73] On the basis of the evidence from the documents and what I was told by Jason Conquer, Mr Schwalger and the company representatives, I am satisfied that the work of the new Grading Supervisor was to be substantially the same as that of the Grading Manager, although differently proportioned in some of the elements under the Production heading, with more work required under some of those elements. All of the work was within the job that the Grading Manager was employed to do and within the work that SPL was entitled to require Jason Conquer to carry out under his employment agreement in return for his salary. What change might have been required was nothing more than a change of focus or emphasis – particularly an express emphasis on co-ordination and communication.

[74] In short, I am satisfied that a reasonable person, taking into account the nature, terms and conditions of each position would not consider that there was sufficient difference to break the essential continuity of employment.

[75] The respondent's justification of the change as necessary to remove duplication of tasks and roles is also not established. Mr Schwalger's evidence of his experience in the GPS role was that although he initially spent more time actually operating the grading machine, he had trained one worker to operate the grading machine in order to give him enough time to do other work required in the GPS role. He was also training an additional worker. This replicates the duplication supposedly removed by the redundancy of the Grader Manager role.

[76] Having examined the respondent's evidence on this point, I am satisfied that there were genuine commercial reasons for *change* in the packhouse structure – communication and co-ordination issues were identified – but I am not satisfied that these amounted to genuine reasons for *redundancy* of the applicant's role. The small degree of change required in the job description in turn required a change of focus for the incumbent, and some possible adjustment in his skills. If the company had the view that his performance to date made it unlikely that he could change his focus or improve his skills (or his application of existing skills), that was an issue it had to address through performance management. If performance improvements were necessary and he did not improve through that process, the respondent would then have been entitled to dismiss him. It was not, I find, entitled to dismiss him at a time where the commercial needs may have warranted improvements but the continuity of job content meant the work done was not superfluous to SPL needs.

[77] The limited "paper trail" explaining the company's reasons for its restructuring proposal confirms, I find, this conclusion. The proposal presented to Jason Conquer and Mr Schwalger referred to "*an overall review of the entire Packhouse structure and will include the position descriptions, responsibilities, authorities and key performance indicators for all staff positions to the level of a team leader*". The evidence disclosed no record of analysis made and factors weighed by SPL representatives at the time of developing the proposal. While there is no minimum requirement for the analysis that has to be generated in the course of considering potential reorganisation of a business,¹⁶ its absence in this particular case – of a sophisticated business with professional senior managers and human resource advice – makes the claim that the redundancy was for genuine reasons less convincing. As does the failure to develop KPIs for all staff positions.

[78] Having reached this conclusion as to the genuineness of this redundancy, I do not now need to consider further any "mixed motive" aspects as these would have been relevant only if genuine business reasons for the redundancy were established.

Fairness of process

[79] Three aspects of the process require some further consideration:

- (i) involvement of Mr Anderson in developing the proposal;
- (ii) use of an external consultant to decide GPS appointment;
- (iii) discussion about other suitable jobs.

[80] Mr Gascoine's evidence was that he initiated the restructuring proposal and delegated its development to Mr Anderson and Ms Evison. They also drafted the GPS job description. He said Trevor Conquer, also a senior manager in the SPL structure, was not involved, partly due to his wife's illness and partly because of "conflict of interest". He also said he decided to use an external consultant to interview the two candidates for the GPS jobs because he and Mr Anderson were "too close" to the matter. That fitting concern to avoid bias or the appearance of bias appears inconsistent alongside Mr Anderson's earlier involvement in developing the proposal and Trevor

¹⁶ *Rolls*, above, at 123

Conquer's exclusion. The inconsistency invites a negative inference.

[81] The use of an external consultant – and the method he used to assess the two candidates for the GPS role – was not part of the process advised to Jason Conquer during the consultation about the restructuring proposal. He was told that if SPL opted to set up the GPS role, he would be invited to submit an application. That happened. What did not happen was the process previously advised of being interviewed by “a panel” and being assessed for the role “taking into account the interview and past performance”. Instead Jason Conquer was interviewed by one person – the consultant – who, according to the SPL witnesses, had no information on the applicants' past performance. The consultant instead relied for his recommendation on Jason Conquer's answers to a personality profile questionnaire and questions on hypothetical scenarios put during the interview.

[82] The proposal also advised that “*should [SPL] be unable to secure a suitable alternative position for you then you will be advised of the disestablishment of your current role*” [emphasis added]. There was no obligation – generally or in the specific employment agreement here – to relocate Jason Conquer to any available job. SPL offered him the opportunity to apply for jobs as GPS, Logistic Co-ordinator, a lower-level grading job or a truck driver. It criticises him for not taking further steps to pursue those possibilities or suggest other alternatives. However the restructuring proposal suggested that SPL would take the initiative in finding him another job – it was expressed as something they would do “for you”. It did not say: “Should *you* be unable to secure a suitable alternative position”. Apart from telling him what was available to apply for, no steps were taken to identify any retraining or other assistance that he might need to meet any requirements that the company had for such positions.

[83] The only real initiative taken was by Mr Booth, a manager elsewhere in the Turners & Grower Group, who sought out Trevor Conquer and then accepted a lunch invitation to talk with Jason Conquer about the prospects of developing a customer representative role for him in the Group. I accept Mr Booth's evidence that he did not make an offer of the role and that he did not initiate the discussion as a representative of SPL. His efforts went as far as talking with and securing the agreement of company representatives to waiving the Group's policy of a two-year bar on re-employing redundant employees, if it were possible to develop a sales role to offer to Jason Conquer. The import of Mr Booth's actions in this case is really to highlight the contrast between the initiative that he took – out of family friendship and industry connections with the Conquers – with how little was done by Ms Evison, Mr Anderson or Mr Gascoine to meet the commitment made in the restructuring proposal to actively consider alternative roles for Jason Conquer.

Determination

[84] For the reasons outlined above, I find that the respondent has not met the burden of establishing there were genuine commercial reasons for the redundancy and did not act as a fair and reasonable employer in dismissing the applicant for redundancy. The dismissal was not justified. The applicant has a personal grievance and is entitled to certain remedies.

Remedies

[85] Awarding compensation in a case of this type involves asking and answering hypothetical questions as to how the worker would have been placed in the absence of the unjustified dismissal. The contingencies or vicissitudes of life must be allowed for in making that assessment.¹⁷ Contingencies include any factors which might have resulted in the worker leaving the employment for other reasons such as personal choice, health, redundancy or proper dismissal for cause. Beyond

¹⁷ *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, 329 (CA)

the statutory provision for a minimum reimbursement of lost wages, fixing the perceived value of future losses resulting from the dismissal is a discretionary exercise. Awards are to be made on a moderate, principled basis and within reasonable range of awards in other cases while accounting for the actual loss suffered by the worker.

Lost wages

[86] The applicant seeks lost income from the date of redundancy until he finds alternative employment. His evidence was that he had applied unsuccessfully for five jobs in the 28 weeks from his dismissal to the date of the investigation meeting. He had also investigated some business opportunities and is now involved in a business where he had earned \$1500 selling health products.

[87] The applicant is obliged to mitigate his loss to the extent he is able. While he had applied for only five jobs over 28 weeks, I accept the evidence of the applicant and Trevor Conquer that the circumstances of losing his job with SPL affected his confidence in seeking alternative work. He has also made some money from commission sales and undertook a personal development programme to rebuild his confidence to seek employment. His endeavours to mitigate his loss, while at the lower end of the scale, were adequate.

[88] I assess the applicant's loss of income as amounting to eight months (35 weeks) salary, subject to deductions set out below. I have reached that assessment after allowing for contingencies including the prospect that future restructuring of the packhouse might have resulted in changes the applicant found unpalatable or the genuine redundancy of his role, and that the applicant might have chosen to leave the job for other reasons. Also, although there were no specific submissions on the point, it is reasonable to expect that a person of the applicant's ability and work experience, as apparent from his resume and other evidence, would be able to secure comparable new employment in the Auckland labour market within that period.

[89] From the assessment of 35 weeks' lost income must be deducted payments already made to the applicant of four weeks wages in lieu of notice and a further 10 weeks wages as redundancy compensation. A further week is deducted for income earned in mitigation. The remainder is 20 weeks.

[90] In reimbursement of lost wages, the respondent is ordered to pay to the applicant a sum equivalent to his salary for 20 weeks (less tax) under s123(1)(b) and s128 of the Act.

Compensation for hurt and humiliation

[91] The applicant gave limited evidence on the extent of distress or hurt he suffered as a result of the dismissal. He spoke of a loss of confidence. The dismissal and not getting interviews for some new jobs he applied for made him "felt not wanted anywhere".

[92] Trevor Conquer's evidence was that the applicant had lost motivation and self-esteem. He also had a "short fuse" and lost his patience during sports activities in a way he had not done before.

[93] The applicant's belief that Mr Schwalger had been offered his job as long ago as November 2004 meant the dismissal for redundancy was not a shock. Rather, he was expecting it. I am satisfied that this was humiliating and warrants a moderate award to recognise the hurt inherent in both the event and manner of the dismissal.

[94] In compensation for the humiliation, loss of dignity and injury to the feelings of the applicant, the respondent is ordered to pay to the applicant the sum of \$8000 (without

deduction) under s123(1)(c)(i) of the Act.

Contribution

[95] As the unjustified dismissal arises from the lack of genuineness in the redundancy decision of the respondent, the actions of the applicant did not give rise to the grievance and no deduction of remedies for contributing behaviour by the applicant is required.

Summary of orders

[96] The respondent is ordered to pay to the applicant by way of remedies for unjustified dismissal the following:

- (i) A sum equivalent to 20 weeks lost salary (less tax); and**
- (ii) under s123(1)(c)(i) of the Act, compensation of \$8000 (without deduction).**

Costs

[97] The parties are invited to agree the issue of costs between them. If they are unable to do so, either party may apply for a determination of costs by the Authority.

Robin Arthur
Member of Employment Relations Authority