

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 235/07
5072670, 5070085

BETWEEN GLENN GREEN, JOHN
 GRANT, CLAUDE WECKE, &
 YUELEI (LUCIA) LIU
 Applicant

AND RENDEZVOUS HOTELS (NZ)
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Shannon Kelly, Counsel for First, Second and Third
 Applicants
 Andrea Halloran, Counsel for Fourth Applicant
 Andrew Shaw and Amy Shakespeare, Counsel for
 Respondent

Investigation Meeting: 15, 16 and 23 March 2007

Submissions received: 27 and 30 March, 20 and 24 April 2007 from Applicants
 4 April 2007 from Respondent

Determination: 6 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Green, Mr Grant, Mr Wecke and Ms Liu were employees of the Carlton Hotel, which at the time was held out as the largest five star major accommodation hotel in central Auckland. In August 2006 the management rights for the Carlton were leased to Rendezvous Hotels NZ Limited (“the company”). The company is a wholly owned subsidiary of Rendezvous Hotels and Resorts International, a large accommodation provider with corporate offices in Sydney and Singapore.

[2] The company took over the Carlton on 7 September 2006. As a condition of the lease agreement all employees were offered employment on their existing terms and

conditions at date of transfer. The Carlton was renamed the Rendezvous. On 13 September 2006 the applicants' were advised their positions were redundant and that they were dismissed. The applicants were 4 of a total of 23 employees who were dismissed for redundancy that day. At date of transfer 290 staff were employed at the hotel.

[3] The applicants challenge the genuineness of the decision to make their positions redundant and the process leading up to, and including, their dismissals.

[4] The company says the applicants' positions were genuinely redundant and that their dismissals were affected fairly and reasonably in all the circumstances.

[5] The parties have attended mediation in an attempt to resolve this employment relationship problem themselves.

[6] The first, second and third applicants lodged their employment relationship problems separately to that of the fourth applicant. Having heard from the parties I directed that the applications be joined to enable these employment relationship problems to be investigated concurrently.

Issues

[7] The issues for the Authority to determine are:

- (i) whether the applicants' positions were genuinely redundant; and
- (ii) whether the applicants' dismissals were conducted fairly and reasonably in all the circumstances.

[8] The test of justification to apply to a dismissal in a redundancy setting is that set out in section 103A Employment Relations Act 2000:

“For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

[9] In *Simpsons Farms Limited v Geoffrey Aberhart* 14 September 2006, Colgan CJ, AC52/06 the Court confirmed that the approach to a genuine redundancy had not altered with the passage of 103A:

“[65] Following the new s103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer’s manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

[66] Especially in redundancy personal grievance cases, the use by Parliament of the phrase “at the time the dismissal or action occurred” at the end of s103A is important. Unlike most (but not all) personal grievances, especially allegations of unjustified dismissal for cause where both the events leading to the decision to dismiss and the decision itself are part of the same process so that justification for a dismissal for cause must take account of relevant events leading to it, dismissals for redundancy often consist of a series of discrete events over a period of time as the facts of this case illustrate.

[67] I do not consider that the recent statutory changes were intended to revisit longstanding principles about substantive justification for redundancy exemplified by judgments such as Hale. The words and phrases of s103A echo the statements of Cooke P and Richardson J in Hale as set out in paras [40] and [41]. Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s103A, to return to the position espoused by the courts in cases such as and following Hale. So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.”

The applicants’ employment agreements

[10] Mr Wecke, Mr Green and Ms Liu all held positions in the human resources department of the Carlton. Mr Wecke was the human resources manager, Mr Green the training manager and Ms Liu the human resources administrator.

[11] Mr Grant was the security manager.

[12] It was a condition of the sale of the business that existing staff would be offered employment on identical terms and that their service would be deemed continuous.

The applicants all had written employment agreements with the Carlton and were offered written employment agreements with the company on identical terms¹.

[13] The applicants accepted the written employment agreements on the terms offered to them by the company. The preamble to those agreements provides:

“Rendezvous Hotels (NZ) Limited will commence operating the former Carlton Hotel Auckland on Thursday 7 September 2006. We are pleased to offer you employment under your current contracted terms and conditions of employment. Should you wish to take up this offer of employment, please sign and return this employment agreement to the Hotel Human Resources Manager by no later than close of business on Thursday 31 August 2006.

We are pleased to offer you employment with Rendezvous Hotels (NZ) Limited, trading as Rendezvous Hotel Auckland (the Hotel). Your employment is subject to the following terms and conditions. The Rendezvous Hotels and Resorts International Standard Operating Procedures stat that you are required to read and fully understand the terms and conditions of your employment as outlined in the Employee Handbook. Please read the Employee Handbook in conjunction with this contract, then sign and return this letter and the declaration, (located at the back of the Handbook) in acceptance of all conditions.”

[14] The applicants’ written employment agreements all contain the following redundancy provisions:

“14 TERMINATION OF EMPLOYMENT

...

Termination for Redundancy Reasons

- *If in the event that your employment is terminated for redundancy, you will be given at least four weeks notice of redundancy wherever practicable but in no case less than seven days. Where seven days notice is given, one week pay in lieu of notice is to be paid.*
 - *You will be entitled to redundancy compensation in accordance with Appendix 1 of this Agreement.*
- ...”

“ APPENDIX 1

REDUNDANCY COMPENSATION

1. *Redundancy compensation shall be calculated according to the following formula:*

¹ With the exception of Ms Liu’s notice period, this is discussed in more detail below.

- (i) *More than 12 months but less than 18 months service = 4 weeks pay;*
- (ii) *More than 18 months but less than 24 months service = 5 weeks pay;*
- (iii) *More than 24 months but less than 30 months service = 6 weeks pay;*

and thereafter at the rate of one weeks pay for each completed 12 months of service, up to a maximum of 20 weeks pay.

- 2. *All redundancy compensation payments shall be calculated from the notified date of termination and shall be calculated on the basis of your ordinary weekly taxable earnings.*
- 3. *Redundancy is a condition under which the Hotel terminates an employee due to the fact that the position filled by that employee is or will become surplus to the needs of the Hotel.”*

[15] As with all employees of the hotel, the applicants were required to sign and return their employment agreements by 13 September 2006.

[16] Mr Green, Mr Wecke and Ms Liu gave unchallenged evidence of the very long hours they worked leading up to 13 September 2006 to collate the employment details for all hotel employees (to enable written employment agreements to be prepared) and to distribute and co-ordinate the return of those employment agreements.

Were these redundancies genuine?

[17] The applicants say their dismissals for redundancy were not genuine because they had a legitimate expectation of ongoing employment. They say it is unclear how their positions were selected for redundancy, they dispute that those positions are surplus to the needs of the company, no redeployment options were explored with them, they understood their jobs were secure and had no inkling that their positions were selected for redundancy until they were advised of their dismissals

[18] In support of their contention the applicants say:

- (i) Written representations were made to them that following the take over by the company it would be “*business as usual*” from 7 September 2006 and that acceptance of employment with the company would

“represent an exciting phase in your career” (refer, letter 24 August 2005 to all staff from Carlton hotel advising of sale, letter 25 August 2006 to all staff from Abacus Group advising of lease to the company).

- (ii) At the all up staff meeting of meeting of 7 September 2006 Mike Brown, General Manager Carlton and Rendezvous, told all staff that while there would be changes at the hotel, their jobs were safe and the only person whose job may not be secure was his own. Mr Brown confirmed in his oral evidence to the Authority that he made this comment.

They all accepted the company’s offer of employment on or about 13 September 2006.

- (iii) They were not told that their positions were redundant until their dismissal meetings on 13 September 2006. There was no consultation with them over any proposed redundancies.

Mr Green

- (i) He says he had ongoing employment and that it was “business as usual” because he was very busy collating and coordinating the employment offers and had been directed to organise Rendezvous culture training for all employees and it was proposed that he and Mr Wecke run that training on 25 and 26 September.
- (ii) He says his dismissal was not genuine because staff knew he was going to be dismissed before he did. He relies on the following email dated 13 September 2006 from Josy Wigzell who was then employed in the administration of the hotel:

“Hi Glen

I hope you are doing well.

Yesterday was a bit of an interesting day.

As I found it quite strange that I knew that you were going to leave before you even did.

Only about 30 minutes before you came into the office [name of] Business Development Manager from (sic) told me that all the HR department were going to be fired.

She found this out from the Co-ordinator whose job it was to tick everyone off the list which was [name of co-ordinator].

Being so new to the team I didn’t think it was fair for him to have such a strain put on him.

...”

- (iii) On 18 September 2006 a position was advertised for a “People Development Manager” at Rendezvous hotel. The advertisement described the position in words identical to Mr Green’s job description.

Mr Wecke

- (i) He says he and Mr Green worked two consecutive days and nights to collate information for the employment agreements and worked long hours coordinating the return of those executed documents.
- (ii) He and his team had to arrange and roster training for all employees on Rendezvous culture and policies by 13 September 2006 and that he and Mr Green were scheduled to conduct these training sessions through to the end of September 2006.
- (iii) He was told by Mr Grant that Mr Brown had warned him (Mr Grant) on 13 September 2006 not to get involved with any challenge to their redundancies by Mr Wecke and that Mr Wecke was responsible for the “f*** ups” around the take over. At the investigation meeting Mr Brown confirmed these statements attributed to him.
- (iv) Mr Wecke saw the advertised “People Development Manager” position shortly after his dismissal. He said in evidence that he had the qualifications and experience to perform that position.

Mr Grant

- (i) Believes his dismissal was not for genuine reasons. From 7 September 2006 he was not involved in the management team briefings, as he had invariably been. On 7 September 2007 the Security Supervisor who reported to him advised that he had meet privately with Mr Brown who had told him that he should not resign because his job was secure. When asked by Mr Grant the Security Supervisor said he could not say anything as to whether Mr Grant’s position was secure;
- (ii) He prepared and submitted rosters for himself and security staff up to 8 October 2006.

Ms Liu

- (i) Submitted a written application form for parental leave to Mr Wecke in August 2006. Ms Liu was advised by Mr Wecke that no decision would be

made on her application until the new owner of the hotel reviewed the application and that there was plenty of time to discuss the issue.

(ii) She worked very long hours to assist Mr Wecke to have the necessary HR information available for the company.

(iii) A HR position was advertised at the Rendezvous on 18 September 2006. On 5 September 2005 a position for a HR Coordinator at an unnamed five star hotel located in inner Auckland was advertised. Ms Liu suspects the advertisement was placed by Rendezvous.

[19] The company says the applicants were made redundant for genuine commercial reasons; cost savings had to be effected immediately on take over. It says the applicants' dismissals were not "personal" because the applicants were among a number of staff employed in departments across the hotel who were dismissed for redundancy on the same day.

[20] Senior executives from Rendezvous Hotels and Resorts International Sydney corporate office came to Auckland prior to the takeover date; Darko Novakovic, chief operating officer and Pat Sheehan, vice president human resources. Their brief was to affect a smooth transfer from Carlton to the company, assess the current state of the business and identify and implement savings in the business as quickly as possible.

[21] The company did not have access to detailed information about the day-to-day management of the business until 7 September 2006. It was not until this point that the management of the business could be carefully assessed and savings could be identified and made.

[22] Mr Novakovic was the most senior representative of the company to give evidence. He said savings had to be made because once he had full access to the Carlton's trading figures they showed that returns fell well short of the annual rental. He also said these trading figures were within an acceptable tolerance of the figures he had anticipated.

[23] Mr Novakovic said he immediately began to develop a master financial plan to reduce the renamed Rendezvous' operating costs by NZ\$2,000,000, which was the initial amount needed to meet the annual rental under the lease agreement. This plan

involved reducing payroll and operating costs. In relation to payroll costs Mr Novakovic averred in his witness statement:

- [26] *During our review process we also identified a number of positions that in our view were not required in the property and that a redundancy process would be needed.*
- [27] *Rendezvous operating philosophy is to bring hotel senior management closer to the shop floor. The majority of middle management positions, along with positions that the guest could not see were initially targeted. These included stewarding, kitchen chefs, security, human resources, night cleaning and general cleaning personnel, accounting personnel, concierge and reception. Closer to change over the list was changed as we learnt of personnel that were not taking up positions of employment.*
- [28] *Our Corporate Human Resources Department were briefed on this position with specific instruction to ensure that all redundancies were implemented in accordance with New Zealand labour regulations and employee sensitivities where possible taking into account our strict contractual obligations on the sale and lease.*
- [29] *Just prior to the changeover on 7 September 2006, a meeting was held with the unions on 6 September 2006, with the Carlton Hotel General Manager, Mike Brown, Corporate Vice President Human Resources, Pat Sheehan and me. The unions at this meeting were advised that the operation would not stay the same and that changes would be implemented immediately on ownership changeover. The unions were invited to discuss these proposals with us.”*

[24] Mr Sheenan averred in his witness statement:

- [19] *From the date of sale on 7 September 2006, the Hotel was losing significant money for every week that the business and employment structure remained unchanged. I was therefore charged with immediately undertaking a restructure of the business and employment structure, but in doing so I was subject to the strict criteria in the sale and purchase agreement and lease agreement.*
- [20] *To not immediately take the business cuts and redundancy action that Rendezvous took, the business would have not been viable in a few short weeks after we took over, particularly when the annual downturn in business that occurs towards the end of the calendar year and the start of the following year was taken into consideration.*
- [21] *As part of this restructure, unnecessary layers of management were removed and the management structure is now substantially closer to the business activity than before. There were functions such as Room Checkers that were unnecessary in our experience. We do not operate with this type of position anywhere else and they were removed from the structure of the Hotel through the redundancy process.”*

[25] In his witness statement, Michael Brown, the General Manager of the Carlton and the Rendezvous averred:

“[20] Rendezvous had compiled a draft list of proposed redundant positions, which they were continually adjusting (reducing in number), in response to staff opting not to join Rendezvous. A final list of redundant positions was produced on 13 September ’06.”

[26] At the investigation meeting questions were put to Mr Novakovic, Mr Sheehan and Mr Brown about how the decision to make the applicants’ positions redundant was made. Mr Novakovic said that on 7 September 2006 an initial list of names was drawn up. He said that within a few days he was able to meet with Mr Sheehan and Mr Brown to reduce the names on the list to get the same outcome. Other than in the very general terms outlined in their witness statements, they could not say how the applicants got onto the list of redundant positions.

[27] In his written evidence Mr Sheehan said that the HR administration function was moved to the executive secretary with support from the Australia office. There was no evidence given as to how this decision was made or what factors were taken into account in making this decision.

[28] There was no evidence that the redundancies had to be undertaken with extreme haste. That the written employment agreements were not required to be returned until 13 September 2006, six days after take over, having set an original deadline of 31 August 2006, demonstrates the company was prepared to take adequate time to fulfil legal obligations.

[29] I accept that during the development of a redundancy plan it would be necessary to identify positions which may be surplus to requirements, as the respondent witnesses’ say. However, the next step must be to select which positions will be surplus and having done that, explore the options in relation to the employee who holds that position. This requires a process of selection and consultation with the affected employee.

[30] In *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195, at page 208, Goddard CJ made the following comments about failure to consult and the impact on justification of redundancy:

“The Tribunal’s finding that the respondent acted unfairly in the respects mentioned both rendered unnecessary and precluded the finding that the

respondent had genuine reasons of redundancy for the dismissal. That is to put the cart before the horse. No genuine reasons can be formed about either redundancy or misconduct in the absence of input from the employee concerned, or at least a reasonable opportunity in which to contribute (sic) it. The employee's representations may well show that there is, on a better view of her or his functions, no redundancy at all or that there are alternatives to dismissal. A failure to inquire or consult is fatal to justification."

[31] In addition to this common law imperative, statutory good faith obligations require an employer in a redundancy situation to consult with an effected employee².

[32] The company says that these consultation obligations are not relevant to the question of genuineness. While that may arguably be the case in a situation of a total closure of a plant, that cannot be the case where some positions are selected as redundant whilst others remain. The evidence received by the Authority shows that some back-of-house and middle management positions remained while others were made redundant. The company witnesses said the positions which remained were necessary and the others surplus. At that point the trail of explanation goes cold; no documentary or detailed evidence was presented to support these statements. I find that, in this situation, consultation is relevant to the question of genuineness.

[33] Did the company consult with the applicants about their redundancies? The company says all employees were on notice that changes would be made when the company took over. Mr Sheehan said in evidence that his statements to the general staff meeting on 7 September 2006 and prior discussions with union organisers amounted to consultation. The content of his discussion with union organisers is disputed. However, as none of the applicants were union members, and those discussions were not public, what Mr Sheehan discussed with them is not relevant to this investigation. Notice of unspecified changes falls well short of consultation.

[34] The company cannot show that it consulted with the applicants about the redundancies when the first the applicants heard of their redundancies was when they were advised they were dismissed for redundancy.

[35] Another factor to weigh in the consideration of genuineness is the advertised positions. Mr Sheehan said the position of "People Development Manager" was not

² Section 4(1A)(c) Employment Relations Act 2000

the same as Mr Green's because it was a regional position. Mr Sheehan also said the role had not been fulfilled because after the advertisement was placed it was decided the position was not needed. The applicants say the advertisement was pulled one day after it was placed because they raised their personal grievances on 19 September 2006. In relation to the "HR Coordinator" role Mr Sheehan said the advertisement was not placed by the company and produced a letter from the recruiting firm that the advertisement had been placed speculatively.

[36] Clearly the "People Development Manager" position was Mr Green's training position. I do not accept Mr Sheehan's explanation that the role was regional; the advertisement is for a position in a five star hotel in Auckland. Mr Green and Mr Wecke were suitable candidates for the role; Mr Green was performing the role, Mr Wecke had the qualifications and experience to fulfil the role. Given Ms Liu is fluent in two languages, has a masters degree in HR management and has published on the subject; it is beyond doubt that she could fairly have been considered for that role.

[37] A further factor to genuineness is the repeated statements, both written and verbal, made to the applicants in the weeks leading up to their dismissals that their jobs were secure. Mr Novakovic's evidence was clear that by 7 September 2006 he knew costs savings would have to be made through redundancies. This contradiction has left the company's decision vulnerable to criticism.

[38] The company has failed to establish that at the time of the applicants' dismissals that their positions were redundant for genuine reasons. This finding does not question the identified need to make costs savings. It has been made because there is no transparency between the identified need for costs savings and the selection of the applicants' positions for redundancy and ultimately dismissal. In the absence of a clear trail the company cannot establish its actions were genuine. This opacity has been deepened by the company's statements to staff that their jobs were secure, when they were not, and the advertising of a position in HR three working days after the HR department was declared redundant.

[39] The applicants' dismissals for redundancy are unjustified.

Were the redundancies fairly carried out?

[40] As stated above the applicants were not consulted about their proposed redundancies. They were each called into meetings on 13 September 2006 and advised by Mr Brown that they were redundant. The applicants were not given adequate notice of their respective meetings. They were each contacted by the executive secretary and asked to come to Mr Brown's office; Mr Wecke at 2pm, Mr Green at 2.30pm, Mr Grant at 12.30pm for a 3pm meeting and Ms Liu at about 3pm. There is no dispute that the applicants were not advised of the purpose of the meeting or advised of their right to have a representative or support person present.

[41] Mr Brown had a script set out in a document entitled "*Confidential Retrenchment Checklist*", the relevant section of which is:

Process

The employee will be informed of the retrenchment by the General Manager as the first step.

Inform. *Mike should limit his address to:*

- 1. The new hotel operating company has identified the need to reduce the hotel staff numbers.*
- 2. A careful analysis of staffing has been conducted and it has been determined that your current position is to be made redundant.*
- 3. Unfortunately this means that the company does not have work for you and is today concluding your employment contract.*
- 4. You will receive a payment to your bank account for your outstanding leave entitlements, notice and redundancy. The payment is in recognition of your service to the hotel. It will be paid directly to your bank account on return of any outstanding hotel property that you may have at work or home.*
- 5. Do you have any questions for me?*
- 6. I will now pass you to Pat Sheehan Vice president Human Resources/Cameron McAlpine Vice President Operations to talk with you further about important information."*

[42] This document was not given to the applicants. Mr Brown said he did not follow the script to the letter. He told the applicant's that they were dismissed for redundancy and expressed sympathy. The applicants' all said they did not know why they had been made redundant. Ms Liu said Mr Brown said her position was redundant for business needs. The other applicants said they were only told that they were redundant.

[43] The next stage of the process is described in the retrenchment checklist as "Counsel" and provides:

“Counsel. Pat or Cameron (see attached schedule) will present the further information to the employee. It is important at this time to show the employee empathy and support.

1. *Ask the employee to sit and ensure they understand what Mike has told them.*
2. *Ask if they have any questions about what Mike has said.*
3. *Tell them that you will now talk to them about what happens from here.*
4. *Hand them their envelope stating that the information in the envelope tells them in detail what they will be paid.*
5. *Hand them Pat Sheehan’s business card and tell them if they have any questions or concerns after today they should call him.*
6. *Tell them that you will now pass them to Joanna who will take them through the next steps but that they should plan to leave the hotel as soon as possible. Be empathetic but encourage them that this is for the best.”*

[44] As directed by Mr Brown, Mr Green went to the office next door where Mr Sheehan met him. He received his final pay slip and Mr Sheehan’s card. He recalled Mr Sheehan saying “it’s nothing personal mate” and that he was then asked to meet with Mr Novakovic outside the office.

[45] Mr Wecke and Mr Grant said Mr Sheehan gave him his pay slip and asked him then to see Mr Novakovic.

[46] Ms Liu said that when she went into Mr Sheehan’s office she asked him if the hotel no longer needed an HR administration assistant and that he replied that those tasks would be performed by the executive secretary. She said he then asked her to return her company property and leave the hotel within 30 minutes. She then left his office and handed her office key card to the executive secretary.

[47] Ms Sheehan said he gave the applicants their final pay slips, offered them outplacement and counselling support and gave them each his card with an invitation to ring him if they needed any support. None of the applicants rang him. The outplacement and counselling support Mr Sheehan referred to in his evidence was not specified to the applicants at that meeting, either in writing or verbally. At the investigation meeting he was unable to detail what the company had put in place by way of outplacement and counselling support at date of dismissal.

[48] In response to Ms Liu's evidence that he told her that the hotel did not need a HR department, Ms Sheehan said he told her that as part of the hotel restructure, the hotel would be supported from corporate offices in Australia for HR issues.

[49] The next stage of the redundancy process involved the applicants leaving Mr Sheehan's office to go out into the reception area of the executive suite, where they were met at the reception desk by Mr Novakovic and the executive secretary. The relevant part of the retrenchment checklist provides:

***Property.** Joanna and Darko will have the lists of hotel property that the employee will be required to return.*

1. *Indicate to the employee what property they will need to return and the return method.*
2. *Inform them that they should take time now to gather their belongings and return what hotel property they can and leave the hotel through the staff entrance.*
3. *Tell them that a Duty Manager will be waiting at the staff entrance to sign them out of the building."*

[50] Mr Green said he was asked by Mr Novakovic if the suit he was wearing was his or "ours". When he realised Mr Novakovic was not joking, he confirmed it was his. He was then asked to return company property in his possession such as name badge and car park card. Mr Green said he was told he had 20 minutes to leave the premises.

[51] Mr Wecke said he stood in the open reception area and was asked what company property he had to return. He said to Mr Novakovic that he needed to collect personal items and was told to do that, return company property and leave the premises immediately.

[52] Mr Grant said when he confirmed to Mr Novakovic that the suit he was wearing was the company's he was told to change immediately, return the suit and all other company property and leave the hotel premises within 20 minutes.

[53] Mr Novakovic said he coordinated the return of company property in a sensitive and professional manner.

[54] The applicants all gave evidence of their own personal shock and distress at the news of their redundancy. They all said that when they left the executive suite they came across staff members crying and supporting one another. They then collected their personal things and prepared to leave the hotel.

[55] Posted at the staff entrance was an employee with a clipboard with names of redundant workers to tick off as they exited the building. Ms Liu said this employee had shown her the list earlier in the day, asking for her help to identify the employees listed. At that stage she did not know that the list contained names of employees, including her own, who were to be made redundant. Mr Wecke said as he exited the building this employee was visibly upset and hugged him. Later that afternoon Mr Green and Mr Grant saw what they believe to be the same list of names circulating at an informal gathering of staff at a pub located near the hotel.

[56] Mr Brown said he had chosen this employee to carry out the task of exiting redundant staff from the hotel for his maturity and demonstrated ability to handle difficult tasks.

[57] Mr Brown joined the informal gathering of staff that afternoon at their local pub. He told Mr Grant that he should not join any legal action Mr Wecke may take against the company but that, in any event, they would be ready for him. Mr Brown also told Mr Grant that Mr Wecke was responsible for many of the “f*** ups” and problems with the takeover. Mr Brown confirmed in his evidence that he made these comments to Mr Grant about Mr Wecke.

[58] There was no discussion with the applicants about how the redundancy process would be implemented, no opportunity to organise a representative, no opportunity to comment on a redundancy proposal, no option to work out notice periods, no written references or certificates of service and no opportunity to farewell co-workers.

[59] The company’s witnesses have attempted to say the applicants were on notice of redundancy and that the process for dismissal was fair and reasonable in the circumstances. I have dealt with the notice issue above. The undisputed facts do not support the claim that the dismissal process was fair or reasonable.

[60] Mr Sheehan said he designed a process which he thought was fair because in his experience redundant staff want that process over as quickly as possible. That may well be his experience, but when statutory obligations require employment relationships to be conducted in good faith, then it is incumbent on parties to those relationships to proactively seek out the comments of those who will be affected by decisions they may make.

[61] The process for executing these redundancies was woefully inadequate. While I appreciate the company wished to implement its cost saving measures quickly there was no evidence to support the swiftness with which these redundancies were affected, no explanation as to why the applicants could not be fairly notified of the proposed redundancies or given a fair opportunity to comment on those proposals.

Remedies

[62] The applicants have established that their dismissals were unjustified. They are entitled to a consideration of the remedies they seek.

Lost Wages

(i) Mr Green

[63] Seeks reimbursement of lost wages from 11 October 2006 to 5 January 2007 quantified at \$11,422.82. This is a period of 12 weeks and 2 days calculated at \$923.08 per week (gross) from the end of the four week notice period he received from the company until he secured alternative employment on 8 January 2007. \$208.00 has been deducted from the lost remuneration claim for casual earnings Mr Green received during the period of claim.

[64] Mr Green gave evidence of his efforts to find alternative employment. He has a young family to support. I accept that his efforts to secure a new position following his redundancy from the company were reasonable. I have found that his dismissal was unjustified on both procedural and substantive grounds. He is entitled to lost wages.

[65] Mr Green is entitled to be reimbursed for 2 months lost wages at the rate of \$923.08 per week (gross), which totals \$7284.64 (gross). I am not satisfied that the evidence supports an award beyond the statutory three months³. Mr Green received one months pay in lieu of notice; he has no loss for the first month following his dismissal. Beyond the three months, Mr Green's evidence that the advertisement of the training manager position must have impacted poorly on his reputation is speculative. I accept that the advertisement would have been hurtful, but there is no direct evidence that it, or any other deliberate actions of the company, impacted on his ability to secure a new position.

Mr Wecke and Mr Grant

[66] They both secured positions within a month of their dismissals on better terms than those they enjoyed with the company. Accordingly, they make no claim for lost wages.

(ii) *Ms Liu*

[67] Seeks reimbursement of lost wages pursuant to section 123(1)(b) and an order that the company pay her 14 weeks paid parental leave to compensate the lost of that future benefit pursuant to section 123(1)(c)(ii).

[68] Ms Liu's wages from the company were \$634.62 (gross) per week. On dismissal she received two weeks pay in lieu of notice as provided in the employment agreement she entered with the company on 13 September 2006. Ms Liu gave evidence that she immediately started looking for a job and had applied for 19 HR positions since her dismissal, without success. She has made reasonable efforts to find another position.

[69] I have found Ms Liu's redundancy was not genuine. She is entitled to be reimbursed three months lost wages, totalling \$7615.44 (gross). This three months period runs from the end of her notice period until her delivery date on Christmas Day.

³ Section 128(2) Employment Relations Act 2000

[70] Paid parental leave is not an employment benefit. It is a statutory entitlement that is not an employer's obligation. There appears to be a gap in the legislative provision of paid parental leave. The payment is expressly protected if employment ends by way of redundancy or resignation during a period of parental leave⁴. No such protection is extended to an employee who is made redundant before they have commenced parental leave. I am unable to make any order for compensation for loss of the parental leave payment.

Hurt, humiliation and injury to feeling

[71] I have read and considered the careful submissions filed by counsel regarding this remedy. In summary the submissions on behalf of the applicants are:

- That the applicants' evidence in support of their section 123(1)(c)(i) was largely unchallenged;
- That the facts of these redundancies warrant exceptional awards;
- The applicants' situations bear a number of similarities to those in *Staykov v Cap Gemini Ernst & Young New Zealand Limited*⁵ (\$30,000 awarded) where the respondent carried out the redundancy in such a way that the applicant felt there was substantial fault on his part, that the applicant was considerably distressed by the employer's conduct towards them and that this affected his self-confidence, his health and caused him stress and anguish.

[72] The respondent's submissions as to distress compensation in summary are:

- The starting point for an assessment of any award is the actual hurt caused to each applicant as a direct result of the employer's actions;
- The
- The applicants were employed by the respondent for one week and that is the extent of the period over which they experienced any alleged disadvantage;

⁴ Parental Leave and Employment Protection Act 1987 s 71V, 71L9(2)

⁵ Judge BS Travis, 20 April 2005, AC 18/05

- There was no suggestion of wrongdoing on the part of the applicants or high-handed or arrogant conduct from by the respondent;
- None of the applicants held particularly senior positions
- None of the applicants lost their homes as in *Simpson Farms*; and
- An award of \$15,000⁶ or \$12,500⁷ is higher than would be appropriate in this case.

[73] The applicants gave evidence of their claims for distress compensation. In addition I received supporting evidence from their doctors and partners.

(i) *Mr Green*

[74] He said that after his redundancy he found it very hard to get back on his feet. He said he was very emotional, moody and depressed and that this placed a strain on his relationship with his wife. Mr Green said he felt stressed and concerned about the financial impact of his redundancy on his future. He said this concern continued until he secured another position three months later.

[75] Mr Green visited his doctor a week after his redundancy and was prescribed anti-anxiety medication to deal with his feelings of stress.

[76] Mr Green said the advertisement of the training development manager position made him feel his redundancy was a sham and wonder why he had been made redundant when his position was advertised. He said he worried that it would look to prospective employers as if he had been made redundant because he had done a bad job and this made him feel scared and anxious about his future.

[77] Mr Green said he still feels angry, upset, humiliated and embarrassed when he thinks about the way he was treated by the company. He said he would like to move on and put these feelings behind him.

⁶ *Simpson Farms*

⁷ *Thompson And Gays Commercial Limited* (AA 411/05, 12 October 2005, Member Robinson)

[78] Mr Green spoke with great emotion of the negative impact of his dismissal. I accept that it has had a significant impact and caused him stress and anguish. His dismissal was abrupt and his distress exacerbated by the advertisement of his position a matter of days following his dismissal. These are matters which were entirely within the control of the company.

[79] It is appropriate to award Mr Green \$15,000 pursuant to section 123(1)(c)(i) to compensate him for the distress and injury he has suffered as a consequence of his redundancy.

(ii) *Mr Wecke*

[80] Mr Wecke said that after 13 September 2006 he was in a state of shock and suffered from nightmares and anxiety attacks. He said he found it difficult to think logically and rationally and worried about how he would cope financially. He said after his redundancy he felt as though he were sinking into a black hole and that one day he experienced his whole body shaking, as if his system was packing up. He said he did not know if he was having a nervous breakdown, a heart attack, or something else. Mr Wecke's doctor prescribed anti-depressant medication and referred him a psychologist.

[81] Mr Wecke said that securing employment within one month of his redundancy boosted his confidence but that he still felt angry, hurt and embarrassed when he thought of the way he had been treated.

[82] Mr Wecke said he felt it was more difficult for him to cope with his emotions because he had recently gone into remission after a long battle with cancer and this had weakened his body's ability to deal with stress.

[83] He said that if the company had followed a fair process there would have been a consultation period and he would have been offered outplacement counselling or an offer of time off for interviews. The lack of process has exacerbated the impact of the redundancy.

[84] Mr Wecke impressed as a sincere witness who has been deeply affected by his dismissal. He has suffered ill health as a result. I accept that Mr Brown's conduct in telling Mr Grant that Mr Wecke was at fault was hurtful and damaging to Mr Wecke.

[85] Mr Wecke is entitled to an award of \$15,000 pursuant to section 123(1)(c)(i) to compensate him for the distress caused by his dismissal.

(iii) Mr Grant

[86] Mr Grant said his job with the hotel was the most exciting job he had ever had. He said that it was no exaggeration to say that the sudden trauma of his dismissal was on a level with what he had experienced when his first marriage ended.

[87] Mr Grant said he got increasingly anxious after his redundancy and that he began to experience chest pains for which he was referred to the hospital by his GP on 19 September 2006 because the GP was worried he was having a heart attack. Mr Grant said hospital was an ignominious experience for someone who had always been proud of his good health. The hospital discharge papers show Mr Grant was not having a heart attack and that stress was the likely cause of the chest pain he was experiencing.

[88] Mr Grant has suffered as a consequence of losing a job he greatly enjoyed. It has impacted on his health. The process undertaken by the company to effect his dismissal was insensitive, for example the requirement that Mr Grant change out of his suit and return it minutes after being advised that he was dismissed.

[89] Mr Grant is entitled to an award of \$12,500 pursuant to section 123(1)(c)(i) to compensate him for the distress caused by his dismissal.

(iv) Ms Liu

[90] Ms Liu said that the two week notice period did not compensate her for the shock of losing her employment, especially when she was six months pregnant at the time and would find work difficult to get. She also said that the two week payment

does not adequately compensate her for the stress, hurt and humiliation that she experienced as a consequence of the way her dismissal was handled and the company's subsequent conduct.

[91] Ms Liu said she could not stop crying when she was advised of her dismissal. She said she telephoned her husband to pick her up from work and that she needed his support because she was so upset. She said when she got home she immediately started looking for another job because she had planned to work up to when the baby was born and her plans were now upset. For the first week following her dismissal Ms Liu said she could not stop crying, lost her appetite and was worried about the effect to of the stress on her baby and this made her feel more stressed.

[92] Ms Liu said the advertising of the HR position at the hotel made her feel sick and hurt particularly when she thought about how hard she had worked during the change over.

[93] On 12 October 2006 Ms Liu attended her doctor who suggested she get a sickness benefit and referred her to a Chinese language telephone counselling. Ms Liu said she felt uncomfortable with contacting the counselling service and began to feel better having spoken with her doctor.

[94] Ms Liu said that as an immigrant the process of finding another position has been very difficult and that she knew this from her own experience and her thesis research. Upon completing her masters degree it took her eight months to secure a position, which was the one from which she was made redundant. Ms Liu's thesis research showed that immigrants to New Zealand, and in particular Asian women, experience real barriers to securing employment. At date of hearing Ms Liu has not secured another position.

[95] Ms Liu says actions of the company subsequent to her dismissal have added to her hurt and humiliation. In her personal grievance letter her representative requested a written reference. The response from the company was that one would be provided "*on satisfactory conclusion of this matter [her personal grievance]*". Ms Liu said this response was very upsetting and she has still not received a reference from the company.

[96] Ms Liu said she was further distressed when she heard the list of redundant employees had been circulated at the after work drinks on 13 September. She said she felt really hurt that a lost like that was circulated and that the company could have created a situation where that could occur.

[97] Ms Liu said she feels embarrassed about her situation and that she has not been able to bring herself to tell her parents-in-law in China that she was dismissed. She said she has not only lost her job but her entitlement to paid parental leave and her self esteem. She said that despite the barriers she had got a job she really enjoyed and now she is unemployed and dependant. She said she will never know how the distress she has experienced has affected her pregnancy or her baby.

[98] I accept that Ms Liu has suffered considerable negative affects as a consequence of her dismissal and that these affects have been amplified by Ms Liu's pregnancy and immigrant status. These are characteristics personal to her and on any objective assessment could reasonably within the knowledge of the company at the time of dismissal. That the company witnesses did not know of her pregnancy vividly demonstrates the inadequacy of the design and implementation of her redundancy.

[99] Ms Liu is entitled to \$15,000 pursuant to section 123(1)(c)(i) to compensate her for distress caused to her the consequence of her dismissal.

Penalty for breach of good faith

[100] The applicants seek a penalty for breach of the good faith obligations owed to them under section 4A of the Act.

[101] The grounds for a penalty do not exist. I have found the company breached the obligations owed to the applicants and that those breaches were serious. However, the evidence falls short of establishing those breaches were deliberate. No penalty will be awarded.

Contribution

[102] The applicants' employment ended through no fault of their own. There is no issue as to contribution.

Costs

[103] Costs are reserved. The parties are invited to resolve this issue themselves. If they are unable to do so the applicants should file and serve memoranda within 28 days of the date of this determination. The respondent should file and serve a reply within 14 days of the receipt of such. Any response should be filed and served within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority