IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 104
3026452

	BETWEEN	BROCK HARE Applicant
	AND	GALVANISING (H.B.) LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Seungmin Kang, counsel for Applicant Bruce Gilmour, counsel for Respondent
Investigation Meeting:	8 August 2018 at Napier
Submissions Received:	Orally and in writing on the day from both parties
Determination:	19 November 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Brock Hare was employed as a process worker by the respondent from 22 May to 22 December 2017. He claims his dismissal was unjustifiable and that his employer breached both his employment agreement and its statutory obligation of good faith to him. Mr Hare seeks reimbursement of lost wages, compensation and costs. Additionally, he seeks the imposition of penalties on his former employer for its breaches of his employment agreement and good faith.

[2] Galvanising (H.B.) Limited (GHBL) rejects Mr Hare's claims. It says his employment was terminated for redundancy following a fair and reasonable process. It denies that any remedies or penalties are appropriate in the circumstances.

Relevant background

[3] Mr Hare, who was 20 years old at the time these events occurred, was originally employed as a day shift process worker at GHBL. He was moved to the night shift during his employment.

[4] On 5 December 2017 he received a letter informing him of a proposed restructure and of a meeting that day to discuss the matter. The proposal entailed making five of the eight night shift workers redundant.

[5] On 8 December 2017, Mr Hare was given notice of the termination of his employment for redundancy. He was given two weeks' notice, which ended on 22 December 2017.

[6] Mr Hare raised a personal grievance by letter dated 6 March 2018.

[7] The parties attended mediation but were unable to resolve the matters between them.

Employment agreement

[8] The terms and conditions of Mr Hare's employment were documented in an individual employment agreement (IEA) signed by him on 23 May 2017 and by his employer on 22 May 2017. The redundancy provisions are set out below:

> Redundancy is a condition in which the Company has a position or positions superfluous to its requirements because of the closing down of the whole or part of our operation, and/or the re-organisation or like cause requiring a reduction in the number of positions. In the event that we propose to declare your position redundant, we shall: **Consult with you a reasonable time in advance over our intention**, including the operational reasons for such intention, before arriving at a final decision to give notice of termination of employment on the grounds of redundancy.
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> In the event that a decision is reached to declare the position redundant, we shall: provide you with at least 2 weeks written notice of the termination of your employment**; use our best endeavours to redeploy or transfer you into any other suitable work which becomes available within our business during such period**. (Bolding added)
>
> In the event that your position is terminated due to redundancy, no redundancy compensation is payable.

The Authority's investigation

[9] I have not set out a record of all the evidence heard or received nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Employment Relations Act 2000 (the Act).

[10] This determination has been issued outside the timeframe set out at s 174C (3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[11] The issues to be determined are:

a. Whether Mr Hare's dismissal was justifiable.

b. Whether GHBL breached Mr Hare's IEA;

c. Whether GHBL breached its obligation of good faith during the restructuring process;

d. Whether a penalty or penalties should be imposed if breaches are found.

[12] If findings are made against GHBL, issues of remedies available to Mr Hare will arise.

Was Mr Hare's dismissal justifiable?

[13] The assessment of whether a dismissal is justifiable is made by applying the test set out at s 103A of the Employment Relations Act 2000 (the Act). It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[14] The Court of Appeal confirmed in *Grace Team Accounting Limited v Brake*[1] that this is the relevant test for dismissals for redundancy, but stated that:

> It will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing

1 [2014] NZCA 541

> it to consider "any other factors it considers appropriate") in redundancy cases[2].
> …
>
> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.

[15] Mr Hare raises questions over the adequacy of the consultation and GHBL's failure to consider redeployment; and the genuineness of his redundancy.

Adequate consultation and consideration of redeployment?

[16] The letter notifying the restructuring proposal was given to Mr Hare on 5 December 2017 by its author, Jaimee Lovett, who was at the time the Business Manager for GHBL. The letter expressed Ms Lovett's concern that:

> Following extensive monitoring of the performance of our company I am concerned that; labour costs have increased, production throughput has decreased and as a consequence customer service has been impacted. This combination of issues means that we must look for more efficient ways of operating our plant and machinery more effectively. Preliminary research reveals that there is potentially a more efficient method of operating, and it is this that I want to make you aware of.

[17] Ms Lovett's letter noted the proposed restructure would result in the night shift reducing to three people, and that Mr Hare's input was required because *(i)f this plan was to be adopted it would impact your current role, position and potentially your future employment with us*.

[18] The letter stated that no final decisions had been made and would not be made until *a proper process of review and feedback has been completed*. It referred to a meeting that was to be held at 3 o'clock that day, the purpose of which was to*:*

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[2] N1 at [77]

- *Explain in more detail why I am considering this.*
- *Discuss how you can input into the decision making process.*
- *Discuss how I may make a selection decision.*
- *Listen and consider any input you have to the above.*

[19] There is no disagreement between the parties that the letter giving notice of the proposed restructure was handed to Mr Hare sometime between 2 pm and 3 pm on 5 December. The meeting referred to in the notice took place at 3 pm with all members of the night shift. Ms Lovett, who has since left GHBL, did not attend the Authority's investigation or provide evidence to it. Richard Millea, who was at the time Operations Manager for GHBL reporting to Ms Lovett, gave evidence for the company. Mr Millea is now the General Manager of GHBL.

[20] Mr Millea said he and Ms Lovett had met with Mr Hare for approximately 15 minutes when they gave the notice of the meeting to him. He said they had talked through the proposal with Mr Hare; advised him of his right to seek advice on the proposal and to have input into it. It was Mr Millea's evidence that he and Ms Lovett made it clear to Mr Hare that, if the proposal went ahead, he would lose his employment as he lacked the necessary skills.

[21] Mr Millea confirmed in answer to questioning in the Authority's investigation that it was his, and Ms Lovett's, expectation that night shift employees would give feedback on the proposal at the 3 pm meeting on 5 December. He said those employees would also have the opportunity to give feedback after that time by talking with him or Ms Lovett. When questioned about what selection criteria were notified to the employees, Mr Millea answered that it had been decided not to put selection criteria to them. He said they explained to employees what was needed to run the factory.

[22] It was Mr Millea's evidence that little feedback was received from employees other than a suggestion to move another member of staff to the night shift. He and Ms Lovett had another meeting with the two night shift supervisors on 7 December as they were concerned no constructive feedback had been received. That meeting did not include Mr Hare, who was not a supervisor.

[23] Mr Millea said that between the meetings he and Ms Lovett compiled a skill set matrix in which they rated all eight night shift employees on the skills the two managers decided were important. The matrix was not shared with the employees who had no opportunity to question or comment on the ratings attributed to them.

[24] On 8 December Mr Millea and Ms Lovett had a short meeting with Mr Hare and advised him the proposed restructure would go ahead and as a result he would be made redundant. Mr Millea said he and Ms Lovett pointed out to Mr Hare that he did not possess any of the skills required to work in the new structure and that, as the day shift was fully staffed, there was no option to re-deploy him, particularly in view of Mr Hare's limited skillset. They handed him a letter confirming that his employment would terminate in two weeks, on 22 December 2017.

[25] On the basis of these facts I find the consultation inadequate and unreasonably brief. GHBL's expectation that Mr Hare would provide feedback over the proposed restructuring at a 3 pm meeting, having heard of the proposal at most an hour before, was unrealistic and unfair. He had no opportunity to take advice before that meeting and was provided with no information to support the assertions made in the letter. This was not in accordance with the provision in his employment agreement that his employer would consult him *a reasonable time in advance over our intention.*

[26] The letter proposing restructuring referred to *extensive monitoring* of the company's performance and to *preliminary research* that potentially indicated a more efficient way of undertaking the business. Mr Millea confirmed under questioning that the extensive monitoring referred to weekly reports of performance that management received. He said that information was not shared with employees.

[27] No information was provided to Mr Hare regarding the preliminary research referred to in the restructuring proposal and the nature of that research remained unclear until evidence was provided to the Authority in the course of its investigation. It appeared the research consisted of visits that had been undertaken over the last 20 years by Stuart Easton, GHBL's director, to galvanising companies overseas and in New Zealand.

[28] Mr Easton did not attend the Authority's investigation but provided an affidavit in which he referred to these visits. In particular, he referred to a visit to a company in Italy whose processes had clearly impressed him. Mr Easton deposed

that he took a number of photos and videos to assist him with his *preliminary research*.

[29] When an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, the employer is obliged to provide information relevant to the continuation of the employee's employment to that employee. The employer is also obliged to provide an opportunity for the employee to comment on the information to their employer before it makes its decision.[3]

[30] While the Act does not specify that information must be in writing, it must be obvious to an employer that it is stressful for employees to face potential redundancy. Employees in that situation are unlikely to retain information provided to them on a verbal basis only. In this particular situation, the employees were advised of the proposed restructure less than three weeks before Christmas which is likely to have added to the stress experienced, especially where, as in Mr Hare's case, there was no provision for redundancy compensation in the IEA.

[31] Mr Millea conceded under questioning that, in hindsight, it would have been better to provide written information to employees.

[32] In my view the timeframe within which the restructuring proposal was notified to employees, consultation took place, and the outcome was notified was unreasonably brief. Mr Hare had no time to take advice on the restructuring proposal before attending a meeting at which he was expected to provide feedback. Following that meeting he had no information on which to seek advice, other than what was in the letter of 5 December and that which was provided verbally at the 5 December meeting.

[33] The meeting took place mid-afternoon on 5 December so Mr Hare effectively had only the mornings of 6 and 7 December in which to obtain advice on his situation before he received notice of the termination of his employment. He was handed a letter on 8 December informing him that his two week notice period for redundancy started that day.

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[3] Section 4(1A)(c) of the Act.

[34] The letter of termination made no reference to redeployment despite the redundancy provisions of Mr Hare's IEA specifying that the employer would use best endeavours during his notice period to redeploy or transfer him to any other suitable work that became available within the business during that time.

[35] As noted earlier, Mr Millea's evidence was that he and Ms Lovett had informed Mr Hare on 5 December his employment would be terminated if the restructure went ahead. They had made clear to him that he lacked the skills to retain employment if the proposed restructure went ahead but did not provide him with information about the skills required for an employee to be considered for retention.

[36] On the basis of the above facts and evidence I conclude GHBL's consultation was inadequate in terms of time and opportunity provided to Mr Hare to take advice on his situation. It did not constitute the *reasonable time in advance* provided for in his IEA. I also conclude he was provided insufficient information on which to provide meaningful feedback to his employer on the proposal, and his employer had predetermined that there would be no redeployment.

A genuine redundancy?

[37] Counsel for GHBL submits it is well settled that an employer is entitled to restructure its business in a way that best meets the needs of the business. He submits GHBL gave clear reason for the need to restructure and the need to operate in a more efficient way. He noted Mr Millea's evidence that productivity and performance were issues raised with employees at the Tuesday *toolbox* meeting on a number of occasions. In his submission, efficiency issues were well known and understood by all employees from at least the end of October 2017.

[38] I do not accept the tool box meetings alerted Mr Hare or his colleagues to an impending restructure. Issues of efficiency and productivity may have been raised in those meetings but Mr Hare and the other night shift employees did not know of any restructuring proposal until 5 December 2017 when they also learned their employment was potentially at risk.

[39] Mr Millea's evidence to the Authority's investigation emphasised workload efficiency as being the reason for the restructuring. However, his evidence was at odds with GHBL's statement in reply, which Mr Millea drafted, signed and lodged in

the Authority. That document refers to workforce performance issues involving the night shift workers, *such as drinking on site and leaving early*, which had led to the decision to reduce the night shift team from eight to five employees.

[40] Mr Millea also recorded in the statement in reply that:

> *In deciding who was suitable to retain their jobs Mr Hares record and performance was reviewed. He had written warnings, including a final written warning.*

[41] This was in contrast to the reason given verbally by Mr Millea and Ms Lovett to Mr Hare on 8 December 2017 which was that he lacked skills they had decided were important for the three employees GHBL wished to retain on the night shift.

[42] Counsel for GHBL submits Mr Hare's apparent insistence on physical copies of research or reports or the selection matrix used to determine which employees would be retained was *overly technical*. In his submission Mr Hare had not provided any evidence to suggest the proposed restructuring was anything other than genuine.

[43] I do not accept that submission or the assumption behind it that the onus is on Mr Hare to prove his dismissal for redundancy was unjustifiable. There is no question that Mr Hare was dismissed, purportedly for redundancy. The onus lies with the employer to establish his dismissal was the action a fair and reasonable employer could have taken in all the circumstances at the time. As the Court of Appeal made clear in *Grace Team Accounting Limited*, *if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test*.

[44] GHBL provided meagre evidence to establish Mr Hare's dismissal for redundancy was justified. Evidence given by Mr Millea referred to different ways of managing the workload based on their conversations with Mr Easton about one of the galvanising factories he had visited. Based on those conversations Mr Millea said he and Ms Lovett formulated the idea of the night shift being reduced to three people who would concentrate on the galvanising of large items only, with all the high volume small items being handled by the day shift.

[45] It does not appear that any financial information was prepared to underpin the proposal that was discussed with Mr Hare and the other night shift employees. If it

was prepared, it was not shared with the employees. They were presented with the information in the letter of 5 December 2017, and with information about how the night shift would reduce to three employees if the proposal went ahead. It was Mr Millea's evidence that the night shift employees were asked for their feedback on alternative options for getting items through the galvanising process.

[46] Mr Hare and his colleagues were not provided with the information GHBL had gleaned from its *extensive monitoring of the performance of* (the) *company* or with statistics showing the *increase in labour costs* and *decrease in production throughput* on the basis of which the proposed restructuring was put forward and, three days later, implemented.

[47] Under cross examination in the Authority's investigation Mr Millea said he and Ms Lovett relied on weekly tonnage statistics and payroll information. He acknowledged it could have been helpful to provide that information. The information Mr Millea referred to was not provided to either Mr Hare or the Authority.

[48] Taking all the above matters into account I conclude Mr Hare's dismissal was not justifiable. I am not satisfied from the evidence that his redundancy was genuine, that is, a decision based on business requirements. The evidence indicates Mr Hare's dismissal was more related to his performance, and that of his night shift colleagues, than to business requirements. The consultation period was unreasonably brief; insufficient information was provided to Mr Hare; and no consideration was given to redeployment.

Breach of good faith?

[49] I find GHBL breached the good faith requirements of s 4 of the Act in failing to provide information to Mr Hare relevant to its decision to make him redundant. The information, which I have referred to in earlier paragraphs of this determination, underpinned the restructuring proposal and formed the basis for decisions about the employees to be retained and those whose employment would be terminated.

[50] Breaching s 4 potentially renders GHBL liable to a penalty. Not all breaches of the statutory good faith provisions will, however, will result in a penalty being

imposed on the party in breach. Under s 4A of the Act a party who fails to comply with the duty of good faith in s 4(1) is liable to a penalty if:

> (a) the failure was deliberate, serious, and sustained; or
> (b) the failure was intended to undermine-
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> i. bargaining for an individual employment agreement or a collective agreement; or
> ii. an individual employment agreement or a collective agreement; or
> iii. an employment relationship; or
> (c) N/A

[51] In this instance I find there was a deliberate intention by GHBL to withhold information from Mr Hare and other employees. The withholding of the information was serious as it adversely affected the ability of employees to provide feedback on the restructuring proposal. The information was withheld over the entire three days period in which the restructuring consultation took place and could therefore be described as sustained. I will consider the appropriateness of a penalty under s 4A(a) shortly.

Breach of IEA?

[52] I have made findings above about the inadequacy of GHBL's consultation process and its failure to consider redeployment options for Mr Hare. It follows from those findings that I consider GHBL breached the redundancy provisions of Mr Hare's IEA. A penalty could be imposed under ss 133 and 134 of the Act for that breach.

Should a penalty or penalties be imposed?

[53] Penalties are imposed at the discretion of the Authority and generally for the purpose of punishment as well as discouragement to others. In determining whether a penalty is appropriate I must take into account the factors specified in a non-exhaustive list in s.133A of the Act. They are:

> (a) the object stated in section 3; and
> (b) the nature and extent of the breach or involvement in the breach; and
> (c) whether the breach was intentional, inadvertent, or negligent; and
> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and

> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[54] I must also consider the guidance provided over the application and weighing of the factors in s 133A by a full Court of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited*.[4]

[55] I have found GHBL breached its statutory duty of good faith to Mr Hare under s 4(1A)(c) in failing to provide him access to all relevant information relating to the restructuring proposal. The employer deliberately withheld information from Mr Hare, which contributed to the inadequate consultation process. It was aware of its obligation to consult with Mr Hare and to use its best endeavours to redeploy or transfer him in the event of redundancy. Its failure in these matters breached the redundancy provisions of Mr Hare's IEA. These breaches were all part of the same process and should be considered together for the purpose of determining the issue of a penalty or penalties.

[56] One factor in my finding the consultation period inadequate was its unreasonable brevity, which allowed insufficient time for Mr Hare to take advice on his situation. I am willing to give the managers the benefit of the doubt and accept they may have believed three days to be a reasonable period.

[57] I do not, however, extend the benefit of the doubt to them over their failure to consider redeployment. I find Mr Millea's acknowledgement significant that, in his and Ms Lovett's initial meeting with Mr Hare to inform him of the proposed restructure, they advised him he had none of the required skills to retain his employment if the restructure proceeded.

[58] Mr Hare's letter of termination made no reference to any endeavours that would be made to redeploy or transfer him during his notice period and I conclude the employer had closed its mind to that possibility. Taking into account Mr Hare's age

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[4] [2016] NZEmpC Christchurch 143.

and relative inexperience I consider him to have been somewhat more vulnerable than the average employee.

[59] My consideration of the s 133A factors leads me to the conclusion that penalties are warranted for GHBL's failure under s s 4(1A)(c) to provide all relevant information to Mr Hare and for its failure to use its best endeavours to redeploy or transfer him as required under his IEA.

[60] Applying the first step of the four-step *Preet* process, GHBL is liable to a penalty or penalties not exceeding $40,000 for those breaches.[5] At this point it is relevant to consider whether one global penalty or separate penalties should be applied. In light of the statutory and contractual breaches both relating to the same restructuring situation I consider one global penalty more appropriate.

[61] The second step entails assessing the severity of the breaches to establish a provisional starting point, accompanied by an assessment of mitigating and aggravating factors. I regard the deliberate withholding of information and the deliberate lack of consideration given to redeployment as an aggravating factor. As far as I am aware, GHBL has no previous relevant history, which I consider a mitigating factor.

[62] I conclude the provisional starting point should be adjusted downwards by 40 per cent. The third step in the process is to consider the means and ability of GHBL to pay the adjusted penalty of $24,000. There is no evidence to suggest GHBL is not in a financial position to pay a penalty or that it would be caused undue hardship and I need not consider that factor further.

[63] The final step in the *Preet* process is to apply the proportionality test. This entails considering whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breach and the harm occasioned by it. It also requires an assessment of whether the result in this case is consistent with those of other cases. Taking those factors into account I find an adjustment to $8,000 appropriate.

[64] Counsel for Mr Hare submits it would be appropriate that 75 per cent of any penalty awarded be paid to Mr Hare. I accept it is appropriate to award part of the

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[5] S 135(2)(b) of the Act.

penalty to Mr Hare but reject the proposed percentage. I find 25 percent to be more appropriate.

Remedies for Mr Hare's personal grievance

[65] Mr Hare has a personal grievance for unjustifiable dismissal and is entitled to remedies subject to consideration of any contribution on his part.

[66] He seeks lost wages calculated at three months' ordinary time which Mr Hare says is $11,466.86 gross. From evidence provided to the Authority I am satisfied Mr Hare attempted to mitigate his loss, and did so by seeking and undertaking alternative employment shortly after the end of his employment with GHBL.

[67] Evidence from IRD of Mr Hare's earnings in February and March 2018 established that he earned wages of $5,058.00 gross in the three months following the termination of his employment. Subject to any findings of contribution, I find he is entitled to be paid the difference between three months' ordinary time wages and the amount he earned in that time. I calculate that amount to be $6,408.86 gross.

[68] Mr Hare seeks compensation for the hurt, humiliation, injury to feelings and loss of dignity he suffered from his dismissal. Through counsel he seeks compensation in the sum of $8,000.

[69] I am satisfied from the oral and written evidence Mr Hare presented that he was humiliated by the manner in which his employment was terminated. Subject to any findings of contribution, I accept the submission of counsel for Mr Hare that $8,000 would be an appropriate amount.

[70] I have found the redundancy for which Mr Hare was dismissed was not genuine. While there may have been some dissatisfaction with Mr Hare's performance by his managers, he was dismissed for redundancy not performance and I find he could not be said to have contributed to the situation that led to his dismissal.

Summary of findings and orders

[71] Mr Hare's claim to have been unjustifiably dismissed succeeds. He did not contribute to the situation that led to his personal grievance.

[72] GHBL is ordered to pay Mr Hare:

a. The sum of $6,408.86 gross under s 128 of the Act, being three months' ordinary time remuneration less the remuneration earned by Mr Hare in that time;

b. Compensation of $8,000.00, without deduction, under s 123(1)(c)(i) of the Act.

[73] GHBL breached its statutory duty of good faith under s 4(1A)(c) to Mr Hare and also breached his IEA.

[74] In respect of those breaches GHBL is ordered, pursuant to s 133 of the Act, to pay a penalty of $8,000.00. Payment of $2,000.00 of that amount is to be paid directly to Mr Hare and the remaining $6,000.00 is to be paid to the Employment Relations Authority for depositing in a Crown Account. These amounts are to be paid within 28 days of the date of this determination.

Costs

[75] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority