

**ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF
CERTAIN INFORMATION (REFER PARAGRAPHS 4-6)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 84
5537974

BETWEEN

DAVID LYLES
Applicant

A N D

SWIMMING NEW ZEALAND
INCORPORATED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Royal Reed, Counsel for the Applicant
Michael Smyth, Counsel for the Respondent

Investigation Meeting: 12 and 13 March 2015

Submissions Received: 13 March 2015 from the Applicant and Respondent

Date of Determination: 23 March 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In December 2014 the Respondent, Swimming New Zealand Inc (SNZ) undertook a restructuring exercise of its high performance programme (HP Programme). As a result of the restructuring a new position of National Head Coach was created and a number of positions, including that of the Applicant, Mr David Lyles, as National High Performance Centre Coach – Auckland, were to be disestablished.

[2] Mr Lyles claims that the decision to make his position as National High Performance Centre Coach – Auckland redundant with effect from 2 February 2015 was substantively and procedurally flawed and accordingly claims unjustifiable dismissal

[3] SNZ claims that its decision to disestablish Mr Lyles's position following a restructuring exercise, and the process it followed in reaching that decision, were fair and reasonable.

Prohibition on publication

[4] I order that relevant documents and/or evidence containing personal information relating to persons who are not a party to the investigation now before the Authority and to documents which contain commercially sensitive information relating to SNZ's HP Programme are not to be published.

[5] Specifically this information is the HP Review, the summary of decision from the interviews conducted with candidates for the National Head Coach position, and the employment agreements of individuals included in the document bundles provided.

[6] These orders are made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

Note

[7] I have considered all of the evidence given, information provided and submissions made during the preparation of this determination, however as permitted by s 174 of the Employment Relations Act 2000 (the Act) I have not set out a full record of these matters. I have however stated findings of fact and law and expressed my conclusions on those matters and/or issues that require determination in order to dispose of the matter; and have specified the orders made as a result.

Issues

[8] The issues for determination are whether or not:

- (a) SNZ's decision to disestablish the position of National High Performance Centre Coach – Auckland, and consequently Mr Lyles, redundancy was a genuine business decision
- (b) The National Head Coach role is the same as, or substantially similar to, Mr Lyles' role as National High Performance Centre Coach – Auckland
- (c) The process followed by SNZ was procedurally fair
- (d) Mr Lyles should be redeployed into the National Head Coach role?

Background Facts

[9] Sport in New Zealand is governed and managed by a Government entity called Sport New Zealand (Sport NZ). Sport NZ delegates responsibility for the management of individual sports to National Sporting Organisations (NSOs). SNZ is the NSO for swimming.

[10] As part of SNZ's activities it is responsible for preparing swimming teams to represent New Zealand in international competitions.

[11] SNZ has a HP Programme into which it selects swimmers to prepare for international pinnacle events, such as the Olympic Games, Commonwealth Games and world championships. High Performance is not the only area of SNZ's operations; it also operates in the area of swimming education, water safety and competition at national level.

[12] SNZ's HP Programme is primarily funded from money received from the government through High Performance Sport New Zealand Inc (HPSNZ) which is a division of Sport NZ. Money from HPSNZ represents 89% of the total funding required each year to run the HP Programme. The balance of funding comes from the SNZ's own funds and contributions from individual athletes to the HP programme.

[13] As an NSO, SNZ differs from a normal commercial business in that its success is not based on profitability. It is a not-for-profit organisation and therefore measures success in other ways. In relation to its HP Programme, its measure of success is the number of medals its swimmers achieve at pinnacle events

[14] SNZ's success, and in particular the success of its HP Programme, is measured by reference to the Key Performance Indicators (KPIs) and HP strategy. The most transparent of those measures is podium success at pinnacle events around the world by the New Zealand swimming team, referred to as the AquaBlacks. If the HP programme is unsuccessful then funding is reduced and allocated to other more successful sports.

[15] Funding received from HPSNZ is subject to an investment agreement whereby SNZ must meet certain KPIs in order to retain funding for future years. Historically, HPSNZ have invested heavily into swimming because it is perceived as a sport in which New Zealand would do well. It is referred to as "cornerstone sport". Other cornerstone sports include rowing, cycling, sailing and athletics because they are sports where New Zealand has achieved prior success at Olympic level.

[16] In 2011 SNZ instigated a review of swimming at the request of SNZ's Board of members (the Board) with the recommendations being published in June 2012 (the Review Recommendations). The purpose of the review was to bring various stakeholders within the

sport together, help secure future funding from HPSNZ for the HP programme, and clarify the purpose of SNZ.

[17] The Review Recommendations is a public document available for download from SNZ's website. The review included a need to develop a Whole of Sport Plan which formed part of the review recommendation 10 and a draft was completed in April 2014. The Whole of Sport Plan is essentially an overarching business plan for swimming setting out key objectives for the organisation in the various parts of its operations, including High Performance.

[18] Also included in the Review Recommendations was a new High Performance strategy (HP Strategy) which is a more detailed strategy for the HP programme which takes the HP programme through to the Tokyo Olympics in 2020. It sets out the key goals/outcomes which the HP programme needs to achieve by 2020. The review and the Review Recommendations allow continued funding from HPSNZ into the HP Programme, but in order to maintain the long term future of that funding SNZ must adhere to the Review Recommendations and the strategy set out in the Whole of Sport Plan (including the HP Strategy).

[19] The HP Strategy sets out six key priorities of the strategic plan:

1. World Class Coaching
2. Strong Team Culture
3. Strong Team Leadership and Direction
4. Integrated Athlete pathway
5. Podium Results role Models
6. Role Models

[20] At the commencement of the current 2012 to 2016 Olympic cycle SNZ believed that establishing two training centres, one in Auckland based at the Millennium Institute for Sport & Health (MISH) and one in Wellington at the Wellington High Performance Centre (WRHPC), with equal hands-on coaching resources, was a suitable structure to achieve the KPIs of the HP Strategy, i.e. hands-on pool deck coaching of those swimmers located at both centres. The emphasis for both roles was on specialist coaching experience with some management capabilities. Also following the Review, Mr Christian Renford was appointed as CEO of SNZ.

Appointment of Mr Lyles

[21] The position of National High Performance Centre Coach – Auckland was advertised on-line and Mr Lyles, who was working in China at the time, applied for, and was subsequently appointed to, the position by Mr Renford’s predecessor.

[22] In or around May 2013 Mr Lyles commenced employment in the position of National High Performance Centre Coach - Auckland. Mr Lyles was employed subject to a fixed term contract commencing in May 2013 and ending on 31 December 2017 (the Employment Agreement). The reason for the fixed term was stated in clause 3.2 of the Employment Agreement:

The reason for this fixed term is that we require a National High Performance Centre Coach – Auckland to work in our h High Performance Programme up to and during the August 2016 Olympics in Rio de Janeiro, and to assist in the months following that with the review and transition to the next four-year phase. After the 2016 Olympics, we will review the High Performance Programme, our priorities and goals for the 2020 Olympics and elsewhere, and our funding and other resources. As a result of the review, we may agree to extend the term or to enter into a new employment agreement. ...

[23] Clause 4.1 of the Employment Agreement contained the general responsibilities of Mr Lyles which included at clause 4.1 (d) that Mr Lyles would: “*familiarise yourself and comply with our rules, policies and procedures ...*”. At clause 5.1 (c) SNZ undertook to notify Mr Lyles of any rules, policies and procedures which applied to him.

[24] Clause 12.8 of the Employment Agreement addressed a redundancy situation stating:

If we decide to disestablish your position prior to the expiry of the fixed term of this agreement, your employment may be terminated on notice in accordance with this agreement for redundancy. We will consult you prior to disestablishing your position, and will consider whether there are any suitable alternatives to redundancy.

[25] Mr Lyles was provided with a position description for the National High Performance Centre Coach – Auckland which referenced the High Performance Programme stating:

In relation to the SNZ High Performance Programme, be responsible for the effective and efficient implementation of the squad programme which includes:

- *Fully supporting the SNZ High Performance Plan*

[26] Mr Lyles said he had not undertaken any due diligence on SNZ before accepting the position of National High Performance Centre Coach – Auckland due to having limited access to the internet whilst he was based in China. In particular he had not accessed the Review Recommendations document containing the HP Strategy which was a public document available for download from the SNZ website.

[27] Mr Lyles said he had not had an induction when he commenced employment at SNZ and had not been advised of any policies and procedures. He claimed to have assumed that any such policies were limited to those he had received when conducting overseas events relating to conduct, and had not enquired further.

Whole of Sport Plan

[28] On 23 April 2014 Mr Renford wrote to all SNZ employees by email which stated:

The Whole of Sport Plan was finalised by the Board at its April meeting, and is now published to the regions.....

Some of these strategies and tactics have already been established (eg the HP Strategy).

[29] Later that same day, Mr Renford sent out another email attaching, amongst other documents, the Whole of Sport Plan. The Whole of Sport Plan set out the vision for growing swimming in New Zealand in details. The Targets section of the Whole of Sport Plan included targets for the HP Programme which were extracts from the HP Strategy.

[30] On 13 June 2014 Mr Renford sent a further email showing the Whole of Sport Plan, including the supporting plans which formed its foundation, one of which was the HP Strategy.

[31] Mr Lyles said he had been aware of the emails sent by Mr Renford concerning the Whole of Sport Plan, and had been aware of the targets contained in it. However he had not discussed such targets with Mr Danyon Loader, the Programme Coach at MISH, who reported to him.

HPSNZ review process

[32] Mr Christian Renford, CEO of SNZ, said that following the results at the Glasgow Commonwealth Games in mid-2014, it became obvious that:

- (1) The HP Programme had not produced podium results in line with the HP Strategy;

- (2) Many of the swimmers who were targets for success in Rio de Janeiro had elected not to train at either the Auckland or Wellington HP centres leaving only development swimmers (those which are trajectories for Tokyo 2020) in the HP programme;
- (3) The majority of individual performance times achieved from the period between the SNZ's national trials to the Commonwealth Games had become slower than the previous times achieved by those swimmers in the HP programme.

[33] Mr Lyles said that the number of swimmers in the Auckland HP training programme had been increasing during his period of employment, although he accepted that the majority of swimmers in the HP Programme were 18 and under. He also disputed that the individual swimming times had decreased.

[34] Information regarding the individual swimming times was admitted into evidence but has not been referenced as being intrinsic to this determination.

[35] Mr Michael Flynn, Performance Consultant for HPSNZ, explained that HPSNZ and SNZ had agreed a stop light system – indicating the level of KPIs achieved - in order to determine overall final achievement rates.

[36] He stated that, based on the improved standards set by SNZ in 2013/2014 and agreed to by HPSNZ, and the real potential for SNZ to achieve their 2016 Rio Olympic KPI's, the summary of results was that SNZ's HP Programme failed to achieve the majority of the priority KPIs for 2014.

[37] Based on these results, Mr Flynn said HPSNZ required SNZ to present within their 2014 annual performance review a brief summary of performances and the key learnings and potential actions that might be required to move forward.

[38] He said the implications of SNZ not being able to discuss the real KPIs for the 2016 Rio de Janeiro Olympics and, from the learning and with the talent already identified during 2013/2014, deliver a strategic review of its plans to enhance the real potential of the young athletes and coaches, would result in a reduction in funding for 2015 and 2016.

[39] As an outcome of the review HPSNZ also required SNZ to report on the strategic priorities every six months to confirm that they were on track with what it had presented during the review.

[40] HPSNZ wrote to SNZ on 10 December 2014 summarising in writing the outcome of the Review, stating:

Investment is conditional on undertaking a detailed 2015 mid-year performance review in partnership with HPSNZ including, but not limited to, a report against the implementation of all recommendations from the 2014 Swimming NZ HP review. In particular, the progress against ensuring world class coaching capability to technically lead the national programme and HP culture. The review to be conducted by 30 June 2015.

[41] As part of its presentation to HPSNZ SNZ undertook to carry out a formal consultation of its HP coaching structures and a review of the performance of its coaching personnel and to review the roles and resourcing of its two HP Centres in Auckland and Wellington.

[42] Mr Renford said he had overseen the preparation of the presentation for HPSNZ, from which it had been clear that SNZ had underperformed in relation to a number of key KPIs contained in the HP Strategy. As a result it was likely that there would be a reduction in funding unless SNZ could demonstrate that they could rectify the situation over the next 18 months to 2 years leading into the Rio de Janeiro Olympics.

[43] Mr Flynn said that although following the HPSNZ review funding had been maintained at the level it had been at when Mr Lyles had been appointed, HPSNZ wanted to see the recommendations being either completed or progressing towards completion, without a change HPSNZ might not continue to support SNZ and there was a potential for the funding level to change.

[44] Mr Renford said the KPIs in which SNZ had underperformed were KPIs 3,2,5 and 6 as set out in the HP Strategy:

- (1) Priority 3: strong leadership and directions;
- (2) Priority 2: a strong team culture;
- (3) Priority 5: insufficient podium results;
- (4) Priority 6: swimmers as role models for the sport.

[45] He said the failure to achieve these KPIs was underpinned by both a reluctance for SNZ's top swimmers to train under the HP Programme, and the results achieved by the HP Programme at the Commonwealth Games.

The Restructuring Exercise

[46] Mr Renford undertook a review of the SNZ HP Programme to see whether a different structure could achieve better results in and out of the water. He said what became immediately apparent was that SNZ had over-invested in coaching resources for a limited number of development swimmers whose performance trajectory would not allow them to perform in the 2016 Rio de Janeiro Olympics.

[47] Mr Renford said he formed the preliminary view that the WRHPC could be disestablished which would free up funds to invest in other areas such as swimmer development and talent identification. He said that what was also apparent to him was that SNZ needed to create a coaching role which:

- (1) was a national role which could look after swimmers located in places other than MISH. That role would require strong leadership capability which was beyond what was expected of the existing coaching roles in the HP Programme.
- (2) was able to have input into those swimmers who were training overseas. The existing situation was that SNZ had little or no input into the training and preparation of those swimmers for pinnacle events. It therefore needed to bring them within the HP Programme to justify HPSNZ's investment into the HP Programme, and to use those swimmers as better role models to attract new swimmers into the HP Programme and additionally to inspire those already in the HP Programme. The coaching role would need to be a more senior role requiring a candidate with experience of leading successful national programmes.
- (3) was able to have a greater input into HP Strategy in conjunction with the HP Director to improve its implementation in the following areas:
 - (a) strong team leadership and direction (HP Strategy priority 3);
 - (b) strong team culture (HP Strategy priority 2);
 - (c) swimmers achieving podium results to the level requirement (HP Strategy priority 5); and
 - (d) leading swimmers become role models for the next generation and for attracting public support and funding to the sport (HP Strategy priority 6).

- (4) had a greater emphasis on leadership since the role would require to lead a national swimming programme which involved the development of other coaches located throughout New Zealand and achieve the buy-in of those coaches into the HP Programme.

[48] Mr Renford said he then looked at Mr Lyles's position. His preliminary view was that the role of National High Performance Centre Coach – Auckland needed to be disestablished because the role was the same as the equivalent role at the WRHPC. Any new combined coaching role would need to assume the duties and responsibilities of both the WRHPC Coach role and the National High Performance Centre Coach – Auckland role meaning that if the combined role was to remain the same, then out of fairness SNZ should conduct a selection process between the two individuals who held those roles.

[49] Prior to consulting with affected employees, Mr Renford said he presented his restructuring proposal to the Board of SNZ who ratified his proposal and gave him authority to proceed to consult with affected staff. He also confirmed that he was the decision maker in relation to the proposal.

Restructuring Process

[50] Mr Lyles said he was scheduled to go to Doha, Qatar, for the World Championships on Wednesday 26 November 2014. Just before his departure, on Monday 24 November 2014, Mr Renford requested a meeting with him. At the meeting Mr Lyles was told to expect an email document outlining some proposals for the HP Programme. Due to Mr Lyles' travel plans, Mr Renford had said he would be unable to meet with Mr Lyles in person at that time to discuss the contents of the document but that he would meet him in Doha the following week.

[51] Mr Lyles said he received the email Consultation Document while he was at the airport waiting to board the aeroplane to Doha for the World Championships. However as he was travelling at the time, in actuality he received the email that Mr Renford sent with the consultation document when he arrived in Qatar some 30 hours later.

[52] Attached to the Consultation Document relating to the proposal to restructure the HP Programme was a position description for a National Head Coach position, a position description for a HP Coaching Coordinator, and a current and proposed HP organisation chart.

[53] The Consultation Document set out the findings of the review and stated that the preliminary view was that WRHPC was not sustainable given the number of swimmers in the

programme, and that the proposal was to close down the WRHPC and disestablish the roles associated with it.

[54] The Consultation Document also stated that the intention was to create a new role of High Performance Coaching Coordinator reporting to the High Performance Development Coach.

[55] As regards Auckland, the Consultation Document stated that SNZ had formed the preliminary view the role of National High Performance Centre Coach - Auckland would be disestablished and a new role of National Head Coach reporting to the High Performance Director would be created. The purpose of the role would be to play an active role in the implementation of the HP Strategy 2013 to 2020, specifically strategic priorities 2, 3, 5 and 6. The document stated that:

These overarching responsibilities make it a very different role to the current role of Head Coach – National Performance Centre. ... from a skills and experience perspective the emphasis is taken of day to day coaching of swimmers (although that will still be required) with greater emphasis being placed on the mentoring of other coaches, implementation of strategic thinking in line with the overall high performance strategy, working with other stakeholders to ensure the high performance programme is a positioned for success. The successful candidate will need to be able to demonstrate leadership capability goes beyond working with athletes and which demonstrates an ability to work with other key stakeholders as part of a national sports programme.

[56] The Consultation Document stated that if the proposal was to proceed the new roles would be advertised both internally and externally. The document stated:

Before making any changes to the coaching structure we would like to consult you first. If you have any other suggestions for restructuring the High Performance Programme then please include those with your feedback. Please also indicate as part of your feedback if you wish to apply for the roles of National Head Coach and/or High Performance Coaching Coordinator. Feedback may be given in writing or in person to me.

[57] The consultation document stated that the anticipated timeline would be:

- presentation of proposal – Wednesday 26 November 2014
- final day for receipt of feedback – Friday 12 December 2014
- decision on restructure communicated to affected employees – Monday 15 December 2014.

[58] Mr Lyles said that he and Mr Renford met twice whilst he was in Doha. Although these meetings were informal in nature, Mr Renford said that they gave Mr Lyles an opportunity to provide any feedback and/or consult the consultation document. Mr Lyles stated that the combined meetings lasted in total approximately 8 hours.

[59] Mr Lyles said that as Mr Renford was in Doha during this time he was able to have two meetings with him to discuss the documents and put forward his views on the proposal in issue. Mr Renford said that Mr Lyles had not asked for more time to provide his feedback, but had he done so, he would have considered the request.

[60] Mr Lyles said that the final day to provide feedback was 12 December 2014. He did not return to New Zealand until late on Tuesday 8 December 2014 which gave him a limited time to provide feedback. However, he did provide a detailed feedback in excess of ten pages.

[61] In his feedback Mr Lyles highlighted the fact that he was not aware of the HP Strategy document which the consultation document of 26 November 2014 referred to, and that he had not been provided with a copy of it. He also highlighted his concerns that SNZ had not given sufficient reasons for the disestablishment of his role as National High Performance Centre Coach - Auckland.

[62] Mr Lyles provided some recommendations about how to make the current structure work better and the suggestion that his current position's job title be changed to National Head Coach, thereby removing the need for his redundancy.

[63] In the lengthy written feedback submitted to him by Mr Lyles, Mr Renford said that in summary Mr Lyles had agreed with the proposals made, specifically that –

- (1) WRHPC should be disestablished, which included the disestablishment of the roles which were based at it.
- (2) SNZ should create a new role focused on swimmer development and talent identification.
- (3) There should be a National Head Coach role which assumed responsibility for all swimmers in the HP programme.

[64] As a result of Mr Lyles' feedback, Mr Renford said he formed a view that Mr Lyles agreed that the current structure needed to change and that the new structure was best for the HP Programme moving forward to the Rio de Janeiro Olympics.

[65] Mr Renford said he also received feedback from the Coach in charge of the WRHPC who had agreed with the rationale for the proposal and had some queries seeking clarity about the reporting and title of the proposed High Performance Coaching Coordinator role.

[66] Mr Renford said he concluded that there was agreement from all those directly affected that the proposal should proceed. He said the only other issue was whether or not Mr Lyles or the WRHPC Coach should be automatically redeployed into either of the two new roles created as a result of the restructure.

[67] Mr Renford said he considered the feedback over the course of the weekend of 13-14 December 2014 before formulating his decision to proceed with the proposal. He also sent all the feedback to the Chair and Deputy Chair of the Board and then convened a telephone conference on 15 December 2014 with them in order to outline his intention to proceed with the proposal. There were no objections to his decision and therefore he drafted the Outcome Document which he sent to all staff directly affected by the proposal on 16 December 2014.

Outcome of the Restructuring Process

[68] On 16 December Mr Lyles said Mr Renford met with him and informed him that he had decided to proceed with the proposals outlined in the consultation document of 24 November 2014

[69] The Outcome Document which Mr Renford provided to Mr Lyles on 16 December 2014 stated:

Applications for the new roles created by this restructure are open to any person whose role has been disestablished by this process.

The existing roles disestablished through this process will end effective 2 February 2015 and so this document is notice under your existing terms of employment that your employment will end on that date unless you are successful in an application for one of the new roles.

[70] Mr Lyles said that the notice provided in the Outcome Document was not sufficient notice under his employment agreement which required three months' notice.

[71] SNZ responded to the notice period issue when it was raised with it and Mr Lyles's notice period has been confirmed as terminating on 17 April 2015 pending the outcome of the this determination.

[72] On 18 December 2014 Mr Renford and Mr Lewis Villanueva, the HP Director, met with the swimmers in Auckland and some HP swimmers parents to inform them of what was

happening and Mr Renford also confirmed that he had spoken to swimmers located overseas by telephone.

[73] Mr Kenneth Minchin, a parent of one of the swimmers in the HP programme, said that at the meeting on 18 December 2014 his wife had asked whether the proposed national head coach would be offered to Mr Lyles. The response had been that the position would be re-advertised to the wider community and that Mr Lyles could apply for the position.

[74] Mr Minchin said that Mr Renford and Mr Villanueva had stated that the role of National Head Coach would be different from Mr Lyles's current role as it would require more leadership. However, it would still be a poolside role as well as involving the nurturing of coaches. He said that Mr Villanueva stated that although there was some leadership, the main task would be to coach the swimmers in Auckland which would remain the most important duty.

[75] Mr Danyon Loader, High Performance Coach at SNZ, also attended the meeting on 18 December 2014 and said that during the meeting Mr Renford had informed those present that SNZ would be re-advertising for a National Head Coach position which would take on more of a leadership role and responsibilities around national coaching and leadership. He added that Mr Villanueva had said that there was more leadership involved in the job description but the main task would be to coach the swimmers in Auckland.

[76] Mr Renford said that he had stated clearly in the meeting on 18 December 2014 that SNZ was looking for a National Head Coach, a role for which Mr Lyles was encouraged to apply. He said that Mr Villanueva had confirmed in addressing the swimmers and their parents that someone would be always on the pool deck coaching at large, which could be one of the other Auckland coaches.

[77] An advertisement was duly placed by SNZ for the National Head Coach role, accompanied by the position description.

[78] Mr Renford said that after he had distributed the Outcome Document he received two emails from Mr Lyles seeking further information about the proposal on 19 and 22 December 2014. Mr Renford responded to the queries raised by Mr Lyles in the second of the emails by email dated 23 December 2014.

[79] Mr Lyles applied for the role of National Head Coach, but did not apply for the role of Talent Identification Development Coach (the position previously referred to as High Performance Coaching Coordinator role).

[80] Mr Lyles raised a personal grievance for substantially and procedurally unjustifiable dismissal on 24 December 2014. The personal grievance was filed with the Authority on 21 January 2015.

Recruitment Process for National Head Coach

[81] The recruitment process established for the role of National Head Coach proceeded to a panel interview stage. The panel established to conduct the interviews at this stage consisted of Mr Renford, Mr Villanueva, Mr Mark Sanders, Chairman of Selectors and current NZ Team Manager, Mr Nick Tongue, SNZ Board Member and a 1996 Olympian, and Mr Flynn.

[82] There were three applicants for the position of National Head Coach at the panel interview stage, including Mr Lyles. Following the panel interview which was held on 12 January 2015, Mr Villanueva, the HP Director, wrote to Mr Lyles on 17 February 2015 to inform him he had not been successful at the panel interview stage.

[83] A recruitment process in relation to the role of Talent Identification Development Coach had been completed and a formal offer of employment had been made to the former WRHPC Coach.

Determination

Was SNZ's decision to disestablish the position of National High Performance Centre Coach –Auckland, and consequently Mr Lyles, redundant a genuine business decision?

[84] The Court of Appeal statement of the law regarding the genuineness of a redundancy in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹(*Hale*) was that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

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

¹ [1991] 1 NZLR 151

S103A Test of Justification

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

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

[87] In a more recent case than *Hale, Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson*² (*Rittson*), the Employment Court referred to *Hale* and its previous comments about *Hale* in *Simpsons Farms Limited v Aberhart*³. His Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

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

[88] Accordingly as I am not in a position to make decisions about how a high performance swimming programme should operate to achieve podium success at pinnacle events, or to assess whether a coach has the skills and ability to coach swimmers to achieve podium success, I must base my determination on whether or not SNZ's decision to disestablish the position of National High Performance Centre Coach – Auckland was based on genuine business rationale.

² Unrep [2013] NZEmpC 39 20 March 2013

³ [2006] ERNZ 825,842

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

[90] In *Brake v Grace Team Accounting Limited*⁴ (*Brake*) Travis J firmly endorsed *Rittson*, finding in that case that although the employer claimed that its financial position had deteriorated over the six months the employee had been employed requiring a reduction in salaries, in fact analysis by the Court concluded that the employer's figures were incorrect and there had been no sudden deterioration.

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

[92] In *Catherine Tan v Morningstar Institute of Education Ltd T/A Morningstar Preschool Ltd*⁵ the Court adopted a similar approach. As in the case of the employee in *Brake*, Ms Tan had been provided with factually incorrect information about the employer's financial position. She had been misled into thinking that the redundancy of her position was inevitable when it was not; the cost savings were relatively minor and insufficient to have satisfied the employer's requirements.

[93] In this current case, although there has been evidence about financial imperatives for the restructuring exercise based on future funding considerations, and the decision by its primary sponsor not to renew its sponsorship, SNZ has not put forward a rationale that its financial position was the primary reason for the restructuring, there are other considerations that fall to be considered.

[94] Mr Renford updated all SNZ staff of SNZ's funding position in an email dated 11 December 2014, which included "*The bottom line is that Swimming New Zealand sees a reduction of \$100,000 to \$1.4M pa. However most importantly we are no longer a one year campaign sport and HPSNZ have committed their support for a further two years. ie till after Rio....*"

[95] I find that there is a significant paper trail⁶ justifying SNZ's decision including *inter alia* the HP Strategy, the Consultation Document, the Outcome Document and the funding

⁴ [2013] NZEmpC 81 13 May 2013

⁵ [2013] NZEmpC 82 16 May 2013

⁶ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116

decision of HPSNZ as set out in the letter from HPSNZ dated 10 December 2014 which included the statement:

Investment is conditional on undertaking a detailed 2015 mid-year performance review...including but not limited to a report against the implementation of all recommendations from the 2014 Swimming NZ review.”.

[96] That the WRHPC Coach position needed to be disestablished is not in dispute by any party and it was agreed as being necessary by Mr Lyles. It had ramifications which included the disestablishment of the roles associated with WRHPC, the relocation of the swimmers who swam at WRHPC, and the fact that if the Performance Centre Coach roles at Auckland and Wellington remained the same, there would need to be a fair process as to who would take the consolidated role.

[97] The decision of SNZ to not merely consolidate the two High Performance Centre Coach roles but to create a new National Head Coach role in line with the recommendations of the 2014 SNZ review, made Mr Lyles’s position surplus to requirements because neither the RHPC Coach role or the National High Performance Centre Coach – Auckland role would exist in addition to the National Head Coach role..

[98] I find that there were genuine business reasons for SNZ to disestablish the position of National High Performance Centre Coach – Auckland role, and consequently make Mr Lyles redundant.

Is the National Head Coach role the same as, or substantially similar to, Mr Lyles’ role as National High Performance Centre Coach – Auckland?

[99] There is no dispute that there had been no issues with Mr Lyles regarding his performance as National High Performance Centre Coach – Auckland. Mr Renford stated that: *“The applicant was very suited to the role for which he was employed..... the applicant had never held a National Head Coach role and therefore had no experience at that level leading a National HP Programme.”*

[100] The advertisement for the National High Performance Centre Coach – Auckland stated that the successful applicant was to: *“As part of the High Performance Team, develop, manage and coach the members of the HIGH PERFORMANCE SQUAD at the Millennium Institute.*

[101] Consistently with the responsibility focus on the Millennium Institute, the advertisement refers to *“your swimmers”* and *“your athletes”*.

[102] The position description for the National High Performance Centre Coach – Auckland is identical to that of the WRHPC High Performance Coach position: both have responsibilities including to:

- lead HP coaching programmes for selected athletes;
- be responsible for the planning, co-ordinating and delivering the day to day high performance training programme with the goal of optimising performances of elite athletes nationally and internationally,
- be willing and available to be Lead Coach for National squads and teams on camps and international competitions;
- in relation to the SNZ HP Programme, be responsible for the effective and efficient implementation of the squad programme which includes:
 - Fully supporting the SNZ High Performance Plan.
- Assist the High Performance Director to communicate programme goals, strategies and club and squad related issues to all coaches and relevant SNZ staff and key stakeholders; and
- Assist the High Performance Director in being responsible for the efficient and effective implementation of the programmes and policies of SNZ and ensure the resources are most effectively deployed.

[103] The position description of the National Head Coach role by contrast was not merely to support the HP Strategy but included responsibilities to:

- Promote the overall strategic coaching direction of the High Performance programme including mentoring coaches as identified by the HP Director;
- Contribute to setting the strategic and operational direction for the Swimming New Zealand's High Performance Strategy 2013-2020
- Proactively provide input into appropriate forums and committees of Swimming New Zealand and High Performance Sport New Zealand (HPSNZ) that will enhance the operation of the High Performance Program and National Performance Centre.
- Propose long term strategies to maximise the development of the competitive capacity of the AquaBlacks.

- Lead the National Senior Team on international and domestic camps and competitions.
- Make relevant connections to Clubs and coaches with identified swimmers at all levels of the talent pathway.

[104] I find that the role of National Head Coach as described would have a greater input into formulating HP Strategy rather than merely implementing and communicating it as was required of the National High Performance Centre Coach – Auckland.

[105] The National Head Coach role was further tasked with enticing top tier New Zealand swimmers who are currently training overseas back into the HP Programme if possible, and if not to manage their careers overseas, also as set out in the Leadership and Management Competencies the National Head Coach was to provide: *“a clear sense of direction to the athletes and has the ability to get their full commitment to the role”*,

[106] I find that from the information provided, Mr Lyles’s existing role required good coaching skills with some management experience to lead a small group of swimmers located at MISH, whereas the new role of National Head Coach required good coaching skills, and strong leadership capabilities to lead a National Programme, and develop other coaches located throughout the country both within and outside of the HP Programme

[107] The role of National Head Coach would include responsibility for some pool deck coaching, however this would be at a reduced level to that required of the National High Performance Centre Coach – Auckland role. Any additional pool deck coaching necessary will be the responsibility of the Programme Coach which is why the role of the Programme Coach – Auckland was retained as part of the restructuring.

[108] I find in examining the responsibilities of the two positions that the role of National Head Coach is not the same as, or substantially similar to, Mr Lyles’ role as National High Performance Centre Coach – Auckland.

Was the process followed by SNZ procedurally fair?

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

[110] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular

is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

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

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

Access to information

[111] As a result of SNZ underperforming in relation to a number of key KPIs a High Performance Review report was prepared, approved by the Board and presented to HPSNZ. As Mr Renford’s proposals included a restructuring of SNZ which would affect certain employees he drafted a Consultation Document for circulation to those employees which included Mr Lyles.

[112] SNZ provided Mr Lyles with the Consultation Document which opened with an analysis of the situation which had given rise to the restructuring proposal, it outlined the proposal in detail, including a summary of the proposed changes and stated that: *”Before making any changes to the coaching structure we would like to consult with you first”*.

[113] The Consultation Document also provided hyperlinks to relevant documents, although I observe that some of these, such as the HP Strategy, should have been familiar to Mr Lyles given his responsibilities as the National High Performance Centre Coach – Auckland, the fact that he had received the emails from Mr Renford concerning the Whole of Sport Plan which referenced the HP Strategy, and the fact that the documents were in the public domain and accessible from the SNZ website.

[114] During the Investigation Meeting Mr Lyles stated that: (i) he had not seen, because he was unaware of it, the HP Strategy document despite being the National High Performance Centre Coach – Auckland, and (ii) he had not carried out any research or due diligence on SNZ, including reading the Review Recommendations which included the relevant KPIs which SNZ was expected to achieve, prior to applying for and accepting his current position. I do not find this to be credible.

[115] The Consultation Document further stated that the directly affected employees were also entitled to any relevant information concerning the proposal.

[116] I accept that Mr Lyles did not have access to the HP Review which had been prepared specifically for HPSNZ or the feedback from HPSNZ; however the relevant information from it, being the agreed KPIs which had not been achieved, were summarised in the Consultation Document.

[117] I find that Mr Lyles was provided with all the information relevant to the restructuring proposal and which he needed to provide significant feedback.

Opportunity to comment

[118] The timing of the restructuring coincided with Mr Lyles being in Doha for the World Championships from 26 November to 8 December 2014. Mr Lyle stated that this had the effect of disadvantaging him by being unable to seek independent advice at the meetings with Mr Renford which were held in Doha, and that he was required to provide feedback on the restructuring proposal in a limited time period.

[119] During the time when Mr Lyle was in Doha he and Mr Renford met on two occasions. Whilst the settings for the meetings were informal, Mr Lyle's evidence was that the meetings lasted in total between 6 and 8 hours, during which time he was able to discuss the restructuring proposal.

[120] In respect of the written feedback, Mr Lyle stated that he had not asked for more time to respond, which Mr Renford said would have been granted had it been requested.

[121] Mr Lyles's feedback was provided before the due date of 12 December 2014, and comprised detailed feedback in excess of 10 pages.

[122] Although 12 December 2014 was a Friday, Mr Renford said he had worked over the weekend, during which period he had considered Mr Lyles feedback, which had also been provided to the Chair and Deputy Chair of the Board.

[123] He had held a telephone conference with the Chair and Deputy Chair of the Board on 15 December 2014 in order to outline his thoughts relating to the restructuring proposal. It was only after this telephone conference that he proceeded with the proposals, and informed Mr Lyles accordingly on 16 December 2014.

[124] I find that Mr Lyles had an opportunity to comment on the information provided before a decision was made.

[125] I find that the process followed by SNZ was procedurally fair

Should Mr Lyles be redeployed into the National Head Coach role?

[126] An employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists⁷. In clause 12.8 of the Employment Agreement it stated that SNZ would consider whether there were suitable alternatives to redundancy.

[127] In this case Mr Lyles and the WRHPC were invited to apply for the roles of National Head Coach and/or High Performance Coaching Coordinator. Mr Lyles chose not to apply for the latter position, but he did apply for the position of National Head Coach.

[128] I have found the position description of the National Head Coach was not the same or substantially similar to Mr Lyles's existing position. Given the extent to which leadership constituted a primary importance in the National Head Coach role, and the fact that this is more in the nature of an innate skill rather than a taught skill, I find that redeployment was not a reasonable alternative.

[129] I find that Mr Lyles should not have been automatically redeployed into the National Head Coach role.

[130] In *Jinkinson v Oceania Gold*⁸ at para [38] Judge Couch stated: "*Thus, the selection process and its outcome must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.*"

[131] I find that the decision to advertise and interview in a contested process was reasonable on the part of SNZ. As part of the selection process, an interview panel of highly qualified people with knowledge of the sport of swimming and the sport world was constituted. The candidates, including Mr Lyles, were all interviewed and scored against 7 criteria of which 2 were focused on leadership qualities.

[132] There is no suggestion that Mr Lyles was not treated fairly, or given a full opportunity to address his leadership ability in the interviews and during the selection process.

[133] The outcome, which in Mr Lyles's case was that he was not the preferred candidate, was the decision of the panel.

[134] I determine that the decision to make Mr Lyles's position as National High Performance Centre Coach – Auckland redundant did not result in an unjustifiable dismissal.

⁷ *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

⁸ See note above

Costs

[135] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority