

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 358
3090612

BETWEEN SEAN MATHIESON
Applicant

AND HARBOUR FISH LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Mary - Jane Thomas, counsel for the Applicant
Samuel Guest, counsel for the Respondent

Investigation Meeting: 27 August 2020 in Invercargill

Submissions Received: 27 August 2020 from the Applicant
27 August 2020 from the Respondent

Date of Determination: 4 September 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sean Mathieson worked for Harbour Fish Limited (HFL) as an office manager in Bluff from 1 May 2019 until his position was disestablished during a redundancy process and his employment ended on 13 September 2019.

[2] Mr Mathieson's application to the Authority claims that HFL unjustifiably dismissed him and that actions HFL undertook during the redundancy process disadvantaged him and that HFL has not acted in a manner consistent with good faith obligations during his transfer from his previous employer and during the redundancy process.

[3] Mr Mathieson was appointed to HFL as a condition of a sale and purchase agreement that HFL entered into to acquire the business of Mr Mathieson's former employer (an Invercargill based fishing business) who he had been employed with since 1999.

Mr Mathieson's claim alleges that the position he was offered with HFL never existed and that it was essentially a sham offer and/or that the subsequent redundancy process was predetermined and this led to his unjustified dismissal.

[4] As a remedy Mr Mathieson initially claimed the redundancy compensatory payment he would have been paid by his previous employer had he not taken up the offer of employment with HFL but during the course of the investigation that claim was withdrawn and the remedies sought were confined to compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 ("the Act") and a penalty for alleged breaches of good faith pursuant to s 133(1)(b) of the Act.

[5] HFL by contrast, contend that Mr Mathieson's employment ended due to a redundancy following a period of genuine consultation and that the need for the ongoing position to be disestablished only became apparent once HFL had assessed the operation of the business they purchased and merged parts of it into their existing operation.

Issues

[6] The issues I have to resolve are:

- i. Was Mr Mathieson unjustifiably dismissed and/or disadvantaged or was the employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner?
- ii. Did HFL breach good faith obligations in both offering Mr Mathieson ongoing employment and then shortly thereafter enacting the decision to make him redundant?
- iii. If an unjustified dismissal and/or disadvantage claim is established what remedies should be awarded?
- iv. If any breach of good faith is established is it appropriate to award a penalty against HFL for such?
- v. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[7] Mr Mathieson worked for his previous employer, Urwin and Company Limited ("Urwin") a fish processing business located in Bluff for approximately 20 years, latterly in a

position of full-time Office Manager reporting to Urwin's Managing Director. The position was covered by an individual employment agreement. The employment agreement contained a detailed consultation process and a four weeks' notice period in the event that Mr Mathieson was made redundant but with a stipulation that: "[No] redundancy compensation is payable, as long as the notice requirements are complied with".

[8] In November 2018 Urwin indicated that they were contemplating selling their business and they entered into a variation of Mr Mathieson's employment agreement recorded by letter of 14 November 2018 and signed by Urwin's Managing Director and Mr Mathieson on 16 November 2018. The variation provided for a retention bonus if Mr Mathieson remained in employment up to the sale date and a performance payment based on retention. It was accepted that Mr Mathieson was a key employee by this time with duties beyond what his job description indicated and that he was effectively an operations manager who had been running the 'business' side of Urwin's enterprise for some years due to health issues a director was experiencing.

[9] Mr Mathieson indicated that his hours with Unwin were often beyond 9-5pm Monday to Friday and he was a committed employee making the majority of decisions for the company around catch, processing and sales of product.

[10] The 14 November 2018 letter recording the contractual variation went on to say:

We will be asking the purchasers to offer you ongoing work on the same or substantially similar terms and conditions as you enjoy now. In the unlikely event that this is not achievable, we would like to offer you a redundancy payment in relation to the sale, over and above your current employment entitlement. The redundancy payment would take account of your current earnings, the length of your serviceit is intended that you would receive a payment of at least four weeks' salary for your first full year of employmentand two weeks' salary for each full year of employment thereafter, to a maximum entitlement of 26 weeks (**Redundancy Payment**). If you are offered the opportunity to accept ongoing work by a purchaser, you won't be entitled to the Redundancy Payment (regardless of whether or not you accept ongoing employment with the purchaser).

[11] HFL and Urwin then entered into a sale and purchase agreement that pertaining to Mr Mathieson contained the following terms:

9.1 **Termination and Offer of terms:** After the date of this agreement:

(a) **Vendor Notice:** the Vendor will give written notice to each of the Employees terminating their respective contractual arrangements conditional on Closing and with effect from the Primary Closing Date;

(b) **Purchaser Offer:** at the same time (unless it has been done so previously) the Purchaser will make, or procure that a third party make on its behalf, a written offer to each of the Employees (in a form approved by the Vendor) offering to employ each Employee:

(i) **Same Terms:** on no less favourable terms as those applying to the Employee at the date of this agreement (including but not limited to, the Employee's contractual entitlements to accumulated sick leave), and without any form of trial or probationary period;

(ii) **Continuity of Service for Employee:** confirming that service with the Vendor will constitute service with the Purchaser for the purposes of any **service-related benefits;** and

(iii) **Closing:** conditional on Closing and with effect from the Primary Closing Date

9.5 **Purchaser's Obligations:** From the Effective Time, the Purchaser will be responsible for and must when due pay to all Transferring Employees all employment related liabilities.

The HFL offer

[12] By letter of 16 April 2019, HFL offered Mr Mathieson ongoing employment indicating in part: “[Y]our employment with Harbour Fish is intended to be on the same or similar terms as your previous employment, but your employment will not be continuous”.

[13] The letter generally outlined that: no 90-day trial period would apply, annual leave accumulated would transfer over unless otherwise agreed, sick leave accumulated up to a maximum of 10 days would be carried over but “no accrued bereavement leave or Domestic Violence leave” would be carried over until 6 months service with HFL was completed.

[14] The letter of offer also stated:

The terms set out in this Agreement will supersede and prevail over any former oral or written agreements with Urwins and any statements made by either party about the terms and conditions of your employment with Harbour Fish.

[15] The letter went on to say Mr Mathieson would be employed pursuant to an Individual Agreement of “[O]ngoing and Indefinite Duration under the Employment Relations Act 2000” and that employment “will commence on 1 May 2019”.

[16] A job description and document attached to the offer letter was described as “General Terms and Conditions”. Mr Mathieson affirmed acceptance by signing the letter alongside an employer signature.

[17] Mr Mathieson indicated that he had not sighted the sale and purchase agreement before agreeing to HFL’s terms but he later during a meeting to discuss a proposed restructure, indicated that he was aware of its general tenor that he be transferred on his existing conditions and he confirmed this as so during the investigation meeting.

[18] Under clause 34 of HFL’s general terms “**Redundancy**” specifies “two weeks redundancy” provided that the employee has been “continuously employed for 12 months”. Clause 38 provided a general notice period of “not less than one calendar month”.

[19] Crucially, Mr Mathieson accepted in evidence that he did not bring the existence of his 14 November 2018 contractual variation and entitlement to twenty six weeks redundancy compensation to the notice of HFL whilst he was contemplating the HFL offer of employment.

[20] Aaron Cooper, an HFL director and signatory of Mr Mathieson’s employment agreement, indicated at the time of transferring employees to HFL, Urwin did not provide a copy of the 14 November 2018 variation pertaining to Mr Mathieson and that HFL only became aware of its existence once Mr Mathieson raised a personal grievance on 23 August 2019.

[21] When pressed why he did not raise the existence of the variation Mr Mathieson explained that he sought no legal advice on the offer despite being made aware of his right to do so and given sufficient time to obtain. Mr Mathieson explained that at the time he thought if he did not take on a similar role with HFL on otherwise identical conditions he would end up with no job at HFL and no redundancy payment from Urwin. As a result, Mr Mathieson said he felt compelled to take up the HFL offer.

[22] I find that Mr Mathieson was aware that in signing an employment agreement with HFL that he would not retain access to his former redundancy compensation entitlement as the HFL agreement specifically precluded all other previous agreements and had a separate and significantly inferior redundancy provision.

Employment with HFL

[23] Mr Mathieson commenced employment with HFL on 1 May 2019 with the job title of office manager based in Bluff on an identical job description ‘cut and pasted’ from material provided to HFL from Urwin. The position reported to the ‘Managing Director’ (Mr Cooper). He did recall an amicable ‘familiarisation’ visit to Dunedin prior to his appointment and a phone call to Mr Cooper afterwards in which there was a general discussion of some centralisation of payroll tasks going to Dunedin and ‘changes’ may occur but could not recall a discussion of specifics.

[24] HFL’s Mr Cooper conceded that almost immediately after employing Mr Mathieson and without consultation or amending his job description, that they transferred some of his tasks to their Dunedin office (including paying staff wages). This according to HFL significantly reduced the scope of Mr Mathieson’s role. Mr Mathieson did not raise a grievance about this at the time. These actions however, breached Mr Mathieson’s employment agreement that incorporated a document entitled “Harbour Fish – General Terms & Conditions of Employment” that at clause 4.3 states:

The Employer may, after consultation with the Employee, amend duties from time to time. One week’s notice in writing will be given by the Employer to the Employee of any alteration to the Employee’s duties.

[25] Mr Mathieson in his evidence indicated that the erosion of his role got to the point where he had so little to do he would go down to the factory to help packing fish and loading boats and that was a humiliating experience but at the time he did not raise a formal personal grievance.

[26] Mr Cooper stated that soon after acquiring Urwin’s business, the board concluded that they would have to restructure staffing including Mr Mathieson’s diminished role and a factory manager role that they believed could be absorbed into a new plant manager role at Bluff. Mr Cooper said he came to this conclusion by way of personal observations of what was going on in the business and an assessment of the tasks remaining with Mr Mathieson and a discussion with the factory manager and office assistant.

[27] Mr Cooper acknowledged that in taking on Mr Mathieson he had “no idea what he did” and although he discussed some likely changes to centralising some aspects of the business with him, he was not explicit about HFL’s plan to quickly assess what further

changes needed to be made and the likelihood that Mr Mathieson's role would not be ongoing.

The restructuring proposal

[28] By way of a letter of 31 July 2019 HFL set out a “[R]edundancy proposal” that initially indicated that Mr Mathieson's role was to be disestablished and the factory manager role “be expanded to become a “Plant Manager” role encompassing the management of both the factory and the office, with support from the office manager in Dunedin”.

[29] The proposal went on to suggest that the existing factory manager (Shane) be appointed to the new plant manager role and Mr Mathieson's position become redundant. A final decision date of 9 August was proposed to complete the restructure.

[30] Mr Cooper indicated HFL has no HR resource and he was reliant on legal advice to guide him through the process and assist with drafting correspondence.

[31] Believing with some reasonable degree of foresight that the process was pre-determined, Mr Mathieson sought legal advice and raised concerns by way of a 6 August letter that sought further information so he could better take part in the suggested consultation process. The letter also questioned why Mr Mathieson had not been considered for the plant manager role and requested a job description of that role.

[32] HFL's counsel responded on 9 August providing a summary of information asked for and an outline of what further changes would occur to Mr Mathieson's role if the proposal was implemented including what work would be handled by their Dunedin office – concluding:

If the proposal is implemented:

- All domestic sales will be handled by the Dunedin Sales team,
- Domestic invoicing will be handled by the Dunedin Office staff and
- The dispatch, transfer and certification of international sales will be handled either by Shane and Kerry, or from the Dunedin Office.

The current workload of the Bluff office manager is not therefore significant, and if the proposal is implemented, the remaining tasks can be easily shared between various staff in Dunedin and the proposed Bluff plant manager.

[33] Details of the new plant manager position and likely salary range were provided. At this stage, no offer was made that Mr Mathieson could formally apply for the new role nor was a selection criteria disclosed but after detailing at length why HFL felt Shane was better suited to the role HFL's counsel indicated to acknowledge Mr Mathieson's expressed belief that he was capable of the extended role:

...our client would be happy, as part of the consultation process, to discuss with your client the advantages and benefits he could bring to the role which our client may not have fully considered to date.

[34] Mr Cooper conceded during the investigation meeting that all he was asking Mr Mathieson to do was provided feedback to a job he intended to give to Shane and essentially a formal selection process was not necessary as he felt Shane was better suited to the new role.

[35] In the meantime, Mr Mathieson in response to the proposal said he suffered a stress reaction and took sick leave that HFL accepted would not require a supporting medical certificate. A meeting of 13 August with Aaron Cooper was offered by HFL but no express purpose for such was indicated.

[36] With a support person in attendance Mr Mathieson met with Mr Cooper and others on 13 August in Bluff. The meeting from which an agreed transcript was provided, traversed a number of matters including:

- i. That some of Mr Mathieson's duties had been transferred immediately upon him taking up the role at HFL and that HFL had prior knowledge that they intended to make those changes to his job description even though they offered him a position with a job description identical ("cut and pasted") to his one with X – likewise, Mr Mathieson conceded that he knew that most of his duties would be removed prior to signing the employment agreement.
- ii. That since taking over, HFL had had to review positions.
- iii. A brief discussion on Mr Mathieson's view that he was more suitable for the new role of Plant Manager that mainly made references back to the 9 August letter having provided such reasoning why the factory manager was better suited and then discussed the proposed appointee's

greater experience on the factory floor (a point Mr Mathieson conceded).

- iv. Mr Mathieson raising the fact that he understood that the sale and purchase agreement required he be offered an ongoing role and Mr Cooper acknowledging this and explained that he began reviewing the business staffing needs from purchase date.

[37] Following the meeting on 16 August, HFL's counsel wrote to Mr Mathieson's counsel setting out their perspective of the 13 August meeting. The letter concluded that HFL had carefully considered Mr Mathieson's comments but had decided to proceed with his redundancy and it gave Mr Mathieson notice that his position as office manager would end on 13 September 2019.

[38] No redundancy compensation was offered due to Mr Mathieson not completing twelve months' service with HFL but counsel indicated that "the employer is willing to pay out Mr Mathieson's notice period without him having to work it". Despite seeking a response to "whether that offer is accepted", counsel for HFL requested Mr Mathieson return his company keys, the company car and the fuel card by the following Monday. A positive written reference supported orally was offered.

[39] Mr Mathieson, by return email from counsel, accepted the offer of notice paid in lieu.

[40] The 16 August HFL letter also conceded that the job description offered to Mr Mathieson was "cut and pasted" from his former employer's employment agreement saying this was consistent with "the contractual obligation on Harbour Fish to employ all staff on similar terms" but:

It was not until Harbour Fish Ltd had completed the purchase of the business, and employed all staff, that it was in a position to determine whether the job descriptions were appropriate and suitable for a business operation which was now part of the larger Harbour Fish Ltd enterprise.

And:

Obvious examples of duties that could be immediately amalgamated into the larger business structure, was the payment of all wages from the Dunedin office, and managing the payments to fishermen [sic].

[41] The decision to transfer Mr Mathieson's remaining duties to Dunedin was described as being made:

... only after our client had owned and operated the business for approximately 3 months and only after a full understanding was gained of how to achieve further efficiencies in the future.

[42] By counsel's letter of 23 August 2019 Mr Mathieson raised a personal grievance claiming that he had been unjustifiably dismissed and disadvantaged - the essence of which was described as:

... by being offered a role which was never going to proceed past a couple of months and was only entered into by the employer to meet the requirements of the sale and purchase agreement. It was affectively a sham employment and as such our client has suffered significant damage.

[43] HFL's counsel responded by letter on 10 December 2019 denying Mr Mathieson's claims and reiterated a mistaken belief held by HFL that after immediately removing some of his functions at the commencement of his employment they thought "that there would still be enough work for Mr Mathieson, based on the remaining tasks that fell under his job description".

[44] The parties attended mediation on 16 December 2019 but the matter remained unresolved.

Unjustified dismissal and/or disadvantage or a genuine redundancy?

[45] Mr Mathieson claimed that his employment was brought to an end by reason of both a prior offer of employment that was a 'sham' and then a flawed redundancy process. He essentially claims that he was personally targeted and that the decision to disestablish his position of office manager was determined prior to the restructuring commencing.

[46] By contrast HFL claim that they employed Mr Mathieson pursuant to a sale and purchase agreement obligation and then properly determined that Mr Mathieson's role could be incorporated into an expanded plant manager position and they endeavoured to act in a good faith manner in enacting the decision including entering into patient consultation with Mr Mathieson who had effectively attempted at an early stage to not engage in the process.

The legal framework

[47] Mr Mathieson's employment agreement contains a provision defining a redundancy situation at clause 34.1 as:

In this clause 'redundancy' means a situation where the Employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the Employee's position is, or will become, superfluous to the needs of the Employer.

[48] The above clause is in accord with long established case law that a redundancy arises where a specific position is superfluous to the needs of an employer's business to establish an abstract construct that it is the position and not the person that is redundant.¹

Justification

[49] However, the above is an overarching definition that does not necessarily address the spectrum of how a redundancy arises and in what context.

[50] In order to justify termination of employment and an employer's actions including in a redundancy situation, HFL must meet statutory requirements set out in s103A of the Act commonly referred to as the 'justification test'. This test requires the Authority to undertake an objective assessment of whether the employer's actions and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time of the ending of the employment relationship.

[51] In applying this test, the Authority must consider a number of factors including: the resources available to the employer and here in context whether the respondent gave the applicant an opportunity to comment on the proposal to end the employment relationship and whether that comment was genuinely considered by the respondent.

Good faith

[52] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act - these include a positive disclosure obligation of an affected employee being provided with access to information supporting the reason for the redundancy and the detail of how it is proposed it will be implemented. Further

¹ *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZLR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.

and crucially, an employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised.

[53] The Court of Appeal in *Grace Team Accounting v Brake*² has ruled that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons and when looking at applying the s103A tests has said:

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.

[54] In essence, the above requires the Authority to determine first if the redundancy was genuine (an assessment that has to exclude any ulterior motive) and then whether it was enacted in a procedurally fair manner.

A sham offer?

[55] First I will deal with the claim advanced that the offer of employment made to Mr Mathieson on 16 April 2019 was a sham as the position offered did not exist. This claim was advanced by counsel on the broad grounds that HFL:

- Immediately or shortly after appointment removed core components of Mr Mathieson's role.
- Did not properly ascertain whether the job description they offered matched the duties they knew had to be undertaken.
- Failed to alert Mr Mathieson to the likelihood that they would soon disestablish his role when that inevitability was clearly contemplated by Mr Cooper.
- Only offered the role as Mr Mathieson was a key in the business transition.

[56] HFL's counsel by contrast, broadly indicated that HFL complied with the sale and purchase agreement employee continuity provision and had no choice in this matter,

² At [85].

genuinely were unaware of the extent and scope of Mr Mathieson's role (having only his outdated job description) and that Mr Cooper subsequently spent time at Bluff observing the business and determining what was the most efficient way of running the business to avoid 'doubling up' on tasks they could undertake in Dunedin – concluding that Mr Mathieson's remaining role was surplus to requirements.

[57] In determining on the evidence, whether the job offer to Mr Mathieson was a sham I am conscious that an allegation of sham being akin to an allegation of fraud “should not be lightly made” as “those engaging in a sham are in reality seeking to deceive others as to the true nature of what they have agreed and are intending to achieve”.³ Counsel for Mr Mathieson did not develop this argument in submissions other than to generally assert that the position offered Mr Mathieson did not exist as offered.

[58] HFL's counsel rightly alluded to there being a 90 day issue around Mr Mathieson not raising a personal grievance at the time shortly after he commenced employment and became aware of imposed changes. There is some force in this submission that by his conduct Mr Mathieson acquiesced to the changes in his role.

[59] Whilst I find there is some strength in the contention that Mr Cooper felt compelled to employ Mr Mathieson pursuant to a sale and purchase agreement and he did not take sufficient time to ascertain if he needed the role in his expanded organisation or alert Mr Mathieson to his restructuring plans, none of this suggests that a 'sham' agreement was intentionally constructed.

[60] In reality, for the transition period at least (or 'bedding down' period as two organisations effectively merged), Mr Mathieson was useful to HFL for his institutional knowledge and industry contacts – Mr Cooper described him as critical to the handover. However, in an operational sense Mr Cooper should have been upfront in his letter of appointment that some of the tasks Mr Mathieson undertook would not be required of him (and were unilaterally removed) and that he was contemplating doing a reasonably swift efficiency audit.

³ Wylie J applying Richardson J's statement of the law concerning shams in *NZI Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at [57].

[61] I find that this did not make the offer a sham – it was a genuine offer of ongoing employment albeit in an ill-defined role. What I do find is that Mr Mathieson has an argument that he was misled into believing the offer was for ongoing employment of reasonable duration and he relied upon HFL’s representation of continuity of terms and conditions of employment and at the time he forwent an opportunity to access a redundancy settlement and seek alternative employment.

[62] In such a circumstance HFL owed Mr Mathieson a good faith duty not to directly or indirectly mislead or deceive⁴ and I find such a duty was transgressed.

Genuineness of the redundancy

[63] I find that even if the redundancy was subjectively genuine on economic grounds which given the limited financial information and contextual factors provided to the Authority appears to be the case, I have to also examine the manner by which Mr Mathieson’s position was identified, was consultation genuine or pre-determined, was Mr Mathieson afforded a fair opportunity to apply for the newly created position and were alternative redeployment options explored once HFL identified Mr Mathieson as redundant.

[64] HFL asserted that the driving force for the restructure was to achieve greater efficiencies and profitability from the Bluff plant driven by a view that one simple way to achieve this was to reduce staffing overheads. HFL claim that having removed some of Mr Mathieson’s tasks an analysis concluded that remaining duties could be undertaken by one manager and Mr Cooper determined that this should be the factory manager given that his role was ongoing.

[65] Mr Mathieson could not recall his role being discussed but he tellingly acknowledged in written evidence that he may only have been completing about 20% of his previous listed jobs and that:

This left me only sales and a little bit of data entry. Essentially Harbour Fish employed me on a salary of \$78,000 to do sales which took me a couple of hours a day in the morning and export certification. Other than that I had nothing else to do for the three months I was employed at Harbour Fish.

⁴ Section 4 (1) Employment Relations Act 2000.

[66] So, I can easily conclude there was a genuine reason to determine that Mr Mathieson's role had virtually ceased to exist due to the removal of duties and the decision to create a new plant manager was justified on organisational grounds and for sound business reasons.

Finding on personal grievance

[67] Having carefully analysed correspondence, the evidence lodged and heard during the investigation meeting and taking into account the contextual factors including the formation of the employment relationship, I find that whilst the disestablishment of Mr Mathieson's position of office manager was substantively justified, on procedural grounds I find Mr Mathieson has a personal grievance that he was disadvantaged by the actions and omissions of HFL in identifying him as the person to be made redundant. This is based on the following reasons:

- i. The prior unilateral removal of Mr Mathieson's duties led to an unconscious bias against him being considered capable of a wider role.
- ii. The initial proposal to amalgamate the duties of the office manager and factory manager was formulated without Mr Mathieson's input or any careful analysis of what tasks he was undertaking and capable of.
- iii. The reasons setting out the purpose of the restructuring were brief and they provided no financial information that coupled with the confusion between position and the person occupying such, made consultation meaningless.
- iv. In formulating a proposal HFL failed to present it as a neutral proposal that two positions were being disestablished and that the remaining employees should have been invited to apply for one vacant new role – Mr Cooper by expounding the factory manager's virtues and capabilities from the outset made it clear that his mind was closed to an objective selection process.
- v. No appointment criterion was developed for the new position or consultation on such.
- vi. More specific information was only disclosed during the redundancy process once Mr Mathieson engaged counsel.
- vii. No formal structured interview took place which led to Mr Mathieson being defensive and self-deprecating when he was asked essentially 'what he would bring to the job'.

- viii. There was no exploration of any other redeployment options or alternatives once the final decision was made.
- ix. No counselling was offered to address Mr Mathieson's distress during the process.
- x. Overall the consultation was perfunctory and Mr Mathieson was not treated in a good faith manner and with due dignity.
- xi. HFL was legally advised throughout the process and has sufficient resources to be able to properly understand and practically apply good faith principles.

Do HFL's identified breaches of good faith warrant penalties?

[68] In considering good faith obligations owed to Mr Mathieson, I have found that HFL to a degree, misled Mr Mathieson when they first appointed him and that HFL engaged in a unilateral breach of his employment agreement by removing duties and then effected a redundancy process that failed to adhere to well established good faith obligations but they otherwise had good reasons to disestablish the position of office manager that Mr Mathieson occupied.

[69] I however, am not persuaded that in the circumstances the identified breaches were deliberate and of a serious magnitude although the erosion of Mr Mathieson's role was sustained throughout a relatively brief employment period.

[70] I accept that HFL 'inherited' Urwin's employees and had little knowledge of the functionality and staffing structure of the Bluff operation but I observe that does not excuse the lack of due diligence they failed to undertake when agreeing to employ Mr Mathieson and others. Too often, workers are seen as mere economic units on a balance sheet and not properly considered as ongoing assets when companies merge or amalgamate – more care was warranted.

Findings

[71] As a result, I am not persuaded that penalties for the good faith breaches identified are warranted and in my view the transgressions Mr Mathieson has identified though not minor, can be adequately remedied by my finding that he has successfully established a disadvantage personal grievance and although not specifically pleaded, a breach of contract action that

reliant upon s 160 (3) of the Act I uphold as an additional finding but am restricted from ordering a penalty on this ground as none was sought.

[72] I overall find in terms of s 103 of the Act HFL did not act in a fair and reasonable manner in all of the circumstances and Mr Mathieson was treated shabbily - the redundancy process was enacted in a flawed manner and caused Mr Mathieson detriment.

What remedies should Mr Mathieson be awarded?

Lost wages

[73] Mr Mathieson described the impact of his employment ending after over twenty years in the business to be distressing and he chose to absent himself from the active employment market and concentrate on personal projects. As such, Mr Mathieson did not claim lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[74] I heard from Mr Mathieson how debilitating it was to be essentially 'parked' in a role and ignored despite his vast institutional knowledge of the Bluff business. He described it as:

I had put my heart and soul into the business for approximately 20 years. I had been trusted to run the place for 20 years. I was well respected by everyone within the business and the way I was dismissed was therefore hugely demoralizing and I am still deeply impacted by it.

[75] Mr Mathieson described the impact on him of the restructuring process leading to an understandable loss of self-esteem and feeling of worthlessness and de-motivation to the extent he says he became moderately depressed, lost sleep and engaged in excessive alcohol consumption with a resultant impact on his partner and family. A friend provided unchallenged evidence that Mr Mathieson's personality changed from being fun loving and caring to moody and impatient.

[76] Mr Mathieson impressed as a witness with no rancour toward HFL and he did not embellish his situation but struck me as being significantly affected by the experience of being sidelined in his role and the redundancy process caused him to suffer alienation from his former work community at Bluff where he has indicated he feels unable to visit.

[77] Having considered Mr Mathieson's evidence and the unusual circumstances of his relatively brief engagement with HFL I award him subject to contribution discussed below an amount of \$16,000 pursuant to section 123(1)(c)(i) of the Act.

Contributory conduct of Mr Mathieson

[78] Section 124 of the Act indicates that I must consider the extent to what, if any, Mr Mathieson's actions contributed to the situation that gave rise to his personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no reason to reduce the remedies awarded above as although Mr Mathieson engaged intermittently in the restructuring process I have found that he was significantly misled and sidelined by his employer. In this respect, he was not engaged in a wrongful action and he did not act in a blameworthy or culpable manner that gave rise to his grievance occurring (which was HFL's decision to reduce staff and the pre-determined selection of him to be made redundant).

Outcome

[79] Overall I have found that:

- a. Sean Mathieson's employment was unjustifiably disadvantaged due to the deficient the manner by which his employer effected a restructuring process.**
- b. Harbour Fish Limited must pay Mr Mathieson \$16,000.00 pursuant to s 123(1)(c)(i) of the Act.**

Costs

[80] Costs are at the discretion of the Authority and here Mr Mathieson was successful in his predominant claim challenging the process of his former employer in making him redundant and has obtained a significant compensatory remedy in an investigation meeting that took just under one day.

[81] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[82] If no agreement is achieved, Mr Mathieson has fourteen days following the date of this determination to make a written submission on costs and Harbour Fish Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David Beck
Member of the Employment Relations Authority