

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 398
5350929

BETWEEN

SHEILA MUNRO
Applicant

AND

PUKEKOHE MOTORCYCLES
(1993) LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: C Eggleston, counsel for applicant
M Smyth, counsel for respondent

Investigation meeting: 17 August and 5 October 2012

Determination: 14 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pukekohe Motorcycles (1993) Limited (PML) employed Sheila Munro as an accounting and administration assistant in its motorcycle dealership. It dismissed her by reason of redundancy on 2 March 2011, and she says the dismissal is unjustified.

[2] The parties dispute whether:

- (i) the redundancy was genuine;
- (ii) a fair process was followed in implementing the redundancy; and
- (iii) what, if any, remedy is payable to Mrs Munro.

Background

[3] PML is a small business which commenced operation in 1994 when it purchased a Honda franchise. Mrs Munro's employment began at the same time.

[4] Pat Sievers is the founder of the company, and is the managing director. In February 2008 he became concerned that the company was making very little profit. He concluded that changes would need to be made, although he did not anticipate a need for any loss of jobs. Work on a possible restructuring commenced, but fell into abeyance.

[5] In 2009, prompted by the deepening effect of the global financial crisis and the state of indebtedness of the business, Mr Sievers took steps to reduce costs and improve cash flow, although he did not resume work on the restructuring. Instead, because one of the company's problems was increasing wage costs and high levels of overtime, in December 2009 he sought to address with the staff the amount of overtime worked as well as levels of payment for overtime.

[6] Peter Maghazey was engaged as service manager in February 2010, then in July 2010 he accepted the additional role of general manager. Turnover and profit had continued to drop, and overheads had continued to rise, so Mr Sievers asked Mr Maghazey to resume the work on a restructuring. Mr Maghazey undertook a preliminary assessment exercise and in August 2010 he reported back to Mr Sievers.

[7] Mr Maghazey's report included comment on the administration department, where Mrs Munro was the sole employee. The report concluded there was not enough capacity in the department to carry out all necessary administrative tasks, and as a result the sales (with 2 employees), parts (with 2 employees) and service departments (with 4 mechanics and a groomer) were carrying out some of their own administration. This caused inefficiencies, as well as difficulties in obtaining accurate financial reporting. Another difficulty was that there was no-one to cover Mrs Munro's duties if she was absent. The report recommended the creation of an additional part time administrator's position to increase administrative capacity and allow the other departments to concentrate on sales. However no immediate action was taken on the recommendation.

[8] At about the same time PML's financial difficulties began to worsen. The sale in July 2010 of a Sievers family property, which had provided the security for overdraft and term loans, left no equity remaining after debts and fees were repaid. At the end of 2010 additional funding was required because a major income-producing

activity effectively to come to a halt, sales were slow and there was not enough money to pay creditors.

[9] The company's bank required a satisfactory proposal regarding the operation of PML's business before it would advance further funds. In addition it indicated in response to Mr Sievers' approach for funding that it considered the payroll was too high for the number of staff employed. These new pressures meant in or about January 2011 Mr Maghazey and Mr Sievers reconsidered Mr Maghazey's August 2010 report.

[10] They decided to proceed with the creation of a second part time position in the administration department, but in doing so they also had in mind budgetary constraints. In particular Mrs Munro was paid at the upper end of the range paid to office administrators. Mr Sievers considered the rate generous with reference to the duties Mrs Munro performed and, particularly because of PML's financial difficulties, he wished to bring it closer to what he considered to be the market rate. This saving, together with the improved efficiencies resulting from the restructuring of the administration function, would fund the second part time position.

[11] Mr Sievers prepared for his own use an agenda for the restructuring which included: the presentation of a letter to the affected staff outlining the reasons for restructuring; an invitation to provide feedback; meetings with staff to discuss the proposal; reviewing and finalising the restructuring; offering new appointments first to the affected staff; and seeking external applications for positions not filled internally.

[12] Two employees were affected by the restructuring – Mrs Munro and a sales employee. Mr Sievers planned to follow with both of them the process outlined in his agenda.

[13] As a first step, on the morning of 17 February 2011 Mr Sievers sought a meeting with Mrs Munro for that afternoon. At the meeting he advised that her position was to be restructured into two new positions, and outlined the reasons. When Mrs Munro asked what that meant, he replied that her position would become redundant and that the details were contained in the materials he handed her. Mr

Sievers acknowledged in evidence that the wording he used suggested that the decision to restructure had already been made. Although he said his intention - as evidenced by the agenda he had prepared - was to address the restructure on the basis that it was only a proposal, it was common ground that neither the word 'proposal' or 'proposed' was used in the discussion or in the materials handed to Mrs Munro.

[14] The materials included a letter dated 17 February 2011, together with a document headed 'Rationale for Restructuring 2011', but not Mr Sievers' agenda. The restructuring document set out a summary of why a restructuring was considered necessary, and included the statement:

There is no doubt that restructuring of the company is required. The directors have taken professional advice and are concerned that they may be at considerable personal risk should the company continue to trade on a non-profitable basis within the current structure.

[15] The rationale for restructuring the administrative role was said to be:

1. *Two administrative roles are now required by the company (refer to position descriptions attached) rather than 1 administrative role as there are now diverse accountabilities and responsibilities to be undertaken. These accountabilities and responsibilities cannot be efficiently and effectively handled by 1 person. Both roles will support 4 divisions within the company as follows:*
 - . *parts;*
 - . *sales;*
 - . *finance/insurance; and*
 - . *service*
2. *Persons in the 2 roles will require to work as a team to complete their tasks. Furthermore the responsibilities will now require persons of a junior-intermediate grade rather than at a senior level as the management and supervising will be handled by the operations manager or in the operations manager's absence the dealer principal.*
3. *The 2 administrative roles will run concurrently together and overlap so if for any reason 1 administrator is absent then the other administrator is able in the short term to provide consistency and continuity for the company.*

[16] The documents included position descriptions, lists of tasks and an 'estimated time allocation summary' for the two administrators' positions. Both positions were to report to the operations (general) manager. The remuneration for the accounts receivable position being offered to Mrs Munro was calculated as 40 hours per week

at \$22 per hour, or \$45,760 pa. The remuneration for the second position, an accounts payable position, was calculated as 25 hours per week at \$22 per hour, or \$28,600 pa.

[17] A further meeting was scheduled for Monday 21 February, but was deferred to the next day. On 22 February Mrs Munro and her husband presented Mr Sievers with a list of 26 questions (one of which was later split to form a 27th) to which they requested answers before deciding what further action to take.

[18] Mr Sievers said he was taken aback by the approach, and sought advice from his solicitors. He said he became nervous because he believed the questions might be used against him in a personal grievance, and that some of them in particular appeared to have been framed to trip him up. He also believed many of the answers were already contained in the restructuring document. He said further that he intended to answer any questions during the meeting he was attempting to arrange, and believed he and Mrs Munro knew each other well enough to resolve any issues arising.

[19] Broadly Mrs Munro's questions worked through the restructuring document, asking for more detailed information in respect of a number of the generalised statements in the document, or challenging those statements. There were detailed questions about how and why the decision about the future of the administration function had been made, questions about how the changes to that function would work, and questions which amounted to Mrs Munro's proposals for addressing the matter. One in particular asked whether Mr Sievers had considered reducing Mrs Munro's role to 4 days a week with a 20% reduction in salary. Finally, some questions indicated a suspicion about the nature of Mr Maghazey's involvement in the matter, and of his motives.

[20] Mr Sievers responded by advising Mrs Munro he would reply in writing, and asking her for another opportunity to meet in order to discuss the restructuring document. He said Mrs Munro's response to the suggestion of a further meeting was to say she did not wish to meet without her support person. No further arrangements were made at the time.

[21] By letter dated 24 February 2011 Mr Sievers provided his written reply, advising that he would answer only the last three of the questions. The questions

were: when is the restructuring scheduled to take place; can I assume I am being offered my choice of the two roles; and what happens if I don't accept either of these roles? The answers were respectively: '*as soon as possible*'; '*yes*'; and '*your current position is redundant and I would need to terminate your employment on the basis of the position becoming redundant*'.

[22] As for the remaining questions, the 24 February letter said Mr Sievers was not prepared to comment. The reasons given were that the questions related to: other staff members and were confidential; the exercise of the management prerogative; and historical matters which were discussed on 17 February.

[23] I found credible Mr Sievers' evidence as to his intention to discuss the contents of the restructuring document as well as any questions Mrs Munro had. It is unfortunate that that he failed to convey his intention to Mrs Munro, and in particular that the written material did not better convey the intention. The written response to the written questions was particularly unfortunate. It is unfortunate, too, that Mr Sievers did not perceive that, from Mrs Munro's perspective a fait accompli regarding her position had been presented to her and she was reacting accordingly.

[24] Several of the written questions concerned the exercise of the management prerogative or referred to historical matters, but the requirement to consult is part of the duty to deal with Mrs Munro in good faith, and means she was entitled to a constructive and informative response even if the decisions in question were management decisions. In particular the rationale for the changed administration role should have been addressed, as should the possibility of an alternative approach which Mrs Munro had raised. Further, Mrs Munro was entitled to an opportunity to provide input, and have the input considered, before the final decision was made.

[25] Mr Sievers' 24 February letter ended by asking Mrs Munro for a written decision on whether she would accept either of the two administrative roles by 28 February 2011. From Mrs Munro's perspective this response reinforced her understanding that a decision on the restructuring had already been made.

[26] Accordingly Mrs Munro's response dated 28 February expressed disappointment at the failure to answer the remaining questions, and said she was in

an untenable position. She would have been happy to reduce her hours of work to four days a week, but did not wish to accept either of the new roles.

[27] Mr Sievers said in evidence he asked Mrs Munro again to meet and discuss ‘things properly’. Her reply was that she could see no point.

[28] Mr Sievers sought further advice from his solicitors. By letter to Mrs Munro dated 2 March 2011 he referred to his three offers to meet to discuss matters, and his view that Mrs Munro did not wish to do so. Because of this, and her decision not to accept one of the two alternative positions, both positions would be advertised and Mrs Munro’s position was redundant. The letter ended by giving Mrs Munro three weeks’ notice of the termination of her employment on the ground of redundancy.

The law

[29] The applicable test of the justification for the dismissal was that contained in s 103A of the Employment Relations Act 2000 as it read before the coming into force of an amendment on 1 April 2011. The test was:

... the question of whether a dismissal ... was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[30] The Employment Court discussed the law relating to a dismissal on the ground of redundancy in *Simpsons Farms Limited v Aberhart*.¹

[31] Regarding the genuineness of a redundancy, the court said:

“[67] ... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A.”

[32] Regarding consultation with affected employees the court pointed out that s 4(1A) of the Act – which details aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies

¹ [2006] ERNZ 825

provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. Although an employer is entitled to have a working plan in mind, mere prior notification of a proposal is not sufficient and consultation must be a reality, not a charade. The obligation to consult does not, however, extend to a requirement that the consent or agreement of the employee consulted be obtained.

[33] The court concluded:

“[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer’s manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.”²

Was the redundancy genuine

[34] Mr Eggleston submitted that the redundancy was not genuine because:

- in reality it was an attempt to reduce Mrs Munro’s salary; and
- it was tainted by an inappropriate motive.

1. Attempt to reduce salary

[35] Considerable emphasis was placed in submissions for Mrs Munro on the fact that, in August 2010, the change Mr Maghazey recommended to Mr Sievers was simply that an additional part time administrative position be created without any suggestion that Mrs Munro’s rate of remuneration be reduced. Then in February 2011 such a reduction was incorporated in the planned restructuring. A comparison of the likely wage cost of proceeding under Mr Maghazey’s August 2010 recommendation in respect of the administration role with the likely wage cost of proceeding under the

² P 842

February 2011 plan yielded relatively little difference. This raised a question as to why the August recommendation was changed.

[36] I find nothing inappropriate in the change. Although pressure from the company's lack of productivity and profitability had been building for several years prior to August 2010, Mr Sievers had been very reluctant to jeopardise his employees' employment or to make the hard decisions he arguably should have made in order to improve the company's position. This was so much so that he did not take any immediate steps to act on Mr Maghazey's recommendation. However matters came to a head at the end of 2010 when more funding was needed and PML's bank had to be persuaded to provide it. In order to achieve this it was necessary to reconsider the level of the payroll as well as the general need for operational efficiencies.

[37] That this resulted in an attempt to reduce Mrs Munro's rate of remuneration must be addressed in its proper context. That is, PML considered, for genuine reasons, that Mrs Munro was being paid at the upper end of the range at a time when the company was under financial and economic pressure and its bank was requiring it to address aspects of the way it was managed. It was entitled to and did reconsider the rate of remuneration. In that respect Mrs Munro's former position was essentially clerical in nature, and she did not have a budgetary, reporting, planning or management role. The new position was also essentially clerical, with Mr Maghazey having the management role. PML's actions did not amount to an arbitrary and unprincipled attempt to reduce Mrs Munro's pay for no good reason.

[38] The change in approach was genuine, and was prompted by the economic circumstances facing PML in late 2010 and early 2011. In that context the attempt to reduce Mrs Munro's rate of remuneration does not vitiate the genuineness of the redundancy. The relevant questions in the circumstances concern the justification for the dismissal which followed, particularly the adequacy of the consultation over the restructuring of the administration function and the terms and conditions of Mrs Munro's employment.

[39] Questions were also raised about PML's employment of Mr Maghazey's partner, Dianne Gantley. By letter dated 1 April 2011 PML offered Ms Gantley the position of 'clerk/receivables' at a salary of \$45,760 for a 40-hour Monday-Friday

working week. This was essentially the same position as had been proposed for Mrs Munro. When Mr Sievers found Ms Gantley had additional skills which he considered warranted a higher salary, he offered Ms Gantley a salary in the order of \$52-53,000 pa. Ms Gantley also said she works in excess of 40 hours per week, including assisting in the parts department on Saturdays.

[40] There was no underlying intention during the work on restructuring to create a position for Ms Gantley, let alone to do so at the expense of Mrs Munro. Indeed in principle Ms Gantley did not consider employment in the same place as her partner to be a good idea and she was reluctant even to consider the position.

[41] A question was raised, however, about how PML was able to fund a higher salary for Ms Gantley than had been planned for Mrs Munro. The answer was that, when the second part time position was filled, it was at a more junior level and was remunerated at a lower rate than had been planned. Secondly, PML's financial position has improved since the restructuring so that there are no ongoing difficulties in funding the remuneration.

[42] Nothing in this suggests a wrongful attempt to reduce Mrs Munro's salary, and to the extent it was necessary to explain the agreement between PML and Ms Gantley, the explanation provided was acceptable.

2. Inappropriate motive

[43] Mr Maghazey's August 2010 review contained comments which reflected his perception of staff attitudes, some of which were negative. In commenting on the financial difficulties the company was facing he expressed a view, for example, that the staff were taking advantage of their positions to ensure maximum gain for minimal output. He was making a general comment because Mr Sievers had asked for his views, and was not seeking to single out Mrs Munro or her performance.

[44] While comments of that kind may be unhelpful, they do not in themselves mean that Mrs Munro's redundancy was a dismissal for poor performance in another guise.

[45] There was no evidence to support the existence of a concern about Mrs Munro's performance, as distinct from a general concern about staff productivity. Even if, in planning how the company could address the issues it was facing, some criticisms were made about current attitudes or practices, PML was not motivated by a wish to terminate Mrs Munro's employment as a result of any adverse view of her performance. Indeed it was not seeking to terminate her employment at all, rather to address the terms and conditions.

[46] There was no mixed or inappropriate motive for the termination of Mrs Munro's employment.

3. Conclusion

[47] For the above reasons I find the redundancy was genuine.

Was a fair procedure followed

[48] Mr Smyth very properly conceded in effect that the consultation process was deficient in the following respects,

- the restructuring document omitted to use the word 'proposal' and gave the impression that the only aspect of the restructuring available for consultation concerned the two roles being created,
- it was conveyed during the 17 February meeting that Mrs Munro's role was redundant, giving her the impression that PML was not open to feedback, and
- there was a failure to answer Mrs Munro's questions when PML had a duty to address them.

[49] Mr Smyth submitted, nevertheless, that there were other factors to be taken into account, in particular that: although Mr Sievers had not used the word 'proposal' he had indicated the extent to which other options had already been considered as well as a wish to continue to work together; a number of steps short of the termination of employment had already been taken in an attempt to improve the company's situation; and Mrs Munro, too, had not observed her duty to be responsive and communicative

in that she refused to meet with Mr Sievers despite his making three requests that she do so.

[50] I have accepted that Mr Sievers intended to engage with Mrs Munro, and found he did not convey that intention adequately or effectively. More significantly the deficiencies in the process leading to the termination of Mrs Munro's employment were sufficient to amount to breaches of the duty of good faith in s 4 of the Act. As I discuss in more detail in the next section of this determination, the breaches undermined the ability of the parties to negotiate an arrangement that could have kept Mrs Munro in her employment. In failing to observe the duty of good faith, PML did not take the actions a fair and reasonable employer would have taken.

[51] Accordingly I find the dismissal was unjustified.

What are Mrs Munro's remedies

1. Reimbursement of remuneration lost as a result of the grievance

[52] Mr Eggleston submitted in reliance on a judgment of the Employment Court in *Bay Milk Distributors v Jopson*,³ that a conclusion that a redundancy was genuine does not inevitably lead to a conclusion that there can be no remedy in respect of lost remuneration. It is still necessary to consider whether, if the employer had acted lawfully, no redundancy would have resulted.

[53] The underlying point concerns the cause of the loss in respect of which reimbursement is sought. If a redundancy is genuine but a personal grievance on the ground of unjustified dismissal is upheld because of the employer's failure to consult, for example, any loss of remuneration could be said to flow from the inevitable loss of the position rather than from the failure to consult on which the grievance was founded. The following approach to resolving the matter was identified by a full court of the Employment Court under earlier legislation, but is still relevant:

'... there may be problems with speculation, but where the grievant has been denied an adequate opportunity for consultation and the discussion of alternatives, the consequences should rest upon the employer who would otherwise benefit from

³ (2009) 7 NZELR 201

wrongful action. There may be plausible evidence of the existence of other options or reasonable alternatives which might have prevented the job loss or have delayed it. If there is, the grievant may more readily have discharged the onus of proving that remuneration has been "lost by the employee as a result of the grievance" ...

... If the evidence establishes that there is no reasonable possibility that proper consultation would have either delayed the dismissal or avoided it, then the employee would have failed to establish loss as a result of the personal grievance. Where, however, there were other options that could have been discussed, but were not, the [Authority] might properly be sceptical of an employer saying after the event that such options would not have either delayed the redundancy or have prevented it occurring. It is a matter of evidence in each case ...⁴

[54] Here PML's broad purpose was to secure improved efficiencies in respect of the administrative function. To that end it sought to centralise the function and increase the total overall number of hours of work available to carry it out. It also sought to reduce the rate at which those hours of work were remunerated in order to better align it with current market rates.

[55] Mrs Munro made one suggestion - that she reduce her hours of work - which I accept did not satisfactorily address the concerns about coverage of administrative duties, or the appropriate rate of pay. However PML did not engage with her on the suggestion. By its response to her list of questions it pre-empted the possibility of further discussion about the options available, and deprived itself of an opportunity to explain more fully the reasons for its proposals and to allay any suspicions about its motives which Mrs Munro harboured.

[56] Mrs Munro said during the investigation meeting that she would have accepted a position paid for at the rate eventually paid to Ms Gantley. Since the evidence was that Mrs Munro had indicated a willingness to reduce her hours, but nothing was said about any willingness to consider reducing her rate of pay, I consider it likely she has come to that view with the benefit of hindsight. In addition her assertion did not recognise the additional skills Ms Gantley possessed, or the extra hours Ms Gantley works.

[57] Despite this there was not enough to persuade me that, even if a proper consultation process had occurred, there was no reasonable possibility of the dismissal being delayed or avoided. Mr Sievers said, and I accept, that he was willing to

⁴ *GWD Russells (Gore) Limited v Muir* [1993] 2 ERNZ 332, 346.

negotiate the details of the proposal. In accepting his evidence I have also accepted that he did not wish to terminate Mrs Munro's employment, and have taken into account his history of avoiding actions that might lead to job losses when the company was already struggling. While I do not believe there was a reasonable possibility that Mrs Munro's existing rate of pay would have been continued, there remained the prospect of an alternative arrangement being reached.

[58] Turning to quantification of the loss, Mrs Munro obtained alternative employment commencing on 26 April 2011 at a lower level of remuneration than she received at PML. She seeks reimbursement for actual and prospective loss of remuneration for a period of three years from the date of termination of her employment, calculated as \$28,000 pa (the difference between her old and her new salary) x 3 years = \$84,000.

[59] In support of an order for reimbursement in respect of a three-year period, Mr Eggleston cited *Jinkinson v Oceana Gold (NZ) Limited*⁵, where the Employment Court found it likely Ms Jinkinson would still be in her employer's employ had she not been dismissed. However there the court was considering s 128(3) of the Act, and a claim in respect of remuneration already lost. It was able to look back over the three year period since the dismissal in question and, unlike here, it was not being asked to consider any prospective loss. It was satisfied on the evidence in respect of the three year period that Ms Jinkinson would have remained in her employment but for the dismissal.

[60] The present claim includes a significant element of prospective loss. There was no evidence beyond assertion to satisfy me that Mrs Munro would have continued in her employment with PML for at least 3 years from the date of dismissal, especially at the reduced rate of remuneration PML would have required.

[61] For that reason I decline to make any order in respect of prospective loss. I adopt the more common approach of focussing on Mrs Munro's actual loss.

[62] Some of Mrs Munro's loss was caused by her refusal to accept a job for which she was qualified, being the position PML offered to her. The offer was for a salary

⁵ [2010] NZEmpC 102

of \$45,760 pa, or \$880 per week. On her previous salary her weekly income was \$1,388.46. The difference is \$508.46 per week. It was 5 weeks before Mrs Munro commenced her new employment, so her loss in respect of that period is:

$$5 \times \$508.46 = \$2,542.30.$$

[63] In her new employment Mrs Munro was paid at \$25 per hour for a 37.5 hour week, or \$937.50 per week. The difference between that and her former rate is \$450.96 per week.

[64] Mrs Munro's employment at PML would not have continued at her existing salary. The uncertainties associated with assessing what might have happened for the purposes of a claim for lost remuneration are best accounted for by considering the difference between the position PML offered and the income from the new position, for the balance of the three month period from the date of termination. The calculation is $8 \times \$450.96 = \$3,607.68$.

[65] I conclude that Mrs Munro is entitled to the reimbursement of remuneration lost as a result of her personal grievance in the rounded sum of:

$$\$2,542.30 + \$3,607.68 = \$6,150.$$

[66] I must next consider whether Mrs Munro engaged in conduct which contributed to the circumstances of her grievance so that any remedy she receives should be reduced. In that respect Mr Smyth relied on Mr Sievers' three requests to meet, and Mrs Munro's own duty to be responsive and communicative.

[67] The first was a request to meet on 21 February, with the meeting being deferred to the afternoon of 22 February at Mrs Munro's request. Unfortunately there was a misunderstanding about whether the new time was confirmed, so that on 22 February Mrs Munro was not expecting a meeting and had not planned to do more than hand her list of questions to Mr Sievers. She did so, and left the premises.

[68] The second request was met with the response that Mrs Munro wished her support person to be present. She was entitled to respond in that way. At the time no further arrangements were made to accommodate that wish.

[69] The third request was made on 28 February, and was answered with Mrs Munro's statement that there was 'no point'. Mrs Munro said in evidence that she assumed Mr Sievers would merely repeat that he would answer only the three questions already answered, and she did not accept genuineness of the offer to meet. She also said she thought PML had expected her to decline the offer of a new position, but there was no foundation for this view and PML had no such expectation. Mrs Munro should have given Mr Sievers the opportunity to discuss matters which he was clearly seeking. Her assumption about what Mr Sievers wanted to say was wrong and, despite the deficiencies in Mr Sievers' conduct of the matter, she should at least have tested her assumption before refusing to engage any further.

[70] In not engaging with Mr Sievers as he requested on the third of the occasions listed above Mrs Munro contributed in a blameworthy way to the failure of the consultation process. She said in evidence that she was upset by the suggestion that she had showed bad faith by refusing to meet with Mr Sievers given that he had presented her with a fait accompli, but while I acknowledge that concern I remain of the view that she should not have closed her mind and should have given Mr Sievers an opportunity to explain his intentions.

[71] I therefore reduce the amount I would otherwise have awarded in respect of lost remuneration by 10%. PML is ordered to reimburse Mrs Munro for lost remuneration in the sum of \$5,535.

2. Reimbursement under s 123(1)(c)(ii)

[72] Mrs Munro seeks compensation for the loss of benefits she would have received, being:

- a petrol allowance, calculated as
\$2,080 pa x 3 years = \$6,240; and
- medical insurance, calculated as
\$1,722 pa x 3 years = \$5,166.

[73] The total is \$11,406.

[74] For the reasons set out above I decline to assess the loss with reference to a three-year period.

[75] Regarding the petrol allowance, PML offered Mrs Munro the use of a fuel card for the three month period from the date of termination of employment, and capped at \$300. Mrs Munro made use of that offer. There will be no further order in respect of the petrol allowance.

[76] Regarding the loss of medical insurance, there was no evidence of how the loss was quantified. I resolve the matter by saying that, if the applicable policy was due for renewal in the 3-month period from the date of termination, Mrs Munro is to be reimbursed for the cost of the renewal of the policy. Otherwise I am not satisfied as to any loss and make no further order.

3. Compensation for injury to feelings

[77] Mrs Munro seeks compensation for the injury to her feelings caused by her unjustified dismissal in the sum of \$15,000.

[78] Mrs Munro was aware the company had experienced financial difficulties and that the bank considered the payroll too high, and recognised that PML would need to take further action to address its difficulties. However she felt shocked betrayed and upset at the news that her position was to be made redundant not only because of the financial implications of the loss of the job but because: Mr Sievers had always stressed that redundancies were to be viewed as a last resort; she expected her role would not be impacted by any action taken to address the company's difficulties and understood the role was considered key to the survival of the business; she perceived that the inclusion of a requirement in the position offered that she report to the operations manager was a 'slap in the face'; and understood that the restructuring was being presented to her as a fait accompli when there had been no prior discussion with her about her position or any alternatives to the changes being put to her.

[79] Mrs Munro said she has also suffered ongoing stress as a result of the termination of her employment, and has experienced physical symptoms of this.

[80] Although I have accepted that Mr Sievers intended to conduct the restructuring as he explained, PML must take responsibility for the impact on Mrs Munro of the way in which the matter was actually conducted.

[81] I accept that Mrs Munro suffered significant injury to her feelings as a result of the personal grievance. After applying the reduction in respect of contributory conduct, I order PML to compensate Mrs Munro for injury to her feelings in the sum of \$7,500.

Summary of orders

[82] PML is ordered to pay to Mrs Munro:

- (a) \$5,535 as reimbursement for remuneration lost as a result of her personal grievance; and
- (b) \$7,500 as compensation for the injury to her feelings resulting from her personal grievance.

[83] PML is further ordered to reimburse Mrs Munro for the cost of the renewal of the medical insurance policy if the policy was due to be renewed in the three month period commencing with the date of termination of employment.

The counterclaim

[84] PML lodged a counterclaim against Ms Munro, alleging breaches of her duty of good faith and fidelity in a matter unrelated to her personal grievance, and seeking a penalty for these breaches. The counterclaim was adjourned pending the outcome of the personal grievance.

[85] PML is directed to advise the Authority within 28 days of the date of this determination of whether it wishes to proceed with the counterclaim.

Costs

[86] Costs are reserved.

[87] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority