

[4] On 21 May 2009 DSWL general manager Amit Jamnadas sent Mr Naiker the following email:

As you are aware DSW is currently completing investigations into a series of theft (sic) at Meadowbank.

The staff member in question is your partner.

You have been asked to go on leave for this week so that there is no interference in the investigation given your position in the business as Product Manager, your levels of access within the company's databases and partner of the accused.

You also aren't allowed the use of the company laptop for remote access from home whilst on leave because your partner is home with you and could interfere.

Your leave is paid leave.

Your leave may be extended whilst investigations are completed. I will advise you any changes (sic).

[5] On 22 May 2009 DSWL's employment advocate sent Mr Naiker a letter calling him to a "restructuring meeting". It said "*because of financial reasons there is the possibility that the company may be forced to make you redundant.*"

[6] In meetings on 26 and 29 May Mr Naiker, accompanied by his representative, was asked to comment on the proposal to make his position redundant. He was told "*four head office positions*" were under review but Mr Jamnadas refused a request to provide information about the three other positions being looked at.

[7] DSWL denies any ulterior motive in the redundancy of the product manager role held by Mr Naiker and says the timing of the review and its decision was unrelated to the dismissal of his wife. It says purchase and implementation of new software from 8 April significantly reduced the work required in that role and DSWL was entitled to make the salary savings by dismissing Mr Naiker for redundancy.

Issues

[8] The issues for determination are:

- (i) whether the redundancy of Mr Naiker's position was decided for genuine business reasons or an ulterior motive; and
- (ii) whether how that decision was made and Mr Naiker's employment then terminated was done fairly; and
- (iii) whether the suspension of Mr Naiker (18-26 May) was an unjustified disadvantage; and
- (iv) whether the decision on Mr Naiker's position was made on discriminatory grounds, based on his marriage to Mrs Naiker who had been dismissed; and
- (v) if the actions of DS Wireless Limited are found to be unjustified to some degree, what remedies (if any) are required considering:
 - (a) lost wages (only if the redundancy decision is found to be not for genuine commercial reasons); and
 - (b) compensation for hurt and humiliation; and
 - (c) after taking account of matters of mitigation and contribution?

[9] For the purposes of the Authority's investigation written witness statements were provided by Mr Naiker, Mr Jamnadas, DSWL's retail manager Danny Tanielu and DSWL's proprietor and managing director Yogesh Parshotam. Each witness attended the investigation meeting and, under oath or affirmation, answered questions from the Authority member and the parties' representatives. The representatives provided careful and thorough oral closing submissions.

Legal framework

The terms of employment

[10] Mr Naiker was employed under the terms of an employment agreement dated 5 May 2003. A revised written employment agreement was prepared when he was appointed as product manager in 2007 but was not formally agreed with him.

[11] The relevant terms from his 2003 agreement include, at clause 35 a definition of redundancy as:

... 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.

[12] It continues with a statement that “*there will be no redundancy payment made*” if an employee’s position is redundant. The notice period for the termination of employment is two weeks.

[13] The agreement also provides for suspension (clause 37):

Where circumstances warrant it, the Employer has the discretion to temporarily suspend the Employee from their duties prior to a full investigation of the allegations surrounding the circumstances involving the Employee. The Employee will be paid their normal wages while they are suspended, unless the period becomes protracted as a result of undue delay caused by the Employee.

Statutory obligations

[14] DSWL’s decision to make the product manager position redundant, and how it went about dealing with Mr Naiker about any proposal, decision and consequences of redundancy, are justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Employment Relations Act 2000 (the Act).

[15] The application of s103A to the personal grievances involving redundancy was described in this way in *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825:

[65] ... The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

...

[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 s103A.

[16] So satisfactory answers are needed to two general questions. Firstly, was the business decision to make a position redundant in this case made genuinely and not for ulterior motives? Secondly, did DSWL act in a fair and open way in carrying out

that decision – particularly did it consult properly about the proposal to make Mr Naiker’s position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

Genuineness

[17] While the Authority does not substitute its view for the business judgement of an employer, the genuineness of any redundancy decision may be impeached if it is not a decision that an employer acting reasonably and in good faith would have reached.¹ An employer must provide an adequate commercial explanation for the course adopted.²

Alleged ulterior purpose or mixed motive

[18] A genuine redundancy is determined in relation to the position not the incumbent.³

[19] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is “*tainted by some inappropriate motive*” and the redundancy is “*masking another and different reason*”, the worker will have a valid grievance.⁴

[20] Mr Naiker, having raised an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[21] If the Authority finds ‘mixed motives’ – such as genuine business reasons but with underlying personality or performance concerns⁵ – the employer bears the burden of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal.

¹ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA).

² *GN Hale & Sons Ltd v Wellington Caretakers IUOW* (1990) ERNZ Sel Cas 843, 851 (CA).

³ *NZ Fasteners*, above, at 747.

⁴ *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC).

⁵ The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw).

[22] If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. However if the predominant motive was for another reason, the dismissal will be unjustified.⁶

[23] An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show “*a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation*”.⁷

Procedural fairness

[24] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way.

[25] Fair treatment may call for counselling, career and financial advice, retraining and related financial support.⁸ This requires more than “*going through the motions*” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.⁹

[26] The good faith obligations of the Act required DSWL to be active and constructive, responsive and communicative in consulting Mr Naiker about changes to the business and proposals which might impact on him, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment on the information before the redundancy decision was made: s4(1A)(c).

[27] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.¹⁰ However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.¹¹

⁶ *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC).

⁷ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC).

⁸ *Aoraki*, above, at 619 and 631 (CA).

⁹ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

¹⁰ *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd*, above, at 747.

¹¹ *NZ Fasteners*, above, at 747.

Determination

An ulterior motive

[28] I find Mr Naiker has established, on the balance of probabilities, that his dismissal for redundancy, and more specifically the timing of that dismissal, was more likely than not to have been engineered for other than genuine commercial reasons.

[29] I accept DSWL had sound commercial reasons for deciding the product manager role was no longer necessary to its operation. However it has an inadequate explanation for the timing of that decision with no significant paper trail or other solid foundation of evidence for why it instigated a review with the sole immediate result being to make Mr Naiker's position redundant only five days after dismissing his wife and asking him to stay away from work for the week. The evidence of Mr Jamnadas that this was "*pure coincidence*" was not convincing.

[30] Mr Naiker accepted in his evidence that around 70 per cent of his role involved work on reporting requirements to do with stock movement and answering queries from managers, stores and commercial customers for certain information. The introduction of new reporting software in the business in April 2009 radically reduced the requirement for him to do much of that work. While there were still some stock management, forecasting and ordering tasks, the new software meant Mr Naiker no longer needed to spend around three hours a day on reporting work.

[31] DSWL began the steps for the introduction of the software in February 2009. The software was formally purchased and installed in early April.

[32] Mr Naiker went on leave in early April. Speaking of the viability of Mr Naiker's role, the evidence of Mr Jamnadas was that DSWL's managers "*knew what we were going to do before he went on leave*" but were having discussions between themselves and "*looking at the numbers*" before deciding. Mr Naiker returned from leave on 4 May but by 18 May Mr Jamnadas had not yet initiated any discussion with Mr Naiker about the future of his job. In those circumstances there is an inevitable taint to the genuineness of the "*restructuring meeting*" unexpectedly called on 22

May. I accept as a matter of likelihood that but for the dismissal of Mrs Naiker and the decision to ask Mr Naiker to stay at home in the following week, a review would have occurred somewhat later. The most likely time was around July when three other positions in DSWL's head office were reviewed with two being made redundant in that month and a third in September 2009.

[33] Accordingly I accept that there were mixed motives for the redundancy of Mr Naiker's position at the time that decision was made and that the predominant reason for the timing was not to do with the genuine business reasons. Rather, the decision was made earlier than it might otherwise have been because of Mr Naiker's association with his wife.

[34] Each of the witnesses for DSWL was adamant that, at the time of his redundancy, they believed Mr Naiker had no involvement with, or knowledge of, the activities for which his wife was dismissed. Accepting that evidence, DSWL's decision nevertheless discriminated against Mr Naiker on grounds prohibited under s104(1)(b) and s105 of the Act, specifically on family status. Family status includes being married to a particular person: see Human Rights Act 1993 s21(1)(l)(iii). In this case Mr Naiker was dealt with to his detriment because of his marriage to Mrs Naiker.

[35] Finding DSWL's actions also amounted to discrimination on the basis of Mr Naiker's family status is a corollary of the finding regarding the predominantly ulterior motive in the timing of the redundancy decision.

Flawed consultation

[36] Against that background I find DSWL did not consult in good faith with Mr Naiker about the prospect of redundancy. During one of the two meetings held with Mr Naiker and his representative about the future of his position, DSWL representatives referred to four "*head office*" positions being reviewed. Although specifically requested to provide information about the other roles affected, DSWL refused. In those circumstances Mr Naiker was denied a real opportunity to comment meaningfully about restructuring, including how his role or any alternative roles might operate subject to changes resulting from the review.

[37] In evidence to the Authority Mr Jamnadas revealed the other roles referred to were call centre roles not directly related to Mr Naiker's role. Changes, including three job losses, were made to those call centre roles as a result of a review in July. He said those changes could not have been implemented earlier due to a contractual commitment for those call centre staff to carry out tasks for a third party. While that is a valid reason for those changes being made later, I do not accept Mr Jamnadas' assertion that there were reasons of confidentiality for not telling Mr Naiker which other roles might be affected. Mr Naiker was subject at the time to standard requirements of confidentiality which could have been reinforced. Instead he was misled by a reference to "*head office*" roles which he took to be other management positions rather than call centre positions. That was a failure of good faith dealing by DSWL.

Alternative roles

[38] DSWL submits that its offer of two alternative roles to Mr Naiker, after making his management position redundant, show a lack of ulterior motive on its part and a genuine desire to retain his services.

[39] However both jobs were on significantly reduced terms. One, a commission-only sales role, was not attractive in a recession notwithstanding DSWL's evidence that one employee in such a role earned around about what Mr Naiker was receiving on his management salary. The other job was a part-time retail role of significantly lower status. More significant is that there was no real discussion with Mr Naiker over any ideas to reshape or re-orient his existing role to better meet the needs of the business.

No unjustified suspension

[40] I find the circumstances under which Mr Naiker was sent home on 18 May and then asked to remain away from work for the following week are within the terms provided for in the suspension clause of his employment agreement.

[41] When he attended work on 18 May, on the day following his wife's dismissal, he spoke with Mr Jamnadas and Mr Parshotam about what had happened. Mrs

Naiker's dismissal arose from how she had dealt with certain store transactions and, that morning, Mr Naiker had printed off some database information concerning store transactions. He had also asked to see video surveillance footage taken of Mrs Naiker while working but Mr Parshotam had specifically instructed Mr Naiker not to spend management time on reviewing that video.

[42] Mr Naiker was allowed to go home on 18 May at his request. While he wanted to take home his laptop and printed material from work, I accept it was not unreasonable for DSWL to ask for his laptop or subsequently request he remain at home in the following week. There was no lack of good faith in how it did so. Its reasons were specifically stated in the email from Mr Jamnadas on 21 May. They were also reasonable to protect Mr Naiker from any accusations that he interfered with DSWL's investigation. He had shown by his actions on 18 May – including looking at database information for which he had full administrator access and could make changes – that he would take an active interest in investigating the circumstances around his wife's dismissal. In terms of the wording of the suspension clause, the allegations related to Mrs Naiker's conduct but the circumstances surrounding those allegations inevitably involved Mr Naiker and warranted him being asked to stay at home. He suffered no disadvantage and received full pay throughout.

Personal grievance established

[43] For the reasons given I find Mr Naiker has a personal grievance arising from the ulterior motive apparent in the timing of the decision to declare his position with DSWL redundant.

Remedies

Lost wages

[44] Mr Naiker was paid eight weeks notice from his dismissal for redundancy on 4 June 2009. This was considerably more than his minimum contractual notice of two weeks. His claim for lost wages relates to the period from the expiry of that notice – early August – until he found full-time work in late October 2009.

[45] I accept that he made adequate attempts to mitigate his losses in that period by applying for a number of jobs.

[46] However I do not accept that his actual losses amount to the full three month period from August to October. Rather I consider as a matter of probability and allowing for the contingencies of life that Mr Naiker's role – but for the ulterior motive apparent at the time of the decision – would most likely have been declared redundant by July along with the call centre roles. Accordingly any lost wages are covered by the notice period for which he was paid. No award for lost wages is made.

Compensation for hurt and humiliation

[47] Mr Naiker cannot be compensated for hurt or distress relating to the period of suspension (which I have found was not unjustified) or for embarrassment or distress arising from his wife's dismissal. However I accept his evidence establishes a period of distress lasting around four weeks following his own dismissal as exhibited by sleeplessness and anxiety about his future.

[48] His dismissal for redundancy was abrupt and isolated him from colleagues in a way which implied a degree of blame for the circumstances around the dismissal of his wife. In those circumstances I consider an award of \$5000 as compensation under s123(1)(c)(i) of the Act is appropriate.

Contribution

[49] No reduction of remedies is required for contribution as there is no conclusive evidence that Mr Naiker contributed in a blameworthy way to the circumstances giving rise to his grievance. At the time that DSWL made its decision, according to Mr Jamnadas and Mr Parshotam, Mr Naiker was not considered to have been involved in his wife's actions.

[50] More recently DSWL has revised that view on the basis of some information from a third party that Mr Naiker might have been told at an earlier stage of concerns over stock anomalies involving Mrs Naiker. However the evidence before me was no more than allegations about which firm conclusions could not be reached.

Summary of determination

[51] Mr Naiker's dismissal for redundancy was unjustified in all the circumstances at the time.

[52] DSWL is to pay Mr Naiker \$5000 as compensation for humiliation, loss of dignity and injury to his feelings.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so Mr Naiker may lodge and serve a memorandum as to costs within 28 days of the date of this determination. DSWL will then have 14 days to lodge a reply memorandum before the Authority determines costs.

Robin Arthur
Member of the Employment Relations Authority