

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 32
3097873

BETWEEN BRENDON PETRICH
Applicant

AND SMX LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Anthony Drake, counsel for Applicant
Matthew Dearing, counsel for Respondent

Investigation Meeting: 18 November 2020

Submissions Received: 24 November and 11 December 2020 from Applicant
26 November 2020 from Respondent

Determination: 29 January 2021

DETERMINATION OF THE AUTHORITY

A. Mr Petrich was unjustifiably dismissed. In resolution of his personal grievance SMX Limited is ordered to pay to Mr Petrich the following sums within 28 days of the date of this determination:

- a) \$29,990 gross under s 123(1)(b) of the Act; and**
- b) \$20,000 under s 123(1)(c)(i) of the Act.**

B. Costs are reserved.

Employment relationship problem

[1] SMX Limited develops, deploys and supports email services for businesses and email providers throughout Australasia and other countries. Mr Petrich sat as an independent director on the Board of SMX from 11 June 2009 to 3 May 2017. He resigned as a director after he was appointed to the role of Product Owner on 1 May 2017.

[2] In his role Mr Petrich had overall management responsibility for developing and delivering the product strategy. This included identifying the product to be developed and in what order a project should be delivered through the development of a “product roadmap”. A product roadmap is a list of potential features for development of a piece of software with identified priorities for each of the features to be completed.

[3] Mr Petrich was dismissed on 10 January 2020 by reason of redundancy. He claims his dismissal was unjustified. He alleges the restructuring was not for genuine business requirements but was based on ulterior motives. Mr Petrich alleges the restructuring was designed to remove him from the company after:

- a) He raised concerns with members of the SMX Board in April, May, September and October 2019 about the accuracy of the financial forecasts being presented to the Board and about his relationship with Mr Ian McDonald, Chief Executive Officer (CEO);
- b) Mr McDonald and Mr Colin Print, Chief Financial Officer (CFO) had raised a loss of confidence in him at the 20 September 2019 Board meeting.

Issues

[4] In order to resolve Mr Petrich’s application I must determine whether his dismissal by reason of redundancy was justified and if not, what if any remedies should be awarded.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Background

[6] SMX has provided the Authority with all of the Board minutes for the 12 month period from October 2018 to October 2019. It is apparent from these minutes that from January 2019 the Board discussed concerns about the business finances falling below the minimum allowable cash balance threshold. At each meeting of the Board the pipeline of potential new business was discussed and instructions from the Board to Mr McDonald and his team was to focus on converting the pipeline into bankable business.

[7] Following the departure of two senior sales employees early in 2019 Mr Petrich was appointed into a caretaker role to oversee sales for SMX and to provide feedback to the Board until a new head of sales could be appointed. In April Mr Petrich contacted the Board Chair and raised concerns about the reporting of the revenue pipeline to the Board. As a director Mr Petrich had developed relationships with all of the Board members and felt comfortable raising concerns directly with the Chair.

[8] Mr Petrich attended the May 2019 Board meeting to speak to the sales information provided to the Board. Mr Petrich advised the Board of his view that the pipeline of work needed to be validated and the forecasting presented to the Board by Mr McDonald represented an optimistic picture.

[9] Also during the May 2019 Board meeting Mr Print advised the Board, in relation to SMX's finances, that it should wait until July 2019 before major action was taken to reduce costs. Despite this, the Board instructed Mr McDonald to cut any "deadwood resources" immediately.

[10] Following the meeting Mr McDonald approached Mr Petrich and Mr Print and claimed they had "thrown him under the bus". In answer to questions at the investigation meeting Mr McDonald could not recall what he said but acknowledged that he was very frustrated. Mr Petrich says from this time onwards Mr McDonald stopped engaging with him and says this was the beginning of the end of his employment with SMX.

[11] At the June Board meeting Mr Print advised the Board that the concerns he had raised at the previous Board meeting were being addressed and that SMX would have a better view of the traction being gained on closing the pipeline by July. Mr Print

reiterated his previous advice that the Board should wait to see if the pipeline was being realised before major action needed to be taken to reduce costs.

[12] Mr Print was asked whether he had modelled a financial plan B showing what the Board should do if the pipeline was not being converted at a fast enough pace. No plan B had been modelled. Mr Print was instructed by the Board to model a plan B showing a likely financial scenario if sales did not gain sufficient traction on the pipeline conversion.

[13] At the July Board meeting Mr Print advised the Board that SMX was not seeing traction on closing the short-term pipeline, although the mid to long term forecast looked more secure. As a result of the short-term pipeline not being realised Mr Print advised that action needed to be taken to reduce costs in order to maintain the required cash balance. Mr Print also advised that he had modelled a financial plan B as instructed at the previous Board meeting.

[14] Mr Print and Mr McDonald were instructed to confirm Plan B and advise the directors weekly of the levers that needed to be pulled to maintain the minimum cash balance and when those levers would be implemented. The Board agreed to defer payment of all directors fees until the cash position had stabilised at the minimum level.

[15] In his August 2019 report to the Board Mr McDonald advised that action was being taken to reduce costs in order to maintain the minimum cash flow balance. The steps included reducing discretionary costs and consultation with three employees over a proposal to disestablish their positions. Two of the three affected employees had resigned. Mr McDonald noted that if the restructuring was implemented in accordance with the proposal the third employee would leave SMX on 24 October 2019.

[16] On 6 September 2019 Mr Petrich contacted the Board Chair for a second time raising concerns about how Mr McDonald was running the business. His concerns included the lack of collaboration and not allowing Mr Petrich to progress his roadmap. At the investigation meeting the Board Chair told me that he held an investigation and spoke to Mr McDonald and the directors about Mr Petrich's concerns and tried to "fix communications". The Board Chair did not advise Mr Petrich he was investigating his concerns and provided Mr Petrich with no further updates or feedback about his investigations.

[17] At the 20 September 2019 Board meeting the Board were advised plan B was being put in place. This is not referenced in Mr McDonald's formal report to the Board and there is no detail about what plan B involved. In his report Mr McDonald noted that he intended to present a separate presentation to the Board to enable a discussion on current opportunities, challenges and proposals on next steps.

[18] During the 20 September meeting the Board instructed Mr Print and Mr McDonald to work together to find at least \$200,000 of additional savings.

[19] Also during the September meeting two additional and relevant issues were raised:

Loss of Trust with [Mr Petrich] – [Mr Print] said that he could not rely on what he was told by [Mr Petrich] and need to find corroborating facts before he would place credence on information. [Mr McDonald] experience is the same.

For SMX, a small company, not to have a high-performing management team was an unacceptable position.

[20] The Board instructed Mr McDonald and Mr Print to report back to the Board within two weeks with a plan as to how the issues would be resolved. Mr Petrich did not become aware of the comments made about him until he received copies of the Board minutes during the restructuring process.

[21] From the evidence adduced during the investigation meeting it is apparent that the Board met again in September, on or about 27 September 2019. No minutes or notes were available to the Authority in respect of the discussions at that meeting.

[22] On 30 September 2019 Mr McDonald called Mr Petrich into a meeting and invited him to take a period of garden leave. Mr Petrich told me he was told this was necessary to allow Mr McDonald to clear his head and realign the company. Mr Petrich declined the invitation of garden leave. Mr Petrich says he asked whether the invitation arose as a result of a restructuring or performance issues and was told it was neither.

[23] Mr McDonald says he suggested that Mr Petrich take a period of garden leave because he had learnt that Mr Petrich had sent an email to the Board Chair setting out his concerns about his ability to work with him [Mr McDonald]. Mr McDonald told me the garden leave was to provide Mr Petrich with the opportunity to take some time out.

[24] I have preferred Mr Petrich's evidence in relation to this conversation because the email Mr McDonald refers to was sent to the Board Chair after 30 September, on 11 October 2019.

[25] On 4 October 2019 updated cash flow forecast information was provided to the Board by Mr Print. The forecast showed cost savings of \$200,000. In his report to the Board Mr Print sets out the steps taken to achieve the cost savings. He does not make any reference to any further restructuring as being necessary to meet the Board's direction to make the savings and does not record any need to reduce management overheads.

[26] During the restructuring process Mr Petrich claimed the savings identified in the cash flow forecast related to his salary being removed from the forecasts. This was denied by Mr McDonald and Mr Print who maintained Mr Petrich's salary was included at all times.

[27] In his email to the Board Chair on 11 October 2019 Mr Petrich advises he was having issues in his employment. He advised the Board Chair that he was at a point where the working environment had become intolerable despite his attempts to resolve his issues directly with Mr McDonald. Mr Petrich requested a meeting to discuss a way forward.

[28] The Board Chair forwarded Mr Petrich's email to Mr McDonald with a question mark. In response to the Board Chair Mr McDonald advised that he had not had any issues raised by Mr Petrich and was not aware of any attempts made by Mr Petrich to resolve any issues. He advised the Board Chair that his door was open for Mr Petrich to discuss the work environment. Following that response the Board Chair advised Mr Petrich that his situation was an employment matter and needed to be raised with Mr McDonald. He included in his email a copy of Mr McDonald's response and pointed out that "...clearly some discussion is necessary between you". It is apparent from the evidence I have reviewed that no discussion took place to resolve the issues raised by Mr Petrich.

[29] On 17 October 2019 Mr McDonald emailed the Board enclosing a proposal to disestablish the Product Owner and CFO roles with a total payroll saving of \$277,000 for FY20 and seeking Board approval to proceed. The attached email stated that the proposal was:

“Further to the last Board meeting, please find attached the proposal for the restructure as discussed.”

[30] A review of the 20 September 2019 Board minutes does not show any record of a discussion about the disestablishment of two management roles. During the 20 September meeting Mr McDonald reports on the restructuring commenced in August 2019. Under the issues section of the minutes it is recorded [my emphasis]:

Issue 2: Non Collaboration between Product and Operations. Discussion was held about the challenges of collaborating and suggested that *CIO should be removed*.

[31] The CIO role is an executive management role at the same level of the organisation as Mr Petrich’s Product Owner role. At the investigation meeting Mr McDonald confirmed that the CIO role did not form part of the plan to restructure despite the Board’s directive that the CIO role be removed.

[32] I have considered whether Mr McDonald’s reference in his covering email on 17 October 2019 could have been a reference to a discussion held at the 27 September 2019 Board meeting. However, as I have already stated, there are no minutes or notes from the Board meeting held on 27 September 2019 to confirm any discussions about restructuring took place.

[33] In his oral evidence at the investigation meeting the Board Chair told me he had a discussion with Mr McDonald about how to address the issues with Mr Petrich but this related to improving communication.

[34] I have concluded it is likely Mr McDonald’s approach to Mr Petrich on 30 September and the offer for him to commence a period of gardening leave may have come about as a result of the discussion Mr McDonald had with the Board Chair on 27 September 2019. There has been no other reasonable explanation as to why this discussion was seen as necessary.

[35] Mr McDonald met then with Mr Petrich on 20 October 2019 and provided him with a copy of a letter outlining a proposal to restructure SMX’s operations. In his letter Mr McDonald advised Mr Petrich that the objective of the proposal was to cut costs to ensure the company maintained an appropriate cash balance while aligning resources

to business needs. A key area identified for savings was to reduce management overheads.

[36] The proposal was for two management roles to be disestablished. The roles of CFO and Mr Petrich's Product Owner role. The expected savings of the disestablishment of the two roles was \$216,000 in the 2020 financial year and \$519,000 in the 2021 financial year. As events transpired only one position was disestablished.

[37] Mr McDonald offered, and Mr Petrich accepted an opportunity to work from home with time to prepare feedback for the consultation meeting.

[38] Mr Petrich attended a meeting on 12 November 2019 to discuss the proposal and provide his comments. Mr Petrich says he was not in a position to provide meaningful feedback at that time because he had not been provided with any information to support SMX's proposal.

[39] Mr Petrich requested supporting documentation including Board reports, CEO reports, financial information and internal correspondence relating to the proposal. In response, Mr Petrich was provided with some of the information he sought including the cash flow forecast dated 4 October 2019.

[40] On 11 December 2019 Mr Petrich raised concerns about the paucity of information being made available to him and made allegations that he was being singled out and that there were ulterior motives informing the proposed restructuring. SMX responded in writing on 13 December 2019 denying Mr Petrich's claims.

[41] A further meeting between Mr Petrich and Mr McDonald was scheduled to take place on Monday, 16 December 2019. Mr Petrich was requested to engage in the process and was asked whether he intended to attend the meeting. In response Mr Petrich informed Mr McDonald that he had provided sufficient feedback. He continued to object to the restructuring on the basis that the process was a sham.

[42] On 7 January 2020 SMX confirmed the decision to disestablish Mr Petrich's role, offered him redeployment and invited him to apply for any other vacancies. Mr Petrich declined the redeployment offer because the position was at a much lower level in the organisation and attracted a significantly lesser salary.

[43] Mr Petrich was given notice of his dismissal on 10 January 2020 and paid in lieu of working the notice period.

The law

[44] In order for a redundancy to be justified SMX must demonstrate the decision to dismiss was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether SMX met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[45] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.¹ That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.² This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[46] The genuineness of a redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes an employee is surplus to its needs, the Authority is not to substitute its business judgement for that of the employer.³

[47] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[48] The requirements in relation to consultation have been summarised by the Employment Court as being:⁴

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

² *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

³ Above n 1 at [98].

⁴ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352 (2017) 14 NZELR 789

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires a provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[49] Mr Petrich's employment agreement did not define redundancy. In the absence of a definition I have used the commonly understood meaning. What is required is that the employee is superfluous to the needs of the business.⁵ The employment agreement required four weeks' notice or payment in lieu and states that compensation is not payable.

Was the redundancy for genuine reasons?

[50] Mr Petrich alleges SMX's decision to disestablish his role had mixed motives. He says he was targeted by Mr McDonald who had an ulterior motive to terminate his employment. Mr Petrich relies on the following factors to support his allegation:

- a) Mr McDonald's conduct toward him after he raised concerns with the Board Chair during the Board meeting in May 2019;
- b) The statement by Mr Print and Mr McDonald recorded in the minutes of the September 2019 Board meeting;
- c) The request for Mr Petrich to take a period of gardening leave; and
- d) The email Mr Petrich sent to the Board Chair on 11 October 2019.

[51] SMX submits the redundancy was a valid attempt to assist the company to reduce costs following a Board directive to affect cost savings of \$200,000.

[52] In a case such as this the Authority must establish the employer's predominant motive in dismissing Mr Petrich. If the decision was for anything other than genuine commercial reasons the dismissal will be unjustified.⁶

June 2019 discussion with the Board Chair

⁵ Above n 1 at [47].

⁶ *Forest Park (NZ) v Adams* [2000] 2 ERNZ 310 at [49].

[53] I find on balance, that the concerns raised by Mr Petrich at the May 2019 Board meeting were not a motivating factor in the decision to disestablish Mr Petrich's role.

[54] Mr Petrich met with Mr McDonald following that meeting and in an email from Mr Petrich to Mr McDonald on 27 June 2019 he confirmed their meeting that morning had served to clear the air between them and to reset expectations. Mr Petrich confirmed that he was on board regarding driving product and providing leadership and conveyed his appreciation for the salary increase confirmed by Mr McDonald during their meeting.

[55] I find that on 27 June 2019 Mr Petrich and Mr McDonald had cleared the air and their relationship was on track.

September 2019 comments

[56] There is no dispute that during the September 2019 Board meeting Mr Print advised the board he could not rely on what he was told by Mr Petrich and needed to find corroborating facts before he would place credence on information provided by Mr Petrich. Mr McDonald is recorded as having had the same experience.

[57] SMX submitted that the Minutes are not a verbatim record and should not be taken as an indication of an ulterior motive.

[58] Mr Petrich raised concerns with SMX during the restructuring process about the comments made in the Minutes and that they indicated an ulterior motive for disestablishing Mr Petrich's role.

[59] In response, on 13 December 2019, SMX denied that the comments had informed its decision to restructure. It told Mr Petrich he had taken the comments out of context and that they related to issues that had arisen earlier in the year in relation to his reporting of sales forecasts and prospects. Its letter states that the comment and related issue was resolved.

[60] I agree with the submissions made for Mr Petrich, that it was improper for Mr Print and Mr McDonald to be raising what appear to be historical issues about Mr Petrich at the September Board meeting. Mr Petrich told me no concerns about his forecasting while undertaking the sales reporting role between April and June were

raised with him. Mr McDonald said he did raise concerns with Mr Petrich in July but the matter was resolved.

[61] Neither Mr Print nor Mr McDonald have explained to me to my satisfaction why they considered it necessary to raise such serious concerns at a time when the responsibility for sales forecasts lay with the new Head of Sales and had done since at least July 2019.

Gardening leave

[62] Mr McDonald's request that Mr Petrich take a period of gardening leave was made after he and Mr Print had raised issues about Mr Petrich at the 20 September Board meeting, and following a second meeting of the Board on 27 September. The Board Chair confirmed he had spoken to Mr McDonald about how to address the issues with Mr Petrich.

[63] Mr McDonald's approach to Mr Petrich on 30 September 2019 came out of the blue for Mr Petrich. I have accepted Mr Petrich's evidence that Mr McDonald assured him the request was not related to his performance or part of a restructuring.

[64] No explanation has been provided by SMX to clarify why it was necessary for Mr Petrich to take gardening leave. No issues had been raised with him about either his performance or his conduct. Mr Petrich was not made aware of the comments made by Mr Print and Mr McDonald at the 20 September 2019 Board meeting.

Email dated 11 October

[65] Mr Petrich sent this email after he had been asked to take gardening leave. He received no response from Mr McDonald despite the Board Chair's advice that discussions were needed. The next step taken by Mr McDonald was to email the Board for approval to disestablish Mr Petrich's role.

Genuine business requirements?

[66] Mr Petrich told me the rationale for SMX's proposal to cut costs to ensure the company maintained an appropriate cash balance, while aligning resources to business needs is inconsistent with financial decisions made by SMX in the lead up to its proposal. For example:

- a) On 2 September 2019 SMX engaged a Microsoft front office contractor at \$20,000 per month; and
- b) A newsletter sent to stakeholders on 3 December 2019 presents an optimistic future for the company with a strong pipeline of sales in New Zealand and Australia.

[67] Mr McDonald told me the front office contractor was engaged in September 2019 to undertake a migration of SMX's email system to Office 365 in accordance with the company's digital transformation project which was designed to reduce costs and increase efficiency.

[68] Mr McDonald agrees the notification to stakeholders on 3 December 2019 was optimistic. At that time there was a reasonable pipeline of significant projects but none of the projects had progressed to signed agreements. He said SMX had to carefully manage cash flow to ensure the company would remain viable if the projects did not proceed or were delayed. It seems to me this is the same position SMX had faced throughout the year.

Conclusion

[69] At the 20 September Board meeting Mr Print and Mr McDonald were issued with a directive to report back to the Board within two weeks with a plan as to how all of the issues raised during the meeting would be resolved. The issues included the loss of trust in Mr Petrich. At the investigation meeting Mr McDonald told me he thought there was a plan but that he was not involved in preparing it. Mr Print told me there was no plan.

[70] Mr Print's reworked forecast dated 4 October was provided to the Board within the two weeks directed by the Board on 20 September 2019. The reworked forecast did not deal with how the issues identified on 20 September 2019 would be addressed. It did, however, show how SMX would meet the directive to achieve cost savings of \$200,000.

[71] It is clear that at the time Mr McDonald embarked on the restructuring process the CFO had already identified how SMX would make the directed cost savings. Mr McDonald's proposal would result in a further \$200,000 plus savings through the removal of the two management roles.

[72] At the investigation meeting Mr Print was unable to explain why, having met the Board's directive, a further \$200,000 costs savings was necessary. A review of the Board minutes shows there was no directive to save more than \$200,000 and no requirement to find further savings of \$200,000 equalling \$400,000.

[73] Further, despite Mr McDonald's assertions that Mr Petrich's salary was not included in the 4 October 2019 Board cash flow update, in his written evidence Mr Print told me [verbatim and my emphasis]:

The \$200,000 ... related to other cost savings that needed to be made between 1 October and 31 March 2019 and which involved:

- a. The *disestablishment of one executive role* (This could have been any one of the CFO, Product Owner, CIO or CTO).
- b. The reduction of contractors
- c. The reduction of sundry and office expenses.

[74] Mr Print's evidence is not consistent with the proposal to disestablish two roles and is not reflected in the written documentation provided to the Board on 4 October 2019.

[75] After considering and weighing the evidence I find there were mixed motives informing the decision to dismiss Mr Petrich by reason of redundancy. SMX has failed to satisfy me on the balance of probabilities that the predominant motive for the dismissal was for genuine business reasons.

[76] Given my conclusions, I find Mr Petrich's dismissal by reason of redundancy was unjustified. The decision to dismiss Mr Petrich by reason of redundancy was not a decision an employer acting fairly and reasonably could make in all the circumstances at the time the decision was made.

Was a fair process followed?

[77] In the event that I am mistaken in my conclusions that the redundancy was not genuine and for the sake of completeness, I have considered whether SMX has met the minimum standards of procedural fairness.

[78] As stated earlier in this determination s 4 of the Act required SMX to provide to Mr Petrich with access to information relevant to the continuation of his employment and an opportunity to comment on that information before a decision was made. While

an employer is entitled to have a working plan in mind it must provide sufficiently precise information, in a timely manner before an employee can be expected to give their view on it.⁷

[79] Mr Petrich claims the process followed by SMX did not meet its obligations. He says he did not receive full information in a timely manner as required and SMX did not properly consider redeployment options for him. He also says he was treated unfairly when considering differences in the way he and Mr Print were treated during the restructuring process.

[80] SMX denies the process of consultation was flawed. SMX says Mr Petrich was given reasonable and multiple opportunities to provide feedback to the proposal in writing and/or in person over a two month period. SMX says it accommodated Mr Petrich's requests for additional information and Mr Petrich simply refused to engage in the consultation process.

[81] In response to an invitation to meet with SMX on 16 December, Mr Petrich notified SMX that he had no further feedback to provide. He maintained he had provided sufficient feedback and objected to the restructuring on the basis that the process was a sham.

Provision of information

[82] It was common ground that Mr Petrich attended a meeting on 12 November 2019 to discuss the proposal to disestablish his role and that during this discussion he identified a number of documents that were necessary for him to properly consider the proposal.

[83] Additional information was provided on 15 and 18 November 2019 however, some information that had been requested remained outstanding. Included in the information Mr Petrich had sought but was not provided were CEO reports to the Board, Board minutes, documentation to the Board relating to the restructure, internal correspondence relating to the restructure and information regarding the costs savings associated with restructures that had taken place at SMX during the previous 12-18 months.

⁷ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352; (2017) 14 NZELR 789.

[84] Some further information was provided by SMX on 3 December 2019 however, this did not include the correspondence between Mr McDonald and the Board relating to the restructure. This information was provided to the Authority following the investigation meeting.

[85] I find that while the provision of information to Mr Petrich by 13 December 2019 was adequate for him to give his views about the reasons for the restructuring, the information gave rise to serious concerns that the restructuring process was not for genuine commercial reasons. Those concerns were raised by Mr Petrich and denied by SMX.

[86] Mr Petrich's job was in jeopardy. SMX was under a duty to properly consider his concerns and address them by providing all relevant information. The email sent by Mr McDonald on 17 October 2019 seeking the approval of the Board for the restructuring was lodged with the Authority after the investigation meeting had concluded. This document shows Mr McDonald did not consider whether the CIO role should be disestablished, even though the Board made it clear on 20 September 2019 that the CIO role should go. This was relevant information and should have been provided to Mr Petrich as part of the consultation process.

Redeployment

[87] Mr Petrich claims SMX did not follow a fair process when it failed to consider redeployment options for him.

[88] On 7 January 2020 SMX advised Mr Petrich in writing of its decision to disestablish his role. Mr Petrich was offered an automatic redeployment option into the role of Service Experience Lead. The position attracted a salary of between \$95,000 and \$110,000. Mr Petrich was advised that if SMX did not hear from him by 4pm on 10 January his employment would terminate and he would be paid in lieu of notice.

[89] Mr Petrich was given three days to consider and respond to the offer of redeployment. Mr Petrich says given the time of year (his solicitor's office was closed for the summer break) the short timeframe was unreasonable. He was critical of SMX for not extending the timeframe instead pressing on with its approach to conclude the process.

[90] SMX denies Mr Petrich did not have time to consider the redeployment opportunities. Mr McDonald told me Mr Petrich was offered an automatic redeployment opportunity which he did not respond to. He says Mr Petrich never requested further time to consider the opportunities, instead he emailed Mr Print on 9 January 2020 suggesting arrangements to return company property and making arrangements to purchase the company laptop and cell phone.

[91] I do not find any unfairness with respect to the redeployment option offered to Mr Petrich. He was a senior executive manager with Board experience. He could have made contact with Mr McDonald, explained that he wished to await the return of his solicitor and sought an extension to the timeframe. After all he had no difficulty contacting Mr Print to make arrangements for the purchase of the company laptop and cell phone.

Disparate treatment

[92] Mr Petrich says he was treated differently to Mr Print during the restructuring process. As events transpired Mr Print's role was not disestablished and he remains an employee of SMX.

[93] Mr Print's role of CFO was, along with Mr Petrich's role, identified for possible disestablishment in the letter of proposal dated 30 October 2019.

[94] Mr Petrich says the differences in their treatment included:

- a) Mr Petrich was summoned to the Boardroom for a meeting with Mr McDonald on 30 October to receive the letter of proposal while Mr Print was invited into Mr McDonald's office;
- b) Mr Print was deeply involved in all Board discussions and presentations whereas Mr Petrich was not;
- c) Mr Print had intimate knowledge of and access to SMX's financial information whereas Mr Petrich struggled to get meaningful information.

[95] In his letter to Mr Petrich dated 7 January 2020 Mr McDonald states in relation to Mr Print's role:

The incumbent HR Office Manager resigned prior to Christmas and the company will need to retain the CFO role temporarily while the new replacement HR

Office Manager receives handover and is trained up in SMX's operations. However, the company's current position is that once handover and training is completed the continuation of the role of CFO will be reviewed and [Mr Print] is aware of this.

[96] What Mr McDonald does not disclose to Mr Petrich in his letter, is that Mr Print had presented a strong argument that it would cost the company more if it were to proceed with the disestablishment of his role than if he stayed. Mr McDonald had accepted Mr Print's argument as valid.

[97] I find this was largely possible due to Mr Print's intimate knowledge of SMX's financial information to which he had unguarded access. He had also been privy to the presentations made to the Board throughout 2019 including the 27 September 2019 Board meeting. These were advantages not extended to Mr Petrich.

Conclusion

Standing back and considering and weighing all of the evidence, I am satisfied the consultation process was lacking in the ways I have identified above. The lack of provision of relevant information and the disparate treatment between Mr Petrich were not minor flaws in SMX's process and led to Mr Petrich being treated unfairly.

Remedies

[98] Mr Petrich has established a personal grievance that he was unjustifiably dismissed and is entitled to a consideration of remedies.

[99] The Authority may award any of the remedies provided for under s 123 of the Act. In this regard Mr Petrich seeks reimbursement of lost wages and compensation in the sum of \$25,000 for humiliation, loss of dignity and injury to feelings.

Lost wages

[100] Section 123(1)(b) of the Act provides for reimbursement by SMX of the whole or any part of wages lost by Mr Petrich as a result of his personal grievance. Section 128(2) of the Act provides for an order of the lesser of a sum equal to his lost remuneration, or to three month's ordinary time remuneration. I have a discretion under s 128(3) of the Act to order a greater sum reflecting the lack of earnings for a period longer than three months.

[101] I am satisfied Mr Petrich has lost remuneration attributable to his personal grievance. Mr Petrich told me he has not been able to secure employment at a salary

level commensurate with his salary at SMX or utilising his skills in management or IT since his dismissal. In his written evidence he told me he had made ends meet by doing odd jobs for friends and working as a digger operator or a roofer. At the investigation meeting this evidence changed and Mr Petrich acknowledged that he had been operating his own company from home since 9 January 2020.

[102] I am not minded to exercise my discretion to award a great sum than the three months. This is because some of the loss suffered by Mr Petrich can be attributed to the fact that he established his own business in construction which would necessarily have taken his energy away from applying for jobs in management or IT.

[103] Three month's pay is equivalent to \$49,750 gross. During the three months following his dismissal Mr Petrich earned \$19,760 which means his actual loss was \$29,990 gross.

[104] SMX Limited is ordered to pay to Mr Petrich the sum of \$29,990 gross for lost wages within 28 days of the date of this determination.

Compensation

[105] Mr Petrich claims compensation for humiliation, loss of dignity and injury to feels pursuant to s 123(1)(c)(i) of the Act.

[106] Mr Petrich told me he had been a dedicated and loyal employee committed to continuing to work with SMX. In his written evidence Mr Petrich told me the ongoing unemployment situation has put him under severe stress causing him a lack of sleep and was having an impact on his mental health. No documentary evidence to support his health issues was made available to the Authority.

[107] I am satisfied Mr Petrich suffered humiliation, loss of dignity and injury to his feelings. I am aware Mr Petrich left his role as an independent director on the Board of SMX, a role he had held for at least six years, to take up his role of Product Owner.

[108] I consider the evidence warrants an award of compensation in the sum of \$20,000. When setting this sum I have been mindful of the need not to keep compensatory payments artificially low.

[109] SMX Limited is ordered to pay to Mr Petrich the sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[110] Where the Authority determines an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁸

[111] I am satisfied Mr Petrich did not contribute to his personal grievance and for this reason I make no reduction to the remedies I have awarded.

Costs

[112] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Petrich shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. SMX shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

⁸ Employment Relations Act 2000, s 124.