New Zealand Employment Relations Authority Decisions

Roach v Mega Jump Limited (Christchurch) [2017] NZERA 1183; [2017] NZERA Christchurch 183 (30 October 2017)

Last Updated: 14 November 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 183
3005612

BETWEEN KELLY MARIE ROACH Applicant

A N D MEGA JUMP LIMITED Respondent

Member of Authority: David Appleton

Representatives: Andrew Marsh, Counsel for applicant

Hugh Matthews, Counsel for respondent

Investigation Meeting: 20 October 2017 at Christchurch Submissions Received: 20 October 2017 from both parties Date of Determination: 30 October 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ms Roach was subjected to an unjustified disadvantage in her

employment arising from the flawed consultation process adopted by the respondent. Her dismissal by reason of redundancy was
based upon justified grounds.

B. I award $15,000 to Ms Roach under s 123(1)(c)(i) of the Employment Relations Act 2000 but decline to award her remedies for lost remuneration.

C. I impose a penalty of $5,000 upon the respondent which is to be

paid to Ms Roach.

D. Costs are reserved.

Prohibition from publication order

[1] I prohibit from publication the financial information about the respondent that was contained in the written evidence before the Authority and referred to in oral evidence.

Employment relationship problem

[2] Ms Roach claims that she was unjustifiably dismissed by the respondent on

22 December 2016. Ms Roach also seeks the imposition of a penalty upon the respondent for the respondent's refusal to attend

mediation during her employment. The respondent denies that Ms Roach was unjustifiably dismissed, asserting that her employment was terminated fairly by reason of a genuine redundancy.

Brief account of the events leading to the dismissal

[3] The respondent operates an indoor trampoline park in Christchurch, and trades as Mega Air. Ms Roach was employed from June 2016 as its operations manager. The respondent company is owned by members of the Haselden family amongst others. Two of the Haselden family shareholders, brothers Matt and Doug, were active in the business. It is Ms Roach's position that, whilst she got on well with Matt, she was subjected to bullying from Doug. Doug Haselden strongly denies this.

[4] According to Ms Roach the business opened in mid-August 2016 and started out well due to the school holidays. However, a spate of injuries occurred in October 2016, including two in which members of the public were badly injured. These accidents attracted significant negative publicity in the local newspaper and other media. That led to a drop off in sales, although Ms Roach says that she believed that the business would pick up again in December 2016, when the summer school holiday period was due to start.

[5] On Monday 28 November 2016 Ms Roach was called into a meeting with Matt Haselden and Michael Bryant, a shareholder in the respondent company based in Auckland. Ms Roach says that she was told at the meeting that the respondent was considering disestablishing her position because of a fall in sales and profitability. She was given a letter which stated as follows:

Dear Kelly,

The briefing today provided you with the business's reasons for proposing to down size the Management Team and the implications of this change on your current position as Operations Manager.

This document serves to recap our verbal communication.

As you are aware, the business needs to adapt to a fall in sales and profitability and with this in mind, we have proposed to disestablish your current role.

This proposal should it go ahead, would have an impact on your current role and so we would like to consult with you as you may have alternative ideas that we have not thought of.

We are extending to you the opportunity to consider the proposed change and to consult with me and your support network.

Should you wish to formally express your thoughts on the proposal, they should be submitted to [email details redacted] by 5 pm Wednesday 30th November.

Any feedback that you submit will be carefully and fully considered.

It is important that a process is maintained to ensure that any feedback from you or your support resources are communicated and considered effectively during this consultation period. To this end I am available to talk with you, so that we can discuss any issues or concerns you may have.

Please let me know if you wish to avail yourself of the opportunity to talk to me by phone or Face time.

Please don't hesitate to contact me should you have any further questions in relation to the

proposal or the process. I look forward to receiving your feedback.

Sincerely, Mike Bryant

Mega Air

Mega Jump Limited

PH [phone number redacted]

[6] Ms Roach says in evidence that she was surprised at what she had been told as she did not believe that the redundancy was justified because, two weeks previously, the company had employed somebody as general manager, Tory Prendergast, who had relocated from Australia in order to take up the newly created position. As a result of her belief, Ms Roach instructed her lawyer, Mr Marsh, to write to the respondent on 2

December 2016 raising a personal grievance on the basis of unjustified bullying by Doug

Haselden and unjustified action in relation to the proposed restructuring process.

[7] There then ensued a series of communications between Mr Marsh on behalf of Ms Roach and the respondent's lawyer, Mr Matthews. Mr Marsh's letter of 2 December took issue, amongst other things, with the procedure followed by the respondent

and alleged that insufficient information had been provided to Ms Roach. Mr Marsh asked for

provision of "full details of the sales and profitability fall as alleged in your proposal of change letter, including full financial statements as completed on behalf of the company from February 2016 onwards".

[8] Mr Matthews responded on behalf of the respondent by providing a copy of Mr Bryant's notes which he spoke to at the meeting with Ms Roach and a very brief summary of the sales and profit figures for September, October and November 2016. These showed a healthy net profit for September, but a net loss for October and November respectively. When asked at the Authority's investigation meeting why he had not instructed Mr Matthews to provide full details of the underlying financial information, Mr Bryant said he did not want to release it all at once because he wanted to give "the big picture", and because he did not want to email confidential information.

[9] On 9 December 2016 Mr Matthews asked Mr Marsh to provide Ms Roach's comments and input on the restructuring proposals by close of business on Monday 12 December 2016. He also stated that the respondent would have a meeting with Ms Roach on Wednesday 14 December in order to review and discuss any alternatives or suggestions that had arisen through consultation "and/or to confirm what restructuring (if any) will take place and the consequences of that".

[10] Mr Marsh responded on 13 December asking for copies of "the relevant company financial accounts and/or monthly management accounts upon which the profit revenue summary figures had been based, together with projections". He also sought answers to other questions and comments he had raised.

[11] Later that day, Mr Matthews provided detailed profit and loss figures for the months of September to December 2016 and a list of "aged payables". By way of an email dated 14 December, in answer to a question from Mr Marsh, Mr Matthews attached a projection of the profit and loss for December 2016 to March 2017. Up to this point no feedback had been provided by Ms Roach. Mr Matthews proposed that the meeting between Ms Roach and the respondent be rescheduled for Tuesday 20 December.

[12] On 15 December 2016 Ms Roach went on sick leave and was certified as being fit to resume work on 19 December. On 19 December 2016 Mr Marsh wrote to Mr Matthews stating that Ms Roach had found out on her return to work that day that Ms Prendergast had resigned from her employment a few days before and had left immediately. Mr Marsh stated that Ms Roach therefore assumed that the proposed

meeting for the following day would no longer proceed as the basis suggested for the restructuring of Ms Roach's position no longer applied. Mr Marsh also stated that Ms Roach had discovered that she was expected to return to work as a jump guard rather than as an operations manager, which he characterised as a unilateral change to Ms Roach's duties. He also chased a response to an earlier request to refer the personal grievance about Doug Haselden to mediation.

[13] Mr Matthews responded by email to Mr Marsh's letter of 19 December on the

same day in the following terms:

Hi Andrew,

thank you for your letter. The meeting scheduled for tomorrow is still to proceed – we look forward to seeing you and Kelly then.

You are of course free to raise any of these other issues at the meeting as

well. Regards,

Hugh Matthews

[14] In response, Mr Marsh sent an email seeking to understand the basis upon which the respondent claimed that was there any need for restructuring given that Ms Prendergast had resigned, and the basis upon which the respondent had sought to "unilaterally amend [Ms Roach's] duties, responsibilities and confirmation that any such attempts will not continue". He again chased for a response to the request for mediation in relation to the grievance against Doug Haselden. He stated that "Unless and until we have a formal response on these matters, our client cannot reasonably be expected to attend any such meeting. She cannot fully and fairly respond to the proposal otherwise".

[15] On the morning of 20 December Mr Marsh wrote to Mr Matthews to say that he had not received a response to his previous email and that Ms Roach was now "overwhelmed by the situation that she is in and far too stressed to either work or attend a meeting today as scheduled". He said that she was booked to see a doctor and that she would obtain a medical certificate. He also referred to a number of communications with Matt Haselden that Ms Roach had received the previous day in which she was advised that "the purpose of the meeting today was to negotiate an exit".

[16] There is a dispute between the parties as to who first raised the suggestion to negotiate an exit package, but as Matt Haselden was not present at the Authority's investigation meeting to answer questions, I prefer Ms Roach's evidence that she did not make the suggestion, and that she rebuffed the overtures as Mr Marsh was acting for her.

[17] By way of a letter from Mr Matthews dated 20 December 2016 sent later that day, he advised Mr Marsh that the position of operations manager was to be disestablished. The material parts of this letter stated as follows:

Dear Andrew

MEGA AIR – KELLY ROACH

Meeting

Since the commencement of your involvement (acting for Kelly):

• We have supplied sales and profit figures for Mega Air and proposal change documents – letter dated 5 December 2016;

• Advised you of a meeting to be held on 14 December 2016 and requesting your comments on the restructuring proposals (and alternatives) – our email

9 December 2016;

• Provided you with profit and loss figures and aged payables – our email

13 December 2016;

• Confirmed to you that there is no further feedback from other employees in answer to your request, nor are there any other relevant directors/management documents, and agreed to reschedule the meeting for 15 December 2016 – our emails 14 December 2016;

• The meeting was further rescheduled for this morning at 11 am to meet your availability – our email 16 December 2016.

However, in your email of 19 December 2016, you advised that you would not attend. Notwithstanding, we indicated that the meeting would proceed and that you were free to raise other issues at that meeting as well.

Clearly, Kelly has no intention of engaging with the employer, despite the requirement for a meeting and the supply of adequate information. This is a breach of Kelly's duty of good faith in her employment relationship, which requires her to be:

"*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things responsive and communicative.*"

The comments made by Matt Haselden yesterday were a response to Kelly, indicating to Matt that she wished to no longer work at Mega Air and wants to negotiate an exit. Matt's response to Kelly was that the most appropriate way of dealing with that, was for her to turn up at today's meeting, where at her request, that matter could be discussed.

Restructuring

In the absence of any response (or meeting), Mega Air has decided that he position of Operations Manager will be disestablished.

It is correct that the General Manager has resigned – however that does not bear on the restructuring proposal in an overall sense. The financial situation, as disclosed, is such that in the absence of both the General Manager and the Operations Manager, shareholders and family will undertake those management and

operational tasks for the immediate future, in order to cut down the fixed overheads to stabilise the financial position for the future. Given the gravity of the figures, had the General Manager not resigned, a further restructuring may well have occurred in any event.

Other Roles

With the decision having been made to disestablish the position of Operations Manager, the question is now, whether there are other role(s) that Kelly might take on at Mega Air. At the moment, the only other role that Mega Air sees as being a possibility would be that of jump guard. If Kelly wishes to be considered for that position – or has any other thoughts on an alternative role(s) that she might take on at Mega Air – then that needs to be communicated promptly, and in any event by no later than 12.00 noon Thursday 22 December 2016. If we have not heard from you in relation to this by that time, we will assume that Kelly has no suggestions and/or does not want to take on the role of jump guard.

The letter also contained a paragraph relating to the grievance against Mr Haselden.

[18] By way of his letter dated 22 December 2016 Mr Marsh raised a personal grievance on behalf of Ms Roach for unjustified dismissal. Mr Matthews replied by way of a letter dated 22 December stating that Ms Roach had neither indicated her willingness to work as a jump guard and not provided any other suggestions for alternative roles and, as the respondent had not identified any other suitable roles, her employment was to be terminated. She was given four weeks' notice of termination and her last day of employment was 20 January 2017. Mr Matthews stated that the respondent required Ms Roach to work out

her notice and that she was to report to Doug Haselden. However, Ms Roach produced a medical certificate stating that she was medically unfit until

20 January 2017.

[19] Ms Roach called as a supporting witness a former manager of the respondent, Hayley Gray, who stated that Doug Haselden had had a conversation with her in early November 2016 in which he told her that he thought that she could do Ms Roach's job better as Ms Roach was "pretty useless". Ms Gray said that she was to keep that between herself, Doug Haselden and the shareholders, and that she should take some time to think about it and let Doug know by the end of the week.

[20] In reply to evidence from Doug Haselden that he did not ask Ms Gray to take over Ms Roach's job but had asked Ms Gray to take over the job of rostering, with which Ms Roach struggled, Ms Gray's response is that she was not offered just rostering but the role of Operations Manager. She said that there was no mistaking the offer as it followed a conversation in which Mr Haselden asked in depth about her previous role running a

geotechnical investigation company. Ms Gray's evidence was credible, and there seemed

to be no reason why she would not have been telling the truth.

[21] Ms Roach said in evidence that Matt Haselden had told her that Doug Haselden was intending to make Ms Roach work as a jump guard and to clean the toilets so that she would leave. Doug Haselden denied this, and Matt Haselden did not give evidence, so I am unable to come to a conclusion on that allegation.

[22] Ms Prendergast, the previous General Manager, also gave evidence on behalf of Ms Roach via telephone (as she was in Australia). Ms Prendergast said that, while she was still employed by the respondent, Doug Haselden had made a number of comments to her about Ms Roach which made it clear that he wanted Ms Roach gone. She said that at her first day of employment on 14 November 2016 Doug Haselden had said to her that "Kelly has made some big mistakes, she won't be coming back".

[23] These comments are denied by Doug Haselden. He says that he knew by the point that Ms Prendergast had commenced employment that Ms Roach was likely to raise a personal grievance against him and so he had stopped communicating with Ms Roach at all and was careful not to discuss the company's business or staff with any of the other staff members. He says that Ms Prendergast made the comment that she thought Ms Roach would not come back.

[24] The respondent called Doug Haselden and Michael Bryant as witnesses on its behalf. Mr Bryant explained that, after the accidents and bad publicity, by the second week of November 2016 the initial turnover and trading success had changed into "an unsustainable monthly trading loss". Mr Bryant said that he flew down from his home town of Auckland weekly to monitor progress and discuss cost cutting alternatives and to improve their marketing and business development efforts.

[25] Mr Bryant explained that, in September 2016, the respondent company decided that they needed to have a manager on board with experience of running a trampoline park as Matt Haselden and Ms Roach did not have that. Ms Prendergast had experience at running a much bigger trampoline jump park in Sydney and had approached the respondent company in October on a speculative basis. Mr Bryant said that the medium term goal of the respondent was to have a general manager in place, to take over from Matt Haselden who had been seconded to the respondent from another family company.

[26] Ms Prendergast was interviewed on 12 October 2016 and offered the role of general manager on 26 October. She commenced employment on 14 November two days before the respondents' emergency board meeting to discuss their financial crisis. Mr Bryant said in his written evidence that, as Ms Prendergast has accepted the job offer in October and had shifted from Australia to take up the position, they were obliged to continue to employ her. In his oral evidence he said he was embarrassed that the company had brought Ms Prendergast into the company.

[27] Mr Bryant said that the shareholders had invested a significant sum into the business and were very concerned that it looked as if it were going to fail. He said that the fixed costs, including borrowing and rental costs, could not be altered and that they needed to reduce the biggest non-fixed cost which was staffing. He said that their staff costs were reduced first by cutting the number of jump guards to the minimum number required to safely supervise people attending. They utilised part-timers and casual staff for busy periods and reduced their dependence on full time staff.

[28] Mr Bryant said that the respondent also reviewed the fixed management staff costs noting that Matt Haselden earned $65,000 a year, Ms Prendergast's $70,000 a year and Ms Roach $65,000 a year plus car expenses. He said that they considered reducing staff management numbers so that the work could be undertaken by the shareholders and directors or their close family who would not require payment "until the transition back to profitability had been achieved".

[29] Mr Bryant said that he considered that Ms Prendergast's position of general manager was still likely to be appropriate as the company needed to improve its marketing, sales and internal processing and systems. He said that the rest of them were essentially novices in these areas whereas Ms Prendergast had the particular experience of running and marketing a much bigger facility in Australia. They therefore came to the conclusion that it was necessary to review and potentially restructure the operation manager's role.

[30] Mr Bryant said that he had managed redundancies within his previous employment and it was decided that, as he lived in Auckland and was not involved in the day-to-day running of the respondent business, he should be the one to run the process.

[31] Mr Bryant says that Ms Prendergast handed in her notice on 13 December 2016 and left immediately. He said that although her resignation meant a significant saving on

her salary of $70,000 a year, by this time he was convinced that the respondent needed to trim not one but two of the three management positions, and that if Ms Prendergast had not left then Matt Haselden would have had to have gone back to the other family company before the end of the year.

[32] When asked what the differences were between the three senior management roles, he said that Matt Haselden's role had ultimate responsibility for everyone else's role, and it required a significant skill set. The general manager's role was similar in scope, and the hope was that Ms Prendergast would be able to take over the work that Matt Haselden was doing. On the other hand, the operation management role comprised more day to day tasks, occurring "at the coal face' and was more hands on, so that the duties were more easily dispersed. He said the role was more "dispensable".

[33] Mr Bryant said that he believed that his management, administration and other functions that had been undertaken by Ms Prendergast and which were being undertaken by Ms Roach could mostly be taken over by Matt Haselden and competent administration staff. He said that the shareholders and other family members could take on jump guard, administration and coffee making roles to enable the Jump Park to continue in operation for the medium term so that they would then be able to assess what would happen from thereon.

[34] Mr Bryant said that he had no indication of what Ms Roach's views or thoughts on

the proposed restructuring was or on any alternatives.

[35] When asked about why he had decided to disestablish the operations managers' role on 20 December without having met with Ms Roach to hear her feedback, Mr Bryant said that it was his view that the respondent "had to get on with its restructuring". He said that, given the time of year, five days before Christmas, and the financial crisis, it could not be left until the New Year. He said that December sales were then tracking significantly below the "appalling" November sales and he felt that Ms Roach was avoiding facing the issue. He said that the process needed to be brought to a conclusion.

[36] To cross examination questions from Mr Marsh, Mr Bryant said that Mr Marsh asking questions of the respondent company prior to 20 December had been "frustrating the whole process" and that every time he tried to get Ms Roach to meet, Mr Marsh would "whip the rug away". I infer from his answers that Mr Bryant felt that Ms Roach was not acting in good faith by refusing to turn up to the consultation meetings.

[37] When asked why he did not respond to Mr Marsh's question about why the respondent wanted to continue to consider restructuring Ms Roach's position when Ms Prendergast had resigned and left, Mr Bryant said "it was hard enough going through lawyers. The more [information we gave you the more] you would ask questions and frustrate the whole process".

[38] Mr Bryant says that, after Ms Roach's dismissal, Matt Haselden became solely responsible for the booking system and its updates as well as updating and changing the website, Facebook and all the marketing activities. He delegated rostering to the duty managers and used a pool of casual staff. Family members would work on busy weekends and act as jump guards or assist with coffee and office sales.

[39] Mr Bryant said that Doug Haselden's wife, who had filled a key administration role, took a 50% cut in pay. He said that December 2016 saw a further fall in sales down compared to November and a net loss. He said that sales have improved (as of October

2017) but that the company's revenues were still significantly below the average pre- accident sales levels.

The issues to be determined

[40] The issues to be determined by the Authority are:

a. whether the dismissal of Ms Roach by reason of redundancy was unjustified; and

b. whether a penalty should be imposed on the respondent for failing to agree to attend mediation.

Was the dismissal unjustified?

[41] There are two aspects of this question:

a. to determine whether the procedure followed by the respondent was justified, and

b. to determine whether the dismissal was substantively justified. That is to say, whether the reason for the disestablishment of Ms Roach's position was genuine and whether there were no other suitable alternative positions available for Ms Roach.

The legal principles

[42] The statutory requirements that need to be satisfied are set out in ss 4 and 103A of the Employment Relations Act 2000 (the Act). These provide as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection

(2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be

active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is

proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of

the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all

the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations

against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action

against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before

dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in

the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[43] In *Grace Team Accounting Limited v Brake1* the Court of Appeal confirmed that, in a redundancy situation, the statutory test for whether a dismissal is justified should properly include an assessment of an employee's commercial rationale, or business case for a redundancy, including clear evidence that the goals of the redundancy will be achieved by the restructure.

[44] In *Rittson – Thomas T/A Totara Hills Farm v Davidson*2 the Employment Court held that the appropriate analysis required under s 103A in assessing whether there is substantive justification in relation to a redundancy dismissal entails more than just enquiring whether an employer's decision to declare a position redundant was a genuine business decision but also requires the Authority to enquire into the business decision to declare an employee's position redundant and whether it was fair and reasonable. That would include reference to any purported cost savings and whether these would actually be achieved by the proposed redundancy.

The procedure adopted

[45] In the Employment Court case of *Vice-Chancellor of Massey University v Wrigley3* the Employment Court examined in detail the obligation of an employer undertaking a redundancy consultation exercise to disclose relevant information, and gave a wide interpretation of what is relevant under the provisions of s 4(1A)(c) of the Act, including information in the minds of the decision makers.

[46] It is clear that, when Mr Bryant first advised Ms Roach of the possibility of her position being disestablished on 28 November 2016, he had several pieces of relevant information in his mind, which he did not share with her, but which she needed to know

for the consultation he expected to occur to be meaningful. This information included:

1 [2014] NZCA 541

2 [2013] NZEmpC 39

3 [2011] NZEmpC 37

a. What was to happen to Ms Roach's duties under the proposal;

b. Why he was not proposing to disestablish Ms Prendergast's role; c. Why he was not proposing to disestablish Matt Haselden's role; d. Details of the financial impact the company had suffered to date; e. The projected future financial impact; and

f. Detailed source data upon which the information at (d) and (e) were based.

[47] Without this information Ms Roach could not give meaningful feedback. By way of example, she may have been able to have suggested that she could take over Ms Prendergast's role, or may have seen savings which had not been contemplated. The opportunity to present such suggestions is the reason why consultation is required, but not giving the employee the tools to make the suggestions defeats the object of the consultation.

[48] Some, but not all of this information was drip fed to Ms Roach, via Messrs Matthews and Marsh over a period of days, but only after Mr Marsh requested it on each occasion. By 19 December, arguably, enough information had been provided to have enabled Ms Roach to have attended the meeting on 20 December (although that is not certain) but then she learned that Ms Prendergast had resigned. This made a major difference to the factual situation that had been presented to Ms Roach. She was therefore entitled to know why that resignation did not alter the plan to disestablish her role. Indeed, Mr Bryant had clearly changed his mind about how many roles needed to be disestablished, but did not see fit to share the reasons of that change of mind with Ms Roach. Again, that failing rendered any consultation practically meaningless.

[49] Mr Marsh asked why Ms Prendergast's resignation did not alter the plan to disestablish Ms Roach's role on her behalf, but Mr Matthews was, presumably, instructed not to answer it. It was a perfectly reasonable question, and it was not reasonable to withhold the answer until the meeting of 20 December. Ms Roach needed the information before the meeting so she could consider it and give a reasoned reply. What the respondent contemplated doing was to effectively ambush Ms Roach at the meeting with information she would not have time to consider.

[50] In addition, Mr Bryant had been told that Ms Roach was unwell. He went ahead and made the decision in any event. He did not instruct Mr Matthews to explore ways with Mr Marsh of getting her feedback despite her illness. There is no obvious reason why Mr Bryant felt the need to disestablish Ms Roach's role so urgently, given that she was only entitled to five days' sick pay under her individual employment agreement. She was not going to be costing the company anything in wages in any event by that time.

[51] Mr Bryant felt that Mr Marsh was deliberately frustrating the progress of the restructure. However, an alternative interpretation is that he frustrated the restructure by not providing all relevant information from the beginning of the process to enable meaningful consultation to occur.

[52] I am also of the view that Mr Bryant gave Ms Roach misleading information when he said to Ms Roach at the initial meeting on 28 November "so I invite feedback from all of you". This is stated in the script for the meeting that he had prepared for himself. However, in his oral evidence he said clearly that he had only sought feedback from Ms Roach. He had therefore falsely created the impression that he was consulting other employees about possible disestablishment of their roles. Indeed, Mr Marsh expressly addressed this in his letter to Mr Matthews on 13 December when he asked for the feedback, but was given no answer until 14 December, when Mr Matthews was instructed to reply "there is no feedback from other employees". This was also a misleading answer, as it suggests that no feedback had been received, instead of the true picture that no feedback had been sought.

[53] This was not a mere detail. To suggest that the company was contemplating disestablishing other roles created an impression of an overall factual matrix which was not accurate.

[54] In conclusion, I find that there were significant flaws in the procedure followed by the respondent which no fair and reasonable employer could have made in all the circumstances. Therefore, the procedure was unjustified.

Was the dismissal substantively justified?

[55] First, I shall address the allegations made by Ms Roach that she had been bullied and belittled by Doug Haselden. Whilst these allegations were not being pursued as a separate grievance by Ms Roach, they were broadly relevant as Ms Roach attributed her dismissal to an unfair targeting of her borne out of Doug Haselden's alleged dislike of her.

[56] I am able to find on a balance of probabilities that Doug Haselden did approach Ms Gray and offer her Ms Roach's job as operations manager in early November 2016. I am also able to find that Doug Haselden was generally dissatisfied with Ms Roach by early November. He may have initially liked her (calling her a "young Ninja", according to his evidence) but he clearly grew dissatisfied with her. Whether this dissatisfaction was fair or not I am unable to say. There appear to have been underlying issues between Matt and Doug Haselden and Ms Roach which may have been colouring Doug Haselden's views of her, and vice versa.

[57] In any event, I accept Mr Bryant's evidence that he was the sole decision maker in deciding to disestablish Ms Roach's role and that he was tasked with the restructure partly to give distance between Ms Roach and Doug Haselden. I also accept Mr Bryant's evidence that once Ms Prendergast had resigned he reached the view that further cuts in management roles were necessary for financial reasons. I also accept that it made sense to disestablish Ms Roach's role rather than Matt Haselden's role, given that the latter was a director and shareholder, and could take a significant pay cut.

[58] Having seen and heard evidence about the financial state of the respondent company from October 2016 to March 2017, I am satisfied that, by December 2016, it was in need of action to reduce costs and increase revenues. I also accept that cutting (relatively) highly paid management roles was a legitimate and logical step to take.

[59] Finally, I believe that there were no alternative roles that Ms Roach could have carried out at that point apart from jump guard or possibly administration duties. Ms Roach was offered a jump guard role in Mr Matthews' letter of 20 December but, perhaps not surprisingly, she did not take up the offer. This was not because it was a lesser paid role but because, by then, she had lost faith in the company.

[60] In conclusion, I am satisfied that the need to restructure was genuine and that the

decision to disestablish Ms Roach's role was substantively justified.

Remedies

[61] I have found that the dismissal of Ms Roach was significantly procedurally flawed so as to render it unjustified, but that the decision to disestablish Ms Roach's role was substantively justified. I have also found that the respondent fulfilled its duty to offer Ms Roach any alternative roles to avoid her dismissal.

[62] These conclusions mean that Ms Roach may recover remedies flowing from to the flawed process, which caused her to suffer an unjustified disadvantage in her employment, but not the dismissal itself. This is because, even if the procedure had not been flawed, the dismissal would still have legitimately occurred for costs saving reasons.

Lost remuneration

[63] Usually, the only remedy available in such a situation is an award for compensation under s 123(1)(c)(i) of the Act, for humiliation, loss of dignity and injury to feelings. I shall address that head of remedy below. However, Ms Roach also seeks loss of remuneration which she says flowed from the impact upon her of the flawed process. This is because, she says, she was so severely impacted by the flawed process that she was unable to secure full time work for some six months after the dismissal.

This impact was on her confidence and mental health she says.

[64] Ms Roach did manage to get some work after her dismissal, working two mornings a week selling salmon and working on a casual basis for a friend in his car yard. Ms Roach's evidence was that she was not mentally able to take on full time work until around six months later. The two jobs she did do were not demanding and the car yard job was flexible enough for her to go home when she felt she needed to. She earned a total of $12,923 between February and July 2017, and claims the gross figure of $17,034 in lost remuneration.

[65] Mr Matthews argued in his submissions that this head of remedy cannot be awarded because the effects allegedly suffered which flowed from the flawed process are likely to be intermingled with effects flowing from the substantively justified dismissal. I agree with Mr Matthews. I cannot award the head of remedy sought because it is impossible to assess the extent to which Ms Roach's distress flowed from the process up to dismissal, and from the dismissal itself.

[66] I do not accept that it is safe to assume that the distress stems solely from the pre- dismissal actions of the respondent because Ms Roach is convinced that the restructure was not justified. Therefore, part of her distress is likely to come from the dismissal itself, which she saw as confirming her fears that she was being unfairly targeted. However, I have found that the restructuring was based on a genuine need, and that the dismissal was substantively justified.

[67] This is not like the situation where I have to assess what compensation under s

123(1)(c)(i) of the Act to award in respect of the flawed process. Ms Roach seeks a precise dollar amount calculated by reference to her actual earnings, and the earnings she would have earned had she not been dismissed. Whereas the assessment of an award under s 123(1)(c)(i) necessarily involves an estimate of the impact of the flawed process as against the impact of the justified dismissal, quantifying a precise monetary loss using the same principle is inherently dissonant. Whatever figure I may arrive at risks imposing an unjust and prejudicial obligation upon the respondent.

[68] In conclusion, I decline to award lost remuneration to Ms Roach.

Compensation under s 123(1)(c)(i)

[69] Ms Roach is eligible to be considered for an award of compensation for humiliation, loss of dignity and injury to her feelings arising out of the flawed consultation process. Ms Roach, and a friend, Hamish Cross, gave evidence of the adverse impact Ms Roach suffered. This evidence did not completely differentiate between pre dismissal and post dismissal effects, but there is clear separate evidence that Ms Roach was significantly impacted before the decision to dismiss her was made. I refer to the email from Mr Marsh to Mr Matthews on the morning of 20 December in which he says she was overwhelmed and too stressed to work or attend the meeting that day. In her oral evidence, Ms Roach says she was unable to get out of bed that day.

[70] I accept this evidence. It is clear to me that Ms Roach had been hearing negative comments about her from Doug Haselden prior to the meeting of 28 November, and she was concerned that she was being targeted when she was told at that meeting that her post could be disestablished. She was then advised, correctly, by Mr Marsh that insufficient information had been provided to her to enable the consultation to be meaningful. That is likely to have increased her suspicions and her stress.

[71] Then, after Ms Prendergast's resignation, she was told that she still had to attend a meeting about disestablishing her role, but was not told why this was necessary after the resignation. She was therefore almost inevitably going to have concluded that she was being unfairly targeted. In the absence of cogent information from the respondent, this was not an unreasonable reaction.

[72] Why had Ms Roach been so severely impacted? I believe from her evidence and that of Mr Cross, that she felt such a strong sense of injustice at her perceived unfair

treatment because she had previously worked very hard in helping to establish the business and had suffered significant stress after the business experienced the spate of accidents and serious injuries in October. She had also been battling what she saw as unfair treatment from Doug Haselden. Against this background, it is not surprising that she was significantly impacted by the flawed process.

[73] I will say that the respondent could have mitigated Ms Roach's perceptions of unfairness by having given her more relevant information from the very start, and having been much more transparent with her. It should also have addressed her personal grievance about Doug Haselden, rather than to ignore it. The respondent must, therefore, bear responsibility for the effects Ms Roach suffered.

[74] Ms Roach is therefore entitled to an award of compensation which reflects the significance of the effects suffered. They were more than trivial, and were relatively incapacitating for some months. Although she originally sought $10,000 in her statement of problem, she asked for more in her brief of evidence. I am not limited by what she sought in her statement of problem therefore.

[75] Taking all factors into account, I believe that an award of $15,000 is an appropriate award under s 123(1)(c)(i) of the Act.

Contribution

[76] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[77] Mr Matthews submits that Ms Roach did contribute to the situation giving rise to the personal grievance because she was not responsive and communicative throughout the process. I can address that argument in short order. Ms Roach, through her lawyer, was entirely communicative, as she was continuing to seek pertinent information about the proposal to disestablish her role, from shortly after she learned of the proposal to the very day of her dismissal. She did not contribute to the unjustified disadvantage caused to her by the flawed consultation process, and I do not reduce the award.

Penalty

[78] Ms Roach seeks a penalty for the respondent having declined to attend mediation prior to the employment ending in relation to the personal grievance against Doug Haselden. She says this was a breach of good faith.

[79] Section 4A of the Act provides as follows:

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

(a) the failure was deliberate, serious, and sustained; or

(b) the failure was intended to undermine—

(i) bargaining for an individual employment agreement or a collective agreement; or

(ii) an individual employment agreement or a collective agreement; or

(iii) an employment relationship; or

(c) the failure was a breach of section 59B or section 59C.

[80] First, I accept that failing to attempt to mediate a personal grievance between an employee and employer in an on-going employment relationship can be a breach of good faith, and in particular a breach of the duty to "be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative". I note that s 3(a)(v) of the Act says that the object of the Act is to build productive employment relationships through the promotion of all aspects of the employment environment and the employment relationship "by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards".

[81] The respondent made no substantive reply to the requests by Mr Marsh to engage the respondent in mediation relating to the personal grievance against Doug Haselden. On

14 December Mr Matthews stated that "the grievance in relation to Mr D Haselden is a

separate matter". No other response was made.

[82] I conclude that the refusal to even answer substantively the request to mediate was a breach of good faith. The respondent had an employee who had formally raised a grievance against a director and shareholder of bullying. That indicates a serious employment relationship problem. As at that time, according to the respondent, it had not yet decided to dismiss Ms Roach. It should, therefore, have taken urgent steps to address

the grievance. Instead, it sat on its hands. It was not a separate matter to the redundancy proposal in the eyes of Ms Roach, and the respondent should have been alive to that.

[83] Having established that the refusal to engage in mediation was a breach of good faith, I must now consider whether a penalty should be imposed. The relevant part of s

4A is under sub section (a).

[84] First, I accept that the decision not to mediate in breach of the duty of good faith was deliberate. There was no evidence led by the respondent to the contrary. Second, I accept that the breach was sustained. Mr Marsh first asked for mediation on 13

December. He asked again later that day when no answer to the request was received in Mr Matthews reply. Mr Marsh asked again on 19 December, and reiterated the request later that day when, again, Mr Matthews did not address the request. A further request was made to mediate on 22 December, while Ms Roach was still employed. A final request was made on 17

January 2017.

[85] Finally, I accept that the breach was serious. This is because, as noted above, Ms Roach was still an employee, and until 20 December, was ostensibly at least still expected to work in the company. Her grievance alleging bullying was serious, and should have been treated as such. I am satisfied that the refusal to agree to mediation is likely to have caused Ms Roach further distress and confirmed in her mind that the respondent was, indeed, targeting her unfairly.

[86] I am therefore satisfied that a penalty should be imposed on the respondent company for failing to agree to mediate in respect of Ms Roach's grievance while she was still employed.

[87] Under the Act a company is liable to a penalty not exceeding $20,000. This breach was relatively serious, and resulted in the employment relationship being undermined4. I would say that the starting point is 50% of the maximum. I heard no mitigating or ameliorating factors to reduce that starting point. I also heard no evidence about the ability of the respondent to pay a penalty.

[88] The final step in fixing the amount of the penalty is to assess what amount is proportional to the breach. Stepping back, I believe that a penalty of $10,000 is

excessive. A more reasonable amount is $5,000, and I fix the penalty at that level.

4 I cannot conclude that that undermining was intentional on the part of the respondent.

[89] Should the penalty be paid to Ms Roach, as is contemplated under s 136 of the Act? I am satisfied on the balance of probabilities that the continued refusal to agree to mediation is likely to have adversely impacted Ms Roach's faith and trust and confidence in her employer to treat her fairly. I therefore direct that the penalty be paid directly to Ms Roach.

Orders

[90] I order that, within 14 days of the date of this determination, the respondent pay to

Ms Roach the following sums:

a. The sum of $15,000 pursuant to s 123(1)(c)(i) of the Act; and

b. The further sum of $5,000, being a penalty imposed upon the respondent pursuant to s 4A of the Act.

Costs

[91] I reserve costs. The parties are to seek to agree costs between them. However, if they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs should serve and lodge a memorandum setting out what contribution they seek, and the basis for it, within a further 14 days. The other party will then have a further 14 days within which to serve and lodge a reply.

David Appleton

Member of the Employment Relations Authority
