

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 119
3010971

BETWEEN GERALD SITOTOMBE
Applicant

A N D BROADSPECTRUM (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Malvern Gwizo, Advocate for Applicant
Kathryn Dalziel and Amy Kennerley, Counsel for
Respondent

Investigation Meeting: 13, 14 & 16 March 2018 at Christchurch

Submissions Received: 4 April 2018, 14 May 2018 and 17 August 2018 for
Applicant
23 April 2018 and 16 August 2018 for Respondent

Date of Determination: 24 August 2018

DETERMINATION OF THE AUTHORITY

- A. Gerald Sitotombe did not raise his personal grievances for unjustified action causing disadvantage within the requisite 90-day period and there are no special circumstances which justify granting leave to raise these grievances out of time. I do not have jurisdiction to hear and determine Mr Sitotombe's personal grievances for unjustified action causing disadvantage.**
- B. Broadspectrum (New Zealand) Limited did not breach any contractual duty or the duty of good faith in connection with Mr Sitotombe's wage rate and his learning and development opportunities**

within Broadspectrum. Mr Sitotombe's claims for these breaches are dismissed.

C. Broadspectrum did not breach s 63A of the Employment Relations Act 2000. Mr Sitotombe's claim for unfair bargaining is dismissed.

D. Broadspectrum did not breach its duty to provide Mr Sitotombe with a safe workplace. Mr Sitotombe's claims for these breaches are dismissed.

E. Broadspectrum unjustifiably dismissed Mr Sitotombe and in satisfaction of this grievance Broadspectrum must pay Mr Sitotombe:

a. \$9,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;

b. \$13,312.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000;

c. \$1,064.96 (gross) for reimbursement of other money lost, being holiday pay, pursuant to s 123(1)(b) of the Employment Relations Act 2000; and

d. \$399.36 for reimbursement of other money lost, being employer KiwiSaver contributions, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

F. There is no factual basis to sustain a claim for breach of the Fair Trading Act 1986. Mr Sitotombe's claim for breach of the Fair Trading Act is dismissed.

G. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] Gerald Sitotombe worked for Broadspectrum (New Zealand) Limited for two and a half years, from the end of September 2013 until the start of April 2016.

[2] Mr Sitotombe has four areas of complaint arising out of his employment. These form the basis of the claims that comprise the employment relationship problem that I have investigated. The four areas are:

- (a) During his employment, Broadspectrum promoted Mr Sitotombe from a Labourer to GPR Operator and then Scoper. Mr Sitotombe says Broadspectrum also promoted him to a Field Manager role but Broadspectrum disputes this. Arising out of these various promotions Mr Sitotombe complains that he was not paid the correct wage rate. Primarily he alleges he should have been paid \$32.00 per hour from the time he started working as a Field Manager. Alternatively, he says, he should have been paid \$32.00 per hour as a Scoper as Broadspectrum paid his colleague, who was also a Scoper, this rate. Finally, in connection with his various promotions Mr Sitotombe complains of unfair bargaining relating to the terms and conditions he was offered and that he was not given training and development opportunities.
- (b) During the course of his employment, Mr Sitotombe says Broadspectrum failed to provide a safe workplace as he was subjected to an excessive workload, unnecessary monitoring, an unfair disciplinary process and bullying and harassment.
- (c) Broadspectrum terminated Mr Sitotombe's employment because of a restructuring, which disestablished his Scoper role. Mr Sitotombe says his dismissal was unjustified.
- (d) Overall, Mr Sitotombe complains that Broadspectrum misrepresented the employment opportunity he accepted and this is a breach of the Fair Trading Act 1986.

[3] Broadspectrum denies that it is liable for any of the claims arising out of these areas of complaint. It also says that I do not have jurisdiction to deal with some of the claims as alleged.

[4] In order to deal with this employment relationship problem I will first consider the legal basis for the claims that stem from the areas of complaint and establish if I have jurisdiction to investigate them. Then I will identify the issues for the claims for which I do have jurisdiction and analyse the issues against the facts and applicable

law to determine if Mr Sitotombe is successful with any of his claims. Finally, if Mr Sitotombe is successful in any of his claims I will consider what remedies he is entitled to.

[5] A large number of allegations have been made in this matter and an array of claims expressed. My investigation into this matter took three days and the witness evidence and documentary evidence covered a lot of ground. The legal submissions presented in writing after the investigation meeting are detailed and comprehensive. I have considered all of this evidence and these submissions but given the volume, I simply cannot address each and every proposition of fact or law. Therefore, I note that in accordance with s 174E of the Employment Relations Act 2000 (the Act), my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but it does not record all of the evidence and submissions received.

Non-publication

[6] Counsel for Broadspectrum led character evidence regarding an individual involved in this matter. In my view, that evidence held no probative value to my investigation. I disregarded it and did not require the advocate for Mr Sitotombe to address it nor did I require the individual to give any evidence about it.

[7] The result is this evidence is not referred to in my determination but it was put before me and was not answered. There is a possibility that if this evidence is discussed by anybody in connection with this case it may leave an unfair adverse impression of that individual. This is not acceptable so I will prevent any further discussion of the character evidence, in relation to this matter.

[8] Therefore, pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication any of the character evidence led by counsel for the respondent at the end of the first day of my investigation, in connection with this matter.

Claims and jurisdiction

Breach of obligations in relation to promotions

[9] Mr Sitotombe's statement of problem sets out various claims relating to his promotions and, what he says are, failings by Broadspectrum. These claims include:

- (a) Breach of contract claims as Broadspectrum failed to:
- i. pay Mr Sitotombe \$32.00 per hour for the Field Manager and/or Scoper role when he was promoted; and
 - ii. provide learning and development opportunities and annual appraisals to Mr Sitotombe in his promoted roles.
- (b) Unjustified action causing disadvantage grievances as Broadspectrum failed to:
- i. pay Mr Sitotombe \$32.00 per hour for the Field Manager and/or Scoper role based on an agreement to do so when he was promoted, the value of the role he undertook and disparity of treatment, as his colleague was paid this amount for the same role;
 - ii. provide learning and development opportunities and annual appraisals to Mr Sitotombe in his promoted roles.
- (c) Breach of the duty of good faith as Broadspectrum failed to:
- i. pay Mr Sitotombe \$32.00 per hour for the Field Manager and/or Scoper role based on an agreement to do so when he was promoted, the value of the role he undertook and disparity of treatment, as his colleague was paid this amount for the same role;
 - ii. provide learning and development opportunities and annual appraisals to Mr Sitotombe in his promoted roles; and
 - iii. negotiate the terms and conditions of his promotions in a fair and constructive manner.
- (d) Unfair bargaining as Broadspectrum failed to meet the requirements of s 63A of the Act when it negotiated the terms and conditions of Mr Sitotombe's various promotions.

[10] Of these claims, counsel for Broadspectrum says the unjustified disadvantage grievances were not raised within 90 days of the events occurring which gave rise to

the grievances, as required by s 114 of the Act. As a result, absent special circumstances, which might allow the Authority to grant leave to raise the personal grievances after the 90-day period, I do not have jurisdiction to hear the grievances.

[11] In response to this the advocate for Mr Sitotombe advances three positions, in the alternative:

- (a) Mr Sitotombe did raise his grievances in time, applying a common sense approach to the issue such that a formal articulation of the grievance is not required, i.e. he complained to Broadspectrum about the various events within 90 days of them occurring, those complaints being sufficient to qualify as raising a grievance.
- (b) That if the complaints were not sufficient to raise a grievance or if the complaints fell outside the 90 days, then Mr Sitotombe raised the grievances within 90 days of the actions, he complains of, coming to his attention. Where the test for when the actions came to his attention being when he formed a reasonable belief that Broadspectrum's actions were unjustifiable.
- (c) If Mr Sitotombe did not raise his grievances in time, on either argument above, then there are special circumstances, which warrant leave being granted for the grievances to be raised out of time.

[12] These positions are based on the requirements relating to raising personal grievances set out in the Act. Pursuant to s 114(1) of the Act a personal grievance must be raised within 90 days of the actions, which are alleged to give rise to the grievances, occurring or the actions coming to the notice of the employee. Pursuant to s 114(4) of the Act the Authority may grant leave for a grievance to be raised after the 90 day period if the delay in raising the grievance was caused by exceptional circumstances and it is just to grant leave.

[13] In order to resolve the question of whether Mr Sitotombe raised his grievances in time, or should I allow him to raise the grievances out of time, I must consider:

- (a) On what dates did the actions, which constitute the alleged unjustified disadvantage grievances, occur or on what date did Mr Sitotombe become aware of these actions?

(b) When did Mr Sitotombe raise his personal grievances for unjustified action and were these 90 days after the dates in sub paragraph (a) above?

(c) If the personal grievances were raised outside the 90-day timeframe, are there exceptional circumstances such that I should allow the personal grievances to be raised after that 90-day period?

[14] The actions that give rise to Mr Sitotombe's grievances relating to the failure to pay him \$32.00 per hour for the Field Manager and/or Scoper role must have occurred in the pay period immediately after Mr Sitotombe was promoted to either role. I do not accept that there could be some later date that applies, being when Mr Sitotombe formed the reasonable belief that the failure to pay \$32.00 per hour was unjustifiable. I believe the two dates are the same – Mr Sitotombe must have formed the view that the failure to pay him \$32.00 per hour was unjustified when he became aware that Broadspectrum had not paid him that rate.

[15] Mr Sitotombe did not raise grievances for unjustified actions in writing within 90 days of these events. I accept that Mr Sitotombe did complain about his wage rate after his promotion but I am not satisfied that these complaints amount to raising grievances¹.

[16] Mr Sitotombe raised a personal grievance for unjustified dismissal through the lawyer representing him at the time, on 28 April 2016. In that written statement of grievance, his lawyer refers to a breach of his employment agreement for failing to pay him \$32.00 per hour, but this also does not constitute raising a grievance for unjustified disadvantage.

[17] In a subsequent letter of 19 May 2016, Mr Sitotombe's lawyer specifically states that he is raising a personal grievance for unjustified disadvantage in relation to pay disparity. This is clearly outside of the 90-day timeframe.

[18] Mr Sitotombe then lodged his statement of problem on 19 May 2017. The statement of problem does raise a grievance for unjustified disadvantage relating to the broader alleged failure of Broadspectrum to pay Mr Sitotombe \$32.00 per hour.

¹ Applying the criteria set out in *Creedy v Commissioner of Police* [2006] 3 NZELR 293 at para.[37]

As the events complained of occurred in 2014 this is clearly outside of the 90-day timeframe.

[19] The next step is to consider if I should grant leave to allow the unjustified disadvantage grievance relating to the failure to pay Mr Sitotombe \$32.00 per hour to be raised after the 90-day period. This turns on whether there are exceptional circumstances (as defined in s 115 of the Act), which caused the delay of some three years in raising this grievance. On the evidence I heard there are no special circumstances and I will not grant leave for the grievance to be raised after the 90-day period.

[20] Turning to the unjustified action grievances relating to the alleged failure to provide learning and development opportunities and appraisals, applying the same analysis, I reach the same conclusion:

- (a) The actions complained of occurred in the period after Mr Sitotombe's promotion and he would have been aware of the alleged failings at the time they occurred.
- (b) Mr Sitotombe did not raise appropriate grievances either orally or in writing prior to lodging his statement of problem.
- (c) The statement of problem was lodged after the 90-day period so the grievances were not raised in time.
- (d) There are no special circumstances which mean that I should grant leave for the grievance to be raised after the 90-day period.

[21] So, in respect of the claims raised for the alleged breaches of obligations in connection with Mr Sitotombe's promotions, I have jurisdiction to determine claims set out in paragraph [9] above for breach of contract, breach of duty of good faith and unfair bargaining.

Failure to provide a safe workplace

[22] Mr Sitotombe's statement of problem sets out various claims relating to alleged failings by Broadspectrum to provide a safe workplace for him. These claims are expressed as a breach of contract claim and an unjustified action causing disadvantage.

[23] Counsel for Broadspectrum raises the same jurisdiction issues with this unjustified action grievance and the advocate for Mr Sitotombe has responded in similar terms. So, again, I must determine if the unjustified action grievance in connection with the alleged failure to provide a safe work environment was raised within the 90-day period or whether I should grant leave for the grievance to be raised out of time.

[24] Applying the same analysis as above I reach the following conclusion:

- (a) Mr Sitotombe would have been aware of his complaints relating to excessive workload, unnecessary monitoring, an unfair disciplinary process and bullying and harassment as the events occurred.
- (b) Mr Sitotombe did not raise appropriate grievances relating to these matters either orally or in writing prior to lodging his statement of problem².
- (c) The statement of problem raised the grievance but this was lodged after the 90-day period from the events occurring, or the end of what was argued to be a continuous course of conduct, so the grievances were not raised in time.
- (d) There are no special circumstances which mean that I should grant leave for the grievance to be raised after the 90-day period.

[25] So, in respect of the claims relating to alleged failings by Broadspectrum to provide a safe workplace, I only have jurisdiction to hear claims arising as a breach of contract.

Unjustified dismissal

[26] There is no issue raised with my jurisdiction to hear the unjustified dismissal grievance.

² There was one written statement submitted by Mr Sitotombe during consultation over restructuring which raised issues with alleged discrimination by Wayne Brewster of Broadspectrum, however this document was created as a response to the restructuring and it raises allegations and complaints about Mr Brewster in the context of Mr Sitotombe being concerned with his involvement in the process - this is not expressed in terms that amount to raising a grievance for unjustified disadvantage.

Breach of Fair Trading Act 1986

[27] Mr Sitotombe's claim is that Broadspectrum misrepresented the employment opportunity, which he accepted, so Broadspectrum misled him and this is a breach of the Fair Trading Act 1986. Specifically the statement of problem refers to Mr Sitotombe being misled into believing his employment relations experience would be "tranquilous", meaning pleasant, joyful and peaceful.

[28] Counsel for Broadspectrum says this alleged breach can only be considered as alleged misleading and deceptive conduct in connection with any offer of employment and there is simply no evidence of this.

[29] Having considered ss 9 and 12 of the Fair Trading Act, s 162 of the Act and *Hutton v ProvencoCadmus Ltd (in receivership)*³, I accept that this claim for a breach of the Fair Trading Act can only arise in respect of alleged misleading conduct in connection with any offers of employment⁴.

[30] Further, having considered the evidence I also accept that there is no evidential basis for me to conclude that Broadspectrum represented to Mr Sitotombe, in the course of making an offer of employment to him, that any employment with it would be tranquilous.

Conclusion on claims

[31] For all of the reasons expressed above I will now move to consider the following claims:

- (a) Three claims relating to Mr Sitotombe's promotions:
 - i. Breach of contract claims as Broadspectrum failed to pay Mr Sitotombe \$32.00 per hour for the Field Manager and/or Scoper role when he was promoted; and Broadspectrum failed to provide learning and development opportunities and annual appraisals to Mr Sitotombe in his promoted roles.

³ [2012] NZEmpC 207

⁴ This conclusion is also supported by my view that ss 4 and 161(1)(f) of the Act provides for a claim based on misleading and deceptive conduct or alternatively if the claim relates to a breach of an obligation in an employment agreement then an applicant is better placed to claim a breach of contract.

- ii. Breach of the duty of good faith as Broadspectrum failed to pay Mr Sitotombe \$32.00 per hour for the Field Manager and/or Scoper role based on an agreement to do so when Broadspectrum promoted him, the value of the role he undertook and disparity of treatment, as Broadspectrum paid his colleague this amount for the same role. Also, Broadspectrum failed to provide learning and development opportunities and annual appraisals to Mr Sitotombe in his promoted role. And Broadspectrum failed to negotiate the terms and conditions of his promotions in a fair and constructive manner.
- iii. Unfair bargaining as Broadspectrum failed to meet the requirements of s 63A of the Act when it negotiated the terms and conditions of Mr Sitotombe's various promotions.

(b) A breach of contract claim relating to alleged failings by Broadspectrum to provide a safe workplace for him.

(c) Unjustified dismissal.

Breach of contract, breach of good faith and unfair bargaining

Issues

[32] For all three claims it is important for me to establish factually what occurred with Mr Sitotombe's roles at Broadspectrum. The relevant factual enquiry is, was Mr Sitotombe promoted to a Field Manager role.

[33] For the breach of contract claim I then need to determine:

(a) If there was a contractual obligation as alleged, so:

- i. In the course of any promotion that did occur, did Broadspectrum offer and did Mr Sitotombe accept a wage of \$32.00 per hour; and/or

ii. Did Broadspectrum have an obligation to provide Mr Sitotombe with learning and development opportunities and appraisals;

(b) If there was a contractual obligation as alleged, did Broadspectrum breach that obligation; and

(c) If Broadspectrum did breach an obligation, what loss did Mr Sitotombe suffer as a result?

[34] For the breach of good faith claim I need to determine if:

(a) In the course of negotiating any promotion that did occur, Broadspectrum met its duty of good faith;

(b) As a result of any promotion that did occur, Broadspectrum should have paid Mr Sitotombe \$32.00 per hour because this was the going rate or the rate at which a colleague was paid (so that Mr Sitotombe was not treated in a disparate way) and, if Broadspectrum should have paid Mr Sitotombe this rate, whether any failing by Broadspectrum was a breach of the duty of good faith;

(c) Broadspectrum had an obligation to provide Mr Sitotombe with learning and development opportunities and appraisals, and if there was this obligation, whether any failing by Broadspectrum was a breach of the duty of good faith.

[35] For the unfair bargaining claim I need to determine if, in the course of any promotion that did occur, Broadspectrum met the requirements of s 63A of the Act.

Mr Sitotombe's promotions

[36] Mr Sitotombe commenced work with Broadspectrum on 30 September 2013. He was employed as a labourer on a fixed term contract.

[37] When this fixed term contract expired, in January 2014, Mr Sitotombe's role was extended and he worked as a records specialist in Broadspectrum's Design division.

[38] In March 2014, Mr Sitotombe became a Ground Penetrating Radar operator in the Construction division working as part of the GPR team. The GPR team consisted of a group of GPR operators who were supervised by Mason Plato.

[39] The first and important conflict between Mr Sitotombe's version of what occurred in his various promotions and Broadspectrum's account is an issue over Mr Plato's status as a supervisor of the GPR team.

[40] Mr Sitotombe says Mr Plato was a Field Manager for the GPR team and when he left the team there was a vacant Field Manager role. Mr Sitotombe says Broadspectrum asked him to take over the vacant Field Manager role, hence his promotion.

[41] Broadspectrum's position on this point was slightly confused. Jay Christie who managed the Construction team said that Mr Plato was a Field Manager but he was only acting as a supervisor for the GPR team; Mr Plato had the title of Field Manager and the pay rate, from a previous role, but he was not operating as a Field Manager when he supervised the GPR team. Mark Crowle, the General Manager of the alliance between Broadspectrum and Enable, said Mr Plato was a Field Manager for the GPR team. Either way both witnesses agreed that when Mr Plato left the GPR team he was not replaced by a new Field Manager as the GPR team did not require this.

[42] Mr Christie accepted in questioning that when Mr Plato left the GPR team he did ask Mr Sitotombe to take the lead of the GPR team for the time being. But his view was that Mr Plato was not acting as a Field Manager for the GPR team. Mr Plato was merely supervising the GPR team as there was no requirement for a Field Manager in that team just a need for someone to coordinate the work between the team members. In essence, by asking Mr Sitotombe to take the lead, Mr Christie says he was simply asking him to coordinate the work of the team.

[43] Having reviewed the evidence I heard on this issue and having looked at the contemporaneous documents I am satisfied that Mr Plato was a Field Manager when he supervised the GPR team. But I am also satisfied that there was no requirement for a Field Manager in that role. As a result, I accept that Mr Christie did not promote Mr Sitotombe to a Field Manager role when he asked him to take the lead after Mr Plato left.

[44] Other important aspects of Broadspectrum's management and operations that became evident to me fortify my conclusions on these two points. First, Broadspectrum documented all promotions through status change forms and for Mr Sitotombe his various promotions were documented except for his purported promotion to Field Manager. Second, Field Manager roles are operational roles that confer a status and pay rate that Broadspectrum honoured even if Field Managers were subsequently shifted to a lesser role. So it was credible that Mr Plato's title or even position was Field Manager even though he was operating as a supervisor. And, it follows that any promotion to Field Manager was not done lightly and without a proper need and, I expect, without proper authorisation from management – this did not appear to occur with a relatively innocuous request that Mr Sitotombe “take the lead for the time being”. Third, in terms of the operation of the GPR team, Mr Plato's departure was part of a process whereby the team was divided into three with each division being managed by a Build Manager (these roles being newly created roles, replacing the Field Manager roles). So even if there had been a need for a Field Manager previously there was not after the team was disbanded.

[45] Turning to Mr Sitotombe's promotion to a Scoper role, there is no dispute between the parties that Mr Sitotombe performed a Scoper role from May 2014.

[46] The second important conflict of evidence appears to be whether this was an independent role or merely part of a Field Manager role.

[47] My conclusion is that the Scoper role was a newly created role in terms of operation and reporting lines. It was not part of a Field Manager role. I have already determined that Mr Sitotombe was not promoted to a Field Manager role prior to him accepting the Scoper role, so he did not remain a Field Manager when this change was effected. I also determine that Mr Sitotombe was promoted solely to a Scoper role; so, Mr Sitotombe was not subsequently promoted to a Field Manager role that had scoping duties.

[48] My conclusion on Mr Sitotombe's promotions is that he was not promoted to a Field Manager role either when he was part of the GPR team nor when he was promoted to the Scoper role.

[49] Having established this, my analysis of the issues as they pertain to any alleged obligation to pay \$32.00 per hour is relatively straightforward. This is

because Mr Sitotombe's claim to be paid \$32.00 per hour rest primarily on his assertion that he was a Field Manager and \$32.00 per hour was the applicable rate for that role. As he was not promoted to a Field Manager role, this fundamental assertion fails.

[50] I will however turn to consider whether as a Scoper Mr Sitotombe was entitled to \$32.00 per hour as part of my analysis of the issues having determined the facts relating to the alleged promotions.

Broadspectrum's contractual obligation to Mr Sitotombe as a Scoper

[51] There is no evidence to support a claim that the parties agreed Mr Sitotombe would be paid \$32.00 per hour as a Scoper. In fact, the evidence is completely contrary. The contemporaneous documents show a rate of \$23.00 per hour was offered and accepted and this was subsequently increased to \$25.60 per hour with payment backdated.

[52] In terms of the alleged contractual obligation to provide learning and development opportunities, Mr Sitotombe's advocate refers to the following provision in Mr Sitotombe's employment agreement:

Our success depends on the skill and expertise you bring to your role.

Accordingly, [Broadspectrum] has a strong commitment to staff development and training. This includes internal courses focusing on the specialist nature and type of work performed and equipment used.

We view learning as part of our culture. You are encouraged to continue this learning process, whether funded by you or the Company, and to expand your personal horizons throughout your career.

Your personal development will be regularly reviewed with you by your manager. It is important that you discuss your career objectives with your manager so that, where possible, assistance may be provided.

[53] Based on this clause there are two problems with Mr Sitotombe's alleged breach of contract claim as it pertains to learning and development opportunities. First, it is not clear that this clause imposes an obligation to provide those opportunities but rather it is an obligation to monitor development and then the provision of assistance with any development is discretionary. And, second, in any event, I am not satisfied that there was a breach of this provision by Broadspectrum.

There was no evidence to show that Mr Sitotombe discussed his career development, that he obtained a commitment by Broadspectrum to provide training or assistance in meeting his career objectives and that there was then a subsequent failure by Broadspectrum to meet that commitment.

[54] It is arguable that there was a contractual obligation to provide appraisals – there is no specific provision in Mr Sitotombe’s employment agreement but it may have formed part of his terms and conditions through the operation of policies and the stated commitment in his employment agreement to reviewing “(y)our personal development”.

[55] My conclusion on the evidence I heard is that there was one failure to provide an annual appraisal in May 2014 when Mr Sitotombe was promoted to the Scoper role. The consequence of this failing is not material in terms of Mr Sitotombe’s claim. First, Mr Sitotombe had only just been promoted to the Scoper role, so, in my view the appraisal may have had limited value in any event. Second, there had been ongoing discussions about Mr Sitotombe’s role and wage rate in terms of his placement into the GPR team and then promotion to Scoper. Third, a subsequent discussion of wages and review of performance resulted in Mr Sitotombe receiving a pay rise and that rise being back dated to his starting date in the Scoper role.

[56] So, my conclusion is there was no breach of the alleged contractual duty to provide an appraisal that supports Mr Sitotombe’s claim that Broadspectrum should have paid him \$32.00 per hour for the Scoper role.

Breach of good faith

[57] The breach of good faith claim is limited by my factual findings on Mr Sitotombe’s promotion to the Scoper role and the agreement reached over his wage rate.

[58] As outlined above I am satisfied that there was discussion with Mr Sitotombe about his promotion to the Scoper role, an agreement as to his rate of pay, subsequent review of his performance and a back dated pay rise. On reviewing this, I accept that Broadspectrum met the duty of good faith it owed to Mr Sitotombe.

[59] In terms of any alleged disparity of treatment because Mr Sitotombe’s colleague was paid more for the same Scoper role, I accept that this colleague was

paid more. However, this was because this employee had previously been a Field Manager and Broadspectrum retained this rate despite this employee not fulfilling a Field Manager role i.e. Broadspectrum did not reduce the employee's wage rate when he agreed to take effectively a lesser role. In these circumstances, paying Mr Sitotombe a lower wage rate was not a breach of the duty of good faith.

[60] For the reasons outlined above regarding the alleged breach of contractual duty to provide learning and development opportunities and appraisals, I find that Broadspectrum did not breach the duty of good faith for the same alleged failure – essentially, because there was no such failure or it was of no consequence.

Unfair bargaining

[61] There was insufficient evidence for me to conclude that Broadspectrum failed to meet the obligation imposed on it by s 63A of the Act.

Breach of duty to provide a safe workplace

[62] My determination of this claim is largely based on an evidential investigation. Mr Sitotombe made a number of allegations against Broadspectrum, and in particular, his managers, based on his work, the supervision of it and various actions and behaviour directed at him.

[63] In summary Mr Sitotombe's claim alleges:

- (a) Broadspectrum assigned him an excessive workload;
- (b) Broadspectrum used GPS inappropriately and without reason to monitor him;
- (c) Broadspectrum conducted a disciplinary process unfairly and without good reason;
- (d) Broadspectrum employees bullied and harassed Mr Sitotombe.

[64] Specifically, the bullying and harassment allegations include management employees:

- (a) Following Mr Sitotombe to the toilet;

- (b) Misleading and misrepresenting Mr Sitotombe's wage rate;
- (c) Making false allegations about Mr Sitotombe refusing work;
- (d) Making exaggerated and misleading statements about Mr Sitotombe being confrontational;
- (e) Failing to support Mr Sitotombe in his work, leading to him being ostracised;
- (f) Unfairly rating Mr Sitotombe in a wage review in August 2015;
- (g) Treating Mr Sitotombe on a disparate basis;
- (h) Failing to keep accurate work records;
- (i) Failing to respond to Mr Sitotombe's complaints; and
- (j) Allowing racial harassment of Mr Sitotombe.

[65] I find that Broadspectrum did not assign Mr Sitotombe an excessive workload, it used its GPS monitoring appropriately and the disciplinary process it conducted was justified and carried out correctly.

[66] As to the bullying and harassment allegations my first observation is that not all of the events complained of occurred. My second observation is if they did occur they were innocuous events and do not constitute bullying or harassment.

[67] Overall, I can see why Mr Sitotombe alleges that the various actions are bullying and harassment but I am not satisfied that Broadspectrum failed to provide a safe workplace for Mr Sitotombe.

[68] Standing back and reflecting on Mr Sitotombe's claims, other than the unjustified dismissal, the recurrent theme is that he believes Broadspectrum should have paid him \$32.00 per hour because this was the going rate for work he was doing as a Field Manager.

[69] In addition, my analysis of the evidence indicates to me that Mr Sitotombe considered himself to be a very able employee and very good at his role.

[70] Putting these factors together it appears that Mr Sitotombe simply could not accept that Broadspectrum could justify paying him the rate it did and he turned this into a subjective perception that he was, in some way, unfairly treated by Broadspectrum. This is expressed in his various claims and his complaints in his evidence that Broadspectrum:

- (a) Did not acknowledge and honour his promotion to Field Manager, denying that this occurred;
- (b) Did not pay him at the rate for a Field Manager role even though he was operating in this role and his colleague was paid this rate, again denying that he was operating at the level he was;
- (c) Did not review his performance properly or engage constructively in his requests for pay review, rather it distorted what limited discussion did occur by arbitrarily grading him at the lowest level, creating concerns over his work performance, and creating complaints about his behaviour;
- (d) Did not engage in any discussion around learning and development or create opportunities for learning and development so there was a basis to claim he had gaps in the skills and competence required when he operated as a Field Manager;
- (e) Gave him an excessive work load to make performance more difficult;
- (f) Monitored him excessively to try to find a basis to be critical of his work.

[71] And, I think he believes that this approach became personal for individual managers in Broadspectrum, possibly because he was exposing their double standards, various failings and misrepresentations of his performance and conduct, such that these individuals harassed him.

[72] Objectively however the evidence does not support this. As I said above, the events did not occur or where they did, they were innocuous or at least not sufficient to constitute harassment. Mr Sitotombe's recollection of what occurred and his

extrapolation of claims is subjective and unreliable, particularly as they pertain to the claim that Broadspectrum failed to provide a safe workplace.

[73] The bottom line is Mr Sitotombe was not operating as a Field Manager and there was no basis for him to be paid \$32.00 per hour as claimed. There may have been some minor failings on Broadspectrum's part when it came to performance monitoring, reviews and discussions about wage increases; but none of this amounts to a breach of duty owed to Mr Sitotombe.

Unjustified dismissal

[74] Broadspectrum dismissed Mr Sitotombe after consulting with him over the disestablishment of one of the two Scoper roles and deciding that it would not appoint him to the remaining role.

[75] The issue, in simple terms, is was Broadspectrum's dismissal of Mr Sitotombe justified, with the onus resting on Broadspectrum to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act.

[76] In *Grace Team Accounting v Brake*⁵, the Court of Appeal said at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[77] Justification requires Broadspectrum to prove that its decision to dismiss Mr Sitotombe was genuine and it met the notice and consultation requirements of the Act.

Was the redundancy genuine?

[78] So, first I must consider if the redundancy was genuine. That involves considering the underlying business reason for the dismissal.

[79] In *Scarborough v Micron Securities Products Ltd*⁶, the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the

⁵ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541

⁶ [2015] NZEmpC 39

circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[80] This means, when assessing if the redundancy was genuine it is not my role to substitute my business judgment for that of Broadspectrum. I must consider the analysis made by Broadspectrum to determine that disestablishing one of the Scoper roles and then the termination of Mr Sitotombe's employment was required. Based on this, I must decide:

- (a) Whether the decision to disestablish one of the Scoper roles was one that a fair and reasonable employer could have made in those circumstances; and
- (b) Whether the decision not to appoint Mr Sitotombe to the remaining Scoper role was one that a fair and reasonable employer could have made in those circumstances.

[81] Mr Sitotombe's roles with Broadspectrum operated as part of the work it did under a Network Delivery Alliance with Enable to install underground broadband fibre cabling in Christchurch.

[82] In February 2016, the Alliance's installation work was coming to an end. Mr Crowle, as the Manager of the Alliance, reviewed the requirements for the remaining work in order to align and manage the overall remaining resourcing need for the installation project. As part of this analysis, he had a detailed plan of the scoping work that had been undertaken and the scoping work to be completed. With this information he produced a projection of the amount of time left for completion of the remaining scoping work and how that aligned with the design work to be undertaken. His conclusion was there was limited time left for two Scopers working concurrently, some 4 – 6 weeks. He decided that Broadspectrum should consider disestablishing one Scoper role and leave the remaining work for one Scoper.

[83] Mr Crowle explained the underlying structure of how the Alliance delivered the installation project, which informed his assessment of the resourcing needs. This involved separate tranches of work (NDPs) being delivered in 12 month periods with

different stages within each NDP. Each stage then had cabinets within it made up of up to 120 premises requiring cabling to be delivered to them.

[84] Mr Crowle's explanation of how the work was undertaken, how the Scoper role fitted into that and his conclusions on the projected work remaining were credible. I conclude that based on Mr Crowle's analysis a fair and reasonable employer could have come to the conclusion that one Scoper role could be disestablished, subject to consultation.

[85] I am satisfied that the decision to commence consultation over the proposed disestablishment of one Scoper role and the decision to effect that disestablishment was genuine.

[86] The second aspect of whether the redundancy was genuine was not as easy to assess. What Broadspectrum proposed was that if one Scoper role was disestablished then it would select whom of Mr Sitotombe or his colleague would remain in that role, leaving the other subject to possible dismissal for redundancy. Broadspectrum proposed selection criteria based on performance in the role.

[87] The criteria and the subsequent application of the criteria resulting in Mr Sitotombe being selected for possible redundancy appear on the face of it to be genuine i.e. there was no ulterior motive or some bias evident in the criteria and its application that suggested Mr Sitotombe's selection was predetermined and/or based on some other unspecified reason.

[88] The difficulty arises because there were flaws in the consultation undertaken, which I address below. These flaws mean that I cannot accept that Mr Sitotombe's selection was substantively justified.

Was the process of consultation a fair one?

[89] In *Grace Team Accounting*, the Court of Appeal confirmed that the other aspect of the justification of a dismissal for redundancy is whether the process by which the consultation over the proposed redundancy occurred was a fair one. And, in this regard, the requirements of s 4 of the Act and s 103A of the Act is the starting point for that.

[90] In *Stormont v Peddle Thorp Aitken Limited*⁷ Judge Inglis (as she was then) summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then 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 the 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.

[91] In my view I need to consider:

(a) Did Broadspectrum made a genuine effort to consult with Mr Sitotombe over the proposed disestablishment of one of the Scoper roles:

- i. Was Mr Sitotombe given sufficient information about the proposed disestablishment of one of the Scoper roles, to enable him to provide feedback;
- ii. Did Broadspectrum give him an adequate opportunity to respond; and
- iii. If it did give Mr Sitotombe an opportunity to respond, did Broadspectrum then consider those responses?

(b) Once a decision was made to disestablish one of the Scoper roles, did Broadspectrum sufficiently consult with Mr Sitotombe over his selection to not be appointed to the remaining Scoper role, again:

- i. Was Mr Sitotombe given sufficient information about his proposed selection;
- ii. Did Broadspectrum give him an adequate opportunity to respond; and
- iii. If it did give Mr Sitotombe an opportunity to respond, did Broadspectrum then consider those responses?

⁷ [2017] NZEmpC 71

(c) Did Broadspectrum consider and discuss alternatives to dismissal with Mr Sitotombe⁸?

[92] Broadspectrum did consult adequately over the proposed disestablishment of one of the Scoper roles, but it failed to consult adequately over Mr Sitotombe's selection.

[93] Broadspectrum's consultation with Mr Sitotombe included:

- (a) Mr Crowle met with Mr Sitotombe (and separately with his colleague) on 24 February 2016 to inform him of the proposed restructure and then provided him with a letter outlining the proposal with the rationale for it. The letter also set out the proposed selection criteria and a timeframe of the various stages for consultation.
- (b) Mr Sitotombe provided written feedback on the proposal on 25 February 2016.
- (c) Mr Crowle considered this feedback and decided that Broadspectrum would proceed to disestablish one Scoper role. Mr Sitotombe was advised of this in a letter on 29 February 2016. In that letter Mr Crowle also advised Mr Sitotombe that he would now move to the selection phase based on key measures of performance, outlining three areas of performance and how that would be measured.
- (d) Mr Sitotombe provided further feedback in writing on 2 March 2016. This feedback raised concerns about Broadspectrum's conclusions on the quality and quantity of his work performance and it set out specific complaints about Mr Brewster's behaviour toward him and concluded that the "investigation" into his work performance was not fair.
- (e) Broadspectrum responded to Mr Sitotombe's complaint about the assessment of his work by tasking Neil Farnell, another manager in Broadspectrum, with conducting an independent assessment of the data that had been analysed.

⁸ Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102

- (f) Mr Farnell reported to Mr Crowle and based on his report Mr Crowle proceeded to apply the selection criteria based on Mr Brewster's information as updated by Mr Farnell.
- (g) Mr Crowle decided to appoint Mr Sitotombe's colleague to the remaining Scoper role leaving Mr Sitotombe facing possible redundancy. Mr Sitotombe was advised of this in a letter on 8 March 2016. This letter also advised Mr Sitotombe that Broadspectrum did not have any suitable redeployment options for Mr Sitotombe, so his last day of work would be 8 April 2016.

[94] Broadspectrum's failings concern the application of the selection criteria:

- (a) Mr Crowle says Mr Brewster had been closely analysing the work of the Scopers over the previous two months and the letter of 29 February 2016 refers to specific measures of performance. However, the information provided to Mr Sitotombe was insufficient, cursory and the conclusions expressed lacked any underlying analysis or examples to support them.
- (b) Mr Sitotombe raised concerns about the selection criteria and Mr Brewster's involvement in the assessment of his performance against the criteria and Mr Crowle did not properly address these concerns.
- (c) Mr Crowle did address one area of concern relating to the analysis of performance by instructing Mr Farnell to review Mr Brewster's calculations. This assessment only addressed one area of performance criteria and on closer analysis contained some of the flaws that Mr Sitotombe raised about Mr Brewster's assessment.
- (d) Mr Sitotombe was not given a proper opportunity to respond to Mr Farnell's assessment and conclusions.

[95] Because of these various failures, the consultation process was not justified. And, as the flaws in consultation directly informed Mr Crowle's selection of Mr Sitotombe, I believe the selection was also not justified. That is, the flaws in the process were such that I cannot say that a fair and reasonable employer could have

selected Mr Sitotombe. So, I conclude that Mr Sitotombe's dismissal was not justified from a procedural and substantive perspective.

Remedies

[96] Having determined that Mr Sitotombe was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act. In this regard, Mr Sitotombe seeks compensation and reimbursement.

Compensation

[97] Pursuant to s 123(1)(c) of the Act I can award compensation for humiliation, loss of dignity and injury to feelings. This is about compensating Mr Sitotombe for the humiliation, loss of dignity and injury to feelings he suffered because of the actions giving rise to his grievance.

[98] Mr Sitotombe and some of his family gave evidence of the impact of the dismissal. The evidence shows that as a result of the way he was treated Mr Sitotombe was:

- (a) devastated and hurt;
- (b) humiliated and degraded by the allegations made about his work;
- (c) stressed for some weeks; and
- (d) unhappy and upset.

[99] I assess the level of compensation to be \$9,000.00.

Reimbursement

[100] Mr Sitotombe seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to s 123(1)(b) of the Act.

[101] If I am satisfied that Mr Sitotombe has a personal grievance and he has lost remuneration as a result, then pursuant to s 128 of the Act I must award Mr Sitotombe at least the lesser of his actual loss or three months ordinary time remuneration.

[102] Three months ordinary time remuneration for Mr Sitotombe is \$13,312.00.

[103] After Broadspectrum dismissed Mr Sitotombe, he started his own business providing similar services to the work he was undertaking at Broadspectrum. In the first nine months of operating, the profit Mr Sitotombe made was less than what his ordinary weekly wage would have been at Broadspectrum. In 2017, Mr Sitotombe made regular profit from his business that exceeded his ordinary weekly wage at Broadspectrum. Based on the profit figures provided, I calculate Mr Sitotombe's actual loss arising from his unjustified dismissal to be \$19,141.55.

[104] So, the starting point for any award of reimbursement of lost remuneration is \$13,312.00 being the lesser amount of the two calculations.

[105] Pursuant to s 128(3) of the Act, I can exercise my discretion and award the greater sum by way of reimbursement. However, given the circumstances of this case, including the likelihood that Mr Sitotombe would have been dismissed at some later point when the rest of the Alliance cabling operation wound down, I conclude that I should not exercise my discretion and I award reimbursement of three months ordinary time, being \$13,312.00.

Interest, holiday pay and Kiwisaver contributions

[106] Mr Sitotombe seeks payment of interest on any reimbursement. Pursuant to clause 11 of schedule 2 of the Act I may award interest if I think fit. In this case I am not persuaded that it is appropriate to exercise this discretion and award interest.

[107] Mr Sitotombe seeks holiday pay on the lost remuneration and I will award this. I am satisfied that I can award this pursuant to s 123(b) of the Act. Mr Sitotombe is entitled to 8% of \$13,312.00, which is \$1064.96.

[108] Mr Sitotombe seeks employer Kiwisaver contributions on the lost remuneration. I am satisfied that I can award this pursuant to s 123(b) of the Act. Mr Sitotombe is entitled to 3% of \$13,312.00, which is \$399.36.

Contribution

[109] As I have awarded remedies to Mr Sitotombe, I must now consider whether he contributed to the situation that gave rise to his dismissal.⁹

⁹ Section 124 of the Act.

[110] This assessment requires me to determine if Mr Sitotombe behaved in a manner that was culpable or blameworthy, and this behaviour contributed to the unjustified dismissal occurring.¹⁰

[111] I do not accept that Mr Sitotombe's behaviour during this matter was in any way culpable or blameworthy and there is no contribution.

Determination

[112] Mr Sitotombe did not raise his personal grievances for unjustified action causing disadvantage within the requisite 90-day period and there are no special circumstances which justify granting leave to raise these grievances out of time. I do not have jurisdiction to hear and determine Mr Sitotombe's personal grievances for unjustified action causing disadvantage.

[113] Broadspectrum did not breach any contractual duty or the duty of good faith in connection with Mr Sitotombe's wage rate and his learning and development opportunities within Broadspectrum. Mr Sitotombe's claims for these breaches are dismissed.

[114] Broadspectrum did not breach s 63A of the Employment Relations Act 2000. Mr Sitotombe's claim for unfair bargaining is dismissed.

[115] Broadspectrum did not breach its duty to provide Mr Sitotombe with a safe workplace. Mr Sitotombe's claims for these breaches are dismissed.

[116] Broadspectrum unjustifiably dismissed Mr Sitotombe and in satisfaction of this grievance Broadspectrum must pay Mr Sitotombe:

- (a) \$9,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- (b) \$13,312.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000;
- (c) \$1,064.96 (gross) for reimbursement of other money lost, being holiday pay, pursuant to s 123(1)(b) of the Employment Relations Act 2000; and

¹⁰ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

(d) \$399.36 for reimbursement of other money lost, being employer KiwiSaver contributions, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[117] There is no factual basis to sustain a claim for breach of the Fair Trading Act 1986. Mr Sitotombe's claim for breach of the Fair Trading Act is dismissed.

Costs

[118] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[119] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority