

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 349
3109452

BETWEEN DOUGLAS SOPER
Applicant

AND SANFORD LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Mary-Jane Thomas, counsel for the Applicant
Kylie Dunn, counsel for the Respondent

Investigation Meeting: 29 and 30 April 2021 at Invercargill

Submissions Received: 30 April 2021 from the Applicant
30 April 2021 from the Respondent

Date of Determination: 6 August 2021

DETERMINATION OF THE AUTHORITY

- A Douglas Soper was not unjustifiably dismissed from his employment or unjustifiably disadvantaged as a result of the restructuring and redeployment process.**
- B Douglas Soper was unjustifiably disadvantaged because of the failure by Sanford Limited to comply with the requirements of s67D of the Employment Relations Act 2000.**
- C Sanford Limited is ordered to pay to Douglas Soper the sum of \$4,000 without deduction being compensation under s 123(1)(c)(i) of the Act.**
- D Costs are reserved and failing agreement a timetable for an exchange of submissions has been set.**

Employment Relationship Problem

[1] Douglas Soper commenced employment with Sanford Limited (Sanford) as a maintenance engineer at Big Glory Bay salmon farm on Stewart Island in 2002.

[2] Sanford is a limited liability company that carries on business as a fisheries company harvesting fish for processing and domestic and international sale. Sanford has two aquaculture operations on Stewart Island, mussel farming and salmon farming.

[3] Throughout late 2018 and early 2019, Sanford restructured its maintenance and engineering operations throughout New Zealand. The focus of the restructure was to move away from a reactive engineering team which was focused on repairs and towards a more measured preventative maintenance approach. Overall it resulted in an increase in engineering headcount in its operation in New Zealand.

[4] On 26 October 2018 Sanford held a meeting at which Mr Soper was present and proposed a restructure of its Stewart Island aquaculture operations, including Big Glory Bay and its Bluff site and factory engineering resources.

[5] It is from the proposed restructure of the Stewart Island aquaculture operation and the decisions that came from it that two of Mr Soper's three employment relationship problems arise.

[6] Mr Soper says that he was unjustifiably dismissed for reason of redundancy because his position was not surplus to the employer's requirements and the new role he was offered as redeployment was not significantly different to his own role. His view is that the process was designed to reduce his terms and conditions. Mr Soper also alleges that the process undertaken in relation to the restructure was flawed. That is alternatively an unjustified disadvantage claim.

[7] A second alleged unjustified disadvantage is that Mr Soper says his employment agreement was not in accordance with section 67D of the Employment Relations Act 2000 (the Act) and that there was no update to his individual employment agreement as required by the Act. The result of this is that Mr Soper says he did not receive a compensatory payment when he was required to be available on call to perform work outside his rostered hours in the event of an emergency.

[8] Mr Soper seeks reimbursement of lost wages, holiday pay and Kiwisaver contributions, \$30,000 for hurt and humiliation and \$10,000 for each of the unjustified disadvantage claims. Further compensation in lieu of the availability payment under s 123(1)(c)(i) and (ii) of the Act is also sought together with costs.

[9] Sanford says that Mr Soper raised his first personal grievance on 10 December 2018 and only events that occurred 90 days prior to that date can be within time for the purposes of a personal grievance. It does not consent to any matters being raised outside of that period.

[10] Sanford does not accept that Mr Soper was unjustifiably dismissed and says that his dismissal for redundancy was substantively justified and carried out in a procedurally fair way. It does not accept that Mr Soper was unjustifiably disadvantaged in relation to any availability provision. It further denies there was any disadvantage in relation to the redundancy process.

[11] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist.

The issues

[12] The Authority needs to determine the following issues in this matter:

- (a) What are the material provisions in the employment agreement?
- (b) What are the relevant legal principles?
- (c) Was the dismissal for reason of redundancy genuine, requiring an analysis of:
 - (i) The business reason for the restructuring.
 - (ii) Whether the role of farm and vessel shift engineer was substantially similar or significantly different to Mr Soper's position of maintenance engineer.
 - (iii) Was there an ulterior motive in disestablishing Mr Soper's role?
- (d) Was the dismissal procedurally fair?

- (e) Was Mr Soper unjustifiably disadvantaged by the process?
- (f) Was Mr Soper required to be available to perform additional hours of work under his employment agreement in accordance with s 67D of the Act?
- (g) If so, did his employment agreement comply with the requirements of s 67D?
- (h) If Mr Soper is found to have been unjustifiably dismissed or disadvantaged then what remedies should be awarded and are there issues of contribution and mitigation?

What are the material provisions of the employment agreement?

2002 individual employment agreement

[13] Mr Soper's evidence was that some of the terms and conditions from his 2002 employment agreement were not carried across to the employment agreement that he signed in 2008. He refers to long service leave, provision of fish and mileage. Mr Soper said in evidence that his first individual employment agreement was "torn up and thrown away" by his manager in 2006. He said that he was never given a copy of the 2002 employment agreement but was permitted to go into the office and have a look at it if he wished. The evidence supported that Mr Soper retained a sense of grievance about this. None of the witnesses who gave evidence from Sanford had been employed at that time.

2008 employment agreement and variation in April 2011

[14] The second employment agreement dated 1 July 2008 that Mr Soper signed together with an agreed variation on 12 April 2011 was in place at the time of the restructuring. Mr Soper says that he was paid a standard 40 hours per week with extra payment for work when he was in Invercargill picking up supplies for work and when called out but not for being on call. He was paid for those hours over and above his 40 hours per week.

[15] Mr Soper said in his evidence that he raised concerns that his employment agreement did not reflect the extra work he was carrying out and the agreed benefits. He said that he was told by his then manager that "omissions would be addressed at a later date".

Position description and duties

[16] The position description and duties set out in the first schedule to the employment agreement was as follows:

- (a) General maintenance of all the equipment at the Salmon Farm
- (b) Basic welding
- (c) Supervision of Contractors
- (d) Position is on call at night in emergency event.

Redundancy

[17] Clause 12 of the employment agreement was headed redundancy. Clause 12.1 provided:

In the event that the Employee's position of employment becomes legitimately surplus to the Employer's requirements, four weeks notice shall be provided of such termination.

[18] Redundancy compensation was set out in clause 12.

Days and hours of work

[19] Clause 5 provides for days and hours of work.

[20] Clause 5.1 provides that days of work shall be rostered as required.

[21] Clause 5.2 provides for hours of work:

Hours of work are variable because of the nature of the Employer's operations but shall be those required to complete the daily duties and shall average eight hours per day on an annual basis. The Employee shall have a 30 minute break for lunch and two 15 minute refreshment breaks during the course of the day.

Implied and express terms

[22] Clause 17 is headed implied terms. Clause 17.2 provided that the agreement sets out all the express terms.

[23] Clause 17.3 provides:

No representations, understandings or other agreements or arrangements will be recognised as terms of this Agreement unless they are:

- a. set out in this Agreement; or
- b. have been agreed and recorded in writing to take effect as additional terms and conditions, and are not inconsistent with anything in this Agreement.

The legal principles

[24] The Court of Appeal in *Grace Team Accounting Ltd v Brake* confirmed that the clear words of the justification test in s 103A now require the Employment Court [and Authority] to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done.¹ The test that the Authority applies in this case is whether the employer's actions and how it acted were what a fair and reasonable employer could have done.

[25] The Court of Appeal in *Grace Team* confirmed that it was not helpful to focus on case law pre s 103A when interpreting and applying s 103A.²

[26] The importance of addressing the genuineness of a redundancy was emphasised by the Court of Appeal.³ The Court of Appeal stated:

Having said that, however we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine mean the decision is based on business requirements and not used as a pretext for dismissing a disliked employee) it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.

¹ *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541 at [81] applying the justification test pre 1 April 2011.

² Above n1 at [84].

³ Above n1 at [85].

[27] A fair and reasonable employer could be expected to comply with statutory and contractual obligations. I have set out the relevant clause from Mr Soper's employment agreement for a redundancy situation where his position becomes "legitimately surplus".⁴

[28] Section 4 of the Act requires parties to deal with each other in good faith in the employment relationship and that includes consultation in a redundancy situation. Parties to an employment agreement must not mislead and deceive each other or do anything likely to mislead or deceive each other. Access to information relevant to the continuation of employment and an opportunity to comment on that is also required under s 4(1A)(c) of the Act.

[29] The Employment Court has confirmed that the emphasis is on substantial fairness and reasonableness, as opposed to pedantic scrutiny by an employer.⁵ In the same judgment the Employment Court held that the key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and to actively consult with affected employees prior to making a final decision.⁶

Was the redundancy genuine?

The business reason for the restructuring

[30] Peter Young is employed by Sanford as its Group Manager Engineering and Infrastructure Assets. In that role he oversees major projects, engineering policy and repair and maintenance planning. He has been in that role since May 2017 although has worked for Sanford since 2015. Mr Young led the restructure of the engineering team at Stewart Island.

[31] Mr Young was tasked with reviewing engineering functions across Sanford. In so reviewing the main feedback he received throughout the business was that repair and maintenance was predominantly reactive and in response to breakdowns. The focus was not on planned maintenance to prevent issues from occurring. This had financial impacts

⁴ Clause 12.1 of the employment agreement.

⁵ *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [60] with reference to *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

⁶ Above n 5 at [60].

because there was short notice of the repair and a break in operational output whilst repairs were carried out.

[32] The starting point for the restructure was planned maintenance with better coverage.

[33] Specifically at Stewart Island Mr Young ascertained at the time of the review from the operational manager that the Bluff engineering team were spending about 75% of the time and budget on reactive repairs and 25% predictive or preventative maintenance. Industry best practice would be 75% planned maintenance and 15% change projects and about 10% reactive repairs.

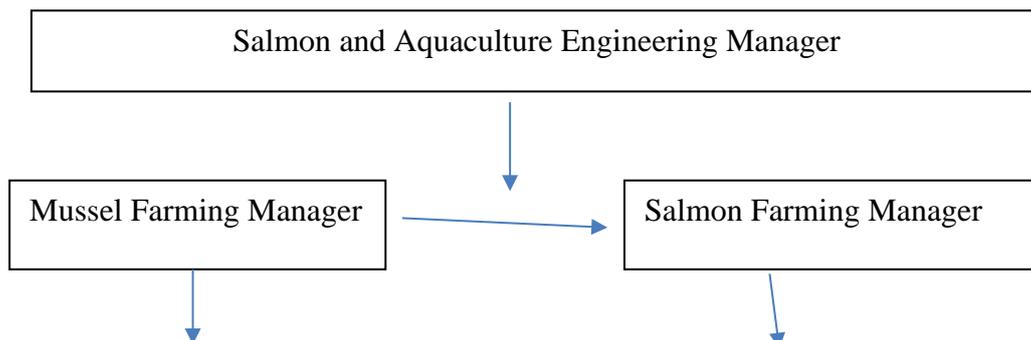
[34] In respect of coverage Mr Soper and the other maintenance engineer worked Monday to Thursday. This meant there was only maintenance cover for four days a week and for the other three days it was necessary to wait to carry out maintenance or use a contractor. Another issue was that the farms on Stewart Island were operational Sunday to Thursday which meant the maintenance engineers were working at the same time as equipment was needed leading to more down time than was ideal.

[35] As a result of the review Mr Young developed a proposal to restructure engineering services throughout the country which lead to an increase in full time equivalent (FTE) engineering positions.

[36] In conclusion I find that there were justifiable business reasons for the review and restructuring of engineering services at Sanford and specifically at Stewart Island. There was a genuine basis for wanting a focus on planned maintenance and better coverage.

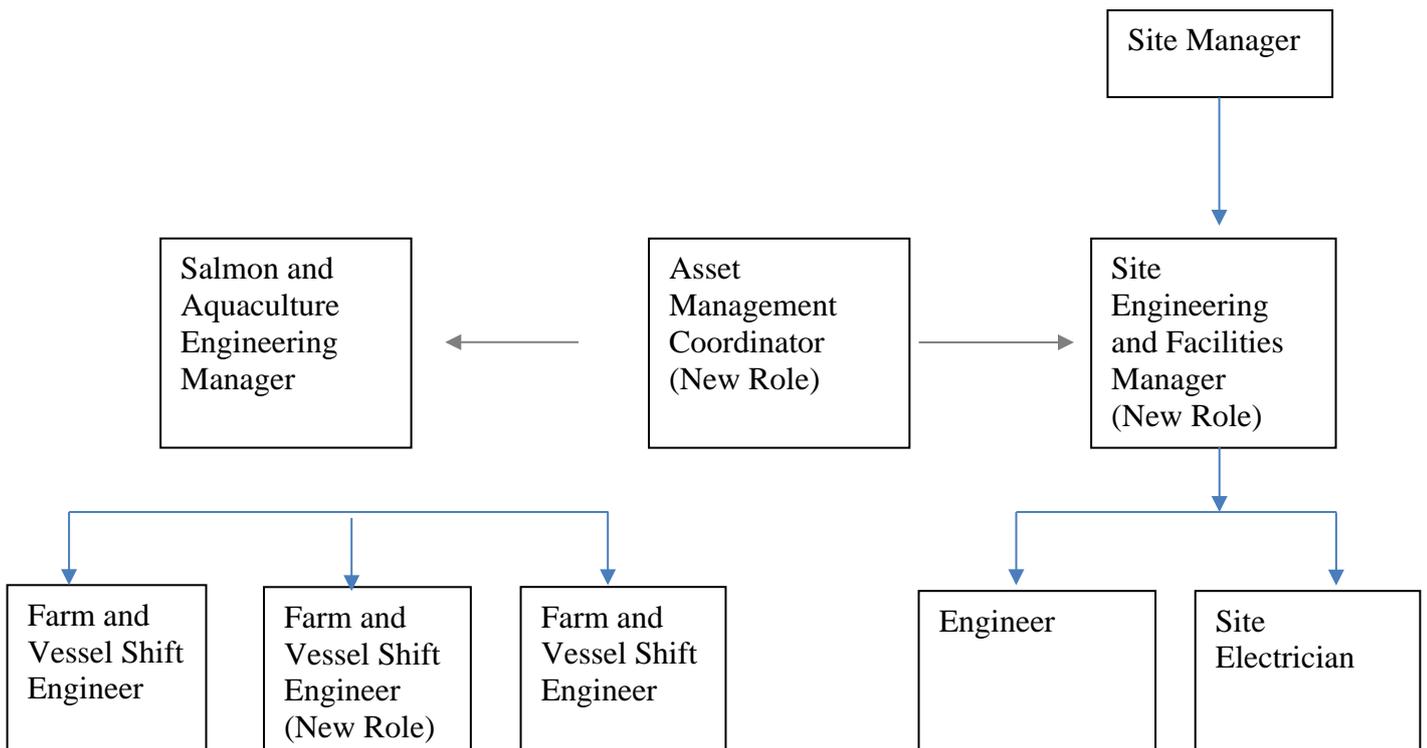
Was the new position created from the restructuring the same position that Mr Soper held?

[37] The structure as at the time of the proposed restructuring on Stewart Island was as follows:





[38] The new proposed structure for Stewart Island was as below:



[39] Changes to the reporting lines were set out with the proposed new roles. There was a change to the role of maintenance engineer and aquaculture engineer that the titles would be updated to farm and vessel shift engineer and the responsibilities would extend to include repair and maintenance work on all aquaculture and machinery and vessels along with project work. There was also a proposed roster change to seven days a week 24 hours per day.

[40] Mr Young initially did not identify Mr Soper's role as being disestablished. He considered that if there was a maintenance role available for Mr Soper at Stewart Island another path could be gone down.

Mr Soper's feedback to the proposal

[41] In written feedback to the proposal discussed at a meeting on 26 October 2018, Mr Soper stated that he was opposed to working on the mussel farm and that he had been specifically employed to work on the salmon farm by someone who had "head hunted" him. He also referred to being under enough pressure and stress with the work load he currently had. He said that he could not work with the mussel manager as they did not communicate well together and that would create friction and further stress.

[42] Further Mr Soper said that he had been working for Sanford for 17 years and had been working 15 years on the pattern of four days on and three off and a half day on Friday doing purchasing and work related jobs on shore. He said that he had kept everything running for 15 years working this pattern of days on and off and "will not agree to change."

Proposed restructuring reconsidered

[43] Mr Young said the feedback caused him to reconsider the proposed restructure and how the changes had been described. He had initially thought that increasing the resource in the area and adding an administrator role would ease the burden for undertaking maintenance of both the salmon and mussel farms. Mr Young considered if the focus is on the actual roles then the farm and vessel shift engineer role was different from Mr Soper's maintenance engineer role. He said he considered it would be more accurate to describe the situation as one where Mr Soper's maintenance engineer role with work based on the salmon farm was to be disestablished and he could be offered the farm and vessel shift engineer role with work split between the mussel and salmon farms as a redeployment option.

[44] Mr Soper was advised of the reconsidered proposal for change and disestablishment in a letter from Mr Young dated 5 December 2018 and had an opportunity to give any further feedback. The proposed role was stated in that letter to be significantly different to Mr Soper's maintenance engineer role. Six reasons for this were provided. It was proposed that the role of maintenance engineer would be disestablished with an opportunity for redeployment to the new position of farm and vessel shift engineer or redundancy.

[45] Ms Thomas submits that from the feedback Mr Young formed the view that Mr Soper was unwilling to work on the mussel farm and was less positive about the change than the aquaculture engineer Jason. She stated that this was not put to Mr Soper but rather simply the changed proposals. She submits that there was an obligation to put that.

[46] It was open to a fair and reasonable employer to conclude Mr Soper had concerns about working on the mussel farm. Mr Soper uses the word “opposed” in his feedback. That was in part because he was employed to work on the salmon farm. The feedback resulted in a changed view on the part of Sanford that the expectations of the new role were significantly different to Mr Soper’s role. One of the reasons set out in the letter of 5 December 2018 was that he would be part of a pool of engineering resources collectively responsible for undertaking work on all aquaculture equipment not just salmon farm equipment. Mr Soper was invited if he wished to respond to that proposal change. I do not consider that more was required. Part of the changed proposal was direct redeployment to the new role but the possibility of redundancy was also available.

Were there significant differences between the roles?

[47] Ms Thomas submits that the engineering role was predominantly the same under the new structure.

[48] Ms Dunn submits clause 12.1 in the employment agreement was engaged.

[49] The new farm and vessel shift engineer role whilst involving work that Mr Soper was able to perform required work across both the salmon farm and mussel farm with project work and work on vessels at Stewart Island and Bluff. I accept that Mr Soper had undertaken work on occasion on the mussel farm, on the vessels and some project work. He had not though been performing work in the way proposed in the restructure. His feedback supports that. The evidence the Authority heard from Mr Soper was not inconsistent with that feedback. The salmon farm was the predominant place where he carried out maintenance work. His employment agreement and position description was consistent with the salmon farm being his place of work as well.

[50] The Authority also heard from Jaco Swart who is the Salmon Farm Manager. Mr Soper reported to Mr Swart. His evidence was that much of Mr Soper’s day was taken up responding to issues with the machinery with not a lot of time for planned maintenance.

He accepted that whilst Mr Soper would occasionally work at the mussel farm it was not part of his day to day job or duties. He said Mr Soper would occasionally cover Jason on the mussel farm when Jason was on leave or needed assistance or when machinery was shared but other than that Mr Soper worked on the salmon farm. He described the salmon farm in his oral evidence as the place where Mr Soper carried out the “vast majority” of his work. Mr Swart said that at the present time the engineers work differently across the mussel and salmon farms and have more time to do scheduled work

[51] Objectively a fair and reasonable employer could consider from that feedback that there was a difference which was not insignificant in where and how the work was proposed to be performed.

[52] There was also a change to the roster pattern proposed. The proposed roster pattern had been six days on and three days off. When the new structure was confirmed following feedback the final decision about rosters was seven days on and seven days off for two of the roles and five days on two off for the third role. Mr Soper in feedback to the proposed restructure was not agreeable to change his roster. In his feedback he says that he had been undertaking the four days on three days off for 15 years. There was also going to be an on call roster and not on call in an emergency only. In his written evidence Mr Soper said that he considered shift patterns was a minor change however that does not reflect his feedback at the time which was the basis for the proposal changes to the proposal.⁷ These were changes from the expectations in Mr Soper’s current role and the new role and could be seen fairly and reasonably as significantly different.

[53] There was a change in reporting lines. Ms Thomas submits that was a “trivial change.” Mr Soper said in his evidence that he had reported in his existing position to the salmon and aquaculture engineering manager. The change in reporting lines needs to be considered with the other changes as well and the change in the direction of work to be undertaken. It was not substantially the same as the reporting lines in the existing role.

[54] Objectively assessed I conclude that Mr Soper’s position working predominantly on the salmon farm four days on and three days off was not substantially similar and could

⁷ Original statement of evidence of Mr Soper at [21].

be fairly and reasonably seen as substantially different to the proposed role of farm and vessel shift engineer. It was a new role and not substantially the same role.

Ulterior motive

[55] There was a suggestion that the process and in particular the disestablishment of the role was an ulterior motive to reduce Mr Soper's terms and conditions. The Authority heard evidence from union organiser Trevor Hobbs about this. Mr Hobbs supported Mr Soper after the restructuring proposal and at negotiations for an employment agreement for the farm and vessel shift engineer role.

[56] I have found the farm and vessel shift engineer role was a new role. In offering redeployment to Mr Soper there was no requirement for that to be on his existing terms and conditions. Mr Soper was advised by HR business partner Tracy South in a letter dated 21 December 2018 that if the proposed changes proceed that he would be offered one of the "newly established roles as a direct redeployment opportunity". Ms South also wrote that the redeployment would include an offer of a new employment agreement that Mr Soper would be able to negotiate. After final decisions were reached in 2019 there were negotiations with Mr Soper and Mr Hobbs about the employment agreement for the new role.

[57] In investigating the ulterior motive claim with respect to reducing terms and conditions of employment the Authority considered the employment agreement negotiated with Mr Soper and his union for the offered redeployment role and compared it to Mr Soper's existing 2008 employment agreement and the variation in 2011.

[58] Most of the written terms in the proposed employment agreement for the new role are the same except that there was payment of salary on a monthly rather than weekly basis. There was an on-call allowance in the new agreement. The difference to the base salary in the main is the procurement work undertaken by Mr Soper on Fridays in Invercargill which was four hours per week. That work and payment for it was not in the 2008 employment agreement. The evidence supports it was paid as extra hours. I could not be satisfied that the requirement for Mr Soper to carry out that work would have continued if Mr Soper had accepted the new redeployment role. Given the roster change it would be less likely it would have. In some respects this was another difference with the new role to what Mr Soper had been carrying out in his role.

[59] There were other matters such as long service leave, provision of two salmon and mileage that were not included but they were not in the 2008 agreement or 2011 variation.

[60] I am not satisfied that objectively assessed the evidence supports an ulterior motive to reduce terms and conditions of employment by virtue of the initial or the changed proposal in all the circumstances.

Conclusion on genuineness

[61] Clause 12.1 of Mr Soper's employment agreement required that his position be legitimately surplus for a redundancy situation. A fair and reasonable employer could conclude that Mr Soper's position of maintenance engineer at the salmon farm working four days on and three days off was legitimately surplus to the requirements of Sanford within the meaning of clause 12.1 of his employment agreement. The disestablishment of Mr Soper's role was a decision following feedback that a fair and reasonable employer could have reached in all the circumstances.

Procedural fairness

[62] There was consultation and provision of information about the proposed changed structure. When there was a changed proposal after initial feedback there was information provided as to why it was considered the maintenance engineer role should be disestablished and why the expectations in the role were seen as significantly different to Mr Soper's current role. Appropriately further opportunity for feedback to the change to the proposal was provided.

[63] There was a further meeting with a PowerPoint presentation to discuss the decision on 15 February 2019 that Sanford were proceeding with the initial proposed changes.

[64] Mr Soper was advised in a letter dated 15 February 2019 from Mr Swart that his role of maintenance engineer was disestablished with effect from 1 March 2019 and he was offered redeployment to the position of farm and vessel shift engineer in the new structure. A draft employment agreement and position description was attached for his review. It was noted that there were two roster cycles and Mr Soper was asked to indicate his preference if he wanted redeployment. Mr Soper was advised that in the event that he did not accept redeployment and there was no alternative role then his employment would be terminated

on the grounds of redundancy. An estimate of his redundancy entitlement was attached to the letter.

[65] Mr Soper wrote on the preference slip that he accepted redeployment and the option of the seven day on and seven day off roster. He added that it was “without prejudice” and subject to the outcome of his two personal grievances.

[66] At that time two personal grievances had been raised by Mr Soper. The first on 10 December 2018 raised a personal grievance under s 103(1)(h) of the Act that he had been disadvantaged by the employment agreement not being in accordance with sections 67C, 67D, 67G or 67H of the Act. There was also a concern that during the meeting at which the proposal to restructure was put it was encroaching on his terms and conditions of employment and his agreement would need to be renegotiated before the proposal could continue. He set out that he was told any change [to his employment agreement] would be after the restructuring and not before.

[67] The second personal grievance was raised on 26 February 2019. It was that Mr Soper had been unjustifiably dismissed following advice that his role was disestablished. At that time Mr Soper was still employed.

[68] Mediation took place between the parties on 1 March 2019. Following mediation agreed next steps were set out in an email from Rebecca Stewart who is the General Manager human resources to Mr Hobbs dated 1 March 2019 which included matters such as the view of Sanford that it was a redundancy situation. It was also confirmed that redeployment was offered to the new role and that a new employment agreement would be presented. The email set out that Sanford would like confirmation by close of business 22 March 2019 whether Mr Soper would accept that new role or take redundancy. It also provided that Sanford was open to meeting to discuss any outstanding personal grievance.

[69] Ms Thomas submits that Mr Soper was unjustifiably disadvantaged by the process in respect of the offer of redeployment. There was a video conference on 27 March 2019 attended by Mr Soper, Mr Hobbs, Mr Young, Ms South and Ms Stewart. Primarily the purpose of the meeting by conference was to negotiate the employment agreement for the new role offered by way of redeployment. The meeting was recorded and transcribed. Ms Thomas said that there was a departure from what had been agreed at that meeting which

was to hold a further meeting on 5 April 2019 after Mr Hobbs had provided wording for some clauses and Ms Stewart had considered the wording and made any changes.

[70] On 29 March 2019 Ms Stewart wrote to Mr Soper and Mr Hobbs and attached an amended offer of an employment agreement. In her email she set out that the amended employment agreement incorporated some of the additional changes requested and a full review of the employment agreement and the clauses Sanford agreed to consider. Ms Stewart set out that Sanford was of the view that the offer was no less favourable than Mr Soper's current terms and conditions of employment. She wrote that the offer was open for acceptance until 5.30pm on 5 April 2019. She recorded that Mr Soper was entitled to a reasonable opportunity to seek independent advice and could contact her if he wanted to discuss any aspects. The letter recorded that should Mr Soper not accept that offer by the expiry date his employment would end by reason of redundancy on 16 April 2019.

[71] A third further personal grievance was then raised on 4 April 2019 under s 103(1)(b) and (1)(c). The grievance referred to Sanford breaching the statutory duty of good faith by "seriously misleading and deceiving" the union and Mr Soper during the negotiations. One of the remedies sought was for "immediate moves to renegotiate Mr Soper's IEA using his existing IEA as the starting point as opposed to the new IEA that the employer has used ...".

[72] Mr Soper did not accept the offer of redeployment on the terms and conditions offered and his employment was terminated on 16 April 2019. He was paid his entitlements including redundancy compensation of about \$53,000 gross.

[73] Overall the process was one that a fair and reasonable employer could have undertaken. There was consultation and a redeployment offer. There was also mediation and a fairly lengthy negotiation by video conference about the employment agreement for the new role. Mr Hobbs provided further clauses of which some were incorporated. In its email of 1 March 2019 Sanford acknowledged the existing grievances and its openness to meet about them. This was important not only in the context of a redeployment offer but because of the without prejudice acceptance of redeployment subject to the outcome of the personal grievances.

[74] To the extent not having a further meeting as agreed before tabling its final offer could be seen as an unjustified action on the part of Sanford it needs to be seen in light of

the fact that there had already been considerable discussion and negotiation about terms and conditions. It also needs to be seen with the views about whether the redeployment role offered was the same or different. That influenced what could be achieved by negotiation. I have found it was a new role. That meant that it could be offered on different terms and conditions.

[75] I am not satisfied failing to hold a further meeting was sufficient to vitiate an otherwise justified dismissal for reason of redundancy. I am further not satisfied that disadvantage flowing from the failure to hold a further meeting has been established in all the circumstances.

[76] In conclusion Mr Soper was justifiably dismissed from his employment with Sanford for reason of redundancy and he was not unjustifiably disadvantaged by the process.

Unjustified disadvantage grievance under s 103(h) of the Act

Was there an availability provision in Mr Soper employment agreement?

[77] Mr Soper was rostered on for four days on and three days off. His hours of work were rostered as required and were expressed to be variable but on an annual basis to average eight hours per day. The evidence established his pattern of work was Monday to Thursday. His position was expressed in his employment agreement to be on call at night in an emergency event. There was no compensation payable for being on call.

[78] Section 67 was inserted into the Act on 1 April 2016 by the Employment Relations Amendment Act 2016 (2016 Act). The application, savings and transitional provisions arising from the 2016 Act are found in Schedule 1AA Part 1 of the Act. Clause 3 provides that for individual employment agreements entered into before the commencement of the 2016 Act section 67C to 67H apply to the agreement from 1 April 2017.

[79] Section 69D provides as follows:

67D *Availability provision*

- (1) In this section and section 67E₂ an **availability provision** means a provision in an employment agreement under which—
 - (a) the employee's performance of work is conditional on the employer making work available to the employee; and

- (b) the employee is required to be available to accept any work that the employer makes available.
- (2) An availability provision may only—
 - (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
 - (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.
 - (3) An availability provision must not be included in an employment agreement unless—
 - (a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and
 - (b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.
 - (4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.
 - (5) In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:
 - (a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision:
 - (b) the number of hours for which the employee would be required to be available:
 - (c) the proportion of the hours referred to in paragraph (b) to the agreed number of hours.
 - (6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:
 - (a) the number of hours for which the employee is required to be available:
 - (b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work:
 - (c) the nature of any restrictions resulting from the availability provision:
 - (d) the rate of payment under the employment agreement for the work for which the employee is available:

- (e) if the employee is remunerated by way of salary, the amount of the salary.
- (7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[80] Section 67D (1) defines an availability provision as a provision where the performance of work is conditional to the employer making it available and the employee is required to be available to accept any work which the employer makes available.

[81] The full Court of the Employment Court in *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* did not accept an argument that s 69D and 69E were intended to only deal with “zero hour” situations and not requirements to work overtime.⁸ The Court accepted in a submission that payment for availability has been a feature of collective agreements for many years, including in respect of allowances for call-back.⁹ Further it was stated:

...It seems to us to be self-evident that the value of an employee's otherwise private time applies equally whether they are waiting to be called in for work or on the off-chance they might be required to undertake additional hours of work at the end of their usual working day. In either case the employee is forgoing opportunities in their private life. We do not interpret s 67D as differentiating between the two scenarios.

[82] Mr Soper was required in his position to be on call (available) outside of his rostered hours in the event he was required to attend an emergency call out. This was an availability provision. Such a provision must not be included under s 67D(3) unless there are genuine reasons for it to be included and there is provision for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

[83] There was no suggestion there were not genuine reasons to include such an availability provision however the focus was on the fact there was no reasonable compensatory payment for being available for callouts outside of the rostered hours. There was no evidence of agreement that the salary included compensation for availability.

[84] I accept that this was unjustified and disadvantaged Mr Soper. He did not receive compensation for being available for an emergency call out and that did not comply with the

⁸ *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47 at [10 to [24].

⁹ Above n 8 at [29].

requirements of the law at that time. He has made out his personal grievance under s 103(h) of the Act.

[85] Before considering remedies I record that the grievance was raised on 10 December 2018. Mr Soper says that under s 114 (1) of the Act the amendments by virtue of the 2016 Act had not come to his notice. Whilst that may well be true I accept Ms Dunn's submission that ignorance of the law does not extend the time within which the 90 day period runs. On that basis therefore the grievance was raised about disadvantage for the 90 day period prior to 10 December 2018.

[86] The next issue is what remedies are available.

[87] The full Court of the Employment Court in *Fraser v McDonalds Restaurants (New Zealand) Ltd* considered remedies where an availability allowance of \$5 per hour was claimed by way of a remedy. It recognised the difficulty with claiming remedies by way of reimbursement within the confines of s 67D of the Act. That is because that would require the Court to fix terms and conditions of employment outside of its jurisdiction. The Court considered there were significant difficulties with the ability to set compensation under s67D even if through the remedies under s 123 of the Act.¹⁰

[88] I acknowledge those difficulties in the present case. I intend to confine consideration of remedies to compensation under s 123(1)(c)(i) of the Act. The grievance about the availability provision was raised within the same period there was a restructuring proposal. Mr Soper wanted to have the matter addressed before the outcome from the restructuring. I do weigh that there were negotiations about availability and on call allowances in the proposed employment agreement from 15 February 2019 so the delay was not excessive.

[89] Mr Soper's employment agreement did not meet the requirements of the law when he was required to be available outside of rostered hours on call. The evidence about humiliation and loss of dignity about this aspect was more limited. It is clear however from the grievance letter that Mr Soper wrote that he considered he had been disadvantaged by being required to work in excess of his rostered hours from time to time without compensation which did not comply with the law.

¹⁰ *Fraser v McDonald's Restaurant (New Zealand) Limited* [2017] NZEmpC 95 at [13].

[90] Any award must recognise that the grievance raised does not cover the entire period since April 2017. In all the circumstances I consider an appropriate award is the sum of \$4000.

[91] There was no contribution on the part of Mr Soper.

[92] I order Sanford Limited to pay to Douglas Soper the sum of \$4000 without deduction.

Costs

[93] Costs are reserved. Agreement may be able to be reached recognising that both parties have had success. Failing agreement Ms Thomas has until 19 August 2021 to lodge and serve submissions as to costs and Ms Dunn has until 2 September 2021 to lodge and serve submission in response.

Helen Doyle
Member of the Employment Relations Authority