IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 183
5572913

	BETWEEN	DAVID MURRAY SWEETMAN Applicant
	A N D	HNZ NEW ZEALAND LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Andrew Riches, Counsel for the Applicant Kay Chapman, Advocate for the Respondent
Investigation Meeting:	19 and 20 November 2015 at Christchurch
Submissions Received:	20 November 2015 on behalf of the Applicant and the Respondent
Date of Determination:	30 November 2015

DETERMINATION OF THE AUTHORITY

A. Mr Sweetman's dismissal for redundancy was procedurally unjustified, but substantially justified. I decline to reinstate Mr Sweetman to his former position, but award him compensation pursuant to s.123(1)(c)(i) of the Employment relations Act 2000

B. Mr Sweetman was not unjustifiably disadvantaged in his employment by being suspended from flying duties during his notice period.

C. Costs are reserved.

Employment relationship problem

[1] Mr Sweetman claims that he was unjustifiably dismissed from his employment as a helicopter pilot with effect from 22 October 2015. He also claims that he was

unjustifiably disadvantaged in his employment due to predetermination in the redundancy process and the disestablishment of his position as permanent pilot, and by the refusal of the respondent to allow him to undertake normal duties during his three month period of notice.

[2] Mr Sweetman seeks reinstatement to his position as well as compensation for lost wages and loss of a *per diem* allowance due to not being allowed to carry out his duties during his three month notice period.

[3] The respondent denies that Mr Sweetman has been unjustifiably dismissed or unjustifiably disadvantaged in his employment, claiming that the disestablishment of Mr Sweetman's position as a pilot was the result of a redundancy process that was both substantively and procedurally justified. It also denies that Mr Sweetman suffered any disadvantage from his suspension from flying duties, or that, if he did, the stand down was justified.

Brief account of events leading to the dismissal

[4] Mr Sweetman is a Canadian citizen and resident in Thailand. His employment with the respondent, which is based in Nelson, New Zealand, began on 17 September 2013. Mr Sweetman was employed as a permanent full-time off-shore captain flying in the Philippines pursuant to the terms of an individual employment agreement. The employment agreement is silent as to whether New Zealand law applied to his employment, but the offer letter refers to the Employment Relations Act 2000 (the Act) and the respondent has not challenged the jurisdiction of the Authority in this matter. Accordingly, I determine that New Zealand law applied to Mr Sweetman's employment with the respondent.

[5] The respondent provides offshore helicopter services for many of the world's largest oil and gas companies and Mr Sweetman was recruited to fly an AW139 helicopter for the Shell Philippines Exploration contract (the SPEX contract) with Shell Philippines Exploration B.V (Shell). His primary work location was Manilla in the Philippines, although his contract required him to be available from time to time to attend training or work at any of the company's other locations. He was entitled to receive a *per diem* allowance of US$60 for each night that he was on tour to cover food and other incidentals.

[6] Clause 32 of Mr Sweetman's employment agreement provided:

> *32. **REDEPLOYMENT AND REDUNDANCY***
>
> *32.1 We may terminate your employment for reason of redundancy if your position becomes, or will be become, surplus to our requirements. However, we will first examine whether any redeployment options are available which are in line with your skills and experience.*
>
> *32.2 In the event of redundancy the Company will give you three months' notice of redundancy, which will be inclusive of the notice period in clause "Termination of Employment". You may not be required to work all or part of the notice period in which case the remainder of the notice period will be paid. You may be required to carry out duties other than your normal duties, and in a different location during the notice period. No redundancy compensation will be payable.*

[7] Mr Sweetman's normal duty cycle was a 28 days on, 28 days off roster. It is the evidence of Mr Sweetman that the company employed a number of pilots who were initially hired on fixed term contracts to work on the Anadarko contract in New Zealand and the SPEX construction project. Mr Sweetman says their contracts were to end at the completion of the SPEX construction project, which was initially scheduled to occur in February 2015, but actually ended in mid-August 2015.

[8] Mr Sweetman says that he became aware partway through the redundancy consultation process in June 2015 that the employment contracts of those pilots on fixed term contracts were extended for a further two years, and that the pilots were transferred on to contracts for the SPEX project.

[9] Mr Sweetman says that, around the time that the fixed term pilots were being transferred into the permanent positions of the SPEX contract, Mr Sweetman was called into a meeting on 19 June 2015 with Brian Currie, the Base and Contract Manager for HNZ Global Philippines. Mr Sweetman says he was not aware that the meeting would be occurring, and was not told he could have a support person present. Another pilot (Forest Huth) was present and they were advised of a proposal that two positions were to be made redundant. He said he was shown a PowerPoint presentation which Mr Currie spoke to, but he was not given a copy of it until he asked for it a few days later. The Authority saw a copy of this document, which was entitled *HNZ SPEX Philippines Commencement of Consultation*.

[10] The text of the presentation was relatively short and is replicated below:

> ***Commencement of Consultation around Proposed Change***
>
> - *Thanks for making time to attend this meeting today.*

- *What I am doing today is starting the consultation process with you around some changes HNZ is proposing on making to our manpower resources that may impact your position with HNZ.*
- *Please note this is a proposal at this stage. No firm decisions have been made yet.*

Proposed Change

- *As you are aware we have embarked on a nationalisation program that has now introduced 2 new FOs*[1] *into the operation.*
- *These additional crews mean that we have excess crews for the operation and we may have to decrease the number of permanent International Touring Captains by 2.*
- *We are not looking at reducing training staff, Base Manager role, co-pilots, national employees or contractors.*

Proposed Selection Criteria

- *The selection criteria we are proposing on using to make the decision are:*
  1. *Total time in the AW139; and*
  2. *What other roles and responsibilities on top of flying the line the pilots perform.*

Your Feedback

- *We would appreciate your feedback on any aspect of the proposed changes by close of business 10 July.*
- *By email to Nina or myself or come and see me.*
- *We will consider your feedback before making any final decisions.*
- *I hope to be in a position to respond to your feedback by 17 July. At this time I will advise whether the proposal is confirmed or amended and, what the timelines will be.*

Support Available

- *Myself or Nina in New Zealand are available throughout this process should you require any extra support or if you have any questions.*
- *Please also utilise HNZ's Employee Assistance provider – STRATOS if you need counselling support as we go through this change process. You can contact them directly on (Australia)* [phone number omitted]*).*

[11] Mr Sweetman says that, when he became aware that the fixed term pilots had been transferred to permanent positions on the SPEX contract, he felt that the decision had already been made. He said it was clear that, if all the fixed term pilots were

[1] First Officers

retained, there would be a surplus of two pilots and the company had already stated that the fixed term pilots (who were called *contractors* within the company) would not be considered for redundancy. These pilots were called *contractors* because they worked on different contracts within the company. They were not contractors in the sense of being engaged on a contract for services. As there is a disagreement between the parties as to whether these pilots were truly employed on fixed term contracts, as defined in s.66 of the Act, I shall adopt the neutral term *contract pilots* in this determination. I shall say more about the status of these four contract pilots below.

[12] On 30 June 2015, Mr Sweetman wrote to Nina Dillon-Phillips, the company's human resources manager. In this letter, Mr Sweetman wrote the following:

> *Confidential*
> *30 June 2015*
>
> *Dear Nina and all concerned,*
>
> *First of all, I truly enjoy my job and intend to remain employed with HNZ until I retire if I am afforded that opportunity. I would be glad to accept any secondary duties the company may see fit to offer me if it will enhance my value to HNZ.*
>
> *Having said that, I have some serious concerns about the proposal that was presented to me by Brian Currie and further summarised in the email I received from Nina.*
>
> *The commitments the Company made to the permanent Captains are clearly stronger than those made to the casual fixed-term Captains, particularly in terms of how long the employment relationship was expected to last. The casual fixed-term Captains knew from the start of their employment that their contracts would expire at or around the completion of the construction phase. On the other hand, the permanent Captains were offered permanent positions specifically for the SPEX contract. Therefore, they had the reasonable expectation that their employment would last at least until the end of the SPEX contract including any potential extensions. The proposed redundancy plan does not take into account the different level of commitment associated with each type of contract. If a permanent Captain were to be made redundant under these circumstances, it would strongly suggest that the company was not adhering to the terms of the Letters of Offer.*
>
> *Since there are limited positions available, it would be more consistent with the terms of the permanent contracts to give these contracts priority and limit, if required, the number of contract extensions that are offered.* ***If only the requisite number of fixed term contracts were extended or renewed there would be no redundancy.***
>
> ***The following section of this letter was written after receiving new information:***

Unfortunately, it just came to my attention that Letters of Offer have already been sent to at least some of the fixed-term Captains. These offers, if accepted, will result in contractual obligations of the Company that did not exist when the redundancy proposal was presented. These obligations will directly affect the positions under question in this proposal. Making these offers during or shortly before the consultation phase is contrary to the spirit of the consultation process.

In summary, after spending a lot of time and effort trying to come up with feedback of a constructive nature, new information suggests that the decisions have already been made. It appears quite likely that two permanent Captains will be dismissed. These dismissals cannot be termed redundancies because the positions held by these Captains will continue to exist and be filled by Captains whose contracts were due to expire. I hope this is not what eventually happens since this, in my opinion, is not what a fair and reasonable employer would do in these circumstances.

Sincerely,
Dave Sweetman

[13] Mr Sweetman says that, on 21 July, he was invited to another meeting with Mr Currie and was given another PowerPoint presentation entitled *HNZ Response to Feedback Received*. Again, Mr Sweetman was given a hard copy. This document provided as follows:

Thank you for your feedback

- *Thank you for the feedback you provided.*
- *We have considered your feedback carefully.*
- *A number of key themes were raised which I will respond to in this presentation.*

1) ***Seniority not considered in the selection criteria***
- *HNZ philosophy is to select the best people for the roles. Selecting people based on seniority doesn't necessarily guarantee this and that is why we are not considering seniority in the selection criteria.*

2) ***"Contractors" vs permanents***
- *We do have pilots working for us who are regarded as contractors. These pilots worked for us on the Anadarko project and when this project concluded we wanted to retain these pilots permanently to work for HNZ in other campaigns with the same rig and to do other contracts we were bidding for with our spare 139s with the fall-back position being the construction phase for SPEX. They were termed contractors to match the work we foresaw. As explained to some of you, these contractors give HNZ a lot of flexibility to use on other short term contracts in New Zealand and Australia and this is why we will continue to use them.*

3) ***Relocating to New Zealand***

- *New Zealand Immigration would not approve non-New Zealanders/Australians to work in New Zealand when we have NZ or Aus pilots who can perform the work.*

4) ***Job sharing***

- *We did consider job sharing as an option but it is not financially practical. There are still costs involved in simulator training, recurrency training, work permits etc.*

5) ***Recall List***

- *Crew who are released will be put on a recall list so that they would be contacted in the event of a new contract opportunity. There is no guarantee that you will end up back in the Philippines.*

6) ***Criteria selected***

- *We chose objective criteria that could be easily measurable rather than subjective criteria.*

7) ***Secondary roles***

- *Pilots who advised the Base Manager that they wanted to take on additional responsibilities and had prior relevant experience were offered secondary roles.*

8) ***Pay cut***

- *Despite the potential financial benefits the company does not want to set a precedent where Captains are compensated the same as First Officers. Even on a voluntary basis.*

9) ***Crew numbers/Make up***

- *Captain–First officer ratio is sufficient for long term crewing requirements.*

Next steps – Confirmation of selection criteria

- *We confirm that the selection criteria we are going to use are:*
  - *1) Total time on the AW139 and*
  - *2) Other roles and responsibilities performed by the pilots.*

Final Decisions

- *Based on this selection criteria* [sic] *you are one of the two pilots we are going to make redundant.*
- *You will be given 3 months notice of redundancy as per your employment agreement from 21 July. However, you will not be required to work past the end of your current tour and you will be paid out the balance of your notice period to 21 October 2015.*
- *This decision will be confirmed in writing to you.*

Support Available

- *Please remember if you need additional support during this time, please contact our Employee Assistance provider. You can contact them directly on (Australia -* [number omitted]*)*

[14] Mr Sweetman said that, during a question session after the conclusion of the presentation (when he was handed his notice of redundancy), he found out that the company had intended all along to retain the contract pilots and that there would be no changes to the crewing requirements of the SPEX contract except for a variation that increased the core crew requirement to three crews (six pilots) onsite.

[15] It is Mr Sweetman's evidence that, aside from the issues with the contract pilots, he also has concerns about the way the selection criteria were used. He says that, shortly before or during the consultation phase, two additional roles (that of Flight Safety Officer (FSO) and Flight Data Management representative(FDM)) had been awarded to two of the five people in the pool of Captains under consideration for redundancy. He says that this process was done behind the scenes, and that no announcement had been made to the rest of the company and did not form part of the consultation process.

[16] With respect to the total time on the AW139, Mr Sweetman says that he had accrued 335 hours flying the AW139 at the time of his notice, which was more than three times the minimum required by the International Association of Oil & Gas Producers. He also says that the use of *raw hours* on-type[2] does not demonstrate the best performers and that most people in the industry would consider total hours of piloting in command of multi-engine helicopters to be a more meaningful measure than time spent on-type.

[17] On 21 July, Mr Sweetman emailed Mr Currie to say that he had arranged for some counselling with Stratos and declared that he believed the safest approach was for him to declare himself unfit to fly until he had received some advice from a professional. He also said the same day that he believed that a couple of days would be enough for him to *get his head together* but that he would attend counselling in any event.

[18] On 23 July, Mr Sweetman had emailed Ms Dillon-Phillips to say that he was raising a personal grievance regarding his dismissal and suggesting that they start the mediation process set out in Schedule 2 of his employment agreement. Mr Sweetman also emailed Mr Currie to say that he had received a one hour phone session with a psychologist from Stratos and that he would like to request one more day off with the intention of being able to fly again on Saturday, 25 July.

[19] On 23 July, following the initial exchanges between Mr Sweetman and Mr Currie, Mr Currie emailed Mr Sweetman to say that HR had, *for the time being, asked me to keep you off the flight schedule until they can properly respond to your request* (which refers to the request to raise a personal grievance). Mr Currie emailed

[2] Time spent flying a specific type of helicopter

Mr Sweetman the following day to say that the respondent's head office in Nelson had confirmed that it would have an answer to Mr Sweetman by 30 July in relation to him flying.

[20] On 29 July, Mr Sweetman received an email from Roger Shugrue, Head of Flight Operations (International) saying that it was standard company policy across the group, when the company believes a pilot to have been affected by an incident, or in this case a redundancy notification, to keep the pilot off the flying schedule. Mr Shugrue said it was a precautionary measure and would be reviewed once the grievance procedure request had been addressed by Mr Laird (Dennis Laird, Managing Director of the respondent) by 30 July. Mr Sweetman was ultimately not allowed back on the flight schedule before his notice expired.

[21] Mr Laird gave evidence to the Authority on behalf of the company. Mr Laird said that the narrowing of the group of pilots in the potential pool for redundancy (which consisted of five pilots), the proposed selection criteria, and the decision to apply the selection criteria, were based on the ongoing operational needs of the company and the desire to keep the most experienced pilots on the AW139.

[22] Mr Laird explained that the four contract pilots had originally been employed under casual employment agreements, (which Mr Sweetman had also originally been offered, but declined) and that the contract pilots had begun work on the Anadarko contract in New Zealand. However, Mr Laird says he had been advised by HR that the employment agreements provided to these four did not meet the New Zealand legislative requirements of being fixed term agreements as they did not comply with ss.66(1) and (2) of the Act. Mr Laird said that they had worked 28 days on and 28 days off, consistently, for the duration of the respective employment relationships with the company.

[23] Mr Laird said that when he was first considering the need to reduce pilot numbers in the Philippines, he and Ms Dillon-Phillips recognised the reality that the employment relationship of these contract pilots was not that of a casual or fixed term and that their employment agreements had not been updated to reflect the true nature of their relationship. He said that the contract pilots were treated as permanent employees and so the company embarked on a process to update their employment agreements.

[24] The Authority saw a copy of a letter of variation issued to one of the contract pilots on 29 June 2015. The respondent says that letters were issued to the other three contract pilots in materially identical terms. The material parts of the letter stated as follows:

> *VARIATION TO CASUAL AGREEMENT*
> *Extension to Casual Agreement*
> *We would like to offer you an extension to your Casual Agreement dated 7 August 2013.*
> *The agreement was due to conclude on 31 July 2015 but will now conclude on 31 August 2017.*
> …
> *All other terms and conditions of your Casual Agreement remain the same.*
> …

[25] Mr Laird said that, notwithstanding what the letter of variation said, the company still regarded these contract pilots as permanent employees, and he could not simply terminate their contracts when he was considering redundancies. They were excluded from the selection pool because of the flexibility they afforded the company by virtue of their respective Australian and New Zealand passports. A significant proportion of AW139 helicopter pilot work is in New Zealand, he says, and, if he had included them in the selection pool, he would have included a selection criterion in relation to flexibility/having the necessary visa requirements to work in Australia and New Zealand. This would have resulted in the same outcome, he says, as Mr Sweetman does not have the right to work in New Zealand or Australia.

[26] Mr Laird said that, in order to obtain a New Zealand visa for Mr Sweetman, the company would have had to have demonstrated to Immigration New Zealand that there were no New Zealand pilots available to carry out the work that they were employing him to do. However, due to a downturn in oil prices, there is now a surplus of New Zealand pilots available, so a visa would not be issued to Mr Sweetman.

[27] Regarding the issue of the nationalisation programme referred to in the first PowerPoint presentation, Mr Laird originally said in his brief of evidence that this is a requirement of the service contract between the company and SPEX. However, in his oral evidence it emerged that there was not a contractual requirement expressed in the SPEX contract, but that Shell expected the respondent to employ local pilots, because of national immigration expectations. As per the requirements of the programme, the

company was required to increase the number of local (Filipino) employees it employed in a responsible and timely way.

[28] Mr Sweetman does not contest that the nationalisation programme required the respondent to employ more Filipino staff, but he asserts that the recruitment of two Filipino pilots would not have impacted him if the contract pilots had not had their agreements renewed. In addition, Mr Sweetman says he was never told that there would be a long term effect on his employment by the nationalisation programme, and he was not consulted when the two Filipino pilots were recruited in November 2014.

[29] Mr Laird said that this nationalisation programme was discussed at a pilots' meeting on 12 November 2014. Although Mr Sweetman was not present at that meeting, he would have received the minutes, Mr Laird says. The Authority saw a copy of these minutes which stated the following:

> *Nationalisation*
>
> *Company is in the process of hiring and training 2 former CHC[3] FOs and AME[4]s who will be the first phase of the Philippines Nationalisation plan. These hirings will eventually lead to the replacement of expat crews as is stipulated in the HNZ-SPEX contract. Second phase will be a pilot cadet program which will not bear fruit for 18+ months from inception.*

[30] Mr Laird's evidence was that, after the dismissal by redundancy of Mr Sweetman and another pilot, the company employed 14 personnel in the SPEX contract, comprising nine captains and five First Officers. The captains were either of New Zealand, Australian or Canadian nationality, whereas four of the five First Officers were from the Philippines.

[31] It was the oral evidence of Mr Currie that he had been discussing with Shell for some time how many pilots were needed to service the SPEX contract, and that he had suggested 14 pilots in total, which Shell had finally agreed with around May 2015. It was the written evidence of Mr Currie that the issue of surplus captains arose because of the addition of two new national First Officers from the nationalisation programme.

[32] Regarding two pilots getting additional responsibilities (FSO and FDM representative), Mr Currie said that, at the time of the restructuring consultation,

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[3] A Canadian based helicopter company
[4] Aircraft Maintenance Engineer

Mr Sweetman had asked to be considered for the responsibilities of FDM representative. Mr Currie explained that they had not advertised for the FDM role as the incumbent (Mr Wise) had offered to step into the previous incumbent's shoes in April 2015 when the previous incumbent was preparing to leave the base. As the incumbent had previous FDM experience, it made him an ideal candidate.

[33] The FSO role was given to Mr Huth, who had previous base safety officer experience. Mr Currie said that it had been common knowledge for some time that the FDM and FSO roles would need to be filled and that inquiries had been made by Mr Huth and Mr Wise prior to the departure of the previous incumbents. Given that both individuals had previous experience, and were suitable for the roles, the company did not look any further. Mr Currie said that these were the only two individuals who had stepped forward and expressed an interest in either role up until that point.

[34] The Authority saw two *Amendment/Addition to Contract Request Forms* in relation to the appointment of Mr Wise and Mr Huth to the FDM and FSO roles respectively. Mr Currie had submitted them for approval on 25 May 2015, and Mr Laird had signed the form in relation to Mr Wise's appointment on 25 May 2015, and signed the form in relation to Mr Huth's appointment on 16 June 2015. Mr Laird said in evidence that he had actually agreed to these appointments before then.

[35] Regarding Mr Sweetman being taken off the flight schedule, Mr Laird says that Mr Sweetman had been clearly very upset at the decision that he would be made redundant and had made his feelings well known. It was the company's priority to ensure that it operated safely in a very high risk industry and that it was entirely appropriate to remove Mr Sweetman from flying under those circumstances, as it was within the company's right to do so. In oral evidence from Mr Laird, it became clear that he had believed that the fact that Mr Sweetman had raised a personal grievance indicated that he had the potential to be stressed or otherwise affected so as to create a risk for the company.

[36] Mr Currie had said that he believed that the decision had been taken in case there had been an accident involving Mr Sweetman and the company could have been

seen to have failed to have taken all reasonable steps to have prevented it. This was a few months after the Germanwings accident Mr Currie said.[5]

[37] Mr Sweetman continued to be paid his remuneration during his notice period. Mr Laird said that a pilot is not disadvantaged by a period of two months of not flying as he simply has to fly one flight with an instructor to be rechecked. After 90 days of not flying, a pilot must complete three take-offs and landings to become current again, which can be accomplished in one training flight. Flight simulator training can also satisfy the requirements.

[38] Mr Laird said that the provision of the *per diem* allowance was to cover the cost of living away from home. If a pilot is not living away from home, they are not incurring any costs and so there is no entitlement to be paid the *per diem*. Mr Laird said that, just because Mr Sweetman was able to live on less than the *per diem* allowance when on duty does not entitle him to be paid it when he was not on tour, as it is an allowance to reimburse a pilot for the expense of living away from home and is not part of the salary.

The issues

[39] The following are the issues that the Authority must determine:

(a) Whether the respondent's reason for Mr Sweetman's dismissal by reason of redundancy was genuine;

(b) Whether the respondent followed a fair process in that dismissal;

(c) Whether Mr Sweetman suffered an unjustified disadvantage in his employment by reason of the process followed;

(d) Whether Mr Sweetman suffered an unjustified disadvantage in his employment by reason of being kept off the flight schedule;

(e) If Mr Sweetman's dismissal was unjustified, whether he should be permanently reinstated to his position; and

(f) Whether any other remedies are due to Mr Sweetman.

[5] In which Andreas Lubitz, a co-pilot, had apparently deliberately crashed his plane into the Massif des Trois-Évêchés on 24 March 2015, killing all 150 people on board.

The governing legal principles

[40] Section 4 of the Act provides as follows:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
> *(1A) The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*
> *(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.*
> *(1C) For the purpose of subsection (1B),* **good reason** *includes—*
> *(a) complying with statutory requirements to maintain confidentiality:*
> *(b) protecting the privacy of natural persons:*
> *(c) protecting the commercial position of an employer from being unreasonably prejudiced.*

[41] Section 103A of the Act sets out the test of justification that the Authority must apply when determining whether a dismissal is justified, as follows.

> ***Section 103A Test of justification***
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[42] In the Employment Court judgment of *Rittson-Thomas t/a Totara Hills Farm v. Davidson*[6], His Honour Chief Judge Colgan made clear that s.103A requires the Court and the Authority to inquire into a decision to declare a person's position redundant. At para.[54] of *Rittson-Thomas*, the Court held:

> *It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*

[43] Therefore, the Authority is obliged to inquire into the merits of the respondent's decision to disestablish Mr Sweetman's role, and then to dismiss him.

Was Mr Sweetman's dismissal by reason of redundancy genuine?

[44] First, I accept that the respondent was in a position where it had 16 pilots, but only needed 14, because Shell would only pay for 14 pilots in the SPEX contract. In that sense, there was a genuine need to reduce the number of Captains to 14.

[45] However, it is Mr Sweetman's assertion that the redundancy was not substantively fair because the fact that the company ended up having 16 pilots, and

[6] [2013] NZEmpC 39

the subsequent redundancy programme, should not have occurred at all, given that four contract pilots on fixed term employment contracts had their contracts renewed in June 2015, after the consultation process had started. If they had not all had their contracts renewed, Mr Sweetman says, there would not have been two surplus pilots.

[46] The respondent, on the other hand, says it had no choice but to retain these four contract pilots because they were, in reality, not fixed term employees, but permanent employees.

[47] The Authority saw contractual documentation for one of these contract pilots. This consisted of a letter of offer dated 7 August 2013; a casual individual employment agreement dated 24 July 2013, and signed on 9 August 2013, and the letter of variation dated 29 June 2015 referred to above. The respondent says that the contractual documentation for the four contract pilots was materially identical.

[48] The letter of offer stated that the pilot was offered casual employment in the role of off-shore pilot for the duration of the Anadarko Drilling and SPEX construction project. It stated that it was anticipated that the Anadarko project would run from November 2013 to April 2014, and that the SPEX construction project would run from May 2014 to February 2015. It also said that there may be the possibility that the construction project would be extended for an additional 5 months.

[49] The casual individual employment agreement referred to the commencement and finishing dates stated in the offer letter. It also stated that the employment would automatically terminate *on the expiry date*. This term is not formally defined, but I find that it refers to the conclusion of the SPEX construction project, whenever that would be.

[50] The letter of variation referred to in paragraph 24 above referred to the agreement concluding on 31 July 2015, instead of February 2015, but the respondent's evidence is that this was because of slippage in the completion date of the SPEX construction project. This slippage accords with the reference to a possibility that the project could be extended by five months. The letter of variation extended the employment to 31 August 2017. This date relates to the end of the respondent's Philippines contract with Shell.

[51] Section 66 of the Act provides as follows:

66 Fixed term employment
(1) An employee and an employer may agree that the employment of the employee will end—
(a) at the close of a specified date or period; or
(b) on the occurrence of a specified event; or
(c) at the conclusion of a specified project.
(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
(a) to exclude or limit the rights of the employee under this Act:
(b) to establish the suitability of the employee for permanent employment:
(c) to exclude or limit the rights of an employee under the Holidays Act 2003.
(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—
(a) the way in which the employment will end; and
(b) the reasons for ending the employment in that way.
(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[52] I find that, whilst the four contract pilots were clearly not casual employees, the respondent was mistaken in law when it determined that the contract pilots were not fixed term employees. When they were issued with their offer letters and employment agreements there were genuine reasons based on reasonable grounds for specifying that the employment of the employees was to end at the conclusion of the SPEX construction phase. The letters of offer made clear both when the employment would end and the reasons. Hence, s.66 of the Act was complied with.

[53] The fact that the variation letters merely extend the fixed terms of the contract pilots by 25 months, despite them being prepared by the very same HR manager who had, apparently, told Mr Laird that the contract pilots were permanent employees, not

fixed term employees, suggests strongly that this purported correction of their employment status to permanent by the respondent is not true, and that this justification has been concocted by the respondent post hoc in order to defend its position in the light of Mr Sweetman's claims. That this is the case is strengthened by the fact that the HR manager wrote to Mr Sweetman on 25 June 2015 and stated *we are not offering these pilots permanent contracts/agreements. Their current agreements are merely being extended for a period of time*.

[54] It is clear that, at the point when the initial terms of the four contract pilots were nearing expiry, which fell during the redundancy consultation process, these four contract pilots were bona fide fixed term employees. Does this mean that the respondent was obliged to not renew one or more of the contract pilots' roles in order to avoid a redundancy situation?

[55] One needs to analyse this question against the redundancy background that was on-going at the time of the renewals. Until the respondent renewed the four fixed term contracts, it was facing the imminent reduction of its work force of pilots from 16 to 12. Around the same time, Shell had confirmed that it only needed 14 pilots to serve the SPEX contract. The respondent determined that it could not accommodate more than 14 pilots, but needed more than 12.

[56] Mr Laird said that there were a number of small but lucrative seismic projects that had been on-going in New Zealand in the first few months of 2015, which the four contract pilots had been able to service during their 28 days-off periods. He said that the respondent had anticipated that the company would be able to win further such work in the coming months, and that there were projects in Australia which the company had submitted tenders for. Mr Laird also said that he was unable to simply slot in New Zealand based pilots for the work, because of the training requirements, and that four pilots were needed as they must work in pairs and they needed to be available at all times, so that when one pair was rostered on the SPEX contract, the other pair would be rostered off, and so would be available for the New Zealand work that arose.

[57] Mr Riches submits that case law supports his contention that a permanent employee such as Mr Sweetman should be prioritised in a redundancy situation over a fixed term employee. He cites the case of *Canterbury Westland Free Kindergarten*

Association (t/a Kidsfirst Kindergartens) v New Zealand Educational Institute[7]. This concerned whether a clause in the relevant collective agreement allowed the plaintiff to employ employees under a fixed term agreement for 3 years with the possibility of reappointment for a maximum of one further term of 3 years. The fundamental point in contention was, therefore, different from the current case.

[58] Mr Riches cites a passage at [55] from *Kidsfirst* in which the Chief Judge said

> *Normally, someone who succeeds in securing a position expects to enjoy security of tenure to this extent: such a person can expect to remain in her or his employment pending good behaviour and continued satisfactory performance of duties for as long as the position continues. Once appointed, the incumbent does not have to fear displacement through the rise of an even more capable aspirant for her position.*

[59] This statement was made in a wholly different context to that faced by the Authority in the present case, and I am loathe to draw from it the inference that the respondent was precluded from renewing the fixed term contracts of the contract pilots when a permanent employee could be dismissed for redundancy as a result.

[60] However, that specific proposition has been advanced by the Authority in the case of *Nafissi v New Zealand School of Education Ltd*[8]. At paragraphs 97 and 98 the Authority stated:

> *[97]…I find in these circumstances that NZSE, having made the changes from Template "A" to Template 'B' fixed term employment agreements at the beginning of 2010, had created a situation in which the reduction in staff numbers could appropriately have been made in accordance with the terms of those agreements.*
>
> *[98] In the circumstances I find that NZSE's decision to treat all employees as permanent employees was, whilst laudably motivated by a desire to act fairly and reasonably, not the correct decision, and that the tutors who had accepted and were employed on the Template 'B' fixed term employment agreements at time of the restructuring exercise should have been selected for redundancy prior to Mr Nafissi being considered for redundancy.*

[61] A determination of the Authority on one matter does not bind it on another, but can be persuasive. However, I find that *Nafissi* must be distinguished in any event, as the situation there was that the fixed term employees did the same work as

[7] [2004] 1 ERNZ 547
[8] [2011] NZERA Auckland 445

Mr Nafissi[9]. This is not the case in the present matter as Mr Sweetman was not able to service the New Zealand and Australian projects which the fixed term contract pilots could and did. This difference is fundamental.

[62] Mr Riches also cites *Nee Nee v TLNZ Auckland Ltd*[10] in which the Employment Court found that the replacement of permanent staff with more profitable casual staff was not a situation of genuine redundancy. However, this case must also be distinguished as Mr Sweetman was not replaced by one of the contract pilots. That was not the rationale for the dismissal, and none of the four contract pilots cost less than Mr Sweetman, even though the renewals of their contracts may have impacted Mr Sweetman's employment.

[63] The situation in the present case is no different in essence from a situation where an employer wins a new client with specialist needs, recruits an employee with specialist skills to service that client, but that employee also has the ability to service other existing clients. Whilst that recruitment may lead to a surplus of non-specialist staff, it cannot be said that the company cannot therefore recruit the new employee.

[64] In my view, the respondent was entitled to renew the contracts of fixed term pilots who were able to work in New Zealand and Australia as well as the Philippines. I believe that to determine that it was not allowed as do so on the grounds that it would adversely affect another permanent employee would amount to the Authority interfering with the respondent's prerogative to conduct its business in the way it judges is most appropriate. Whilst the fixed term employees' employment would otherwise have terminated lawfully in accordance with the terms of their contracts, the respondent has a right to elect to retain their services, either by making them permanent employees or by renewing the fixed terms.

[65] Therefore, I do not find that the respondent renewing the fixed term employees' contracts means, without more, that Mr Sweetman's dismissal for redundancy was substantially unjustified.

[66] The key, however, is to determine whether the respondent complied with the statutory obligations of good faith required by s.4 of the Act. It is therefore necessary

[9] Paragraph [83] of *Nafissi*.
[10] [2006] ERNZ 95

to examine the procedure followed to ascertain whether there has been substantial and procedural fairness to Mr Sweetman.

Was the procedure followed by the respondent fair and reasonable?

[67] The Authority's inquiry into this question requires an inquiry into the following sub-issues:

(a) Was the pool of selection correctly constituted?

(b) Whether there should have been consultation with Mr Sweetman regarding the extension of the contracts of the contract pilots;

(c) Whether there should have been consultation with Mr Sweetman regarding the recruitment of the two Filipino First Officers;

(d) Whether there should have been consultation about the assignment of the FDM and FSO roles to Messrs Wise and Huth respectively;

(e) Whether there should have been consultation about the agreement with Shell that only 14 pilots were needed to service the SPEX contract;

(f) Whether the selection criteria used were fair and reasonable;

(g) Whether proper consideration was given to Mr Sweetman's feedback; and

(h) Whether there were any other failings that rendered the process unjustified.

Was the pool of selection correctly constituted?

[68] I accept that it was not appropriate to have included the Training Captains in the pool, as they had specialist skills and had to be approved by the Civil Aviation Authority to run training on the AW139 simulator. These additional skills meant that they were needed by the respondent and were not easily replaceable.

[69] I also accept that it was not appropriate to have included the Base and Contracts Manager in the pool (Mr Currie). He had significant additional duties and experience which, again, meant he could not be easily replaced.

[70] It was also not appropriate to include the First Officers in the pool, as the company had financial and operational reasons for maintaining a ratio of Captains to First Officers of around 60:40. If a First Officer had been terminated for redundancy, this would have caused a greater imbalance than already existed.

[71] I also accept that it was not appropriate to include the four Filipino First officers in the pool, as Shell expected the respondent to follow the nationalisation programme. I accept Mr Laird's evidence that, to have dismissed one of the local staff could have adversely impacted the relationship with Shell and jeopardised any future renewal of the contract between Shell and the respondent.

[72] However, it is less clear that it was appropriate to have excluded the contract pilots from inclusion in the pool. These pilots were flying the same rosters as Mr Sweetman in the SPEX contract and were, as far as the SPEX contract was concerned, interchangeable with Mr Sweetman. However, they did have the additional aspect to their skill set of having the flexibility of being able to service projects in New Zealand and Australia.

[73] Mr Laird has said that, if they had been included in the pool, the company would have utilised a third criterion of *flexibility to work in New Zealand*, and they would have scored higher than Mr Sweetman in any event on that measure. This argument is predicated upon Mr Sweetman not being able to gain a New Zealand visa, and therefore also being able to also service the seismic and other projects in New Zealand. However, I accept that these projects are short term and that it is unlikely that it would have been cost effective for Mr Sweetman to have been able to service these New Zealand based projects given that he lived in Thailand when he was rostered off the SPEX contract work.

[74] On balance, I believe that the respondent did not act unfairly in defining the pool of selection as it did.

Should there have been consultation with Mr Sweetman regarding the extension of the contracts of the contract pilots?

[75] Whilst the respondent had the right to consider renewing their fixed term contracts, this decision was clearly likely to have had an adverse effect on the continuation of Mr Sweetman's employment. Therefore, in accordance with the obligation under s.4(1A)(c) of the Act, the respondent should clearly have consulted

with Mr Sweetman about the decision to renew the fixed term contracts, prior to the decision being implemented. Given the impact upon his employment of that decision, no fair and reasonable employer could have failed to have consulted with Mr Sweetman in all the circumstances.

[76] This renders the dismissal unjustified on procedural grounds, as the flaw is not minor.

Should there have been consultation with Mr Sweetman regarding the recruitment of the two Filipino First Officers?

[77] Mr Sweetman's position is that the respondent should have consulted with him (and the other pilots) in November 2014 when it decided to recruit two new Filipino First Officers. The respondent's evidence was, essentially, that it was not required to do so at that time, as it was not known that the recruitment would lead to surplus pilots as it had anticipated winning new contracts at that point.

[78] Whilst I find that Mr Sweetman is likely to have known about the plans, I accept he was not aware that they could impact on his employment given that he knew that there were four fixed term employees whose contracts would be expiring in mid-2015.

[79] The obligation on the respondent under s.4(1A)(c) was to give Mr Sweetman the opportunity to comment on the information relating to the decision to recruit the two Filipino pilots before the decision was made where the decision was <u>likely</u> to have an adverse effect on the continuation of his employment. However, I accept the evidence of Mr Laird that it was not known at that point what the effect was likely to be as there were too many variables, such as pilots leaving and new contracts being tendered for. I believe that, in November 2014, it was not foreseeable that the recruitment of the two Filipino pilots would have had an adverse effect on Mr Sweetman's employment, specifically.

Should there have been consultation about the assignment of the FDM and FSO roles to Messrs Wise and Huth respectively?

[80] Mr Laird approved the *Amendment/Addition to Contract Request Form* for Mr Huth three days before the consultation meeting with Mr Sweetman. He must, therefore, have known that the consultation was due to begin. Mr Laird says that the

decision to appoint Mr Huth to the role had been made long before and that he was merely approving the payment of the Flight Safety Officer allowance to Mr Huth.

[81] However, whilst I do not doubt that evidence, Mr Laird still had the power at that point to have stopped the appointment and to have told Mr Huth and Mr Sweetman (and indeed, Mr Therrien, the other Captain whose employment was terminated for redundancy) that the position of Flight Safety Officer had not yet been approved and that Mr Sweetman and Mr Therrien could put forward a case for doing the role. Whilst this may have upset Mr Huth, that approach would still have afforded a chance for Mr Huth to have done the role, whereas the approach actually taken by the respondent deprived Mr Sweetman of that chance.

[82] This procedural failing is more than just minor because one of the only two selection criteria was *other roles and responsibilities other than flying the line the pilots perform*. Therefore, given this criterion, I find that no fair and reasonable employer could have failed to have given Mr Sweetman an opportunity for putting forward a case that he could carry out the FSO duties.

Should there have been consultation about the agreement with Shell that only 14 pilots were needed to service the SPEX contract?

[83] This assertion of Mr Sweetman derives from the evidence of Mr Currie that he had been speaking with the Shell contract manager for the SPEX project and that he had suggested that 14 pilots would be needed to service it, which Shell had accepted. Mr Sweetman asserts that this decision also had an adverse impact upon his employment and so he should have been consulted about it pursuant to s.4(1A)(c). However, it was not the decision of the respondent to operate the SPEX contract with 14 pilots, it was Shell's. The respondent merely suggested that this was the number of pilots that the contract could be operated with but it could not dictate that. I do not, therefore, accept that s.4(1A)(c) is engaged in this case.

Were the selection criteria used fair and reasonable?

[84] Redundancy selection criteria must be relevant (*New Zealand Building Trades Union v Hawke's Bay Area Health Board*[11]). This means they should reflect the genuine and reasonable needs of the business. They should also be objectively

[11] [1992] 2 ERNZ 897

measurable, although subjective assessments will be involved: *Redgwell v Morrison Printing Inks & Machinery Ltd* [12].

[85] Mr Sweetman challenges the criterion of hours flown on the AW139, although he did not do so during the consultation process. He says that a better gauge of experience based on a single numerical measure is hours of pilot in command of multi engine helicopters. However, Mr Currie, a very experienced pilot as well, who did not design the criteria, said that he disagreed and believed that experience flying the specific aircraft used in oil exploration was more appropriate. He said that he has known pilots with a great deal of total flying time who were weaker than pilots who had less total flying time.

[86] It would appear that this is a question almost of a philosophical nature, which the Authority does not have the expertise to answer without expert evidence, which would be out of proportion to the issue in hand. There is no obvious flaw with using hours on-type that I can see, and it is very easily measurable. It seems to be a very relevant measure, given that a minimum amount of time flying on-type is a requirement of the International Association of Oil and Gas Producers. I therefore do not accept that this criterion was inappropriate.

[87] Mr Sweetman does not take issue with the other criterion itself, and it again seems to be a relevant one, which is easily measurable. All of the additional roles held by other pilots on base are significant and require experience and training. I therefore believe that this criterion was also appropriate.

[88] Mr Sweetman has not proposed any additional criteria, and none spring to mind as being obviously lacking, given the operation of the respondent. I therefore find that the criteria were fair and reasonable.

Was proper consideration given to Mr Sweetman's feedback?

[89] Mr Sweetman's feedback was solely on the issue of the renewal of the fixed term contract pilots. I believe that proper consideration was given to the feedback made by him on that issue. The feedback presentation programme addresses the issue and explains the rationale given for renewing the fixed term contract pilots' contracts.

[12] [1992] 3 ERNZ 235

Were there any other failings that rendered the process unjustified?

[90] Mr Sweetman was given no forewarning of the first meeting and was not told he could have a support person present. The reason given by Mr Currie was that he wanted to prevent rumours. There is some credibility in this answer given that the base was relatively small and that Mr Currie could not speak to all employees at the same time because of the way the rosters worked.

[91] However, that does not excuse the lack of the provision of the right to have a support person present, which is a fundamental right of all employees, as the support person could have been asked to have kept matters confidential. It is true, however, that Mr Sweetman was given a significant amount of time to give his feedback, and so he could have sought professional advice in that time.

[92] Overall, I believe that the failing was not minor, but that it did not result in unfairness ultimately. However, the exception in s.103A(5) requires both limbs to be satisfied, which is not the case. Therefore, this finding does lead to the process being unjustified, as no fair and reasonable employer could have failed to have offered Mr Sweetman a support person in all the circumstances.

[93] One other aspect of the process that causes me concern is the fact that the consultation presentation attributed the need to reduce the number of pilots by two to the nationalisation programme alone. However, this presented an overly simplistic picture, which was misleading. Clearly, the decision to renew the contracts of the four contract pilots also had a significant bearing on the position. I have already found that the failure to consult about the extension of these contracts was unjustified. However, I also find that the information given to Mr Sweetman was misleading and/or deceitful in that it oversimplified the picture, and so the respondent's actions in this respect were a breach of good faith.

What effect do these procedural flaws have on substantive fairness?

[94] There are times when procedural flaws can be so fundamental that they cast doubt on the substantive fairness of the dismissal. This will be the case, in a redundancy context, where the flaws have deprived the employee from putting forward a case which is likely to have changed the outcome, either by persuading the employer that there was no need to reduce the number of employees by as many contemplated, or at all, or that another employee should have been dismissed instead.

[95] The key procedural flaws I have found relate to the failure to consult with Mr Sweetman about the extension of the contracts of the four contract pilots and the failure to allow him to apply for the FSO position. However, if Mr Sweetman had been able to object to the extension of the contracts of the contract pilots, I do not believe that he would have been able to have overcome the argument that these four pilots gave the respondent the ability to service short term projects that arise in New Zealand and Australia. To have reduced their number by one, so as to accommodate Mr Sweetman, would have effectively reduced the availability of servicing that work by 50%, because of the need for the pilots to fly in pairs, and Mr Sweetman's inability to fly in New Zealand and Australia due to visa restrictions.

[96] In respect of the FSO position, I understand that Mr Sweetman's experience as a FSO was some 20 years ago, and that Mr Huth's experience was much more recent. Even if they had an equal chance of gaining the role, however, which is what Mr Currie conceded, Mr Huth still had more flying hours on the AW139 than Mr Sweetman.

[97] This raises the question of which criterion would have been weighted most highly; flying hours or extra responsibilities. This question was not addressed by the respondent, as Mr Sweetman failed on both measures to tick the boxes. He had the lowest flying hours and he had no additional role on the base. I believe, however, that having had extra flying hours on the AW139 would have been weighted less heavily than having an additional role on the base, given that every pilot had more than enough hours to fulfil the minimum requirements.

[98] One must therefore consider what would have happened had the respondent allowed Mr Sweetman to have applied for the FSO post. The Authority did not see Mr Huth's CV, or hear evidence about his experience. However, it is significant that Mr Sweetman did not ask Mr Currie about the FSO role, but made a case for the FDM role. It was only when he had been told that the FDM role had already been allocated to Mr Wise that he asked about the FSO role. This strongly suggests that Mr Sweetman understood that his lack of recent experience as a FSO would have weakened his chances of obtaining that role.

[99] I must therefore conclude that, even if Mr Sweetman had been given the opportunity to have applied for the FSO role, he is not likely to have been successful.

[100] The other flaws I have identified, which are of a more minor nature (albeit not minor in absolute terms), do not bring into question the genuineness of the redundancy, nor render the dismissal substantially unjustified.

[101] In conclusion, Mr Sweetman's dismissal was not substantively unjustified.

Was Mr Sweetman unjustifiably disadvantaged by the process?

[102] It must follow from my finding that there were unjustified failures to properly consult with Mr Sweetman about the decision to renew the fixed term pilots' contracts, to give him an opportunity to apply for the FSO role and to offer him a support person, that he was unjustifiably disadvantaged in his employment by these failings.

[103] How this impacts on Mr Sweetman's remedies will be addressed below.

Was Mr Sweetman unjustifiably disadvantaged by being kept off the flight schedule?

[104] My finding of fact on this issue is that the respondent decided to suspend Mr Sweetman from flying duties because he had chosen to raise a personal grievance. This decision was because the respondent feared that the action of raising a grievance demonstrated that Mr Sweetman was aggrieved and that this, in turn, could indicate a state of mind which could impact adversely on his ability to fly safely. The questions to be addressed are:

a. Did the suspension from flying duties constitute a disadvantage to Mr Sweetman; and

b. If so, was the disadvantage unjustified?

Did the suspension from flying duties constitute a disadvantage to Mr Sweetman?

[105] I believe that it did, as Mr Sweetman's flying currency was impacted. Even though I accept the evidence of the respondent that this would be rectified at the expense of a new employer in the oil and gas industry by giving Mr Sweetman sufficient simulator training, there is the likelihood that he will have to seek employment outside of the oil and gas industry (such as in tourism, rescue work and so forth) where such training may not be provided. Even though the requirements of such an employer may be less in return, Mr Sweetman would still have spent a

reasonably considerable period not having flown, which I accept could impact on his confidence, at least initially.

[106] In addition, Mr Sweetman received a per diem allowance of US$60 when he flew. This was to recompense him for expenses, but he was not required to produce proof of expenditure. Therefore, he made a profit essentially. The respondent states that he was only entitled to receive this allowance to recompense him for expenses, and so cannot be entitled to the payments when he did not incur expenses.

[107] However, I take into account the reality of the arrangement, which is that Mr Sweetman received the allowance when he flew and that the respondent did not care what his expenses were. Therefore, these payments were more than merely reimbursements of out of pocket expenses, but a supplement to his wages. Whilst that finding may have tax consequences for Mr Sweetman and the respondent, that is something beyond the jurisdiction of the Authority.

[108] It follows from this finding that Mr Sweetman suffered a disadvantage, and a loss of a financial benefit, in not having been able to earn the allowance for 28 days.

Were these disadvantages unjustified?

[109] When I weigh up the evidence from the parties, I believe that one cannot ignore the particularly safety sensitive environment in which they operate. Whilst determining a pilot's state of mind may be a very subjective exercise without a formal psychiatric assessment, the respondent is able to take into account its experience in terms of the risk and likely impact of events on a pilot's safe operation of an aircraft.

[110] Whilst the raising of a personal grievance cannot reasonably be punished by an employer, I find that the respondent's rationale for the suspension of Mr Sweetman's flying duties was fair and reasonable, given the context of the environment in which the company operated. Mr Sweetman could have asked to have been formally assessed, but he did not. It therefore came down to his opinion against the respondent's. I do not find that there was anything inherently unreasonable in the respondent's decision. To put it another way, the decision to stand Mr Sweetman down from flying duties was a decision that a fair and reasonable employer could have taken in all the circumstances which prevailed at the time.

Should Mr Sweetman be reinstated?

[111] Having found that Mr Sweetman's dismissal was procedurally unjustified, but not substantially unjustified, the question of reinstatement does not arise, as the loss of employment did not arise out of the grievance. However, as this remedy is of such importance to Mr Sweetman, I shall analyse the position to show why I conclude that reinstatement would not have been practicable in any event.[13]

[112] Section 123(1)(a) of the Act refers to the ability of the Authority, having determined that the employee has a personal grievance, to provide the remedy of *reinstatement of the employee in the employee's former position or the placement of the employee in a position less advantageous to the employee*.

[113] Section 125 of the Act, dealing with the remedy of reinstatement, states as follows:

> ***125 Remedy of reinstatement***
> *(1) This section applies if—*
> *(a) it is determined that the employee has a personal grievance; and*
> *(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).*
> *(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.*

Would it have been practicable for Mr Sweetman to have been reinstated?

[114] The issue of practicability has been one of the tests of reinstatement for many years. The Court of Appeal in *Lewis v Howick College Board of Trustees*[14] upheld the reinstatement test applied by the Employment Court at first instance, which reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*[15] (*NZEI*) which had, in turn, affirmed the test applied by the Labour Court in the first instance in that case. The Employment Court in *NZEI* said:

> *Whether… it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of*

[13] Although reinstatement is no longer a primary remedy under the Act, the Employment Court in *Angus v Ports of Auckland (No 2)*, [2011] NZEmpC 160 at [61],observed that reinstatement may still be *the most significant remedy claimed because of its particular importance to the grievant* in a particular case and whether an order for reinstatement should be made needed to be examined on a case by case basis.

[14] [2010] NZCA 320,

[15] [1994] 2 ERNZ 414 (CA).

> *their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*\

[115] In *Lewis* the Court of Appeal added:

> *[6] … The test for practicability requires an evaluative assessment by the decisionmaker and the factors to be considered have been clearly identified by this Court in the NZEI case. We see no basis on the wording of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to the issue of reinstatement is preferable.*
>
> *[7] There is no dispute between the parties that the onus of proof of lack of practicability rests with the employer.*

[116] The respondent has referred in its evidence to the adverse effect on its operations of the slump in oil prices that first occurred around a year ago but which has become worse in recent months. I accept this evidence, and note that it is general knowledge that global oil prices are predicted by analysts at the time of writing this determination to slump to US$20 a barrel, which is near to the cash cost of production, and which would force drillers to abandon their operations.

[117] The respondent has said that it has been making pilots redundant in other parts of its business and that it will not need 15 pilots in the SPEX contract. If Mr Sweetman were reinstated, they say that another redundancy exercise would therefore have to be implemented. I accept that this is the case, and that it would not be reasonable for the respondent to be expected to employ a surplus pilot until August 2017, or until more work became available.

[118] There are few recent decisions of the Employment Court or higher courts which have specifically considered reinstatement in a situation where a restructuring exercise has been carried out and the respondent asserts that reinstatement would require a new redundancy exercise to be carried out. In the case of *Walker v Firth Industries*[16], which was not a redundancy dismissal case, His Honour Judge Couch considered that the fact that no vacancies for drivers (the position held by Mr Walker)

[16] [2014] NZEmpC 60

existed at his former plant did not, of itself, make reinstatement impracticable[17]. Judge Couch also held that the mere fact of delay did not make reinstatement impracticable[18].

[119] On the other hand, in the Employment Court Case of *Baguley v Coutts Cars Ltd*[19] the Court stated:

> *There is a good deal to be said in favour of reinstating the applicant and requiring Coutts to go through a proper process which, on our findings, may or may not reach the same result. We consider, however, that to grant reinstatement in this case would serve no useful purpose, especially as the applicant's fitness for work is not clear. It would not be proper to grant it in any case because it would not be practical to do so. It would not work. We accept that Courts has reduced its groomer workforce to two persons and that it has currently two persons doing that work. There is at least one chance in three that, if reinstated, the applicant might again be made redundant and in short order. To reinstate the applicant to a position in which the sword of Damocles would hang above his head would not help to heal the grievance. We decline this remedy.*

[120] Would it have *worked* to have reinstated Mr Sweetman? I consider that it would not have done. This is because I believe that it is more likely than not that he would be selected again for redundancy, even if a fair and reasonable process was followed. I make this assessment on the following basis;

a. The selection criteria chosen by the respondent were fair and reasonable, and so it would be fair and reasonable to utilise them again;

b. It was reasonable for Mr Sweetman not to have been offered the chance to apply for the FDM role, as the decision to give Mr Wise that role was made prior to the decision to commence consultation. Therefore, it would not be reasonable or practicable to expect the respondent to have Mr Wise and Mr Sweetman enter into competition for that role now;

c. Even though Mr Sweetman should have been offered the chance to have applied for the FSO role, I find that it was more likely than not that he would not have been the most suitable candidate. Therefore, in

[17] At [83]
[18] At [84]
[19] [2000] 2 ERNZ 409 at [68]

a competition now between Mr Huth and Mr Sweetman, Mr Huth is more likely to gain that role;

d. Mr Sweetman would not hold any other roles or responsibilities on base;

e. Mr Sweetman does not have the right to work in New Zealand or Australia, and so it is not likely that one of the four contract plots would be made redundant instead of Mr Sweetman;

f. Mr Sweetman had the fewest flying hours on the AW139.

[121] Therefore, if Mr Sweetman were reinstated, the outcome of a further redundancy process is more likely than not to be the same. It would not, therefore, have been practicable or reasonable to have reinstated him even if the dismissal had not been substantively fair.

Are any other remedies due to Mr Sweetman?

[122] Section 123(1)(a) to (c) of the Act provide as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[123] Section 128 of the Act provides as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*

> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[124] I have found that the dismissal was substantively justified despite the procedural failings. Ms Chapman makes reference in her submissions to the recent judgement of the Employment Court in *Waterford Holdings v Morunga*[20] which reiterated the principle that, before an award of lost remuneration is made, the loss must be as a result of the grievance. Where there is procedural unfairness but the decision to dismiss is substantially justified, the actual loss does not arise out of the grievance, but out of the substantively justified dismissal. In such a case, no award for lost remuneration is appropriate.

[125] In a redundancy dismissal, there may still be the scope for an award of lost remuneration where there has been procedural unfairness but a substantively fair dismissal. This is where, had a fair procedure been followed, the employment would have lasted longer, and so further remuneration would have been earned during that extended period. However, I do not believe that this is the case here. Mr Sweetman had three weeks within which to give his feedback. A fair and reasonable consultation, with full access to the relevant information, is not likely to have eventuated in the necessity of a longer period of consultation.

[126] I therefore cannot award anything for lost remuneration, as Mr Sweetman's financial losses do not arise out of his grievance.

[127] He is, however, entitled to compensation for humiliation, loss of dignity, and injury to his feelings arising out of the procedural deficiencies. Mr Sweetman gave a lot of evidence of the stress he has been caused by no longer being able to work, and earn money. This, however, derives from the dismissal rather than the lack of proper consultation or provision of information.

[128] It is clear, however, that Mr Sweetman was particularly concerned about the extension of the contract pilots' contracts, which he only found out about midway

[20] [2015] NZEmpC 132

through the feedback period. Had the respondent addressed this with Mr Sweetman at the outset, explaining the details and the rationale for the proposed decision, and giving him the opportunity to make representations about those proposed extensions prior to the decision to extend them being made, it is likely that Mr Sweetman's feelings of frustration and helplessness would have been much less[21].

[129] I do, therefore, accept that Mr Sweetman was disadvantaged by this failure and did suffer humiliation, loss of dignity, and injury to his feelings as a result. I assess the effects as moderate, and would have fixed the award at NZ$15,000[22], save that Mr Sweetman has specifically sought compensation in the sum of $10,000 in his amended statement of problem dated 22 October 2015. I can therefore only award him $10,000 in accordance with the legal principle reiterated in *McIvor v Saad.*[23] This award, obviously, encompasses compensation for both the unjustified disadvantage and the procedural deficiencies in the dismissal.

[130] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act). However, I do not find that Mr Sweetman contributed in any way to the procedural deficiencies that found his personal grievance.

Order

[131] I order the respondent to pay to Mr Sweetman the sum of NZ$10,000 as compensation under s.123(1)(c)(i) of the Act.

Costs

[132] I reserve costs. The parties are to attempt to agree how costs are to be dealt with between them, but if they are unable to do so within 21 days of the date of this

[21] Whilst Mr Sweetman did give feedback about the extension of the contract pilots' terms of employment, he did so without any reassurance that the respondent had not already made its decision in that regard.
[22] I refer to the Employment Court judgement in *Hall v Dionex*, [2015] NZEmpC 29, which assessed compensation awards as having stagnated, and which supports, in my view, an award of $15,000 as properly reflecting moderate effects.
[23] [2015] NZEmpC 145

determination, any party seeking costs may serve and lodge a memorandum of counsel within a further 14 days and any reply may be served and lodged with a further 14 days.

David Appleton
Member of the Employment Relations Authority