

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 86
5583042

BETWEEN ALAN WINN
Applicant

A N D SPOTLESS FACILITY
SERVICES (NZ) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: David Goldwater, Counsel for Applicant
Guido Ballara, Counsel for Respondent

Investigation Meeting: 21 March 2016 at Christchurch

Submissions Received: Oral submissions from counsel for Applicant on
21 March 2016
Oral submission and written submissions from counsel
for Respondent on 21 March 2016

Date of Determination: 15 June 2016

DETERMINATION OF THE AUTHORITY

- A. I decline the applicant's claim for a personal grievance; the applicant was not unjustifiably dismissed and the respondent did not act in a way that was unjustified and caused disadvantage to the applicant's employment.**
- B. The respondent did not breach the duty of good faith nor did it breach the applicant's individual employment agreement and I do not impose any penalties.**
- C. Costs are reserved with a timetable set for submissions if required.**

Employment relationship problem

[1] The respondent, Spotless Facility Services (NZ) Limited (Spotless), employed the applicant, Alan Winn, as a boiler technician. Alan commenced this role with Spotless on 26 March 2012.

[2] On 27 July 2015, Spotless served notice of termination on Alan for redundancy.

[3] Alan complains that the redundancy completed by Spotless was not genuine and was predetermined. As a result, he says his dismissal was unjustified.

[4] In the alternative, Alan says the process carried out by Spotless, in relation to the restructure that led to his redundancy, was not justified and therefore he has a personal grievance for unjustified action causing disadvantage.

[5] Further, Alan claims that in carrying out consultation over the proposed restructure and potential redundancy, Spotless breached the duty of good faith and the terms of his employment agreement such that I should impose penalties against it.

[6] Spotless says that the redundancy was justified and it denies that it acted unjustifiably. It also says it has not breached the duty of good faith or breached Alan's employment agreement and as such, I should not impose any penalties against it.

The issues***Unjustified dismissal***

[7] Broadly speaking, the issue to be resolved in respect of the termination of Alan's employment is, is the redundancy genuine and have the notice and consultation requirements of the Employment Relations Act 2000 (the Act) been complied with such that the restructure and termination of Alan's employment by reason of redundancy is justified¹?

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

Unjustified action causing disadvantage

[8] The issues pertaining to Alan's personal grievance of unjustified action causing disadvantage arising out of the consultation by Spotless include:

- (a) What actions did Spotless carry out in consultation over the proposed restructure and potential redundancy of Alan's role;
- (b) Were any of the steps Spotless undertook, or failed to undertake, in consultation unjustified;
- (c) If any of these actions were unjustified, then has such unjustified action caused disadvantage to Alan's employment or a condition of it?

Penalties

[9] The issues pertaining to the request for penalties include:

- (a) Do the actions of Spotless amount to a breach of the duty of good faith such that a penalty should be imposed against it;
- (b) Do the actions of Spotless amount to a breach of the employment agreement such that a penalty should be imposed against it;
- (c) If so, for either (a) or (b) above, what is the quantum of any penalty and should this be paid to Alan?

Events

[10] Spotless employed Alan as a boiler technician. He commenced this role on 26 March 2012.

[11] Spotless had a contract with the Department of Corrections to look after the boilers and heating at three prisons in the Canterbury area, Christchurch Men's Prison, Christchurch Women's Prison and Rolleston Prison (the Contract).

[12] Alan's role related to maintaining and repairing the boilers and associated equipment at the three prisons pursuant to the Contract. This work included preventative maintenance as well as responsive work repairing breakdowns or faults in the boiler and heating systems.

[13] Spotless had six staff assigned to work on the Contract. These were an Operations Manager, Cherie O'Byrne; a Project Manager, Scott Thompson; a Service Manager, Michael Ng; a boiler technician, Alan; and two qualified and registered plumbers. It was a Department of Corrections requirement that Spotless had two qualified plumbers assigned to work on the Contract.

[14] Towards the end of May 2015, Spotless reviewed its performance in relation to the Contract. Scott Thompson and Cherie O'Byrne undertook this review. Scott and Cherie reviewed job dockets against the revenue obtained. They found that there was a lack of profitability and in fact, Spotless was making a loss on the Contract.

[15] As a result of their review, Scott and Cherie determined that further investigation was required into those losses with a view to establishing what steps could be taken to return it to profitability.

[16] Scott had been involved in upgrading the boilers in the prisons in 2013. He was particularly concerned to understand the downturn in profitability considering the upgrade and the fact that there should be a low fault ratio because of the new and upgraded equipment. He believed it was necessary to examine the maintenance being undertaken including the programmed maintenance or preventative maintenance.

[17] Scott and Cherie also spoke to Michael Ng, the Service Manager.

[18] The result of this investigation was that Scott and Cherie determined that the labour costs for the boiler technician were high particularly in light of the upgrade in 2013. This caused Scott and Cherie to explore what work the boiler technician completed. And what followed from that was consideration of the registered plumbers being able to carry out that work thus reducing the need for a boiler technician. If this was possible it could lead to the disestablishment of the boiler technician role.

[19] Scott and Cherie thought this was possible and decided to review that further by consulting with Alan.

[20] There were two parts to the investigation. First, a review of the costs associated with the Contract and a need to reduce fixed costs that identified a potential overspend on the boiler technician. Second, a review of that potential overspend on

the boiler technician role to understand: what Alan did; whether less time was required to do this work; and whether the two registered plumbers could do it.

[21] Scott and Cherie decided to consult with Alan to get his views on whether Spotless could disestablish the boiler technician role and have the work carried out by the two employees.

[22] On 26 June 2015, Alan was given a letter that set out in very general terms that Spotless wanted to discuss with him the possible restructure of the current operation. This letter stated:

This letter confirms our discussion that you are invited to attend a meeting with [Cherie] and Scott Thompson on 29 June 2015, 9am at 16 Magdela Place, main meeting room to discuss a proposed restructure of the operation which potentially affects your role within Asset Services.

At this meeting we wish to discuss:

- Our proposal to restructure the current operation;
- Proposal to disestablish any roles.

The business reasons behind our proposal will be explained to you at this meeting, but they are briefly as below:

- Reduce overhead costs at Christchurch Department of Corrections site;
- Introduce a more efficient staffing structure to appropriately service the boilers.

We would like to give you an opportunity to comment and make suggestions regarding our proposal before any decision is made.

You are reminded of your right to bring a representative to this meeting and we encourage you to do so.

[23] Alan attended the meeting on 29 June 2015 without a support person. Scott and Cherie were present at that meeting and Scott checked that Alan was okay to proceed without a support person. Scott then explained that due to high costs associated with the Contract, Spotless was considering proposals to cut costs that might include disestablishment of the boiler technician role.

[24] As part of the discussion and explanation for the proposal, Spotless provided Alan with a two-page document. This document outlined the terms of reference for the review into the cost saving required on the Contract that Scott and Cherie were undertaking. The document explained the need to look at reducing the overhead cost

structures and increasing efficiencies in performing the Contract. That was all to be done in the context of the current onsite staffing structure that was set out in the document. The document then referred to a proposed onsite staffing structure. That was a proposal setting out the disestablishment the boiler technician role so that the Contract could operate with the two plumbers, the project manager and the operations manager.

[25] Alan was confused on receipt of this document. He described it in his evidence as being two separate documents. One was a review that Scott and Cherie were proposing to undertake and the second was a proposal that showed his job would be disestablished which he believed Spotless was going to implement. The confusion arose because on the one hand, Spotless appeared to be undertaking a review of how costs could be reduced, but it had provided a solution that he perceived as being the one that it would implement.

[26] As a result of this meeting, Alan then went and took legal advice about the review and potential restructure. His lawyer, David Beck, raised a personal grievance claiming unjustified action causing disadvantage for him on 1 July 2015. In this personal grievance letter, Mr Beck recorded:

Although our client received an invite on 26 June to a meeting that he attended on 29 June he received no background information about the review that has now led to a proposal to disestablish only his position. On 29 June he was handed two undated documents one headed Terms of Reference – Review of Asset Services Staffing located at Department of Corrections – Christchurch and the other headed: Proposed Onsite Staffing Structure. The first document purports to signal that you intend to carry out a review, what the scope and objectives are and its Deliverables which are described as reducing costs and increasing efficiency. However, despite flagging that you intend to carry out such a review, the second document delivers a proposal to only disestablish our client's job as if the review had already been completed and you are seeking input on the results of such. Surely this is wrong and suggestive of predetermination.

Our client thus advances a grievance that the manner by which this restructuring is being effected is already procedurally deficient and causative of unnecessary distress. He has had no input into the proposal to disestablish his job and you have provided no background information including costings on how you arrived at this proposal.

...

In the alternative, quite apart from the above significant procedural breach our client is concerned that this announcement follows closely on from a dispute with you about him being required to be rostered

for on call matters for the first time in 2½ years. This raises the suspicion, particularly because the review only involves his job, that this is being driven by an ulterior motive.

[27] On 3 July 2015, Celeste Botherway, Human Resources Adviser at Spotless, wrote an email to Mr Beck in response to the personal grievance letter. In this email, Celeste stated:

Spotless does not accept many of the assertions contained in your latter [sic]. Specifically we reject the allegations that:

- The proposal is predetermined;
- The proposal is off the back of any dispute in relation to your client being “on call”.

We believe there is sound business rationale to restructure this part of the business and the proposed process is appropriate (subject to potential modification as a result of feedback during the consultation period).

We note your request for further financial information in support of the justification for restructuring.

All readily retrievable information will be provided to you in the near future.

[28] On 6 July 2015, Alan provided his feedback to Spotless. This feedback consisted of two pages in which he identified the tasks that he undertook as a boiler technician.

[29] On 8 July and 10 July 2015, Spotless provided further information to Mr Beck for Alan to consider as part of the proposed restructure.

[30] On 13 July 2015, Alan, Mr Beck, Cherie, Scott, Celeste and Jane Benton, Operations Manager at Spotless, all participated in a meeting to discuss the feedback that Alan had provided and to seek further feedback.

[31] Alan complains that Spotless conducted the meeting merely as a “*tick box exercise*”. He complains that none of the Spotless managers showed any concern or understanding towards him. He goes on to describe how the meeting evolved. There was a discussion about the review. The detail around the proposed restructure was discussed including Spotless’ suggestion that 20 hours of preventative maintenance could be allocated per month to all three of the Department of Corrections sites. Alan had a chance to respond to this and said that he did not think it would be enough. He

gave them an outline of what he had been doing over the previous month. In his view, there was more than 20 hours of preventative maintenance work on those sites each month.

[32] It is also apparent from the notes produced from that meeting that Mr Beck expressed on Alan's behalf the belief that the decision had been predetermined.

[33] Following that meeting on 13 July 2015, Mr Beck emailed Celeste to advise the concerns that he and Alan had regarding the meeting. In that email Mr Beck stated:

Throughout the meeting Mr Thompson and Ms O'Byrne displayed a belligerent and unempathetic attitude [sic] and appeared completely disinterested in what our client said as he outlined his belief that you have gravely underestimated the amount of skilled input he contributes to maintenance tasks – neither of them asked any pertinent questions or seemed at all willing to hear our client's perspective and alarmingly neither took any notice of what was said. Our concern that the review was well underway prior to consulting our client and that most of it seemed based on undocumented interviews with co-workers was confirmed this morning and frankly we consider this whole process to be confused. Mr Thompson indicated a review "report" would be produced but only for management decision-making. You concluded by indicating that you would "take on board" what our client has said and then meet with him when the review is completed to communicate the results of such. We indicated lack of basic trust in the process while our client's PG was still extant and this view not assuaged by the meeting that hardly constituted genuine consultation. This follows a general lack until pushed, of information disclosure and then such that has been disclosed, lacking coherence and context. Our client's confidence and trust in his employer has now been further eroded and he felt humiliated by this morning's meeting (not helped by you and Jane not being physically present). Overall we consider this looks like a dismissal for an ulterior motive rather than a genuine redundancy.

[34] Spotless did not agree with these contentions and Celeste responded to Mr Beck on 13 July 2015. She recorded in that email that there were some factual inaccuracies expressed by Mr Beck, in respect of what transpired during the meeting. She noted that the process was not predetermined and Spotless did not accept or agree with that. It was a case that Alan had been reassured on a number of occasions throughout the meeting that no decision had been made and the purpose of the meeting was for him submit feedback to the proposal as part of the consultation. The email then went on to record:

During the meeting no new feedback to the proposal was presented by your client (either directly or through his representative). The sole focus was an attempt on your part to highlight perceived flaws of the process.

Jane Benton, Operations Manager of Facilities Management asked your client a number of questions in relation to his workload since the boiler upgrade and provided him with an opportunity to expand on the feedback he submitted on 6 July 2015. However, Mr Winn elected not to engage with the company in this regard.

Spotless is confident that a fair and thorough restructuring process is being adopted and provides further assurance that no decision has yet been made on any new Asset Services structure.

[35] After the meeting and exchange of email correspondence described above, Celeste and Scott met and considered all of the information they had received as part of the review and proposed restructure. They concluded:

- (a) Spotless was losing money on the Contract and it had to reduce costs;
- (b) the labour requirement of the Contract could be provided more efficiently as outlined in the proposed restructure, despite Alan's feedback that was contrary to that;
- (c) continuing with the boiler technician role did not "*stack up*";
- (d) the outcome would be to confirm the proposed restructure; and
- (e) they would consult with Alan over the potential loss of his employment arising from redundancy as his role had been disestablished.

[36] On 20 July 2015, Alan and Mr Beck attended a meeting at which Spotless explained the outcome of the consultation. Scott told Alan that having gone through everything carefully, they had decided to proceed with the proposed restructure and that would involve the disestablishment of his role.

[37] In that meeting, Spotless also discussed the need to consider redeployment and Cherie offered Alan EAP, which he accepted. The meeting concluded with agreement that a further meeting would occur within seven days at which the parties would look at redeployment opportunities for Alan.

[38] Following that meeting, on 21 July 2015, Scott undertook some investigation into possible redeployment for Alan but his review indicated that there were no suitable positions available.

[39] On 27 July 2015, Scott wrote to Alan to confirm the decision to disestablish his role and terminate his employment providing for his last day to be 7 August 2015 unless anything came up by way of redeployment opportunities in the interim period. Spotless still wished to discuss whether there were any opportunities for redeployment.

[40] On 30 July 2015, Mr Beck raised a further personal grievance for unjustified dismissal on behalf of Alan.

[41] On 5 August 2015, Alan met with Cherie and Jane to discuss the redeployment opportunities and Spotless concluded that there were no suitable opportunities available.

[42] On 5 August 2015, Spotless sent a letter to Alan confirming that the restructure was proceeding as previously advised and that his role had been disestablished. It outlined that they had discussed but had not been able to identify any suitable alternative employment opportunities and therefore the letter confirmed that his employment with Spotless would end on 7 August 2015. The letter advised Alan that he was not required to attend work during the period and he would receive his final pay on 12 August 2015.

Unjustified dismissal

[43] In *Grace Team Accounting*², the Court of Appeal said that if an employer can show that a redundancy is genuine and that consultation requirements have been met then the test of showing that the dismissal was justified is likely to be met. The Court stated at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test. In the end the focus of the [Authority] has to be on the objective standard of a fair and reasonable employer, so the subjective findings of what the particular employer has done in any case will still have to be measured against the [Authority's]

² Supra

assessment of what a fair and reasonable employer ... could ... have done in the circumstances.

[44] In *Scarborough v. Micron Securities Products Ltd*³, the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

Was the redundancy genuine?

[45] The first consideration is, therefore, was the redundancy genuine? As the Employment Court has indicated, it is not my role to substitute my business judgment for that of Spotless. What I must do is look at the analysis made by Spotless to determine that the restructure was required. I must consider whether the conclusion to restructure based on that analysis was one that a fair and reasonable employer could have made in those circumstances. Then I must consider in the circumstances whether the decision to make the employee redundant as a result of the restructure was genuine.

[46] The Contract was operating at a loss. Spotless had reviewed its six monthly performance of the Contract and come to the conclusion that it needed to reduce costs. Its further analysis of those overheads indicated to it that it was potentially spending too much money on a boiler technician role for the work that needed to be done. This was in the context of the 2013 upgrade to the boilers and associated machinery. In Spotless' view, the large amount of preventative maintenance the boiler technician undertook was actually not necessary.

[47] Spotless then considered a solution being the proposed restructure whereby the two plumbers undertook a reduced amount of preventative maintenance. If this could be done then Spotless could disestablish the boiler technician role.

³ [2015] NZEmpC 39

[48] One of the key considerations for Spotless was the amount of preventative maintenance assigned to the boiler technician. Scott and Cherie's review indicated that only 20 hours of preventative maintenance would be required per month. Scott and Cherie had come to this conclusion by reviewing job tickets and service records and obtaining feedback from Alan regarding what his job entailed and what he did. Their conclusion was that because the equipment was new and would require less servicing, the preventative maintenance requirement was only 20 hours per month and existing staff, other than the boiler technician, could carry this out. On this basis, Spotless could disestablish the boiler technician role.

[49] The conclusion that they reached was that the cost structure within the Contract as it pertained to the boiler technician was not sustainable and it made sense to proceed with the proposed restructure that would involve the disestablishment of that role.

[50] Based on this I am satisfied that Spotless made a comprehensive investigation into the concerns that informed its decision to put forward a proposed restructure and then proceed with it. I am satisfied that the decision to restructure was one that a fair and reasonable employer could have made in those circumstances.

[51] Alan believed that Spotless had predetermined the result of the consultation and was dismissive or disinterested in anything he said. Whilst that may have been his perception, I am not satisfied that that was actually the case. I take on face value the evidence of Spotless from the four participants in the various meetings and the two participants in the review and formulation of the proposed restructure that the decision to disestablish his role and select Alan for redundancy was genuine.

[52] It follows from my conclusions that the decision to implement the proposed restructure and select Alan for redundancy was genuine.

Was the process of consultation a fair one?

[53] As stated by the Court of Appeal in *Grace Team Accounting*, the second aspect of the question of whether an action is justifiable, as expressed in s 103A, is to consider whether the process by which the consultation and implementation of the restructure and subsequent redundancy was a fair one. As the Court of Appeal expressed, the consultation requirements of s 4 of the Act is certainly the starting

point for that, but there may be other considerations in terms of the process. In my view I need to consider whether:

- (a) Sufficient information was disclosed to Alan to enable him to make informed comments on the review and the proposed restructure;
- (b) Did Spotless make a genuine effort to consult with Alan once it had provided that information? Did it give him an adequate opportunity to respond;
- (c) If it did give Alan an opportunity to respond, did Spotless then consider those responses;
- (d) Once a decision was made to implement the restructure and disestablish Alan's role, did Spotless sufficiently consult with him and consider alternatives to dismissal⁴?

[54] The restructure had two parts to it. First, the review that Spotless undertook of the costs associated with performing the Contract because of the loss it sustained in the six months up to May 2015. Second, the proposed restructure premised on a model that involved the reduction of preventative maintenance and other staff carrying out that reduced amount of preventative maintenance.

[55] The problem that Spotless faces in satisfying the test of justification is that it did not consult with Alan over the first aspect of the restructure, the costs review. That review potentially related to his role and there could have been a decision as part of the review that was likely to have an impact on his role.

[56] The letter of 26 June 2015, the initial meeting on 29 June 2015 and the two-page consultation document refer to the costs review but it was not clear to Alan that he could provide feedback on the costs review and even if it was clear, he did not have sufficient information to be able to properly provide feedback.

[57] The proof of this is in Alan's evidence about his belief that the consultation document was actually two documents, one outlining the review that he was to have no input in and the second outlining a restructure.

⁴ Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102

[58] Alan may have been confused about this as the document is clearly a single document and the feedback that Spotless sought was on both the review and the proposed restructure. However, the document fails to provide sufficient information about the review being undertaken. If the purpose of the document was to get feedback from Alan on how costs might be reduced in relation to the Contract then it needed to provide information about the costs and the loss sustained. Spotless could have used the letter of 26 June 2015 or the meeting on 29 June 2015 to provide this information to elicit the necessary feedback, but failed to do so.

[59] In contrast, Spotless provided sufficient information regarding the proposed restructure to Alan for him to provide considered feedback on it. He was encouraged to be involved throughout the process. Spotless provided information relating to its review, explained the rationale and sought feedback by asking for information from Alan about what he did in the role, his view on whether the preventative maintenance could be reduced and his view on whether the reduced work could be undertaken by the other employees.

[60] Counsel for Spotless persuaded me through cross-examination of Alan that Alan had an adequate understanding of the proposed restructure. So, for example, in the course of cross-examination, Alan conceded he knew what the letter of 26 June 2015 outlined and that it was about a restructure. He knew that that affected his role and understood what was being proposed. He also knew from that letter that it was about reducing costs vis-à-vis his role in the Contract. He received that letter, reviewed it and did not ask for more time before the meeting. He accepted that in the meeting on 29 June 2015 Spotless provided further information to him about the restructure including the two-page document. Overall, he accepted that Spotless was asking for feedback on the disestablishment of his role.

[61] Alan then went on in cross-examination to accept that Spotless gave him the opportunity to give feedback on his role and he did so in writing on 6 July 2015. He also accepted that his feedback and other aspects of the proposed structure were discussed in the meeting of 13 July 2015. Prior to that meeting, he obtained further information regarding the preventative maintenance and the amount of work undertaken. This included tables that Spotless had produced to show the summary of the hours and cost involved in the preventative maintenance.

[62] Alan was given sufficient information about the proposed restructure so that he could provide feedback on it. He was also given adequate opportunities to give that feedback which he took.

[63] Spotless then considered Alan's feedback before it made its decision to implement the proposed restructure.

[64] In this regard, I note that Mr Beck has expressed in correspondence concerns that he and Alan were of the view that it had been predetermined. Mr Beck did not give evidence at the investigation meeting and I can only give limited weight to the contention in his correspondence, as I could not test his view and the conclusion that he drew by questioning him directly. The converse also applies. I cannot conclude that Mr Beck was wrong in his conclusion or that it was ill founded. It may well have been the impression he and Alan received from the meetings. However, I cannot conclude that his impression is in fact what the Spotless participants were thinking or doing in the meetings. That Mr Beck and Alan obtained that impression was unfortunate but I do not believe that it influenced the opportunity that Spotless was affording Alan to engage in consultation over the review and proposed restructure. That he perceived it as something else is not a fault I can attribute to Spotless in the process.

[65] In contrast, the evidence from Spotless was that this process was not predetermined and it did consider what Alan said to it in writing and in the meetings on the review and proposed restructure. Whilst Alan told Spotless that 20 hours preventative maintenance was not sufficient to maintain the boiler and associated equipment, Spotless did not accept that. It was within Spotless's prerogative to do so having reviewed this. Simply because Alan said something contrary to it and disagreed with what Spotless accepted does not make that decision by Spotless wrong nor does it mean it did not consider what he had said appropriately. I take the Spotless evidence on face value that it did review what Alan said objectively, but it did not accept his conclusions.

[66] Once Spotless made the decision to proceed with the restructure and disestablish Alan's role it did consider redeployment opportunities. It did this on more than one occasion and discussed that with Alan. In the course of his evidence, Alan suggested there were technician roles that were available which he could

undertake, but Spotless did not accept this and it is clear to me from its analysis that there were no roles available for Alan.

Was Spotless obliged to consult with Alan over the costs review?

[67] On the face of it, the review into cost savings for the Contract lead to a decision to propose a restructure that included the disestablishment of Alan's role.

[68] However, any consultation over that cost saving would have been moot. This is because the decision to propose the restructure came from the review but was premised on a conclusion (subject to consultation) that the boiler technician role was superfluous. That is the role was based on a high amount of preventative maintenance that Spotless considered was not necessary. The decision to restructure was no longer about saving costs although that was a benefit of the proposal, it was simply that the role was not needed. Even if Alan had been able to identify alternative cost savings that meant the Contract would not make a loss even with the cost of his role continuing, Spotless would have still proposed the restructure because it did not need to employ Alan to undertake work that was not necessary.

[69] The consultation requirements in s 4 of the Act include at s 4(1A)(c):

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

(a) ...

(b) ...

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely, have an adverse effect on the continuation of employment of 1 or more 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.

[70] Spotless was obliged to provide Alan with *relevant information ... about the decision*. That information was information *relevant to the continuation of [Alan's] employment*. The decision was whether to proceed with the proposed restructure and disestablish Alan's role. The information relevant to that decision was not the cost

saving information but rather the conclusion that Alan's role was superfluous as the preventative maintenance required under the Contract could be achieved with 20 hours per month and the two qualified plumbers could undertake this.

[71] Spotless was then obliged to provide Alan with an opportunity to comment on this information, which it did.

[72] Spotless was not obliged to consult with Alan over the review of costs. Spotless was only obliged to consult over the proposal to restructure including the disestablishment of Alan's role. Spotless followed a fair process throughout the consultation in relation to the proposed restructure.

[73] As I have already indicated the redundancy was genuine; Spotless has followed a fair process; there is no unjustified dismissal.

Unjustified action causing disadvantage

[74] For the reasons expressed above, I find that Spotless did not act in an unjustified manner. There is no unjustified disadvantage grievance.

Penalties

[75] As there was no obligation to consult over the cost review and as Spotless did consult adequately over the proposed restructure, Spotless did not breach the duty of good faith or any obligations it owed under the employment agreement. There is no basis for me to consider imposing penalties.

Determination

[76] I decline Alan's claim for personal grievances. Alan was not unjustifiably dismissed nor did Spotless act in a manner that was unjustifiable and caused disadvantage to his employment.

[77] Spotless has not breached the duty of good faith or Alan's individual employment agreement. I do not impose any penalties against Spotless.

Costs

[78] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred in taking part in these proceedings. If they cannot agree, then

Spotless can lodge and serve a memorandum on costs within 28 days of the date of this determination. Alan will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

[79] If I must determine costs, the parties should expect me to do so on the usual daily tariff basis adjusted upwards or downwards to account for the particular circumstances or factors of the case⁵.

Peter van Keulen
Member of the Employment Relations Authority

⁵ *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135 at [106]-[108]