

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 231
5388493

BETWEEN WAYNE WOODWARD
 Applicant

A N D TOTALLY BOATING 2004
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
 David Ballantyne, Counsel for Respondent

Investigation meeting: 23 October 2013 at Nelson

Submissions Received: 25 October 2013 by telephone

Date of Determination: 11 November 2013

DETERMINATION OF THE AUTHORITY

- A. There were genuine commercial reasons behind the decision to make the applicant's position redundant. However, the process followed was procedurally unfair. Hence the dismissal was unjustified.**
- B. The respondent acted in breach of s.19(2) of the Holidays Act 2003, and this gives rise to an unjustified disadvantage in the applicant's employment.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Woodward raises a personal grievance that he was unjustifiably dismissed by reason of redundancy on 26 March 2012, claiming that his dismissal was both

substantially and procedurally unjustified. Mr Woodward also claims that he suffered an unjustified disadvantage in his employment when he was forced to take holiday at short notice at a time which did not suit him. He also originally claimed for breach of contract, alleging that the respondent failed to carry out contractual annual performance reviews, but this claim was withdrawn by Ms Sharma during submissions, and so shall not be further considered in this determination.

[2] The respondent denies that Mr Woodward was unjustifiably dismissed for redundancy. It also claims that Mr Woodward was asked to take two weeks' annual leave because he had accumulated in excess of five weeks' leave, contrary to the terms of the employment agreement.

Brief account of the events leading to the dismissal

[3] Mr Woodward is 65 years old and, prior to his dismissal, had worked as an outboard technician for around 36 years. He had worked for the business of the respondent since 1989, but signed a new contract of employment with the respondent company in January 2004 when that company took over the business. Mr Michael Dobson has been the business owner ever since then, although Mr Woodward usually reported directly to a service manager.

[4] According to Mr Woodward, in early March 2012, he was told by Mr Dobson that he was required to take two weeks' annual leave between 6 and 20 March 2012. Mr Woodward says that he told Mr Dobson he was not happy to do that because he had already arranged to take annual leave in April 2012 and that he had indicated this on a calendar in the office. However, it seems to be common ground that Mr Dobson insisted that Mr Woodward take the annual leave at the time he was told to.

[5] Mr Dobson's evidence is that he had told Mr Woodward on several occasions leading up to Christmas 2011 that he had accumulated in excess of four weeks' annual leave and that, under the terms of his employment agreement, he could not carry over annual leave and that he could therefore be required to take it at the respondent's discretion. Mr Dobson says that he had already told Mr Woodward that he needed to take his annual leave within the year or risk losing it.

[6] Mr Dobson says that Mr Woodward had indicated that he would let him know what dates he wanted to take but did not do so. He was not aware of the dates that Mr Woodward had written on the calendar he says. Mr Dobson's evidence was that,

by early March 2012, Mr Woodward had still not advised him when he intended to take annual leave so Mr Dobson advised him that he would need to take a continuous two week period of annual leave as he could no longer continue to accumulate annual leave under the terms of his employment agreement. It is Mr Dobson's evidence that he is likely to have agreed to Mr Woodward waiting till April 2012 to let him take his leave if he had known about it. Mr Dobson said that, even with the two weeks' leave taken in March, Mr Woodward still had nine days' leave left which had accumulated from the previous year.

[7] On 21 March 2012, shortly after Mr Woodward's return from annual leave, Mr Woodward was given a letter dated 21 March 2012 which read as follows:

Proposed redundancy

Dear Wayne

Because of the difficult economic environment that exists at the moment we have undertaken a review of our business and as a result we have identified your position as one that we believe we no longer require.

Because there are several other positions that could have been selected for redundancy, we decided to evaluate each of the employees who are employed in those similar positions and retain those employees who we believed possess the attributes that the business needs for the future. In your case we believe that your attributes are less than for others. In arriving at this proposal we evaluated each employee on the basis of skills, comebacks, reliability and wages cost.

Enclosed is a copy of your employment agreement; you should read the section on Redundancy, clause 13 to see what your entitlements are.

Before we finalise our decision we intend to commence the following process:

- We will meet with you before we make our final decision to enable you to ask questions and make suggestions and you are invited to bring a support person to that meeting.*
- We will listen to your suggestions and questions and will take those into account before we make any final decision.*
- We will meet with you again and explain what our final decision is and how that will affect your employment.*

Should this proposal proceed we will make a final decision on 26/03/12.

I will contact you to arrange a consultation meeting on Friday 23/03/12.

*Kind regards,
Michael Dobson*

[8] No other information was provided to Mr Woodward prior to the meeting on 23 March. It is Mr Woodward's evidence that he attended the meeting on 23 March 2012 with his companion, Ms Thomas, as a support person. Mr Woodward says that he asked Mr Dobson how he had formed the view that he had *less attributes* than his co-workers, as he had not ever been told, either by Mr Dobson or his previous employer, of any concerns. Mr Woodward says that he was told that Mr Dobson had no issues about his skills or his reliability but Mr Dobson then proceeded to refer to a list of 24 *comebacks* – problems with boats which had to come back to the workshop for remedial work after servicing – written on a piece of paper, a copy of which Mr Dobson handed him.

[9] It is Mr Woodward's evidence that, when he attempted to respond to the list of 24 comebacks, Mr Dobson showed no interest in listening to what Mr Woodward had to say. Mr Dobson says that Mr Woodward looked down the list marking it with a pen, saying *I know about that one; I don't know about that one*. Mr Dobson explained that he had obtained the list of Mr Woodward's comebacks by looking on the financial system and finding each invoice associated with a comeback, and seeing who had done the work originally. Mr Dobson says, up until March 2012, he had been given general data about comebacks by the service manager without any being broken down by technician. When he had done the analysis he was surprised to see that Mr Woodward had 24 comebacks since mid-2008, whilst his colleagues had had two, one and zero comebacks respectively.

[10] It was common ground that the matrix that Mr Dobson had created which scored Mr Woodward against his three colleagues was not handed to Mr Woodward, although it was on the table in front of Mr Dobson. Both Mr Woodward and Ms Thomas gave evidence that they saw it on the table in front of Mr Dobson, upside down.

[11] Upon questioning Mr Woodward during the Authority's investigation meeting, he said that he did not make any suggestions of ways to avoid his redundancy, and did not prepare anything before the meeting because he thought he was going to be made redundant anyway, given the content of the letter of 21 March.

[12] Ms Thomas did make a suggestion during the meeting, which was that Mr Woodward could carry out the servicing of boats at Okiwi Bay, in the Marlborough Sounds, where he had a bach. Mr Dobson said at the meeting that he would consider this, and gave evidence to the Authority that he had spoken to the sales manager over the weekend of 24/25 March 2012, who told Mr Dobson that Mr Woodward had mentioned this possibility to him also. The salesman told Mr Dobson that he had told Mr Woodward that that idea would only work if Mr Woodward did the servicing as a contractor, and that Mr Woodward had not been interested in doing that. For this reason, Mr Dobson did not consider the suggestion of Ms Thomas would work. However, there is no evidence that he fed this back to Mr Woodward prior to the dismissal.

[13] Mr Woodward says that, on Monday, 26 March 2012, he went to work as normal and, just prior to his lunch break, Mr Dobson approached him and asked to meet with him in his office. He says that Mr Dobson told him that he was no longer required to work at the company and that his employment was terminated on four weeks' notice. He says that he was asked to collect his things and leave the premises. He was not given a letter of termination and, he says, the respondent did not shout him a farewell do to mark his departure after so many years. This Mr Dobson conceded, although he disagreed that he had required Mr Woodward to leave the premises immediately.

[14] Mr Dobson explained how he had reached the decision that Mr Woodward's position should be made redundant. There were four workshop technicians employed in the Nelson branch at that time, including Mr Woodward. Mr Dobson decided that there were four essential criteria against which he would score the technicians in deciding which one of them should be made redundant. These *attributes* were as follows:

- (a) Range of skills;
- (b) Comebacks;
- (c) Wages cost; and
- (d) Reliability.

[15] Mr Dobson's evidence is that he scored Mr Woodward as 9 out of 10 in respect of range of skills; 1 out of 10 in respect of his comebacks; 5 out of 10 in respect of his wages cost; and 10 out of 10 in respect of his reliability. The other three staff received, respectively, 9, 8 and 7 for range of skills; 10, 10 and 9 in respect of comebacks; 8, 9 and 10 in respect of wages costs; and 10 each in respect of reliability.

[16] It is clear, therefore, that Mr Woodward was scored particularly low for his comebacks and his wages cost, but that it was his extremely low score on comebacks that produced such a low total mark. Mr Woodward was scored a total of 25 out of 40 whereas his colleagues were scored 37, 37 and 36 out of 40 respectively.

[17] Mr Dobson explained that wages were assessed as a relevant factor because:

*... the more one is paid the less value they are to the business
however you would expect those on higher wages to add more value
and so score higher in the other areas to offset this additional cost.*

[18] Mr Woodward was paid more than any other technician, at \$24.50 per hour. The other three technicians were paid \$22, \$21 and \$20 per hour respectively. In this respect, it would appear that marking Mr Woodward as a 5 in respect of wages cost was too low as he was not paid twice as much as the individual who was marked 10. It would have been more accurate to have marked Mr Woodward as a 7, although this would not have resulted in a materially different score for Mr Woodward.

[19] Mr Dobson's evidence is that, at the meeting on 23 March 2012, he explained the issues the business was confronting and the reason behind the need to make one of the positions redundant. He said he outlined the selection process and denied that Mr Woodward was denied his request for information concerning the selection criteria process and how it was applied. He says that Mr Woodward made it clear that he accepted the criteria and range of skills assessed by Mr Dobson, but that he did not understand why he had scored lower than the other employees for comebacks.

[20] Mr Dobson's evidence was that, until he undertook the selection criteria exercise, the service manager had only given him a global figure each month for the cost of dealing with comebacks, and that he had assumed that the four technicians had been equally responsible for them. He had been made aware originally of a small number of high profile comebacks but, when he did the selection criteria exercise, he discovered that there were many less significant ones which were mostly related to Mr Woodward's work. Mr Dobson said that comebacks are a significant cost to the

business, not only because of the time taken to correct the faulty work but also due to the loss of customer goodwill created by that faulty work.

[21] Mr Dobson denied that Mr Woodward's comebacks had never been discussed with him and that Mr Woodward was not aware of any, as he had often done the remedial work himself. Mr Dobson also denied that he did not listen to Mr Woodward's denials about the comebacks during the meeting on 23 March.

Issues

[22] The Authority is required to determine the following key issues:

- (a) Whether Mr Woodward's dismissal was justified; and
- (b) Whether Mr Woodward suffered an unjustified disadvantage in his employment when he was told that he had to take annual leave in March 2012.

Was Mr Woodward's dismissal justified?

[23] In order to answer this question, the Authority must have in its mind the test of justification set out in s.103A of the Employment Relations Act 2000 (the Act) and the obligations of good faith, and especially those set out in ss.4(1A)(a)-(c) of the Act.

[24] The s.103A test is as follows:

(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.

[25] Section 4(1A) of the Act provides as follows:

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.

[26] In determining the justification of the dismissal, there are two sub issues to examine:

(a) Whether there was a genuine need to make Mr Woodward's position redundant; and

(b) Whether a procedurally fair process was adopted in making Mr Woodward's position redundant.

Was there was a genuine need to make Mr Woodward's position redundant?

[27] In the Employment Court case *Rittson-Thomas t/a Totara Hills Farm v. Davidson* [2013] NZEmpC 39, His Honour Chief Judge Colgan clarified his reasoning in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 to assert that, where an employee challenges an employer to justify a redundancy dismissal, it is not enough for the employer to claim that it was a genuine business decision and that the

Authority is not entitled to inquire into the merits of it. On the contrary, such an inquiry is necessary to determine whether the decision and how it was reached was what a fair and reasonable employer could have done in all the relevant circumstances.

[28] It was Mr Dobson's evidence that his company serviced the recreational boat user, rather than the commercial boat user, and that, in terms of the financial hardship being experienced during the global financial crisis, discretionary spending on items such as boats had tended to drop off.

[29] Although Mr Dobson did not put detailed financial evidence before the Authority to support his contention that the company had been facing severe financial difficulties in early 2012, he did produce a copy of a statement of financial performance for the year ended 30 June 2012 which had the equivalent financial figures for the financial year 2011, as comparison. These figures showed that, as at 30 June 2011, the respondent company had made a loss of nearly \$300,000.

[30] Mr Dobson's evidence was that his business had continued to experience a significant downturn in trade leading into early 2012. He said he had closed down his Motueka branch in 2011, which had resulted in two technicians being transferred to the Nelson branch, where Mr Woodward worked. Mr Dobson said that he retained these two mechanic technician positions in the Nelson branch for 12 months but, as the company tried to continue to trade profitably, it was apparent that the business was carrying more employees in direct service roles than was required and that some were superfluous.

[31] Mr Dobson states that, by March 2012, he was well aware that the revenue for the 2011/12 financial year was running substantially below that of the previous year whilst the workshop wages were still running at a level similar to those of the previous year. Mr Dobson said that he had hoped that the business would pick up during 2012 but, by March 2012, the workshop sales had been running around 12% to 13% behind the levels encountered in the previous year and showroom sales were showing a similar decline.

[32] Mr Dobson said that to address these issues he took a number of steps, as follows:

- (a) The business renegotiated its rent with the landlord;

- (b) A workshop labourer first had his hours reduced, and was then made redundant;
- (c) The hours of the office manager were cut back from 40 to 20 hours per week;
- (d) Three members of staff (including himself) took pay cuts of around 8%;
- (e) Mr Dobson went through each item of expenditure line-by-line to see how else expenditure could be reduced; and
- (f) He decided to reduce the over-capacity in the workshop by making one boat technician redundant.

[33] The statement of financial performance for the year ended 30 June 2012 showed that, to that date, the business had still made a loss of nearly \$90,000.

[34] Although the Authority did not see detailed financial statements showing the financial performance of the respondent company in the months leading to March 2012, having taken into account all of Mr Dobson's evidence, I am quite satisfied that, by March 2012, there was a genuine and pressing need for the respondent to further reduce its costs so as to avoid further significant loss.

[35] I also conclude that Mr Dobson's decision that the most effective means of reducing overall costs was by reducing the wages costs incurred by employing four technicians was a sensible and reasonable conclusion to have reached and was what a fair and reasonable employer could have done in all the circumstances at the time.

[36] In light of these conclusions, I do not accept that Mr Woodward's dismissal was for some reason other than for redundancy, or that the reason of redundancy was a sham.

Was the process followed in making Mr Woodward's position redundant procedurally fair?

[37] It was Mr Woodward's evidence that he had been suspicious when he was made to go on annual leave in March 2012, implying that Mr Dobson wanted him out of the way so that he could carry out his plans to make Mr Woodward redundant. Mr Woodward admitted that he had no objective reason for his suspicions, however.

[38] Mr Dobson did confirm in his evidence that it was probably during that period of Mr Woodward's enforced annual leave that he concluded that it was necessary to reduce the number of technicians he employed in order to prevent the company making further losses. However, I see nothing inherently unfair in Mr Dobson reaching his decision to reduce his operating costs during Mr Woodward's enforced annual leave. What is key is whether Mr Woodward was treated fairly once that decision had been made.

[39] It is my conclusion that the process followed by the respondent in concluding that Mr Woodward should be made redundant was not what a fair and reasonable employer could have done in all the circumstances at the time. The procedural requirements of an employer in deciding whether to dismiss an employee by reason of redundancy and, where there is a choice between employees, which employee to dismiss, are reasonably onerous involving, prior to the decisions being made, both the provision of all relevant information and full and effective consultation, as required by s.4(1A) of the Act. There were a number of procedural failings in the way that Mr Dobson dealt with the decision to dismiss Mr Woodward.

The decision to make a position redundant

[40] Mr Dobson's evidence is that he reached the decision that he needed to reduce the number of technicians he employed and then took advice (not from his current counsel) as to how to effect that decision. The duty of good faith set out in s.4(1A) requires provision to affected employees of access to information that is relevant to the continuation of their employment and then to give the employees an opportunity to comment on the information before a decision is made that will, or is likely to have an adverse effect on the continuation of one or more of the employees' employment. It must be the case that *relevant information* includes any proposal that the respondent intends to dismiss one of the employees by reason of redundancy. The statutory requirements mean that the consultation must occur at the proposal stage, and before a settled decision is made that an employee will be dismissed for redundancy. That means that all four technicians should have been consulted with about the possibility of a redundancy, before the selection process was completed.

[41] Mr Dobson has stated that consulting with all four technicians about a possible redundancy dismissal had been put in the *too hard basket* by him and that it might have caused one or two of them to have looked elsewhere for work.

Mr Ballantyne said in his submissions that consulting all four technicians would have *wreaked havoc* and that the Authority must have regard to how businesses operate.

[42] Whilst recognising that consultation with a pool of staff, one of whom could potentially be made redundant, is very likely to prove unsettling for them, and could disrupt the business in the short term, that level of consultation is what s.4(1A) of the Act requires. The alternative is that a decision having an adverse effect on the continuation of employment of one of more employees (namely, to dismiss one of them) would have been made before the opportunity to comment on that decision has been made. That is plainly contrary to the requirements of the Act.

[43] In any event, I am not convinced that the consequences of consulting with a pool of staff about the possibility of reducing their numbers, would *wreak havoc*, provided that the consultation process was done sensitively and was not unnecessarily prolonged.

The selection criteria

[44] Mr Dobson gave evidence that, after getting advice, he decided to use four criteria against which to score each of the four technicians. The four criteria he applied (range of skills, comebacks, wages costs and reliability) all appear to be reasonable and relevant ones and can be justified in terms of the business needs of the respondent going forward. None of them are obviously unlawfully discriminatory.

[45] However, Mr Dobson did not consult with Mr Woodward about these four criteria and how he would apply them prior to carrying out his scoring exercise. It is clear that, pursuant to s.4(1A)(c) of the Act, those four criteria constituted *information, relevant to the continuation of the employees' employment, about the decision.*

[46] If Mr Woodward had been given an opportunity to comment upon the criteria, provided that Mr Dobson had then considered any such comments in good faith, as was his obligation, Mr Dobson might have been persuaded to apply different or additional selection criteria. In such circumstances, it is perfectly conceivable that Mr Woodward would have scored higher than one or more of his colleagues and would not have been chosen for redundancy.

[47] It was suggested as long ago as 1992, in the case of *Hildred v. Newmans Coachlines Ltd* [1992] 3 ERNZ 165, that selection criteria should be clearly communicated to staff and opportunities to contest or discuss the criteria should be given. This was not done in this case and constitutes a failure which, alone, could render the dismissal unjustified.

How the selection criteria were applied

[48] The next issue that should have been communicated to Mr Woodward for consultation prior to the scoring exercise was the way each individual technician was scored against the criteria chosen. Mr Dobson conceded that scoring Mr Woodward 5 out of 10 for wages costs did not really have an objective basis. It is certainly not the case that Mr Woodward earned twice as much as another technician (Mr Harris) who was scored 10 out of 10 (the difference in wages between them being \$4.50 per hour).

[49] However, this failure to consult about the scoring process is most stark in the issue of comebacks. Mr Woodward said that he thought that it was unfair to take into account his comebacks going back nearly four years when one of the other technicians had only worked for the company for two years. Mr Woodward made the fair point that Mr Dobson was not comparing like with like. Although Mr Dobson had an explanation for going back nearly four years, the fact is that Mr Woodward was deprived of the opportunity to make any representations at all about the scoring taking place over that period. It was perfectly possible that, had Mr Dobson discussed the way he meant to score the staff with Mr Woodward first, Mr Woodward could have persuaded him to adopt a different approach, which may have resulted in a less disadvantageous score.

The comebacks

[50] A further serious procedural flaw was the failure of Mr Dobson to give full details in advance of the 23 March meeting of each of the comebacks relied upon by him in scoring Mr Woodward 1 out of 10. Mr Dobson waited to the consultation meeting to present Mr Woodward with a list of 24 issues (expressed in very terse terms such as *589 Trailer – lights; Sam & Russo - White plastic; 585 Fit up – Bait Boarding*) which he said were comebacks attributable to Mr Woodward. As some of these went back nearly four years it was clearly unfair to present these comebacks to

Mr Woodward in the consultation meeting without any prior warning and expect Mr Woodward to make comments upon them and to make reasoned suggestions to save his job.

[51] In Mr Dobson's letter to Mr Woodward dated 21 March 2012, he simply stated that *we believe that your attributes are less than for others*. There was no clear indication that the attribute against which Mr Woodward scored most badly was comebacks and that Mr Woodward's score was significantly below those of the other three technicians as a result of that bad score.

[52] The correct approach would have been for Mr Dobson to have included with his letter of 21 March 2012 not only the list of comebacks that he was relying on, but also supporting documentation which clearly showed Mr Woodward that he was responsible for each one, so as to jog his memory. During the Authority's investigation meeting Mr Woodward was still maintaining that he did not know about the majority of these comebacks. No evidence was presented to the Authority to support Mr Dobson's contention that Mr Woodward was responsible for them. Whilst it is perfectly possible that Mr Dobson is completely correct in his conclusions, Mr Woodward had a fundamental right to not only have full information in front of him but also sufficient time to think about each one of these comebacks and to be given the opportunity to make informed representations about each.

Financial information

[53] A further failing by Mr Dobson in the process was that he did not give Mr Woodward any financial information whatsoever to support his contention that the company needed to lose one technician's position. The whole point of the meeting on 23 March 2012 was to explore with Mr Woodward his suggestions for avoiding his redundancy. If Mr Dobson had given Mr Woodward some financial data (such as wages costs, other expenses, and revenues) it is possible that Mr Woodward could have come up with some suggestions. Even if that was extremely unlikely in Mr Dobson's view, Mr Woodward still had the basic right, pursuant to s.4(1A) of the Act, to that information. It is clearly unfair and highly prejudicial for Mr Dobson to have had all that information in his head, to use that information to justify the decision to make Mr Woodward redundant, but not to share any of it with Mr Woodward.

Alternatives to dismissal

[54] A further flaw in the process was Mr Dobson's failure to discuss with Mr Woodward whether there were any alternatives to dismissal. This requirement is made clear from such cases as *GN Hale & Son Ltd v. Wellington Etc Caretakers Etc IUOW* [1991] 1 NZLR 151 and *New Zealand Nurses Union v. Air New Zealand Ltd* [1992] 3 ERNZ 548. During his evidence to the Authority, it was suggested that Mr Woodward would have contemplated taking a reduction in his hours which would have had a bearing on wages cost. Mr Dobson dismissed out of hand such a suggestion saying it would not have been sufficient. However, alternatives to dismissal were not even discussed, and it is therefore not surprising that Mr Woodward and his support person left the meeting feeling that his dismissal was a done deal.

Conclusion

[55] In conclusion, the respondent demonstrated procedural failings which had a cumulatively significant prejudicial effect on Mr Woodward. It is not my conclusion that Mr Dobson deliberately failed in the way described above. However, because of the significant and numerous procedural failings, I must conclude that the employer's actions in dismissing Mr Woodward by way of redundancy were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Substantively justified dismissal

[56] I conclude that, but for the procedural flaws, Mr Woodward's dismissal by reason of redundancy would have been justified. One of the flaws identified in the process followed was the failure to consult with Mr Woodward about the selection criteria and how they were to be applied. Although Mr Woodward said that it was unfair to go back four years in the list of comebacks, he did not say that he felt that the attribute of comebacks was an unfair measure to apply and did not say that additional or alternative criteria should have been used. For the reasons explained by Mr Dobson, I believe that the criterion of comebacks was a reasonable criterion to use in selecting which of the four technicians to make redundant.

[57] Mr Woodward acknowledged responsibility for nine of the comebacks during the Authority's investigation meeting. It is very likely that, with the benefit of more information, he would have been in a position to acknowledge many more, including in the two year period immediately before March 2012. I do not believe, therefore, that, if the unfairness in the lack of proper consultation in respect of this criterion had not occurred, Mr Woodward would not have scored very low in respect of it.

[58] Another procedural flaw was the failure to consult with the technicians about whether it was necessary to make a post redundant. It is possible that, if this consultation had occurred, the technicians would have all offered to take a pay cut equivalent to the saving of Mr Woodward's wage bill, thereby avoiding the need to dismiss him. However, I believe that this is unlikely, as that collective pay cut would have had to have been significant in each case, amounting to more than 25% in some cases. On balance, therefore, I do not accept that this failure was likely to have saved Mr Woodward's job.

[59] During the Authority's investigation meeting, Mr Woodward did not say that he would have suggested any measure if asked which, objectively, is likely to have saved his job. Furthermore, he did not challenge the conclusion reached by Mr Dobson that a role in Okiwi Bay could have been done in any way other than as a contractor.

[60] All in all, I do not believe that any of the procedural flaws were such that, if they had not occurred, Mr Woodward would not have been justifiably dismissed by reason of redundancy. His dismissal was therefore substantively justified.

Did Mr Woodward suffer an unjustified disadvantage in his employment when he was told to take annual leave?

[61] Section 19 of the Holidays Act 2003 provides as follows:

19 When employee may be required to take annual holidays

(1) An employer may require an employee to take annual holidays if—

(a) the employer and employee are unable to reach agreement under section 18(3) as to when the employee will take his or her annual holidays; or

(b) section 32 (which relates to closedown periods) applies.

(2) If subsection (1) applies, an employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.

[62] Although I accept Mr Dobson's evidence that he and Mr Woodward could not effectively agree when Mr Woodward would take the accrued holiday carried over from the previous year, and so s.19(1)(a) applies, I do not accept that the requisite 14 days' notice was given to Mr Woodward as required by s.19(2). There is no provision for the imposition of a penalty against an employer who breaches s.19 of the Act. The consequences of a breach of this section by an employer are that the employer cannot insist that the employee take the holiday. However, Mr Woodward did take the holiday, albeit reluctantly.

[63] Mr Woodward gave evidence that he had wanted to go take his annual leave in the Marlborough Sounds in April 2012, instead of March 2012, because he and his partner always go away at that time of year. However, he had had no particular plans for that period.

[64] Although Mr Dobson said he would have probably let Mr Woodward take leave in April if he had realised that that was what Mr Woodward wanted, Mr Dobson did not say that he would have let him take the leave in April as well as in March. I therefore accept that Mr Woodward suffered a disadvantage in his employment when he was forced to take leave at a time he did not wish to.

[65] As to whether the disadvantage was unjustified, I must accept that it was, by dint of the fact that the respondent did not give the 14 days' notice required under the Holidays Act 2003.

Remedies

[66] Mr Woodward does not seek reinstatement.

[67] I have concluded that there was a genuine redundancy situation in respect of the role that Mr Woodward had been employed in, that his dismissal was substantively justified, but that Mr Woodward's dismissal was unjustified by reason of a materially flawed process.

[68] In assessing the remedies that are available to be awarded in a case where the redundancy has been assessed as genuine, it is necessary to consider whether, but for the procedural flaws, the employee would still have been dismissed for redundancy. *Christchurch City Council v. Davidson* [1997] 1 NZLR 275; *Aoraki Corp Ltd v. McGavin* [1998] 3 NZLR 276. I have concluded that he would have been.

[69] Therefore, it is not appropriate for Mr Woodward to be awarded any remedies under s.123(1)(b), save in respect of the wages that he would have earned during a proper consultation process. If a proper process had been followed, including consulting with all of the technicians, I believe that it would have taken no more than two weeks longer than it actually did. Therefore, it is appropriate for Mr Woodward to be awarded two weeks' gross salary, representing the pay he would have earned had proper consultation taken place.

[70] Mr Woodward claims \$804 in terms of lost Kiwisaver benefits, but this remedy is also not available to him as his redundancy was substantially justified.

[71] However, Mr Woodward is entitled to an award under s.123(1)(c)(i) of the Act for both the unjustified dismissal and the unjustified disadvantage arising from being forced to take annual leave in breach of the Holidays Act 2003.

[72] Mr Woodward gave evidence that the sudden loss of his job put him in a financially stressful situation, and that having to apply for an unemployment benefit after having worked all his life was very demoralising. However, this is an effect of the redundancy, which was subjectively justified, and not of the procedural failings, so I cannot take that aspect of the effect into account.

[73] Mr Woodward also gave evidence that he felt that his redundancy was effectively a done deal, and this does follow from the procedural failings. I infer from Mr Woodward's evidence that he felt powerless, and that he felt that there was nothing he could have said to have changed Mr Dobson's mind right from the outset. I believe from Mr Woodward's evidence that he felt in particular that it was not a good way to be treated after having worked for the business for so many years. A thorough and fair consultation process would have significantly mitigated these feelings, I believe.

[74] It is therefore appropriate to award Mr Woodward a remedy for the humiliation, loss of dignity and injury to his feelings arising from the procedural failings in the dismissal process. Considering all the evidence, I believe that an award of \$10,000 properly compensates Mr Woodward.

[75] Turning to the unjustified disadvantage that Mr Woodward suffered arising from the failure to give him proper notice of the requirement to take annual leave, I do not believe that the humiliation, loss of dignity and injury to his feelings was great.

He said in evidence that they had no particular plans for April, when he would have preferred to have taken the leave. I believe that an award of \$500 is appropriate.

[76] Having determined that Mr Woodward has a personal grievance, and having awarded remedies to Mr Woodward, I must consider the extent to which Mr Woodward's actions contributed to 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. (Section 124 of the Act). I am completely satisfied that Mr Woodward contributed neither to the failure to give him proper notice of the requirement to take annual leave, nor to the situation giving rise to the need to make him redundant. I therefore do not reduce his remedies.

Orders

[77] I order the respondent to pay to Mr Woodward:

- (a) two weeks' gross salary in the total sum of \$1,960; and
- (b) the total gross sum of \$10,500 pursuant to s.123(1)(c)(i) of the Act.

Costs

[78] The parties are directed to seek to agree between them how costs are to be dealt with. However, if they have failed to reach agreement within 28 days of the date of this determination, the applicant has a further 14 days within which to serve and lodge a memorandum of counsel, and the respondent has a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton
Member of the Employment Relations Authority