IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 14
3132059

	BETWEEN	NIGEL WOOTTON Applicant
	A N D	ROADRUBBER TYRES LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Sarah Townsend, counsel, for the Applicant
	Jeff Goldstein and Linda Ryder, advocates for the Respondent
Investigation Meeting:	9 November 2021 in Christchurch
Submissions and further information received:	9 November 2021 and 11 November from the Applicant.
	9 November 2021 and 17 November from the Respondent.
Date of Determination:	24 January 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nigel Wootton worked for Roadrubber Tyres Limited (Roadrubber) from 1 October 2019 as a tyre fitter until he was made redundant on 16 March 2020.

[2] Through an advocate, Mr Wootton raised a personal grievance by letter dated 24 May 2020 alleging he had been unjustifiably dismissed and unjustifiably disadvantaged. The letter set out claimed procedural deficiencies in Roadrubber's restructuring process that Mr Wootton suggested amounted to breaches of good faith obligations and he challenged the substantive reasons advanced in the process for making his position redundant. Mr Wootton also asserted the decision to end his employment was pre-determined and driven by an ulterior motive. No response was provided to the personal grievance letter and a request for disclosure of personal information remained unaddressed.

[3] The matter was filed in the Authority on 5 February 2021. Mr Wootton claims he has been:

(a) Unjustifiably dismissed.

(b) Unjustifiably disadvantaged.

(c) The subject of identified good faith breaches.

[4] Remedies sought by Mr Wootton were: lost wages with interest, compensation for hurt and humiliation, penalties for the identified breaches including for the failure of Roadrubber to respond to a request to supply wage and time records and a contribution to costs.

[5] A statement in reply of 9 March 2021 contested the validity of Mr Wootton's claims and initially sought, then abandoned, a claim that the personal grievance had been raised out of time.

[6] The parties then attended an unsuccessful mediation.

The Authority investigation

[7] During the investigation meeting I heard evidence from Nigel Wootton, his friend Mike Bolger and Roadrubber directors, Aaron McCloy and Suzanne McCloy who all provided written briefs. I record that all parties provided useful background information and assisted in my investigation.

[8] Pursuant to s 174E Employment Relations Act 2000 ("the Act") I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders, but I do not record all evidence and submissions received but I have carefully considered such.

Issues

[9] The issues to be resolved are:

a) Was Mr Wootton unjustifiably dismissed or disadvantaged by the manner he was made redundant or was the employment relationship ended by reason of a genuine redundancy absent of any ulterior motive and effected in a procedurally fair manner?

b) Whether there was a genuine business reason for the enacted restructure?

c) During the restructuring process, did Roadrubber adhere to owed good faith obligations?

d) If an unjustified dismissal or unjustified disadvantage is established what remedies should be awarded?

e) Should penalties be awarded if I find Roadrubber has breached identified statutory obligations and if awarded, how should the penalties be apportioned?

f) If remedies are found appropriate, the extent of, if any, contributory conduct of Mr Wootton.

g) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[10] Mr Wootton commenced employment as a tyre fitter in 2010 with the previous Roadrubber business owner initially working 12 hours per week and then 30 hours per week from 2013. Mr Wootton worked Monday to Friday inclusive from 9 am to 3pm.

[11] The McCloys' purchased the business and took over the responsibility of employing Mr Wootton from 1 October 2019 and two other full time tyre fitters. Mr Wootton says he

was assured by the previous owner that his existing pay and conditions would prevail with the exception of him being placed on a 90 day trial period.

[12] There was some dispute over the timing of when Mr McCloy presented Mr Wootton with an employment agreement and letter of offer (signed on Tuesday, 1 October 2019) and whether a copy of the agreement was provided for Mr Wootton to retain. On the latter, only one version was signed and Mr McCloy claimed Mr Wootton retained it for a period and then it went missing and was later found by Mr McCloy around December/January 2020. Once found, Mr McCloy did not immediately provide Mr Wootton with a copy of the employment agreement.

[13] Mr Wootton says he was given the letter of offer and employment agreement on the eve of his employment commencing with no opportunity to bargain or seek advice and Mr McCloy insisted he was given it on the previous Thursday. The letter of offer contained a term indicating if not signed by 1 October 2019 the offer would be withdrawn.

[14] The employment agreement as well as having a 90 day trial period, reduced Mr Wootton's notice period from four weeks to one week.

[15] The hours of work provision in the subsequently produced employment agreement read:

> Hours of Work
>
> The employee will work for 27.5 hours each week Monday-Friday. The hours of work each day will be 9am – 3pm.
>
> Breaks
>
> The employee is entitled to:
>
> - Meal breaks of 30 Minutes to be taken at agreed time. These will be unpaid.

[16] Mr Wootton as was his practice with the previous employer, says he took no morning break (none was provided for in the agreement) and was paid 30 hours per week. This was an arrangement that Mr McCloy conceded he had agreed to continue with Mr Wootton. Mr Wootton emphasised he worked through his daily break.

[17] In late November 2019, Roadrubber increased the establishment of tyre fitters to four. Mr McCloy who has significant experience in wholesale tyre operations, says business

activity markedly increased as he invested in tidying up the environment and modernising business practices. Mr Wootton suggested that increased customer activity was not unusual during summer months but would then decrease.

[18] In early January 2020, once Mr Wootton had completed his 90 day trial period, Mr McCloy infiromally approached him to work additional hours. Mr Wootton says he also raised his pay rate with Mr McCloy as it had remained static for some years ($20 ph.). Mr McCloy says Mr Wootton initially declined to work additional hours stating that he did not really want to do extra hours but would further consider the request.

[19] Mr Wootton recalled Mr McCloy not persisting with the discussion on his pay and hours but in late January, he recalled Jay, the workshop manager who Mr McCloy had appointed, approaching him as he was leaving work, grabbing him by the shoulder and insisting he would have to start working extra hours, starting the following day. Mr Wootton says he sought advice from a friend and then he rang Jay back to say he wanted a formal meeting to discuss the situation. Mr Wootton says when he returned to work a co-worker said Jay had had a 'meltdown' after he had left and advised staff that Mr Wootton's hours would be changing whether he liked it or not.

[20] Mr McCloy says he did not instruct Jay to make a specific approach concerning Mr Wootton's hours but conceded he had spoken to Jay generally about a change in hours being necessary. I conclude it is more likely that Jay and Mr McCloy discussed this operational matter in some detail. Mr McCloy says a further ten days or so elapsed before he again approached Mr Wootton and the response was he wanted a formal meeting, which Mr McCloy acceded to. Mr McCloy did not set the meeting up promptly but sought legal advice and this led to a meeting being scheduled for 18 February 2020.

[21] In the interim, Roadrubber employed someone in the store and an additional tyre fitter to work from 8 am – 5:30 pm Monday to Friday and every other Saturday.

Restructuring proposal

[22] In response to Mr Wootton's request for a formal meeting, Mr McCloy had resolved on legal advice, to change tack and decide he would restructure Mr Wootton's role. To this end, he got his legal advisers to prepare a document headed "CONSULTATION

DOCUMENT: A new structure for Road Rubber Tyres Ltd 2020". The document was dated 17 February 2020. The proposal centred only on Mr Wootton's role and involved what it described as his part-time position being disestablished and a full time position being created that Mr Wotton was to be offered. The newly created position offered hours of work of 8:30 am - 5:30 pm, Monday to Friday with an additional requirement to work every second Saturday from 9 am - 2 pm with no offer of increased or additional remuneration.

[23] Whilst impressive in scope, the consultation document contained no comparative financial information or sales data despite mentioning "increased volume of work" as reason for the changes. The rationale for the disestablishment of Mr McCloy's positions was described as:

> A part time tyre fitter working 27.5 hours does not provide the business with the necessary resource or cover. The business has considered whether or not to employ an additional part time tyre fitter. It has decided that the extra cost, expense and inconvenience in employing an additional part time tyre fitter is outweighed by the benefits to the business of having one person undertaking a full time role.
>
> As a result the business needs an additional full time tyre fitter to meet customer needs and to provide cover for other staff when they are on their breaks or absent from work. The full time tyre fitter would work 8 am – 5.30 pm Monday – Friday and Saturday 9am-2pm. It is proposed that the person performing the full time role would be paid $20 an hour.

[24] It is noted that the starting time in the latter description (of 8am) differs from two other references to it being 8.30 am but at the subsequent 18 February meeting (discussed below) Ms McCloy suggests they needed Mr Wootton's position to become "8:30 till 5 basically with every second Saturday because that's where we are needing people to fill the roles moving forward". [1] However, no amended employment agreement or detailed written offer was subsequently provided.

[25] Whilst it emerged that the restructuring proposal was put to Mr Wootton, under a heading: "Why are you [sic] consulting" it said it was to ensure "that everyone has a full opportunity to put their ideas and opinions forward on the proposed changes". I observe this was misleading as it gave the impression all tyre fitters were being consulted on the proposal.

[26] At the 18 February meeting (attended by the McCloys', Mr Wootton and his friend Mike Bolger) that was the subject of a transcript and recorded by agreement, Mr McCloy

[1] Transcript of 18 February 2020 meeting provided to Employment Relations Authority.

without prior notification, first presented the aforementioned consultation document that was prefaced with a comment from Mr McCloy that "it basically only affects really yourself no one else in the business". [2]

[27] Mr Wootton responded that he did not consider his hours to be part time and in acknowledging Roadrubber wanted extra hours, he said he would consider this but needed some further time as he had a distracting personal matter to deal with – this was agreed and 5 March was set as a date for feedback.

[28] Mr Wootton flagged during the 18 February meeting that a component of his response would be a 'quid pro quo' discussion about raising his hourly pay rate but the response to this was equivocal with emphasis placed by Ms McCloy on the increased hours.

[29] With no prior warning, the McCloys' used the final portion of the 18 February meeting to raise performance concerns with Mr Wootton regarding two unidentified customer complaints. The conversation could be reasonably categorised as 'verbal counselling' with Mr McCloy extolling the need for a 'positive attitude' in future customer communication. No indication was given that the matter was to be taken further.

Mr Wootton's response to the restructuring proposal

[30] Mr Wootton by email of 2 March to Mr McCloy, indicated he was prepared to work 9 am to 4 pm each day and would consider Saturday work if his hourly rate increased to $24 with a penal provision of time and a half for working Saturdays.

[31] Mr McCloy did not respond or acknowledge Mr Wootton's 2 March email, indicating he had been on holiday. Mr McCloy's written evidence claimed for the next meeting he had the "full and open intention to try and come to some sort of agreement with Nigel about his hours and the pay structure" and he had been encouraged by Mr Wootton's response proposing a change of hours. However, Ms McCloy in her written evidence said they were happy with Mr Wootton's work, wished to retain him and looked forward to another meeting to "explore the offer further" but:

> We were not going to accept Nigel's offer because it did not provide for the required increase in hours and he was asking for a significant increase in his hourly rate (20% plus) which we were no prepared to pay.

[2] Ibid.

Final meeting: 12 March 2020

[32] The same parties met again on 12 March. I was provided with no contemporaneous notes of this meeting and the parties' relative perception and recall of the meeting was somewhat divergent. I was supplied a typed summary of the meeting prepared by Ms McCloy that was not shared with Mr Wootton at the time.

[33] Mr Wootton said having not had any response to his proposal prior to the meeting, he got the impression during the meeting, that the sole focus was upon him working the extra hours as stated and that was how the 12 March meeting opened.

[34] The McCloy's claimed Mr Wootton was very agitated and abusive. Mr McCloy conceded (despite this not being recorded in the summary notes) that he opened the meeting asking Mr Wootton "if he was going to increase his hours?" but then the conversation quickly focussed upon a claim by Mr Wootton that he had no signed employment agreement and his belief that he was still bound by the previous owner's terms. Mr McCloy says Ms McCloy then provided the signed agreement and covering letter but recalled Mr Wootton threw it back on the table and insisted he had not signed it and then he got up and left the meeting saying "let me know if I am expected at work tomorrow or sack me and see how you get on with that". I observe that Mr McCloy could not explain why he delayed providing the employment agreement to Mr Wootton until this meeting.

[35] Both parties accepted the meeting was brief (5-10 minutes). Mr Wootton accepted that he was frustrated and upset and claimed this was due to his treatment by his direct manager Jay and the lack of response to his proposal and, a general perception that he had no choice but to accept the offer. By contrast, the McCloys claimed that they had been prepared to negotiate but did not get the chance to do so.

[36] Mike Bolger, Mr Wootton's support person, confirmed Mr Wootton was agitated during the meeting, believing that the change in hours was inevitable and Mr Bolger also said he did not get the impression that the McCloys were prepared to negotiate, although he accepted the meeting was very short.

[37] About 30 minutes after the meeting ended, Mr McCloy texted Mr Wootton asking him if he would be at work the next day (Friday) and Mr Wootton replied "yep".

16 March 2020 letter

[38] Mr McCloy claimed he then provided a cooling off period (in fact the weekend intervened) before he provided a formal letter to Mr Wootton on Monday 16 March. The letter did not counter Mr Wootton's proposal on pay and willingness to work additional hours, apart from saying they had "considered carefully your suggestions" before making a number of points that culminated in an effective ultimatum:

> If you choose not to accept this change of position we will be required to terminate your employment by redundancy as per the consultation document and noted under section 7.
>
> Please confirm by 3pm Tuesday 17 March 2020 if you wish to accept this new position.

[39] Mr McCloy said on presenting the letter to Mr Wootton on Monday 16 March, that he perceived this to be the end of 'consultation'. Mr Wootton verbally responded to Mr McCloy indicating he would not work the additional hours. By text that evening, Mr McCloy pressed Mr Wootton to confirm what he took to be a resignation, saying: "Assuming nothing has changed then your last day of work was <u>today</u> and we will pay out your notice period any holidays owing". Mr Wootton responded by text: "Confirm will not be changing hours" and Mr McCloy texted back: "Thanks for confirming I will arrange your final pay and email you. All the best for the future".

[40] No further meeting occurred and in an email exchange of 17-21 March Mr Wootton affirmed his final pay had been correctly calculated. Mr Wootton was provided one week's pay in lieu of notice. Mr Wootton then signalled a personal grievance through an advocate's letter of 24 May 2020.

The legal framework

[41] Mr Wootton's employment agreement under a heading "Redundancy" stated:

> Redundancy is when an employee's role is no longer needed. If after following a good faith restructuring process the employee is made redundant they will be given notice as set out in Ending employment. They will not receive redundancy compensation or other redundancy entitlements.

[42] The above provision has no defined process and there is no statutory definition of redundancy. However, it has long been established in common law that a redundancy arises where a specific position is superfluous to the needs of an employer's business to establish an abstract construct that it is the position and not the person that is redundant. [3] This is only an overarching definition that does not necessarily address the spectrum of how a redundancy arises and in what context.

[43] Roadrubber's brief redundancy provision does allude to a fair process by referencing a "good faith" obligation. Roadrubber's: "Consultation Document" of 17 February 2020 advised Mr Wootton that consultation would occur on the proposed "organisational change" and that this would involve "a four-step process" being:

- The employer presents a proposal for change;
- Employees and, if applicable, the union(s) give feedback on the proposal including alternatives;
- The employer reviews the proposal on the basis of employees' ideas and makes changes where appropriate; and
- Responds to employees with a final plan, including feedback on employees' suggested alternatives.

[44] In the Employment Court decision *Stormont v Peddle Thorp Aitken Ltd*, Chief Judge Inglis outlined basic consultation principles as:

> Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew. [4]

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[3] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZILR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.
[4] *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].

[45] The employment agreement did not define good faith obligations such as an employer having statutory obligations to amongst other requirements, share economic information. [5] The employment agreement is thus of limited assistance but I find having put out a consultation document, Roadrubber was obliged to be guided by such. Overall though, to determine whether the expressed purpose of fairness in the agreement and consultation document was met, I must apply statutory considerations of justification and good faith.

Justification

[46] In order to justify termination of employment or an employer's actions, including in a redundancy situation, Roadrubber must meet statutory requirements set out in s 103A of the Act commonly referred to as the 'justification test'. In *Stormont* the court indicated:

> In order for a redundancy to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The Court must consider whether the employer met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.[6]

Good faith

[47] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act - these include a positive disclosure obligation enabling employee access to all relevant information supporting the reason for the redundancy and detail of how it will be implemented. Further and crucially, a fully informed employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised and once the decision has been made, redeployment options should be explored.

[48] The Court of Appeal in *Grace Team Accounting v Brake* [7], observed that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment

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[5] *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102.
[6] [2017] ERNZ 352 at [52].
[7] *Grace Team Accounting Ltd v Brake* [2015] 2NZLR 494 (CA) at [85].

relationship for valid and demonstrable commercial reasons and when looking at applying s 103A, O'Regan J said:

> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test. [8]

[49] In essence, the above requires the Authority to determine first if the redundancy was genuine (an assessment that has to exclude any ulterior motive) and then whether it was enacted in a procedurally fair manner.

Ulterior motive

[50] I first deal with the claim advanced that Mr Wootton felt "targeted" by the proposal - essentially a claim that the restructuring process was enacted for an ulterior motive after Mr McCloy abandoned an initial strategy of seeking to reach agreement on increasing Mr Wootton's hours of work. A claim Mr Wootton says, is based upon him being singled out because he was part-time and the fact that no other employees were consulted or their hours of work including starting and finishing times, considered for change.

[51] Roadrubber say the redundancy was genuine and deny that they were influenced by extraneous factors, claiming nothing was untoward in the relationship and that they sought to retain Mr Wootton's services but wished him to increase his hours and working days to ensure the operation of the business responded to the peaks of demand they were experiencing. The McCloys claim they openly discussed their needs on going forward which included having an additional employee working alternate weekends and Mr Wootton did not indicate he would change his working days to accommodate this need. Mr Wootton's counsel also pointed to the incongruity of a performance issue being discussed at the first consultation meeting as an implied indication of an ulterior motive.

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[8] At [85].

Assessment

[52] In determining whether the process adopted 'masked' an ulterior motive, I am conscious that this is close to an allegation that this was 'sham' process being akin to an allegation of fraud and that it "should not be lightly made" as "those engaging in a sham are in reality seeking to deceive others as to the true nature of what they have agreed and are intending to achieve".[9] Counsel for Mr Wootton did not develop an extensive 'ulterior motive' argument in submissions beyond Mr Wootton's belief he had been unfairly targeted.

Finding

[53] In carefully assessing the situation, I am inclined to view the initiating of the restructuring process and particularly its timing, as clearly not coincidental to the attempt to secure an agreement that Mr Wootton increase his hours of work. I observe that Mr McCloy could have spent more time on pursuing the option of negotiating change with Mr Wootton by agreement and I was not convinced that Jay, Mr Wootton's direct report's attempt to force the issue assisted the situation. The latter left Mr Wootton with an understandable perception that the later 'consultation' with Mr McCloy was not genuine and the outcome pre-determined. Notwithstanding, Roadrubber was in a difficult position as an employer is entitled to restructure its operations to meet genuine business needs, provided due process is followed. I also observe that a restructuring process will always be fraught when it is preceded, as was here, by an attempt to secure the same outcome by agreement.

[54] My view of the informal raising of performance matters during the consultation meeting was that this was badly timed but innocuous, given the nature of the issue discussed and that it was made clear that no disciplinary sanction was being contemplated. As such, I do not find an ulterior motive was present, in the sense that Roadrubber clearly needed to retain Mr Wootton's services in an expanding business. Roadrubber reinforced this by outlining how difficult they had found it in the short period they had been running the business, to recruit and retain replacement tyre fitters.

[55] I have to examine the process followed once the restructuring was initiated but first must consider whether genuine business reasons for changes were made out.

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[9] Wylie J applying Richardson P's statement of the law concerning shams in *NZI Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at [57].

Was there a genuine business reason for the restructure?

[56] Whilst the Authority following the Court of Appeal decision of *Brake* cannot substitute its objective view of the employer's subjective assessment of its business situation, this does not prevent the Authority from considering, in applying s103A of the Act, the commercial accuracy and efficacy of the business decision to restructure.[10] In this context, which I acknowledge differs somewhat from the facts in *Brake* (which involved declining profitability), the Authority can determine whether Roadrubber at the time established to Mr Wootton, the validity of its decision to restructure, including questions of:

- Whether there was sufficient disclosure of financial information to Mr Wootton.
- Whether Roadrubber conducted an analysis of its existing and future business needs.
- Whether alternatives existed to increasing only Mr Wootton's hours and were they adequately explored.
- Whether Roadrubber took into account Mr Wootton's personal circumstances around why his then pattern of working hours had been established.

[57] On the first point, Roadrubber disclosed no financial information or other information to support the bare assertion made in the consultation document that: "With the increased volume of work being carried out at Roadrubber Tyres the operational requirements of the business have changed".

[58] On the second point, at the investigation meeting when asked whether he did an analysis of the 'peaks and troughs' of the customer volume, Mr McCloy indicated he had not done so. This was a matter that Mr Wootton had alluded to in the first consultation meeting when he responded to Mr McCloy's generalised claim that the shop was getting "busier and busier", by pointing to seasonal peaks. This query warranted more detailed information being disclosed and discussed to support the supposition that it was essential to increase Mr Wootton's hours of work.

[59] I also observe that although Mr McCloy is an experienced business operator, the period from when he took the business over to his decision to restructure was relatively short

[10] Op-cit 7 at [85].

and two weeks prior to presenting the restructuring proposal, Roadrubber engaged an additional tyre fitter working the hours they sought to impose on Mr Wootton.

[60] Both the above summations lead me to conclude the situation was somewhat akin to what Judge Inglis dealt with in *Stormont* of an employer adopting a "gut feel" approach to its operation. *Stormont* was a case where there was also a paucity of information disclosed and Judge Inglis noted:

> While no particular degree of formality is necessary, what is required is a fair process and a real as opposed to illusory, opportunity for the affected employee to engage before any final decision is made. [11]

[61] The third point I observe is decisive, given that it was disclosed that despite the wording of the consultation document being plural for employees to be consulted – which is, only Mr Wootton's position was under scrutiny. Whilst this was not a situation where a selection between individuals was at issue, it was one where alternative cover of additional hours and days to be worked could have been explored within the team of tyre fitters. The McCloys conceded this did not occur nor was any exploration of engaging an additional part-time employee undertaken or crucially Mr Wootton's offer to partially increase his hours. The latter offer appears to have been rejected out of hand, with no attempt by the McCloys to explore such and whilst Mr Wootton prefaced his proposal with a suggested pay increase, the adequacy of his existing hourly rate for retention purposes was not researched.

[62] In my view, the failure to consult with the wider team or fairly consider their working hours arrangements (given two other fitters had set rostered days off), was a significant omission, that apart from being misleading to the applicant, signified that Roadrubber was not serious about the consultation and had in effect pre-determined the outcome at an early stage.

[63] *Harris v Charter Trucks* is an Employment Court case involving a close parallel with Mr Wootton's situation, being a selection for redundancy where Mr Harris occupied a generic driving role akin to co-workers but was singled out for redundancy with his co-workers not being involved in consultation. Judge Couch identified a series of issues that rendered the identification of Mr Harris as unjustified and finding in part a: "Fundamental flaw was the failure to consult all employees affected by the proposed restructuring". [12]

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[11] Op cit 4 at [59].
[12] *Harris v Charter Trucks*, CC 16A/07, CRC 8/06, 19 December 2007 at [69].

[64] It also emerged in evidence on the fourth issue (consideration of personal factors), that little or no attention was paid to the significant personal impact on Mr Wootton's physical health of significantly extending his working hours. Mr McCloy disclosed an assumption was made that Mr Wootton was single and no longer needed to attend to his child's school pick up and drop off responsibilities and could thus work additional hours, whereas Mr Wootton in evidence and submissions, highlighted he would struggle physically with the demands of what amounted to almost a doubling of his workload.

[65] The Employment Court in *Waikato District Health Board v Archibald* has highlighted that employers must have more regard to individual circumstances of employees when proposing significant changes to existing roles and that: "Employees need to engage with employees about any concerns they have about the impact of proposed changes. Employers should not make assumptions". [13]

[66] Whilst I do observe in the circumstances Mr Wootton did not assist himself by his state of agitation during the brief formal consultation meeting, some of this can be explained by his understandable belief that Roadrubber was set upon a fixed course and not amenable to considering his personal situation or other options. These unique circumstances curtailed any discussion around the physical impact of the additional hours on Mr Wootton.

Finding

[67] I find by objectively considering the above factors and the consultation shortcoming, Roadrubber has not sufficiently made out to Mr Wootton at the time or demonstrated to the Authority, that this was a genuine redundancy situation. My view is that Roadrubber did not act as a fair and reasonable employer could in all of the circumstances in concluding Mr Wootton's positon was surplus to their ongoing requirements and failed to reasonably engage on alternatives to redundancy.

Procedural fairness and good faith factors

[68] Given the finding above that a genuine redundancy has not been made out, I need not go through in any great detail, the impact of alleged procedural fairness issues. I do highlight though, that Roadrubber's failure to properly respond or engage with Mr Wootton's counter

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[13] *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [47].

proposal on hours and his pay rate (given his length of service and satisfactory performance as evidenced by him surviving a 90 day trial period) is a significant consultation shortcoming. In addition, the written exchanges at the time of the ending of Mr Wootton's employment do not support the McCloys' claim made during the investigation meeting, that they wanted to further engage with Mr Wootton in a negotiation or detailed consultation other than significantly increasing his hours and days worked on their terms.

Good faith breach?

[69] Despite being legally advised, Roadrubber failed to disclose any economic information that it based the decision upon. A simple disclosure of profit, loss and liabilities or a detailed analysis of customer trends would have better explained the situation to Mr Wootton. A failure to disclose such is a specific breach of s 4(1A)(i) of the Act and a penalty is sought.

[70] In considering whether to impose a penalty I need to consider whether this failure to be transparent with economic information disadvantaged Mr Wootton in the sense of preventing him from making an informed submission during the consultation phase of the restructuring. In this context, I consider that on the evidence, Mr Wootton was reasonably aware of the customer flow situation and he had been privy to business information at the time the McCloys purchased the business as he had also considered purchasing it but it would have assisted engagement and genuine consultation, if Roadrubber had prepared and disclosed updated financial information.

[71] I was also asked to consider imposing a penalty on Roadrubber for their initial failure to promptly disclose wage and time records pursuant to s 130(2) of the Act. In the circumstances, Roadrubber did act on legal advice and wrongly believed Mr Wootton's personal grievance had been submitted out of time. I also have assessed the impact on Mr Wootton in pursuing his grievances and found such to be minimal.

Finding

[72] In the circumstances, without condoning the breach of good faith and the statutory breach I find no compelling grounds for the imposition of penalties has been made out.

Overall finding

[73] I find that in all of the circumstances, Mr Wootton was unjustifiably dismissed and is entitled to remedies discussed below.

Remedies

Lost wages

[74] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Wootton should I find that he has established a personal grievance and s128(2) of the Act mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[75] The timing of Mr Wootton's employment ending on 16 March 2020 was unfortunate as by the end of what would have been his one week notice period, New Zealand went into its first Covid lockdown for 12 weeks until 14 May 2020. Roadrubber obtained a wage subsidy to retain employees and counsel suggests Mr Wootton would have obtained this benefit but for his unjustified dismissal. Mr Wootton says he was unable to secure alternative comparable employment beyond the lockdown period as a tyre fitter but he provided no evidence of any job seeking activities and he has eventually decided to leave the industry due to an ongoing physical condition that manifested as needing diagnosis and treatment in September 2020. Mr Wootton secured an Uber driving job in September 2021. Mr Wootton's counsel submitted he should be paid lost wages up to the end of 2020.

[76] I find that it is equitable in the circumstances to award Mr Wootton a total of six months lost earnings of $600 per week in a total amount of $14,400 on the basis that he would have likely been unable to physically continue working as a tyre fitter, on the medical evidence he provided, from September 2020.

Section 123(1)(c)(i) Compensation

[77] Mr Wootton gave evidence of the significant impact of his dismissal and the uncertainty it created at a difficult time to find immediate alternative employment. Mr

Wootton described being deeply hurt and humiliated by how he was treated in the redundancy process. He indicated he lost sleep and was prescribed anti-depressant medication.

[78] I am convinced that Mr Wootton suffered humiliation, loss of dignity and injury to feelings for a significant period.

[79] Taking into account the circumstances and awards made by the Authority and court in similar cases and principles relating to compensatory awards, including *Archibald*, I consider Mr Wootton's evidence warrants a reasonably significant compensatory amount and I fix that sum at $18,000 under s123 (1)(c)(i) of the Act.

Contribution

[80] Section 124 of the Act states that I must consider the extent to what, if any, Mr Wootton's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess this I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation.* [14]

[81] Although Mr Wootton had a reciprocal duty to be active and communicative and responsive and he did not positively engage at the second meeting I find he cannot be expected in the distressing context of how the restructuring was enacted and how his former employer engaged with him, to be held blameworthy for his actions. This was a redundancy that normally is regarded as a 'no fault' termination of employment.

[82] I therefore find Mr Wootton was not engaged in any wrongful actions and he did not act in a blameworthy or culpable manner that gave rise to his grievance occurring so, no reduction in any of the remedies granted is warranted.

[14] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Outcome

[83] Overall I have found that:

a. Nigel Wootton was unjustifiably dismissed from his employment with Roadrubber Tyres Limited.

b. Roadrubber Tyres Limited must pay Nigel Wootton the sums below:

i. $14,400 gross lost wages;

ii. $18,000 pursuant to s 123(1)(c)(i) of the Act without deductions.

Costs

[84] Costs are at the discretion of the Authority and are reserved.

[85] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority must be persuaded that circumstances exist to depart from the Authority's daily tariff based approach to costs.

[86] If no agreement is achieved, Mr Wootton has fourteen days following the date of this determination to make a written submission on costs and Roadrubber Tyres Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority