

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2024] NZEmpC 136
EMPC 242/2024**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN STELLAR ELEMENTS NEW ZEALAND
LIMITED
Plaintiff

AND ANDREW AMESBURY
Defendant

Hearing: 12 July 2024
(Heard at Christchurch)

Appearances: D Erickson and C Wi, counsel for plaintiff
A Fechny, advocate for defendant

Judgment: 31 July 2024

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a challenge to an interim reinstatement order made by the Employment Relations Authority.¹

[2] From October 2022, Mr Amesbury was employed by Stellar Elements New Zealand Ltd (Stellar), which is part of the international entity known as the Amdocs Group.

¹ *Amesbury v Stellar Elements New Zealand Ltd* [2024] NZERA 364 (Member Vincent).

[3] For the purposes of a particular segment of Amdocs' business called the Cloud Unit, Mr Amesbury was employed in a Principal Consultant role. It was anticipated that in due course he would undertake billable client activities once such work became available. From the outset, that work was unavailable. Accordingly, he was diverted to internal projects involving the building of relevant solutions such as Microsoft Azure, as well as undertaking some presales work; this was not client billable work. From October 2023, Mr Amesbury undertook a role known as Service Line Owner, Platform, which was a position within Cloud Services, a team that was being established within the Cloud Unit. It too did not involve client billable work.

[4] In 2023–2024, several restructure processes were undertaken throughout the Asia Pacific region of Amdocs' operations. The focus of these steps was on reducing costs, with minimal impact on customer service. Included were cost saving measures within the Cloud Unit. Two of these processes took place in July 2023 and January 2024.

[5] Parallel to these developments were communications between the parties as to whether Mr Amesbury would receive a bonus under an Amdocs Annual Incentive Plan which had concluded on 30 September 2023. Mr Amesbury had understood he would likely receive a bonus notwithstanding the fact that he was not engaged in billable work. He was told he had met relevant performance goals. He was shocked when, at the end of January 2024, he was told by his manager that he would not be receiving a bonus. Management said this was because he had not met any targets for billable work.

[6] On 5 March 2024, Stellar wrote to Mr Amesbury indicating a restructure which would see the "Amdocs Cloud New Zealand" business being restructured so that the number of "consulting principal lead" positions would be reduced from two to one because of declining workload within Amdocs Cloud New Zealand. The other "consulting principal" role in New Zealand would be retained because it was

generating billable work.² Feedback was sought. The letter stated that Mark Lazaro, Regional Head of Consulting, based in Australia, would be receiving such feedback on behalf of “Amdocs Cloud Division”. At the same time, Mr Amesbury was told he need not work.

[7] An exchange of correspondence then followed between Ms Fechney, advocate for Mr Amesbury, and Mr Erickson, counsel for Stellar. Amongst the many topics that were raised for Mr Amesbury was an assertion that the apparent focus on retaining billable work roles was unfair because it did not take account of the fact that Mr Amesbury had, in good faith, agreed to perform non-billable work. That exchange was followed by a meeting on 26 March 2024 where the parties were supported by their respective representatives, in the course of which Mr Amesbury suggested redistributing billable work between existing Principal Consultants.

[8] On 10 April 2024, Stellar wrote to Mr Amesbury, stating that it had considered his suggestion for the reallocation of work, but that it was thought to be impracticable. The company said it had not been able to identify any suitable redeployment opportunities. Accordingly, four weeks’ notice of termination was given. The letter was re-sent on 15 April 2024 with some amendments.

[9] Three days later, proceedings were filed on behalf of Mr Amesbury in the Authority. The statement of problem was accompanied by an application for reinstatement. This application was heard by the Authority on 22 May 2024. In its determination of 19 June 2024, the Authority ordered Mr Amesbury’s interim reinstatement to the same position he held when dismissed, or to a position no less advantageous, from Monday 1 July 2024.³

[10] Stellar raised a de novo challenge to the Authority’s determination on 1 July 2024. It said in essence the interim reinstatement order should not have been made. In response, Mr Amesbury said the interim order should stand.

² Mr Amesbury was initially employed in 2022 as a “Principal Consultant”. By the time of the restructuring in 2024, he was described for restructuring purposes as “Consulting Principal Lead”. It is unclear whether the altered description has any significance.

³ *Amesbury v Stellar Elements New Zealand Ltd*, above n 1, at [56].

[11] By joint memorandum signed by the representatives on the same day, urgency was sought for the hearing of the challenge, as well as a stay of execution. After hearing the parties on 2 July 2024, Judge Smith granted the joint application for stay subject to certain conditions.⁴ These were that:⁵

- (a) from 1 July 2024, Mr Amesbury was to receive his salary and all other financial benefits directly associated with his employment, including medical insurance;
- (b) Stellar was not required to provide him with any work; and
- (c) Mr Amesbury was not required to perform any work for Stellar.

[12] Judge Smith ordered that the stay was to continue until the resolution of Stellar's challenge.

[13] The case was also set down for an urgent hearing. In the circumstances, a pragmatic approach was taken to the filing of evidence. A bundle of documents was to be filed which contained all the affidavits and documents which had been before the Authority. A timetable was established for the filing of additional evidence. In addition, both sides were to file submissions in advance.

[14] Because the challenge before me requires a fresh consideration of the application, I will not summarise the conclusions reached by the Authority. However, I acknowledge the Authority's thorough and careful consideration of the parties' evidence and submissions.

Legal framework

[15] The applicable legal principles are not in dispute. The Employment Relations Act 2000 (the Act) provides for a remedy of reinstatement of an employee to their former position or placement to a position no less advantageous to that employee.⁶ It

⁴ *Stellar Elements New Zealand Ltd v Amesbury* [2024] NZEmpC 117.

⁵ At [5].

⁶ Employment Relations Act 2000, s 123(1)(a).

states that reinstatement is to be a primary remedy and that the Authority or Court must provide for reinstatement wherever practicable and reasonable.⁷

[16] The Authority is empowered to order interim reinstatement. When considering such a possibility, it must apply the law relating to interim injunctions having regard to the object of the Act.⁸ That object is set out in s 3 and states that productive employment relationships are to be built through the promotion of good faith in all aspects of the employment environment and of the employment relationship. Good faith is to be promoted by recognising that employment relationships must be built not only on mutual obligations of trust and confidence, but also on the legislative requirement for good faith behaviour, and by acknowledging and addressing the inherent inequality of power in employment relationships.

[17] In *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the Court of Appeal confirmed that for interim injunction purposes, an applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Then, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an interim order until the applicant's claims are resolved following a substantive hearing. Finally, an assessment of the overall justice of making an interim order is required as a check.⁹

[18] It is well established in this Court that a claim for interim reinstatement raises two sub-issues:¹⁰

- (a) whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and
- (b) if so, whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

⁷ Section 125.

⁸ Section 127.

⁹ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12].

¹⁰ *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128, [2011] ERNZ 312 at [4].

[19] In its consideration of the *Brooks Homes* litigation, the Supreme Court stated that the merits of the case, insofar as they can be ascertained at the interim injunction stage, are also relevant in assessing the balance of convenience and the overall justice of the case.¹¹

[20] An application of this nature must inevitably proceed on the basis of untested affidavit evidence;¹² the evaluation of that evidence is accordingly made on a provisional basis.

[21] I proceed on the basis of these principles.

Overview of the parties' cases

[22] Mr Erickson said that Stellar accepted there was an arguable case for unjustified dismissal but that the case was not strong in light of the various subtopics that fell for consideration. He went on to submit that there was no arguable case for permanent reinstatement because it was not practicable and reasonable in the existing circumstances. He also submitted that even if there was a case for permanent reinstatement, it was a weak one as there were no vacant positions within Stellar and no meaningful work for Mr Amesbury to perform.

[23] Counsel submitted that the balance of convenience favoured the status quo that existed prior to the Authority's determination. Moreover, damages would be an adequate remedy. On that topic, he argued there was no evidence filed by Mr Amesbury as to his ability to satisfy his undertaking as to damages. Additionally, he referred to the existence of good substantive grounds for the restructure proposal which would be undermined by interim reinstatement and submitted such an order would have an adverse impact on third parties.

[24] Finally, Mr Erickson submitted that overall justice favoured Stellar, particularly in light of its contention that the defendant did not have a strongly arguable case for unjustified dismissal and permanent reinstatement. He submitted these factors

¹¹ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

¹² *Communication & Energy Workers Union Inc v Telecom New Zealand Ltd* [1993] 2 ERNZ 429 (EmpC) at 439.

should be balanced against the disruption that would be caused by such an order, including to third parties.

[25] Ms Fechner, by contrast, submitted that there was a strongly arguable case that Mr Amesbury was unjustifiably dismissed when each of the subtopics was considered. She said there was also a strongly arguable case for permanent reinstatement; it was not accepted that there was no available work given the international nature of Amdocs' business operation.

[26] As to the balance of convenience, Ms Fechner argued that the prejudice to Mr Amesbury in not making an order outweighed the prejudice to Stellar if an order was made. Moreover, she submitted it was unlikely Mr Amesbury would be called on to satisfy his undertaking.

[27] Finally, she said that overall justice favoured Mr Amesbury. She particularly relied on the fact that he should have been reconfirmed to the Service Line Owner, Platform role in which he had worked and which was vacant at the time of the restructuring process.

Serious question

Preliminary matters

[28] It is necessary to begin my consideration of these issues by referring to the structure of the global business operated by Amdocs, which provides the framework within which Mr Amesbury worked.

[29] Amdocs acquired two New Zealand registered companies, Sourced Group New Zealand Ltd and Roam Creative Ltd, later re-named to Stellar Elements New Zealand Ltd. Later, it was decided that there should be a single New Zealand-based operation, Roam Creative Ltd.

[30] Mr Amesbury was employed by Roam/Stellar for the purposes of Amdocs' Australian and New Zealand Cloud Unit work. The Australasian focus of the Cloud Unit was illustrated by an organisational chart which Mr Amesbury produced. It

recorded the persons engaged in Cloud Unit work within Australia and New Zealand (the ANZ Region). Stellar accepted the accuracy of the organisational chart.

[31] The interconnectedness of personnel in the regional operation was demonstrated by the assortment of New Zealand and Australian staff within the relevant reporting lines.

[32] Mr Amesbury's direct report was to Ken Mutch, Managing Principal Consultant, who reported to Mr Lazaro. Both of these persons were not employed by Stellar but by a relevant Amdocs Australian entity, with Mr Lazaro being described as the "Australian and New Zealand Manager".

[33] Tracy Lu was involved in the restructuring process and gave evidence for Stellar. She said she was HR Business Lead for Sourced Group. She did not say who her employer was, but it is reasonable to infer, as Mr Erickson accepted, that, since she is based in Sydney, she is not a Stellar employee.

[34] It would appear that Stellar was used as a vehicle for employing New Zealand staff; this meant that those persons would be governed by New Zealand employment law. However, the company was simply a local entity for a large multinational operation that contained a complex structure due to its global nature.

[35] Stellar did not produce any evidence to suggest the company was independent from any other Amdocs entity in the ANZ region, whether from a financial, operational or any other perspective. The evidence does not establish there was a standalone New Zealand operation as such. And, as will be explained more fully shortly, Mr Amesbury's work was not confined to New Zealand.

[36] It is also relevant to note that the restructuring initiatives that took place with regard to Stellar employees was simply part of a wider drive to reduce costs, not only within Australia and New Zealand, but elsewhere. It is within that broad context that Mr Amesbury's work circumstances fall for consideration.

[37] I turn to a consideration of the evidence as to Mr Amesbury's employment arrangement. He was recruited at a time when the Cloud Unit sales forecasts and business outlook were optimistic. There was engagement with a potential New Zealand-based client which led the Cloud Unit to forecast a need for local resource to service the client. A decision was made to hire Mr Amesbury for the purposes of the anticipated growth. However, that growth did not eventuate. As noted, Mr Amesbury accordingly undertook various internal projects from the outset of his employment.

[38] Mr Amesbury stated that his work involved receiving instructions from Amdocs' employees, including managers, in Australia. He said he also worked with Amdocs' employees in Canada, USA, Israel, Singapore and the United Kingdom. He focused on presale work. He cited, as an example, the pivotal role he undertook in securing a new customer in the Asia region, within the first month of his employment.

[39] In October 2023, Mr Amesbury was asked to work for a new Cloud Services team, which would engage in non-billable presale activities. He was told at the time by Yuri Litvinov, who was heading up the new team from Australia, that he would work in a position described as the Service Line Owner, Platform position, for at least six months. His duties were established by Mr Litvinov. In that position, Mr Amesbury worked with a global team involving Amdocs' colleagues in Canada, USA, Singapore and United Kingdom. His timesheets were forwarded to Mr Litvinov's team, which resourced the role. In January 2024, he applied for appointment to the role on a permanent basis.

[40] However, at the end of January 2024, an issue arose as to whether Mr Amesbury would be paid a bonus. Previous exchanges had led him to understand that he would be awarded a bonus that would amount to 20 per cent of his base salary, which was \$240,000, under the applicable plan. Mr Amesbury was surprised and shocked when it was decided that no bonus would be paid on the grounds that he was not engaged in billable work.

[41] Because Mr Amesbury felt insecure as a result of this development, he decided that he would not maintain his application for the permanent position of Service Line Owner, Platform. He withdrew that application in February 2024. However, he said

he and Mr Litvinov continued to have discussions about him possibly being in that role permanently, notwithstanding the withdrawal of his application. He was also told he could move into a Solution Consultant role within the Cloud Service. Mr Litvinov said he did not see any value in Mr Amesbury returning to his substantive position to focus on client work because he had been working on presales throughout his entire tenure with Amdocs. On 21 February 2024, Mr Litvinov told Mr Amesbury that his current role was likely to continue past March 2024.

[42] Mr Amesbury continued to work in the Service Line Owner, Platform role. As at early March 2024, he said he was engaged in presales work for an Amdocs New South Wales client and was developing cloud content to sell to the other parts of that entity.

[43] The foregoing is the context within which the notification of restructuring of Mr Amesbury's position as a Consulting Principal occurred.

Strength of arguable case as to unjustified dismissal

[44] Distilling the submissions of the parties, the issues going to the strength of Mr Amesbury's claim that he was unjustifiably dismissed require a consideration of several topics. They concern the adequacy of the selection criteria, whether reconfirmation or redeployment could have been explored, whether Stellar's decision to terminate Mr Amesbury's employment was predetermined, whether there was an ulterior motive, and whether there was sufficient information provided to Mr Amesbury for consultation purposes.

[45] Before dealing with these issues, the principles which govern justification, for the purposes of dismissal based on a redundancy, should be mentioned. In *Grace Team Accounting Ltd v Brake*, the Court of Appeal confirmed that the test as to justification under s 103A of the Act applies to termination of employment as a result of redundancy: What could a fair and reasonable employer have done in all the circumstances at the time?¹³ This question includes a consideration of all the statutory criteria of the section, substantive and procedural.

¹³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

[46] Included in the assessment is the question of whether the consultation requirements of s 4 of the Act as to good faith were complied with.¹⁴ A relevant good faith requirement in this case is that described in s 4(1A), which emphasises that parties to an employment relationship are to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. This means that an employer who is proposing to make a decision that will likely have an adverse effect on the continuation of an employee's employment is required to provide to an affected employee access to information about the decision that is relevant to the continuation of the employment, as well as an opportunity to comment on the information before the employer makes its decision. Obviously, this should be a meaningful process.

[47] I will now consider the various subtopics which arise, noting that they overlap.

Selection criteria

[48] Mr Erickson acknowledged that the selection of an employee for redundancy must be carried out in good faith with reference to relevant criteria and without reference to irrelevant criteria.¹⁵ He said the Court of Appeal had held that the formulation of selection criteria and their application are within the employer's prerogative but that criteria may be reviewed if they are not relevant and fair.¹⁶

[49] Mr Erickson said there is no evidence of those problems here. He submitted in essence that Stellar's proposal to restructure Mr Amesbury's role as Principal Consultant was clearly spelled out to him and that he was given an opportunity to respond. He did so. The company considered the particular proposal which he had raised. It was not adopted. Mr Erickson submitted that these steps were those of a fair and reasonable employer.

[50] Ms Fechney submitted that focusing on only one of numerous Principal Consultant roles in the ANZ Region was not the action of a fair and reasonable

¹⁴ At [85]. See also *Birthing Centre Ltd v Matsas* [2024] NZCA 139 at [57].

¹⁵ *New Zealand Building Trades Union v Hawke's Bay Area Health Board* [1992] 2 ERNZ 897 (EmpC) at 913.

¹⁶ *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA) at [33].

employer. Work could have been redistributed as Mr Amesbury had said at the restructuring meeting which he attended. Furthermore, the identification of his role for restructuring had insufficient regard to the fact that he had been required to perform non-billable work rather than billable work.

[51] I start by considering the correspondence between the representatives prior to the termination of Mr Amesbury's employment. Ms Fechny had stated that the team for which he worked involved different entities across New Zealand and Australia, and included approximately 15 Principal Consultants.

[52] However, the focus of the restructuring issue raised with Mr Amesbury was with regard to the New Zealand entity only. In that context, Stellar identified only one of the two New Zealand Principal Consultant roles – that of Mr Amesbury – for potential redundancy. She asked why this was.

[53] In his response to Ms Fechny, Mr Erickson said that Stellar did not agree that a selection process was applicable in the particular circumstances.

[54] Having said that, he went on to respond that the operation of the business "as a whole" relied heavily on client engagement and interests which inevitably would form the criteria in identifying affected roles. He said Stellar had reviewed all Principal Consultants across the ANZ Region against that consideration. Apart from a role which had an organisational function, all other Principal Consultants were actively engaged in billable work; Mr Amesbury was not. In her evidence, Ms Lu confirmed this was the approach adopted for the assessment of all relevant employees in the region.

[55] Despite what was said at the time, the selection process was arguably unfair.

[56] Mr Amesbury's Principal Consultant role was selected because it was not producing billable hours. The unfairness was that he had never worked in the Principal Consultant role but, rather, in another role to which no reference was made, and in which he was still working when the restructuring process began.

[57] It is strongly arguable that were a fair and reasonable employer to have selected the role for restructuring, such an employer could be expected also to take into account the work the employee was in fact engaged in.

[58] It is accordingly necessary to consider the overlapping issue relating to reconfirmation and/or redeployment.

Reconfirmation/redeployment issues

[59] If his Principal Consultant role was to be declared redundant, could Mr Amesbury have been offered reconfirmation or redeployment to the Service Line Owner, Platform role?

[60] It is necessary to enlarge on the relevant chronology. As noted earlier, Mr Amesbury was requested to fulfil the responsibilities of the Service Line Owner, Platform role as from October 2023. It involved non-billable work for at least six months.

[61] Mr Litvinov was recruiting several staff to work in the Cloud Services team, including for the Service Line Owner, Platform position.

[62] By January 2024, Mr Amesbury had decided to apply for permanent appointment to this role. He did so. However, because of the issues concerning the payment of a bonus, he then withdrew his application in February 2024. Mr Litvinov then told him that the activities in which he was engaged would continue past March 2024.

[63] There is an issue as to whether Mr Amesbury was seconded to the role (his position) or whether the circumstances were less formal and did not amount to being a secondment (Stellar's position).

[64] The significance of the point relates to whether, once restructuring of his contractual position occurred, he could have been reconfirmed in the role in which he was working at the time or, if not, whether he could have been offered redeployment to it.

[65] Whilst there is no formal documentation recording a secondment, it is arguable that the circumstances point to such a conclusion. For instance, two of his managers, Mr Mutch and Mr Litvinov, both used the descriptor of “secondment” at the time. Mr Amesbury also used the term to describe his understanding of his work arrangements.

[66] The more important point, however, is the fact that Stellar asked Mr Amesbury to work in this role. He did so in good faith, even although it would not see him undertaking billable work.

[67] Mr Amesbury continued in the Service Line Owner, Platform role up until the time when he received the proposal to restructure his appointed role.

[68] The letter of 5 March 2024, which commenced the consultation process, said nothing about the possibility of a permanent appointment to an alternative role. The issue was, however, raised by Ms Fechny in her letter of 11 March 2024, when she stated that Mr Amesbury should have been considered for appointment to the “seconded position” on a permanent basis.

[69] In his response of 18 March 2024, Mr Erickson noted that Mr Amesbury had applied for that role but later withdrew his application. He went on to say that a selection process for the position had by this time been undertaken and a preferred candidate identified.

[70] The evidence suggests that the preferred candidate had not accepted the offer at that point and never did. Mr Amesbury said that he understood the candidate had been interviewed on 6 March 2024 – the day after Mr Amesbury was notified of the restructuring process – and offered the role on 15 March 2024. He also understood that the candidate, who he knew well, had made it clear to Stellar by 21 March 2024 that he did not want to take up the role; this point was not refuted in evidence subsequently filed for Stellar. The candidate’s own position within Amdocs was restructured; Ms Yu confirmed that the last day of his employment was 12 April 2024. This was three days before the operative outcome letter was sent by Stellar to Mr Amesbury. That letter did not record that the role was vacant, stating only that Stellar had not been able to identify any suitable redeployment opportunities.

[71] While, as noted, Stellar's case is that it proceeded on the basis that Mr Amesbury had withdrawn his application for the role some months earlier, Mr Amesbury's evidence is to be noted. He said that the circumstances had changed significantly since then – restructuring of his appointed position had subsequently been notified.

[72] Indeed, it is arguable that the real nature of Mr Amesbury's employment relationship with Stellar was no longer as a Principal Consultant, but rather, as Service Line Owner, Platform.

[73] Mr Litvinov also told Mr Amesbury he might move into a Solutions Consultant role of which there were several within the new Cloud Services team.

[74] Given Stellar's good faith duties to be communicative and to provide access to relevant information, it is strongly arguable that it was incumbent on it when it commenced a consultation process to be proactive in informing Mr Amesbury of the availability of the role in which he was engaged at the time, particularly if his primary role was to be restructured.¹⁷ Mr Amesbury was initially led to believe that there was an alternative preferred candidate. He was not updated that the preferred candidate did not wish to accept an offer made to him, nor was he told prior to the operative outcomes decision that the position was vacant. Further, the evidence does not show he was informed about the status of other potential roles within the Cloud Service.

[75] A further point going to the sufficiency of Stellar's ability to explore redeployment options relates to its integration in a large international business operation. The evidence suggests there may have been other roles within Amdocs that could have been explored. A fair and reasonable employer, having the backing of an apparently well-resourced international operation, could be expected to do so. This point is also strongly arguable.

[76] I conclude that it is strongly arguable that Stellar's approach to restructuring Mr Amesbury's role, without being proactive in respect of an alternative role, was not

¹⁷ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, [2023] ERNZ 218 at [45]–[85].

in, the circumstances, the action which a fair and reasonable employer could have taken.

Predetermination

[77] The circumstances were arguably unfair for another reason. The confined focus of Stellar on Mr Amesbury's Principal Consultant role, without considering alternative positions, meant the outcome was potentially predetermined. Mr Amesbury's assertion to this effect is reinforced by the fact that there was no constructive engagement as to the possibilities he raised concerning the potential for redistributing billable work within the team. Although Stellar asserts this was not an available option, there is an issue between the parties as to whether this was adequately explored, particularly at the restructuring meeting on 26 March 2024. In the absence of any information as to what inquiries were made on the topic, Mr Amesbury's claim on this issue is arguable.

[78] There are two further points. Mr Amesbury says he was told, at the time advice of the restructuring proposal was given, that he need not work further. He says this also indicates predetermination.

[79] There is a dispute between the parties as to what was meant by this statement. Ms Lu said that such a suggestion was standard practice when a consultation process was under way so that the employee was able to take time off. She said this was acknowledgement that the process could be difficult and that an affected employee could thus have time to consider a proposal and put forward a response.

[80] Mr Amesbury does not agree this was in fact a standard practice. He also says he did not understand that the instruction was to provide him with an opportunity to engage in consultation. It is arguably unlikely he would need several weeks to deal only with consultation. On balance, the untested evidence tends to suggest that termination was likely and that Stellar wanted Mr Amesbury to leave.

[81] A further factor which is relevant to the issue of predetermination concerns an Amdocs document which Ms Fechny forwarded to Mr Erickson on 21 March 2024, which stated that Mr Amesbury would be "offboarding" with effect from 29 March

2024. Mr Erickson replied on 25 March 2024, denying that such a process had been initiated.

[82] For her part, Ms Lu said she had told Mr Amesbury that a “formal HR offboarding process” had not been initiated. She said that she had been keeping those who operated a particular work system informed of discussions with Mr Amesbury, so that they would know there was a “potential need for offboarding in the near future”. I cannot at this stage rule out the possibility that this is also an arguable indication of predetermination.

[83] Standing back, the various points that have been raised with regard to Mr Amesbury’s predetermination assertion are together strongly arguable.

Ulterior motive?

[84] Mr Amesbury’s case is that the difficulties which arose with regard to him being paid a bonus led to him being targeted for redundancy; that is, the company had an ulterior motive for his redundancy. Stellar says the two circumstances were separate, even if the issue of billable work was relevant to the decisions made in each instance.

[85] Apart from these assertions, there is no further evidence which would allow a more detailed evaluation of this issue. It suffices to say for present purposes that the point is not frivolous and vexatious, and is arguable.

Was sufficient information provided for consultation purposes?

[86] Again, this topic overlaps with earlier considerations. Mr Amesbury received no information as to the restructuring approach which was being adopted with regard to the Australian employees who were also in the ANZ Region of the Cloud Unit. As I have said, the role targeted for redundancy was one of two in New Zealand. No information was provided as to steps being taken elsewhere, which were arguably relevant given the way in which the region was managed.

[87] Nor, as I have just explained, was Mr Amesbury provided with current information as to the Service Line Owner, Platform position, or any other role within Cloud Services, a step which a fair and reasonable employer could have taken.

[88] It is strongly arguable that the good faith obligations to provide information in s 4(1A)(b) and (c) of the Act were not fulfilled.

Conclusion as to strength of case on unjustified dismissal

[89] Standing back, I consider Mr Amesbury's grievance that he was unjustifiably dismissed is strongly arguable on both substantive and procedural grounds.

Arguable case – permanent reinstatement

Availability of reinstatement

[90] Section 125(2) of the Act requires the Authority, and thus on a challenge the Court, to be satisfied that reinstatement of an unjustifiably dismissed employee is both reasonable and practicable. As noted, reinstatement is to be a primary remedy.

[91] Mr Erickson submitted that a general principle which underlies all remedies is that they can only relate to the particular wrong suffered as a result of the grievance. He referred to dicta where the Court of Appeal held, in light of this principle, that where the personal grievance was not that the employment was terminated, but that the manner of implementation of the decision was procedurally unfair, then the remedy had to be directed to that particular wrong. In such an instance there would be no power under the statute to make an award for loss of a job.¹⁸

[92] While the distinction may be arguable, it is not one which assists in the present case because my findings with regard to the strength of the dismissal case involve both substantive and procedural problems.

[93] Mr Erickson invited the Court to assess the threshold arguments of practicability and reasonableness on the basis of Stellar's current circumstances.

¹⁸ *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 at 619, [1998] 3 NZLR 276 (CA); but see *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA) at [23]–[26].

However, the section does not restrict the assessment to current circumstances. It is arguable that the provision allows the Authority to consider each factor with reference to any time it considers relevant according to the interests of justice.

[94] Mr Erickson urged the Court to conclude that the threshold requirement of practicability could not be cleared because Stellar simply has no relevant position at the present time in which he could be placed, either as a Consulting Principal or similar.

[95] It is arguable, however, that this approach is unduly narrow. I have already commented on the restricted focus which the company adopted during the restructuring; it did not consider the broader picture within the ANZ Region, where the evidence suggests there were options for redeployment.

[96] Chief amongst them, of course, was the Service Line Owner, Platform role in which Mr Amesbury had worked up until notice of a restructuring was given.

[97] Ms Lu told the Court in her affidavit of 8 May 2024 that it was not planned that this role would be employed under the New Zealand Stellar entity. It is unclear when or why this plan was developed.

[98] On the evidence, it is apparent there is flexibility in the operation of the Cloud Unit. Mr Amesbury's evidence is that a consideration of alternative roles in Stellar only does not align with hiring practices that Amdocs has used previously. He cited two examples. The first situation arose when he applied to join Amdocs for a role which was said to be based in Melbourne; the recruiter said that in fact the role could be performed anywhere. The second concerned his application for the Service Line Owner, Platform role, which was advertised as being in Toronto. The evidence suggested that this was presales work being overseen by Mr Litvinov in Australia, and that at the time Mr Amesbury applied for the role, it was being performed by him in New Zealand.

[99] In her affidavit of 10 July 2024, Ms Lu commented on the presales work Mr Amesbury had carried out for Stellar regarding a possible engagement with a New

South Wales client. She said that within “the broader Cloud Unit”, there was “currently” no excess presales work. She said that if “we” were required to provide such work to Mr Amesbury, it would be taken off other employees, which would be disruptive in terms of the completion of the work.

[100] I am not persuaded that this means permanent reinstatement would not be practicable. In the circumstances, such an order may create challenges for Stellar, but they arise from the way in which the company has handled the restructuring. No reason has been advanced by Stellar as to why these challenges could not be managed sensibly.

[101] I conclude it is strongly arguable that permanent reinstatement would be practicable.

[102] I turn next to the issue of whether permanent reinstatement would be reasonable. In *Angus v Ports of Auckland Ltd*, a full Court accepted a submission that the requirement for “reasonableness” involves a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned.¹⁹ A significant point going to the equities of this case concerns the way in which the reconfirmation/redeployment issues were dealt with. I have concluded it is strongly arguable that it was incumbent on Stellar to be proactive in informing Mr Amesbury of the availability of the role which he had been performing until the restructuring exercise began. The evidence suggests there may have been other roles that could also have been consulted on. Given the regional approach to the operation of the Cloud Unit, it is also strongly arguable that it would be reasonable for Stellar to reinstate Mr Amesbury to the role he was employed in, or one which is similar.

[103] Noting the point made by Chief Judge Inglis in *Humphrey v Canterbury District Health Boards* that Parliament intended to raise the bar that employers would have to negotiate in order to prove that reinstatement was neither reasonable nor practicable, I conclude that it is strongly arguable that Mr Amesbury has a valid claim for permanent reinstatement.²⁰

¹⁹ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [65].

²⁰ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [42].

Balance of convenience

[104] The assessment of the “balance of convenience” question, which is concerned with the relative positions of the parties during the interim period, is usually undertaken by reference to the adequacy of damages, preservation of the status quo, the relative strength of the parties’ cases, and any other uncompensable disadvantages to either party. The representatives touched on all these issues.

[105] Starting with the issue as to adequacy of damages, the framework for considering this matter concerns Mr Amesbury’s financial circumstances between now and the ultimate resolution of the investigation process by the Authority. A substantive investigation has been scheduled for 3–4 September 2024. Ms Fechney stated that a decision would be expected to be published within three months of that date. That means consideration must be given to a reasonably significant period of time, essentially up until the end of the year.

[106] Mr Amesbury referred to various difficulties. He said the job market is currently very competitive with low demand for his role type. There have been widespread layoffs within the industry. To date, his efforts to find new employment have been fruitless. This availability problem had been noted by several recruiters.

[107] A further impediment to which he referred is that he is bound by a restraint of trade covenant that, as things stand, applies until mid-October 2024. For Stellar it was indicated that this would be capable of variation for the purposes of a particular role, providing its position could be protected in a suitable way.

[108] In my view, the more significant issue is whether it is reasonable to assume that Mr Amesbury should be attempting to obtain alternate work until the end of the year whilst resolution of his employment relationship problem is under investigation.

[109] I consider the balance of convenience favours Mr Amesbury on this point. He has a strongly arguable case that he was unjustifiably dismissed. Given the primacy of the remedy of reinstatement, it is preferable to consider an interim order rather than leaving him in a situation where he must carry the risk of attempting to obtain income for his household when there is a problematic labour market.

[110] His difficulty in obtaining specialist work is a challenge which is compounded by the fact that his wife is unable to engage in permanent full-time work for health-related reasons, and his family is unable to mitigate this loss of income. Details of the particular issues have been provided in evidence and are now the subject of a non-publication order, as I will outline later. For present purposes, I accept the accuracy of that information.

[111] In short, I am not persuaded that damages which might be ultimately ordered by the Authority would be a fair substitute for interim reinstatement. The balance of convenience on this issue favours Mr Amesbury.

[112] The next point made for Stellar is that although Mr Amesbury has given an undertaking under s 127(2) of the Act, he has not given any evidence of his ability to satisfy the undertaking if called upon.

[113] The difficulties in obtaining work and thus income, as well as dealing with medical expenses, has led to what Mr Amesbury described as a dire financial predicament in which he has had to rely on savings to this point. These are being consumed by both regular and unforeseen expenses.

[114] Mr Amesbury has also pointed out that the situation in which he finds himself has severely affected his mental health, leading to significant sleep deprivation and constant high anxiety due to financial instability, which includes an inability to visit and support aging family members in the United Kingdom.

[115] Notwithstanding the difficulties which have been outlined, Mr Amesbury has not resiled from his undertaking, but it is reasonable to conclude that doing so would create financial pressure.

[116] Against those considerations is the submission made by Ms Fechny that, in any event, it is unlikely Mr Amesbury would be subsequently ordered to pay damages to Stellar under s 127(2) of the Act. She said that were an interim reinstatement order to be made, Mr Amesbury would be able and willing to perform work which would be

of value to the company. Ms Fechner also submitted that there is no other apparent class of loss which could be claimed by Stellar.

[117] I accept these submissions. I am not satisfied that any issues as to honouring the undertaking are so profound in the circumstances that the balance of convenience thus tilts towards Stellar.

[118] Next, Mr Erickson submitted that Stellar had good substantive grounds for disestablishing Mr Amesbury's role. He said that the result of the restructuring steps that had been taken meant there were no suitable roles within Stellar itself in which Mr Amesbury could be reinstated.

[119] I have already discussed this point. I have concluded, for present purposes, that Mr Amesbury's claims as to whether the dismissal was justified are strongly arguable, as is his case for permanent reinstatement. Accordingly, the merits also favour interim protection being granted until the investigative process is concluded.

[120] Next, Mr Erickson submitted that there could be a potential impact on third parties if an interim reinstatement order were to be made. This was put on the basis of potential impact on other Principal Consultants if work were to be redistributed, and on clients who have a developed relationship of trust with such employees.

[121] This submission proceeds on the basis of Stellar's focus on the position within the New Zealand company itself and, it would seem, with regard to New Zealand-based clients. I have found, for present purposes, that a broader analysis is appropriate that may involve other roles in the Cloud Unit. As noted earlier, there may be management challenges, but it is appropriate in the circumstances for Stellar to deal with these. I conclude that this particular point of prejudice is not established.

[122] Finally, reference was made by Stellar to the "status quo". The point of an interim injunction is to preserve the status quo. These words are often used when considering the making of an interim injunction as a shorthand way of referring to the

last settled position which applied between the parties when the decision which is contested was taken.²¹

[123] Up to the point when the restructuring process was commenced, Mr Amesbury was performing the functions of the Service Line Owner, Platform role. When it was commenced, he was told he no longer needed to fulfil those functions. By the time the final outcomes letter was sent, the position was vacant, but Mr Amesbury was told there were no other alternatives available. It was planned that Stellar would no longer manage the role. These circumstances strongly suggest unfairness.

[124] I am satisfied that the balance of convenience favours Mr Amesbury.

Overall justice

[125] Mr Erickson suggested that imposing an employment relationship where the defendant's role was superfluous to requirements and no other suitable roles would be available would not be just, and that the merits were also relevant since they favoured Stellar.

[126] However, I have reached a different conclusion on both these issues. A particularly relevant point for the purposes of overall justice is the way in which the circumstances concerning the Service Line Owner, Platform role were dealt with. Insufficient information was provided to Mr Amesbury about it during the restructuring process. He was told in the letter of termination that Stellar had "not been able to identify any suitable redeployment issues." Then the Court was told that subsequent planning has proceeded on the basis that the role is not now intended to be filled by a Stellar employee.

[127] On the basis of this evidence, I am satisfied that overall justice favours the grant of interim relief as sought.

[128] The challenge is accordingly dismissed.

²¹ Also described as "the last peaceable state between the parties", see *Inguran, LLC v CRV Ltd* [2023] NZHC 3692 at [16] and [50].

Non-publication issues

[129] Shortly before the hearing of the challenge, Mr Amesbury filed an affidavit in which he provided details of health information relating to his wife. At the same time, an application for non-publication of that evidence was filed. At the hearing, Mr Erickson said the defendant did not oppose the application.

[130] Accordingly, I made an order that particulars relating to Mr Amesbury's wife's medical condition as described in his evidence and in counsel's submissions are not to be published.

[131] I am satisfied that the interests of justice require the making of this order. The information provided to the Court is both private and personal. There is no public interest in those details being available beyond the parties and the Court.

Other matters

[132] Since the challenge has now been resolved, I direct that:

- (a) the interim order of stay dated 2 July 2024 is to be discharged with effect from 5 pm on 7 August 2024; and
- (b) the interim order of reinstatement made by the Authority will resume as from 9 am on 8 August 2024.

[133] The parties are agreed that they should attend mediation. I direct accordingly. It is unlikely that such an event could occur before or even after the date when reinstatement is to resume. The parties will nonetheless have an opportunity to discuss any matters, including return to work issues, in good faith prior to attending the mediation.

[134] Mr Amesbury has successfully resisted the challenge. He is entitled to costs. This issue is to be discussed between the parties in the first instance. I indicate my provisional view that these should be considered on a category 2B basis under the

Court's guideline scale as to costs.²² If necessary, I will receive an application for costs from Mr Amesbury within 14 days of the date of this judgment, and a response from Stellar within 14 days thereafter.

B A Corkill
Judge

Judgment signed at 2 pm on 31 July 2024

²² "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.