



**Issues**

[4] The issues for resolution are:

- (i) whether the redundancy of Mr Blake's position was decided for ulterior motives or genuine commercial reasons; and
- (ii) whether Mr Blake was fairly consulted about the decision and how it would be carried out; and
- (iii) if the answer to either or both (i) and (ii) is no, what remedies are required; and
- (iv) whether Mr Blake should repay some fuel costs and wages to Senate; and
- (v) costs.

[5] Mr Blake, Senate's managing director Annette Richards and its present chief operations officer Hillary Robinson each provided written witness statements before the investigation meeting. They attended the meeting and answered questions.

[6] Jude Glass also lodged a sworn affidavit but did not attend the investigation meeting. She is the Auckland manager of Pathways, a mental health services provider. Mr Blake worked for Pathways full-time before he started work for Senate and remained working part-time for Pathways throughout his employment with Pathways. At the time of the investigation meeting he was again a full-time employee of Pathways.

**Was the redundancy for genuine reasons or for an ulterior motive?**

[7] In alleging Senate's actions were for ulterior and not genuine motives Mr Blake bears the burden of convincing the Authority that the theory has substance.

[8] He says it is now apparent that Ms Richards had developed a concern that he got paid by both Pathways and Senate for some of the same hours of work and that he worked more time for Pathways than Ms Richards understood he would. This concern was not put to him for explanation or comment before Ms Richards made the redundancy decision.

[9] Mr Blake had begun working as manager of Senate's Mental Health Division on 28 May 2007. The role included liaising with potential clients about using the temporary nurses and support staff provided by Senate and also training those staff for placements.

[10] His written employment agreement stated the hours of work would be 32 a week and "*anticipated that further on*" those hours would increase to 40 a week.

[11] Ms Richards had offered Mr Blake a full-time job with Senate some weeks earlier. They met to discuss terms and agreed Mr Blake would receive an hourly rate of \$32, with full use of a company car and prepaid cell phone, and the agreement was to be recorded in writing.

[12] On 1 May 2007 Mr Blake gave notice of resignation from a job with Pathways. The next day Ms Richards telephoned him and said she had a "*change of heart*" about offering him a full-time job at Senate. However after hearing that Mr Blake had already resigned from Pathways she agreed to go ahead with employing him. At his suggestion they agreed he would work 32 hours a week for Senate but continue to work for Pathways on a part-time basis. The two now disagree over whether the arrangement was for the part-time work for Pathways to total one or two days a week.

[13] By August 2007 Ms Richards became concerned about what hours Mr Blake was working for Pathways. Around this time she telephoned Ms Glass, Mr Blake's Pathways manager. She asked for information about what hours Mr Blake was paid by Pathways and explained she was concerned he was not separating out hours worked for both employers. Ms Glass did not supply any such information. Instead she said she trusted Mr Blake and suggested Ms Richards raise the concern directly with him.

[14] Ms Richards did not mention anything to Mr Blake about her concern until the day after he was told by Ms Robinson about the redundancy decision. Mr Blake contacted her by telephone on 26 September. He made the call after he had given Ms Robinson a letter saying he was shocked by the decision and wanted three months salary in lieu of notice. His employment agreement provided for two weeks notice.

[15] Ms Richards confirmed that the position was to be made redundant and told Mr Blake he should “*be careful*” as she “*knew things*” about him. When Mr Blake asked if she had any issues with his performance, Ms Richards replied that she knew he had been “*double dipping*” through his work with Pathways.

[16] This largely agreed evidence confirms that Ms Richards clearly believed, rightly or wrongly, that Mr Blake was claiming pay from both Senate and Pathways for some of the hours he worked and that she had that belief at the time she made the decision about the redundancy of Mr Blake’s position.

[17] However even if this belief did cause Ms Richards to have mixed motives in making the decision, the weight of evidence does not, I find, support a conclusion that her belief was the predominant motive for disestablishing the position held by Mr Blake. Rather, as Mr Blake most likely also knew, there were significant commercial pressures on the bureau, including its mental health division.

[18] Senate was not successfully competing to get shifts for its bureau staff. Other agencies were winning work at rates which Mr Blake accepts were hard to compete with. Although he had some success with securing or maintaining clients who would offer work for Senate staff, some clients were lost to other agencies. The total number of shifts secured had dropped. Documents provided by Senate during the investigation confirmed this point.

[19] Supporting the predominance of the commercial rationale for the redundancy is the disestablishment of other positions around the same time. The human resources manager resigned in September 2007 and was not replaced. Two telephone consultants – involved in placement work – were laid off in December. Ms Richards’ son also worked for Senate but his employment was discontinued around this time.

[20] There were some prospects that work undertaken by Mr Blake to have Senate accredited by ACC for certain work might boost business. Ultimately, however, Senate was entitled to make a commercial decision about the number of positions it could afford. As the Court of Appeal stated in *GNH Hale & Sons v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079, 1084:

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*

### **Was the decision carried out in a fair way?**

[21] However as the Court noted in *Hale*, while the redundancy of a position may be decided on genuine grounds, the fairness of the procedure followed in the resulting dismissal may still “*fall to be examined*”.

[22] Senate says it acted in good faith by telling Mr Blake of the prospective redundancy soon after it was aware of the decline in mental health service work. It says he was given an opportunity to provide feedback on alternative employment offered to him but instead chose to leave work within a few days.

[23] However – based largely on the evidence of Ms Richards and Ms Robinson and not just that of Mr Blake – I find that actions of Senate were not what a fair and reasonable employer would have done at the time for three reasons:

- a. He was not advised of the prospect of redundancy before a decision was made; and
- b. He was not advised of Ms Richards’ concerns about his supposed ‘double dipping’ but this was used as a threat when he protested about the circumstances of his redundancy; and
- c. The decision on his redundancy was ‘sprung’ on him in a meeting he had initiated about his future with Senate.

[24] On these grounds he has a personal grievance for unjustified dismissal because of the way that Senate made and carried out its decision to make his position redundant.

[25] Ms Richards and Ms Robinson say it was between a week and ten days before 25 September that they first talked about making Mr Blake’s position redundant.

Before 25 September Ms Robinson had contacted the Department of Labour helpline for information about redundancy and checked Mr Blake's written terms of employment regarding notice.

[26] On 24 September Mr Blake says he suggested to Ms Richards that he could take over the position of the resigning human resources manager in order to move to a full-time position with Senate. Although Ms Richards was at the time clearly contemplating the redundancy of Mr Blake's position, she gave no indication or expressed no reservation about his suggestion. Rather, according to Mr Blake, she described this as a "*positive proposal*" and said she would talk with Ms Robinson about it. Ms Richards says she does not recall this conversation with Mr Blake but accepts it may have occurred. She felt unwell at the time but does recall telling Ms Robinson about Mr Blake's idea.

[27] On 25 September it was Mr Blake who initiated a meeting with Ms Robinson. She had begun working for Senate in early September and on 21 September Ms Richards announced to staff that Ms Robinson would be the general manager.

[28] Mr Blake began talking with Ms Robinson about his idea of taking up the human resources role in order to work full-time for Senate. Mr Blake says Ms Robinson stopped him and said: "*Look Peter, I am sorry but I will have to stop you there. I have been directed by Annette [Richards] to inform you that your position is now redundant*".

[29] Ms Robinson denies that the situation was put as bluntly as this although a letter written to Mr Blake by Ms Richards, and dated 26 September, does refer to Ms Richards having "*decided to make your position redundant*" (my emphasis).

[30] In the 25 September meeting Ms Robinson did ask Mr Blake to consider some temporary or alternative employment with Senate. She suggested some additional work may be needed to complete the ACC accreditation project and that Mr Blake could also work as a telephone consultant at the rate of \$18 an hour.

[31] I accept, in those circumstances, that Mr Blake was shocked by the news and wanted to end his employment with Senate as soon as possible rather than work on in

a substantially lower paid telephone consultant's position. The additional work offered on ACC accreditation amounted to only one week.

[32] The shock of the decision was compounded by Ms Richards' accusation in the telephone conversation on 26 September that he had been "double dipping" in his pay.

[33] He ended his employment with Senate on 28 September 2007.

### **Remedies**

[34] Mr Blake's personal grievance does not give rise to a right to be reimbursed for lost wages and benefits (such as personal use of a car and a mobile), because his dismissal for redundancy has been accepted as being for genuine commercial reasons.

[35] However he is entitled to compensation for the humiliation, loss of dignity and injury to feelings caused by how Senate decided that redundancy decision and carried out his subsequent dismissal.

[36] I accept his evidence that he felt shocked by how he learnt of his redundancy and has since been embarrassed about having to explain the rapid change in his situation to managers at Pathways and other mental health services that he previously had contact with while working for Senate.

[37] Having regard to the particular circumstances of this case, and the general range of awards in cases of this type, Mr Blake is awarded the sum of \$6000 for the humiliation and injury to feelings caused by Senate's actions: s123(1)(c)(i) of the Employment Relations Act ("the Act").

[38] No reduction in this remedy is required under s124 of the Act as Mr Blake's actions did not contribute to the situation of Senate not properly consulting him before making the redundancy decision.

### **Counterclaim**

[39] I decline to make the orders sought by Senate for Mr Blake to pay it money for

three items: (i) fuel expenses; (ii) overpaid wages for two weeks after his employment ended; and (iii) reimbursing Senate for one day's pay for each of the 18 weeks he worked for the company. I do so for the following reasons.

*Fuel expenses*

[40] Senate claims fuel expenses for return journeys between Auckland and Whangarei over 18 weeks. It suggests Mr Blake travelled in a Senate car each week to do work for Pathways in Whangarei but its evidence fell far short of proving it.

[41] Mr Blake had a contractual entitlement to personal use of the Senate vehicle, included travelling to his bach near Whangarei. I accept that he did this on four occasions during his employment with Senate and that on two of those occasions he carried out work for Pathways. This did not result in additional expense to Senate beyond that arising from Mr Blake's permissible personal use to travel to his bach.

*Overpayment of wages*

[42] Senate initially alleged it had overpaid Mr Blake for two weeks more than he was entitled at the end of his employment. However in closing submissions Ms Robinson conceded Mr Blake's final pay was one week short and undertook to correct that.

*Reimbursement of pay for day a week for 18 weeks*

[43] Based on its "double dipping" allegation, Senate says Mr Blake really worked for Pathways for two days a week during the 18 weeks of his employment with Senate. Because Senate paid him for 32 hours a week in that period, it claims the equivalent of one day's pay a week should be reimbursed.

[44] Taking 22 August as one example, Senate said a Pathways car log showed that Mr Blake was travelling elsewhere on Pathways business that day when he also claimed wages from Senate. Closer examination of the document showed – as Ms Richards accepted in the investigation meeting – that the log entry was to do with another Pathways staff member who was using the car that day, and not Mr Blake.

[45] There are Pathways time sheets that show Mr Blake being paid for the same hours on some days that he was paid for working at Senate. However I accept his evidence that (with the approval of his manager there) he provided Pathways with what were effectively projected time sheets for particular supposed hours that aggregated or collated part hours he worked for that organisation on those days.

[46] I also accept Ms Richards knew and approved of “*crossover*” of working days and hours between Senate and Pathway work being undertaken by Mr Blake. It was part of what he called an “*adult employment relationship*” where he would deal with mobile telephone calls and emails from one organisation while at work for the other.

[47] After Mr Blake’s employment ended Senate commissioned a report on his internet use from his computer at the Senate office. The report showed Mr Blake logged onto a Pathways management site most days, as well as checking Trade Me and New Zealand Herald websites among others. However because this was never raised with Mr Blake during his employment, Senate is not able to establish that his internet use – including on the Pathways site – did interfere with carrying out his duties to Senate or that this was not done during legitimate breaks in his work for Senate.

[48] Taken overall Senate has not established sufficient reason for the reimbursement of pay and fuel costs it sought from Mr Blake.

### **Costs**

[49] The parties are encouraged to agree any issue of costs between them. If they are unable to do so, Mr Blake may lodge a memorandum as to costs within 28 days of the date of this determination. Senate will then have 14 days to lodge a memorandum in reply before the Authority determines costs. No costs application will be considered outside this timeframe without prior leave. In the normal course of events costs would be set under the principles discussed in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

**Summary of outcome**

[50] Mr Blake has a personal grievance for unjustified dismissal because of Senate's actions in deciding to make his position redundant without fairly consulting him before the decision and how it carried out its decision.

[51] He is entitled to compensation for the humiliation and injury to feeling caused by those actions but not lost wages as the redundancy was for genuine commercial reasons. He is awarded \$6000 under s123(1)(c)(i) of the Act.

[52] Senate has also undertaken to remedy a shortfall of one week's wages in Mr Blake's final pay.

[53] Costs are reserved.

Robin Arthur  
Member of the Employment Relations Authority