

was forced to confirm that they were not in a position to pay for the item because their bank would no longer advance them the funds required. As a consequence of the decline in TML's fortunes, the decision was taken to extend the annual leave of the majority of staff over the Christmas holiday period and the principal of TML Mr Taege sought to use the Christmas break as an opportunity for drumming up some new work. Amongst other things he travelled to Southland to endeavour to get some replacement contracts from that district.

[5] The New Year at TML started on 19 January 2009 and as usual on a Monday morning, there was a staff meeting first thing. Mr Taege spoke to that staff meeting (as he told me in his evidence he had spoken to previous staff meetings on successive Monday mornings) and updated the staff on the firm's financial position. That information was gloomy. Contracts had been cancelled and Mr Taege had been unsuccessful in obtaining replacement work over the holidays, despite his best endeavours. Mr Taege had to reluctantly confirm to the assembled staff that it would be necessary for the firm to consider redundancies because of the downturn and that individual *one on one* meetings would be held with each staff member.

[6] Of course, Mr Callaghan was one of the staff interviewed and it seems to be common ground that his interview took place sometime in the morning of that first day. The interview involved Mr Callaghan himself, Mr Taege and Mr Taege's foreman, Mr Trotter. Mr Taege was clearly unhappy about the whole prospect of having to declare redundancies and was uncomfortable at the meetings with staff. Even Mr Trotter thought that Mr Taege was a bit *too soft* in relation to staffing matters and would try every other solution before making staff redundant.

[7] The meeting with Mr Callaghan was by all accounts a short affair; Mr Callaghan gave evidence that he thought the meeting was unlikely to have *cracked 10 minutes* and Mr Taege agreed. Mr Callaghan claimed that Mr Taege had made him redundant at that meeting, that there was no consultation about the proposed redundancy and no genuine opportunity for Mr Callaghan to suggest alternatives to losing his role in the organisation.

[8] Mr Taege, in oral evidence to the Authority, told me in answer to one of my questions that he accepted Mr Callaghan's recollection of that meeting, that he had in fact made Mr Callaghan redundant in effect on the spot, and he agreed with Mr Callaghan that Mr Callaghan had been given one weeks notice of the redundancy.

[9] Mr Taege also confirmed that he had decided in advance that Mr Callaghan *would have to go* and that was because Mr Callaghan's skill set was the least appropriate for the business going forward. However, Mr Taege agreed with the contention that as he had not explored with Mr Callaghan whether he might have other skills that he could bring to the business, his conviction that Mr Callaghan should be dismissed for redundancy may have been premature. Mr Taege said (and I accept) that he gave Mr Callaghan the opportunity to comment on the redundancy and to suggest alternatives but he accepted that, given he had decided Mr Callaghan's position was surplus to requirements and told Mr Callaghan that he was dismissed for redundancy, all in the space of this very short meeting, it was difficult to see how the prospect of consultation was in any way a genuine one.

[10] In the result, Mr Callaghan left this very short meeting with the conviction that he had been dismissed for redundancy and the belief that he had been given a weeks notice. There is no written confirmation of the employer's decision until some days later when a hastily worded letter was provided by TML to Mr Callaghan which confirmed that he was dismissed for redundancy and was given a weeks notice effective from 19 January 2009. Acting on that advice (or perhaps even before its receipt) Mr Callaghan attended at the Work and Income New Zealand office, indicated that he had been dismissed for redundancy and arranged to commence the appropriate benefit with effect from Monday 23 January 2009.

[11] Mr Callaghan told Mr Taege about his WINZ situation. There was some confusion between the parties about when Mr Callaghan's service with TML actually concluded. Mr Callaghan thought it concluded on Friday 23 January 2009 while Mr Taege thought that Mr Callaghan concluded work on Monday 26 January 2009. Mr Callaghan alleges that Mr Taege asked him to return to work on Monday 26 January 2009 and that Mr Callaghan was ready willing and able to do that, but only on the basis that Mr Taege agreed to pay Mr Callaghan *under the table*. Mr Taege refused to do that and so Mr Callaghan did not perform any work on Monday 26 January 2009 although he was physically present at the workplace to remove his tools and personal property.

[12] Mr Taege is clear that he did not ask Mr Callaghan to return on Monday 26 January 2009 and I accept that evidence as truthful. Mr Callaghan certainly thought that Mr Taege had asked him to return but I am satisfied that that is not what

happened. Mr Taege said it would have been inconsistent for him to ask Mr Callaghan to return on Monday 26 January because Mr Callaghan had told him previously that he (Mr Callaghan) would commence his benefit on and from 26 January 2009. On that basis then, Mr Taege understood that Mr Callaghan's last day of work was Friday 23 January 2009.

[13] On Monday 26 January 2009 Mr Callaghan's evidence is that he hurt his back when he was putting his tool kit into his vehicle to remove it from the workplace. He filed an ACC claim alleging a work related injury and when this was eventually referred to Mr Taege, he indicated to ACC that Mr Callaghan was not working on that day which was of course strictly speaking correct. In the result, the matter was resolved on the footing that Mr Callaghan explained to ACC that he had been at the workplace, had hurt his back while putting his tool kit into the car and that on the basis that he was entitled to make a claim as a work related injury on the business of getting to and from work, the claim was accepted on that footing with Mr Taege signing off on it as well.

[14] A personal grievance was formally raised on Mr Callaghan's behalf by letter from his lawyer dated 17 February 2009.

Issues

[15] It will be useful if the Authority considers the following matters:

- (a) Was the redundancy genuine?
- (b) Was the process used by TML fair?
- (c) Did TML breach good faith?

Was the redundancy genuine?

[16] I am satisfied the redundancy is genuine and that concession has now been made as well on Mr Callaghan's behalf during the course of the investigation meeting. Although the original statement of problem alleged that the redundancy was not a genuine one, it is now accepted that TML had very real financial difficulties as a consequence of a dramatic fall in its forward orders.

Was the process fair?

[17] I do not accept that Mr Callaghan knew nothing of the financial predicament of the firm until 19 January 2009 and indeed he conceded as much at the end of his evidence before the Authority. I prefer Mr Taege's evidence to the effect that he spoke to staff each Monday morning first thing and once the forward orders position started to weaken (from beginning December on) he says (and I accept) that he told his staff what was happening.

[18] It follows that when Mr Callaghan presented for work on 19 January 2009, he would have been aware that the firm was trading in difficult circumstances. The staff meeting on 19 January would have re-emphasised that point. Mr Taege told me (and I accept) that he indicated to the staff the number of contracts that had been terminated thus losing orders for the business and he also reported on his efforts to get replacement on farmers on Southland.

[19] Mr Callaghan was spoken to by Mr Taege and the foreman Mr Trotter. Mr Trotter was there to act both as a witness for Mr Taege and as a support person for Mr Callaghan. That is not a satisfactory arrangement and employers in this situation would be well advised to ensure that their staff have an opportunity to have their own support person present. I accept that in the present case, the reason that these events happened so quickly was Mr Taege's very evident reluctance to address redundancies at all and his attempts to leave things to the last minute in the hope of finding an alternative strategy to save his cash flow.

[20] It is for entirely similar reasons that the meeting involving Mr Callaghan took barely ten minutes. Mr Callaghan said in his evidence that he formed the view that Mr Taege did not want to be there and when I asked Mr Taege about that matter when he was giving evidence, he readily agreed.

[21] As I have already made clear, Mr Taege readily conceded that he had made Mr Callaghan redundant at the one on one meeting on 19 January 2009, that he had pre-determined that by concluding that the fitter and turner position needed to be disestablished and that the consultation process while talked about with Mr Callaghan in a theoretical sense, was not a genuine prospect as the redundancy had already been declared.

[22] There is dispute between the parties as to who determined the length of the notice period. Mr Callaghan said that he was dismissed on 19 January 2009, given one weeks notice from that date and that that decision conveyed orally to him at the meeting was confirmed in writing by the letter dated 19 January 2009 (although it is common ground that the letter was not created until sometime after that date). Based on that intelligence then, Mr Callaghan arranged with Work and Income New Zealand to commence a benefit on and from Monday 26 January 2009 and he conveyed that information to Mr Taege. Mr Taege's evidence was clear that he expected that Mr Callaghan would work until close of business on Monday 26 January 2009, that is seven days from the date that he was given notice of dismissal. I am satisfied that it was Mr Callaghan who made the decision to reduce the notice and not Mr Taege and I do not accept Mr Callaghan's evidence that Mr Taege asked him to return to work on Monday 26 January 2009.

[23] Speed in itself is not necessarily a determinant of a failed redundancy process but it is a fact that a hasty process will leave less room for contemplation, less room for considering and reflecting on alternatives to redundancy and more opportunity to miss vital steps of the process.

[24] As a matter of general philosophy, a satisfactory redundancy process would normally involve notification to staff of the prospect of a restructure and the reasons for it, followed by a one on one interview wherein the discussion can be more focused on the individual skills of a particular employee and the sorts of roles that such an employee could fulfil in the business which are different from the role that they are currently employed to perform. That second stage would normally give a genuine opportunity for the employee to consider options to redundancy, suggest alternative strategies and alternative ways in which that particular individual might assist the business and then have an agreed timeframe for the individual employee to come back to the employer with any views that might have been developed in response to the prospect of a restructure. Then of course, the employer must give genuine consideration to any views advanced by individual employees and be seen to properly include any appropriate suggestions in any final determination of the matter.

[25] In the present case, it is fair to say that all of those generic steps were cramped up. There was no real opportunity for Mr Callaghan to suggest alternative strategies. I note in passing that he was hardly proactive in suggesting alternative scenarios but I

accept his point that having been dismissed on the spot the notion of coming back with some suggested alternatives seems a little pointless. No doubt TML can argue that no amount of consultation could change the ugly reality that jobs had to go and that certain positions (and presumably including Mr Callaghan's position) were more vulnerable than others. That fact does not obviate the need for an employer to undertake a fair and transparent process which first provides the employee with all the information necessary for the employee to consider alternatives then gives a proper opportunity for alternative strategies to be suggested by the employee, and finally gives a genuine commitment to consider the alternative strategies suggested by the employee.

[26] I also accept that in the present case, Mr Taege was plainly uncomfortable with making anybody redundant (all the evidence suggests that) that he had left it until the last minute to declare redundancies and that he had endeavoured to do everything he could think of prior to declaring redundancies in order to avoid that unpleasant necessity. I take that into account as well in assessing remedies.

Did TML breach their good faith obligation?

[27] I am absolutely satisfied that TML behaved in good faith throughout the proceeding. I have accepted that TML got the redundancy process wrong but not out of any sense of treating their staff improperly or unfairly but indeed precisely because they were acutely uncomfortable with the process of having to declare redundancy and took all reasonable steps to try to find an alternative strategy before being forced to declare redundancy at the very last minute.

[28] I formed the view that Mr Taege was an honourable and decent man who gave his evidence truthfully and honestly and who was prepared to make honest and proper concessions, even where the consequences of those concessions were adverse to him. In those circumstances, I think it proper to make a finding that Mr Taege was acting in good faith throughout the process, notwithstanding my finding that the process was not as satisfactory as it might have been.

Determination

[29] It is clear law that a genuine redundancy is a *justifiable* reason for dismissal and in consequence will only attract awards for compensation in rare circumstances save where the process used by the employer is flawed. In *STAMS v NZ Rennet Co Ltd*

[1991] 2 ERNZ 487 for example, Goddard C J held in the penultimate paragraph of his judgment that *...the grievant is entitled to be compensated only for that injury to his feelings and distress over and above that which would have been caused to him anyway when the inevitable come to pass.*

[30] Having reached the conclusion earlier that this was indeed a genuine redundancy but that the process was a flawed one, it is necessary now to fix the appropriate level of compensation. In doing that, the nature of the grievance is properly identified as a grievance caused by an unjustified disadvantage, because the fact of the dismissal is held to be genuine by reason of the job going.

[31] In *Simpson Farms Ltd v Aberhart* AC 52/06, 14 September 2006, Chief Judge Colgan emphasized the breadth and range of factors which constitute the non-economic loss in cases of this kind in the following passage at para 83:

Knowledgeable and objective observers can understand that role disestablishment leading to dismissal for redundancy is not a criticism of an employee's work performance. However, longstanding, loyal and competent employees.... nevertheless suffer from real senses of failure, betrayal and disillusionment in their reasonable and lawful attempts to be fully involved in a process that is likely to have significant effects on their employment and career, when they are deprived of that opportunity.

[32] A claim for \$8000 would be at the high end of awards for this kind of case and having regard to all the factors I am required to consider, including the behaviour of TML, which I regard as misguided rather than unjust, I think a more appropriate award is \$2,500.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority