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Duffy v CGML Limited (Wellington) [2016] NZERA 281; [2016] NZERA Wellington 80 (8 July 2016)

Last Updated: 30 November 2016

Attention is drawn to an order prohibiting publication of the respondents' financial information in this matter

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2016] NZERA Wellington 80

5580538

BETWEEN NICHOLAS DUFFY First Applicant

A N D MICHAEL SPEIGHT Second Applicant

A N D CGML LIMITED First Respondent

A N D WILLIS STREET PARKING LIMITED

Second Respondent

Member of Authority: Michele Ryan

Representatives: Barbara Buckett, Jordan Boyle, Counsel for Applicants

Guido Ballara, Counsel for Respondents

Investigation Meeting: 12 and 13 April 2016 at Wellington

Submissions Received: 22 April 2016 from the Applicants

28 April 2016, from the Respondents

6 May 2016 from the Applicants "In Reply"

Determination: 8 July 2016

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicants, Mr Nicholas Duffy and Mr Michael Speight, worked for

CGML Ltd (CGML) for almost 18 months before they were both made redundant on

6 June 2015. They say their redundancies were contrived having fallen out of favour with CGML's directors and where each had received a de-facto warning in a "letter of concern" weeks before CGML presented a proposal to restructure. In addition they say the financial information, on which CGLM's restructure was based was flawed, and that their selection for redundancy was predetermined. Both seek compensation, lost wages, lost benefits and costs associated with the warnings, and the dismissals, which are alleged to be unjustified. Mr Duffy also claims he is owed wages pursuant to the employment agreement with the second respondent Willis Street Parking Ltd (WSP).

[2] CGML is an acronym for “Chow Group Management Limited”, a company that provides operational support to a wider group of companies under the directorship of brothers John and Michael Chow (the directors). WSP is one of those companies.

[3] CGML rejects the applicants’ claims. It says the restructuring was a consequence of a genuine business need to change direction and reduce costs. It says the redundancies were made after careful consultation and selection process conducted in good faith. It says the applicants’ focus on letters of concern have been used as a means to bolster claims of predetermination but that those matters are unrelated to the restructure. Mr Duffy’s claim for arrears of wages with WSP is denied.

Non publication order

[4] With all parties’ consent I issued a non-publication order pursuant to clause 10 of Schedule 2 of the Employment Relations Act. The order pertains to the financial information relevant to CGML and its operations across the wider Chow group referenced in evidence and documents provided to the Authority.

The Authority’s investigation

[5] The Authority’s investigation lasted two full days. Mr Duffy and Mr Speight attended the investigation as did the directors and their sister Ms Jenny Chow who is

CGML’s Office Manager. A significant volume of documents was provided. I have carefully considered the information provided. As permitted by s.174E of the Employment Relations Act I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicants’ claims.

[6] The applicants’ briefs of evidence were provided outside the timetable agreed between the Authority and the parties’ representatives. I accepted the applicants’ primary statements but advised I was unwilling to accept the evidence of a subsidiary witness. Counsel for the applicants sought to reintroduce that individual’s statement by way of “in reply” evidence. Having reviewed the content of the statement I considered it did not advance the applicants’ case beyond the information that the applicants had already provided and declined to have the witness interviewed.

[7] Mr Duffy sought to introduce a CTV recording which depicted CGML’s offices following a meeting on 5 March 2015. The recording does not contain sound. Mr Duffy sought to augment the recording by providing a commentary on events. Having viewed the footage I concluded there was no means to objectively establish what was communicated between various individuals and I was unwilling to allow the material.

The issues

[8] The following issues require investigation and determination:

- (a) whether one or both of the applicants were unjustifiably disadvantaged by the letters of concern;
- (b) whether there were genuine business reasons for the restructure;
 - was the financial information accurate and supportive of the decision to restructure?
- (c) whether the process by which the applicants were made redundant was procedurally fair;
 - were the applicants unfairly disadvantaged by the assessment process and/or unfairly selected for redundancy?
 - should Mr Duffy have been included in the restructuring and selection process?
- (d) is there evidence that the restructure was contrived; (e) is Mr Duffy owed arrears of wages from WSP.

Additional information

The property management team

[9] Prior to 2014 CGML engaged external contractors to manage its properties across the group. In September 2013 the directors decided to build an in-house property management team. Mr Stephan Zhu, who had previously worked for the directors, was appointed to the position of ‘Property Operations Manager’.

[10] Mr Speight joined the property team in mid-January 2014 as ‘Property Facilities Co-ordinator’.

[11] Mr Duffy was also known to the directors having provided financial and commercial property advice in 2009.1 He

commenced employment with CGML as

'Head of Property' in early February 2014 on an annual salary of \$100,000 which increased to \$130,000 relatively soon after. Concurrent to his employment with CGML, in June 2014 he also signed an employment agreement with WSP.

[12] The property team grew to four when Ms Rina Lewis was appointed 'Assistant Commercial Property Manager' in August 2014.

Events relevant to Mr Duffy

[13] Mr Duffy's employment was without incident until early September 2014 when he received a letter titled "*Various Concerns and expectation (sic)*". CGML indicated it was concerned about aspects of work not being completed in a timely manner. Mr Duffy answered in writing and at a meeting on 10 September 2015, stating he was overly stressed by the conflicting demands of each director, a matter he had raised previously. Mr Duffy says the directors responded angrily and that after the meeting Mr John Chow told his personal assistant that he could restructure the property team and get rid of Mr Duffy.

1. Final Submissions on behalf of the applicants record that the directors had known Mr Duffy for 10 years.

[14] There is no dispute that the issues between the parties were resolved later that month.

[15] In mid-November 2014 Mr Duffy began undertaking work for a new company within the wider Chow group, CCI Finance (CCI). With his agreement Mr Duffy's job description was amended in February 2015 to incorporate CCI activities albeit he remained Head of Property. It was envisaged that by September 2015 CCI would command 80% of Mr Duffy's attention. Concurrently Ms Lewis was promoted to Commercial Property Manager.

[16] Mr Duffy's work for CCI was short lived. In late March 2015 Mr John Chow became aware that the financing required to progress CCI was not obtainable on acceptable terms and CCI was put on hold. Some work was redistributed back to Mr Duffy in early April 2015.

The letters of concern

[17] The applicants each received a letter titled "Letter of Concern" within a month or so of CGML announcing its proposal to restructure the property team. The circumstances in which each received the correspondence is different.

Mr Speight's letter of concern

[18] Mr Speight was late for a client meeting on 19 February 2015. Afterwards Mr Michael Chow sought an explanation from him about his delayed appearance and behaviour at the meeting.

[19] Four days later Mr Speight received a letter of concern. Amongst other things the correspondence expressed disappointment on hearing that Mr Speight regarded his work on a project as a demotion and referred to aspects of his job description. The letter concluded with the following:

I would like written response from you confirming committed [sic] in our property team and 318 project by 4pm Thursday 26 February

2015, otherwise I will find other alternative option.

[20] Mr Speight responded in writing the following day and advised:

I am fully committed to both my role as a property facilities manager and to CGML. I will assist in the capacity as stated in my employment agreement to ensure the delivery of the 318 Lambton Quay project.

[21] In a self-evaluation form dated 4 March 2015 Mr Speight recorded he had no questions or concerns about his job. No further direct interaction about the events of

19 to 24 February 2015 appears to have transpired until Mr Speight raised a personal grievance on 1 May 2015.

Mr Duffy's letter of concern

[22] On 5 March 2015 Mr Michael Chow approached Mr Duffy immediately before a regular team meeting was due to begin. Mr Duffy advised him that he had pressing work he needed him to complete and would not be present. He says he was cut off twice by Mr Chow who aggressively insisted he attend. That interaction lasted no more than 30 seconds. The meeting went

ahead but was cancelled shortly after.

[23] On return to his office Mr Duffy says he heard the directors yelling in Cantonese. He says Mr John Chow entered his office and questioned why his brother was angry. He says he was spoken over during his explanation, and again was cut off twice. Mr Duffy says he was made to answer either yes or no that he understood it was his responsibility to notify the attendees in advance of a meeting if he was not planning to attend.

[24] Mr John Chow agrees he asked Mr Duffy to answer yes or no to towards questions but says it was difficult “to get a straight answer” from him.

[25] Having assessed the witnesses I consider it likely that each individual, over the course of both exchanges asserted his respective position robustly and was not easily dissuaded from their view. It was clear from Mr Duffy’s testimony that he considers it was unreasonable of Mr Michael Chow to not have accepted his explanations.

[26] At mid-day or thereabouts Mr Duffy received a “Letter of Concern” from Mr Michael Chow requesting he attend a meeting to discuss the concerns (set out below) and informing him he could bring a support person:

1. *Today, you failed to attend a meeting without informing the directors.*

2. *The reason you gave for not attending the meeting was that you*

were too busy. As you personally arranged the meeting as Head of Department, it is not acceptable to say that you are too busy to come to the meeting. You should have advised the directors and rearranged the meeting.

3. *Your attitude towards the directors is not acceptable.*

[27] In the early afternoon Mr Duffy attached and emailed the letter to Ms Jenny Chow (who dealt with HR issues) and asked “whether this is a “Good Faith” meeting or a “Disciplinary Action meeting” and asked about relevant procedures. Ms Chow says she recommended he talk to Mr Michael Chow.

[28] The parties met on 10 March 2015. Mr Duffy asked to respond formally to the concerns in writing on Friday 13 March 2015. In the interim period Mr Michael Chow wrote another letter on 11 March 2015. That letter stated:

Re: Letter of Concern

...

To aid your response, below are points discussed in the meeting and the conversation surround [sic] each:

1....

I asked you to explain why you had failed to attend the meeting you had requested. You responded that you felt that due to having received some urgent tasks from John that morning, together with the fact that Rina had progressively taken over a lot of your roles as Head of Department, you would not attend the meeting.

I explained to you that that was not acceptable and that you should have informed the directors that you could not attend the meeting, or should have rescheduled it. You accepted that you should have notified the directors.

2....

I explained to you why the reason you gave for not attending the meeting was unacceptable. I am in fact busier than you, running 20 companies and

make time to attend meetings.

3....

I asked you to explain why you had displayed attitude [sic] in the meeting which was unacceptable. I additionally explained why I felt your notetaking was a display of unacceptable behaviour. You accepted that your notetaking may not have been appropriate.

I advise that a copy of this letter and your response will be kept on your personal file. If I do not see an improvement in the issues discussed in next four week [sic] I will have no option other than to formally meet with you and the outcome of that meeting may be disciplinary action, including a warning letter.

[29] Mr Duffy’s response advised he had not been dealt with fairly, but that he took seriously the comment regarding disciplinary action. He requested the parties attend mediation.

[30] Mr Michael Chow did not reply to the content of Mr Duffy’s response. On 24

March 2015 Mr Duffy initiated further correspondence stating he was stressed by the lack of resolution on the issue and requested a formal response alongside all information CGML held on the matter. Mr Michael Chow responded. He advised he had nothing further to add and noted “*Regarding your request for mediation with MBIE, its totally up to you. Please advise the date if you decide to proceed*”. Through his representative, on 30 March 2015 Mr Duffy raised a personal grievance in respect to the letter of concern.

The proposal to restructure

[31] On 11 March 2015 CGML received news that a key Wellington based tenant would not be renewing its lease. Mr Duffy was asked to recommend how rental income could be improved. His audit identified a growing increase in unoccupied commercial space particularly in the Wellington based properties.

[32] The directors met with the property team on 24 March 2015 and put forward a proposal to restructure on the basis of “*costs savings, property market conditions and changing property direction*”. Three options were proposed; “(1) *reduce the property department size; (2) contract out the property department, or; (3) mix of 1 and 2.*” Staff were asked for, and did provide, initial feedback on the proposal.

[33] On 27 March 2015 Mr Duffy advised CGML in writing that he considered the restructure was a means to make him redundant instead of resolving the issues around the letter of concern.

[34] The directors met with staff on 1 April 2015 to discuss the proposal and feedback received. The directors advised that the Wellington commercial property market was likely to further weaken, and spoke of the possibility of moving a portion of the business to residential accommodation. A range of documents were distributed including; a discussion paper detailing the reasons for the proposal, possible options, a consultation timeframe and some financial information.

[35] Between 1 and 16 April 2015 Mr Duffy and Mr Speight requested and received additional financial information. The directors met with the team on two further occasions and staff provided additional responses to the proposal.²

[36] On 17 April 2015 members of the property team were informed that option 3 was preferred. All four positions in the property team were to be disestablished and

two new roles created. The position of ‘Commercial Leasing and Property Manager’

² Team meetings were held on 1, 9, and 16 May. Mr Duffy additionally met with CGML’s accountant and John Chow on 8 May.

was described as sitting between the roles previously held by Mr Duffy and Ms Lewis, with some functions outsourced to an external property management company. Aspects of the roles held by Mr Speight and Mr Zhu were combined into one position;

‘Property Operations and Facilities Manager’. Some functions associated with those roles would be outsourced. The job descriptions for the two new roles were distributed and staff were told that assessment for each role would be measured against the relevant job description. CGML noted there appeared to be no other redeployment opportunities but asked staff to provide comment on that matter and, in the event that functions were outsourced, to indicate if they wished to transfer to the third party property management company.

[37] There was some initial miscommunication about whether Mr Speight and Mr Duffy had expressed interest in either role but in any event all staff applied for the position most closely correlating to the one each had previously held. Interviews were held on 1 May 2012.

[38] The applicants were each given a copy of their personal assessment and preliminary score on 5 May 2015, and informed of the total score of the team member who had also interviewed for the role. Both applicants received a lower score than their competitor. They each expressed dissatisfaction with the scores assigned to various criteria and advised CGML that any decision resulting in dismissal would be challenged.

[39] On 7 May 2015 CGML replied to the applicants’ individual concerns and informed that following consideration of those matters the scores would stand. The applicants were advised that no redeployment options had been identified (by any party), nor had either individual expressed interest in transferring to the contractor. Each applicant was given notice that employment with CGML would conclude on 6

June 2015. Mr Duffy and Mr Speight each elected to be paid in lieu of notice and left CGML a week (or thereabouts) later.

Were the applicants unjustifiably disadvantaged by the letters of concern?

[40] Section 103(1)(b) defines the context in which an unjustified disadvantage personal grievance may arise. There must be an unjustifiable action by the employer

which affects the employment of the recipient employee to his or her disadvantage.³

3 s.103(1)(b) paraphrased

The justifiability (or otherwise) of the employer's action is assessed against what a notional fair and reasonable employer could have done at the time the action occurred. In *Bilkey v Imagepac Partners* Judge Colgan (as he was then) noted:⁴

"a personal grievance claim depends upon an act or omission having disadvantageous consequences to the employee and not merely the employee's subjective dissatisfaction at [his or her] circumstances"

[41] The applicants allege the letters of concern disadvantaged each of them by making ongoing employment less secure and were warnings by another name.⁵

CGML says it regularly addresses concerns with employees by use of a letter of concern.

[42] Next, the applicants say the letters of concern were issued without regard to the contractual obligations within their respective employment agreements, or CGML's 'Employee Manual'.

[43] The applicants have an identical contractual term at clause cl. 46 of their employment agreement which provides:

Disciplinary Procedures

"Before entering into a disciplinary process the employee will be given a reasonable opportunity to improve and that this may be in the form of an informal verbal reprimand. The intent is to encourage the employee to behave in a manner that is appropriate to their employment."

[44] The Employee Manual addresses 'Performance Problems' and sets out procedures which will be implemented. The first of these refers to an 'Incident Report' which is "*used to document all performance incidents and informs the employee of the unsatisfactory behaviour when problems are of a less serious nature.*"

[45] I agree the letters of concern do not strictly follow the form of either of the above mechanisms but the effect of the letters of concern are, in substance, the same as each of the above processes; that is, to advise the employee of the employer's expectations and to allow the employee to improve before disciplinary action is initiated. Good faith obligations require an employer to inform employees of its expectations and I find the letters of concern were a means to achieve that end. I do

not accept that the letters of concern were of such a departure from agreed contractual

⁴ EMC Auckland AC65/02, 7 October 2002

⁵ citing *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Workers Union*[1990] 1

NZLR 533

terms or policy that that their dispatch amounts to an unjustified action against one or both of the applicants.

[46] Nor am I persuaded the letters of concern led to disadvantageous consequences for either of the applicants. No sanction was imposed against either applicant for the event which initiated the letter, nor were the letters accompanied by advice that the content could be relied on to augment any potential future disciplinary action.

[47] The applicants' claims of an unjustifiable disadvantage associated with the letters of concern are dismissed.

Were there genuine business reasons for the restructure?

[48] As with any allegation of unjustified dismissal, including those made on grounds of redundancy, the onus lies with the employer to establish that its actions are what a fair and reasonable employer could have done. This portion of the determination assesses whether there were genuine business reasons for the redundancies.⁶

[49] The applicants dispute the directors' assertion that the decision to review the property team was prompted by news that a key tenant would not be renewing its lease.⁷ They say CGML had been aware, as early as November 2014, that the tenant was unlikely to renew its lease.

[50] I do not accept that CGML's inaction to address that concern in November disqualifies the event as a trigger for CGML to consider changes to its direction in March 2015. Mr John Chow's email of 11 March 2015, sent to Mr Duffy following confirmation earlier in the day that the lease would not be renewed, evidences his concern about the vacancy rate across Chow group commercial property and I accept his testimony that the loss of the client was a likely catalyst for CGML's review

of its direction. There is also email evidence, drafted prior to the applicants' receipt of the

letters of concern, that in mid-January 2015 the directors had begun to contemplate a

6 In *Grace Team Accounting Ltd v Brake* [2014] NZCA 541; [2014] ERNZ 129 (CA) at [85] the Court of Appeal observed that a redundancy effected for purposes other than genuine business needs is unlikely to satisfy s.103A (the legislative test of justifiability)

7 That email asked Mr Duffy to recommend how the vacancy rate could be improved and indicated the directors would need to "form our view for the future property direction" on receipt of that information

move towards residential accommodation to manage vacant spaces when leases expired.

Did the financial information support the decision to restructure?

[51] A component of the applicants' challenge to the restructure rests on an argument that CGML did not adequately establish a financial imperative on which to commence a restructure.

[52] Recent decisions of the Employment Court and the Court of Appeal make it clear that a decision to make an employee redundant for financial reasons would not be the action of a fair and reasonable employer if the financial information on which the cause of the redundancy is based is manifestly inaccurate.⁸

[53] On 1 April 2015 two documents prepared by CGML's accountant were provided to the property team. The first of these estimated the cost of maintaining an in-house property team based on salary expenditure and direct expenses (comprising 'Rental' and 'Other') costs. The second document set out the price CGML considered it would have paid over the 2014/15 year had it outsourced the property team's functions to a third party provider. The effect of the documents led CGML to conclude that outsourcing the functions of the property team would result in a saving of \$148,568 (or thereabouts).

[54] Mr Speight and Mr Duffy dispute the accuracy of those documents.

[55] During the course of the consultation process and during the investigation meeting the applicants say the assessed cost of the in-house team was unfair because it did not take into account cost savings produced by the team.

[56] Mr Duffy says it was unfair to include the full cost of his salary as a property team expense when portions of his work extended beyond CGML. He says the in-house assessment should have allowed for a proportional reduction to the cost of his salary. Alternatively, he says market fees for external work should have been charged back to CGML and offset against the total sum of salary costs. Mr Speight says he was able to reduce annual facility costs but those savings were not reflected in the

financial information. I do not consider either of these matters advance the

8 *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39; *Tan v Morningstar Institute of Education Ltd t/a Morningstar Preschool* [2013] NZEmpC 82; *Grace Team Accounting Ltd v Brake* [2014] NZCA 51

applicants' claim that the financial information provided was incorrect. Mr Duffy's original and amended CGML job descriptions required him to work on all property matters across the wider group. CGML was under no obligation to charge out Mr Duffy's activities to other companies. I accept also the evidence of Mr John Chow that it was anticipated that a third party contractor would be able to reduce costs associated with the management of facilities.

[57] The applicants refer to the cost of 'Rental' (rental space) attributed to the property team. The evidence is that CGML leased significant floor space for its offices. The applicants say the cost of rental space was excessive when the team did not require the space and amenities available within CGML's offices. In feedback to CGML the applicants recommended that the property team should be relocated to cheaper premises or that CGML sub-lease a portion of its office space. I consider the amount of office space in which an employer chooses to conduct its business is a decision within its sole discretion.

[58] Mr Speight reported concerns that the figures setting out the cost of outsourcing property management services were outdated. On 9 April CGML undertook to gather updated information from three separate property management companies although it is unclear from the evidence whether this information was obtained. However Mr Speight agreed during questioning that he had independently obtained information from two of the possible companies that CGML anticipated might perform the outsourced functions. I understand those estimations were similar to those asserted by CGML.

[59] Next, and following Mr Speight's request for actual direct expenses (power, telephones, office supplies etc), CGML furnished a breakdown of the expenses estimated at \$192,980. It is submitted that CGML did not respond to Mr Speight's repeated request for actual figures and he was unable therefore to fairly assess or provide comment on those costs. At the

Authority's investigation CGML advised that it was not able to reasonably identify the actual expenses associated with the property team from the total cost of its office expenses. I accept CGML's failure to advise Mr Speight of that difficulty may have given cause for Mr Speight to view the financial information with scepticism: however there is no evidence to suggest the calculations were inflated to a point where the overall financial information provided with respect to the cost of the in-house team was manifestly wrong.

[60] Finally, the applicants also say they were not furnished with explicit financial information which reflected the cost associated with the mixed model; the option ultimately chosen by CGML. I agree that CGML's failure to provide a financial analysis correlating to this option was not helpful. That omission however does not lead me to conclude the decision to restructure was disingenuous or that the applicants were misled or misinformed. The information set out in the financial documents allows, by deduction, for an approximate calculation of the cost of retaining some staff and partially outsourcing of the property team functions. The applicants are both

financially literate and I consider were able to perform this evaluation.⁹

[61] That failing must also be viewed against the entirety of CGML's rationale for the restructure. CGML's proposal to restructure was not premised solely on a desire to save costs.

[62] I am satisfied that by mid-March 2015 Mr John Chow held serious concerns about the commercial property market in Wellington. Those concerns were validated by Mr Duffy's subsequent audit and recommendation. I note there was no real challenge by any member of the property team during the consultation process about

the directors' view of the property market,¹⁰ although Mr Duffy and Mr Speight each

considered the impact of market conditions on CGML could be abated by alternative business decisions. I consider those criticisms reflect the applicants' view as to how CGML should address the concerns rather than whether there were genuine concerns about the market conditions.

[63] Throughout the consultation process CGML routinely indicated it needed to move away from commercial property as its primary source of income towards residential property and no longer needed the complement of in-house commercial property specialists it had. I am satisfied that the weakening market and a consequent decision to have CGML change its direction, alongside a wish to reduce costs, gave genuine cause for CGML to undertake its restructure. The choice to reduce the composition of the property team was an outcome of those imperatives. I find that was a decision open to a fair and reasonable employer in all the circumstances.

Was the selection process undertaken fairly?

⁹ estimated savings between \$75,000 - \$100,000

¹⁰ see initial feedback from Lewis, Speight and Zhu dated 30 March 2015; Duffy feedback dated 14 April 2015; meeting notes of 1 & 9 April 2015.

[64] The applicants allege that they were not properly informed about how they would be assessed.

[65] There is no express reference in CGML's emails of 29 April 2015 that it would use a scoring process to appraise each member but I am unwilling to conclude that defect rendered the selection process unfair. My conclusion is supported by the content of the 29 April correspondence which advised that assessments would be undertaken by way of an interview (scheduled for 1 May). Each individual would be questioned as to how they could perform the new role and why. The applicants were informed that skills, attributes and past performance would be assessed against the relevant new job description. Consideration would also be given to whether each member had met the functions of their disestablished role. Team members were invited to provide any further information they wished CGML to consider and to advise if they had any questions.

[66] I am satisfied that the applicants knew they would be assessed and were aware of the criteria on which the assessment would be made. The application of a numerical system was likely a convenient operational mechanism to quantify the strengths (or weaknesses) of each applicant against the various criteria. I do not accept the applicants were disadvantaged by that methodology.

[67] Next, the parties are in conflict over whether Ms Lewis and Mr Zhu were interviewed twice for the positions and therefore received an unfair advantage for selection compared to the applicants who were interviewed only once. The interview notes of both Ms Lewis and Mr Zhu both refer to a previous meeting (with Mr John

Chow).¹¹

[68] It is clear there were frequent discussions between the team members and the directors throughout the restructuring process. I find references made to previous meetings within the interview notes are too ambiguous to satisfy me that Ms

Lewis and Mr Zhu had, in fact, an additional interview. I found Ms Chow's explanation on this issue was candid and sincere. She accepts that early arrangements had been made to interview Ms Lewis and Mr Zhu. She says those interviews were postponed when it became clear that Mr Duffy and Mr Speight also wished to be apply for the newly established positions. I accept her evidence.

11 I note a similar reference is made in the body of Mr Speight's interview notes

[69] In the absence of contractual agreement as to selection criteria, an employer may, following genuine consultation, formulate criteria by which it will measure an employee when considering selection for redundancy. A reasonable employer will advise an employee of the selection criteria prior to assessment and assess an employee fairly and according to the criteria without reference to undisclosed considerations. Further, an employer should consider any comments an employee may make on the result of his or her assessment before a decision is made.¹²

[70] The Court of Appeal in *Coutts Cars Ltd v. Baguley* stated¹³:

If criteria are properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge is unlikely to be fruitful.

[71] Mr John Chow assessed and scored each member following individual interviews recorded in note form by Ms Chow. It appears from the documents that the interviews followed set questions. The applicants each consider the scoring was applied unfairly. Mr Duffy and Ms Lewis achieved a relatively close score of 68.88% and 73.86% respectively, having been assessed against 25 criteria with an assessed value between 1 to 5 to each criterion. Mr Speight received a score of 65.25% and Mr Zhu of 76.50% against 20 criteria.

[72] Following receipt of his scores Mr Duffy raised concerns that he had received ten scores of 3 defined as "Acceptable (meets criteria required for successful job performance)".¹⁴ He advised CGML that he had never been told, including during a recent performance review, that he could improve in the areas scored. He specifically referred to scores of 3 correlating to the following criteria; 'To-do attitude', 'Must be honest and trustworthy' and 'Must be reliable'. He advised his salary level and recent

increased responsibilities would indicate a much higher score. Mr Duffy does not accept that Ms Lewis, whom he had mentored, could objectively receive a higher score.

[73] Mr Speight also communicated with CGML stating he had little involvement with the directors and asked why Mr Duffy and (more latterly) Ms Lewis were not involved in the assessment process given he had reported to each of them. He noted that he should have been scored 5 for 'Good knowledge of Microsoft Office & Excel'

¹² *Apiata v Telecom New Zealand Ltd* [1998] 2 ERNZ 130

¹³ [2001] NZCA 382; [2001] ERNZ 660

¹⁴ The record sheet appears to have marked him a score of 3 against 8 criteria

instead of 4. At the Authority's meeting he said Mr Zhu's score of 3.5 is evidence of

bias as Mr Zhu's skills in this area were very poor.

[74] CGML responded to the applicants' concerns. It advised Mr Duffy that a score of 3 reflected a satisfactory performance and therefore there had been no need to bring those matters to his attention. It advised that the level of remuneration reflected the job functions not honesty, trustworthiness or reliability. CGML advised Mr Speight that it did not consider it appropriate to have Mr Duffy or Ms Lewis involved in the scoring process given they were affected employees.¹⁵ Each employee was advised he had received an above average total scores but less than the other affected employees.

[75] At the Authority's investigation focus was placed on Mr Zhu's and Ms Lewis' scores of 4 in respect to the 'honest and trustworthy' criterion compared to the score of 3 apportioned to both Mr Duffy and Mr Speight on the same measure. Mr John Chow said he had known Mr Zhu much longer than Mr Speight as reason for the score. Applying that reasoning Mr Duffy questions why his score was lower than Ms Lewis given Mr Duffy had known the directors for 10 years and Ms Lewis for one year. Under cross examination Mr John Chow denied he considered Mr Duffy dishonest. He said he found Ms Lewis more trustworthy. He agreed his view on the matter was subjective.

[76] Subjective criteria are acceptable so long as those considerations are applied in good faith.¹⁶ Similar to the circumstances and findings made in *Bourne v Real Journeys*,¹⁷ had the applicants been evaluated solely on a small number of subjective standards, claims of bias may have had more force. However Mr Duffy and Mr Speight were assessed against 25 criteria over 6 subject categories and 20 criteria across 5 categories respectively. There is no evidence that the three (or

thereabouts)

subjective criteria and corresponding scores were given a disproportional weighting compared to other criteria against which the applicants were assessed.

[77] No aspect of CGML's selection process leads me to conclude that either applicant was assessed unfairly or not in good faith.

15 I note during Mr Duffy's interview he was asked to comment on who would be more suitable for the Property Operations and Facilities Manager position

¹⁶ *Dunn v Methanex New Zealand Ltd* [1996] 2 ERNZ 222

¹⁷ [2011] NZEmpC 120 at [126]

[78] Mr Duffy suggests that the February 2015 alterations to his job description placed him outside the property team and therefore the potential for redundancy selection. I do not accept that view. It is clear that aspects to day to day functions had changed but I do not consider these were so substantial that it could be objectively said he no longer worked within the property team. As noted, Mr Duffy position as Head of Property continued to require him to be responsible for all property matters across the wider group both before and after the alterations to his job description.

Is there evidence that the restructuring was contrived?

[79] Mr Duffy asks the Authority to view John Chow's statement to his personal assistant in September 2014 that he could restructure the property team to get rid of Mr Duffy, as illustrative of CGML's practice of making an employee redundant when it became displeased with him/her. He believes CGML decided to make him redundant at this time.¹⁸ It is further suggested that CGML's decision in late 2014 to shift him towards CCI increased his vulnerability in a future restructure by excluding him from property team work whilst promoting Ms Lewis, and was deliberate. Mr Duffy's oral testimony advised that Mr Zhu told Mr Duffy he had heard Mr John

Chow in a telephone conversation refer to "restructuring" and his name was mentioned.

[80] I was not provided with any evidence of an employee being made redundant as a consequence of a quarrel with a CGML director. The length of time between September 2014 and the introduction of a proposal to restructure in late March 2015 leads me to conclude it is highly unlikely that CGML had a long term strategy to remove Mr Duffy from his employment. In the period between these two timeframes Mr Duffy began working on CCI matters. That decision was mutually agreed and with a view to advancing both parties' interests. It is apparent that the failure to obtain suitable financing in March 2015 for CCI was not expected and was

disappointing.¹⁹ As regards the evidence in respect of the overheard telephone

discussion I am not satisfied this evidence is sufficient to fairly conclude Mr Duffy's

redundancy was predetermined. Mr Zhu was not called to give evidence by either party and on balance I do not consider it is appropriate to give weight to it.

¹⁸ Opening Submissions of the Applicant

¹⁹ Agreed bundle of evidence, documents 0175-0177

[81] Mr Speight says CGML unfairly preferred and selected Mr Zhu for redeployment over him. He believes the preferment is illustrated by Mr Zhu staying at John Chow's home in Auckland whereas he had not. He further says CGML had formed an adverse view of him in the 6 weeks (or thereabouts) before the restructuring proposal was introduced. He refers to an email sent to Mr Duffy from John Chow on 12 February 2015 which requests a mechanism to monitor Mr Speight's out of office work. He points also to evidence that Mr Duffy was asked about Mr Speight's whereabouts on or about 18 February. Mr Speight says he was later made to fill out timesheets but I do not accept he was singled out in the way he suggests. The evidence is that the directors held some general concerns about timekeeping in the property team. These were addressed in mid to late February 2015 when timesheets were introduced for all members of the property team to complete. I accept Mr John Chow's testimony that other CGML employees occasionally stayed at his Auckland residence but that those arrangements were a matter of convenience as opposed to preferential treatment.

[82] The applicants have formed a view that the letters of concern are the cause for CGML's proposal to restructure. This is understandable given the proximity in timing between the receipt of that correspondence and the subsequent proposal to restructure. On balance I find those events are coincidental. There is insufficient evidence to support the proposition that the

restructuring and the applicants' resulting redundancies were a consequence of either the letters of concern or increasingly hostility in the employment relationships between the parties as alleged. I do not accept the restructuring was contrived. If I am mistaken and the restructuring was used to justify otherwise unjustifiable dismissals I would be unwilling in any event to award lost wages. In the 3 months' following termination of employment each applicant advised he applied for two alternative employment positions only. Neither

provided contemporaneous evidence of those applications.²⁰ Mr Duffy says he was

focussed on opportunities as an independent consultant and said "*it was not worth applying for something that was not perfect*". Mr Speight went overseas in September

2015. I am not satisfied that either applicant adequately sought to mitigate his loss.

²⁰ Mr Speight provided two documents which evidence his application for an employment position but the documents were undated.

[83] The events leading to the execution of the employment agreement between Mr Duffy and WSP (on or about 30 June 2014 but backdated to 3 February 2014) are not in dispute, although CGML denies Mr Duffy was ever an employee of WSP.

[84] Sometime in mid-June 2014 Mr Duffy attended the Disputes Tribunal on behalf of one of the Chow group companies. The adjudicator made it clear to him that in order to represent the company he needed to be either an officer or employee of it.

[85] The directors subsequently sought authorisation from the Registrar of the Disputes Tribunal to have Mr Duffy attend on their behalf. That request was declined. Mr Duffy then proposed to the directors that he become an employee of WSP (and the other company involved in a dispute) on an annual salary of \$1- so that he could represent WSP. He says Mr John Chow advised the agreement should record wages of \$14.50 per hour (the then minimum wage).

[86] Section 6 of the Employment Relations Act requires the Authority to consider "*the real nature of the relationship*" between parties when deciding whether a person is an employee.

[87] Mr Duffy says he performed the functions set out in the job description attached to the WSP agreement. I consider those duties were captured by his role as Head of Property for CGML.²¹ I note also that each employment agreement specified

the hours of work as 9.00am to 5.30pm.²² It is not feasible that Mr Duffy could

perform both employment agreements for separate employers at the same time.

[88] Mr Duffy's explanation, that he was too fearful to ask for wages from WSP following the disagreement in September 2014, is also not credible. The events of September occurred more than two months after the WSP agreement was signed and backdated. I find it likely that Mr Duffy would have sought backdated wages prior to

September if the terms of the agreement genuinely reflected the arrangement.

²¹ The job description associated with the position of Head of Property required the occupant to "*manage all property matters across the wider Chow Group* and sets out a wide range of specific tasks and duties including "*other Property related matters as required*".

²² at Schedule A respectively

[89] I am not persuaded that the parties ever intended to have the WSP employment agreement impose corresponding employment associated rights and obligations on either of them at the time the agreement was signed, or subsequently.

Summary of findings

[90] I have not been persuaded that CGML's letters of concern unjustifiably disadvantaged the applicants. Nor am I satisfied that the events surrounding those letters either prompted or crystallised a plan to dismiss the applicants. The applicants' redundancies were a consequence of a genuine business need for CGML to alter its direction, and were undertaken in good faith in a procedurally fair manner. I have found CGML's actions were fair and reasonable in all the circumstances and open to it. It follows that the applicants were dismissed justifiably.

[91] Mr Duffy was not an employee of WSP and is not owed wages by it. [92] The applicants' claims have not been successful and are dismissed. **Costs**

[93] Costs are reserved.

Michele Ryan

Member of the Employment Relations Authority
