

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 583
3267739

BETWEEN SRI HIDAYAT ESTHAUFIK
Applicant

AND FORMSTRESS PRECAST
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Danny Gelb, advocate for the Applicant
Richard Harrison, representative for the Respondent

Investigation Meeting: 2 July 2024

Determination: 3 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sri Hidayat Esthaufik was employed by Formstress Precast Limited (FPL) as a CAD draughtsperson in October 2018 until his dismissal by way of redundancy on 25 August 2023. His position was permanent and full time.

[2] Mr Esthaufik says he has been unjustifiably disadvantaged by FPL's failure to follow a fair and reasonable consultation process and unjustifiably dismissed for redundancy. He seeks remedies including lost wages of \$7,450.22 (gross), holiday pay calculated on that sum of \$596.02, compensation for humiliation, loss of dignity and injury to feelings hurt and humiliation and a contribution to costs.

[3] FPL denies Mr Esthaufik was unjustifiably disadvantaged in his employment or unjustifiably dismissed. It says its actions were those a fair and reasonable employer could have taken in all the circumstances.

The Authority's investigation

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Esthaufik, his wife, Yuslyna Yunus and from FPL, Greg Johnston, general manager and Scott Mulholland, technical manager. Mr Esthaufik and Mrs Yunus gave evidence by audio-visual link.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Authority was assisted by an interpreter of the Malaysian language.

The issues

[6] The issues identified for investigation and determination are:

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- i. Was Mr Esthaufik unjustifiably disadvantaged in his employment by the actions of FPL?
- ii. Was Mr Esthaufik unjustifiably dismissed by way of redundancy?
- iii. If so, is Mr Esthaufik entitled to a consideration of remedies sought including:
 - a. Compensation under s 123(1)(c)(i) of the Act;
 - b. Reimbursement of lost wages (to be quantified) under s 123(1)(b) of the Act?
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Esthaufik which contributed to the circumstances which gave rise to his grievance?
- v. Is either party entitled to an award of costs?

The parties' employment agreement

[7] The parties' written employment agreement signed on 11 October 2018 includes:

25. **Redundancy**

25.1 Redundancy is a situation that occurs when your employment is terminated by the Company, the termination being attributable, wholly or mainly, to the fact that your position is, or will become, superfluous to the needs of the Company.

25.2 You shall not be eligible to receive redundancy compensation if:

- a. You are employed on a causal, temporary, fixed term basis or have been employed for less than 2 years.

...

25.3 In the event that your position becomes redundant, the Company may terminate your employment upon giving you one month notice or pay in lieu of notice. No other redundancy payments are due for this position.

25.4 Redundancy calculations will be made exclusive of any bonus payments and other benefits.

Relevant law

The test for justification

[8] In considering a personal grievance for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied:¹

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [85].

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.²

[9] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act's legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act's objects of "acknowledging and addressing the inherent inequality of power in employment relationships". The provisions specified included s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[10] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law."³

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

³ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

Background

[11] FPL manufactures precast and prestressed concrete products. The business operates from a yard in Waiuku, South Auckland and its products are supplied to construction projects throughout New Zealand. Part of the production process is design which is undertaken by the drafting team. At the time of Mr Esthaufik's redundancy there were eight employees in the drafting team – a supervising drafter, a senior drafter and 6 draftspeople, of which Mr Esthaufik was one. There were also two contract draftspeople.

[12] Prior to Mr Esthaufik's redundancy there had been changes in the business which had some impact on the drafting team. In 2022 FPL merged with another business which had production plants in Auckland and Otaki. Two of the draftspeople from the Otaki plant relocated to the Auckland yard increasing the team Mr Esthaufik was employed in to eight.

[13] The post COVID construction downturn had a significant impact on FPL's business. On 24 May 2023 a meeting was held with staff to advise them of the deteriorating commercial situation and that staff numbers would likely be reduced as a result. FPL then undertook an initial round of redundancies which involved merging the two Auckland yards. Employees in the yard and quoting teams were made redundant in that process. Despite these efforts the required cost reductions were not achieved and a further staff meeting was held on 7 August. Mr Johnston believes Mr Esthaufik was at this meeting. Following this, positions in the yard and the office, including the drafting team were identified for disestablishment. Of the drafting team FPL identified three positions for possibly redundancy - one of the positions was Mr Esthaufik's, along with the drafting team leader and another draftspeople who was then off work on long term leave. The two contract draftspeople had already been let go.

[14] How did FPL identify Mr Esthaufik's role as one which might be made redundant?

[15] Mr Johnston said he accepted Mr Mulholland's assessment that a drafting team of five – the senior and four draftspeople would be able to undertake the work at hand with Mr Mulholland's undertaking additional tasks. They then undertook a whiteboard exercise where they assessed the skill levels of the draft team members, including Mr Esthaufik. This assessment was based on the range of products on which the employees

could work and what they were good at, and this assessment was then measured against the current workload skill need. Meetings were then set up with the employees whose positions had been identified for possible disestablishment which included Mr Esthaufik.

[16] Late in the afternoon of 22 August 2023 Mr Esthaufik was called into a meeting with Mr Johnston and Mr Mulholland. Mr Esthaufik says he was told he was being laid off because FPL needed to restructure, that he was to pack up his personal belongings and leave immediately and to return to work on Thursday 24 August at 11am to attend a meeting and given a letter dated that same day under Mr Mulholland's name. He said the meeting lasted about 15 minutes.

[17] FPL's witnesses' recollection of the meeting is different. Mr Johnston said he told Mr Esthaufik the meeting was a follow on from the general staff meeting earlier that month, Mr Mulholland outlined why Mr Esthaufik's position had been identified including the need for the draftspeople to know the panel products handled from the site including the products brought with the business with which FPL had merged. They say Mr Esthaufik was given the option to come into work before the Thursday or to take the time off and that he was not told to take his belongings or that he was being made redundant. Mr Johnston and Mr Mulholland say Mr Esthaufik was not told he was laid off at that meeting. They said they wanted to hear what he had to say about the proposal. Mr Johnston acknowledged Mr Esthaufik appeared upset at the meeting.

[18] Mr Mulholland then gave Mr Esthaufik a letter which provides:

Restructuring and consultation process

As discussed due to the downturn in the construction market, we are currently reviewing our staffing levels across the business. One of the issues for us is what staffing levels are required, with the possibility of a reduction in number soft her Drafting team.

As a result, we wish to meet with you to discuss the current situation and the various options available moving forward. We would like to have this meeting on Thursday the 24th of August at 11am at the Formstress Office.

In this meeting we propose to discuss the following matters:

- (a) Current staffing levels in the department and the business needs going forward
- (b) Whether there is an opportunity to redeploy staff in other areas
- (c) Any other feedback for us to take into consideration regarding roles and responsibilities

The above list of matters is by no means exhaustive, and we welcome suggestions as to any other matters you may wish to raise with us at this meeting. We have not made any final decisions and the purpose of next meeting is to brainstorm all possible or alternative options, along with the current and future workload.

Nevertheless, as we will be discussing the possibility of redundancy and although this has not been decided or identified, you may wish to bring support or representation to our meeting. If the meeting date/time are unsuitable for you/your representative, please let us know and we will try to re-schedule to a more suitable time.

I appreciate that this process may be an unsettling for you and should you have any queries/issues please do not hesitate to contact me or Greg on our mobile phone, which is included at the bottom of this letter.

[19] FPL says when Mr Esthaufik did not attend work on Wednesday, they assumed he had taken up the offer to take time off to consider the proposal and possibly get some advice.

[20] Mr Esthaufik next attended work to go to the meeting scheduled at 11am on Thursday. Mr Johnson and Mr Mulholland attended for FPL. Mr Esthaufik's recollection is they discussed his work experience. Mr Johnston and Mr Mulholland said they worked hard to get Mr Esthaufik to comment on the proposal to understand if identifying his role was reasonable or if there were other options. They asked about his work experience to ensure they were aware of all his relevant skills and that there was a discussion about reduced hours, but this was not an option for Mr Esthaufik. Mr Esthaufik's recollection is the meeting lasted about 15 minutes and ended with Mr Mulholland saying they would think about whether the redundancy should proceed, and he was to return at 4.45pm later that day. Mr Johnston and Mr Mulholland then considered all the positions under review and what other opportunities there might be for the affected staff for example if a resignation would create a vacancy. Their deliberation ended with a decision to disestablish Mr Esthaufik's role and make him redundant.

[21] The meeting reconvened at the agreed time. Mr Johnston confirmed the decision to make Mr Esthaufik redundant and handed him a termination letter dated that day and his final pay slip. The letter, signed by Mr Johnston and Mr Mulholland includes:

As discussed in our meetings, due to the downturn in the construction market, we are currently reviewing our staffing levels across the business. One of the issues for us is the staffing levels with the current workload.

Over the last few days, we have taken into consideration all comments and suggestions from everyone in the meetings. However, we have made the

decision that our current staffing levels are too high with the declining market. Unfortunately, your role will be made redundant on the 25 August 2023.

As per your contract one month's notice is required for redundancy, we will not require you to work this month and will make payment in lieu of a month's notice.

We are happy to provide references and aid you in your efforts in seeking other employment opportunities.

Discussion

(i) *Was Mr Esthaufik's redundancy genuine?*

[22] The evidence is clear that FPL's business was experiencing a substantial downturn and prior to the restructuring of the drafting team significant numbers of employees in the yard and quoting teams had been made redundant. It is accepted the workload of the drafting team had declined and the business was under continued pressure to make savings. In these circumstances it is accepted that it was necessary for FPL to look to reduce costs which might include staff costs.

[23] To ensure that the redundancy process is procedurally fair, employers should ensure they comply with their good faith obligations when making selection decisions. In accordance with s 4(1A)(c) the proposed selection criteria should be consulted on. The final selection criteria should be applied fairly and consistently to make a redundancy decision and affected employees should have an opportunity to respond and discuss assessments.

[24] In *Jinkinson v Oceana Gold*, the Court held that the employer breached their obligations of good faith because it failed to inform Ms Jinkinson of the selection criteria it was using to appoint the new mine technician positions.⁴

[25] I accept FPL used selection criteria to identify Mr Esthaufik's position for possible redundancy - skills and experience with a particular emphasis on the current workload and particular panel products. However, on the evidence before the Authority FPL is unable to establish to the necessary standard that these criteria and the application of the criteria were communicated to Mr Esthaufik in such a manner as would enable him to meaningfully comment. These matters are not clearly referred to in the letter given to Mr Esthaufik at the end of the 22 August meeting. This is unfortunate because given his accepted upset during the meeting a letter to reflect on

⁴ *Jinkinson v Oceana Gold* [2009] ERNZ 225.

which set out the selection criteria, its application to him and that his comment was sought may have assisted Mr Esthaufik engaging with the process and gone some way to discharging FPL's obligations towards him in a restructuring setting. While it was likely FPL's intention was to communicate the basis for the possible redundancy and how Mr Esthaufik's position had been selected and allow him an opportunity to comment, this is unable to be established on the evidence. No notes were taken at the meeting which means there is no contemporaneous record of what was discussed. The meeting and letter of 24 August do not remedy these flaws – there is significant differences in the evidence as to what occurred in the meeting and no contemporaneous record of any detail which might address the concerns outlined above.

[26] This is not a matter of process alone. At the investigation meeting Mr Esthaufik said in evidence that he could do all the work that went through the drafting team. If the opportunity to fully discuss the selection criteria had been provided by FPL during the redundancy process, then Mr Esthaufik's view that he was capable of performing all the work could have been more fully discussed between the parties and may have been a matter Mr Johnson and Mr Mulholland further reflected on in their final deliberation as to which employees would be made redundant.

[27] FPL submits the commercial context and the restructuring of the business establishes the genuineness of Mr Esthaufik's dismissal for redundancy. While it is accepted Mr Esthaufik's dismissal occurred in this context, the failure to consult on the selection criteria for his position means FPL is vulnerable to questions as to how Mr Esthaufik's position was selected, and this goes to an assessment of genuineness and whether Mr Esthaufik's position could be said to be "...superfluous to the needs of the Company".⁵

(ii) *Has FPL complied with the notice and consultation requirements of s 4 of the Act?*

[28] As set out above the selection criteria was not made clear to Mr Esthaufik during the consultation process and this has deprived him the opportunity he was entitled to be consulted on how and why his position had been selected for possible redundancy and then confirmed for such. He could not have anticipated what the selection criteria would

⁵ Clause 25.1 of the parties' written employment agreement.

be because this was not agreed to in the parties' written employment agreement. I have found Mr Esthaufik was not given a chance to comment on the reasonableness of such criteria or its application to him. This has left FPL vulnerable to criticism that it has failed to consult fairly and reasonably on the selection criteria. FPL was responsible for and wholly in control of the process which has resulted in Mr Esthaufik's dismissal.

[29] I have reflected on the resources available to the business to undertake a redundancy process. This has included that FPL had undertaken such a process prior to that which resulted in Mr Esthaufik's redundancy and which impacted significant numbers of employees and has completed other employment related matters involving a degree of complexity such as merging existing businesses.

[30] The deficiencies outlined above are not minor or technical and mean FPL has been unable to demonstrate it acted fairly and reasonably in dismissing Mr Esthaufik. On the evidence before the Authority Mr Esthaufik's dismissal for redundancy on 24 August 2023 was unjustified.

Remedies

Reimbursement of lost wages

[31] After reviewing the evidence of loss and Mr Esthaufik's attempts to mitigate that loss the Authority is satisfied he is entitled to an award of lost wages calculated at \$7,450.22 (gross) being the difference between the earnings he made within the three-month period of claim and what he would have earned if he had remained employed by FPL. He is entitled to holiday pay of \$596 calculated on that sum.

Compensation for humiliation, loss of dignity and injury to feelings

[32] In evidence Mr Esthaufik said as a result of losing his income with FPL he faced significant financial uncertainty as well as emotional distress and this has negatively impacted his young family. They experienced long periods of separation when he was only able to secure work in a different city to which the family have now relocated. He is no longer working as a draftsman, and he is now working shift work which means ongoing disruption to family life. Mr Esthaufik expressed gratitude to FPL for providing the opportunity for his family to migrate to New Zealand and the loss of the stability provided by that employment has been a cause of sadness.

[33] It is accepted the impact of his personal grievance has had a negative impact on Mr Esthaufik. The Authority is satisfied he experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Mr Esthaufik is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings he has suffered consequent to his established personal grievance of \$16,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Park that contributed to the situation giving rise to his grievance?

[34] No deduction from the remedies awarded is to be made under s 124 of the Act. Mr Esthaufik's dismissal was a no-fault redundancy did not contribute in a blameworthy way to the situation giving rise to his personal grievance.

Summary of orders

[35] The following orders are made in Mr Esthaufik's favour:

- a) Within 21 days of the date of determination Formstress Precast Limited is to make the following payments to Mr Esthaufik:
 - a) \$16,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
 - b) \$7,450.22 (gross) pursuant to section 123(1)(b) of the Employment Relations Act; and
 - c) \$596 (gross) holiday pay calculated on the lost remuneration award pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Esthaufik may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum FPL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can

anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Ulrich
Member of the Employment Relations Authority