

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 370  
3309420

BETWEEN

TANYA FRANICH  
Applicant

AND

EDGESMITH LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Dawid Luttig, advocate for the Applicant  
Beverley Edwards, counsel for the Respondent

Investigation Meeting: 2 April 2025

Submissions and further information received: 15 April and 6 May 2025, from the Applicant  
15 April and 5 May 2025, from the Respondent

Determination: 26 June 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Tanya Franich was employed by Edgesmith Limited (Edgesmith) in an estimator – internal sales role providing support to its directors and business development managers. She was employed from 23 August 2022 until her dismissal for redundancy on 9 February 2024.

[2] Ms Franich says her dismissal was unjustified and that the actions of Edgesmith unjustifiably disadvantaged her in her employment. She seeks remedies including compensation for lost wages and hurt and humiliation and a contribution to costs.

[3] Edgesmith sells fence and gate hardware to contractors, retailers and end users. It has branches in Auckland and Christchurch. It says due to declining sales, in January

2024 it commenced a restructuring process and Ms Franich was one of three effected employees. It says the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances and that she was treated fairly and reasonably throughout the process.

### **The Authority's investigation**

[4] While investigating this employment relationship problem the Authority heard evidence from Ms Franich and her husband and on behalf of Edgesmith, Gareth Knight, chief executive officer, Grant Kaminer, sales manager and Michelle McKee, financial controller.

[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 issues**

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

- i. Was Ms Franich unjustifiably disadvantaged in her employment by the actions of Edgesmith?
- ii. Was Ms Franich unjustifiably dismissed by way of redundancy?
- iii. If so, is Ms Franich entitled to a consideration of remedies sought including:
  - a. Compensation of \$30,000 under s 123(1)(c)(i) of the Act;
  - b. Reimbursement of lost wages of \$10,360 (gross) 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 Ms Franich which contributed to the circumstances which gave rise to her grievance?
- v. Is either party entitled to an award of costs?

## **The parties' employment agreement**

[7] For the purposes of this determination the relevant written employment agreement is dated 24 May 2023.<sup>1</sup> Clause 25 deals with terminations and regarding redundancy provides:

25.1 The Employee will be redundant if their position becomes surplus to the Employer's requirements (including where substantive changes are made to the Employee's position).

25.2 If the Employee's position is made redundant and the Employee cannot be redeployed to a different position within the company, the Employer will provide the Employee notice of termination as set out in the termination provisions of this Agreement/Schedule A. The Employer may, at its sole discretion, pay the Employee in lieu of all or part of the notice period.

25.3 There will be no redundancy compensation payable.

...

[8] Schedule A of the employment agreement includes a notice period of four weeks and provides the Silverdale office was Ms Franich's main place of work subject to business change.

## **Relevant law**

### *The test for justification*

[9] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully 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:<sup>2</sup>

[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).

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<sup>1</sup> In May 2023 Ms Franich changed to the internal sales role and the parties entered a new employment agreement.

<sup>2</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [80] - [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*.

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[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.<sup>3</sup>

[10] 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".

[11] The duty of good faith extends to selection criteria and requires both the criteria for selecting employees and how it will be applied to be discussed with the effected employees or their representative. 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. 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.<sup>4</sup>

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<sup>3</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

<sup>4</sup> *Jinkinson v Oceana Gold* [2009] ERNZ 225.

[12] 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”.<sup>5</sup>

### **Background**

[13] On 30 January 2024 Mr Knight wrote to Ms Franich inviting her to a meeting to discuss a restructuring proposal of the internal sales roles at the Silverdale branch. There were four employees at the Silverdale branch in internal sales roles. The restructuring proposal, the letter provided, arose from a business decision to create three new positions – a store person and sales role at the East Tamaki office and a sales role in the Christchurch office - and that due to current business circumstances including a downturn in sales the new roles would need to be funded from current revenue. The letter made clear roles in the Silverdale sales team were the focus of the restructuring proposal - “This restructuring has the potential of disestablishing Internal Sales roles in Silverdale”. The letter continued that Edgesmith wished to discuss the proposal in more detail individually with Ms Franich as with the other members of the Silverdale sales team and there may be follow up meetings in the following week to discuss ideas and feedback received. The letter said Ms Franich could get representation and advice, that she was welcome to bring a support person to the meeting and the meeting could be rescheduled to accommodate such.

[14] Ms Franich attended the meeting on 2 February as invited. She did not attend with a support person or representative. Mr Knight and Mr Kaminer attended for Edgesmith. The meeting was recorded, and the transcript has been provided to the Authority as it has been for the meetings that followed. In the first part of the meeting Mr Knight outlined the reason for establishing the sales role in Christchurch and expanding the roles in East Tamaki. He advised the Christchurch role was not filled and asked Ms Franich if she would be interested, which she was not. Mr Knight then discussed the Silverdale team, the rationale for reducing the sales team numbers including trading levels with key clients and put the proposal to Ms Franich to reduce it to a team of two with that reduction funding the new proposed role in Christchurch. A further letter was provided to Ms Franich at the meeting which restated the restructuring proposal and included an organisational chart with the new roles and a

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<sup>5</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

chart comparing sales in 2023 and 2024. The meeting ended with another scheduled for Friday 9 February.

[15] There was no discussion as to how the Silverdale team would be reduced from four to two other than to indicate the role of the person on extended leave was likely not part of the picture.

[16] The meeting proceeded on Friday morning as scheduled. Ms Franich attended alone. Mr Knight and Ms McKee attended for Edgesmith. Ms Franich was asked for her feedback on the proposal. Her comments were focussed on how training would be provided for the new roles including how that might impact the Auckland team and whether there was an opportunity for her with the reseller role which was shown as a new role in the organisational chart. Mr Knight made clear the reseller role was not available - it had not yet been fully scoped, and would likely happen over the next year as part of larger plans for the business. The discussion turned back to the restructuring proposal, that Edgesmith recognised this was stressful and hoped to decide the outcome later that day. Ms Franich asked, and it was confirmed four weeks' notice would be provided. The meeting ended with a discussion about how workload would be managed with a reduced team. There was no discussion of the mechanism Edgesmith might apply to reduce the sales team roles and how that might apply to the effected employees including Ms Franich.

[17] Later that day, at 2.30pm the meeting was reconvened with the same attendees. The transcript records Mr Knight opened the meeting by outlining the selection criteria Edgesmith had used:

We've thought through things and come to a decision at the end of the day we think all people have, quite different strengths I think, and we weighed that up and experience as well.

[18] He then outlined the strengths Edgesmith had identified of the three sales team members including Ms Franich and continued:

So, it was quite a hard decision, but through weighing all that up, we couldn't really make a decision based on skills and we don't have any issues with anyone's job performance so there wasn't any real way of weighing things on that as well. In the end we came down to making decision based purely on cost.

So based on that we've decided to make your role redundant. For us I guess we're looking to hire two store people in Christchurch and one in East Tamaki with effectively not too much difference in costs and the other two are on quite a lower amount. That's in the end how we made a decision. We probably expected to see more difference between everyone's strengths and weaknesses and ideas and what they bring, but to be honest we didn't really.

[19] Ms Franich expressed shock that she had been selected for redundancy when an employee with six months tenure and, in her view, a limited grasp of the job had not. She asked for the recording of the meeting and "what does this redundancy look like?" to which Mr Knight said she would not be required to work out her notice period. There was a discussion of her final pay calculation. Ms Franich asked for a longer notice period because she advised this was not a good time for her personally and requested the information in writing. She then set out personal circumstances which made the news of losing her job more difficult including a threat her husband had received from a co-worker's husband. Mr Knight said he was unaware of this situation. Ms Franich then raised a concern her redundancy was motivated by other factors and expressed her upset and disbelief at the decision. The meeting ended. That was Ms Franich's last day of work at Edgesmith.

[20] On 13 February Mr Knight wrote to Ms Franich confirming the proposed restructure and confirming her employment was terminated on 9 February by way of redundancy following application of a selection criteria based on salary cost. The letter provided a detailed break down of her final pay and made an offer of a further five weeks pay "in full and final settlement". This further payment was an increase to an earlier offer following an exchange between the parties.<sup>6</sup>

[21] Ms Franich replied later that day she "...would like to accept the offer" with the caveat she did not believe she had been treated "correctly". She continued she was getting advice, to that end requested copies of her employment agreement and the recordings of the restructuring meetings and she may take legal proceedings. Edgesmith duly made the payments outlined in the 13 February letter. On 5 April Ms Franich's representative wrote to Edgesmith raising personal grievances in relation to her employment ending by way of redundancy.

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<sup>6</sup> Edgesmith does not say the payment of the additional sum settled matters between the parties.

## **Discussion**

(i) *Was Ms Franich's redundancy genuine?*

[22] The evidence establishes Edgesmith sought to reorganise its business to meet client needs and in a way which took account of a sales downturn it was experiencing. The evidence also establishes Edgesmith was looking ahead to further business development and this was a factor in the restructuring. In these circumstances it is accepted that it was reasonable for Edgesmith to look to redeploy staff resources. This finding relates to the restructuring proposal in general. How this impacted on Ms Franich, as one of four employees in effected roles and who, ultimately was selected for redundancy for which her employment was terminated is also to be considered under genuineness.

[23] Ms Franich's submission is not accepted that the failure to provide the actual client feedback which motivated the proposal to create a Christchurch sales position undermines the genuineness of the restructuring. The nature of the feedback was made clear to her and the issues facing the Christchurch office were discussed in detail during the 2 February meeting. It is also not accepted as a failure that the exact number of sales roles to be made redundant was not identified until the 2 February meeting. This information was provided to Ms Franich with time for her to consider and request further information if she wished.

[24] Consideration has been given to whether Edgesmith's decision to restructure the East Tamaki role prior to the Silverdale restructuring proposal unreasonably narrowed the focus of that process. While two-stage restructuring processes can introduce complexity and may be unfair this is not established in this matter. The two offices were significantly different and the issue of the apparent overstaffing of Silverdale was a clear focus of the restructuring from the outset.

[25] Returning to the selection criteria, it is accepted Edgesmith used selection criteria to identify Ms Franich's position for possible redundancy that is, cost, following an assessment that skills and experience across the Silverdale sales team were neutral factors. On the evidence before the Authority Edgesmith is unable to establish to the

necessary standard that these criteria and the outcome of the application of them to Ms Franich were communicated to her in such a manner as would enable her to meaningfully comment. The selection criteria to be applied was not referred to until the outcome meeting on the afternoon of 9 February by which stage it was too late for Ms Franich to have any meaningful input because the decision was made. Ms Franich was clearly shocked at learning at that meeting how the decision had been made to disestablish her role and ultimately make her redundant. A fair opportunity for her to reflect and comment on the selection criteria prior to the meeting would have allowed her to understand and fairly engage with the whole process and gone some way to discharging Edgesmith's obligations towards Ms Franich in a restructuring setting.

[26] This is not a matter of process alone. The transcript of the 9 February outcome meeting demonstrates Ms Franich had a clear view about the matter of skills and experience between the sales team members. If the opportunity to discuss the selection criteria had been provided by Edgesmith during the redundancy process, then Ms Franich's view could have been more fully discussed between the parties and may have been a matter the decision makers further reflected on in their final deliberations.

[27] Edgesmith submits it was clear cost was an issue from the commercial context outlined in the proposal and the 2 February meeting and the restructuring proposal that followed. While it is accepted Ms Franich's dismissal occurred in this context, there is no evidence before the Authority Ms Franich knew her individual pay level was a feature of the restructuring or indeed if she knew she was paid more than the other sales team members to such a degree that it would feature so significantly in the restructuring outcome.

[28] Edgesmith has met its obligations to consider redeployment options for Ms Franich. The redeployment issue was canvassed by the parties during the restructuring meetings. Ms Franich was unable to take up the Christchurch role and the reseller role was not yet ready.

[29] In summary the failure to consult on the selection criteria for his position means Edgesmith is vulnerable to questions as to how Ms Franich's position was selected, and

this goes to an assessment of genuineness and whether her position could be said to be “...surplus to the Employer’s requirements”.<sup>7</sup>

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

[30] As set out above the selection criteria was not made clear to Ms Franich during the consultation process. This has deprived her of the opportunity to which she was entitled to be consulted on whether the criteria to be applied to her was reasonable and how she was assessed under application of any such criteria. She could not have anticipated what the selection criteria would be because this was not agreed to in the parties’ written employment agreement. The evidence shows Ms Franich had clear views about the selection criteria which Edgesmith may well have benefited from considering had it provided her the opportunity. Edgesmith was responsible for and wholly in control of the process which has resulted in Ms Franich’s dismissal. The deficiencies outlined above are not minor or technical. Edgesmith is unable to establish it has discharged the obligation to consult fairly and reasonably with Ms Franich on the selection criteria and its application to her and is unable to establish it had a fair and reasonable basis to select her for redundancy.

[31] For the above reasons Ms Franich’s dismissal for redundancy on 9 February 2024 was unjustified. The claim of unjustified disadvantage arises from the factual matrix of and fold into the established basis of the personal grievance for unjustified dismissal.

## **Remedies**

### *Reimbursement of lost wages*

[32] Ms Franich seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim is from 12 April 2024, when payments from Edgesmith were exhausted (four weeks’ pay in lieu notice + five weeks ordinary pay ex gratia) to 27 May when she commenced new employment.

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<sup>7</sup> Clause 25.1 of the parties’ written employment agreement.

[33] Edgesmith submits Ms Franich is not entitled to any lost wages given the payments received.<sup>8</sup> It also submits Ms Franich's ill health during the period of for which she claims lost wages means she could not have taken reasonable steps to find a new job. Ms Franich's evidence is she did what she could given her health to find another job and she has provided supporting information from her treating doctor. It is accepted she experienced a period of ill health after her employment ended, sought treatment and got steadily better which allowed her to take up work in late May. I decline to exercise my discretion and award more than the three-month ordinary time remuneration. The evidence shows factors contributing to Ms Franich's ability to start work are additional to and outside the loss of her job.

[34] After reviewing the evidence of loss and Ms Franich's attempts to mitigate that loss the Authority is satisfied she is entitled to an award of three-weeks being the difference between the earnings she received within the three-month reimbursement period and what she would have earned if she had remained employed by Edgesmith. Eight per-cent holiday pay and the 3% Kiwisaver contribution are to be calculated and paid on the three-week award.

*Compensation for humiliation, loss of dignity and injury to feelings*

[35] Ms Franich said her dismissal has had a severe impact on her overall well-being and left her feeling incapacitated for a number of months. She sought and received medical treatment soon after her dismissal for the acute negative impact she experienced. Her physical health was set back, it was distressing for her family to see her in such a state and she could not help in the community as she had. She remains unclear why she was selected for redundancy or why the cost of her salary had become determinative, and she would have taken less pay if the opportunity had been provided. Mr Franich said his wife had experienced a severe and negative shift in her behaviour in the months following her dismissal.

[36] It is accepted the impact of her personal grievance has had a negative impact on Ms Franich. The Authority is satisfied she experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Ms Franich is entitled to an award to compensate the humiliation, loss of dignity and injury

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<sup>8</sup> Holiday pay and payment for hours worked received from Edgesmith is not properly included in the lost wages period.

to feelings she has suffered consequent to her 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 Ms Franich that contributed to the situation giving rise to his grievance?*

[37] No deduction from the remedies awarded is to be made under s 124 of the Act. Ms Franich'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**

[38] Within 21 days of the date of determination Edgesmith Limited is to make the following payments to Tanya Franich:

- a) lost wages under s 123(1)(b) of the Act in an amount equivalent to 3 weeks ordinary time remuneration plus eight per-cent holiday pay and the employer Kiwisaver contribution; and
- b) compensation under s 123(1)(c)(i) of the Act in the amount of \$16,000 for the personal grievance.

### **Costs**

[39] 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, Ms Franich 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 Edgesmith Limited 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 Urlich  
Member of the Employment Relations Authority