

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 379
5605542

BETWEEN MARTIN GAGE
 Applicant

A N D NEW ZEALAND MINT
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Mike Harrison, Advocate for Applicant
 Lisa Mackay, Advocate for Respondent

Investigation Meeting: 22 August 2016 at Auckland

Submissions received: 22 and 24 August 2016

Date of Determination: 18 November 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Martin Gage was unjustifiably dismissed by New Zealand Mint Limited.**
- B. Within 28 days of the date of this determination New Zealand Mint Limited is to pay Mr Gage the following sums:**
- (i) \$22,500.00 gross as three months' lost wages; and**
- (ii) \$6,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] New Zealand Mint Limited (NZ Mint or the company) sells, mints and trades in legal tender collectable coins, gold bullion (bars) and medallions around the world. It began trading in April 2012 after purchasing the business of the old New Zealand Mint company Antiquitus Aurum, which subsequently went into liquidation.

[2] Martin Gage had been employed by the former owner in 2010, and was employed by NZ Mint from when it bought the business. From 2014 onwards his position was Sales Director-European Markets.

[3] NZ Mint had two territorially divided sales territories/roles, one for the United States of America and one for Europe, including the rest of the world, except Russia, which had been handled by an agent.

[4] Although Mr Gage did not sell in Russia, a portion of the European sales was based on goods which were subsequently re-sold by the purchasers into Russia. During 2014 and 2015 NZ Mint's sales into Europe fell, as a result of Russian sanctions and devaluation of the rouble.

[5] Mr Gage suffered a sporting accident in mid August 2015 and was away from work from that time. At a 19 August telephone conference call with NZ Mint representatives Mr Gage was told that his role was completely safe. There was then on-going weekly phone contact from his manager Brent Hindman (Head of Sales) to keep Mr Gage up to speed and discuss his recovery.

[6] After some weeks of Mr Hindman managing most of Mr Gage's workload, NZ Mint became concerned that the full time Sales Director-European Markets role no longer seemed to be required.

[7] On Friday 25 September Mr Gage informed NZ Mint that he was returning to work the following Monday. On the evening of Sunday 27 September he was texted by NZ Mint's Chief Executive Officer Simon Harding, who asked to meet at a café before work the next day.

[8] At the meeting on Monday 28 September Mr Gage was given a letter dated 25 September, which informed him of NZ Mint's proposal to disestablish his role. The letter offered him the chance to provide feedback on Wednesday 30 September, with

the company considering the feedback and then hoping to confirm what it would be doing by Friday 2 October. Access to an employment assistance programme (EAP) was offered. Mr Gage was put on special leave and not required to go into the office from then onwards.

[9] The following day Mr Gage received texts from three current or former colleagues, saying that they were sorry to hear that his position had been likely to be disestablished.

[10] On Wednesday 30 September Mr Harding and Mr Gage met. Mr Gage provided a letter containing, and also discussed, questions concerning the proposed new structure, what he could do to improve (his performance) and what was available from the company to assist him (EAP and redundancy payment).

[11] The CEO responded at the meeting and by email providing some information and suggesting a meeting on Friday to enable further feedback.

[12] On 1 October the CEO emailed Mr Gage to see if he wanted a meeting, to which Mr Gage responded that he did not.

[13] By letter of 2 October Mr Gage was informed that his position was being made redundant from that day and he would be paid a month in lieu of notice and any outstanding holiday pay.

[14] Mr Gage claims that his dismissal was substantively and procedurally unfair. NZ Mint says that Mr Gage's position was genuinely redundant and that it went through a fair procedure in the process of his termination.

[15] The investigation meeting was held on 22 August 2016. Evidence was heard from Mr Gage, Mr Hindman and Mr Harding.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[17] The issues for investigation and determination are:

- (a) Was Mr Gage unjustifiably dismissed?
- (b) If so, what remedies (if any) should he receive?
- (c) Should either party contribute to the costs of the other party?

Redundancy dismissals

[18] As the Court of Appeal noted in **Brake v Grace Team Accounting Ltd**¹, the justification test in s 103A of the Act applies to redundancy situations as well as to other dismissals. The Court stated that if a redundancy was genuine and the notice and consultation requirements in s 4 of the Act had been duly complied with, that would go a long way towards satisfying the s 103A test.

[19] A fair and reasonable employer must comply with their statutory and contractual obligations. The parties are required under s 4 of the Act to deal with each other in good faith and not to mislead or deceive each other, or do anything likely to have that effect.

[20] Under s 4(1A) of the Act an employer who is proposing to make a decision which will, or is likely to, have adverse effect on the continuation of employment must provide to the employee access to information, relevant to the continuation of the employees' employment and the opportunity to comment on the information to their employer before the decision is made.

Was Mr Gage's redundancy genuine?

[21] Following from *GN Hale & Sons Ltd v Wellington Caretakers IUOW*² it has been well established that an employer is entitled to make its business more efficient,

¹ [2014] ERNZ 129

² [1990] 2 NZILR 1079

and that the Authority should not substitute its own decision about how the business should be operated.

[22] However, the introduction of the s 103A into the Act, led to the following comments by Chief Judge Colgan in *Rittson-Thomas t/a Totara Hills Farm v Davidson*:

“It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to simply say that this was a genuine business reason and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.”³

[23] Here NZ Mint says that the decline in the level of European sales and resulting work load decrease justified the redundancy. During the consultation process some figures were provided to Mr Gage regarding the decrease in sales in the last few years and the drop in the European market’s contribution to NZ Mint’s sales revenue.

[24] Mr Hindman had been managing most of Mr Gage’s work and had not found the volume of it particularly difficult to add to his own role. He initially thought the low work level may just have been a blip, but it continued for the six plus weeks while Mr Gage was away.

[25] An assessment was made by NZ Mint that the European role had a shrinking client base and diminishing sales. The company was not blaming Mr Gage for this, but rather attributing it to the collapse of the Russian market following sanctions being imposed and the subsequent collapse of related sales into the European market. The CEO considered that a full time European role was not justified.

[26] Mr Gage does not accept that the position was dire. He points out that he achieved his gross profit target by 48% in 2014. There was a dispute about whether the sales figure was a target or the level above which commission would be paid. The company accepts that Mr Gage did reach that level and was paid commission in 2014. However, for the first five months of the 2015-16 financial year the cumulative level was not reached.

³ [2013] NZEmpC 39 at [54]

[27] The company's position did not have to have reached a dire level for it to justify a redundancy. Mr Gage accepts that there had been some decrease in European sales.

[28] However, Mr Gage still considers that his dismissal may not have been genuinely for redundancy, but rather to have related to his extended absence from work due to injury and surgery, or another reason. He suggests a mixed or improper motive for his dismissal.

[29] The background to this is Mr Harding telling Mr Gage on 19 August that he should not worry about his role, as his job was safe and would be waiting for him on his return.

[30] Also adding to Mr Gage's suspicions was the removal a week later of his access to company emails and the remote network. Mr Harding's response to Mr Gage's questioning of this, was that access had been changed so that he could focus on recovery rather than work. Also, the email password needed to be changed to facilitate the switching off of the email rules which were making it difficult to manage Mr Gage's emails.

[31] The speed of the company's actions in starting the consultation process immediately on Mr Gage's return from medical leave, may well have contributed to him connecting the two matters. However, from the company's perspective, it was attempting to be fair to Mr Gage by holding off initiating the restructuring process whilst he was on leave.

[32] During the consultation process Mr Gage was told about his low customer numbers and the poor performance of his territory. This discussion led him to question whether NZ Mint was terminating him because of his performance. However, I am satisfied that while the company had concerns about the performance of the territory, this did not relate directly to Mr Gage's performance. The blame was on events in Russia and resulting changes in the European market.

[33] It is not uncommon when an employee is away on extended leave, for an employer to gain a new perspective on the role in the incumbent's absence. In this case primarily Mr Hindman, but also Mr Harding, were covering Mr Gage's work. Mr Hindman found that he was able to accommodate the work along with his own

workload without major difficulty. A restructure may validly be brought about because the work done can be picked up by another existing employee.

[34] I am not satisfied that the evidence established some alternative motive, for dismissing Mr Gage. Although Mr Gage had concerns about other motives as referred to above, he did say at the investigation meeting that he saw the reason behind the redundancy as the opportunity for NZ Mint to alleviate cost.

[35] There is no evidence that the company employed anyone else subsequently to undertake Mr Gage's work. Rather, the company had coped with Mr Gage's absence without significant difficulty and continued to do so after his dismissal. I am satisfied that Mr Gage's dismissal was genuinely for redundancy.

Was the procedure adopted fair?

[36] Mr Gage challenges a number of aspects of the procedure including the consultation process, selection for redundancy, and consideration of redeployment.

Predetermination

[37] Mr Gage considers that the decision to make his position redundant was predetermined. This submission on his behalf was partly based on Mr Hindman's alleged evidence at the investigation meeting that the decision (to make the position redundant) had been made prior to Mr Gage's return to work. However, that was not my understanding of Mr Hindman's evidence. I took him to say that a decision was made prior to Mr Gage's return to undertake a restructuring process.

[38] Mr Gage also suggested that the cutting off of his email access may have been related to a decision to remove his position while he was on leave.

[39] However, I have not found sufficient evidence to support that suggestion. Shortly after Mr Gage went on leave NZ Mint explained to him its concerns about him being able to recover satisfactorily without worrying about work. At the teleconference he was told that recovery was the key priority, to hold back from emailing customers, and let the company respond on his behalf.

[40] Mr Gage also believes that NZ Mint staff had been told that he was going, prior to the decision being notified to him. This was due to the text messages which he received. However, he accepts that these largely indicated that some staff knew that he was likely to be made redundant, rather than a decision had already been made.

[41] Mr Gage felt that his privacy may have been breached by telling other staff. Mr Harding says that the executive team were properly notified of the consultation process occurring and that the other sales director Tom Meek was also notified as he was in the same area as Mr Gage and was expecting him to come back to work that week. The evidence did not establish that staff were told by management inappropriately.

[42] Overall I am not satisfied that there is sufficient evidence to establish that the dismissal was predetermined.

Consultation

[43] Although the company undertook a consultation process there are issues about the level of information provided to Mr Gage, and the speed of the process.

[44] In the letter of 25 September, NZ Mint provided figures indicating a decrease in sales in the last few years (dollar and percentage value) and the drop in the European market's contribution to the company's sales revenue. However, at the investigation meeting the company provided a spreadsheet of sales, linking clients to each of the two sales directors, showing the value of transactions over a year, and whether they were a regular customer or ad hoc only etcetera. The average value of sales and total number of clients for each of the two men were specified. This information was not provided to Mr Gage during the consultation process.

[45] In terms of the speed of the consultation process, there had been no discussion regarding the possibility of restructuring or redundancy prior to the meeting on 28 September. NZ Mint says that it chose not to interrupt Mr Gage's recovery with news that it was considering restructuring, and also noted that he was on prescribed pain relief medication for at least some of his leave. I accept that NZ Mint acted fairly in deciding not to raise the issue with Mr Gage while he was on leave.

[46] Mr Gage says that he was completely shocked when Mr Harding told him, at the 28 September meeting, that NZ Mint was looking at disestablishing his role. He described himself as being punch drunk; unable to respond. Mr Gage had been informed soon after his accident that his position was safe and would be there on his return. As it turned out his position was not safe on his return.

[47] On Monday Mr Gage was informed in the letter, that after considering any feedback, the company hoped to confirm what it was doing by Friday. Mr Harding says that that was not a fixed time, rather it was guidance. However, I find that the impression given is that the company are likely to be completing this matter within the week. Whilst restructuring processes which proceed over a lengthy period can be unsettling for employees, equally, very short processes can lead to distress too.

[48] NZ Mint's process should have taken into account the earlier reassurances to Mr Gage about the security of his employment, and the effect of starting the consultation process in the morning before he even started work on his first day back. In those circumstances I am not satisfied that a fair and reasonable employer could have decided to progress with such speed. Consultation is never to be treated perfunctorily or as a mere formality.⁴

[49] Then Mr Gage informed NZ Mint in his letter of 30 September that:

Given the timing of this event, I am still reconciling the situation and do not have any feedback to provide to you.”

[50] Similarly, the brief notes taken for the company at the 30 September meeting, also refer to a statement, presumably by Mr Gage, that this has come out of the blue, (he was) reconciling what was happening, and not having any more feedback.

[51] Although Mr Gage may have said and written that he had no feedback he was at that time also seeking information regarding the proposed new structure and alternative roles. I take this to indicate that he lacked some important information and still had an interest in what the proposed restructuring was going to look like.

[52] Even if the company had started with a five day timetable, I find that Mr Gage's indications in his letter of 30 September and at the meeting that the restructuring had come out of the blue and he was still trying to reconcile the

⁴ *Communication & Energy Workers Union Inc v Telecom New Zealand Ltd* [1993] 2 ERNZ 429

situation, should have prompted NZ Mint to reconsider the speed of the process. There was no apparent need to progress to an outcome so quickly.

[53] The company set another tentative meeting up in the event that Mr Gage wanted it. Mr Harding had not heard from Mr Gage so emailed a query about the possible meeting and he emailed back saying:

It is clear to me that your decision to disestablish the role of Sales Director Europe has already been made and that, giving me an opportunity to provide any additional feedback is merely a formality.

Therefore I do not view today's meeting as a good use of either of our times.

[54] The company kept the meeting time open, in case Mr Gage reconsidered but said that it would then make its decision on the information it had.

[55] At the investigation meeting Mr Gage raised the prospect of some kind of combined role of the responsibilities of a vacant bullion trader position with aspects of Mr Gage's sales role. I accept NZ Mint's submission that that possibility was not raised by him at the time he was still employed. However, the possibility does suggest that had Mr Gage had more than a few days after the sudden announcement that his redundancy was being considered, that he may have been able to provide more significant feedback.

[56] Although Mr Gage did not pursue the final meeting, this must be seen against the background of an indication that the process would likely last a total of five days, and his impression, as expressed to the company, that a decision had already been made. NZ Mint did not address Mr Gage's impression at the time. There was a sense that the company was conducting something of a tick box exercise rather than undergoing an active, constructive and meaningful communication process.

Selection

[57] Mr Gage considered that Mr Meek's American sales director role should have been considered as part of the restructure. Mr Gage thought that he had more industry experience than Mr Meek, and thus potentially should not have been chosen for redundancy.

[58] Mr Gage also considered that he had been with the company (and the earlier business) longer than Mr Meek, and therefore should not have been made redundant on that basis. The principle of last on first off (LOFO) has historically been a common basis specified in awards, redundancy agreements and collective agreements, to determine who will be made redundant. However, I cannot see a basis for NZ Mint to have to adopt that principle in this case.

[59] Mr Gage's expectation that experience and service would be taken into account are understandable. However, I am not satisfied that a fair and reasonable employer could not decide that there was a difference between the two roles and that only one required restructuring.

[60] The two sales director roles covered different territories, regulatory regimes and clientele. Although Mr Gage had had some contact with US clients, the incumbent in the American role had daily on-going interactions with the US clients.

[61] Mr Gage appears to have assumed that after his departure his work was merged with that of Mr Meek and therefore a selection should have occurred between the two men as to which was made redundant. However, the evidence at the investigation meeting, was that the European clients were requiring relatively little work and Mr Hindman, Mr Gage's manager, had continued to incorporate the European work into his own role.

[62] The American part of the business had not suffered from a downturn and was still considered viable. There had in fact been a significant increase in sales in that area. NZ Mint considered it better to leave the imbedded customer relationships with the existing staff member in place. I accept that it was within NZ Mint's prerogative not to require the permanent employee in the American role to have to go through a restructuring process.

Redeployment

[63] In *Wang v Hamilton Multicultural Services Trust*⁵ the Employment Court concluded that:

Applying the reasoning adopted by Judge Couch in *Jinkinson*, the failure to consider redeployment in the context of the test of justification under s 103A

⁵ [2010] NZEmpC 142 at [42]

of the Act leads to the conclusion that in this case the employer failed to act in a way that a fair and reasonable employer, judged objectively, would have done in all the circumstances at the time the dismissal occurred.

[64] The obligation was on NZ Mint to consider other alternatives to making Mr Gage redundant⁶. Were there vacant positions which he was capable of fulfilling?

[65] The bullion trader vacancy was mentioned in the letter dated 25 September. However, the company wrote that:

“We would expect to go through an external competitive call for applications to fill this position and you would be welcome to apply for the opportunity if you were to be interested. However the role is considerably junior [and] less well remunerated than your current position”.

[66] Mr Gage asked for the job description for consideration, including remuneration expectations, which were provided by NZ Mint.

[67] Perhaps not surprisingly, Mr Gage took the explanation of the position and the process of him having to apply against external candidates to mean that the company regarding the offer for him to apply as a pleasantry, rather than a real opportunity for him.

[68] Mr Gage had already covered the bullion trader role at times when people were away. He also sold bullion as part of his own role previously. Mr Gage considered that he could do the role. Previously the receptionist had been moved into that role, and as far as he was aware she had no previous trading experience.

[69] Mr Harding says that he considered Mr Gage to be overqualified for the bullion trader role which was paid about half the remuneration and was much more junior than the sales director role. He considered it insulting to Mr Gage (to have offered it to him). Mr Harding says that if Mr Gage had pursued the possibility they would have considered it, although they would have been worried about longevity.

[70] This was something of a chicken and egg situation. Mr Gage says that he would have considered it if the company wanted him for it, and the company says that they would have considered him if he had expressed interest. However, it is significant that the company had indicated that it would advertise (make an external

⁶ *Wang* at [40]

competitive call) and also that Mr Gage had expressed some interest in the sense of asking for the job description and remuneration.

[71] The position of bullion trader would not be one which could be described as ‘substantially similar’; a phrase used in some redundancy provisions in employment agreements. However, I do not consider that that is the test in this case.

[72] Mr Gage was to be without a job, in a situation where he had no entitlement to redundancy compensation. When he enquired about redundancy (in the sense of compensation) he was told that there was no entitlement to redundancy (compensation). In those circumstances there was a real prospect that he could have taken the job at least for a period.

[73] Mr Gage had covered the role before temporarily, without any apparent difficulties. In light of *Wang*, I consider that the bullion trader position should have been directly offered to Mr Gage, rather than advertised through an external process with Mr Gage having to compete with others.

Conclusion on procedural fairness

[74] Although there are a number of aspects of NZ Mint’s process which were reasonable, I am not satisfied on balance that it complied with all its obligations as a fair and reasonable employer. The consultation process provided only modest information, and was too rushed in all the circumstances of this particular case. The possibility of redeployment was not sufficiently explored by NZ Mint.

[75] I do not consider that the defects in NZ Mint’s process were minor.

[76] I find that Mr Gage’s dismissal was unjustified for the reasons outlined above.

Remedies

Lost wages

[77] Mr Gage claims 13 weeks’ lost earnings on his base salary as well as a figure for commission. As there is the prospect that Mr Gage’s employment may have continued for longer had the personal grievance not arisen, I consider that he is able to claim lost wages.

[78] I am not satisfied that the lost wages should include a commission figure as this was dependent on actual sales and the evidence was that the sales in the five months prior to Mr Gage's accident had cumulatively not reached the level for payment of commission.

[79] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration. I order that NZ Mint pay Mr Gage 13 weeks' lost wages at the base salary rate, totalling \$22,500.00. I have calculated this on a weekly rate of \$1730.77 gross, based on Mr Gage's \$90,000 gross per annum base salary.

[80] I am satisfied that Mr Gage made attempts to mitigate his loss. He registered with numerous recruitment companies and applied for a number of positions. However, he had been working in a niche market at NZ Mint which can make finding other employment more difficult. When he was unable to find comparable work, he took up work as a bartender.

[81] Although there was mention in the statement of problem of lost KiwiSaver and superannuation benefits, this was not supported by evidence, so I do not make any awards in this regard.

Compensation under s 123 (1)(c)(i)

[82] Mr Gage claims \$10,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

[83] Ms Gage gave evidence regarding the effects of the dismissal on him. He says that he was dumbfounded and humiliated to be required to attend a meeting before work, on his first day back from being away on medical leave, to be told about the restructuring. This was after he had been told that his job was safe.

[84] Mr Gage felt completely disheartened by his dismissal. He had not anticipated it and was deeply saddened by the whole thing. I accept that his feelings were injured as a result.

[85] I also take into account that this was a redundancy situation, albeit with redeployment prospects, and that Mr Gage has not established all the aspects of the process which he considered were unfair and may have humiliated him.

[86] I order NZ Mint to pay Mr Gage \$6,000.00 under s123 (1)(c)(i) of the Act.

[87] I have considered under s 124 of the Act whether Mr Gage's remedies should be reduced due to any contribution by him. I do not consider that there was any conduct by him which can be regarded as causative of the outcome and blameworthy.

Costs

[88] The parties are invited to resolve the matter of costs. If they are unable to do so Mr Gage shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NZ Mint shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority