

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 227
3073073

BETWEEN LINARA GAFIATULLINA
Applicant

AND PROPELLERHEAD LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Mark Donovan, counsel for the Applicant
Paul Robertson and Corbin Child, counsel for the
Respondent

Investigation Meeting: 16 and 17 March 2020

Determination: 12 June 2020

DETERMINATION OF THE AUTHORITY

- A. Propellerhead Limited did not act unjustifiably in making its decision to dismiss Linara Gafiatullina on the grounds of redundancy or how it carried out that decision.**
- B. Costs are reserved with a timetable set for memoranda to be lodged and served if the parties cannot resolve any issue of costs themselves.**

Employment Relationship Problem

[1] Propellerhead Limited (PL), a software development business, dismissed Ms Gafiatullina on the grounds of redundancy on 20 March 2019.

[2] In the personal grievance she raised about her dismissal Ms Gafiatullina said PL had personally targeted her in selecting her position for redundancy and had failed to adequately consider options for redeploying her to other roles in the business which she

could have carried out. She also said that if PL had permitted her to work out her four week notice period, rather than requiring her to leave on the day of her dismissal, she would still have been employed when the resignation of another employee made available a position she could have filled.

[3] PL denied any personal reasons motivated its decision. It said the role Ms Gafiatullina held was disestablished for necessary business reasons and she lacked the experience necessary for other roles available at the time. PL also said its employment agreement with Ms Gafiatullina entitled it to pay her in lieu of working out her notice. PL said it chose to pay Ms Gafiatullina in lieu for the full notice period, reversing an arrangement she had requested to work some days of her notice period doing a handover of work, because she had verbally abused PL's director Andrew Weston when he told her of his decision to dismiss her for redundancy.

Issues and investigation

[4] After considering the written and oral evidence of the witnesses and submissions of counsel given at the Authority investigation meeting, the issues requiring determination were:

- (i) Was PL's decision to dismiss Ms Gafiatullina for redundancy, and how it was made, what a fair and reasonable employer could have done in all the circumstances at the time, including considering whether:
 - (a) PL's decision was made for genuine business reasons, not ulterior purposes; and
 - (b) PL fairly considered redeployment or other alternatives to her dismissal?
 - (c) PL carried out the dismissal fairly, including by paying Ms Gafiatullina in lieu of notice rather than allowing her to continue working during the notice period?
- (ii) Should either party contribute to the costs of representation of the other party?

[5] Ms Gafiatullina, Mr Weston and the following nine people provided written witness statements:

- Kim James and Sarah Sherwin, advisors from a consultancy business that provided human resources services to PL; and
- Former PL employees Petar Bodor, Anke Raich and Anna Gladushko; and

- PL’s recruitment consultant Andrew Goldie; and
- PL’s Delivery Lead Link Jan von Burgen; and
- Stuart Weir, a lawyer who accompanied Ms Gafiatullina as her legal representative at two meetings with Mr Weston and Ms Sherwin about the redundancy proposal and decision; and
- Andrey Rummyantsev, Ms Gafiatullina’s husband.

[6] There was no need for Mr Rummyantsev to attend the investigation meeting to answer questions about his witness statement, which recounted his wife’s view of what had happened and his observations of the effect of her dismissal on her. The other witnesses were available to answer questions about their sworn or affirmed witness statements. In the case of Ms Raich, this was by telephone and, in the case of Mr Weir, by FaceTime audio visual connection. The other eight attended in person.

[7] 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 law on dismissal for redundancy

[8] The phrase “dismissal for redundancy” describes a situation where an employer’s reason for terminating a worker’s employment is attributable, wholly or mainly, to the fact that the position filled by a worker is, or will become, superfluous to the needs of the employer. When called on to determine whether a dismissal for redundancy was justified, the Authority does not substitute its own view for the business judgement of the employer as to whether the position was surplus to its needs. Rather, the Authority’s role is to determine whether what the employer did, and how the employer did so, were what a fair and reasonable employer could have done in all the circumstances at the time.¹

[9] This statutory “test of justification” assesses the actual employer’s actions against the objective standard of the fair and reasonable employer. The assessment has, broadly, two parts.

¹ Employment Relations Act 2000, s 103A.

[10] One part considers whether the employer has shown its decision to disestablish a position was made for genuine business reasons and not as a pretext for dismissing a disliked employee.²

[11] The other part considers whether a fair process was followed in making and carrying out that decision. This includes meeting the good faith obligations on an employer proposing to make a decision likely to have an adverse effect on the continuation of a worker's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on that information before a decision is made.

[12] The employer should also fairly consider whether, while the worker's present position is no longer needed, there may be some alternative role to which the worker could reasonably be redeployed rather than dismissed from the employment.³ As noted in learned commentary on this area of employment law, paying lip service to redeployment is not consistent with the good faith obligation to be active and constructive in *maintaining* a productive employment relationship. Examples of such lip service include too readily discounting an existing employee's ability to meet the requirements of other possible roles or exaggerating the difference between a redundant role and a role to which redeployment may be possible.⁴

[13] How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the employer.⁵

[14] Those statutory obligations are also considered in light of the terms of the worker's employment agreement. Ms Gafiatullina's employment agreement included the following term on redundancy:

Should a redundancy situation arise which results in your employment being terminated, the Company will provide the period of notice (or payment in lieu of notice) set out in Schedule 1. No redundancy compensation is payable.

[15] The notice period set in Schedule 1 was four weeks.

[16] The termination clause in the employment agreement also allowed for PL to pay in lieu of notice for all or part of that notice period. It included the following provision:

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

³ *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 at [43].

⁴ Geoff Davenport and Frances Lear "Redundancy challenges - Wang eight years on" [2018] ELB 94.

⁵ Employment Relations Act 2000 s 4(1A) and s 103A(3)-(5).

If you are paid in lieu of notice, your employment will terminate on the day payment is actually made.

Ms Gafiatullina's position, the redundancy proposal and the decision on it

[17] Ms Gafiatullina began work for PL on 11 November 2016. Her roles were originally described as being a Project Manager and a Scrum Master. She later undertook roles as a Portfolio Manager and Delivery Lead Link.

[18] Those role descriptions were drawn from Holacracy, a trade-marked American management system used by PL to organise its business. Self-managing 'circles' or teams were authorised to arrange their own work, subject to policy and financial restrictions, using so-called agile techniques. The system distinguishes between roles and the people who fill them. Some individuals hold multiple roles. Holders of 'lead link' roles connect circles by attending 'tactical meetings' of both their circle and other circles in order to assist overall 'alignment' of the business.

[19] In February 2018 Ms Gafiatullina signed an updated employment agreement. Her position description included the following roles: Holacracy Coach, to promote its practice within the business; Lead Link (Delivery), to help clients create software; Portfolio Manager (Delivery), to optimise teams' delivery of work; Scrum Master (Delivery), to support 'agile' software practices and Onboarding (People), to help integrate newly hired staff into the business.

[20] On 23 February 2018 Ms Gafiatullina took parental leave. She returned to work on a part time basis from 2 July 2018 and resumed full-time work from 30 July 2018. During her absence Mr Weston had covered the Portfolio Manager role and Mr Bodor carried out the Delivery Lead role.

[21] On 1 March 2019 PL presented Ms Gafiatullina with a proposal to disestablish her role. The proposal referred to the Portfolio Manager role being "a significant part" of her position, with other roles being minor and able to be dispersed amongst other roles. It identified reduced work in two areas covered by her roles. As Portfolio Manager she was accountable for allocating streams of work to teams but those tasks had been delegated to Product Owners. A "Practice App" developed to track and forecast work, replacing part of Ms Gafiatullina's role, was also being used more.

[22] The proposal described financial difficulties of the business, with some details of net losses over recent months. It said disestablishing the position held by Ms Gafiatullina would save PL at least \$170,000 a year. It also referred to changes made to other roles to address PL's financial situation. A contractor role was cancelled. The appointment of a strategist, due to start work in three months, was to be reversed.

[23] PL asked Ms Gafiatullina for her comments on the proposal and said it would work closely with her to explore "options" if her position was made redundant. Those options were said to include potential redeployment opportunities within the business.

[24] In her written response Ms Gafiatullina disputed PL's description of its financial difficulties. She said PL had gone ahead with salary increases for some other positions and could save money by dismissing two other people on performance grounds. She said the Practice App could not replace the work of the Portfolio Manager and her work as Delivery Lead Link was more than minor role. She said that latter role could not be satisfactorily carried out if assigned to someone with another role.

[25] She also said she had not been offered other redeployment options within PL. She identified those as being an updated Holacracy Coach role and a Product Owner role that PL was actively looking to fill. She also described the redundancy proposal as looking "very much like something personal". The reasons Ms Gafiatullina gave for that view was that Mr Weston had ignored her after sending her the proposal and his fellow director and business owner Sandra Kaminski, who was Mr Weston's wife, had spoken to her "in an unpleasant manner" the day after she was given the proposal.

[26] Mr Weston responded in writing to Ms Gafiatullina's comments. He said an employee Ms Gafiatullina criticised was performing to an acceptable standard and salary reviews for other staff were necessary to retain some people in "revenue generating roles". He referred to the loss of two major clients and its effect on PL's revenues. He disagreed with her description of limits on use of the Practice App and said its usefulness would continue to improve. He also disagreed with Ms Gafiatullina's description of her work in the Delivery Lead Link role. He said Mr Bodor, who had performed the role while she was on parental leave, found it formed only a small part of his work. Mr Weston also said there was no prospect of redeployment to an expanded Holacracy Coach role as this was a cost that PL was not going ahead with at that time and the role was not being offered to anyone else either. He agreed there was a currently

unfilled position as a Product Owner but said that role had already been offered to and accepted by someone else in November 2018, to start in April 2019. PL was bound by that earlier commitment to other person.

[27] Mr Weston also denied there was anything personal in the proposal. He said the proposal was not a reflection on Ms Gafiatullina's skills and performance, which had been very good. He apologised if he had "come across" as ignoring her but this was because he found the process "emotionally difficult".

[28] Ms Gafiatullina, with her lawyer Mr Weir, met with Mr Weston and Ms Sherwin on 18 March to discuss her feedback on the proposal. Mr Weston confirmed there was no prospect of redeployment into a coach or Product Owner. No one at that meeting referred to any prospect that Ms Gafiatullina might be able to work as one of PL's Analysts, the job title PL used for people doing software testing.

[29] All four met again on 20 March at an office away from PL's premises. Ms Gafiatullina was told PL had decided to disestablish her role, no alternative roles were available and she was not required to work out her four week notice period. Arrangements were made for Ms Gafiatullina to approve a draft of an announcement to staff about the end of her employment at PL.

[30] Mr Weir's brief handwritten notes suggested the alternative roles referred to in the meeting were as a coach or Product Owner.

[31] Ms Gafiatullina's evidence was that they had also agreed in that meeting that she would have some time, in the following two days, to carry out a handover of some of her work before finishing at PL on Friday 22 March.

[32] She said Mr Weston then apologised to her for making her role redundant but she told him she did not believe his apology. She told him she looked at what people did, not what they said and what he had done showed his real attitude. She criticised him for starting the restructuring process on a day she was at home with her son on sick leave. She also said Mr Weston had told her, early in her employment at PL, that he was "a bad manager" and every time he tried to manage people "it resulted badly". She told him he had now proved that to her. Ms Gafiatullina said she was upset but had not yelled or been aggressive in how she spoke to Mr Weston.

[33] Mr Weir said he told Mr Weston and Ms Sherwin at the end of the meeting that Ms Gafiatullina did not accept the redundancy was genuine and she would explore her options. Ms Sherwin said Mr Weir referred to raising a personal grievance.

[34] While en route to PL's offices Ms Gafiatullina received a message from another staff member telling her that her account in a company internal messaging system had been disabled. Her email access was also disconnected that afternoon.

[35] On her return to the PL offices Ms Gafiatullina went to the staff kitchen, where Ms James found her and asked her to leave the premises. Ms Sherwin and Mr Weston spoken to Ms James after their meeting with Ms Gafiatullina and Mr Weir finished. They had decided Ms Gafiatullina was angry and they did not want to take any risk from what she might say to staff about the termination of her employment or by her having any further access to confidential information in PL's computer system. Ms James said Ms Gafiatullina left the premises after having lunch with a colleague and speaking with two other PL staff members.

[36] Later that day Ms Gafiatullina approved the wording of an email to staff saying her Portfolio Manager role had been disestablished and thanking her for her strong contribution to PL. Ms Gafiatullina did not attend "farewell drinks" held two days later at a nearby bar which Ms James said had been arranged for Ms Gafiatullina and other employees who were leaving PL around this time.

Was a genuine business need for redundancy of the position established?

[37] In closing submissions given at the Authority investigation meeting Ms Gafiatullina questioned the rationale and genuineness of PL's decision to disestablish her position on three grounds: firstly, PL oversimplified its financial difficulties; secondly, PL incorrectly assessed the duties associated with each of the roles she carried out in her position; and, thirdly, PL had an ulterior motive.

The financial difficulties

[38] The information provided to Ms Gafiatullina at the time of the redundancy proposal adequately established a significant decline in business revenue and real financial pressure on PL's resources.

[39] Ms Gafiatullina correctly identified that spending on salaries, as recorded in PL's accounts, did increase overall during this period. This was partly due to an increase in the salary Mr Weston received but that was part of an arrangement where he also reduced drawings as a shareholder, resulting in an overall lower cost to the business.

[40] The salary increases paid to staff in some positions were a matter of business judgement about what was necessary to retain key revenue-generating employees. PL also continued, in the following months, to employ new staff to work in those revenue-generating areas of its business. Spending more in one area on what PL judged to be necessary expenditure did not negate the genuineness of moves to reduce its costs in other parts of the business.

[41] Ms Gafiatullina submitted the losses shown in the months for which PL provided financial information were really only seasonal fluctuations. However the business had lost two major clients and was, as PL submitted, "running out of runway" on a large business loan. The evidence overall did not establish PL's actions in respect of its financial position were outside the range of what a fair and reasonable employer could have said and done in the circumstances at the time.

Assessment of the role

[42] Ms Gafiatullina submitted PL's decision about the utility of her role was flawed because PL underestimated how much work was required in both the Portfolio Manager and Delivery Lead Link roles. She disagreed with Mr Weston's view on the effect of reallocating some work to Product Owners and how effectively the Practice App operated in tracking and forecasting that work. The difference of view between them was an argument about the quality and range of the work done, which Mr Weston accepted Ms Gafiatullina had carried out to a high standard. Ultimately however PL's decision was about the level of resources it would apply to an area where it considered necessary tasks could be adequately completed another way. Mr Weston was in a reasonable position to have made that assessment having recently carried out the role while Ms Gafiatullina was absent on parental leave.

[43] Similarly PL simply had a different assessment of the amount of time that could and should be spent on the Delivery Lead Link role. The evidence of Mr Weston and Mr Bodor was that role required less than 15 per cent of their time when they had carried

it out. This was starkly different from Ms Gafiatullina's view that proper performance of that role required more than two-thirds of her time each week. Ultimately, again, PL made a business judgement about the level of resources it would commit to the role and was prepared to tolerate whatever shortfalls in attention and quality of outcome that might create. It was not, on the evidence overall, outside the range of what could reasonably have been decided as a matter of business judgement in the circumstances at the time.

An ulterior motive?

[44] Ms Gafiatullina's evidence failed to establish, on the balance of probabilities, that PL's decision to make her position redundant and then not redeploy her to another role in the business was to any significant degree motivated by any dislike of her or other such ulterior motive.

[45] She referred to having had disagreements with Mr Weston and Ms Kaminski about some decisions about business strategy and staff members. However nothing established this had created any level of animus towards her and her role in the business that motivated the redundancy proposal.

[46] Mr Weston accepted in his oral evidence that he did have "in the back of his mind" some concerns clients had earlier raised with him about Ms Gafiatullina's interpersonal relations and this made him reluctant to put her into a client-facing role. He had not discussed those concerns with her at the time they were raised. However the mere existence of some negative client feedback, which he had not felt the need to address with her, was not sufficient to support a conclusion that this became a significant or predominant reason for the decisions made that led to the termination of Ms Gafiatullina's employment on the grounds of redundancy.

[47] In her original personal grievance letter of 17 April 2019 Ms Gafiatullina alleged PL went through the restructuring process to get rid of her "personally" and she was the "only victim" amongst its 70 staff. Her contention was plainly wrong. Others directly affected included a contractor, a technical strategist and an offshore team of Russian developers that PL stopped using for its work.

Redeployment – had PL fairly considered options?

[48] While Ms Gafiatullina’s closing submissions said PL did not fulfil its promise to “work closely” with her to explore redeployment options, the evidence showed PL had fairly considered the prospects for an ongoing role as a coach or Product Owner. Answering the question of whether PL did enough regarding any prospect of a role as an Analyst was more complex.

[49] PL made a reasonable business decision that it could not afford, at that time, to commit resources to the coach role. There was no doubt Ms Gafiatullina could have performed the role of Product Owner, which was paid at a lower salary, if PL had such a position available at the time. PL did not. Rather, PL had a potential surplus of Product Owners because it had recruited two people for those roles some months earlier. At the time of recruitment PL had work available for them. The offer and acceptance of that employment had already been completed but the new appointees were awaiting approval of necessary work visas. One withdrew due to visa difficulties. By the time the other one had completed that process and was about to start work, PL did not have a position for her to fill. However, soon after the new appointee started, another Product Owner resigned and she filled that vacant position.

[50] PL did continue to advertise for Product Owners through the following months. It was part of its long-term recruiting programme for identifying potential candidates but it had three existing Product Owners resign in the ensuing period from March to December 2019 and they were not replaced. This was also the answer to Ms Gafiatullina’s contention that if she had been permitted to work through her full notice period, she would have still been employed at the time of resignation of one or more Product Owner and could then have been redeployed into one of those roles. PL did not replace those people.

[51] PL did continue to take on new employees as Analysts during this period and Ms Gafiatullina said PL did not do enough to consider redeploying her to one of those roles.

[52] The dispute in the evidence between various witnesses on this point included the question of whether that prospect had even been thought and talked about by Mr Weston and Ms Sherwin in considering the restructuring proposal, whether it should have been, and whether it would have made any difference to the outcome anyway.

The last aspect concerns the counterfactual question of whether its redeployment obligations would have required PL, on the standard of a reasonable and fair employer, to have offered such a position to Ms Gafiatullina.

Was it thought about?

[53] The evidence from Ms Gafiatullina, Mr Weston, Ms Sherwin and Mr Weir, along with the limited documentary evidence on the restructuring process, established that no-one wrote about the prospect of an Analyst role as a redeployment option or talked about that role during the meetings they had on 18 and 20 March 2019.

[54] Ms Gafiatullina did not raise that prospect herself until after she was dismissed. She mentioned it for the first time in her personal grievance letter of 17 April 2019. Ms Gafiatullina noted that at the time of her redundancy PL was looking to fill two analyst roles and another analyst resigned soon after her employment ended. She wrote that she would have expected PL to contact her to ask if she wanted any of those Analyst roles which she was very capable of performing.

[55] In her oral evidence Ms Sherwin said she and Mr Weston had briefly touched on the question of the available analyst roles while discussing the restructuring proposal between themselves on 14 March 2019. She recalled Mr Weston had said that role “was not a possibility” because Ms Gafiatullina did not have the necessary skills and experience. In his oral evidence Mr Weston did not recall that part of his conversation with Ms Sherwin that day but said if he had thought about the analyst role as a redeployment option for Ms Gafiatullina, he did so briefly and dismissed it. He said he was familiar with her “cv” and knew her skills and experience were not at the level of the sort of senior quality analyst PL needed and was employing in those roles.

[56] On the basis of that evidence it could only be said that whatever consideration was given to an analyst role as a redeployment option for Ms Gafiatullina was, at best, fleeting.

Should PL have done more to consider the prospect of an Analyst role?

[57] The obligation to explore redeployment options rests with the employer in a redundancy situation. As part of the consultation process when redundancy of a position is being considered, information about those options must be shared with the employee. However the employer will often still have more and better information

about the total situation of the whole business, and possible ongoing roles within it, than can conveniently and completely be conveyed to the employee. The point of that observation is that it is not enough for an employer to say an employee never raised the possibility of a particular role or job type that the employer may not have thought of as a potential redeployment option.

[58] However, equally, an employer is not required to exhaustively explore every possibility, however fanciful. What must be done is what a fair and reasonable employer could have been expected to do in all the circumstances at the time.

[59] In this particular case one measure of what was reasonable was the parameters Ms Gafiatullina herself mentioned in her written and oral communication with PL about the options for her if the Portfolio Manager position was disestablished. She was a person in a relatively senior position within the business. She had ready access to detailed financial information. She was closely involved with the recruiting and induction of new staff. She was familiar with the roles within the business, the work performed in those roles and the salaries paid for them. In that context it was significant that she did not mention at any stage during the restructuring process that she might suitably be considered for, and be interested in filling, one of the Analyst roles available at the time.

[60] Arguably, Mr Weston could also at least have mentioned that he had fleetingly considered whether an Analyst position was a possibility and asked Ms Gafiatullina to comment on his conclusion that she did not have the necessary skills and experience for such a role. However, in these particular circumstances, that was not an unreasonable omission given Ms Gafiatullina, with her own detailed knowledge of the business and its roles, herself appeared not to have given such a role any thought.

Could PL have reasonably declined to offer redeployment to an Analyst role?

[61] If the conclusion on the preceding point were wrong, there was a further counterfactual consideration that nevertheless produced the same result. If PL had considered redeploying Ms Gafiatullina to an Analyst role, the evidence on balance suggested it could also have reasonably declined to do so, as Mr Weston said he would have done.

[62] Mr Weston said Ms Gafiatullina lacked the skill and experience of software testing at the level that PL needed from its Analysts. While he accepted she was a well-qualified and capable person who could have been trained to carry out the particular role, he said the length of time needed to develop the necessary level of experience was unreasonably long. He said the five people PL had hired for Analyst roles in the period from October 2018 to August 2019 had an average of 12 years' experience in designing and carrying out the testing strategies PL needed.

[63] Ms Gafiatullina, in her evidence, challenged Mr Weston's assertion by pointing to one PL analyst hired in 2017 with less than two years' experience. Mr Weston's response to that point was that PL had found hiring analysts at such a junior level had not got the work outcomes it needed and PL had, partly as a result of its experience with that junior analyst, subsequently changed to hiring on Analysts with far more years of experience in the design and conduct of testing.

[64] Ms Gafiatullina did have some experience of testing in her work history, both in Russia and, after she moved here in 2015, in New Zealand. Mr Weston's evidence was, however, more compelling in establishing that was not sufficient to meet PL's needs. It did not appear to exaggerate the difference between her experience and the requirements of the role. The facts of Ms Gafiatullina's case differed from the situation in *Wang v Hamilton Multicultural Services Trust* where the Employment Court found the functions of an available alternative role were within the capabilities of the worker who, with some upskilling, would easily be able to perform the new role.⁶ While Mr Weston readily accepted Ms Gafiatullina could have performed the Analyst role, the length of time and training needed to develop the necessary depth of experience went beyond what an employer could reasonably have been expected to bear and pay for.

[65] A further aspect of the counterfactual consideration was whether Ms Gafiatullina would have accepted a role as an analyst if one had been offered to her. The salary for that role at PL was more than a third lower than what she was paid as Portfolio Manager. When asked during the investigation about that differential, Ms Gafiatullina said she would have wanted to negotiate a higher salary. That was an unlikely outcome in the context of PL's financial difficulties at that time and its ability to recruit Analysts at the lower salaries it was offering.

⁶ [2010] NZEmpC 142 at [43].

Did PL follow a fair process in what it did and how it did it?

[66] The restructuring process PL followed, with the assistance of external human resources advisors, met the formal requirements of consultation.

[67] The one aspect of doubt regarding what was done concerned PL's decision on 20 March not to allow Ms Gafiatullina go ahead with an arrangement she had sought to carry out some work handover activities in the following few days. Mr Weston initially agreed to this but changed his mind after Ms Gafiatullina expressed her disappointment about his decision on the redundancy and criticised him as a manager.

[68] There was no real issue regarding Ms Gafiatullina otherwise being paid notice in lieu rather than working out the full four-week notice period provided in her employment agreement. Rather, as Mr Weir's oral evidence established, he and Ms Gafiatullina had talked about this before the 20 March meeting and expected this would likely be the arrangement made.

[69] While cutting access to IT systems on the day of dismissal is not uncommon or necessarily unreasonable, changing an arrangement already made about how notice and the end of the employment will be carried out, without first giving the employee an opportunity to comment on the change, does not meet the usual standard of fairness. Mr Weston may have been surprised by vehemence of Ms Gafiatullina's comments at the end of their meeting and reasonably have been worried she might act rashly in some way, with a negative effect on staff, clients or the security of PL's confidential information. However the failure of PL to first talk with Ms Gafiatullina about its change of heart about her doing handover work in the following day or so was a defect in its process. But this defect did not result in any unfairness to her that was more than minor. She did speak to colleagues at work on 20 March and had the opportunity to meet with them at a social function later in the week that she did not attend. Considered in its full context the defect did not cross the s 103A(5) hurdle of being something more than minor that resulted in Ms Gafiatullina being treated so unfairly that PL's actions in carrying out the dismissal for redundancy were unjustifiable.

Outcome

[70] For the reasons given Propellerhead Limited had not acted unjustifiably in its decision to dismiss Ms Gafiatullina on the grounds of redundancy or how it carried out that decision. Ms Gafiatullina's personal grievance application is dismissed.

Costs

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[72] If they are not able to do so and an Authority determination on costs is needed PL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Gafiatullina would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[73] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Robin Arthur
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].