IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 162/10
5276659

	BETWEEN	DAVID GARDNER Applicant
	A N D	CWF HAMILTON & COMPANY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	David Beck, Counsel for Applicant Matt Fogarty, Counsel for Respondent
Investigation Meeting:	24 February 2010 and 17 May 2010 at Christchurch
Determination:	17 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gardner) says that he was unjustifiably dismissed and/or disadvantaged by unjustified actions of the respondent (Hamiltons) in the process the latter adopted in declaring Mr Gardner's position surplus to its needs. Further, Mr Gardner contends that he was not fairly assessed for an alternative position at Hamiltons after his own position became surplus to Hamiltons' requirements and that Hamiltons breached good faith.

[2] Hamiltons resists all of Mr Gardner's claims saying that his position was disestablished as a consequence of a proper restructuring process and that at all times Mr Gardner was treated fairly and considerately. The allegation of the breach of good faith is denied.

[3] Mr Gardner was employed at Hamiltons from April 2001 until his position ended as a consequence of the redundancy in May 2009. He was engaged at

Hamiltons as Manufacturing Engineer. When he was appointed to Hamiltons, Mr Gardner came with some other New Zealand experience but particularly with extensive experience as a mechanical engineer in a variety of large entities in the United Kingdom.

[4] Mr Gardner says that his head of department (Mr Jon Leadbeater) was prejudiced against him and he relies on two particular incidents prior to the restructure to ground that contention. Then, having contended that Mr Leadbeater was biased against him, Mr Gardner contends that Mr Leadbeater used his *malign influence* to ensure that Mr Gardner lost his position in the restructure. Those claims are hotly denied by Hamiltons' evidence generally, and Mr Leadbeater's evidence in particular. By way of summary of Hamiltons' position, it denies that Mr Leadbeater was biased against Mr Gardner and also denies that Mr Leadbeater had any influence over the selection of staff positions to be disestablished.

[5] Hamiltons says that the restructure was necessary as a consequence of the global economic recession. Hamiltons was particularly affected by the slowing international marketplace because 95% of its business is export-related. A projected fall of 40% in revenue terms was expected and a round of restructuring commenced in April 2009 with a total of around 50 positions being disestablished.

[6] For our purposes, a consultation process in respect of Mr Gardner's work area commenced on 22 April 2009 with an initial consultation meeting. This was followed by the preparation of a change proposal document with a final decision to be made in early May 2009. There were further meetings involving Hamiltons and Mr Gardner from 22 April 2009 down to 29 April 2009 when the change document issued. Andrew Burrows, a colleague of Mr Gardner, became the effective spokesperson for the small group working in *Manufacturing Engineering* which included Mr Gardner.

[7] The change proposal identified the disestablishment of two full time positions but the creation of new positions. Mr Burrows, on behalf of the affected staff, requested job descriptions and further documentary material relating to the proposed new positions to assist affected staff in identifying whether to apply or not.

[8] Because some of the staff (including Mr Gardner) were members of the Engineering Printing and Manufacturing Union (EPMU), officials of that union were involved in the proposed restructure. Those officials raised concerns about

Mr Leadbeater's fairness. In the result, Hamiltons removed Mr Leadbeater from the selection panel and notified this position to Mr Gardner and others on 7 May. In doing so, Hamiltons rejected the contention that Mr Leadbeater was biased.

[9] The selection panel met on 14 May and, amongst other things, rated Mr Gardner poorly. It is common ground that Mr Gardner sought to be redeployed. On Monday, 25 May 2009, Mr Gardner was told that he was not suitable for any of the redeployment opportunities.

[10] A personal grievance was subsequently raised on 24 July 2009 and the matter proceeded to the Authority in the usual way via an unsuccessful mediation.

Issues

[11] It will be convenient to review this employment relationship problem under two broad heads:

(a) Was the position occupied by Mr Gardner genuinely redundant; and

(b) Was Mr Gardner fairly assessed?

[12] An *umbrella* issue which also requires analysis is the question of whether Mr Leadbeater was indeed biased against Mr Gardner and, if he was, whether that poisoned the decision-making process.

Was the position occupied by Mr Gardner genuinely redundant?

[13] It is fair to say that there is now some suggestion of the need to consider two competing themes in assessing whether a redundancy is genuine or not. First, there is the long established principle that the Courts will not seek to challenge the commercial decisions of an employer in declaring positions surplus to requirements. An example of this approach is to be found in *G N Hale & Sons Ltd v. Wellington Caretakers IUOW* [1990] 1 NZLR 151.

[14] However, since the passage into law of s.103A of the Employment Relations Act 2000 and the determination that that section applied to redundancy dismissals as well as to other dismissals, the availability of an alternative test in redundancy cases began to be suggested by some commentators, to the extent, for instance, of the suggestion that *the concept of managerial prerogative arising from Hale is on a*

collision course with the concept of reasonableness in s.103A …: S Hood, *Colliding with Hale*, New Zealand Lawyer, 26 June 2009.

[15] For my part, I am not persuaded that there is a *collision course* as I think the two strands were carefully interwoven by Chief Judge Colgan in his decision in *Simpsons Farms v. Aberhart* [2006] 1 ERNZ 825 where His Honour observed at para.[67]:

> *So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or Court, even under section 103A.*

[16] In *Air New Zealand v. V* [2009] ERNZ 185, the Full Court made clear that the Authority's duty was *to objectively review all of the actions of an employer up to and including the decision to dismiss*: para.[37]. This approach will be particularly relevant in a dismissal for alleged redundancy where typically the appropriateness of the employer's actions relates not just to the decision to dismiss, but also necessitates an assessment of the other aspects of the interrelationships between the parties up to the point at which the redundancy is declared. This approach is adopted by His Honour Judge Couch in his recent second judgment in *Jinkinson v. Oceana Gold (NZ) Ltd* [2010] NZEMPC 102, CRC4/08. I have derived great assistance from this judgment in deciding the present matter.

[17] A final strand in the skein is the effect of s.4 of the Employment Relations Act 2000 which creates the statutory duty of good faith. Subsection (1) of s.4 requires the parties to act in good faith towards each other and forbids them from misleading or deceiving each other in their conduct. Subsection (1A) is especially relevant in relation to redundancy matters but before dealing directly with that aspect, which I will set out in full, it is worth noting that the first two subsections of subsection (1A), define good faith as being wider in scope than the common law implied term of mutual trust and confidence, and requires the parties to be active, constructive, responsive and communicative.

[18] Section 4(1A)(c) is particularly relevant to redundancy situations and it reads as follows:

> *Without limiting paragraph (b)* [the duty of good faith] *requires an employer who is proposing to make a decision that will, or is likely to,*

> *have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected –*
>
> *(i) Access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) An opportunity to comment on the information to their employer before the decision is made.*

[19] The fair and reasonable employer, bound by the terms of s.103A, will, of necessity, comply with the requirements of s.4 as well because, as Judge Couch observes in *Jinkinson* at para.[42]:

> *A fair and reasonable employer will comply with its statutory obligations.*

[20] In the present case, at a macro level, there can be no reasonable challenge to the need of this employer to restructure its business to meet the reduced demands of the international marketplace. The question must be whether, at a micro level, the employer's restructuring has fulfilled the employer's legal obligations in terms of s.4 of the Act and in terms of s.103A. Having concluded that the fundamental *raison d'étre* of the restructuring has been made out by Hamiltons, it is now necessary to review whether the process adopted by Hamiltons in achieving the desired result was the process that a fair and reasonable employer would undertake in the circumstances as they existed at the time.

[21] What then was Hamiltons' proposal? Hamiltons essentially wanted to turn two similar manufacturing engineering positions into one. There were, of course, two candidates occupying the two manufacturing engineering positions prior to the proposed restructure, one of whom was Mr Gardner. Mr Gardner does claim at one point in his evidence that he ought to have been *simply reconfirmed* into the new position but that rather overlooks the fundamental point that there was another candidate for the single remaining position who presumably also wanted that position and who, on the basis of Mr Gardner's view, might also advance the proposition that he too should be simply reconfirmed into the new role. Of course, the practical reality is that Hamiltons had to choose between the two candidates and that is the real thrust of Mr Gardner's claim. It is addressed in the next section of this determination.

[22] By way of summary then, I conclude that at a *macro* level, Hamiltons was impelled to take action to reduce its costs so as to meet the reduced demands of the international marketplace and that that decision was a legitimate business judgment

which only it is in any position to make. Further, I conclude that a subset of the wider restructuring contemplated by that overall downsizing was Hamiltons' decision to do away with one of two manufacturing engineering positions (one of which was held by Mr Gardner) and again, subject to what follows in this determination, I conclude that it was available to the employer, as a legitimate business decision, to reduce the number of manufacturing engineering roles to better meet customer demand.

[23] The justification for this position is, I consider, well set out in the memorandum to affected staff date 29 April 2009. That document begins by setting out the steps that Hamiltons had already taken to address the contraction of its markets, then summarises the information provided at the notification meetings and then outlines the proposal together with the justification for it. The essence of the proposal as explained in that document of 29 April 2009 and as subsequently adopted by Hamiltons for implementation was what Mr Harsent, the Human Resources Manager for Hamiltons, described as the *two pool approach*. What he meant by this phrase was that there were two groups of positions each containing two roles and in each group, the proposal was that two positions would become one. It is common ground that Mr Gardner was a viable candidate for the two jobs in one pool but not for the two jobs in the other pool.

[24] For the sake of completeness, I should also make clear that I am satisfied that the process adopted by Hamiltons adequately provided for proper consultation within the meaning that that expression has in redundancy law. There were a series of meetings between Hamiltons and the affected staff and I am satisfied that Hamiltons carefully worked its way through the various objections and comments made by the staff before committing to a particular plan. In particular, there is ample evidence before the Authority that Hamiltons engaged extensively with the union which represented a number of the affected staff (including Mr Gardner) in order to deal with its anxieties about aspects of the proposal. A particular aspect of the proposal which was subject to change as a consequence of pressure from affected staff and the union, was the membership of the panel appointed by Hamiltons to make the eventual selections. I comment further on that aspect in the next section of this determination.

[25] It is also clear from the evidence that Hamiltons gave the affected staff the opportunity to comment on the proposal and make suggestions about alternative structures or strategies. A response was received from affected staff (including

Mr Gardner), and while it was clear that the proposal from the affected staff was received by Hamiltons, it certainly was not accepted. Of course, Hamiltons is under no obligation to accept a proposal from affected staff which does not meet that needs of the business; this proposal was, in my judgment, simply fanciful in that it proposed increasing staff numbers rather than decreasing them and really flies in the face of the economic reality of the situation.

Was Mr Gardner fairly assessed?

[26] I have already indicated that I am satisfied the consultation undertaken by Hamiltons met its obligations in terms of the law. However, to some extent, I need to traverse the same ground again in considering the assessment process because it is apparent from the evidence that the assessment process was materially changed as a consequence of the impact of submissions from the affected employees and the union.

[27] However, the appropriate place to start is the employer's *change proposal* dated 29 April 2009. I set out below the relevant paragraph in that document which reflects the employer's intention in respect of the assessment process:

> *If the (change) proposal does proceed then we will go through a selection process to determine which employees will be made redundant. This will include: a review of the remaining position descriptions and (as required) specifying actual project requirements, establishing selection criteria, seeking expressions of interest in the remaining roles, completing selection process and consulting directly with affected staff.*

[28] That change proposal was notified to affected staff (including Mr Gardner) in a meeting on the day the document was dated, that is 29 April 2009. The notes of that meeting, prepared by Mr Harsent, are before the Authority. It is noteworthy that at this meeting, Mr Burrows (the spokesperson for affected staff including Mr Gardner) asked for job descriptions, selection criteria and project plans. Mr Harsent said that that information would logically become available *as we progress through the process as outlined*. He then went on to say that if the consequence of the provision of the information requested at an early stage was to push the time out, that was *okay*. In response, the affected staff acknowledged that asking for the information they sought *was ahead of schedule* but they wanted to be prepared in the event the change proposal was in fact implemented.

[29] Some of the information requested was promptly provided by Hamiltons under cover of an email dated 30 April 2009. In that communication, Hamiltons provided the proposed position descriptions together with a list of major projects that needed to be completed over the ensuing year. The selection criteria was not at that point complete but Hamiltons indicated that it would use its general criteria as it had in previous restructures and it expressed that idea in the following way:

> *Our generic criteria used during previous restructures included: adaptability and competency, work rate, quality, timekeeping, cooperation, disciplinary record and length of service.*

[30] On top of those core competencies, Hamiltons intended to overlay the technical requirements of each position.

[31] Then, also on 30 April 2009, Mr Harsent met with two representatives of the union. Those union representatives had previously met with their members (including Mr Gardner). That meeting is important because it appears to be the first occasion that Hamiltons was advised of a feeling amongst the affected staff that Mr Jon Leadbeater was biased. Again, there are notes of this meeting, also prepared by Mr Harsent. Those notes refer to a number of matters traversed in the meeting but for our purposes the important issue is the union's notification that there was a concern about Mr Leadbeater. The notes record that observation in the following terms:

> - *Selection process – concerns Jon Leadbeater may be biased based on earlier dealings with affected staff.*

[32] The union representatives involved in the meeting with Mr Harsent on 30 April 2009 promptly reported to two of the affected staff (including Mr Gardner). The intelligence conveyed was that Mr Ian Swain, as the relevant line manager, would be part of the selection panel. Mr Swain is a subordinate of Mr Leadbeater. It appears that the union also told the affected employees that Mr Swain had already conducted some form of assessment or appraisal of the affected staff. The affected staff then confronted Mr Swain and according to Mr Gardner's evidence (and the evidence of Mr Burrows) Mr Swain allegedly told the affected staff that the previous day Mr Leadbeater had asked him to rank all of the affected staff individually and that he did so orally but that that ranking was not reduced to writing. In further exchanges between the parties, the evidence for Mr Gardner is that Mr Swain confirmed that the ranking was on the rough basis of *best person to worst person*. Again, the evidence

for Mr Gardner is that Mr Swain was not keen to discuss the matter but clearly felt under some duty to disclose.

[33] A document dated six days later (6 May 2009) was then prepared and signed by the four affected staff (including Mr Gardner). The provenance of this document and indeed its contents is hotly debated by the parties. Mr Gardner was adamant that the document was provided to Mr Harsent; Mr Harsent was equally adamant that he did not have the original document and that his source for the subject matter covered in the statement was the relevant union official, not any of the affected staff. Mr Harsent's evidence was that he had raised the matter with both Mr Leadbeater and Mr Swain and each of them denied that there have been any collusion over ranking of affected staff. Mr Swain apparently told Mr Harsent that he had been *bushwacked* by the affected staff. Certainly, Mr Harsent did not speak to any of the affected staff about the contents of the 6 May 2009 document.

[34] Mr Swain told me in his oral evidence that he had been *ambushed* by the affected staff, including Mr Gardner, and that he was confronted with a statement from Mr Gardner that he was going to be on the interview panel and that he had already ranked the candidates in writing. The irony of all this from Mr Swain's perspective was that, at the point that he had the meeting with the affected staff, he had no knowledge that he would be on the selection panel. Indeed I am satisfied that his evidence is truthful that he was not actually appointed to the selection panel until 7 May, fully a week after the meeting with the affected staff. Perhaps more importantly though, Mr Swain denied absolutely the affected staff's version of what had happened at the *ambush* meeting of 30 April 2009.

[35] He said that he had had an informal meeting with Mr Leadbeater, that Mr Leadbeater had never asked him how he would rank or score the affected staff and that in fact Mr Swain had said that there needed to be a formula adopted for ranking the affected staff so that the selection panel could do the job logically. But of course, as Mr Swain was at pains to emphasise to me in his testimony, the conversation that he remembers with Mr Leadbeater (which must have happened in late April 2009) was before he was identified as a selection panel member. Plainly, then, there are two different versions of the meeting between Mr Swain and the affected staff which I need to either reconcile or otherwise deal with.

[36] To assist in that process, it is helpful to review Mr Harsent's contribution. His evidence is that he found out about the meeting between Mr Swain and the affected employees via the union official and he emailed the union official the following day (1 May 2009). The relevant portion of Mr Harsent's email to Mr Joy of the union is in the following terms:

> *Following the … meeting (between Mr Harsent and the union) I understand that you reported back to the affected employees … and they advised that a discussion had taken place with their line manager, Ian Swain. Apparently Ian was "informed" that he was to be part of the proposed selection panel and said words to the effect that a discussion had already taken place with Jon Leadbeater and staff rankings had already been made.*

[37] The email then goes on to record that Mr Joy then emailed Mr Harsent making serious allegations about the credibility of Hamiltons' process.

[38] In responding to that *serious allegation*, Mr Harsent then continues with his email to Mr Joy commenting on Mr Swain's involvement in the following terms:

> *As intimated, Ian Swain was taken aback when confronted with his involvement in the selection panel. That's because we had not discussed it with him – as I keep saying this is the consultation phase and we have got to get to a final position possibly requiring a selection process. …*
>
> *I am advised that the discussion identified between Jon Leadbeater and Ian Swain was regarding the need to develop relevant technical selection criteria or methods of ranking affected employees if the proposal proceeded.*
>
> *It was this aspect of the discussion which has been interpreted by the affected staff that the ranking of their particular merits had already been completed. Clearly this is factually wrong given the selection criteria had not been established.*

[39] I have quoted at length from Mr Harsent's email because it seems to me to bear directly on the utility or otherwise of the 6 May 2009 statement from the affected employees. Having sought Mr Swain's comments on the issue directly and having carefully reflected on the documentary trail filed on behalf of Hamiltons in the Authority, I am satisfied that the statement produced on behalf of Mr Gardner and dated 6 May 2009 does **not** accurately state the position. I prefer Mr Swain's recollection of events, first because I was impressed with Mr Swain as a witness and second because his evidence on this discussion with the affected staff is consistent with Mr Harsent's email to the union on the same issue. The essence of Mr Harsent's email is that, first, at the point at which the relevant discussion took place, Mr Swain

was literally *ambushed* given that he had no idea that he was going to be on the selection panel, and indeed the making of that decision was still some seven days away. Secondly, Mr Harsent correctly identifies that at the date of the meeting between Mr Swain and the affected staff, there was no selection criteria agreed. All that had happened to that point, as I noted above, was that Mr Harsent had indicated to the affected staff that it was likely that the company would use the same core competencies in this selection process as it had in others.

[40] There was a further discussion between union official, Mr Joy, and Mr Harsent on 6 May 2009 at which Mr Joy again reiterated the conviction that Mr Leadbeater was not trusted by staff to participate in the selection panel but that Mr Swain was. This intimation, which is confirmed by Mr Harsent's notes of the meeting, suggest that whatever residual confusion may have existed, between the affected staff and Mr Swain, had dissipated within the following week and the staff were happy for Mr Swain to proceed with the assignment. From that same meeting between Mr Joy and Mr Harsent, there is also the suggestion (again from Mr Joy) that another member of the selection panel might be Peter Moore, Hamiltons' company secretary. Apparently, Mr Moore was well regarded by the workforce and trusted for his integrity.

[41] In the result, when the panel was finally brought together, both Mr Swain and Mr Moore were members. On that basis then, it is difficult to conclude that the personnel involved in doing the selection were in any way biased against Mr Gardner as he and his colleagues had successfully lobbied to have two of the panel be individuals who they had, in fact, suggested. I leave to the next section of this determination the question of whether it can be contended successfully that Mr Leadbeater exercised a *malign influence* over the whole process. Clearly, for present purposes, Mr Leadbeater was not part of the selection panel, specifically at the request of the affected staff, including Mr Gardner.

[42] On 8 May 2009, Mr Harsent circulated a short paper confirming the membership of the selection panel, identifying the selection criteria, and committing to a timeframe. Feedback on that paper was then sought. As a consequence of the feedback, Hamiltons agreed to add further criteria, namely length of service. I pause at this juncture simply to observe that up to this point in the process, it would be difficult to be critical of Hamiltons' process. The consultation was extensive and it is

clear on the evidence that Hamiltons allowed itself to be persuaded of the merits of a number of changes to the restructuring process itself. Of those changes, perhaps the most significant were the changes in the personnel to form part of the selection panel. In addition, Hamiltons' agreement to add an additional criteria to the selection and its willingness to provide job descriptions at arguably a very early stage in the process, are worthy of comment. Also, as a consequence of the misunderstanding (because that is what I think it was) between Mr Swain and the affected staff, Hamiltons was prepared to devote some energy into resolving the apparent confusion so that the whole process was not derailed. Indeed, as I noted above, as a testament to its success in that regard, there appears to have been no residual concern from the employees about Mr Swain continuing to be involved in the selection panel.

[43] The selection panel itself met on 14 May 2009 to make the final selection. In essence, Mr Gardner protests its decision, complaining about not only the process that the panel used, but also about the ratings that it made in respect of his suitability for continued employment.

[44] As to the process used by the selection process, it is clear first of all that the panel had no documentary information such as personnel files or anything of that sort to assist it in its deliberations. All of the *applicants* were in-house and therefore known in some way to the panel members. Mr Harsent told me that the assessments were made by the panel members *just by what was in the panel members' heads*. He confirmed that human resources files were not supplied to the panel relating to the individuals being assessed, but he acknowledged that there may have been other files held in the engineering department which were considered by the panel. Mr Harsent of course was not involved in the selection and was not present when the selection panel met. Mr Harsent defended the absence of human resources files on the basis that they may have contained information that was prejudicial to candidates, particularly because Mr Gardner, for instance, had previously raised employment relationship problems or grievances. Mr Harsent also said that none of the affected staff sought to be interviewed but that if the candidates had wanted to be interviewed, *we would have agreed*. Given the extent to which Hamiltons listened to and took account of the various issues raised by the affected staff during the consultation process, I accept Mr Harsent's evidence that if interviews had been requested, they would have been arranged.

[45] The evidence of Mr Swain about the deliberative process during the evaluation is that both he and Mr Billington (one of the other members of the selection panel) separately concluded that they would apply the agreed selection criteria both on a qualitative basis and on a quantitative basis. As already noted, there were four employees being assessed, two in each pool. So far as Mr Gardner was concerned, he was competing for a single position with one other colleague. Mr Swain's evidence describes that both he and Mr Billington first carried out a qualitative assessment and subsequently carried out a quantitative assessment. He says that he and Mr Billington worked independently scoring the candidates against the criteria already determined by Hamiltons and then when the scoring was complete, he and Mr Billington discussed the scoring and the reasoning for it. Where there was a difference, an average score was struck. That average seems to have been determined by discussion with Mr Moore, who was effectively the moderator of the panel. As the company secretary of Hamiltons, Mr Moore did not participate in the assessment of the employees in a technical sense (presumably because it was outside his area of expertise) but effectively acted as the chair of the panel.

[46] Mr Moore's evidence at my investigation meeting confirmed the evidence of Mr Swain. Mr Moore remembers that there was a lengthy discussion at the beginning of the meeting about the need to assess the candidates both quantitatively and qualitatively and that was agreed to. Interestingly, Mr Moore also points out that both methods of assessment favoured the successful candidate rather than Mr Gardner. As a consequence, Mr Moore concludes that as either the qualitative or quantitative approach would have produced the same result, the conclusion, in favour of the successful candidate is a robust one.

[47] Mr Gardner makes specific complaints about some of the scores that he received in this process. He also complains that the assessment process was conducted *in secret*. It is a little difficult to assess what alternative there might have been to a confidential assessment process; perhaps Mr Gardner is obliquely complaining about the absence of an interview. I have already noted that Mr Harsent made clear that if there had been a request for an interview, that would have been agreed to. But of course, there was no such request. And I am not persuaded that Mr Gardner's complaints about the particular scores that he received needs to be the subject of detailed scrutiny. I do not consider it is the Authority's role to require line

by line justification of the reasoning for a particular mark in a selection process. That to me is the kind of *pedantic scrutiny* the Court would quite properly reject.

[48] Notwithstanding that conclusion, Mr Swain helpfully responded to the particular allegations made about scoring in Mr Gardner's evidence. I am satisfied that the Authority needs only to ensure that there was a fair and robust selection process that was correctly applied and that it is not the Authority's role to require justification for individual scores in an assessment process. If I am mistaken in that conclusion then I would call in aid the helpful observations in Mr Swain's evidence which explain why the panel reached the conclusions that it did.

[49] This was a selection process undertaken by line managers two of three of whom had been specifically suggested by the affected staff for participation, who determined their own process based on the selection criteria they were required to administer and have then reached conclusions on two separate means of assessment (qualitative and quantitative), in each of which Mr Gardner comes second. In addition, the selection criteria which Hamiltons had originally proposed was modified as a consequence of input from the staff.

[50] It seems to me legitimate to conclude that the results of this process are fair, robust and measured. In particular, I conclude that both Hamiltons and the affected staff left it to the selection panel to determine their own process (and properly so). It is clear from the evidence for instance that Hamiltons sought only a qualitative assessment of the candidates but that the panel of its own motion decided to reality check their assessment on that measure by conducting a quantitative assessment as well. I am satisfied that both Hamiltons and the affected staff trusted the assessment panel to produce a fair and robust process and that it was reasonable for both parties to do that. There was I consider, ample opportunity for either Hamiltons or the affected staff to be doctrinaire about what process they required or sought. There is good evidence from the process up to this point that Hamiltons were flexible enough to allow modifications to the process and that if for example there had been a request from the affected staff for the candidates to be interviewed or for particular information (such as a curriculum vitae or other similar document) to be presented to the selection panel, then that could have been accommodated. No such request was made and it seems to me that in those circumstances, both protagonists (as it were)

could properly leave the assessment process in the hands of a trusted panel to run their own process and reach their own conclusion.

[51] It follows that I am not satisfied that Mr Gardner can properly complain about the fairness of the assessment. No doubt it is unfortunate for him that he was not assessed as positively as he would have hoped but plainly, this was a competitive process where two candidates were seeking one position and it was inevitable that one of those persons would miss out.

[52] One final matter is worth touching on for the sake of completeness; it is the contention that in terms of the *last on first off, all things being equal* principle Mr Gardner should have survived the process of restructuring rather than lose his position as a consequence of it. There are two difficulties with this thesis; the first is that on the employer's view of things, (a view which I hold they are entitled to form) all things were not equal and secondly, Mr Gardner's service with Hamiltons post-dated the commencement of the service of the successful applicant.

Was Mr Leadbeater biased against Mr Gardner?

[53] While in the preceding sections of this determination the Authority has dealt with the substance of Mr Gardner's personal grievance claim, one theme which pervaded Mr Gardner's claim throughout was the contention that Mr Leadbeater *had it in for him*. Mr Gardner expressed the matter in his evidence by referring to Mr Leadbeater having a *malign influence* over the whole process thus poisoning the outcome of the restructuring proposal. I am satisfied on the balance of probabilities that Mr Leadbeater had no such influence over the process.

[54] I reach this conclusion because I am not satisfied that Mr Gardner has demonstrated either that Mr Leadbeater had any influence over the process by which the decision was taken to terminate Mr Gardner's role for redundancy, nor am I satisfied that Mr Leadbeater in fact was unkindly disposed towards Mr Gardner.

[55] Dealing with the last of those matters first, Mr Leadbeater's evidence before the Authority hotly denied the claim that he was biased against Mr Gardner and I have to say that I preferred Mr Leadbeater's evidence on this point to Mr Gardners. Mr Gardner is obviously distressed about his dismissal, sees it as unfair, and seeks to find a basis for explaining it. In his eyes, Mr Leadbeater is that basis. It is of course Mr Gardner's obligation to demonstrate to the satisfaction of the Authority that

Mr Leadbeater in fact had the *malign influence* over proceedings which Mr Gardner claimed: *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659.

[56] Mr Gardner refers to two matters which he claims prejudiced Mr Leadbeater against him. The first is the so-called *Shotover River incident* where Mr Gardner alleged that Hamiltons management were effectively *pointing the finger at him*. The evidence does not support that conclusion. The evidence is clear that Hamiltons were concerned about the performance of the whole of the department that Mr Gardner was in, not the performance of Mr Gardner himself.

[57] The second issue was the *Blue Arrow Project* which Mr Gardner had worked on but was subsequently replaced by Mr Leadbeater with another employee who had particular skills which Mr Gardner did not have. Again, there is simply no evidence that Mr Leadbeater *had it in for* Mr Gardner. In relation to *Blue Arrow* Mr Leadbeater took Mr Gardner off the project because Mr Leadbeater needed to have another employee working on it with specialist skills. That is a perfectly proper management decision and ought not to be viewed as in any way sinister.

[58] Finally, on this point, I have to say that I reject completely Mr Burrows' claim that Mr Leadbeater had frequently told him that he *had it in for* Mr Gardner. I was not impressed with Mr Burrows' evidence and frankly preferred the evidence of Mr Leadbeater and also the evidence of Mr Swain who made it clear that although he had regarded Mr Burrows as a friend, he received previous advices from Mr Burrows to the effect that Mr Gardner lacked capability. If, I accept Mr Swain's recollection of those remarks from Mr Burrows then, at the very least, those observations from Mr Burrows are inconsistent with his subsequent evidence now advanced on Mr Gardner's behalf.

[59] In summary then, I am not persuaded that Mr Leadbeater was biased against Mr Gardner.

[60] Even if I am mistaken about that aspect, the evidence for Mr Leadbeater influencing the redundancy selection process is weak indeed. First, as is apparent from the substance of this determination, Mr Leadbeater had no involvement in the selection panel. Second, I have already made clear that I do not accept the evidence alleging that Mr Leadbeater prevailed upon Mr Swain to give him a ranking of the candidates in advance of the selection meeting. As I have already held, I am satisfied

the only discussion between Mr Swain and Mr Leadbeater about the viability of the candidates pre-dated Mr Swain's nomination as a member of the selection panel and was initiated by Mr Swain and not Mr Leadbeater and was about the necessity for there to be a proper ranking of the candidates so that a robust process could be delivered.

[61] I conclude then that Mr Leadbeater was neither biased against Mr Gardner nor was he in any way involved in the selection process. It follows that I do not accept that Mr Leadbeater had a *malign influence* over the proceedings. Indeed, I thought Mr Leadbeater was a straightforward and truthful witness who, like Mr Swain, tried very hard to behave honourably and fairly in what must have been difficult circumstances.

Determination

[62] For reasons which I have canvassed in the foregoing determination, I am not satisfied that Mr Gardner has any cause for complaint in the process that Hamiltons have undertaken and I dismiss his application as a consequence.

Costs

[63] Costs are reserved.

James Crichton
Member of the Employment Relations Authority