

The investigation

[3] The Authority investigated this employment relationship problem by receiving written statements of evidence from various relevant persons. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave closing submissions.

[4] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The facts

[5] SP Blinds has since 1961 supplied roller, roman and Austrian blinds all over New Zealand to both commercial and residential projects. Its sole director is Mr Zhongyao (Frank) Lin (Mr Lin).

[6] Mr Hogan was employed by SP Blinds under the terms of an individual employment agreement dated 8 July 2019. His role was Architectural and Specification Market Development Manager on a salary of \$100,000.00 (One hundred thousand dollars).

[7] In his role, Mr Hogan engaged with architects, designers, planners and other building professionals to make them aware of and promote SP Blinds' product range. This engagement occurred at the very early stages of the building process so as to encourage building professionals' familiarity with and best use of SP Blinds' products. The inclusion of SP Blinds' products in concept drawings and in the drawings and specifications submitted to local territorial authorities increased the use and sales of SP Blinds' products.

[8] It is not disputed that Mr Hogan performed his role well.

[9] On Wednesday 18 March 2020 a new salesperson commenced employment at SP Blinds. It says that this person had been recruited before the COVID-19 lockdown situation arose.

[10] In the context of a global COVID-19 pandemic, the New Zealand Government announced a Level 4 lockdown that was to commence at midnight Wednesday 25

March 2020 for four weeks. The Government also announced the introduction of a COVID-19 wage subsidy scheme for business the purpose of which was to allow employers to maintain connections with their employees.

[11] On 23 March 2020 at the weekly SP Blinds' sales meeting, Mr Lin informed staff that SP Blinds was considering apply for the Government's COVID-19 wage subsidy.

[12] On 24 March 2020, SP Blinds applied to the Ministry of Social Development (MSD) for the COVID-19 wage subsidy. The application required SP Blinds to disclose to MSD the personal information of relevant employees including Mr Hogan. The application involved a declaration by SP Blinds that it had discussed the application with the employees named and that those employees had consented to the information about them being provided to MSD. SP Blinds also declared it would use its best endeavours to retain the employees named in the application on at least 80% of their regular income for the period of the subsidy.

[13] In an email to staff that same day, the accounts administrator confirmed that the application for the subsidy had been made. The same email also informed staff that SP Blinds would pay staff 80% of the wages and salaries from the commencement of the lockdown.

[14] Mr Hogan had not given his express consent to SP Blinds for it to pass on his personal private information to MSD.

[15] SP Blinds received COVID-19 wage subsidies for 15 employees including Mr Hogan totalling \$105,444.00.

[16] On 25 March 2020 Mr Lin emailed and texted Mr Hogan stating SP Blinds was facing "challenging circumstances" and inviting him to a Zoom meeting the following day.

[17] The next day Mr Hogan attended a Zoom meeting with Mr Lin. Mr Lin was supported by HR Consultant Ms Catherine Murray (Ms Murray). Mr Lin informed Mr Hogan of a proposal to restructure the business which in turn included a proposal to disestablish the role of Architectural and Specification Market Development Manager. Mr Hogan was not provided with any information or documentation relating to the proposal to disestablish his role. He was however, invited to ask questions and submit feedback on the proposal.

[18] On 2 April 2020 Mr Hogan provided SP Blinds with his response to the proposed restructure. As part of his feedback, Mr Hogan challenged SP Blinds' decision not to consult with him before reducing his remuneration. Mr Hogan also expressed concern that SP Blinds had, without his prior knowledge or consent, applied for and received the subsidy on his behalf. Additionally, he noted that since SP Blinds had received the subsidy on his behalf, it was obliged to use its "best endeavours" to continue to employ him for the duration of the subsidy period. The feedback also raised alternatives to redundancy.

[19] On 3 April 2020 SP Blinds replied to Mr Hogan's comments. It confirmed that it had become aware that it was not able to reduce Mr Hogan's salary without his consent. It also confirmed that its application had been successful and that it had received the subsidy on behalf of its employees.

[20] At Mr Hogan's request, SP Blinds provided him with financial statements including a Balance Sheet as at 31 March 2020 showing total equity of \$425,785.81 and a Profit and Loss statement for the month ending 30 April 2020 showing net profit of \$16,549.80. 22.

[21] Mr Hogan gives evidence he noted that SP Blinds had not forecasted any sales whatsoever for the four week COVID-19 shutdown period. He points out there were actual sales that had already been made in that period. He noted too there were no forecasted sales for three months after 25 April 2020 and that the data provided did not include the money received from the wage subsidy. Mr Hogan was not told what the cost savings would be (if any) if his role were disestablished.

[22] On 6 April 2020 Mr Hogan wrote to SP Blinds with his feedback on its apparent financial position. He advised he was aware that SP Blinds had sent over \$400,000 worth of quotes out of the business, and that \$50,000 to \$60,000 worth of invoices had been sent out but had not been included in the financial forecasts. It did not appear to Mr Hogan that there had been a downturn in revenue to justify a proposal to disestablish his role. SP Blinds did not deny the forecast figures Mr Hogan stated and it also confirmed that some deposits had been paid to it for the sales that Mr Hogan had commissioned.

[23] By letter dated 6 April 2020, Mr Hogan raised a personal grievance for unjustified disadvantage in relation to the decision that his salary be reduced.

[24] By letter dated 8 April 2020 SP Blinds confirmed Mr Hogan's employment was terminated by reason of redundancy.

[25] By letter dated 5 May 2020 he raised a personal grievance for unjustified dismissal.

The issues

[26] The issues requiring investigation and determination are these:

- (a) was Mr Hogan unjustifiably disadvantaged by SP Blinds:-
 - (i) applying for and receiving the COVID-19 wage subsidy on his behalf, without his consent or knowledge? and
 - (ii) unilaterally varying his individual employment agreement by reducing his wages without his consent.
- (b) was Mr Hogan's dismissal for redundancy and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time? -
 - (i) was there a genuine reason for his redundancy?
 - (ii) did SP Blinds use its best endeavours to retain Mr Hogan in accordance with the declaration signed for the subsidy to the Ministry of Social Development (MSD)?
- (c) did SP Blinds breach its duty of good faith by? -
 - (i) dismissing Mr Hogan for redundancy during the subsidy period, but several days after declaring it would use its "best endeavours" to retain employees?
 - (ii) not providing Mr Hogan with all relevant financial information during the consultation period.
- (d) if SP Blind's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (i) lost wages (subject to evidence of reasonable endeavours by Mr Hogan to mitigate his loss); and
 - (ii) compensation under s123(1)(c)(i) of the Act.
- (e) if any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Hogan that contributed to the situation giving rise to his personal grievances?
- (f) should either party contribute to the costs of representation of the other party?

Unjustifiable disadvantage?

[27] Was Mr Hogan disadvantaged in his employment by unjustifiable action by SP Blinds when it applied for and received the COVID-19 wage subsidy on his behalf without his knowledge and consent? Was he disadvantaged in his employment by unjustifiable action by SP Blinds when it unilaterally varied his individual employment agreement by reducing his wages without his consent?

[28] Mr Lin expressed a view that were it not for Mr Hogan's redundancy, he would not have pursued this grievance.

[29] The accounts administrator's email of 24 March 2020 developed into a discussion about arrangements for customer communications. An initial decision that all phones and emails be diverted was not supported but eventually a consensus more customer centric solution was arrived at. I find that it was that ultimate position reached that Mr Hogan was endorsing when he wrote in an email to the accounts' administrator at about 2.00pm "Hi Dani, All good, you've done a good job".

[30] I do not accept Mr Hogan's note to the account's administrator was his consent for his personal information to be passed on to MSD for the purposes of SP Blind's application for the Government's COVID-19 wage subsidy. I also do not accept that same note from Mr Hogan was his express consent for his employer to reduce his salary to 80% of what he was contractually entitled to. It is correct that he did not explicitly object either. But his silence is not to be regarded as acquiescence. Mr Hogan did not consent to the unilateral variation of this term of his employment agreement.

[31] I do not consider that Mr Hogan seriously pursues a disadvantage claim arising out of his former employer's failure to obtain his express consent to pass his private information to MSD. I decline to consider the matter any further preferring instead to concentrate on resolving what I regard as the real problems between these parties.

[32] I do however regard SP Blinds unilateral decision to pay Mr Hogan 80% of his salary clearly wrong. I think it is right to observe that in such extraordinary and unprecedented times the legalities of that decision were not commonly understood.

[33] I find that SP Blinds was wrong to unilaterally reduce Mr Hogan's salary to 80% of what he was contractually entitled to. I find that Mr Hogan was disadvantaged

in his employment by that decision and further, that that decision by SP Blinds was not justifiable.

Unjustifiable dismissal?

[34] Was Mr Hogan's dismissal for redundancy and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time? Mr Hogan particularly asks whether there was a genuine reason for his redundancy and whether SP Blinds actually did use its best endeavours to retain him, as it had declared it would, in its application for the Government's COVID-19 wage subsidy.

[35] The parties' employment agreement does not provide a definition of redundancy but where it occurs the agreement provides as follows:-

14 Redundancy

In the event you are declared redundant, you shall be given four weeks' notice of termination of your employment or at the discretion of the employer, be paid in lieu thereof. The notice period specified in this clause shall be inclusive of the notice period specified in the Termination clause above [four weeks]. You will not have any entitlement to redundancy compensation.

[36] I note that there was almost no paperwork that typically features in these situations. There was no formal letter signed by a manager inviting Mr Hogan to a meeting. There was no change pack outlining a restructure proposal accompanied by a letter signed by a manager inviting Mr Hogan to study the proposal, ask any questions or submit any feedback he might wish to make. There was no outline or timeline of any process and there was no offer of support in acknowledgement of the inherent stress the uncertainty of such processes typically involve.

[37] Mr Lin gave evidence that he consulted Ms Murray on 25 March 2020. He said that in proposing the disestablishment of Mr Hogan's role he had reviewed SP Blinds' bank statements. The SP Blinds bank account balance as at 31 March 2020 was about \$160,000.00 which apparently included the Government COVID-19 wage subsidy for the full contingent of employees.

[38] Mr Hogan asks how could SP Blinds consider making him redundant only two days after applying for the Government's COVID-19 wage subsidy and also permitting a new employee to start work on 18 March 2020? Mr Lin's evidence was that he did not think the fact he had applied for the subsidy meant that he could not manage potential redundancies if it necessary. Mr Hogan very seriously doubted and could not

believe that SP Blinds was in possession of information, data, or forecasting as the basis for considering restructure changes and the disestablishment of his role.

[39] Mr Lin apparently did not say much else, but Ms Murray confirmed that a decision on the “possible restructure” would be made within days. Mr Hogan was invited to submit any feedback he had by Monday 30 March 2020.

[40] Mr Hogan was not presented with any documentation or information supporting the proposal to disestablish his role.

[41] Mr Lin sent a follow up letter to Mr Hogan. The letter confirmed the impetus for the “possible restructure” was the expectation of a significant economic downturn affecting SP Blinds’ business. It said that to survive through the challenging time, the business “needed to look internally at what it could do and where it could save costs”.

[42] The letter stated that Mr Hogan’s role was to develop and maintain “a network of architects, architectural designers and specifiers in order to build trust and relationships in order(sic) to grow the sales opportunities for the business”.

[43] The letter also confirmed the proposal involved the disestablishment of the role Mr Hogan performed and materially:-

“we feel that this work is not a necessary requirement for the business at this time and not an area that will require a lot of focus when we are back up and running. We believe that when we are able to return to manufacture and install our products, we need to focus on the sales that can be converted as quick as possible in order to re-stimulate cashflow and reduce our costs as much as possible”

[44] To Mr Hogan’s detriment, SP Blinds apparently regarded its continued commercial survival necessarily involved a clear preference for liquidity rather than the specialist management of its sales pipeline.

[45] Mr Hogan provided relevant and constructive feedback. He made request for certain financial information. That information revealed that SP Blinds was at the time solvent and profitable. Mr Hogan also suggested alternatives to his redundancy.

[46] Mr Lin told the Authority that he did not really put any thought into selection criteria that led him to focus on the particular role performed by Mr Hogan, amongst all the roles performed by the employees of SP Blinds, as the most suitable role for potential disestablishment.

[47] He went on to say that it was Mr Hogan's role that was the highest paying or most expensive for SP Blinds, and as it was a role that he (Mr Lin) had created then he could disestablish it without considering other roles and the effect on the business.

[48] It is my conclusion that Mr Lin simply decided Mr Hogan's salary was the most costly for the business and for that reason alone, it was the role performed by Mr Hogan that would be disestablished because it would yield the most cost saving. I note Mr Lin's evidence that:-

“...it was not sustainable to continue with what was a ‘new’ position costing in excess of \$100,000 (plus the vehicle) at that time.”

[49] That is a different decision from whether or not the role performed by Mr Hogan was actually still required or superfluous to its needs or not essential to it. That is what the note from Mr Lin purports to represent as the consultation had with Mr Hogan. But I find it was not actually the reason that Mr Hogan's role was in fact disestablished.

[50] I do not see that there was any consultation with Mr Hogan that it was his role that was the most expensive for SP Blinds and it was proposed that it be disestablished for that reason. He is not asked to comment on that proposal or given the opportunity to challenge it, to mount a case that his salary is on a cost benefit analysis more commercially advantageous for SP Blinds. I consider that this is the decision Mr Lin actually made but he did not in fairness to Mr Hogan, provide him an opportunity to respond to that thinking.

[51] The note from Mr Lin declared that if the proposal went ahead and Mr Hogan's role was disestablished:-

“we have no other vacant positions within the business, your employment would be terminated by way of redundancy”.

[52] Once the decision was made that Mr Hogan's position was to be disestablished, there was a further consultation exercise to be undertaken, in good faith and in fairness to Mr Hogan. Redundancy is a last resort. A fair and reasonable employer will do all that it can to avoid redundancy.

[53] Mr Hogan's feedback suggested alternatives to his redundancy. However, I am not persuaded that SP Blinds engaged with him about alternatives to the termination of his employment. It ought to have done so and it was obliged to do so as a fair and reasonable employer. SP Blinds needed to undertake an engagement exercise by way of consultation with Mr Hogan as to the identification of alternatives to redundancy. Mr

Lin's letter advised that consequent upon the disestablishment of Mr Hogan's position "as there are no available positions within the business, your employment would be terminated by way of redundancy".

[54] That advice quite wrongly closed the door on engagement about the identification of alternatives to redundancy. Mr Hogan was entitled to have his employer actively give consideration and identify options and alternatives to his employment being terminated. It is apparently from Mr Lin's letter that SP Blinds wrongly considered that alternatives to redundancy was limited only to whether or not there were vacant roles into which Mr Hogan could have been redeployed. The enquiry is wider and could include consideration of alternatives such early retirement, redeployment, retraining, reduced hours, job sharing etc.

[55] The obligation on SP Blinds was to actively investigate and identify any such alternatives to Mr Hogan's employment being terminated. Even Mr Hogan's feedback did not prompt SP Blinds to engage further with him. In its letter to Mr Hogan of 8 April 2020 informing him his employment was terminated, it stated "and the fact that we have no other available positions at present" evidenced that was all SP Blinds considered its obligation to avoid redundancy involved.

[56] I conclude that SP Blinds did not give the consideration to alternatives to redundancy that Mr Hogan was entitled to. As a fair and reasonable employer SP Blinds was required to more because a fair and reasonable employer would have done more.

[57] I decline to express a view about whether or not SP Blinds met its commitments to MSD. That is not an enquiry this Authority is concerned with.

Breach of the duty of good faith?

[58] Mr Hogan claims SP Blinds breached its duty of good faith by dismissing him during the subsidy period but several days after declaring it would use its "best endeavours" to retain employees. However, that was an undertaking it gave to MSD and not Mr Hogan.

[59] I agree that consultation SP Blinds carried out with Mr Hogan was defective. But I am not persuaded that it acted to mislead or deceive him. Rather, I consider it was misguided.

[60] I accept that Mr Hogan was provided with access to information relevant to the continuation of his employment, about the decision that was proposed. There was

engagement with him that provided a means by which he was able to request and receive information relating to the decision.

[61] I am not persuaded that SP Blinds failed to act in good faith towards Mr Hogan, and certainly not to such an extent as would require consideration of remedies for Mr Hogan.

The result

[62] For the foregoing reasons I conclude that SP Blinds' decision to terminate Mr Hogan's employment for redundancy and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Hogan has a personal grievance for unjustifiable dismissal.

[63] I also conclude that SP Blinds' decision to pay Mr Hogan 80% of the salary he was contractually entitled to and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Hogan has a personal grievance for unjustifiable disadvantage.

The resolution

[64] Mr Hogan is entitled to formal orders to resolve the personal grievances I have found.

[65] I must first consider whether there was any blameworthy conduct on Mr Hogan's part which contributed to the situation that led to the personal grievances I have found. I find that there was no such blameworthy conduct on Mr Hogan's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to him.

Reimbursement

[66] In respect of the personal grievance for unjustifiable disadvantage, I make no order for reimbursement. He did not lose remuneration as a result of the unjustifiable action. The representatives negotiated the reimbursement to Mr Hogan of the unilateral reduction in his salary being the gross sum of \$832.06 (Eight hundred and thirty-two dollars and six cents).

[67] Mr Hogan described how during the Covid-19 lockdown, employers were not making hiring decisions and were retaining existing staff. He said he used his best endeavours however to find another job. He applied for and succeeded to final stage

interviews with Urban Group and Allco but he was not successful in being offer the positions.

[68] Mr Hogan's experience searching for alternative employment prompted him to make a decision to start his own business. He started Hogies Home Improvements Ltd and borrowed a start-up loan from the bank. The income from the new business was well below his salary with SP Blinds being just enough to cover the loan repayments.

[69] Hogies Home Improvements Limited made a net profit of \$15,393.35 for the 11 month period ending 28 February 2021.

[70] I am satisfied that Mr Hogan has lost remuneration as a result of the personal grievance of unjustifiable dismissal I have found. I am not prepared to find that Mr Hogan ought not be entitled to an award of reimbursement because his redundancy was genuine. I also consider that had SP Blinds properly carried out an enquiry about alternatives to redundancy it may be that Mr Hogan would not have lost remuneration.

[71] I consider Mr Hogan is entitled to be reimbursed the remuneration he would otherwise have earned had he not been unjustifiably dismissed. I am satisfied that he acted to mitigate his losses. I consider Mr Hogan ought to be reimbursed the loss of one years' salary reduced by the earnings of Hogies Home Improvements Limited. I order SP Blinds to pay the gross sum of \$85,000.00 (Eighty-five thousand dollars) to Craig Hogan as reimbursement.

Compensation

[72] Mr Hogan gives evidence that the emotional, psychological and physical stress that SP Blinds has caused him during unprecedented times was and has been an immense and terrible strain.

[73] Mr Hogan has serious doubts about the genuineness of his dismissal. He believes that SP Blinds took the opportunity presented by the pandemic to get rid of him.

[74] He says he was greatly hurt humiliated and felt a real loss of dignity by his employment being made redundant within a week. The impact of SP Blinds' decision to terminate his employment has been huge not only for him but also on his family.

[75] The redundancy left him considerably out of pocket financially, emotionally drained, and extremely stressed to the point he had a breakdown and had to attend counselling. The mental stress also progressed into physical discomfort.

[76] Mr Hogan says he was further humiliated and shocked by the complete lack of endeavours by Mr Lin to retain him as an employee and after accepting the government wage subsidy on his behalf. He says his shock was topped by the deceit of suggesting that SP Blinds would get no future sales during the alert level 4 lockdown and by putting forward a zero sales budget even though there were still jobs lined up to be completed and commenced.

[77] Mr Hogan and his wife have dependents living with them including his mother and his wife's father, their eldest son and his fiancé. They also financially support their son who lives in Melbourne. The loss of Mr Hogan's salary meant the household had only Mrs Hogan's salary.

[78] Mrs Hogan describes seeing her husband go into himself and stop talking. She says he lost a significant amount of weight and he became quite depressed. That state of depression let him to have a mental breakdown which required counselling. Mrs Hogan is a medical professional and she was able to recognise the signs of depression in her husband. She observed him not being able to eat or sleep, lacking concentration and not communicating.

[79] I am satisfied that Mr Hogan has suffered hurt and humiliation, loss of dignity and injury to his feelings as a result of his unjustifiable dismissal. Having regard to the nature of the personal grievance and the evidence given by Mr Hogan and Mrs Hogan, I make a global award for compensation in respect of the two personal grievances I have found. I order SP Blinds Limited to pay to Craig Hogan the sum of \$20,000.00 as compensation.

Costs

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

[81] If they are not able to do so Mr Turner may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Mr Organ will have 14 days to lodge any reply memorandum.