

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 152
3112573

BETWEEN CAROLYN ION
Applicant

AND MAORI INVESTMENTS
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Sally Palmer and Sheridan Climo, advocates for the
Applicant
Mary Breckon, counsel for the Respondent

Investigation Meeting: 20 and 21 January 2022 in Whakatane

Determination: 21 April 2022

DETERMINATION OF THE AUTHORITY

A. Maori Investments Limited did not act unjustifiably in the process followed or decisions made that led to the termination of Carolyn Ion's employment.

B. Costs are reserved.

Employment Relationship Problem

[1] Carolyn Ion's employment with Maori Investments Limited (MIL) ended on 24 January 2020 on the grounds of redundancy. She had worked four days a week as the company's Office Administrator since August 2017. Ms Ion had arranged not to work on Tuesdays so she could use that day to attend various meetings in her role as an elected councillor of Kawerau District Council.

[2] During a restructuring process carried out by MIL chief executive officer Kiriwaitangi Rei between October and December 2019 Ms Ion was offered a full-time

position as office receptionist. Ms Ion declined that role because working five days a week would have prevented her attending various council meetings and other duties she had scheduled for Tuesdays. Instead she opted for a redundancy option MIL provided for employees who did not want to take up whatever role they were offered or to express interest in being considered for other roles created in the restructuring process.

[3] By letter dated 17 January 2020 Ms Rei had given Ms Ion notice that her employment would end due to redundancy on 17 April 2020 if she did not accept the receptionist role or did not succeed in gaining one of the other available roles. The letter identified five other roles available to staff affected by the restructure. Three of those roles were for 30 hours a week.

[4] Ms Ion met with Ms Rei on 24 January to advise she was opting for redundancy. By that time Ms Rei was aware two other staff members had also opted for redundancy so at least two of the 30-hour positions were available. Ms Rei asked if Ms Ion would consider accepting one of those roles, as Payroll and Finance Officer, but Ms Ion declined. Ms Ion arranged to leave work that day. She was paid two months' salary as redundancy compensation, provided under a term in her employment agreement, and paid notice for three months taken from the date of the 17 January letter. Her employment agreement required three months' notice for redundancy terminations but not paid notice for that period.

[5] Ms Ion subsequently raised a grievance alleging the process followed by MIL was flawed, the offer of a full-time receptionist role was not genuine because MIL knew she could not accept it and alternative options to her working full time were not adequately explored. Her application to the Authority, and witness statements lodged later in support of her case, also alleged MIL's restructuring process was engineered to remove her and other staff members Ms Rei did not like.

[6] MIL denied those allegations. It said the restructuring was necessary for genuine business reasons and was carried out through a fair process in which feedback of staff members, including Ms Ion, was taken into account in the structure finally adopted. MIL said it was obliged to offer Ms Ion the full-time receptionist role it created in the restructuring as that role was closest to what she already did. When Ms Ion declined that role, MIL said it did what it could to continue her employment by asking her to consider another part-time role with the same hours and salary.

The Authority's investigation

[7] For the Authority's investigation the following seven witnesses provided written statements:

- Ms Ion;
- Ms Rei;
- Sandra Collins-Rieger, a consultant who provided advice to Ms Rei during the restructuring process;
- Christine Powell, a MIL employee who attended some of the staff meetings about the restructuring;
- Kimiwai Karekare, a former MIL employee who also opted for redundancy in January 2020;
- Daryll Simpson, another former MIL employee who also opted for redundancy in January 2020; and
- Waimātao Temo, another former MIL employee who had worked in its office and as a manager of one of its businesses.

[8] All witnesses attended the Authority's investigation meeting. Under affirmation they confirmed their written statements and gave further oral evidence by answering questions asked of them. The parties' representatives also gave oral closing submissions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. The seven witnesses provided extensive evidence, both in writing and in answers to questions over the two days of the investigation meeting. The parties also provided many documents about the restructuring process and communication during and about it. All this evidence has been thoroughly reviewed. However, as provided for in the Act, this determination does not set out an account of all that evidence or the closing submissions made by the parties' representatives at the investigation meeting about the facts and relevant legal principles. Rather, conclusions reached are explained by reference to the key facts and in light of the parties' submissions. Those conclusions are reached on the civil standard of proof, that is the balance of probabilities. It is an assessment, from the evidence, of what was more likely than not to have happened.

The issues

[10] The issues identified for investigation and determination were:

- (a) Was MIL's decision to disestablish the Office Administrator position held by Ms Ion, and how that decision was reached, made for genuine business reasons, without ulterior motive and following a fair process?
- (b) If not, was the termination of Ms Ion's employment on the grounds of redundancy, an unjustified dismissal?
- (c) If not an unjustified dismissal, was Ms Ion nevertheless unjustifiably disadvantaged by what MIL did and how it carried out its redundancy process and decisions?
- (d) If MIL did act unjustifiably, what remedies should be awarded? And, if any remedies were awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Ion contributing to the situation giving rise to her grievance?
- (e) Did MIL breach good faith duties in how it carried out its redundancy process and, if so, should a penalty be imposed?
- (f) Should either party contribute to the costs of representation of the other party?

The test of justification

[11] Ms Ion's employment agreement with MIL included a standard definition of redundancy. It describes a situation where the employment of an employee is terminated by the employer in circumstances attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.

[12] In considering an employer's decision on redundancy, the Authority does not substitute its own judgement for the employer's assessment of whether a position was surplus to its needs. Rather, when called on to consider if a dismissal for redundancy was justified, the Authority must determine, on an objective basis, whether the employer's actions, and how the employer acted, met the statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time.¹

¹ Employment Relations Act 2000, s 103A.

[13] Where questions are raised about the commercial rationale for the employer's decision, or ulterior motives are alleged for the selection of a position and an employee for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and not as a pretext for dismissing a disliked employee.²

[14] The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Employees likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. 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 particular employer.³

Restructuring was considered for genuine business reasons

[15] MIL is an asset holding entity with around 4,500 shareholders. In 2016 MIL's board decided on a change in business strategy, from passive holding of forest and other land assets to also investing in and managing commercial assets in the agricultural and horticultural sectors. Over the following years it purchased several kiwifruit and blueberry orchards. Its employees previously comprised a small office-based team of administrators. Operation of the newly-purchased businesses resulted in a substantial increase in the number of employees, particularly during seasonal harvesting in its orchards. In turn this resulted in the duties of MIL's administrative office expanding to include operation of a payroll for many seasonal workers and additional business auditing requirements.

[16] The evidence of all witnesses confirmed operation of the payroll during the seasonal peaks placed considerable strain on the existing administrative staff and their operating procedures. Four office staff became involved in various aspects of administration of the payroll, including Ms Ion. There were instances where this

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

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

additional work, in turn, affected the ability of the office staff to complete other work on time or correctly.

[17] In that context there was no real doubt MIL had a genuine business reason for considering restructuring of its administration staff positions and their mix of duties. It was not a situation where a business needed to look at reducing staff and cutting costs. Rather MIL could reasonably have decided to consider the number and nature of roles needed to meet the requirements of its expanding operation.

The process followed was fair

[18] At a staff meeting on 18 November 2019 Ms Rei advised office staff that she and Ms Collins-Rieger were reviewing the structure for MIL's office team and their input would be sought both in group sessions and through discussions anyone wanted to have with Ms Rei individually. An email sent on 22 November advised the five office staff that their next staff meeting, on 27 November, was an important meeting as Ms Rei would "be discussing the proposed future structure of MIL".

[19] At that meeting Ms Rei presented a restructuring proposal which noted some new roles could be created and some roles could be disestablished. It included two "medium term" options, for up to five years, and one long term option. The proposal included a timeframe with dates for feedback and decisions, running from late November 2019 through to mid-January 2020. Following discussion in the meeting Ms Rei agreed to schedule two staff meetings to provide feedback, rather than just one as she initially suggested.

[20] On 4 December Ms Ion arranged to meet on her own with Ms Rei to talk about some questions she had about the proposal. In that meeting Ms Ion mentioned Ms Rei had not told staff they could have a support person with them during discussions about restructuring. Ms Rei promptly addressed that concern in an email to all office staff saying they were welcome to bring a support person to the feedback meetings and the outcome meeting. However she also said if any staff member was not comfortable with additional people attending those meetings to let her know. If any such concerns were expressed, Ms Rei said feedback meetings planned for 9 and 16 December would be held individually with anyone bringing a support person and, for everyone else, as a group.

[21] During the following days office staff arranged their own meetings both at work and at their own homes to discuss the proposals. As a result of one of those discussions, Ms Ion, Ms Karekare and Ms Simpson jointly submitted a two-page feedback document. It included a chart of the proposed positions. Their chart was adapted from one of the options provided to them in their 27 November staff meeting. Their chart included a full-time receptionist role, a full-time Finance Officer role and a .75 FTE Payroll and Finance Officer role.

[22] MIL's final proposed structure, presented to a staff meeting on 13 January 2020, included the three positions Ms Ion and her two colleagues had also identified as necessary in the feedback they had given. The only significant difference was that the Finance Officer role in MIL's structure was for 30 hours a week, not full-time. The hours for the other two roles were the same as Ms Ion and her two colleagues had suggested in their feedback – a full-time receptionist and a Payroll and Finance Officer working 30 hours a week.

[23] There was no further feedback from staff on MIL's final proposal. Individual meetings were arranged with each staff member on 17 January to advise them of the restructuring outcome and its effect for them personally. At her individual meeting Ms Ion was offered the full-time receptionist role and given the letter setting out that offer, the prospect of applying for other roles and the redundancy option if she did not wish to have any ongoing role.

[24] Ms Ion, through her evidence and her representatives' closing submissions, criticised several aspects of how MIL carried out its restructuring process and decision-making as falling below the standard expected of a fair and reasonable employer. For the following reasons, none of those alleged flaws were established as being unfair.

[25] Firstly, the initial omission of an express reference to the right to support and representation during a restructuring process was addressed early. When Ms Ion, relying on her own experience and general knowledge of such processes, raised this point with Ms Rei, the other employees were notified promptly. The suggestion that different arrangements for feedback meetings might be made if people were attending with a representative or support person was not inherently unfair. A finding of unfairness in such arrangements would depend on the circumstances, such as whether different information might be provided and different outcomes might result. In the

actual circumstances of this case, the evidence of Ms Ion and other witnesses established they were aware of their rights to support and representation anyway but felt no need to exercise them. Most, Ms Ion included, had individual meetings or discussions with Ms Rei during the process, as well as attending the group staff meetings, and did not arrange for a support person to attend with them. No actual unfairness was identified.

[26] Secondly, and similarly, it was not unreasonable for some staff whose positions were not directly affected by the restructuring proposal to be included in the group meetings and for information about potential outcomes for all roles to be shared with everyone in those meetings. This concern related to Ms Powell attending the staff meetings where the proposal was discussed although no change to her position, as the share register administrator, was contemplated. Further, Ms Ion said she was embarrassed to have information about the possible disestablishment of her role discussed with everyone. She said it was a violation of privacy. Those concerns were misconceived.

[27] An employer can properly consult staff whose positions are not directly affected. This is because other employees may have valuable insights about the effects of proposed changes and whether they improve or worsen the situation being addressed. They should also have the opportunity to comment on how changes in other roles may affect their own role. This is also the answer to the notion that a restructuring proposal concerning interrelated roles could be addressed as a private matter. It was neither practical nor appropriate to have various changes to roles, including the reorganisation of various duties, discussed individually rather than in a group setting.

[28] Thirdly, there was adequate financial information available to those involved in discussing the proposal. This was not a situation where an employer was reducing roles and the commercial rationale for decisions was in issue. Rather, the proposal was considering how MIL should adapt itself to the needs of a growing business, not a cost-cutting exercise. And, even if such information was fairly required, Ms Ion and other employees had access to relevant figures through their work in helping to prepare the annual report and attending MIL's annual general meeting.

[29] Fourthly, the restructuring proposal included adequate opportunities for input from employees. Important parts of the outcome suggested their feedback had been

considered in the final proposal advised to them on 13 January and implemented from 17 January onwards. This was apparent from the inclusion of the three positions Ms Ion, Ms Karekare and Ms Simpson had identified as appropriate in the feedback they gave about the structure.

No ulterior motive established

[30] While their views appeared to align with the conclusions reached by Ms Rei about an appropriate medium-term structure, the evidence disclosed a gap between how Ms Ion and her colleagues saw those positions then being filled and what Ms Rei believed was necessary for MIL to do in completing the restructuring proposal.

[31] Although Ms Ion had been involved in proposing a full-time receptionist role, she had not intended that she would fill such a position despite a large part of her existing role being carried out at the MIL office front desk.

[32] According to her evidence at the investigation meeting, Ms Ion saw herself as taking up the role of payroll and finance officer as that included some work she was already doing, aligned with skills and experience she had, and also was for a number of hours that would fit with her being able to continue her commitments as a local councillor.

[33] However, as became clear through the evidence of Ms Rei and Ms Collins-Rieger, Ms Ion had not communicated that expectation to them, either through what was said in the written feedback from her and her two colleagues or any individual conversation. While Ms Rei was surprised the written feedback supported a full-time position for the “front of house” role, she acted on advice from Ms Collins-Rieger that staff members should be offered the role closest to their current job when making appointments to the restructured positions.

[34] But Ms Ion perceived the offer of the full-time receptionist position differently from what Ms Rei said was intended. Ms Ion saw it as Ms Rei proposing something she knew Ms Ion could not or would not accept so that Ms Ion would, instead, opt for redundancy. In part this was because Ms Ion had only recently agreed an update to her employment agreement. The variation recorded an extension of her weekly hours from 22 to 30 and listed extra duties she was doing in liaising with the orchard businesses

and assisting with payroll. It also recorded agreement that Ms Ion was “not available to work on a Tuesday”.

[35] Ms Rei had also asked Ms Ion in the previous week to attend a meeting about payroll issues and Ms Ion understood from what was said then that she would continue in a payroll-related role, likely the Payroll and Finance Officer position.

[36] In that light Ms Ion saw the full-time role offered to her in the 17 January meeting as indicating MIL, and Ms Rei particularly, did not want her employment to continue. Her view was reinforced by what she said was Ms Collins-Rieger’s response when Ms Ion referred to a full-time role conflicting with her council commitments. Ms Ion said Ms Collins-Rieger responded by saying Ms Ion would have to “fix that”.

[37] Ms Collins-Rieger and Ms Rei had a different recall of what was said in that conversation. Ms Rei said that, when Ms Ion asked why MIL was offering her a full-time role, Ms Collins-Rieger replied that the role was effectively what Ms Ion already did and MIL had to offer it to her. However Ms Collins-Rieger also referred to the other roles created in the restructuring and said Ms Ion could apply for one of those.

[38] All three women agreed in their evidence that Ms Ion had not given any indication in that conversation, her prior feedback or subsequent communication with Ms Rei that she considered the Payroll and Finance Officer role most appropriate for her continued employment with MIL. It was not a situation where Ms Rei knew of that view and preference but ignored it.

[39] Weighing the evidence about those discussions, and the process followed, there was not enough to say the decisions made and positions offered by Ms Rei were ‘engineered’ or masked an ulterior purpose of ending Ms Ion’s employment.

[40] The evidence of Ms Temo, however, required further evaluation of the circumstances and that conclusion.

[41] In the latter half of 2018 Ms Temo started worked for MIL as Ms Rei’s executive assistant. As well as working with Ms Rei during the day, Ms Temo also travelled by car with Ms Rei from their homes in Rotorua to MIL’s offices in Kawerau each work day. As a result of this work Ms Temo had heard Ms Rei talk about her

views of various staff members and make phone calls where she talked about how to go about restructuring the business.

[42] In December 2018 Ms Temo was appointed as manager of one of MIL's businesses. From then she worked at different premises and did not travel to work with Ms Rei.

[43] Ms Temo's employment with MIL ended in August 2020 when she resigned after a period of ill-health. She was later offered an administrative role but this offer was withdrawn in December 2020. An advocate acting for Ms Temo subsequently advised MIL in March 2021 she would pursue a personal grievance. MIL said it would attend mediation with her but received no response. A few months later, in July 2021, Ms Temo offered to give evidence in support of Ms Ion's personal grievance against MIL.

[44] Ms Temo had attended some of the meetings held with MIL staff about the restructuring proposal in late 2019 and early 2020. She said she had also heard some conversations between Ms Rei and Ms Collins-Rieger about the restructuring when they were meeting with her at the MIL business she managed.

[45] From her contact with Ms Rei in late 2018, attending some of the staff meetings and what she heard from Ms Rei and Ms Collins-Rieger, Ms Temo's evidence was that she believed the restructuring process was intended to end the employment of Ms Simpson and Ms Karekare because Ms Rei did not like them. She said the restructuring was extended to include Ms Ion's role because Ms Rei was annoyed by questions Ms Ion had asked at staff meetings about the proposal.

[46] Ms Rei and Ms Collins-Rieger both firmly rejected those allegations.

[47] In weighing that evidence, and for the following reasons, I have concluded Ms Temo's evidence was not sufficient to establish the restructuring proposal, and decisions Ms Rei made about creating and reorganising positions, were designed or used as a pretext to end the employment of Ms Ion.

[48] Firstly, the balance of evidence from both Ms Ion and Ms Rei established Ms Ion was, during the course of her employment, a trusted and valued member of MIL's staff and she had a sound working relationship with Ms Rei. There was, as a matter of

likelihood, some misunderstanding between them about why Ms Ion was offered the full-time receptionist role on 17 January 2020. However the evidence assessed overall points strongly towards Ms Rei intending and expecting Ms Ion would continue to work for MIL in some capacity following the restructure.

[49] Ms Ion's own evidence was that Ms Rei was upset to hear in their 24 January meeting that Ms Ion was opting to take redundancy rather than seek one of the available roles. I accept Ms Rei's evidence that she was shocked and asked Ms Ion to consider one of the other new positions, saying appointment to one of those roles would be uncontested as both Ms Simpson and Ms Karekare had opted for redundancy. Ms Ion responded that she had made her mind up and was not interested in other roles.

[50] Secondly, even if Ms Temo correctly reported critical personal opinions Ms Rei expressed about some staff members, this did not establish the restructuring process was predominantly for the purpose of ending their employment. The evidence amply established the strains that growth had placed on MIL's office operation, including the capacity of some staff members to meet the growing demands. Ms Temo may have heard Ms Rei make comments about those staff in that context but it did not establish the level of animus about them that Ms Temo attributed to her. Significantly, the outcome of the restructuring process included various roles suitable for those three staff members and each of them had an opportunity to claim one of those roles. They each, for various reasons, chose not to pursue those options.

[51] Thirdly, Ms Temo's evidence was inevitably influenced by her own disappointments about how her employment with MIL had later ended. In part it relied on speculation and was at odds with some earlier views she had expressed. In her witness statement Ms Temo said the proposal for a full-time receptionist role was "only ever created so Ms Rei could remove Ms Ion" and the reception duties could be covered on Tuesdays by other staff. However Ms Temo's own written feedback about the proposal in December 2018 said "the receptionist role should be stand alone and full time".

[52] Taken overall the available evidence did not support a conclusion that decisions made about the positions in the restructuring process and the basis on which Ms Ion was offered ongoing employment were tainted by inappropriate motives related to personality or other concerns.

Alternatives to redundancy were fairly offered

[53] Ms Ion claimed MIL had failed to genuinely consider redeploying her to other roles once it decided to disestablish her 30-hour a week role as its office administrator.

[54] The proposition was at odds with evidence of both the outcome letter given to her on 17 January and the request made of her by Ms Rei in their 24 January meeting when Ms Ion said she was opting for redundancy. Accepting the full-time receptionist role formally had to be offered to Ms Ion but was not viable for her, the letter identified four part-time roles for which she could have applied. At least three of those roles were within Ms Ion's skill set and experience. By the time of the 24 January meeting the decisions of other employees to take the redundancy option meant Ms Rei could, and did, offer Ms Ion the uncontested option of taking the Payroll job. It was Ms Ion who closed her mind to that alternative to redundancy, not MIL.

Flaw in notice period

[55] Examination of the evidence during the investigation meeting did identify one flaw in the process adopted by MIL. It was not a point Ms Ion had pursued in her application to the Authority but is addressed here as it could have amounted to one instance of unfairness in what was done and how it was done.

[56] The outcome letter given to Ms Ion on 17 January said that if she did not accept the full-time receptionist role or did not apply for and gain one of the other roles, "this letter will serve as notice of termination of your employment due to redundancy effective Friday 17 April 2020".

[57] Her employment agreement, as clause 15.7, had this term on notice of redundancy:

In the event that the employment of the Employee is to be terminated for reasons of redundancy, MIL shall give three months' notice to the Employee of the termination of the Employee's employment.

[58] The approach to notice taken in the 17 January letter conflated the definition of redundancy, given in an earlier clause, as being where the position "will become" superfluous with the notice clause's reference to where employment "is to be terminated". The first reference is in the future tense. The second is in the present tense. As worded, the notice period is properly interpreted as running from the date where the employer had completed consideration of alternatives to dismissing an

employee for redundancy. It was premature for MIL to give notice of termination on 17 January. Its own process, before notice of termination of employment could be given, had some time still to run. Firstly, Ms Ion had to make a choice about the position offered to her and, secondly, if seeking an alternative role, any selection or appointment decision had still to be made. Only after completing that process, if no alternative role was confirmed, could MIL reasonably have said the employment “is to be” terminated for reasons of redundancy.

[59] In Ms Ion’s case this process was completed in one week because she told Ms Rei on 24 January that she was not accepting the offered role or seeking any others. She provided Ms Rei with her signed redundancy “preference” form and arranged to finish work that day.

[60] Theoretically MIL could have declined to pay Ms Ion the two months’ redundancy compensation provided in her employment agreement because that was limited to situations where the employee was not offered a suitable alternative position with MIL. Arguably the Payroll Officer job, at 30 hours a week and including some payroll functions Ms Ion already carried out, was such a suitable alternative. However MIL had opted to waive that limitation in the restructuring outcome it notified to her and other employees. Although not expressly included in the 17 January letter, the option to “take redundancy” was understood by Ms Ion and others to include payment of that compensation even if an alternative role was available.

[61] Similarly the agreement did not require the three month notice period to be paid but MIL exercised a discretion to pay Ms Ion and others electing redundancy for the notice period.

[62] Against that background, where departing employees were paid more than their minimum contractual entitlements, no unfairness occurred and no claim was made in relation to what was arguably a notice period one week shorter than technically required.

Outcome

[63] For the reasons given Ms Ion has not established MIL acted unjustifiably in the decisions made and the process followed that led to the end of her employment with it. Accordingly, Ms Ion’s application to the Authority is dismissed.

Costs

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

[65] If they are not able to do so and an Authority determination on costs is needed MIL 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 Ion 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.

[66] 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.⁴

Robin Arthur
Member of the Employment Relations Authority

⁴ www.era.govt.nz/determinations/awarding-costs-remedies/.