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TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 115
3021671

BETWEEN LMN
Applicant

AND BANK OF NEW ZEALAND
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Chris Fernando, Counsel for the Applicant
Andrew Schirnack and Susannah Maxfield, Counsel for
the Respondent

Investigation meeting: 27 April 2018

Submissions received: 4 May 2018 from the applicant
11 May 2018 from the respondent

Determination: 17 August 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 I prohibit from publication Mr LMN's real name and any information that may identify his real name/identity. I have made this decision without an application from Mr LMN because I consider his health remains seriously affected and it will not be in his best interests to be identified in any media reports of my determination.

[2] Mr LMN worked as an Auditor in Specialised Finance (Invoice and Stock Finance) for the Bank of New Zealand (BNZ). He is a qualified chartered accountant who had previously worked as a tax consultant/tax advisor at Grant Thornton.

[3] Mr LMN claims that in December 2016 the BNZ unjustifiably dismissed him by way of a sham redundancy that was aimed at getting rid of him personally, as opposed to making the role redundant.

[4] He says the decision was based on flawed data. Mr LMN says that the BNZ breached its duty of good faith to him, however, he does not seek a penalty for the breach.

[5] By way of remedy for the unjustified dismissal, he claims lost wages, and compensation for humiliation, loss of dignity and injury to his feelings. He also claims compensation for his loss of use of the BNZ car.

[6] Mr LMN originally asked to be reinstated to his previous role but withdrew that claim, confirming the withdrawal at the investigation meeting.

[7] The BNZ says that it made Mr LMN's role redundant for genuine reasons, supported by sound commercial sense. It says it used a fair process and acted reasonably and in good faith towards Mr LMN.

[8] I have issued this reserved determination four days outside of the three-month period after receiving the last of the submissions. Under s 174C(4) of the Employment Relations Act (the Act) the Chief of the Authority has decided that special circumstances exist and has allowed me to provide the determination outside of the usual three-month period.

Issues

[9] I need to resolve the following issues in determining Mr LMN's claim:

- (i) Did the BNZ have substantive justification for making Mr LMN's role redundant?
- (ii) Did the BNZ follow a fair procedure in making Mr LMN's role redundant?
- (iii) Should the BNZ pay any remedies to Mr LMN?

Factual background

[10] In 2008, Mr LMN was approached about whether he would be interested in working as an auditor for invoice finance within the BNZ. He left his job at Grant Thornton to undertake the BNZ role. He was appointed as a Senior Associate-Audit Invoice Finance in June 2008, initially based in Wellington. At the time, there was one other auditor in the same role based in Auckland. Initially, Mr LMN undertook all the audits in the lower North Island and in the South Island.

[11] In early 2009, Mr LMN moved to Christchurch, his home town. He remained responsible for all the audits in the South Island, including the Nelson region and the lower North Island. After the February 2011 Canterbury earthquake, the Wellington based auditor took over the lower North Island audits from Mr LMN. Mr LMN remained responsible for the South Island.

[12] In 2016, the invoice finance audit team consisted of five auditors with three in Auckland, one in Wellington and Mr LMN in Christchurch.

[13] Mr LMN helped with audit visits in the Wellington region from time to time. From time to time, the Wellington-based auditor undertook some audits in the Nelson region, if Mr LMN was on leave, for example. Otherwise, all auditors undertook audits for customers in their own region.

What is the role of the invoice finance audit team?

[14] Invoice finance is a type of business finance provided to relatively small businesses that are growing rapidly and need to supplement their cash flow. The BNZ arranges credit for the business based on the invoices the business has issued to its customers in a given month.

[15] Each invoice finance customer was given an invoice finance rating by the BNZ, from 1-5. A rating of 1 represents the lowest risk and 5 represents the highest risk.

[16] There are three types of audits. An auditor completes a desktop audit based on paperwork and while at their own office, for example, Mr LMN undertook desk top audits at his Christchurch base. An auditor completes a standard audit visit and a stock audit visit at

the customer's premises. Therefore, there is travel involved in such audits, sometimes within the city in which an auditor is based and sometimes out of town.

[17] The risk rating determined how frequently the customer's business would be audited and what kind/s of audit would be done. For example, prior to 2017 a business with the highest rating of 1 would have an audit only every six months, with an audit visit and a desktop audit alternating. Whereas, a business with a rating of 5 would have an audit visit every one to two months and never have a desktop audit. Businesses rated 4 would never have a desktop audit, and would be audited every two or three months.

The continuous improvement project

[18] Mark Sutton was the BNZ's Centre Manager Invoice Finance and in August 2016 was Mr LMN's manager. Mr Sutton remained in charge of the redundancy process despite a new manager becoming responsible for the risk teams, which Mr LMN's role was within, in October 2016. Mr Sutton was based in Auckland.

[19] In late July 2016, Mr Sutton initiated a project to try to reduce the number of audits, in particular audit visits, done by each auditor. Mr Sutton hoped to increase the auditors' capacity to focus on high-risk customers and those new to invoice finance. He also wanted to decrease the auditors' travel costs.

[20] He wanted to see if changing the type of audit rating, to leave out the eCRS rating, a rating used within the broader BNZ business, would reduce the rating customers got. If customers had lower risk ratings then invoice finance could reduce the frequency of audits and replace some audit visits with desktop audits.

[21] Mr Sutton directed Andrew Williamson, who was a risk analyst in the invoice finance team, to assess how changing the audit rating would alter the auditors' workload.

Andrew Williamson's work

[22] Mr Williamson collected information about the number and types of audits that the auditors had been doing. He also prepared a forecast of audit numbers for 2017 based on the audit rating then being applied, and compared the two types of audit ratings to ascertain if

changing the audit rating would result in a decrease in the number of audits done, especially audit visits.

[23] There were “live” online audit schedules that were updated and therefore changed frequently, for example, if a customer’s risk rating changed, a customer left or new customers were added. Mr Williamson realised those schedules allowed him to identify each auditor’s current customers, but did not give him a complete picture of the audits an auditor had concluded over the past year.

[24] Therefore, Mr Williamson reviewed all the customer files for the customers identified on the audit schedules by viewing the audit reports contained in a folder on each file.

[25] Mr Williamson said he reviewed 262 customer files, of which approximately 35 were Mr LMN’s customers. He then gathered data on customers who were no longer in the current audit schedules but who had audits conducted over the past 12 months. Mr Williamson’s evidence was that he was very confident that he was able to calculate the exact number and type of audits each auditor had done in the past 12 months.

[26] Mr Williamson estimated the amount of time each type of audit took by speaking to each auditor for their assessment of how long each type took them. He then calculated the average time taken for each kind of audit to be completed. Mr Williamson’s calculation was that, on average, a standard invoice audit took five hours, an invoice and stock audit took six hours and a desktop audit took one hour.

[27] Mr Williamson said that he noticed early on that Mr LMN had fewer customers than the other auditors. However, his role was limited to gathering and collating information for Mr Sutton, in particular, preparing a comparison of the number of audits necessary depending on each risk rating.

[28] Mr Williamson provided the data to Mr Sutton and had a meeting with him to explain the tables he presented.

[29] On 30 August 2016, Mr Williamson sent the team the comparison information he had produced which was discussed at the next team meeting. The team was aware that the purpose behind changing the risk ratings was to reduce the number of audits and increase

capacity. Mr Williamson's email also said the move to the new risk rating would save money. The data produced in that email was combined data for the whole country and was not broken down on a per auditor basis.

[30] At that stage, Mr Williamson calculated that the overall number of audits would reduce by 133 and the number of hours spent auditing would reduce by 882 nationally.

Mr LMN's performance review with Mr Sutton

[31] On 9 September 2016, Mr LMN had his "end of year conversation" with Mr Sutton. Mr LMN says that he asked for a pay rise at this meeting. In reply, he says Mr Sutton told him that he was lucky to have a job. Mr LMN believes that Mr Sutton targeted his position for redundancy because he asked for a pay rise and because he was the highest paid auditor in the team.

Mr LMN's 2017 proposed audit schedule

[32] On 26 September 2016, Mr Williamson sent Mr LMN an email with a proposed audit schedule for Mr LMN's 2017 year based on the new rating system. He grouped the on-site audits requiring out of town travel by location. The proposed schedule included the Nelson customers. He asked Mr LMN for feedback. Mr LMN responded that it looked like a good plan in theory, noting that in reality things could change depending on client availability.

Mr Sutton formulates the proposal to disestablish the South Island position

[33] At the time Mr Sutton decided to propose disestablishing the South Island auditor's role, the auditors had different numbers of customers with Mr LMN's client load at 35, including the Nelson customers. The Wellington auditor had 50 customers without the 6 Nelson customers. The Auckland auditors had 62, 61 and 54 customers respectively. Mr Sutton formulated a proposal to disestablish the South Island auditor's role and have the South Island customers picked up by the other auditors whose workloads had also decreased with the new risk rating system.

[34] Gina Miller was the BNZ human resources business partner for the customer fulfilment services business unit. The invoice finance team was part of that unit. In late September 2016, Mr Sutton consulted Ms Miller about the potential restructuring in the audit team. Ms Miller gave Mr Sutton advice about the process for proposing a redundancy. She

worked with him to create the written proposal and accompanying information. Ms Miller was not a decision-maker.

[35] On 13 October 2016, Mr LMN was at a site visit for a new client when Mr Sutton sent him an email asking to meet with him in Christchurch the following day. Mr LMN says that the email caused him some anxiety because he did not know why Mr Sutton was coming to Christchurch to see him.

The proposal

[36] On 14 October 2016, Mr Sutton met with Mr LMN in Christchurch and Ms Miller joined them by phone. Mr Sutton presented the proposal to Mr LMN as being a result of the continuous improvement project. He said the new risk ratings had significantly reduced the workload in Mr LMN's position. The figures used were that overall audit visits had reduced by 30% per annum but that in the South Island audit visits had reduced by 46% per annum.

[37] Mr Sutton told Mr LMN that meant he would have fewer than 1 audit visit per week during 2017. Mr Sutton proposed that the North Island based team could undertake those audits because of their increased capacity, also arising out of the new risk ratings.

[38] The proposal excluded Mr LMN's Nelson audit figures. Ms Miller's understanding was that there was no predictability in whether Mr LMN undertook the Nelson audits, or the Wellington auditor did.

[39] The figures included in the proposal also excluded the desktop audits.

Consultation

[40] Mr Sutton and Ms Miller gave Mr LMN until Monday, 24 October 2016 to give his feedback. However, that was Labour Day. When Mr LMN pointed that out Mr Sutton said he could give his feedback by Tuesday, 25 October 2016.

[41] Ms Miller told Mr LMN about the support BNZ would make available to him, which included the employee assistance programme services, BNZ's wellness website and change tool kits.

[42] Mr Sutton gave Mr LMN the opportunity to go home for the rest of the day, which he did.

[43] Mr Sutton later provided the proposal to the full team, excluding Mr LMN who had declined to attend that meeting. Mr Sutton asked the other auditors for feedback on the proposal because if there was no auditor in the South Island they would have to undertake all the South Island audits.

[44] Mr LMN provided written feedback to Mr Sutton on 24 October 2016, despite it being Labour Day. Mr Sutton says he carefully considered Mr LMN's feedback. The other auditors gave no feedback on the proposal.

Confirmation of the proposal

[45] On 27 October 2016, Mr Sutton and Ms Miller (by phone) met with Mr LMN. Mr Sutton confirmed that Mr LMN's role would be disestablished.

[46] Mr Sutton and Mr LMN discussed the audit numbers and Mr Sutton says he did his best to respond to Mr LMN's questions and concerns at the meeting which Mr Sutton said were largely the same as the written feedback. Mr Sutton confirmed that Mr LMN's role would be made redundant.

The law on redundancy

[47] Mr LMN not only claims the redundancy was not genuine, but also that he was targeted personally and the redundancy has ruined his career as an accountant.

[48] The BNZ is required to prove that its decision to disestablish his position and dismiss Mr LMN was justified and it met the notice and consultation requirements of the Employment Relations Act 2000 (the Act). It needs to prove that it acted as a fair and reasonable employer could have acted in all the circumstances at the time.

[49] In *Grace Team Accounting v Brake*¹, the Court of Appeal said that if an employer can show that a redundancy is genuine and that consultation requirements have been met then the test of showing that the dismissal was justified is likely to be met:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.²

¹ See *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] ERNZ 129.

[50] In *Scarborough v. Micron Securities Products Ltd*³, the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[51] A fair and reasonable employer will act in good faith. There are specific additional duties of good faith on an employer who proposes to disestablish a position by way of redundancy. Section 4(1A)(c) of the Act 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 an employee to provide:

- the affected employee with access to information relating to the continuation of the employee's employment, and
- an opportunity to comment on that information before the employer makes its decision.

[52] When assessing if the redundancy was genuine it is not my role to substitute my business judgement for that of the BNZ. What I must do is look at the analysis made by the BNZ to determine that disestablishment of the South Island auditor's role was appropriate and that the termination of Mr LMN's employment was required. Based on this analysis I must then decide:

- (a) Whether the conclusion to disestablish the South Island auditor's role was one that a fair and reasonable employer could have made in those circumstances; and
- (b) Whether the decision to terminate Mr LMN's employment, because of that, was one that a fair and reasonable employer could have made in those circumstances at the time.

Mr LMN's criticisms of BNZ's decision

[53] Mr LMN made a number of criticisms of the BNZ's approach both before it made its decision to make his role redundant and since then in his application and submissions to the Authority.

² Note 2, paragraph [85].

³ [2015] NZEmpC 39

Impact of a new salesperson

[54] Mr LMN says that the reason there were fewer customers in the South Island was, in part, because from the end of 2015 the South Island did not have a dedicated invoice finance salesperson. In late 2016 the BNZ appointed a new salesperson who was due to begin work in November 2016. Mr LMN says that his role should not have been disestablished because the new salesperson may have obtained sufficient new customers to justify keeping him on.

[55] Mr Sutton's evidence was that he had considered the potential impact of a new salesperson when he was developing the proposal. He said he telephoned the manager in charge of the sales team to ask for his view on whether the new salesperson would be able to significantly increase the number of invoice finance customers in the South Island. Mr Sutton's evidence is that the manager told him he did not expect a significant increase. Mr Sutton took that into account in deciding whether to propose the redundancy.

Time used to calculate the 2017 workload was variable

[56] Mr LMN submits that the time relied on to forecast the 2017 workload was not a fixed, reliable measure and so the data was not reliable. That is because Mr Williamson made an estimate of average times for each kind of audit. However, Mr LMN pointed out that the types of audits for any one customer may change over a period of time. For example, an audit visit could change into a desktop audit and vice versa depending on material risk identified by the auditor.

[57] I do not consider that the fact that there was only an estimate of time taken for each type of audit reduced the BNZ's ability to rely on Mr Williamson's assessment of the time each type of audit took. Clearly, the forecast was not a fully fixed schedule of the number and type of audits that each auditor would do in 2017. However, Mr Williamson used a fair way to assess the likely period of time each type of audit would take. Mr Williamson sought Mr LMN's estimate of the time taken for each audit, along with the estimates of the other auditors.

[58] In addition, Mr Sutton was well aware that the type of audit deemed necessary may change over the year with any change in customer risk.

Desktop audits and Nelson audits were deliberately and maliciously not included in the figures used to support the proposal

[59] Mr Sutton had asked Mr Williamson to provide a forecast for Mr LMN for 2017 that compared the workload if he undertook the Nelson audits, to the workload if he did not undertake the Nelson audits. There were 6 Nelson customers.

[60] Mr LMN says that in doing so Mr Sutton demonstrated that he had already made up his mind to get rid of Mr LMN and pass the Nelson customers to the Wellington auditor. I do not accept that. Mr Sutton was entitled to assess what difference the Nelson customers made to Mr LMN's workload. In addition, the Nelson audits had historically been undertaken by Mr LMN when he worked in Wellington. It was reasonable for Mr Sutton to consider what difference it would make to Mr LMN and the Wellington auditor's workloads if the audits were managed in Wellington again.

Errors of computation

[61] Mr LMN points out some errors in the BNZ's audit schedule numbers. For example, there are clear errors in two different BNZ audit schedules for Mr LMN's 2017 year that were current in October 2016 (17 and 31 October 2016). In the 17 October schedule the total annual audit figure is 99, when it should be 100. In the 31 October schedule Mr LMN's total annual audits has reduced to 98, although the schedule records the number as 97.

[62] I note that in each schedule Mr LMN's customer numbers are 36, one more customer than Mr Williamson had identified in August and September 2016.

[63] There are other computational errors Mr LMN has highlighted. They do not all relate to his 2017 forecast of audits, but to those of other auditors.

[64] Mr LMN asserts that either Mr Sutton or Mr Williamson "tampered" with the audit schedules to make it look as if he would have fewer audits to do than was actually the case. That does not explain why there are computational errors in other auditors' schedules.

[65] Having heard evidence from Mr Sutton and from Mr Williamson, I do not consider that they deliberately tampered with the figures at all, let alone for any negative purpose. There were clearly mistakes, but ones that Mr LMN was awake to and in the case of the

17 October schedule, at least, he would have been able to bring the computational error to the BNZ's attention before it made its decision about the role. There would have been no utility in tampering with the figures as Mr LMN's skill lies with figures, and both Mr Sutton and Mr Williamson were well aware of that.

[66] Mr LMN has a related concern that in leaving out the Nelson and desktop audits in his formulation of the proposal Mr Sutton manipulated the available data to exclude some of Mr LMN's material workload.

[67] I have already decided that Mr Sutton was entitled to know the figures with and without the Nelson workload. However, Mr LMN's submission is that his workload reduction would have been far less if the Nelson audits and all the desktop audits were included. He believes Mr Sutton deliberately and wrongly excluded them to make the case for his redundancy more compelling.

[68] Mr Sutton's explanation for excluding the Nelson customers and the desktop audits for 2017, was that even with those audits included Mr LMN's workload was still far lower than that of the other auditors.

[69] The proposed rationale for the redundancy set out in the proposal was that the new risk rating system had reduced the national overall number of audit visits by 30%, but in the South Island, the reduction was 46% per annum, down to 44 visits per year. Therefore, Mr Sutton assessed that Mr LMN had less than one audit visit per week, which was insufficient to retain a full-time auditor in the South Island.

[70] However, if the Nelson audit figures were included, which in fairness they should have been, the number of audit visits in 2017 that Mr LMN would have had in the South Island was 51, not 44. Mr Williamson assessed the number of desktop audits as increasing from 24 to 40, making a total of 91 audits for 2017, including desktop audits.

[71] By comparison, I note that the other auditors were forecast to have 150, 158, 147 and 147 audits respectively, including desktop audits in 2017.

[72] Mr Sutton's evidence was that even when those figures were included Mr LMN still would have had less than two audits per week, of which the desktop audits would only take

about 40 hours per annum. Mr Sutton was very clear that he still would have considered the South Island auditor's role to be surplus to BNZ's requirements if he worked on the numbers including the Nelson audits.

Ability to objectively decide whether to disestablish a full-time auditor's position

[73] One of Mr LMN's criticisms of Mr Sutton's decision-making is that there were no written BNZ policies, guidelines or benchmarks on what the workload of an invoice finance auditor should be. Therefore, Mr LMN questions how Mr Sutton could have objectively decided the workload to be insufficient for an auditor to be retained. He asks what would have been considered a sufficient number of audits per week. He criticises Mr Sutton for basing such a serious decision on his "feeling" that less than two audits a week was insufficient to retain the role.

[74] An employer is entitled to have a working plan in mind for its business when it puts a redundancy proposal to the employee for consultation. However, such a plan must be based on more than a "gut feeling" that a role needs to be disestablished.⁴

[75] In this case, Mr Sutton had reasonably reliable data produced by Mr Williamson about Mr LMN's workload prior to the change in the risk rating and after the change in the risk rating. He had data that showed Mr LMN's workload was lower than that of his colleagues in the North Island even prior to the change in risk ratings. I accept his evidence that he had not previously considered that the South Island role should be disestablished.

[76] The new data supplied by Mr Williamson was sufficiently reliable to allow Mr Sutton to reconsider the need for the role once the risk ratings were changed. I do not consider that Mr Sutton proceeded simply by "gut feel". He took into account data that allowed him to make an objective comparison to the workloads of the other auditors. He not only considered the demonstrable reduction in Mr LMN's workload projected for 2017 but also the reduction in the other auditors' workloads allowing them to be able to absorb the South Island audit work.

⁴ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71

Was the purpose all along to save money and that was unfairly hidden by the BNZ?

[77] Mr LMN submits that the BNZ misled him by not stating from the outset that the purpose of the project was to save money. If that were correct it would mean that the BNZ had breached its duty of good faith to Mr LMN.

[78] Mr LMN says that the aim in changing the risk rating must have been to save money all along because it ended in his dismissal. He says that BNZ is lying about its motivation for proposing his redundancy. He relies, in part, on a media statement made by BNZ's CEO on 12 October 2016 that changes were being made in "back office non-customer facing areas" in order to "face cost challenges up front".

[79] I note that this argument by Mr LMN is incompatible with his argument that Mr Sutton decided to target him personally because he had asked for a pay rise.

[80] Mr Sutton's evidence was that there was no impetus, or pressure on him, to save money or cut costs at the beginning of the continuous improvement project. Mr Sutton says there was no target of savings to achieve. So the proposal was not motivated by cost reduction; that was not the underlying purpose. However, when Mr Williamson's data was produced, Mr Sutton simply considered the position was superfluous given the reduction in workload.

[81] The project took place in an atmosphere where the BNZ was looking to reduce costs to maximise its profit. However, I accept Mr Sutton's evidence that was not the impetus of the project he undertook to change the risk rating, except in one small area. Another aim of the project was to produce the most efficient and therefore less expensive travel plan for the auditors to undertake site audits away from their home base.

[82] The effect of the project as far as Mr LMN was concerned was that it ended up in cost savings for the BNZ. However, because there was not a costs saving target to be achieved the BNZ has not had to prove to me that the decision to disestablish the South Island auditor's role achieved the cost savings target.

Mr LMN says the redundancy was unfair because it happened due to factors outside of his control

[83] This concern of Mr LMN's relates to his sense that the BNZ personally targeted him and that was very unfair because he had been a loyal and hardworking employee for eight and half years.

[84] Mr LMN's individual employment agreement with the BNZ does not define redundancy, but the commonly accepted definition is that a redundancy occurs when the employer decide that the role has become surplus to its requirements. The essence of a redundancy is that it is a no fault dismissal. That is, an employee will be dismissed through no fault of their own.

[85] There is no question that Mr LMN was a good employee and that his colleagues and customers valued him and the work he did. There is also no doubt that he feels personally hurt by being made redundant from his job and because whatever he did or said did not result in him being able to retain his job.

[86] Mr LMN is correct that the risk rating project and its result, which impacted most significantly on his role was out of his control, as was the lack of a salesperson in the South Island for most of 2016.

[87] I am satisfied that, despite the way Mr LMN feels, he was not punished or targeted by the BNZ. It made a purely commercial decision to make the role he was employed in redundant because the role had become surplus to its requirements. It became surplus to the BNZ's needs because the new risk rating increased the auditors' capacity, and, in particular, reduced Mr LMN's workload beyond what Mr Sutton considered sufficient to justify retaining the role. However, I acknowledge that does not reduce the negative impact his dismissal had on Mr LMN.

Mr LMN's feedback was ignored

[88] Mr LMN submits that the redundancy was pre-determined and that the consultation was merely a "tick the box" or purely formulaic process. He says that his feedback was ignored.

[89] Mr Sutton denies having ignored Mr LMN's feedback. He says he considered all of the feedback.

[90] The document prepared by Mr Sutton and Ms Miller that they presented to Mr LMN on 27 October 2016, when the disestablishment of the role was confirmed, contains a summary of Mr Sutton's responses on eight points Mr LMN made in his feedback on the proposed change.

[91] In it Mr Sutton replied that:

- He had no concerns that the removal of the eCRS rating did not adequately capture the overall client risk to the BNZ;
- The volume he calculated and presented to Mr LMN in the proposal did not include the Nelson audits. Those numbers were current as at 28 September 2016 and the schedule had not been updated. The numbers he worked on were 44 audit visits and 33 desktop audits;
- The audit frequency and travel project was not aimed at reducing auditor positions but it highlighted that there was not enough work to sustain a full-time auditor in Christchurch.
- There were a number of change proposals underway in the BNZ. Some of those were directly related to cost cutting. This was not and was not driven by a desire to reduce cost or FTE.
- The impact on future business had been considered and the new salesperson role was not expected to have any immediate effect on numbers of customers in the South Island. Any increase in customers will be able to be covered by existing auditors.
- He was confident that BNZ could maintain service to the South Island customers.
- He was confident that the travel costs will be manageable given the South Island reduction in workload. Having other auditors travel is preferable to an underutilised role.
- He had considered attrition but because team turnover is very low, it was not a viable alternative.

[92] Mr Sutton confirmed at the investigation meeting that he had considered whether the Wellington auditor, who is at or near retirement age, was going to retire within the next year. However, he was aware the Wellington auditor did not intend to retire in the short term.

[93] The fact that Mr Sutton and the BNZ did not agree with Mr LMN's questions and feedback does not mean that the consultation was a farce or that his feedback was ignored. I do not accept that the process was merely "tick the box" or formulaic.

[94] However, I consider Mr LMN has a legitimate concern about the information that was provided to him before Mr Sutton made his decision. Mr LMN says that it was difficult to give informed feedback because he was not properly informed of the background data Mr Sutton was relying on to make his proposal.

[95] It is of concern to me that Mr Sutton used limited figures, that is, without the Nelson customers and the desktop audit numbers, to reach his decision that Mr LMN's workload had reducing by 46% when he presented the proposal to Mr LMN. As part of his feedback, Mr LMN asked whether the Nelson customers had been included. Mr Sutton failed to provide the figures he had relied on to make his decision to Mr LMN and instead, proceeded to make the decision to disestablish the position before providing Mr LMN with access to that information.

[96] I also note that Mr Sutton provided no information or data that led him to conclude that the travel costs would not outweigh the costs savings obtained in disestablishing Mr LMN's role.

[97] Information about the Nelson customers was information that related to the continuation of Mr LMN's employment. So was information about the travel costs. The lack of the provision of the figures means that Mr LMN did not have any opportunity to comment on that information before Mr Sutton made his decision. It was a breach of the BNZ's duty of good faith under s 4(1A)(c) of the Act.

Redeployment and other alternatives to dismissal

[98] Mr LMN says that the BNZ did not appoint him to other positions within the bank that he would have been capable of doing with adequate support, coaching and training.

[99] Mr LMN's individual employment agreement provided that in the event of redundancy:

8.1.2 Before you are given notice of termination of your employment, BNZ will examine any redeployment opportunities to a comparable role at that time. However, BNZ reserves the right to fill vacancies on merit.

[100] The significance of this was that if Mr LMN were redeployed, or if he was offered a directly comparable role but turned it down before he was given notice of termination of his employment, he would not have been eligible for redundancy pay.

[101] The formal redeployment period was two weeks starting on 27 October 2016. BNZ's internal vacancy team was aware of Mr LMN's availability. From 27 October 2016, Mr LMN was notified of any internal vacancies.

[102] Mr LMN expressed interest in an Auckland based role an Audit Senior Manager in the bank's internal audit section. It was a more senior role than the invoice finance audit role, a Band 2 role compared with the invoice finance audit role being in Band 1. Ms Miller, who was tasked with assisting Mr LMN during the redeployment period, agreed to put him forward for the role and speak to the "people leader" to progress his expression of interest. She and Mr Sutton encouraged Mr LMN to move to Auckland because they were confident he was more likely to be able to find a good role with the BNZ in Auckland, as opposed to Christchurch.

[103] Mr LMN decided that he would remain based in Christchurch and did not make an application for the Auckland Audit Senior Manager's role.

[104] Mr LMN expressed interest in three other roles. Two were business acquisition manager roles. They were sales roles and Ms Sutton describes them as "a real 'hunter' type of sales role". Mr LMN had no sales experience and the "people leader" decided that his lack of experience meant that the level of training that BNZ would need to provide him was too significant to redeploy him to one of those roles.

[105] Mr LMN was also interested in a Senior Associate role in Timaru in the agribusiness team. However, his lack of experience in the agribusiness sector meant that BNZ did not consider him suitable for that role either.

[106] Mr LMN submits that the BNZ did not consider all alternatives to redundancy and should have retained him part-time until client numbers grew. He also suggests that BNZ should have looked for secondment opportunities for him. Ms Miller and Mr Sutton say that Mr LMN did not ask to be retained part-time and that if he had they would have considered that as an option.

[107] Ms Miller says any secondment opportunities would have been identified during the redeployment period. However, none were identified. While there were teams that were short-staffed it did not mean that secondments were available or could be created.

[108] In addition, BNZ provided the services of an agency to assist Mr LMN with searching for other jobs outside of the BNZ by way of a career transition programme. Mr LMN made use of those services.

[109] I accept that ultimately none of the roles Mr LMN was interested in within the BNZ were either directly comparable to what Mr LMN had been doing or similar enough to allow Mr LMN to undertake them without significant training and support beyond what it was reasonable to expect the BNZ to supply. BNZ acted as a fair and reasonable employer could have acted in relation to attempts to redeploy Mr LMN.

Significance of the wrong redundancy pay figure

[110] Before presenting the proposal to Mr LMN, Ms Miller advised Mr Sutton that if Mr LMN was made redundant his redundancy compensation would be \$51,802.84 gross. Mr LMN says that after the formal meeting delivering the proposal ended Mr Sutton told him that he would be entitled to \$80,000 in redundancy pay if BNZ disestablished his role. Mr Sutton agrees that he told Mr LMN that, and that he was mistaken.

[111] Mr LMN says that the BNZ deliberately told him he would be eligible for an inflated amount of redundancy pay, which was the carrot held out to make him more likely to accept redundancy.

[112] Mr Sutton says that at some later point he rang Mr LMN to correct the redundancy pay amount and apologised for getting it wrong. He says that he found it a difficult call to make as he liked Mr LMN and was sorry that he had misled him about the redundancy pay.

[113] Mr LMN does not remember Mr Sutton's apology. However, I am satisfied that Mr LMN was made aware of the fact the redundancy pay he was entitled to was less than Mr Sutton had originally told him. He was made aware of this before his employment ended.

[114] Although Mr Sutton's mistake is regrettable, I do not consider it was a procedural defect in the BNZ's process leading to its decision to terminate Mr LMN's employment.

The BNZ should have consulted all team members

[115] Mr LMN says that all team members should have been consulted at an early stage since the risk rating project involved the whole team.

[116] Mr Sutton put the proposal to Mr LMN first and privately, rather than in the team setting, because it was only Mr LMN's role that would be affected by the proposed redundancy. Later he put the proposal to the whole team and invited feedback from the other team members.

[117] The BNZ cannot be criticised for deciding to treat Mr LMN with some dignity in putting the proposal, with its consequent negative affect on him, to him privately before putting it to the whole team.

No notice of the real purpose of the 14 October meeting with Mr Sutton

[118] Mr LMN says that getting a request to meet with Mr Sutton the day before the proposal was presented to him, but not knowing what the meeting would be about, meant he was stressed overnight and got a nasty shock when the proposal was presented to him. His view is that the real purpose of the project was hidden from the audit team. He submits that he and the rest of the team should have known all along that the new risk ratings could lead to the loss of FTE (full-time equivalent) hours.

[119] Mr Sutton says that the project did not have as its original purpose disestablishing an audit role. I have already established that I accept that. I do not accept that there was always

an intention to disestablish Mr LMN's role and that the real purpose of the project was "shrouded in mystery and deceit" as Mr LMN contends.

[120] Mr Sutton says that he wanted to do Mr LMN the courtesy of presenting the proposal to him in person, as he knew it would be distressing and he had a lot of respect for Mr LMN.

[121] I consider that the BNZ acted as a fair and reasonable employer could have acted in all the circumstances. Once it had formulated a proposal, it notified Mr LMN it wanted to meet with him and did so presenting the proposal face-to-face.

[122] The BNZ also offered Mr LMN support by way of its employee assistance programme and ongoing contact from Mr Sutton and Ms Miller. Mr LMN is very critical of the support he received after the decision was made to disestablish his role. For example, he criticises getting an out-of-office notification from Ms Miller in response to an email he sent telling her how much he was struggling with his health as a result of the termination of his employment. That is an unfair criticism because Ms Miller was unable to give any other response given that she was not at work that day.

[123] I am satisfied that in recognition of Mr LMN's distress at losing his job and the consequent effect on his health the BNZ acted fairly and reasonably towards him. For example, Ms Miller and Mr Sutton made sure he was considered to be on garden leave rather than on paid notice, until his final day of work, which meant he received his entitlement to the employee share offer at the end of 2016.

Conclusion on whether the redundancy was justified

[124] Mr LMN submits that his case is so similar to the *Grace Accounting Ltd v Brake*⁵ case that I should find that his dismissal was not substantively justified. In that case, the employer relied on a basic arithmetic error, which led it to understand it had suffered a \$60,000 loss when it had made a \$60,000 profit. It was a \$120,000 error. It made the decision to make Mrs Brake redundant wholly on the basis it understood its financial situation had deteriorated significantly since it employed her. If that error had not been made, there was no basis to consider that any positions needed to be made redundant.

⁵ Note 2.

[125] I consider this case to be different to the *Brake* case for the following reasons. For the 2017 year, without the Nelson audits Mr LMN's number of audits reduced by 30% overall, although the reduction in audit visits would have been 48%. That is 2% greater than the 46% quoted by Mr Sutton in the proposal. With the Nelson audits included his number of audits reduced by 17.27% overall, with his audit visits reducing by 40%.

[126] Although, Mr Sutton made an error in his assertion that Mr LMN's audit visits would have reduced by 46% it was an error in the opposite direction from the error made by Mr Grace. The reduction in audit visits of 48% made it more likely, not less, that the BNZ could make a decision to make Mr LMN's role redundant.

[127] Including the Nelson audits, in 2016, based on Mr Williamson's estimated number of audits, Mr LMN spent about 491 hours on audits. The projected hours for 2017, again including Nelson, were 311 hours. That is a reduction of 180 hours, or a 36% time reduction.

[128] In the *Grace Accounting* case, there was more than adequate work for Mrs Brake and other staff. In this case, the BNZ did not make any fundamental errors in concluding that Mr LMN's workload would reduce significantly and that the other auditors, due to reduction in their workloads, could pick up Mr LMN's workload.

[129] The lack of accurate background information provided to Mr LMN during the process did not impact on the ability of the BNZ to make a substantively justified decision that in the face of the reduction in workload it no longer required a South Island based auditor. The BNZ decision to disestablish the role was a decision that a fair and reasonable employer could have made in all the circumstances at the time.

[130] However, the lack of that information given to Mr LMN during the consultation was not something a fair and reasonable employer would have omitted. Therefore, Mr LMN has a personal grievance and I must consider remedies.

Remedies

Lost wages

[131] Mr LMN has claimed four months of lost wages of \$24,333.32, for the period until he began his new job, which is not an accounting job.

[132] Mr LMN believes that his dismissal from the BNZ has caused the premature loss of his professional accountancy career. Therefore, he also claims the difference between what he would have earned if he remained employed at the BNZ and what he earns in his new role for the rest of his working life, which amounts to \$1.9 million.

[133] Sections 123 and 128 of the Act provide that where the Authority finds that an employee has a personal grievance and has lost remuneration “as a result of the grievance”, it must order the employer to pay the employee the lesser of a sum equal to the employee’s lost remuneration or 3 months’ ordinary time remuneration. Section 128 gives the Authority the discretion to order an employer to pay more than three months lost remuneration.

[134] In this case, the reason Mr LMN has lost remuneration is because he was made redundant. The BNZ made a substantively justified decision to make his role redundant but did so in an unjustified manner. Mr Sutton made the decision too early, that is, before he had provided Mr LMN with the data the BNZ relied on.

[135] If the BNZ had corrected its process, by taking time to provide Mr LMN with the information it should have provided to him during the consultation process it would have had to allow Mr LMN a further period to make his feedback based on the correct numbers.

[136] I consider that I can only order the BNZ to pay lost remuneration to Mr LMN for that further period. That is, Mr LMN’s personal grievance is not based on the fact that his role was made redundant, but on the fact that the process was deficient. If the process had not been deficient, and if it had been rectified, I am satisfied that a fair and reasonable employer could have made the decision to make the role redundant. However, that decision would not have been made for a further period of far less than 3 or 4 months. I consider that the BNZ only has to reimburse Mr LMN for a period of two weeks during which it could have told him what figures Mr Sutton relied on, sought further feedback from him and made a fair decision.

I am satisfied that decision would have been to disestablish the full-time auditor's role in the South Island.

[137] Mr LMN was paid \$73,000 per annum. The gross amount owed for two weeks pay is \$2,807.70.

[138] I do not consider that Mr LMN's redundancy pay should operate to reduce the amount of lost wages he is entitled to. He remains entitled to the full amount of lost wages as well as the full amount of redundancy pay.

Loss of use of vehicle

[139] Mr LMN also claims that the BNZ should reimburse him for the loss of use of his work vehicle because he had to buy a new car once he lost his job.

[140] The value of a work provided car to an employee who is able to use it for their limited personal use is approximately \$8,500 per year. That works out to be \$163.46 per week. Mr LMN would have been entitled to the use of the car for a further two weeks if the BNZ had corrected its process. Therefore, he should be reimbursed a further \$326.92 gross.

Compensation

[141] Mr LMN claims \$25,000 in compensation for humiliation, loss of dignity and injury to his feelings from the dismissal.

[142] Mr LMN's health has been adversely affected both by the process leading up to his redundancy and the effects of the redundancy on him. In the last two months of his employment he suffered anxiety and depression, which he says has been ongoing. His evidence is that he was completely devastated by the redundancy because he expected to be able to work for his whole career at the BNZ. At the very least, after 8.5 years of employment he was looking forward to his 10 year anniversary.

[143] He now considers that his accountancy career is over as a result of what he sees as the BNZ's dishonest targeting of him in a sham redundancy. Mr LMN is a relatively young man with over 25 years before he would be eligible for government superannuation at the age of 65.

[144] The lack of data supplied to him during the consultation period caused him to suspect that he had been targeted. The process was unfair because he was unable to give detailed feedback because he lacked the information Mr Sutton relied on. It also resulted in him feeling that he was not listened to and that his feedback was not taken into account. However, because I have found that the redundancy was not aimed at him personally and was not a sham the most that Mr LMN can be compensated for is the emotional and mental effects on him of the unfair process. I cannot order the BNZ to compensate him for the loss of his job, which is the main thing that has so negatively affected him.

[145] Mr LMN did not provide any medical evidence from around the time of the consultation period and the dismissal. He provided a medical certificate from 3 February 2018, which relates to him being unwell on that date from stress, anxiety and depression. However, I assess any ongoing effects of stress, anxiety and depression in 2018 to be related to the loss of Mr LMN's job, or perhaps the pressure of his new role, neither of which the BNZ needs to compensate him for.

[146] It is a difficult task to separate out the effects of the dismissal from the effects of the unfair process. However, that is what I must do. I consider the effects on Mr LMN of the unfair process can be compensated by the BNZ paying him \$7,500.

Orders

[147] The Bank of New Zealand must pay Mr LMN the following amounts:

- (i) \$3,134.62 gross for lost remuneration and loss of a benefit; and
- (ii) \$7,500 compensation for humiliation, loss of dignity and injury to his feelings under section 123 (1)(c)(i) of the Employment Relations Act.

Costs

[148] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[149] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff for a one-day investigation meeting is \$4,500. The investigation meeting less than one full day.

[150] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority