IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 11
5417429

	BETWEEN	MELISSA NGATAI Applicant
	A N D	WARD DEMOLITION LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Kathryn Dalziel, Counsel for Applicant Ben Molloy, Counsel for Respondent
Investigation meeting:	17 and 18 December 2013 at Christchurch
Submissions Received:	18 December 2013 from Applicant 18 and 20 December 2013 from Respondent
Date of Determination:	28 January 2014

DETERMINATION OF THE AUTHORITY

A. There were genuine commercial reasons behind the decision to make the applicant's position redundant. However, the process followed was procedurally unfair. Hence the dismissal was unjustified.

B. Costs are reserved.

Employment relationship problem

[1] Ms Ngatai claims that she was unjustifiably dismissed on 15 March 2013 when her position was disestablished. The respondent denies that Ms Ngatai was unjustifiably dismissed and claims that her dismissal was by way of a genuine redundancy.

Brief account of the events leading to the dismissal

[2] The respondent operates a demolition company and is based in the North Island. After the September 2010 earthquake in Canterbury the respondent secured a small amount of work in that area but established an operation in Christchurch after the February 2011 earthquake. The respondent's evidence is that the work in Christchurch began to get very busy around January 2012 and it was around that time that the respondent decided it needed to employ an administration officer based in Christchurch to deal with the substantial Christchurch demolition work that it was doing at that time. Ms Ngatai was employed by the respondent in May 2012. The respondent's evidence is that Ms Ngatai quickly became entrenched into its business.

[3] The evidence of the respondent is that the 22 month period up to November 2012 had been the busiest that the company had ever experienced but that around October or November 2012 it became clear to the owner of the company, Peter Ward, that *things in Christchurch were changing.* His evidence is that there were by that time around fifty demolition contractors all vying for work in Christchurch and that the Christchurch Earthquake Recovery Agency (CERA) had slowed down its release of work.

[4] Mr Ward's evidence is that, over the 2012/2013 Christmas break, he thought about the situation and became *pretty sure that it was going to be much more difficult to maintain the profitability of the operation in 2013.*

[5] It is Mr Ward's evidence that he had an initial discussion with Ms Ngatai and with her colleague Ms Sheard on 15 January 2013 and that he told them that he had concerns about the pipeline of work going forward and that he was not confident of maintaining the amount of work that they had had the previous year. Mr Ward's evidence is that he wished to speak to Ms Ngatai in particular because she was, at that time, engaged to Mr Ngatai who was employed as a project manager by a major construction company and who was responsible for issuing work to demolition companies. Mr Ward understood that Ms Ngatai therefore had a good understanding of who was getting what work and what was happening around the Christchurch sites.

[6] It is Ms Ngatai's evidence that, the following day, Mr Ward told her that her job was *on the line.* Mr Ward denies this but says that he told her that she should be prudent when she asked him whether or not she should go ahead and book her

honeymoon. On 19 January 2013 Mr Ward emailed Ms Ngatai in the following terms:

> *Hi*
> *As per our conversation in site office this week the Christchurch operation has some forward concerns the amount and profitability of work there.*
> *I would like yourself to come back to me with some options on how we may change some of these issues.*
> *I will be back in Christchurch later this week so I will organise a meeting then.*
> *Thanks Peter*

[7] In response to this email Ms Ngatai sent to Mr Ward, to Mr Kendall, the respondent's project manager, and to Mr Mancer, the respondent's group accountant, an email setting out the ideas that she and Ms Sheard had come up with, identifying areas that they believed were having a negative impact on profit. Ms Ngatai identified seven areas of operation that she believed could be improved in order to reduce costs and improve income.

[8] The Authority saw a copy of an email from Mr Mancer to Mr Ward dated 23 January essentially advising Mr Ward that a due process had to be followed that addressed each of the issues that Ms Ngatai had raised. Mr Ward's evidence is that he met with Ms Ngatai the following day in Christchurch at their office (which was a Portacom), listened to what she said and raised at least three of those issues with the crew as valid concerns at the toolbox meeting they held straight afterwards. He said that he took on board the other issues that Ms Ngatai had raised.

[9] Mr Ward's evidence is that he did not consider that the suggestions provided in Ms Ngatai's email were going to save the business operation in Christchurch. He said that the two administration staff in Christchurch cost $110,000 per year. His evidence is that he had already started reducing labour staff numbers and the amount of equipment in Christchurch and that his initial thoughts were that this administration overhead cost was unlikely to be sustainable. His evidence is that he decided that he needed to consult with Ms Ngatai and Ms Sheard directly and let them know that there was a good chance that he might have to let them go.

[10] Accordingly, he instructed Mr Mancer to draft a letter to Ms Ngatai on 4 February which stated that the company was facing circumstances in Christchurch which required a complete review of its operations; that CERA were releasing

demolition contracts on a piece meal basis and that those contracts were subject to a highly competitive bidding process between the various demolition companies. The letter stated that this factor, as well as others (unspecified) meant that it was expected that the company's operations in Christchurch would generate considerably less income than in previous years and that Christchurch was the only city in which the company had a staffed administration office. The letter stated that there was now a real prospect of shutting the Christchurch administration office down and that, if that were to happen, that *would unfortunately result in redundancies* for Ms Ngatai and Ms Sheard. The letter concluded by inviting Ms Ngatai to provide feedback to the company in writing and proposing a meeting on 13 February. The letter was signed by Mr Ward.

[11] The proposed meeting on 13 February took place and detailed notes of that meeting were put before the Authority. It is clear that Ms Ngatai took a very active part in the meeting and that she initiated a discussion about an exit package for her and Ms Sheard. It is my view that these discussions were likely to have been without prejudice communications, details of which should not have been disclosed to the Authority, but both parties to those discussions expressly and willingly waived any privilege that attached to them and gave evidence in respect of those discussions.

[12] Later on the same day Ms Ngatai sent an email to Mr Ward and Mr Mancer setting out what she would accept in terms of an agreed exit package. It is clear that no agreement was reached between them, however, as Mr Ward was not prepared to pay to Ms Ngatai what she sought. His evidence is that he decided that the most sensible thing to do was to just continue on with the consultation process. It is understood that an agreed exit was eventually agreed with Ms Sheard.

[13] On 14 February 2013 Ms Dalziel, on behalf of Ms Ngatai, emailed Mr Molloy, who was acting for the respondent, stating that she was now formally Ms Ngatai's representative. In her email she also stated that there were some issues with the process and that there was a significant amount of information that had not been supplied to the employees in accordance with the company's good faith obligations and, *on this basis, it appears that the restructuring is not genuine.*

[14] On 18 February Ms Dalziel wrote to Mr Molloy stating that [the] *restructuring and termination of* [her] *client's employment was evidently pre-determined* and then

set out information that she required to be provided under s.4(1A)(c)(i) of the Employment Relations Act 2000 (the Act):

> 1. *Full details of Ward Demolition's operations, including details of its Auckland and Christchurch offices and the organisational structure of the Company.*
>
> 2. *Full details of the administration office staffing throughout New Zealand, including all costs associated with administration in Auckland and administration in Christchurch.*
>
> 3. *Full financial accounts and records of the Company for the last three years, including profit/loss accounts for both Christchurch and Auckland.*
>
> 4. *Details of all contracts currently being pursued in Christchurch and throughout the South Island, including any current tenders or bids with CERA. We are prepared to approach CERA under the Official Information Act for details of all your client's bids if necessary.*
>
> 5. *All communications and correspondence between CERA, MP's and any other third party in relation to the Christchurch operations.*
>
> 6. *All information and research on demolition contracts that are being released by CERA on a 'piecemeal basis' and the data on which your client has made this statement.*
>
> 7. *The "other factors" referred to in paragraph 3 of your client's letter dated 4 February 2012 which means it is now expected that the Company's operations in Christchurch will generate considerably less income than in previous years.*
>
> 8. *Full details of the significant concerns about the operation or efficiency of the work undertaken in Christchurch, the information upon which issues of profitability and workflow were assessed and the basis for the decision to act upon some but not all of the matters given in feedback on 23 January 2013.*
>
> 9. *All internal communications within the Company in relation to the Christchurch office, its performance and this restructuring. Without limiting the above, this includes all correspondence between the director and the group accountant.*
>
> 10. *Any Company Minutes or records relating to the decision.*
>
> 11. *The Company's health and safety plan.*
>
> 12. *Details of work that your client anticipates will be available in Christchurch, including all projections.*

[15] On 18 February 2013 Ms Dalziel complained that the respondent had spoken directly to Ms Ngatai to advise that a meeting originally arranged to take place in

thirty minutes time was to be cancelled. Ms Dalziel stated in a separate email to Mr Molloy that her client was *highly distressed over the entire process* and that her clients (including Ms Sheard at that time) felt unjustifiably disadvantaged by the entire process and were suffering hurt and humiliation.

[16] Mr Molloy provided certain information by way of a letter dated 19 February 2013 to Ms Dalziel including:

(a) a table prepared by Ms Ngatai, showing jobs secured, work in progress, and jobs applied for by the Christchurch operation; and

(b) an email chain between Mr Ward, Mr Mancer and Mr Kendall dated 19-21 January concerning a possible restructure.

[17] Mr Molloy's letter explained that all the jobs listed in the table were either already completed or would otherwise be completed by the end of March; that there was only one job that could continue, which only involved two employees and a crusher machine; that the company would not be paid for one completed job because of the collapse of the head contractor; and that tenders still outstanding were not expected to come to fruition.

[18] Mr Molloy said that *all other information requested is either not possessed by our client or else considered irrelevant to this matter.* Mr Molloy also stated that Ms Ngatai and Ms Sheard had direct access to much of the information requested, as they were responsible for the administration of Christchurch operations. He asked that Ms Ngatai provide to the Company by 4pm the following day any suggestions as to alternatives to closing the Christchurch office. The letter ended as follows:

> *Our client also invites you and your client to attend a final meeting with it at **10:00 a.m. Thursday 21 February 2013** to discuss any suggestions and other feedback provided by your client. If no suggestions are provided, our clients will at this meeting advise your clients of its final decision.*

[19] Ms Dalziel responded to Mr Molloy's letter by way of a letter dated 20 February 2013 in which she set out her justifications for the request for information made in her letter of 18 February.

[20] Mr Molloy responded by way of a letter dated 21 February 2013 stating that Ms Ngatai was responsible for keeping management updated as to the on-going

workflow of the operations in Christchurch, and that information provided by the company in its last letter had actually been prepared by Ms Ngatai. He asked for any more up to date data that Ms Ngatai may have in her possession to be provided to the company.

[21] Mr Molloy also provided responses to questions raised by Ms Dalziel in her previous letter. The information provided by way of these answers consisted of the following categories:

(a) An explanation as to what was meant by *other factors* in the company's letter dated 4 February;

(b) What was meant by *other South Island work*, referred to by Mr Ward at the 13 February meeting. This was prospective work which had by then turned out to be aborted.

(c) That no vacancies for administrative roles existed in the company;

(d) Why staff were being flown to the United States of America;

(e) An explanation as to who was responsible for health and safety work within the company, along with a copy of the company's Health and Safety Handbook;

(f) What had been meant by *a change in bidding practices* referred to in Mr Molloy's letter of 19 February;

(g) An account of a job in Christchurch that had been bid for, its value and the stage reached;

(h) An explanation that the company was in the process of moving or selling various pieces of demolition machinery and equipment;

(i) That of the 16 employees then in Christchurch, the number would be reduced to 8-10 within the following month;

[22] Mr Molloy did not include the full set of the information sought by Ms Dalziel in her letter of 18 February including, notably, the *full financial accounts and records of the Company for the last three years, including profit/loss accounts for both Christchurch and Auckland*.

[23] Mr Molloy indicated that Ms Dalziel and Ms Ngatai should attend a meeting on 25 February to provide suggestions and ideas as to alternative courses of action and any other feedback they may wish to communicate. He stated that a final decision would be communicated on 26 February.

[24] On 21 February 2013 Ms Ngatai was signed off sick for seven days (on account, it is understood, of stress). On 26 February 2013 Ms Dalziel wrote a letter to Mr Molloy formally raising a grievance on the basis of unjustified action and highlighting the following alleged failings by the respondent:

> *a.* *Refusal to supply material relevant to the decision despite the duty of good faith and repeated requests for relevant information.*
> *b.* *Failure to make enquiries in respect of health and safety management as promised.*
> *c.* *On-going failure to recognise the representative.*
> *d.* *On-going directions to attend meetings which need to be subsequently cancelled due to failure to provide information and failure to provide proper notice.*
> *e.* *On-going attempts at a process despite admissions that the decision has been made.*
> *f.* *The employer's stated intention to terminate employment, regardless of consultation.*

[25] In her letter of 26 February Ms Dalziel also stated that, without the information she had requested, Ms Ngatai could not prepare a response; that Ms Ngatai believed that she could make an administrative role work from Christchurch, particularly as there was national administration work that could be run through Christchurch, because there was current work to complete, health and safety requirements and opportunities for more work in Christchurch which her client wished to explore. However, she said she could not make submissions on this without the information requested.

[26] Mr Molloy responded by way of a letter dated 27 February 2013 in which he stated that his client did not accept that its financial accounts for the Company were relevant, and that those accounts were commercially sensitive. He also stated that his client considered that it would be difficult for Ms Ngatai to undertake national administration work in Christchurch given that she worked in a Portacom that was rented at $500 per month which was currently sitting in an empty space, whereas the respondent already had a dedicated administration office in Auckland. It also stated that it was the respondent's understanding that Ms Ngatai had previously rejected re-

deployment to the Auckland office. (This rejection of working in Auckland was confirmed by Ms Ngatai in her evidence to the Authority).

[27] Mr Molloy terminated his letter by stating that, if Ms Ngatai preferred to give feedback in writing rather than in a meeting that would be acceptable. He asked that the written feedback be given by Friday 1 March 2013. Unfortunately, Ms Ngatai's cousin then died unexpectedly on or around 4 March 2013 and her honeymoon was due to commence later on that week.

[28] On 5 March 2013 Mr Molloy advised that, during Ms Ngatai's absence, his client intended to divert her calls to her mobile to another telephone the following day. He also requested that Ms Ngatai's laptop be returned while she was on leave to allow them to access company information. Ms Dalziel responded on 6 March to say that Ms Ngatai had already placed an answer-phone divert on her mobile and that her company laptop did not have company information stored on it which was not on the Auckland server or on hard files in the office.

[29] On 12 March 2013 Mr Molloy wrote a letter to Ms Dalziel stating that, during the period of Ms Ngatai's absence, the position had not changed, no new jobs had been secured and no opportunities for further employment had arisen. He stated that the respondent was now placed in the position of having to cease renting the Portacom that currently constituted Ms Ngatai's office and that, as a result, it was likely that Ms Ngatai's position would be disestablished. He asked for any further feedback or suggestions as to possible alternative courses of action by Thursday 14 March. He stated that the respondent would then consider this and advise Ms Ngatai of its final decision in writing by 4pm on Friday 15 February 2013.

[30] Ms Dalziel responded by way of a letter dated 14 March in which she stated that the respondent's failure to provide the information requested has prevented Ms Ngatai from providing meaningful feedback. She also rejected the suggestion that the Company's accounts were commercially sensitive as Ms Ngatai was a senior employee and been trusted with other financial records. She also stated that an alternative approach could have been arranged so that the accounts were not disclosed to Ms Ngatai. Ms Dalziel said that her client could not make any further suggestions as to possible alternative courses of action as she had insufficient information.

[31] Mr Molloy responded to this letter by way of a letter of 15 March and enclosed a letter from Mr Ward to Ms Ngatai advising her that the Company had no choice but to disestablish her role. This letter referred to the financial necessity of the decision to reduce the Christchurch operation and close the Christchurch administration office; the fact that the Company had a well established national administration office based in Auckland with more than enough capacity to manage any further South Island based work and that Ms Ngatai did not wish to be re-deployed to Auckland.

[32] Ms Dalziel raised a personal grievance in respect to the alleged unjustified dismissal by way of an email dated 8 April 2013, stating that the dismissal was neither genuine, nor procedurally fair.

Issues

[33] The issues that the Authority must determine are as follows:

(a) Whether the respondent's reason for the dismissal of Ms Ngatai by reason of redundancy was genuine;

(b) Whether the respondent followed a fair procedure in that dismissal;

(c) Whether Ms Ngatai suffered any unjustified disadvantage in her employment by reason of the procedure followed.

Was Ms Ngatai's dismissal by reason of redundancy genuine?

[34] It is Ms Ngatai's case that the decision to dismiss Ms Ngatai by way of redundancy cannot have been genuine because the evidence of the respondent is that it did not consider financial information relating to the company, most particularly its financial accounts, when coming to the conclusion that it was necessary to close the Christchurch administration office and disestablish its functions.

[35] I accept that the evidence from Mr Ward given to the Authority, which I found to be completely candid, does support the assertion that he did not undertake an analysis of the existing financial position of the company. What he took into account was the increase in the competition in Christchurch from other demolition companies, both major players and smaller ones, combined with the approach that he observed CERA was taking in what he called the piecemeal release of work. His main concern

was with the future pipeline of Christchurch demolition work for 2013, which he envisaged effectively drying up to a point where a presence in Christchurch would no longer be profitable.

[36] Section 103A sets out the test of justification that the Authority must apply when determining whether a dismissal was justifiable. Section 103A(2)-(5) provide as follows:

> *(2) The test 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.*
>
> *(3) In applying the test in subsection (2), the Authority or the Court must consider –*
>
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
>
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
>
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
>
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
>
> *(4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
>
> *(5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
>
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[37] In the Employment Court judgment of *Rittson-Thomas t/a Totara Hills Farm v. Davidson* [2013] NZEmpC 39, His Honour Chief Judge Colgan made clear that

s.103A requires the Court and the Authority to inquire into a decision to declare a person's position redundant. At para.[54] of *Rittson-Thomas*, the Court held:

> *It will be insufficient under s.103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*

[38] Therefore, the Authority is obliged to inquire into the merits of Mr Ward's decision to disestablish Ms Ngatai's role and then to dismiss her.

[39] I cannot accept the submission of Ms Dalziel on behalf of Ms Ngatai that Mr Ward's failure to take into account the financial accounts of the company when deciding to disestablish the Christchurch administration function means that he is unable to satisfy the Authority that the decision was genuine. The financial accounts of the company were, by definition, a picture of what had been happening up to the point when they were prepared. Mr Ward was emphatic in his evidence that he took into account the prospective work that he anticipated was coming into Christchurch over the forthcoming months from January 2013.

[40] I accept the proposition that, in many circumstances, a detailed analysis of the income and expenditure of an operating unit would assist an employer to make an informed decision about the viability of that operating unit and any restructure of it. For example, it would typically identify areas where efficiencies could be made, overheads reduced, and opportunities for income enhanced. However, Mr Ward's evidence was that the demolition environment in Christchurch had changed fundamentally between the time when he first started operating there and the end of 2012. Whilst financial accounts may provide a reliable indication of what financial performance may be expected in the future, that cannot be the case where the business landscape in which the company operates has begun to change in a materially adverse but ultimately unpredictable way.

[41] The evidence of Mr Ward was very cogent in explaining how the decrease in demolition work (which, Ms Ngatai accepted, would not include residential demolitions as that work could not be made to pay for the company), coupled with the increase in competition, meant that more demolition companies were chasing fewer

jobs which was pushing down tender prices to the point where the company could not make any profit on the jobs available.

[42] Ms Dalziel points to the lack of *a significant paper trail* as being an indicator that the redundancy was not genuine. However, I am not persuaded that, even if Mr Ward had carried out a detailed analysis of all the expenditure arising out of the Christchurch operation, he would have come up with a solution that would have avoided the closure of the Christchurch administration office and the disestablishment of Ms Ngatai's role. This is, perhaps, most starkly illustrated by the evidence from the respondent that, at the time of the investigation meeting in mid-December 2013, only three employees were employed in Christchurch, and that, in November 2013, there were no Christchurch or South Island contracts being pursued.

[43] In addition, for the period from 1 April 2013 to 14 October 2013, the income received from operations in Christchurch, excluding income from contracts that existed prior to 31 March 2013, amounted to 2 % of the total income received from Christchurch between 1 March 2012 to 14 October 2013.

[44] I do not accept that the lack of a significant paper trail points to a failure by the respondent to carry out a proper analysis of the future financial security of its Christchurch operation. It is my finding that Mr Ward did give the situation a considerable amount of thought, but that the portents were very clear; the increasingly difficult competitive environment for commercial scale demolition work, coupled with the opportunities to bid for such work being released with less frequency, signalled an urgent need to reduce the scale of its Christchurch operation. I believe from the evidence that Mr Ward did see a *solid foundation of evidence* leading him to conclude that the Christchurch operation needed to be significantly reduced. (*Rillstone v. Product Sourcing International 2000 Ltd* ERA Auckland AA167/07, 7 June 2007).

[45] All in all, therefore, I do not accept that, as submitted on behalf of Ms Ngatai, the respondent is unable to show that its decision to disestablish Ms Ngatai's role was genuine because it did not examine the financial accounts for the company as a whole.

[46] It is also submitted on behalf of Ms Ngatai that the decision to dismiss her was predetermined. The evidence relied on by Ms Ngatai in supporting this assertion is that Mr Ward had primarily recruited Ms Ngatai because of her then engagement to a

project manager in a construction company in Christchurch who was in a position to give work to the respondent. Ms Ngatai asserts that Mr Ward became disappointed that the anticipated work was not forthcoming.

[47] With respect to Ms Ngatai, I find this assertion purely speculative and do not accept it. I found Mr Ward's evidence to be extremely candid and credible and I certainly do not believe that that had been his primary reason for recruiting Ms Ngatai in the first place, nor that he was disappointed with her when more work did not come through her fiancé, resulting in his dismissal of her.

[48] Ms Ngatai also asserts that there is other evidence of Mr Ward's negative views of her in his brief of evidence submitted to the Authority, where he referred to Ms Ngatai *"fishing"* when she had telephoned him on 16 January 2013, *"hijacking"* the meeting of 13 February, trying to *"extort"* money from him and of being *"extravagant"* in her wedding and honeymoon plans.

[49] I do not accept that post dismissal references in Mr Ward's brief of evidence to Ms Ngatai *fishing* and Ms Ngatai's wedding and honeymoon sounding *extravagant* constitute convincing proof that Mr Ward harboured negative views of Ms Ngatai prior to her dismissal, so as to demonstrate that Mr Ward's dismissal of Ms Ngatai was premeditated.

[50] The evidence in relation to the allegations of Ms Ngatai hijacking the meeting on 13 February, and trying to extort money, arose from the discussions initiated by Ms Ngatai on 13 February about a possible exit package for her and her colleague, Ms Sheard. It turns out that Ms Sheard did leave by way of an agreement but that, for reasons that were not fully explained to the Authority, Ms Ngatai was unable to negotiate a package with Mr Ward.

[51] It is my conclusion that Mr Ward probably did believe that Ms Ngatai was fishing and that he genuinely believed that she was trying to obtain a bigger exit package from him than he felt comfortable giving her. I pass no judgment on Ms Ngatai's attempt to secure a settlement agreement as it is irrelevant to the inquiry that the Authority must make. Suffice to say that it is not uncommon for knowledgeable and switched-on employees to try to negotiate an exit package with their employer where they believe there is a possibility that they could lose their jobs, either by way of redundancy or other dismissal.

[52] Given the fact that Mr Ward engaged the services of Mr Molloy from a reputable Auckland firm to advise him on the process he should follow, and given the correspondence I have seen that passed from Mr Molloy to Ms Dalziel, in which the respondent appears to be at pains to provide what it regarded as relevant information (albeit over a period of time) and to seek feedback from Ms Ngatai, I cannot conclude that, despite Mr Ward's probable suspicions of Ms Ngatai's motives, that initial attempt by Ms Ngatai to secure an exit package influenced him to dismiss Ms Ngatai for any reason other than that he genuinely believed that her role could not be sustained.

[53] In summary, I conclude that there were clear genuine commercial reasons for the respondent to close down its Christchurch administrative operation and to disestablish the roles of Ms Stead and Ms Ngatai. A failure by the respondent to analyse the financial accounts of the company prior to making that decision did not render the decision to do so unjustified. I also conclude that, substantively, the decision to dismiss Ms Ngatai by reason of redundancy was one that a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

Was the procedure followed by the respondent fair and reasonable?

[54] The inquiry into this question requires an inquiry into the following sub-issues:

(a) Was sufficient information disclosed to Ms Ngatai in order to enable her to make informed comments as part of the consultation process;

(b) Did the respondent make genuine attempts to consult with Ms Ngatai;

(c) Were sufficient attempts made by the respondent to consider alternatives to dismissal.

Was sufficient information disclosed?

[55] Section 4 of the Act provides as follows:

> ***4 Parties to employment relationship to deal with each other in good faith***
>
> *(1) The parties to an employment relationship specified in subsection (2)—*

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), 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 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

(1C) For the purpose of subsection (1B), **good reason** *includes—*

(a) complying with statutory requirements to maintain confidentiality:

(b) protecting the privacy of natural persons:

(c) protecting the commercial position of an employer from being unreasonably prejudiced.

[56] It is also relevant to consider s.3(a) of the Act, which provides as follows:

3 Object of this Act

The object of this Act is—

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and

(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and

> *(iii) by promoting collective bargaining; and*
> *(iv) by protecting the integrity of individual choice; and*
> *(v) by promoting mediation as the primary problem-solving mechanism; and*
> *(vi) by reducing the need for judicial intervention*;..

[57] The full Employment Court in *Vice-Chancellor of Massey University v Wrigley and Kelly* [2011] NZEmpC 37 commented, at [47] and [48] as follows:

> *[47] What is immediately apparent in s 3(a) is the strong and fundamental emphasis on good faith as the principal means of achieving successful employment relationships. This supports an interpretation of the specific obligations in s 4 which minimises the likelihood of employment relationship problems developing. In general, that is more likely to be achieved by giving timely and ample access to relevant information. More informed employee involvement will promote better decision making by employers and greater understanding by employees of the decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems*

> *[48] Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.*

[58] Paragraph [56] of *Massey* states that providing employees with a limited amount of information may enable them to understand the employer's proposal but may not give them the information necessary to recognise and develop alternative proposals. The Employment Court goes on to say:

> *Equally, adopting a relatively narrow approach to what is relevant may exclude information which militates against the employer's proposal. In most cases, information that is "relevant to the continuation of the employees' employment" will include a good deal more than the information the employer relies on for the proposal for change. Power does not confer insight or wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers.*

[59] The key objection of the respondent to disclosing the entirety of the information sought by Ms Dalziel on behalf of Ms Ngatai during the consultation process was that it was not all relevant. I understand from Mr Ward's evidence that, apart from the question of relevance, in particular the full financial accounts and records of the Company for the last three years, including profit/loss accounts for both Christchurch and Auckland, were regarded by him as highly confidential and would not have been disclosed to Ms Ngatai in any event.

[60] I have found above that Mr Ward's failure to analyse the full financial accounts does not demonstrate that the decision to disestablish Ms Ngatai's role was not genuine. However, that finding does not lead automatically to a further finding that the full financial accounts were not relevant from the point of view of the respondent's obligations under s.4(1A) of the Act. As the Employment Court held in *Massey*, *In most cases, information that is "relevant to the continuation of the employees' employment" will include a good deal more than the information the employer relies on for the proposal for change*.

[61] Analysing the information that was requested by Ms Dalziel in her 18 February letter, I believe that most of the information sought was either eventually provided (albeit in piecemeal fashion) or did not exist in the form requested. The key pieces of information that were refused or not provided in the form requested were:

> *(a)* *Full details of Ward Demolition's operations, including details of its Auckland and Christchurch offices and the organisational structure of the Company;*
>
> *(b)* *Full details of the administration office staffing throughout New Zealand, including all costs associated with administration in Auckland and administration in Christchurch;* and
>
> *(c)* *Full financial accounts and records of the Company for the last three years, including profit/loss accounts for both Christchurch and Auckland.*

[62] I shall examine each category of information below.

Full details of Ward Demolition's operations

[63] There does not appear to have been an outright refusal to provide this information. In addition, aspects of the information sought were provided, such as information about how health and safety issues were handled. However, it does not

appear that a comprehensive breakdown of operations was provided to Ms Ngatai. I do not believe this failure was deliberate, but I do believe that, if the respondent had provided the information, Ms Ngatai would have been in a better position to have thoroughly considered her redeployment options and, as such, the information was relevant to the continuation of Ms Ngatai's employment. In conclusion, no fair and reasonable employer could have refused to have provided this information sought in all the circumstances.

Full details of the administration office staffing throughout New Zealand

[64] Again, there does not appear to have been an outright refusal to provide this information and, again, aspects of the information appear to have been provided. However, the information was not provided exactly as requested as the costs information was withheld. Whilst it may have been onerous to have provided details of the costs associated with the administration functions in Christchurch and Auckland, it was relevant to disclose them as costs would have been one of the key factors in Mr Ward deciding not to continue the Christchurch administration function, even if the precise costs had not been in Mr Ward's head at the time he was formulating his proposal.

[65] Even if the information would not have resulted in Ms Ngatai dissuading Mr Ward from closing the administration function in Christchurch, she had a right to see the costs information as it was relevant to the continuation of Ms Ngatai's employment. The respondent is not arguing that it was confidential, and it could have assisted Ms Ngatai in formulating suggestions that could have retained at least some of her functions. In conclusion, no fair and reasonable employer could have refused to have provided this information sought in all the circumstances.

Full financial accounts and records of the Company for the last three years

[66] It is not clear to me why this information in its entirety would have been relevant. Ms Ngatai said in her oral evidence that it would have enabled her to carry out *a factual diagnosis*. I infer from this that she would have examined the accounts and, presumably, tried to argue that the company could carry her administration function despite diminishing work in Christchurch, or suggested further ways of reducing overheads and increasing income. However, there were no separate accounts for Christchurch and Auckland, according to the respondent, and Ms Ngatai

would have had to have drilled down and engaged in a detailed analysis which may have taken some considerable time and effort, and possibly expert assistance.

[67] In theory, I accept that Ms Ngatai was entitled to see sufficient information to enable her to make suggestions of ways of reducing overheads and increasing income. I do not accept that three years' worth of information for the entire company was necessary however. There must come a point where the relevance of information sought by an employee facing dismissal by reason of redundancy diminishes to the point where issues of practicality outweigh the employee's right to see that information.

[68] However, in my view, a fair and reasonable employer could have explored in greater detail with Ms Ngatai and Ms Dalziel what information could have assisted her to make representations, and which the company may have been willing to provide despite its concerns about the confidential nature of the full accounts. A bare refusal to produce the information was insufficient and arguably in breach of the respondent's duty under s.4(1A)(b).

Conclusion

[69] In conclusion, adopting the interpretation set out in *Massey*, I find that the respondent did fail unreasonably to provide access to information, relevant to the continuation of Ms Ngatai's employment during the consultation process. No fair and reasonable employer could have failed to provide this information in all the circumstances, and accordingly, this failure renders the dismissal procedurally unjustified.

[70] During submissions, Ms Dalziel asked the Authority to comment on whether it is reasonable for an employee to request the kind of full information in a redundancy situation that Ms Dalziel did on behalf of Ms Ngatai in this case, and whether such requests put unfair pressure on an employer. In answering this question, I first acknowledge that some representatives play a tactical game when representing prospectively redundant employees, seeking a wide range of information to both delay the decision and to pressurise an employer to cut a deal.

[71] However, since *Massey* and *Totara Hills*, the full extent of the duty upon an employer consulting in a redundancy situation has become clear, including as it does the right of the employee to understand the business rationale behind the proposal and

to have access to relevant information that may go beyond that considered by the employer in formulating the proposal. As ever, though, the duty of good faith underpins the entire process and, in particular, the duty to maintain a productive employment relationship in which the parties are, amongst other things, responsible and communicative. This requires an open dialogue between the parties, including their representatives, and where a request is made for information, its relevance should be explained, and where the request is refused, reasons given and suggestions made as to alternatives so as to assist the employee in providing relevant feedback.

Did the respondent genuinely attempt to consult with Ms Ngatai?

[72] Having analysed the correspondence passing between the parties, putting aside the procedural failing in respect to the provision of information, I am satisfied that the respondent did enter into the process of consultation in good faith. That is to say, it gave Ms Ngatai ample opportunity to comment upon the information before the decision to dismiss her was made and genuinely considered her comments, such as they were (given that she had stated more than once that she could not provide full feedback without all the information she sought). However, given the significant change in the commercial demolition landscape that Mr Ward saw playing out, I believe that there was ultimately very little that Ms Ngatai could have said which would have justified keeping her position open.

Did the respondent properly consider alternatives to dismissal?

[73] Ms Ngatai had two suggestions that she says may have saved her from being dismissed. One is that she could have been given a Christchurch based company-wide health and safety coordinator role, the other a Christchurch based company-wide administration role.

[74] Considering both of these options together first, as they could conceptially have been combined roles, I do not believe that they would have been viable given that Ms Ngatai was not willing to relocate to Auckland. I do not believe that it is likely that the company could have justified the expense of keeping the portacom that it rented so that Ms Ngatai alone could have remain employed. However, I believe that there are additional reasons why these suggestions would not have succeeded.

[75] Although Ms Ngatai had experience of health and safety work, I accept the evidence of the respondent that, in a demolition context, much of that work needed to

be done on the ground. This would mean visiting each demolition site and identifying the hazards involved in each job. This plainly could not be done using Google Earth or some other remote electronic means. Whilst there may have been some residual office based health and safety work, such as maintenance of a health and safety register, and development and upkeep of the company's health and safety policies, I do not accept that these tasks would have taken up more than a minimal amount of work. In addition, it appears that these tasks were already effectively undertaken by existing staff in Auckland or easily capable of being done by them.

[76] As far as a company-wide administration role was concerned, there were already staff in Auckland doing administrative work, and the Christchurch work was diminishing, so that an extra person carrying out the role could not have been financially justified I believe. I cannot accept, therefore, that the respondent unreasonably failed to allocate other tasks to Ms Ngatai, or consider alternatives to dismissal.

Was Ms Ngatai disadvantaged by the process undertaken by the respondent?

[77] For the reasons stated in this determination while considering whether the process followed by the respondent was what a fair and reasonable employer could have done in all the circumstances, I believe that these failings identified amounted to an unjustified disadvantage in Ms Ngatai's employment.

Remedies

[78] Section 123 Of the Act provides as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have*

> *been expected to obtain if the personal grievance had not arisen.*

[79] Ms Ngatai does not seek reinstatement, but seeks reimbursement of lost wages and compensation for humiliation, loss of dignity, and injury to her feelings. I deal with reimbursement of lost wages first. I have found that the decision to disestablish the administration function in Christchurch was justifiable, that the redundancy was genuine and that there were no viable alternatives to dismissal. Ms Ngatai's dismissal has been found to have been unjustified because of the procedural flaws I have identified rather than because of any substantive lack of justification and I am satisfied that those procedural flaws did not result in the redundancy being substantially unjustified. In other words, had they not occurred, the dismissal would have been justified, as a fair and reasonable employer could have dismissed Ms Ngatai in all the circumstances at the time.

[80] The Court of Appeal in *Aoraki Corp v McGavin* [1998] 1 ERNZ 601 stated at page 619, the following proposition.

> *What is crucial, however, is to recognise that the remedy can relate only to the particular wrong, to what has been lost or suffered as a result of the particular breach or failure. In this case the personal grievance is not that the employment was terminated, but that the manner of implementation of the decision to terminate was procedurally unfair.*

[81] I did not hear any cogent evidence that persuades me that, had the procedural flaws not occurred, the consultation process is likely to have lasted longer than it did. Therefore, I cannot find that Ms Ngatai has lost any wages or other money as a result of the dismissal, or the process followed.

[82] I cannot award any compensation to Ms Ngatai for humiliation, loss of dignity, and injury to her feelings arising out of the fact of her dismissal, as that was substantially justified, and no disadvantage accrued from the dismissal itself for the same reason. I do accept, however, that the process followed by the respondent was likely to have resulted in Ms Ngatai suffering humiliation, loss of dignity, and injury to her feelings. I accept that her asking for information that was not provided when her job was in danger of being disestablished is likely to have created a sense of powerlessness and frustration which, as a minimum, would have impacted adversely upon Ms Ngatai's dignity.

[83] Of course, the unjustified disadvantage suffered by Ms Ngatai arising from the process followed cannot create a separate head of right to compensation under s.123(1)(c)(i) to that arising from the unjustified dismissal finding.

[84] When assessing the evidence of the humiliation, loss of dignity, and injury to her feelings suffered by Ms Ngatai, and trying to separate the effects caused by the process from the dismissal itself, I believe that the sum of $5,000 is an adequate sum to compensate her. In reaching this sum I take into account the fact that Ms Ngatai was employed for around nine months prior to her dismissal, and that she knew that the role was not going to be a long term one, saying in evidence that she felt it would be a two to three year contract.

[85] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, it must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. Whilst her request for three years' worth of financial accounts for the entire company was too wide, considering the communications between the parties' representatives overall, I do not believe that Ms Ngatai contributed in any blameworthy way to the respondent failing to provide to her the information I have found should have been provided. Accordingly, I decline to reduce the compensation awarded.

Penalties

[86] Ms Ngatai has asked that the Authority make an enquiry into penalties. It is understood that Ms Ngatai seeks a penalty in respect of an alleged breach of the duty of good faith by the respondent in the process followed. Relevant parts of s. 4A of the Act state that a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under this Act if the failure was deliberate, serious, and sustained or the failure was intended to undermine an individual employment agreement or a collective agreement or an employment relationship.

[87] I accept that there was a de facto breach of the duty of good faith by the respondent in that it failed to comply fully with s. 4(1A) (c) of the Act in the failure to disclose to Ms Ngatai all the information that was necessary. However, I am not

satisfied that this failure was deliberate, serious and sustained, nor that the failure was intended to undermine Ms Ngatai's individual employment agreement or the employment relationship between her and the respondent.

[88] I believe that the failure of the respondent arose from a misunderstanding about the breadth of the duty to disclose to Ms Ngatai information relevant to the proposed redundancy of her position. I infer from the correspondence from the respondent's adviser that the respondent was intending to comply with its duties in the consultation process, but that it did not accept Ms Ngatai's interpretation of what she was entitled to see. I do not believe that this situation merits the imposition of a penalty.

Order

[89] I order the respondent to pay to Ms Ngatai the sum of $5,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[90] I reserve costs, and invite the parties to seek to agree how costs are to be disposed of between them. In the absence of such agreement within 28 days of the date of this determination, any party seeking an order as to costs from the Authority may serve and lodge a memorandum of counsel and any memorandum of counsel in reply must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority