

The facts

[4] Mr Panoho was employed by WLT as a Sawmill and chip mill machine operator (loading decks, unloading trucks and materials handling with the log yard.

[5] On 10 March 2008 WLT's employees were given a written notice of a restructure. It said:

Restructuring Notice

10/3/08

A recent review of the Whirinaki Log Transfer Limited operation has highlighted a number of fundamental structural and operational issues that need to be addressed by the company with a degree of urgency.

The decision has been made to restructure the Whirinaki Log Transfer business to ensure that the business more accurately reflects the requirements of Pan Pac's operations for the immediate future. This restructure will enable WLT to provide a sustainable and competitive materials handling service without compromising existing service levels. The new structure will also enable WLT to become a more financially viable and sustainable business.

The key areas to be restructured are:

- 1. Machine requirements and application.*
- 2. Manning levels and skill requirements.*
- 3. Rebranding of the business.*

The area that will directly impact on you as an employee of WLT is a review and consultation process to identify the individual skills required to match the fundamental changes in the way WLT carries out the materials handling functions within the yard.

This letter serves as notice that the company will be carrying out one on one interviews with employees to explain the restructuring process and timetable.

The consultation process will allow the company to establish a skills matrix which will be the basis for making decisions on:

- *Changes to current roles/job descriptions.*
- *Possible redundancies.*
- *Options for retraining required to suit new roles.*

The consultation process will take two weeks from the 11th of March, until the 25th of March. The new structure will be explained through individual meetings with staff before the end of the month.

*Chris Emmens
Mike Lambert Limited*

[6] On 10 and 19 March 2008, Mr Panoho met with Mr Chris Emmens, the group general manager, Andrew Esson, management consultant, and Mr Campbell Prendergast, the company's log manager.

[7] On 10 March they discussed the restructuring notice and what was to be involved in the restructuring.

[8] On 19 March 2008 they discussed a skills matrix template that was handed to Mr Panoho. There is a dispute about what was written on the template. After the meeting Mr Panoho threw the template away because it did not have his name on it.

[9] Mr Emmens says that on 16 April 2008 he gave Mr Panoho a completed skills matrix with his details and name only, on the document. Mr Panoho denied that claim. I was informed at the Authority's investigation meeting by Mr Emmens that two employees were ring-fenced and excluded from the matrix evaluation: one who was on maternity/parental leave and another who had driving skills. I will return to this later.

[10] On 23 April 2008, Mr Panoho was put on email notice of an individual meeting to be held on 24 April about the company's restructure and of the opportunity to take a support person. The notice said:

Guys,

On Thursday the 24th of April in my office we will be having individual meetings with you all to go over the upcoming company restructure. You are more than welcome to bring in a support person.

Here are the proposed meeting times. 30 minutes each ...

Please advise Campbell soonest of your availability, and once again our apologies for the notice.

*Regards,
Campbell [Prendergast]*

[11] At the meeting Mr Panoho was given a redundancy notice and timetable for him to respond to at another meeting to be held later in April. The redundancy notice said:

Redundancy Notice

23 April 2008

Dear Joe,

Whirinaki Log Transfer Limited trading as "Holmes" has completed a comprehensive consultation and review process of log yard operations.

The review focused on the following key areas.

1. *Operation activities by function.*
2. *Employees skills matrix.*
3. *Future needs of the business Machinery/People.*
4. *Optimal work patterns for Plant/People.*
5. *Multi skilling of workforce.*

Prior to and during the course of the review a number of fundamental changes have taken place in the log yard operation.

1. *Introduction of specialised Materials Handler.*
2. *Loss of stem unloading function.*
3. *Introduction of log cradles to improve machine productivity from the 3py.*
4. *Net reduction in the number of machines on site and in use at any one time.*

As a result of the restructuring process and reduction in business activity the company has identified a number of employee redundancies.

Your position has now been made redundant and as per your employment contract the company propose to give you one month's pay in lieu of notice (Clause 12.1 and 12.2) effective from Wednesday 30th April 2008. (Emphasis added).

The company now seeks your response to the redundancy notice and proposes to meet with you on Tuesday 29th of April.

We encourage you to seek independent advice and should you require a copy of your individual employment contract please contact Campbell.

The company propose to give you paid leave from today until Wednesday 30th of April to prepare for the meeting. This leave will not impact on your current leave entitlement. (Emphasis added)

The company will provide the following:

- *Support to find alternative employment either within the group or outside.*
- *Counselling support.*
- *Help to compile a CV.*
- *Services of an employment agency.*

- *Written reference or verbal referee.*

Should you have any other questions or concerns please feel free to contact either Campbell or myself prior to the Wednesday meeting. Campbell will confirm the time and location on the Tuesday.

*Yours faithfully,
Chris Emmens*

[12] Mr Panoho decided not to respond and understood he had been made redundant. WLT says that the letter of redundancy notice conveyed a “*proposal*” for redundancy.

[13] Mr Panoho was requested to take paid leave until 30 April to prepare for the proposed meeting and to get independent advice. Another person filled in.

[14] Mr Panoho says he met with Mr Prendergast on 30 April and at that meeting they discussed the company’s offer of support to find new employment. He was paid one month’s pay in lieu of notice.

The issues

[15] I am required to scrutinise the genuineness of the employer’s decision to dismiss Mr Panoho for redundancy and whether or not the dismissal was fair in all the circumstances: s 103A of the Employment Relations Act applied. The application of s 103A has been dealt with by the Employment Court in *Simpsons Farms v Aberhart* [2006] ERNZ 840 where Chief Judge Colgan discussed the consultation obligations (p840) and summarised the “new justification test in redundancy cases” (at p842).

[16] There are three matters that require findings. They are:

- Was it reasonable for Mr Panoho to throw away the template on 19 March 2008?
- Was Mr Panoho given his details on the skills matrix with his ratings on 16 April 2008?
- What interpretation can be put on the redundancy notice dated 23 April?

Determination

The reasons for restructuring

[17] The letter dated 10 March restructuring notice provided sufficient reasons behind the restructure to enable Mr Panoho to respond: ie

“A recent review of the Whirinaki Log Transfer Limited operation has highlighted a number of fundamental structural and operational issues that need to be addressed by the company with a degree of urgency.

The decision has been made to restructure the Whirinaki Log Transfer business to ensure that the business more accurately reflects the requirements of Pan Pac’s operations for the immediate future. This restructure will enable WLT to provide a sustainable and competitive materials handling service without compromising existing service levels. The new structure will also enable WLT to become a more financially viable and sustainable business.”

[18] I am satisfied that WLT had financial difficulties and that it was required to lower costs and make changes to the delivery of logs to keep work for the business. Mr Ken Holmes, the managing director had a genuine concern that the entire work could be contracted out, which he wanted to avoid. Mr Panoho accepted that WLT had financial difficulties. As such I have not relied on the financial accounts provided by Mr Panoho for 2006 that show at that time the company was in a satisfactory financial position. I have not relied on the accounts because of the lapse in time and it was common ground that the company had experienced financial difficulties.

[19] WLT embarked on a genuine restructure to preserve work with the outcome that there was a decision made to lose two positions (initially four jobs) including Mr Panoho’s position.

[20] I accept the evidence of Messrs Esson, Emmens and Holmes that they had a “hands on” involvement in the operation of WLT and that WLT had requirements placed on it by Pan Pac to reduce costs and make efficiencies. Mr Holmes identified the names of the people at Pan Pac who he discussed his business with: I accept his evidence. Messrs Esson, Emmens and Holmes supported their evidence by telling me that one Wagner machine had been relocated to another site and the stem unloading contract had been lost. Furthermore, I accept Messrs Holmes’s and Emmens’s evidence that part of the problem could have involved the entire contract being put up

for tender unless accepted changes were made and that they wanted to avoid that happening. This was not contradicted by Mr Panoho.

[21] I have been requested by Mr Holmes to rely on the oral evidence from him and the company's other two witnesses about the state of the company and reasons for restructuring without having regard to the detail from accounting and financial documents, records and statements that were requested by Mr Panoho's representative during the Authority's investigation. The reliance on the absence of detailed documents is not unusual for small/medium businesses and how they are run, and while it is not ideal, it is not fatal. I am satisfied that Messrs Emmens and Holmes did not use such written material in making their decisions at the time anyway, but that generally they used their knowledge of the business and the personal dealings with the Pan Pac people at the time. I accept that Mr Holmes runs his business very much on a "hands on" basis and that he has a sound and good knowledge of his own business, which was not contradicted by Mr Panoho. This was supported when Mr Emmens says he spent time visually observing the material handling processes, shift patterns, delivery peaks, yard layout, operator skill and productivity and log yard wood flows. This evidence was not challenged

[22] Furthermore, during my investigation meeting, an email was read to me by the respondent's representative. It was received during the Authority's investigation meeting from a named person from Pan Pac. If that was produced as proper evidence, and corroborated by the person concerned, it would more than likely prove what Messrs Holmes and Emmens said was true and reliable considering they told me they had regular meetings with the named Pan Pac people. Given the above, the submission made on the applicant's behalf that the respondent had been duplicitous, misleading and deceptive was not established.

Consultation

[23] I find that WLT consulted Mr Panoho on the restructure.

[24] First, WLT outlined its position in a letter dated 10 March 2008 (the restructuring notice) that included informing staff of the reasons for the restructure, that individual skills needed to be identified, the establishment of a skills matrix and what the decision could include:

- *Changes to current roles/job descriptions.*
- *Possible redundancies.*
- *Options for retraining required to suit new roles.*

[25] The information made available on the restructuring was sufficient to meet the requirements for consultation, including the reasons and the basis on which a decision would be made. There is no requirement at that step of the process that an employer is required to make provision for a support person or representative when the employer is communicating with the workforce. In any case Mr Panoho was not prejudiced because he was informed on two occasions later of his right to get a support person and WLT encouraged him to get independent advice.

[26] The consultation was supported by the company's position that it had to make savings and create efficiencies to have a multi skilled workforce that could be deployed anywhere on a range of duties. In addition the company had to look at reducing numbers to make savings.

[27] Another factor considered by Mr Emmens was multi-skilling, which he raised during his discussions with Mr Panoho. Although this was not referred to in the written communications, I am satisfied that there was some discussion on multi-skilling between them because Mr Panoho accepted that he discussed multi-skilling with Mr Emmens.

[28] Second, Mr Panoho agrees he met with WLT (Messrs Emmens and Holmes) to discuss the restructuring notice. Mr Panoho accepted that he received the restructuring notice and this was confirmed by his wife, Kura. It is therefore more than probable Mr Panoho was told of the process, the timetable and the basis upon which a decision would be made. However, Mr Panoho reached his own conclusion that it would not apply to him, and unfortunately this was the wrong conclusion to have reached.

[29] It is common ground that meetings were held on 10 & 19 March. I find that Mr Panoho was given the skills matrix template on 19 March that referred to him by name, including the skills headings and the values for each rating. Mr Panoho said that he threw a copy of the template away after the meeting because it did not have his name on it. I find that this action was unfortunate because the restructuring notice made it very clear what was happening and because the skills matrix would be developed and used as a basis upon which a decision would be made. It was

unreasonable that Mr Panoho threw it away because he was given it to respond to and the restructuring notice made it clear what it was for.

[30] Next, I find it was more than likely that Mr Panoho was given a copy of a template that included his ratings for the skills matrix on 16 April 2008 because:

- Two witnesses confirmed he was given a copy.
- The skills headings and ratings were referred to on the various documents produced at the Authority's investigation meeting.
- Mr Emmens produced the matrix and explained the various versions of that document.
- The matrix was only one part of the basis for a decision. Another consideration involved multi-skilling, which was discussed.
- Mr Panoho confirmed he attended meetings on 10 & 19 March and 16 & 24 April.
- Mr Panoho confirmed providing feedback (para.17 of his written statement).
- Mr Panoho was given his personal skills matrix on 16 April 2008 (statement of problem filed in the Authority).
- He says he threw his copy of the template away.
- The matrix applied to other employees.
- Mr Panoho changed his evidence at the Authority's investigation meeting over the type of meetings held and he accepted that individual "one on one" meetings occurred, not a mass meeting as stated in the SOP.
- Mr Panoho accepted during the Authority's investigation that the person he said filled his role did so during the time he and another employee were given time off in lieu and accepted that person did not replace him in the same role. Thus he had to change his evidence on this matter.

- The employer could account for the names and number of employees involved including those employees who left and the two employees who were not on the matrix.

[31] Mr Emmens only produced the full matrix with all the affected employees' names on it at the Authority's investigation. Its failure to release it earlier was based on a genuine decision about privacy, I hold. The full document is sufficient to establish that there was a basis for selection and that others were also considered. The employer was not required to provide the full document to Mr Panoho at the time but did meet the minimum requirement of providing him with his ratings detail: that happened on 16 April, before the meeting on 24 April when the redundancy letter was handed to him.

[32] Mr Emmens has caused some confusion around the matrix by referring to the various versions of that document and how the blending of the ratings occurred. Mr Emmens informed the Authority that it was Mr Prendergast who merged their separate ratings into the spread sheet. Mr Emmens has not provided much detail about this. The SIR did not provide much detail about the matrix either. This is not sufficient for me to decide that the document was not reliable because WLT's witnesses have been open in regard to it during the Authority's investigation.

[33] Mr Emmens was also not very helpful on the use of the skills matrix because he was not clear about the matrix being used for a competitive selection and/or as a guide on sorting out the structure of positions. However, I accept that the employer's letter made it clear that a matrix would be established and used as the basis for a decision that Mr Panoho was consulted on. There was no decision made on using a competitive process of selection, except that the matrix referred to the individual rankings from the ratings. Mr Panoho could have reasonably concluded that the matrix was the basis of the decision for his position to be chosen for redundancy, and that had been indicated to him earlier in the restructuring notice.

[34] On balance, I find that the matrix is a record of a skills rating for Mr Panoho and that there was an assessment made on other employees. However, the matrix was only part of the basis on which a decision was made because other matters were also considered by WLT: i.e the 10 March 2008 restructuring letter and the discussion between Mr Emmens and Mr Panoho on multi-skilling and Mr Emmens's on site evaluation, the use of machinery and the loss of the stems unloading contract.

[35] I find that WLT was acting in good faith having informed Mr Panoho of the information it was relying on i.e the matrix and multi skilling. WLT could have reasonably expected Mr Panoho to respond and not to have left it to the Authority's meeting to reply in detail on the areas of the matrix he now disputes (such as his skills including driving, using the Wagner machine and his sickness and ACC records). It is not for me to substitute my opinion for that of the employer in regard to the employer's conclusions. Mr Panoho did have the opportunity to raise the matrix earlier if he had taken the matrix results more seriously. He could have reasonably raised it at least on 16 April or before the next meeting held on 24 April.

[36] It is not necessary for an employer to disclose and rely on documents to justify a redundancy/restructuring so long as the employer acts fairly and in good faith. I am satisfied that: from the information provided that included the restructuring notice, the template matrix, the personal ratings and ranking for Mr Panoho and the meetings that occurred and the evidence of how the business was run; the non disclosure of the other employees' information on the matrix at the time does not make the process flawed (see Court of Appeal *Coutts Cars Ltd v Baguley* [2002] 1 NZLR and *Simpsons Farms v Aberhart* [2006] ERNZ at page 839 paragraph [52].)

[37] I am satisfied that the selection was sufficiently formulated, and overall the employer has been open and communicative on the matrix as required under the Employment Relations Act, except that it did not inform Mr Panoho that two employees were being ring-fenced and the reasons for that decision, which Mr Panoho would be entitled to have an opportunity to comment on.

[38] The skills about the positions for the two ring-fenced employees were not included on the matrix and in the documentation. That is understandable given the information was not disclosed. One of them had truck driving skills, which was the reason given for ring-fencing the position for that person. The employer was entitled to make that decision because it as based on a skill the employer particularised to that person and Mr Panoho was not a truck driver having regard to his job description. I am at a loss to know why the employer decided to ring-fence the employee who was on maternity/parental leave. Just because that employee was on maternity/parental leave would not protect them from a restructure/redundancy situation. Of course the employer would have to be open and communicative with them about the situation and consult them. In this case I was informed during the investigation meeting that

WLT ring-fenced that person's position because that person could operate a scaler. Mr Panoho says he could operate the scaler too. I note that scaling was not part of his job description. Mr Panoho was not informed about these circumstances until the Authority's investigation. This is information he would have been entitled to know about to talk about his qualifications and there is an impact on the situation because Mr Emmens did not know about Mr Panoho's full range of qualifications and there was no provision for such qualifications to be itemised on the matrix. It was Mr Emmens responsibility to make sure he knew Mr Panoho's qualifications. However, because Mr Panoho's job description did not make provision for driving a truck and scaling, I find the employer would have been entitled to ring-fence those employees in making a decision in its own judgement, but it needed to be open and communicative. It did not meet that standard. The employer's failure not to be communicative over this was not fair, I hold.

[39] I conclude that the decision was made to reduce the number of positions by two (instead of four initially) and those positions involved Mr Panoho and one other person, despite a reference in the redundancy notice to: "*employee redundancies*". Those words might lead to a conclusion it was the employee being made redundant instead of the focus required on the position. For clarity I am satisfied it was not the person being made redundant in the first instance, but that two positions became superfluous to the employer's needs. In this regard I have given the benefit of doubt to the employer, despite the failure of it to follow best practice. I have reached this conclusion because of the general approach taken to the restructuring and the underlying reasons for the restructuring that have been established, and the way Messrs Holmes and Emmens ran the business, including their consultation on the restructure and involvement with people from Pan Pac. This was a commercial decision.

[40] No details were provided of any changes to job descriptions and any decisions made on retraining for any new roles. However, I am satisfied that the decision was made to reduce the number of positions by two and absorb all the duties in the remaining positions because of the reduction in positions, the ring-fencing of positions and the use of the matrix ratings and rankings.

[41] I am supported by the Court of Appeal decision in *Aoraki Corp v McGavin* [1998] 1 ERNZ at page 615 that referred to the *Brighthouse Ltd v Bilderbeck* decision, also in the Court of Appeal [1995] NZLR 158 (CA), that said;

“Determining what positions could be dispensed with in a genuine redundancy and the feasibility of redeploying displaced workers were in principle matters of commercial judgment, not procedural fairness”.

Opportunity to respond and comment

[42] The next planned meeting was scheduled on notice for 24 April. There was no advance notice that a decision had been made and that the meeting would be about the decision to make redundancies and that Mr Panoho was affected by that decision. I am supported in this conclusion by Mr Prendergast’s notice that said:

On Thursday the 24th of April in my office we will be having individual meetings with you all to go over the upcoming company restructure. You are more than welcome to bring in a support person.

Here are the proposed meeting times. 30 minutes each ...

Please advise Campbell soonest of your availability, and once again our apologies for the notice.

[43] Mr Panoho was given an opportunity to take a support person. He never raised any objection about the timing of the meeting at the time. He attended the meeting and chose not to take a support person. That decision might have been entirely different if Mr Panoho had been informed that the purpose of the meeting was to convey a decision that his position was redundant. This was unfair.

The employer’s decision

[44] I find the decision to make Mr Panoho’s position redundant was given to Mr Panoho on 24 April. The redundancy letter dated 23 April was clear and unambiguous that the decision was made to terminate his employment for redundancy. It said:

“Your position has now been made redundant”

[45] The respondent would like me to find the decision was a “*proposal*” for redundancy. It is my finding that it was no such thing. Mr Panoho was informed that

his position had been made redundant. Also, the main purpose of that letter was to inform Mr Panoho of the proposal for arrangements to apply to his redundancy and departure.

[46] As such the letter was poorly written if the employer meant for it to be a “proposal” on a decision for redundancy. However the letter did afford Mr Panoho an opportunity for further comment and input. The letter stated:

“The company now seeks your response to the redundancy notice and proposes to meet with you on Tuesday 29th of April.”

[47] The letter also informed Mr Panoho that he could get independent advice, and indeed it encouraged him to do so:

“We encourage you to seek independent advice and should you require a copy of your individual employment contract please contact Campbell.”

[48] Mr Panoho had no opportunity to discuss redeployment and retraining before being informed of the decision on 24 April because neither of these matters was raised. A fair and reasonable employer would have raised them if only to advise they were not available, in this case. This is especially so in Mr Panoho’s case because there was reference to them in the restructuring notice and the employer relied on there being no redeployment options available in the Authority’s investigation meeting. There was no explanation of the details that WLT considered in regard to redeployment even though WLT says it considered redeployment and gave evidence to the Authority that there were no options available for Mr Panoho. No explanation was provided by Messrs Emmens and Holmes that they gave Mr Panoho an opportunity to comment. Given that Mr Panoho was not represented there was more responsibility on the employer to be communicative and open and not to put the responsibility entirely on Mr Panoho, who I accept would have less knowledge about what to raise and comment on.

[49] Mr Panoho would have reasonably concluded that his position had been made redundant because of that letter. In reaching that conclusion it is reasonable that he would have concluded WLT had made its mind up. In other words on that basis it is reasonable to conclude that he would have understood he had no opportunity to make a further response on the restructuring and selection process. The employer’s failure to put the matter to Mr Panoho as a proposal that he was potentially an affected

employee facing the possibility that it was his position that would be lost was unfair, especially as he had not been informed that two employees had been ring-fenced and there had been no discussion with him on redeployment and the decisions on the job descriptions and retraining. I am supported in the above by no further arrangements being made for meetings with the decision makers; Messrs Emmens and Holmes.

[50] In all other respects the redundancy notice was a proposal on how the redundancy decision was to be carried out and Mr Panoho was given an opportunity to discuss any departure arrangements with Mr Prendergast, for example the provision of assistance, paid leave and one month's pay in lieu of notice. I find the employer genuinely offered to give Mr Panoho time off to get independent advice and to prepare a response on the arrangements for departure. He was not prejudiced because he was paid and he accepted during the Authority's investigation meeting that another person filled in to cover his time off.

Conclusion

[51] WLT has been able to establish that there was a genuine reason to restructure and make redundancies.

[52] I am satisfied that the restructuring notice made it clear that Mr Panoho had the opportunity to respond on the restructuring and to participate in the development of the matrix for his skills and qualifications before the employer finalised a decision.

[53] But Mr Panoho was not sufficiently informed that the meeting on 24 April was to be about employer's decision to make his position redundant. This was unfair because if Mr Panoho had understood what that was about he may well have taken a different approach to the matter. WLT was not communicative and open with Mr Panoho about what the meeting was actually about and did not inform him about the ring-fenced employees.

[54] A fair and reasonable employer would have included an additional step in the process of putting Mr Panoho on notice before making the decision impacting on him. WLT fell short of what a fair and reasonable employer would have done, despite there being a genuine reason to restructure and that WLT consulted on the restructure. WLT's failure to be open and communicative related to:

- Failing to tell Mr Panoho that two employees had been ring-fenced and the reasons for that to enable Mr Panoho to comment and have input on any impact relating to his qualifications and the selection.
- Failing to inform Mr Panoho of the details of the purpose of the meeting on 24 April, thus depriving him of any affective opportunity to be prepared for that meeting, and to be represented.
- Failing to discuss redeployment at the time.

[55] The procedural failures mean that Mr Panoho has a personal grievance.

The remedies

[56] I conclude that Mr Panoho had no guarantee that his position would remain. Given the ranking he received on the assessment, and that it was most likely there were no redeployment and retraining options available, Mr Panoho has not established that he would be entitled to lost wages. I accept that there were no redeployment options because of the genuine restructuring, the loss of the stem loading contract and the threatened loss of WLT's remaining sole contract for work on site with Pan Pac, and the reduction in the number of positions. It appears Mr Emmens did not know about any of Mr Panoho's driving qualifications and experience. However with the relocation of the Wagner machine this would not have affected the decision, I hold.

[57] Mr Panoho cannot be compensated for the loss of his job because of redundancy as his redundancy was justified. Much of his evidence related to the impact of the redundancy on his feelings and he cannot be compensated for that either. Mr Panoho was paid his correct notice, which was not challenged.

[58] Any compensation for humiliation, loss of dignity and injury to feelings is at the lower end of the compensation scale having regard to the threshold in *Baguley* (above) and *Simpsons Farms Limited v Aberhart* (above). Mr Panoho's evidence on his claim for compensation relating to the employer's failure to be open and communicative on the issues was minimal, but I do accept that the employer's failure impacted on Mr Panoho's feelings. However the extent of any impact on his feelings must be at the lower end of the compensation scale given that the employer could justify the dismissal and only failed to meet procedural standards that would not have had any impact on the outcome. Mr Panoho cannot have contributed to his personal

grievance in the circumstances of the employer failing to meet the required procedural standards. I award Mr Panoho \$2,000 compensation under s 123 (1) (c) (i) of the Act and order Whirinaki Log Transfer Limited to pay Mr Panoho this sum.

[59] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority