

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 334
3235759

BETWEEN JUNGHWAN PARK
 Applicant

AND DATA INSIGHT LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Seungmin Kang, counsel for the Applicant
 Jeremy Ansell and Caitlin Sargison, counsel for the
 Respondent

Investigation Meeting: 30 – 31 January 2024

Submissions received: 15 February and 7 March 2024, from the Applicant
 29 February 2024, from the Respondent

Determination: 7 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Junghwan Park was employed by Data Insight Limited (DI) as a senior data engineer and architect on 24 October 2022 until his dismissal by way of redundancy on 14 June 2023.

[2] Mr Park says his dismissal was unjustified. He seeks remedies including reinstatement to a position no less advantageous to the one he held when his employment ended, compensation for lost wages and hurt and humiliation and a contribution to costs.¹ Mr Park is in receipt of legal aid.

¹ On 21 July 2023 Mr Park withdrew his application for interim reinstatement lodged 16 June 2023.

[3] DI is an agency providing analytical data consulting services. It says Mr Park's was a new role created to offer data engineering and architecture services which after 4 months was considered not feasible when the expected pipeline of work could not be achieved. It denies Mr Park was unjustifiably dismissed from his employment. It says the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances.

The Authority's investigation

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Park and from DI, Carmen Vicelich, founder and CEO, Ben Winterbourne, general manager and Neil Bryant, head of analytics.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues identified for investigation and determination are:

- i. Was Mr Park unjustifiably dismissed?
- ii. If so, is Mr Park entitled to a consideration of remedies sought including:
 - a. Reinstatement under s 123(1)(a) of the Act;
 - b. Reimbursement for lost income under s 123(1)(b) of the Act;
 - c. Compensation for unjustified dismissal of \$30,000 under s 123(1)(c)(i) of the Act;
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Park which contributed to the circumstances which gave rise to his grievance?
- iv. Is either party entitled to an award of costs?

The parties' employment agreement

[7] In September 2022 Mr Park applied for a role with DI as a data engineer and architect. He was well qualified for the role - he has a degree in computer science, a master's degree in information management and more than ten years' experience in data-related work in the IT industry in Korea and New Zealand. The job advertisement for the role includes a description of DI as a data analytics agency providing data strategy and data analytics to "...support businesses to make data driven decisions and deliver customer centricity." The advertisement describes the role as "[d]ue to growth..." and that it would be part of the analytics team reporting to one of the analytics managers to "...source, transform and load data into applications while providing guidance and insights that can be actionable by the business and our clients."

[8] Mr Park attended an interview with Mr Bryant and on 20 September 2024 was invited to complete a practical exercise "...to both understand your skill set, as well as give you a good idea of the type of work we do." The applications which formed the basis of the exercise were client management databases used internally by DI.

[9] Mr Park's application was successful and on 28 September the parties entered a written employment agreement (the employment agreement). At about this time Mr Park declined an interview with another company.

[10] Clause 1 of the employment agreement provides Mr Park was employed as a senior data engineer and architect. With respect to the role's job description clause 1.2 includes:

The Employee's duties and responsibilities are outlined in the attached job description. The Employer may, after consultation with the Employee, amend the job description and the duties associated with the position but not so as to change substantially the nature of the responsibilities of the Employee (except in the case of a restructure).

[11] Clause 18 of the employment agreement provides for four weeks' notice if employment is terminated for redundancy.

[12] Schedule A of the employment agreement provides the role objective as:

You will be responsible for working closely and collaboratively with the analytical team to deliver and present commercially focussed solutions that are actionable by our clients.

[13] Schedule A also describes the key working relations for Mr Park's role as:

Internal: Analytics Team Members
 Product Team Members
 Head of Analytics
 General Managers

External: Clients (as assigned)

Relevant law

The test for justification

[14] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied:²

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [85].

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, 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. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.³

[15] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act's legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act's objects of "acknowledging and addressing the inherent inequality of power in employment relationships". The provisions specified included s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

(a)...

(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;...

[16] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law."⁴

Background

6 March 2023 – proposal to disestablish Mr Park's role

[17] On 6 March Mr Park was invited to a meeting at which he received a letter from DI marked "Workplace change proposal". The letter set out a proposal to disestablish his position in broad terms "...to ensure that all of our roles are commercially viable, have a potential pipeline of work in the short and medium term and are the right fit for

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

⁴ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

[DI] as a consultancy agency.” In respect of Mr Park’s role, the reason provided for the disestablishment proposal was:

...the role of Senior Data Engineer & Architect was created to open up Data Insight’s opportunities and possibilities within the data architecture world with our customers. This role has been in place for over 4 months now, with no client work achieved outside of internal Data Insight work (including sister companies...”

The role currently has no opportunities going forward with our clients, and as such isn’t feasible to maintain.

[18] The letter then stated that other roles within the analytics team in which Mr Park worked had been assessed as commercially viable because they had a “...high degree of client work in both the past and near future”. Those roles are analyst and data scientist. The letter then outlined a process for consultation and assessment and that if the role was disestablished Mr Park would receive four weeks’ notice as provided under the employment agreement.

[19] This process was new to DI – it was the first restructure it had undertaken in the ten-year history of the business.

[20] DI says the change proposal letter would not have come as a surprise to Mr Park because the issue of underutilisation of his resource had been discussed with him prior to that date. It also says the issue of the viability of Mr Park’s role crystallised in the new year when at the end of the sales cycle the data engineering/architecture work it had expected to win did not eventuate.

[21] Mr Park does not accept the 6 March announcement would not have come as a surprise. He says the announcement came as a shock. He says he completed all tasks assigned to him, he had understood his role involved projects for internal clients, his work was intertwined with his team and it was never made clear to him that billing, or what level of billing of his work to external clients was a significant feature of the assessment of and ongoing feasibility of his role.

[22] There is no dispute Mr Park’s hours were recorded and coded in DI’s time management system. Information, provided later in the restructuring process, as to the type of billable hours relied on by DI to reach the decision to propose disestablishment of Mr Park’s role was drawn from this system. Mr Park was aware of this system – an introduction to it was part of the induction suite he had been taken through when he started with DI. What has not been established on the evidence is that DI expressly drew

to Mr Park's attention the significance of the expected level of billable hours to his role prior to the presentation of the change proposal. For example, Mr Park's employment agreement did not have a billable hours' target for him or the team of which he was a member.

[23] On 9 March Mr Park's representative wrote to DI providing feedback on the proposal including:

- (i) specific facts had not been provided supporting the change proposal;
- (ii) the role had only been in place for 4 months;
- (iii) the role was not being disestablished for genuine reasons namely his work performance and issues with Mr Bryant;
- (iv) if the disestablishment proposal proceeded Mr Park would be entitled to be offered any redeployment role and not subject to a fit assessment including any recruitment testing; and
- (v) a request for specific information including:
 - a. DI's financial position;
 - b. objective data comparing Mr Park's role utilisation with other DI roles, project and client changes during Mr Park's employment and justification for review the role after 4 months;
 - c. why a DI sister company was employing a senior data engineer and why that role was not an alternative role for Mr Park;
 - d. why Mr Park had not been offered recent new hire roles at DI, when the recruitment process started and what other roles would likely be filled that year;
 - e. how DI had mitigated utilisation of Mr Park's role including actions taken to find other work;
 - f. objective information to support the conclusion there was no short to medium term work available for Mr Park;
 - g. job description and terms and conditions of the alternative roles listed;
 - h. basis for conclusion Mr Park had performed no client work;
 - i. how Mr Park's removal from two project involving big data processing was factored into the restructuring decision;
 - j. how Mr Park's role could be considered under-utilised when he had received positive feedback from colleagues.

[24] The letter ended with a request to extend the feedback proposal which was granted – DI suspended the plans and timetable set out in the 6 March letter.

[25] On 16 March Mr Bryant emailed Mr Park that he had no billable work for him and was looking at internal work he could do. To that end Mr Bryant proposed one-off pieces of work Mr Park could do over the “next week or so” including meeting with the sister company to document work done for its client management data base. Mr Park queried why Mr Bryant had emphasised availability of billable work when that was not a requirement of his employment agreement.

[26] On 17 March DI replied to Mr Park’s 9 March letter responding to the feedback provided and providing further information. In response to the suggestion the proposal was not genuine the letter restated the proposal to disestablish Mr Park’s role was because without a discernible pipeline of work it was not commercially viable and minimal client work had been achieved outside internal DI work including for sister companies. DI’s view was four months was a sufficient time to assess the viability of the role. In response to the specific feedback Mr Park had provided the letter included:

- (i) DI wished to hear from Mr Park if he had ideas to resolve the utilisation issues;
- (ii) denied the proposal was due to an underlying performance issue;
- (iii) listed the current roles being recruited, if Mr Park’s role was disestablished redeployment opportunities could be looked at but an “assessment of fit” would be necessary and Mr Park would need to agree to the role;
- (iv) the request for financial records was declined because financial hardship was not claimed;
- (v) a table outlining Mr Park’s utilisation rate and that of the other roles in the analytics team;
- (vi) a table showing DI’s projects October 2022 to 6 March 2023;
- (vii) DI could not influence the sister company’s recruitment decisions because it is a different employer and operates under separate management;
- (viii) Mr Park was not put on notice earlier that his role was in jeopardy because the proposal commenced on 6 March. Advertised role from that date are relevant to the restructuring proposal;

- (ix) outlined how Mr Park's role had been supported and promoted by DI including advertising to clients;
- (x) described short term as "next month" and medium term as "next 6 months";
- (xi) a lack of work could not be proved but pointed to the absence of work in the short to medium term;
- (xii) confirmed no fixed plan to recruit positions other than those described;
- (xiii) attached position descriptions for data analyst and software developer roles and salary bands;
- (xiv) confirmed the three projects Mr Park had undertaken work on, described the work performed and why Mr Park's involvement had ended;
- (xv) a table of projected work showing no current deals open for data engineering and key deals lost in January 2023; and
- (xvi) there was no question as to the quality of Mr Park's work.

[27] The letter then restated the original timetable had been suspended and no deadline for feedback had been set, the suggestion the parties meet "to further discuss and clarify the issues raised" was made again and that DI would not move to make a decision until Mr Park was satisfied, he had provided all his feedback.

[28] Mr Park says DI contradicts itself when it says the work for the sister company was internal work and not billable but, in a recruitment setting it was a separate company. There is no evidence roles in Mr Park's category are shared on a permanent basis between the sister companies.

[29] On 22 March Mr Park's lawyer wrote to DI declining the offer to meet to provide feedback and providing further feedback including:

- (i) an expression of surprise that one page of supporting information had been provided;
- (ii) information which could reasonably be expected to be provided had not been such as financial information, reasons for and details of proposed changes in business processes, reasons for removal of the role and who will do Mr Park's work;
- (iii) the criteria for restructuring had not been met because DI could not prove the role was no longer viable due to lack of available work;

- (iv) Mr Park's employment agreement and any provided documents do not support DI's requirement for a target of billable hours to be met;
- (v) it was accepted DI was not in financial hardship;
- (vi) Mr Park's utilisation rate calculation was not supported by evidence, other roles not selected for disestablishment appeared to have low utilisation rates and Mr Park was busy in the weeks before he received notice of the change proposal;
- (vii) Mr Park disputed he did no work outside internal DI work including that of sister companies;
- (viii) the work Mr Park undertook for the sister companies could and should be charged for as client work and the decision not to do so is an unreasonable driver for disestablishing Mr Park's role;
- (ix) it is contradictory and unreasonable to state DI cannot influence a sister company's recruitment decisions and not charge out Mr Park for work performed for that company;
- (x) no explanation had been provided as to why another DI employee continued to work on an external client project Mr Park was advised had been cancelled;
- (xi) DI had contracts with a number of clients which would require data engineering services;
- (xii) redeployment roles must be offered to Mr Park if they are available and he is qualified to undertake them;
- (xiii) a request for further information supporting the utilisation rate, all actions DI had taken to address the issue of utilisation rate, full job descriptions and comparable salary and hours information for the alternative role in the team and objective data of project and client change from October 2022 to 6 March 2023;
- (xiv) if DI proceeded with the proposal Mr Park would raise a personal grievance;
- (xv) Mr Park was experiencing substantial, undue stress due to the process and attached a medical certification placing him off work until 10 April; and
- (xvi) an urgent response was sought.

[30] On 23 March DI wrote to Mr Park's lawyer. The medical certificate was acknowledged as was that Mr Park would be on sick leave until at least 11 April, recorded the parties were not in agreement as to the sufficiency of information provided to allow Mr Park to provide feedback and the process would continue to be suspended to allow Mr Park further time to provide feedback. Mediation was also proposed. No further information was provided with this letter.

[31] On 20 April the parties attended mediation. This did not resolve matters between them. DI wrote to Mr Park's representative later that day seeking any further feedback he may have on the change proposal before a decision was made. The timeframe given was close of business the following day.

[32] On 21 April Mr Park's representative responded to DI:

- (i) repeating the feedback provided in the correspondence 9 and 22 March;
- (ii) seeking information of the utilisation rates of all DI employees from 24 October 2022 to week ending 7 March 2023;
- (iii) copies of two specified project contracts to verify removal of data engineering;
- (iv) copies of all signed DI client contracts in the period 24 October 2022 to 21 April 2023 to see whether they included data engineering or architectural work;
- (v) detail of all DI billed hours for data engineering work for two specified clients;
- (vi) detail of all projects currently under negotiation with data engineering or architecture work;
- (vii) the reason why MYOB and Xero integration tasks were not assigned to Mr Park when available around 13 March 2023;
- (viii) full job descriptions and comparability information including salary and hours for the roles listed in the change proposal; and
- (ix) actions taken by DI to utilise Mr Park's resource using non-data engineering or non-data architect work and details of his billable hours for such work between 24 October 2022 and 6 March 2023.

[33] The letter ended seeking an assurance that if the change proposal was implemented DI would remove all reference to data engineering and data architecture services from its website and would not provide such services.

[34] On 24 April, DI wrote to Mr Park's representative raising a concern he may have deleted client information, this was potentially a serious data breach and Mr Park's access to DI's network was suspended until an explanation was received and a view formed.

[35] On 3 May, Mr Park's lawyer wrote to DI's representative providing a comprehensive response - he had accessed the information in order to provide feedback on the ongoing work and engagement with the clients and had copied the documents onto his work laptop. He did not interfere or modify the original documents held in the shared folder. Information remained on his work laptop and was not shared with any third party. Mr Park offered to return the laptop for examination and advised he still retained access to the system.

[36] On 5 May DI advised it accepted Mr Park's explanation and the data breach matter was closed. The letter set out a response to Mr Park's feedback and expressed a wish to progress the restructuring matter for which his feedback was sought by 8 May. The letter also expressed a concern that Mr Park had not yet provided substantive feedback to the change proposal other than disestablishment of his position would not be justified, that DI had tried in good faith to provide all the information sought and "in a genuine hope" Mr Park would take the opportunity to provide further feedback made the following "comprehensive" response to the information request:

- (i) attaching utilisation rates for Mr Park and his team members. This was summary information so all clients would not be revealed;
- (ii) attaching a weekly breakdown of Mr Park's time by project;
- (iii) detail of how data engineering was removed from scope for one identified client contract and the data engineering work for the other identified client was not within Mr Park's job role;
- (iv) declined to share all signed contracts on grounds of commercial sensitivity and confidentiality;
- (v) about 24 hours of data engineering and architecture work billed for the two identified projects;
- (vi) of current contracts under negotiation one has a couple of weeks data engineering work available;
- (vii) MYOB and Xero integration data engineering tasks had not been given to Mr Park because it had only recently been signed off;

- (viii) attaching job descriptions, salary ranges for full time positions of analytics manager, senior data scientist and data scientist;
- (ix) attaching a summary from the DI project management software database of all non-data engineering and architecture work performed; and
- (x) DI did not intend to promote data engineering or architecture work if Mr Park's role was disestablished because it had no capacity to do so.

[37] On 15 May Mr Park provided detailed feedback under the following headings:

- (i) 'inconsistencies and errors in DI's proposal and responses' – there was no justifiable reason to treat work for sister companies as non-billable, at least 12.5% of one identified project was billable data engineering work, DI knew there would be data engineering work available in the recently signed off contract;
- (ii) 'common and different skill sets between data engineer architect, analyst and scientist' – DI's claim temporary non-data engineering and non-data architect work was not available for Mr Park was technically incorrect given the significant skill overlap with his role and data-analyst and data-scientist;
- (iii) 'DI had provided Mr Park insufficient information'; and
- (iv) 'Mr Park's access to the project management software database'.

16 May – decision made to disestablish Mr Park's position and redeployment process starts

[38] By letter dated 16 May, DI advised Mr Park the decision had been made to disestablish his position. The letter then turned to redeployment. Mr Park was asked to indicate by 19 May if he was interested in a list of roles currently advertised and was referred to the DI website for details. The letter included:

This does not mean that we would necessarily offer you one of these roles, but rather provide us with a starting point for assessing if one of these might be a suitable redeployment opportunity. We obviously have your CV on file from your application in 2022, but if there is further supporting information relevant to any of the role(s) of interest to you, please provide that also.

[39] On 19 May Mr Park's lawyer wrote to DI that the decision letter had caused him undue anxiety and stress which was impacting his health, he was seeing his doctor on 23 May and sought an extension to respond by 26 May. He also sought paid stress

leave for the period 19 to 26 May. By return email, DI agreed to an extension to 26 May and that Mr Park would receive paid sick leave from 19 to 26 May.

[40] By letter dated 26 May Mr Park's representative wrote to DI that he intended to raise a personal grievance for unjustified dismissal and seek interim reinstatement and/or permanent reinstatement. The letter also set out Mr Park's response to redeployment matters including that he sought to be appointed to the senior insight analyst on condition he received the same salary and no less advantageous terms and conditions, any appointment would be without prejudice to raising a personal grievance and seeking remedies including reinstatement, DI would continue to promote data engineering at least until his intended claims were determined and if a new project required data engineering and architectural work it would be provided to Mr Park. The letter also referred to a without prejudice offer DI had made to Mr Park open until 2 June and made clear the 26 May letter was not a rejection of that offer.

[41] On 31 May DI's employment advocate replied to Mr Park's lawyer:

- (i) DI understood Mr Park wished to be considered for the role of senior insight analyst as a redeployment opportunity;
- (ii) attaching a document titled "Data Insight Interview Assessment Form" undertaken by Mr Winterbourne which assessed Mr Park as 54% aligned with the key elements of the senior insights analyst role. The form recorded the assessment was based on Mr Park's curriculum vitae submitted for the data engineer/architect role and as demonstrated during his employment;
- (iii) on that assessment Mr Park would not be successful in the senior insight analyst role;
- (iv) a final decision had not been made and invited Mr Park to provide direct feedback or submissions regarding the assessment.

[42] By reply on 31 May Mr Park's new representative wrote to DI's employment advocate including that Mr Park believed there was little point responding to the preliminary assessment because his view was DI's decision to disestablish his role and not redeploy him appeared predetermined. In respect of the assessment itself the letter stated:

- (i) it was unfair of DI to rely on Mr Park's curriculum vitae submitted for his role because it was focussed on the position of senior data engineer and architect;
- (ii) there appeared to be no documentary basis for DI to have assessed Mr Park as not having demonstrated analytical role, techniques and projects during his employment with DI;
- (iii) the scores given appear arbitrary without a standard for criteria scores or overall success.

[43] The letter concluded Mr Park awaited DI's final decision and that he saw the only option available to him now was to raise a personal grievance for unjustified dismissal. Matters relevant to an injury Mr Park suffered on 16 May for which he received accident compensation were also addressed.

[44] On 14 June Mr Winterbourne wrote to Mr Park by way of his solicitor notifying him the decision had been made to dismiss him on grounds of redundancy. The letter detailed the background of the change proposal and the redeployment process including in relation to the senior insight analyst role:

We have also found you have been unwilling to meaningfully engage with us during the last few weeks and tell us why you consider you would be a suitable fit for the position.

Given this and having considered your feedback and your views, our view remains that you are unsuitable for the role of Senior Insight Analyst and that redeployment to this position is not feasible. This is for the reasons previously outlined and also set out in the Interview Assessment Form. The Senior Insight Analyst position is substantively different from your Senior Data Engineer & Architect position, and we do not believe you would be a suitable fit for it, even with some degree of upskilling.

[45] The letter thanked Mr Park for his contribution to the business and wished him well. Mr Park received 4 weeks' pay in lieu of notice.

Discussion

Was Mr Park unjustifiably dismissed by way of redundancy?

[46] Mr Park submits his dismissal was not substantively or procedurally justified because DI:

- (i) acted unfairly and unreasonably in the period up to 6 March 2023 when the workplace change proposal was provided;

- (ii) acted unfairly and unreasonably in the period up to 16 May 2023 when the decision to disestablish his role was made and communicated to him; and
- (iii) conducted a redeployment process which was unfair and unreasonable.

(i) *Were DI's actions up to 6 March 2023 when the workplace change proposal was provided unfair and unreasonable?*

[47] Mr Park submits DI's actions from the commencement of his employment up to and including 6 March when he was first advised of the proposal to make his role redundant should be subject to heightened scrutiny given his was a new, specialised role which was disestablished after three months (excluding the summer holidays) and for which, unreasonably in his view, DI had failed to make a 'Plan B'. Mr Park said in evidence if DI had made clear to him earlier that his role was contingent on securing a future pipeline of work, he would have been in a better position to raise associated issues during his employment. He said he was not provided an opportunity to discuss matters effecting the business, and in particular his role, and if he had been provided that opportunity, he feels confident he would have been able to perform any tasks he was asked to. He submits these flaws in DI's approach to his role and the review of its viability is demonstrated by the following:

- (i) failing to fully and properly inform him that low utilisation rates and/or billable hours as recorded in the work time recording system could affect the continuation of his employment;
- (ii) holding an unreasonable expectation Mr Park was aware he was being underutilised when he was unaware of the utilisation rate or the emphasis DI put on it and he understood his role was intended from the outset to be focussed on internal projects;
- (iii) failing to raise concerns about Mr Park's utilisation rate in a timely manner so denying him the opportunity to respond to the concerns or express his ideas to secure the feasibility of the role;
- (iv) failing to undertake market research as to a future pipeline of work for Mr Park;
- (v) failing to advise Mr Park prior to the change proposal that deals containing work anticipated for him had fallen over; and

- (vi) failing to look at opportunities prior to the change proposal which were within its control for example with a sister company.

[48] The reason Mr Park's position was made redundant was because DI had been unable to secure work for the role from clients and by March 2023 it could not see any such work being secured in the foreseeable future.⁵ The information before the Authority establishes the decision to create the role Mr Park was offered and worked in arose from a genuine expectation that work could be secured to justify the role, that during Mr Park's employment the work did not eventuate and attempts to find other similar work was unsuccessful.

[49] DI's assessment of Mr Park's utilisation rate, how his working hours were recorded and billed and his knowledge of and reaction (or anticipated reaction) to the change proposal are matters which were the subject of the change proposal and on which I am satisfied Mr Park was given a fair opportunity to comment. I am also satisfied those comments were considered by DI. For example, Mr Park was able to review how his hours had been billed and could make comment on them. As to the utilisation rate of 85%, during the consultation process Mr Park was provided an opportunity to understand the rate and comment on it and its application to him and other staff members. These are organisational matters which are reasonably within the control of the employer with the proviso that they are applied and used consistently with the obligation of good faith and in accordance with the parties' employment agreement.

[50] The difficulty DI faces in establishing the 6 March 2023 proposal to disestablish Mr Park's role was genuine on the basis of insufficient client work is that, on the evidence before the Authority Mr Park was offered, accepted and worked in a role where there was never sufficient client work for him to perform. Given these circumstances there is compelling logical force in Mr Park's opposition to the asserted genuineness of his redundancy given there was never sufficient client work for the entirety of Mr Park's employment with DI, including up to 6 March when he received notice of the change proposal. It was fair and reasonable for Mr Park to seek to understand why at that point the role was no longer sustainable when at no earlier point,

⁵ Refer letter change proposal letter 6 March 2023.

including at the commencement of his employment, had it been made clear to him the role was in effect conditional on the expected securing of a pipeline of work. This was not a reasonable inference to draw from the fact the role was new – while DI assumed the risk in employing Mr Park on a permanent basis without a pipeline of work in the absence of clear evidence Mr Park understood the significance to DI of the circumstances of his role from the outset, DI cannot assume he too shared the risk.

[51] Given the good faith obligations and in particular the s 4(1A)(b) obligation to be constructive in establishing and maintaining the employment relationship, DI was obliged to raise these matters with Mr Park in timely manner, including from the time the employment relationship was entered, because these matters, which existed from the outset went to the viability of his employment. This was not a situation, as in *Grace Team Accounting*, where there was adequate ongoing work from the outset which justified Ms Brake's employment on a full-time basis. In this situation, on DI's analysis and on the clear words of the 6 March proposal letter Mr Park's role never had adequate work. It is accepted DI anticipated there would be adequate work, but that is not the same as there being adequate work for Mr Park to have a viable role.

[52] This concern was clearly and repeatedly articulated by Mr Park to DI from 6 March – he repeatedly said he had work to do and where he could see work, he could perform. Despite this, the documentation between the parties shows DI never fully engaged with this criticism – the correspondence does not demonstrate it looked back through the employment relationship to consider if and perhaps satisfy itself and Mr Park its actions were consistent with the maintenance of ongoing employment. Perhaps if it had the parties would have been in a better position to work together constructively and in light of the mutual assumption of ongoing employment by, for example, utilisation of mechanisms within the parties' employment agreement including that which provides DI can, albeit not substantially, change Mr Park's position job description and duties following consultation.

[53] For these reasons, DI cannot establish its actions leading up to the presentation of the change proposal were consistent with the good faith obligations it owed Mr Park. This finding inevitably casts a shadow over subsequent events between the parties including the change proposal and feedback process.

- (ii) *Were DI's actions up to 16 May 2023 when the decision to disestablish Mr Park's role was communicated to him were unfair and unreasonable?*

[54] In respect of the period from 6 March to 16 May 2023 Mr Park submits DI's actions were unfair and unreasonable irrevocably tainting the decision to make his role redundant by:

- (i) failing to consider reasonable alternatives to disestablishing his position which could, in his view, reasonably have included allowing Mr Park to undertake other task within his skills and relevant to projects DI had or making his role less than full time;
- (ii) failing to consider those options and seeking Mr Park's view notwithstanding any concerns it may have had as to whether it fell within the scope of Mr Park's role or was financially sustainable;
- (iii) failing to provide financial records when requested on 17 March 2023;
- (iv) failing to provide Mr Park with the option of a two-week project available in June 2023 which was outsourced; and
- (v) failing to provide Mr Park with special paid leave particularly given the 6 March letter stated DI would aim to support staff through the process.

[55] As set out above, DI cannot demonstrate it has engaged with Mr Park's fundamental criticism of its approach which stretched back through the employment relationship. The extensive and lengthy correspondence between the parties required for DI to provide information to Mr Park to allow him to meaningfully comment on the change proposal, further demonstrates DI had not sufficiently grappled with the significance of the situation in a good faith setting that is, it had employed Mr Park with no guaranteed ongoing work for him to do, had not told him that or, at least had not expressly told him the potential significance of that to the ongoing viability of his role from the outset of the relationship and was now moving to call time on his role and potentially the employment relationship. Given the work context of the parties' employment relationship and Mr Park's role, skills and experience DI could reasonably have anticipated he would require a significant degree of substantive information to allow him to meaningfully and unambiguously respond.

[56] In addition, I find DI has not engaged meaningfully with Mr Park's fundamental concern, raised repeatedly though the consultation phase, that his data engineering skills

and experience which he had exercised in the role and had brought to the workplace in his interactions with other team members, was fully integrated into the day-today work of DI.

(iii) *Was DI's redeployment process unfair and unreasonable?*

[57] The statutory good faith obligations and in particular s 4(1A)(b) are relevant in a redeployment setting because throughout an employment relationship an employer has an obligation to be active and constructive in maintaining the relationship.⁶ The Authority's role in considering a refusal or failure to redeploy includes an assessment of whether the reasons are substantively justified or whether the process followed to reach those reasons was fair and reasonable. The Court has described this assessment in the context of the statutory good faith obligations as follows:⁷

Where an employer has not actively and constructively sought to maintain the employment relationship in breach of s 4(1A)(b) or the reasons for not redeploying were not justifiable, a dismissal will be unjustified.

This does not mean that there is an absolute duty to offer redeployment in all cases.

Typically, where an employer has carried out a robust consultation process and has actively and constructively considered redeployment, has been responsive and communicative throughout the process and then has good reasons for not redeploying, it will be difficult for an employee to claim that they have been treated unfairly and that the decision is unjustified.

[58] Mr Park submits DI's consideration of redeployment options for him was unfair and unreasonable because it used the curriculum vitae he had submitted to apply for his role with DI and his work with DI as a data engineer to assess his suitability for the redeployment opportunity. He says this was unfair because it denied him the opportunity to provide a curriculum vitae tailored for the deployment role under consideration and demonstrate he had skills relevant to the role. Further he says given DI's approach in applying unreasonable criteria and reaching an apparently arbitrary assessment as to his suitability for the redeployment role meant its proposal for further discussion was not genuine.

⁶ Employment Relations Act 2000, s 4(1A)(b).

⁷ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, [72] – [74].

[59] DI says its actions are within the “target” of what a fair and reasonable employer could have done – it told Mr Park what positions were currently being advertised and provided access to information about the roles, he should indicate which roles he was interested in, gave him more time and paid leave when he requested that, told Mr Park it would use the curriculum vitae on file to assess him and asked him to provide further information. It says Mr Park’s refusal to engage with the process prevented further consideration of the redeployment options.

[60] DI’s approach to redeployment has unfortunately left Mr Park with the impression the decision had already been made that he was not suitable for the role. This is somewhat understandable given DI’s approach effectively required Mr Park to establish he was suitable for the role which was then reinforced when he was assessed as not being suitable for the role when DI used an assessment tool (the interview matrix) which Mr Park had not been notified of or his comment sought as to its suitability. Such an approach is not consistent with s 4(1A)(b) which requires parties to be active and constructive in maintaining the employment relationship and requires a proactive approach to redeployment in the course of a restructure.⁸ DI’s assessment that Mr Park did not have the soft skills necessary for the data analyst role, the communication or commercial skills and that the training that would be involved would be significant were specific matters that it ought to have put to Mr Park for comment. This is particularly so given the information before DI of Mr Park’s view of the significant overlapping skill sets between his role and that of data analyst.⁹ Using this information in a fuller discussion with Mr Park as to his suitability for his identified preferred redeployment option may have gone some way towards DI discharging its good faith obligations in a redeployment setting.

Remedies

[61] Mr Park has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

⁸ *Gafiatullina v Propellerhead Ltd* [2021] ERNZ 654 at [143]–[144].

⁹ Refer [37] above.

Reinstatement

[62] Reinstatement is the primary remedy in proceedings for unjustified dismissal.¹⁰ The remedy of reinstatement is to the employee's former position or one no less advantageous.¹¹ It must be awarded wherever practicable or reasonable to do so.¹²

[63] Mr Park submits reinstatement is reasonable and practicable:

- a party opposing reinstatement would have to prove reinstatement was not reasonable or practicable;¹³
- he can return to and successfully reintegrate into workplace;
- his was a no-fault dismissal for redundancy;
- the fact of a personal grievance and defence of that grievance is not a factor in assessing practicability or reasonableness; and
- the availability of a vacancy is not a requirement for reinstatement.¹⁴

[64] DI says it is neither practicable nor reasonable to reinstate Mr Park. A data engineer and architect role no longer exists, and DI does not perform work in that area. DI holds sincere concerns as to Mr Park's ability to return to work at DI due to the potential data breaches he was involved in, his refusal to undertake some work, his repeated threats to raise grievances and complaints. DI says there has been an irreparable loss of trust and confidence.

[65] The availability of a vacancy is not a requirement of reinstatement.¹⁵ The considerations are practicability and reasonableness. DI is a not large business and the data analytics team is relatively small. There are no current vacancies which Mr Park could fill. While DI has been on notice from the outset of Mr Park's intention to seek reinstatement the inevitable disruption to the organisation of DI's data analytics team if Mr Park's reinstatement was awarded means reinstatement would not be practicable.

¹⁰ Section 123(1) Employment Relations Act 2000.

¹¹ Section 123(1)(a).

¹² Section 125(2) Employment Relations Act 2000.

¹³ *Humphrey v Canterbury District Health Board Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

¹⁴ *Walker v Firth Industries* [2014] NZEmpC 60.

¹⁵ *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

[66] The redundancy process will have inevitably eroded the trust and confidence between the parties and may make re-establishing that necessary element of any employment relationship difficult. In addition, Mr Park has raised that his redundancy was motivated by an undisclosed performance issue and/or conflict with a manager. His evidence to the Authority suggests he still holds that view. Given the small team environment and the likelihood, if he was reinstated that he would report to those managers, this further weighs against the reasonableness of reinstatement.

[67] Mr Park's claim for reinstatement is unsuccessful.

Reimbursement

(i) lost wages 21 March to 9 April

[68] This is a claim for unpaid days Mr Park was unable to work due to ill health consequent to the redundancy process. It was unpaid because Mr Park did not have a contractual or statutory entitlement to sick days.

[69] The claim is unsuccessful. While it is accepted Mr Park was unwell as a consequence of his engagement with the redundancy process and did not attend work the evidence does not establish actions of DI in breach of employment obligations owed to Mr Park were the cause.

(ii) lost wages from end of employment

[70] Mr Park seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and section 128 of the Act. The period of claim is from date of dismissal to date of reinstatement (if awarded) or date of determination. He has been in receipt of accident-related compensation for a significant portion of the period of claim arising from an injury which occurred on the day he learnt his employment was to end. He says factors such as the restraint of trade and his injury have restricted his ability to find other work. These factors are of limited relevance in the absence of evidence Mr Park sought and was unreasonably denied release from the post-employment restraints or that his actions which caused his injury were a reasonably anticipatable outcome of the notice of dismissal.

[71] The usual position is that ACC and similar payments are taken into account when assessing lost remuneration, because reimbursement for lost earnings is for an

established loss. Where that loss has been mitigated or reduced by other earnings, it is not open to the Authority to award more than the actual loss.¹⁶ DI submits, if Mr Park's dismissal is found to be unjustified, it would not be reasonable for the Authority to award any lost wages – because Mr Park received accident-related compensation his financial position has not been negatively impacted, he received the redundancy compensation and failed to mitigate his claim for lost remuneration having applied for two positions.¹⁷ Mitigation is a relevant factor to consider in assessing an award of lost wages.

[72] After reviewing the evidence of loss and Mr Park's limited attempts to mitigate that loss I am satisfied he is entitled to an award of lost wages calculated from three months after his employment ended being the difference between the amount he received in accident-related compensation payments and what he would have earned if he had remained employed by DI. The employer Kiwisaver contribution and holiday pay is to be calculated on that sum.

Compensation

[73] In evidence Mr Park said he has suffered various stress related symptoms arising from his redundancy including anxiety, insomnia, headache, indigestion, shaking and depression. He has been prescribed medication for these symptoms. As a result of losing his income he faced significant financial uncertainty as well as emotional distress which has negatively impacted his family.

[74] It is accepted the impact of the unjustified dismissal has had a profound and negative impact on Mr Park. The Authority is satisfied he experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Mr Park is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings he has suffered consequent to his established personal grievance of \$16,000.00.

¹⁶ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57 at [162]–[163].

¹⁷ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Park that contributed to the situation giving rise to his grievance?

[75] No deduction from the remedies awarded is to be made under s 124 of the Act. Mr Park's dismissal was a no-fault redundancy and he did not contribute in a blameworthy way to the situation giving rise to his personal grievance.

Special damages

[76] Mr Park seeks reimbursement of legal fees of \$13,892 as special damages. The claim is not successful. This matter is not in a category which would warrant an award of special damages.¹⁸

Summary of orders

[77] Mr Park was unjustifiably dismissed. The following orders are made:

- a) Within 28 days of the date of determination Data Insight Limited is to make the following payments to Mr Park:
 - a) \$16,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
 - b) three months lost remuneration pursuant to section 123(1)(b) of the Employment Relations Act 2000 less accident-related earnings in the relevant period; and
 - c) holiday pay and Kiwisaver contributions calculated on the lost remuneration award pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

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

[79] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Park may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that

¹⁸ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71.

memorandum DI will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[80] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Urlich
Member of the Employment Relations Authority