

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 199  
5348771

BETWEEN

ROBERT PATTERSON  
Applicant

A N D

SUPERIOR MOTOR CYCLES  
LIMITED  
Respondent

Member of Authority: David Appleton

Representatives: Linda Ryder and Shona McClelland, Counsel for  
Applicant  
Jonathan Smith, Counsel for Respondent

Investigation meeting: 30 and 31 May 2012 at Christchurch

Submissions Received 17 August 2012 from the applicant; 29 August 2012  
from the respondent

Date of Determination: 14 September 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Patterson was unjustifiably dismissed and unjustifiably disadvantaged.**
- B. The respondent is to pay to the applicant the compensatory sum of \$10,000.**
- C. The respondent is to pay to the applicant the sum of \$8,750 gross for lost remuneration.**
- D. Costs are reserved and a timetable set.**

**Employment relationship problem**

[1] Mr Patterson claims that he was unjustifiably dismissed on 22 April 2011 and unjustifiably disadvantaged in his employment in relation to a failure to properly consult with him over his proposed redundancy. Mr Patterson also claims that there was a breach of s.4(1A)(c) of the Employment Relations Act 2000 (the Act) by the respondent.

[2] The respondent claims that Mr Patterson's dismissal was justifiable, arising out of a genuine redundancy situation, and that fair and reasonable procedures were followed. It also denies that Mr Patterson suffered an unjustifiable disadvantage and that it breached s.4(1A) (c) of the Act.

**Brief facts leading to the dismissal**

[3] Mr Patterson worked for the respondent principally as a motorbike salesman. He had worked for the respondent since October 2007. Apart from selling new motorbikes, the respondent also sold genuine parts, and motorcycle accessories. It also has a workshop in which two mechanics worked.

[4] Immediately after the major earthquake in Christchurch on 22 February 2011, the respondent's business premises were behind the cordon for a number of days, severely limiting access. When the cordon was reduced, the owner of the respondent business, Mr Bellamy, together with some friends and two of the staff, worked to repair damage to the building and the stock. Mr Patterson, along with other staff, was not required to attend work during this period. The business reopened on Monday 21 March 2011.

[5] On Friday, 18 March 2011, which was a public holiday in Canterbury to commemorate the victims of the 22 February earthquake, Mr Patterson received a telephone call from I R Thompson Associates Limited, a firm of employment advocates, advising him that a letter from them needed to be sent to him urgently. The letter was then emailed to Mr Patterson, which he accessed that day while travelling. It stated as follows:

*Dear Mr Patterson,*

*We act for Superior Motor Cycle Limited, and we have been requested to formally write to you regarding structural changes that our client is considering undertaking.*

1. *As you are aware, due to the recent earthquake, our client's operations have been closed and it is expected that there will be a substantial downturn in the industry.*
2. *Therefore, our client is considering making some changes to the business operations and the current staffing levels.*
3. *Our client has indicated that your position may be surplus to their requirements.*
4. *Our client is considering that he may be in a position to undertake your role, therefore freeing up one position and consequently reducing overheads.*
5. *Of course, our client has not made any decisions regarding this proposal, nor will they until they have had an opportunity to discuss, and/or consult with you regarding this proposal.*
6. *However, depending on the outcome of this consultation one of the possible outcomes may be that your position could become redundant. Therefore, you are advised of your right to have a support person and/or a representative present during any meeting, which relates to the proposal for change.*
7. *Our client wishes to meet with you on Wednesday 23 March 2011 at 12.30pm. The location for the meeting will be confirmed to you in due course. Alternatively, if you do not wish to meet with us, you are welcome to provide written submissions on/or before 5.00 pm on 22 March 2011.*
8. *However, you must communicate to us your preference. In the meantime, our client has explained that you are due to return to work on Monday 21 March 2011. Because this proposal will come as a surprise to you, our client has instructed that you can remain on paid leave until this proposal has concluded.*

*If you have any questions or comments, please feel free to contact me.*

*Yours faithfully,  
I R Thompson Associates Limited  
Robert Thompson  
Advocate*

[6] Mr Patterson confirmed his attendance at the meeting on 23 March 2011 and attended it accompanied by a friend of his, Ms Wendy Lush, who is an HR practitioner.

[7] Mr Patterson and the respondent disagree on certain details with respect to the content of the meeting, but it appears to be common ground that either Mr Bellamy or Mr Thompson, who was present at the meeting, stated that trading had already been

pretty tough but there was uncertainty as to how things would be after the February earthquake.

[8] It is also agreed that Mr Patterson put two proposals to Mr Bellamy to consider in order to prevent him from being made redundant. One of these was that he would only work three days a week; the second that he would forego his commission (which accounted for around \$6,000 to \$8,000 a year on top of his base annual salary of \$45,500). It is also agreed that, after taking a break to discuss these suggestions, Mr Bellamy and/or Mr Thompson rejected these two proposals on the grounds that part time work as a salesman would cause communication problems within the business and that neither of the suggestions would produce the savings that Mr Bellamy was looking for.

[9] It is also common ground that Mr Patterson was asked what notice he felt was reasonable and that either Ms Lush or Mr Patterson responded that they felt that either eight weeks or three months would be reasonable. However, Mr Thompson told Mr Patterson that he would be given four weeks' notice which he would be able to serve on garden leave. (Although an employment agreement had been given to Mr Patterson by Mr Bellamy when Mr Bellamy had taken over the business, Mr Patterson had not signed it because he had been waiting for confirmation in writing of the commission structure that he was to receive).

[10] There was also discussion about whether, if Mr Patterson got himself a job before expiry of the notice, the company would cease paying his salary for the remainder of it. It is also agreed that Mr Patterson was told at the end of the meeting that he was to be made redundant.

[11] There was one particular issue that was very strongly in contention between the parties however. The respondent's witnesses, Mr Bellamy and Mr Thompson, both state that Mr Patterson was offered an alternative role which Mr Patterson rejected. Mr Thompson said that the role of parts and accessories had been offered, with unknown hours. Mr Bellamy's evidence was that the role offered was an accessories role. Mr Patterson asserts that he was not offered any alternative role at all, and that he would have taken anything on offer, even a casual role, to avoid being dismissed.

[12] Mr Thompson's handwritten notes, which he states that he made during the meeting, include the following words:

- *Parts roles- pay*
- *Parts position – hours unknown*
  - *Parts & accessories*
  - *Capable*
  - *Clean up*
- *not interested in parts, wants sales roles, is a salesman.*
- *has no interest in work in parts, like going back.*
- *position open has skill*
- *rethink*
- *will do sales for less but not parts.*

[13] This issue is particularly relevant because, at some point within the 24 hours immediately after the meeting of 23 March 2011, at the end of which Mr Patterson was made redundant, a contract was signed by an individual called Grant Beatty, employing him in a casual role selling motorbike accessories. The contract is dated 23 March 2011, the same day as the meeting with Mr Patterson. The evidence of the respondent is that both Mr Beatty and Mr Bellamy put the wrong date on the contract, and that it should have been 24 March 2011. The agreement also states that it was to start on 23 March 2011 (this date having been hand written) but someone had also written, seemingly in a different hand, on the top of the contract *Start date, 25/3/11*. The evidence of Mr Bellamy was that it had been written by the office manager. The casual employment agreement signed by Mr Beatty stated that he was employed as a *Consultant* and that *the Employee will Consult*.

[14] The Authority was also shown an email from Mr Thompson purportedly sending to Mr Bellamy a copy of this casual employment agreement on 24 March 2011, in support of the respondent's contention that it was not signed until that date.

[15] It is Mr Patterson's case that the respondent had always intended to employ Mr Beatty prior to the meeting on 23 March 2011 and that was why he had not been offered the role. He asserts that this is evidence of the consultation being a sham and the decision having been predetermined.

[16] The respondent's case is that the decision to offer Mr Beatty the role was not made until after Mr Patterson had declined it during the 23 March 2011 meeting. Mr Beatty was a long term acquaintance of Mr Bellamy and had been helping Mr Bellamy immediately after the earthquake to restore order to the respondent's

premises. Mr Beatty has a great deal of experience in the sale of motorbike accessories and his evidence was that he offered to put some structure in place to improve the way that the accessories department was run. He said that he made this offer when Mr Bellamy had offered him the position, although he could not recall when that offer had been made.

[17] Mr Beatty explained that he wanted a casual agreement because, at that point, he was not certain how many hours and for how long he wanted to work. Another condition of him taking up the post was that the respondent put in place a new computer system which Mr Beattie had worked with before and which he knew would greatly assist the business in improving the accessories side of the business. Mr Bellamy had agreed to this condition.

#### *IT report*

[18] During the course of the Authority's investigation meeting, it became clear that the copy of the agreement signed by Mr Beatty which Mr Thompson said he had sent to Mr Bellamy on 24 March 2011 was not identical to the copy of the agreement that Mr Beatty and Mr Bellamy had signed. It differed in three main respects:

- (a) The formatting was different;
- (b) The signed agreement lacked the words *Superior Motor Cycle Limited Casual employment agreement*, which appeared as a header on each page of the agreement sent by Mr Thompson; and
- (c) One of the sentences in the declaration part of the signed agreement finished with two full stops whereas the one sent by Mr Thompson only had one full stop.

[19] It was recognised by the respondent that these discrepancies, which neither Mr Bellamy nor Mr Thompson could explain, potentially prejudiced its case, as they suggested that Mr Bellamy had obtained the casual employment agreement prior to 24 March 2011 and that he had, therefore, already intended to employ Mr Beatty when he was consulting with Mr Patterson.

[20] In addition, Mr Patterson gave evidence that, a few days before the 22 February earthquake, Mr Beatty had come into the respondent's premises for a

chat with Mr Bellamy and, after Mr Beatty had left, Mr Bellamy had mentioned that some of the major accessory suppliers of the respondent wanted Mr Bellamy to employ Mr Beatty and, if he did, they would give Mr Bellamy some products. Mr Patterson said that Mr Bellamy had asked him what he thought of Mr Beatty, and Mr Patterson had said that he did not know him. Mr Patterson surmised that the accessory suppliers had wanted Mr Bellamy to employ Mr Beatty because of Mr Beatty's expertise and knowledge of their products.

[21] The discrepancies between the two contracts also called into doubt Mr Thompson's evidence that he had only given Mr Bellamy one copy of the casual agreement, on 24 March 2011.

[22] In light of the credibility issues raised by the discrepancies between the two copies of the casual employment agreement, and the fact that these credibility issues went to the heart of one of the contentions of Mr Patterson (that the respondent had predetermined the issue and that the consultation was a sham) and in order to obtain the best evidence available to the Authority to try to explain whether the discrepancies could have been caused by what one might call IT issues, the Authority directed that an independent forensic IT analyst be appointed to examine the email servers of Mr Thompson and Mr Bellamy, together with the properties of the document that had been emailed to Mr Bellamy.

[23] The instructions to the IT expert were agreed between the parties and the Authority and the final IT report was received by the Authority on 18 July 2012. The expert in question was Mr Steve Knutson, a director of Canterbury Business Solutions with over 20 years' experience supporting and implementing information technology solutions. Mr Knutson is a Microsoft-certified systems engineer and has a BSc in computer science.

[24] Mr Knutson's report states that he carried out onsite investigations at the premises of the respondent and of I R Thompson Associates Limited. The report indicates that he checked the operating systems and Microsoft Office versions of the email correspondence and contract documents; checked document properties to identify the creation date and inspected email properties to confirm send/received dates and times.

[25] Mr Knutson's conclusion was that it was highly unlikely that the contract documents had been intentionally modified. As counsel for the applicant indicated to the Authority that she did not wish to challenge the report, it is not necessary to go into the detail of Mr Knutson's findings, or the rationale for his conclusions. My reading of the report is that, whilst formatting issues can be caused automatically upon the printing of a document, and even spelling or grammatical mistakes corrected automatically, it is not possible for a full stop to be inserted into a document automatically.

[26] Mr Knutson states that Mr Thompson upgraded the software he used from Microsoft Office 2000 and Wordpad to Microsoft Office 2010 in July 2011. The casual contract had been created by Mr Thompson in March 2011 in Workpad. The IT report states that the likely cause of the full stop disappearing upon printing of the contract that had been put before the Authority (the one attached to Mr Thompson's email) is the auto-correct function of Microsoft Word 2010 which is on by default and fixes common grammatical issues automatically. Mr Knutson states in his report that it is highly likely that opening the original document, originally created in Microsoft Wordpad, with the newer Microsoft 2010 would have replaced the double full stop with a single full stop.

[27] Therefore, as it is unlikely that an additional full stop would have been inserted manually into the signed contract, I infer that it is more likely than not that the version of the casual employment agreement actually signed by Mr Beatty predates the document that was put before the Authority, which had been printed from the email sent by Mr Thompson at 2.28pm on 24 March 2011. However, this does not prove that the agreement had been given to Mr Bellamy by Mr Thompson or his office prior to it having been emailed to Mr Bellamy on 24 March because the physical copy of the agreement shown to the Authority (lacking the extra full stop) was, I understand, printed at the time of the investigation meeting in May 2012. Therefore, I infer that the additional full stop would have been present in the version apparently sent to Mr Bellamy on 24 March 2011, but that it disappeared upon printing in May 2012.

[28] Mr Knutson also states in his report that there is no indication in IR Thompson's systems that a version document had been emailed *or existed* prior to the version that was emailed by Mr Thompson to Mr Bellamy at 2.28pm on 24 March

2011. This cannot be strictly true, though, because he also states that the document was created on 23 March 2011 at 1.02 pm.

[29] Although the document signed by Mr Beatty bears the date *23 March 2011* in three places, which ordinarily would be strong evidence that the document was signed on that date, before the email to Mr Bellamy had been sent by Mr Thompson, in light of the IT analysis carried out by Mr Knutson, I am satisfied that the document signed by Mr Beatty is more likely than not to have been signed on 24 March 2011 despite it bearing the date of 23 March 2011. I attribute the misdating to a mistake by one of the signatories, which was copied without conscious thought by the other.

### **The issues**

[30] The Authority must consider the following issues:

- a. Was the dismissal of Mr Patterson justified;
- b. Did Mr Patterson suffer an unjustified disadvantage?

[31] I would like to thank Ms Ryder and Mr Smith for presenting such cogent and comprehensive submissions, which I have found very helpful in determining these issues.

### **Was Mr Patterson justifiably dismissed?**

[32] In order to consider this question, the Authority must consider a number of other questions. These are as follows:

- (a) Should the s.103A test of justification that applies in this case be the pre April 2011 amendment test (the *would* test) or the post-amendment test (the *could* test)?
- (b) Was the dismissal for redundancy substantially fair?
- (c) Was the dismissal procedurally fair?

### **Which version of the s.103A test applies?**

[33] Mr Patterson was advised on 23 March 2011 that his employment was to be terminated by reason of redundancy. On the respondent's case, therefore, that is the

date when the decision to dismiss the applicant was made. Mr Patterson continued to be employed, however, receiving his pay weekly, until 21 April 2011 when his employment ceased.

[34] Ms Ryder, counsel for Mr Patterson, submits that the correct test to apply is the pre-amendment test because it is the date when the decision to dismiss was made that is important. The pre-amendment s.103A test was worded as follows:

*For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[35] The post-amendment test is worded as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (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.*

[36] Both versions of the test make clear that the point in time which must be considered is when the dismissal or action occurred. The wording expressly does not state that the consideration must be made in respect of the circumstances at the time when the decision to effect the dismissal or action occurred. Furthermore, it is established law that a dismissal does not occur until the employee's employment has terminated. *New Zealand Automobile Association Inc v Mckay* [1996] 2 ERNZ 622.

[37] Whilst I must *objectively review all the actions of the respondent up to and including the decision to dismiss* (*Air New Zealand v. V* [2009] ERNZ 185), I believe that it is still correct to apply the post-amendment test for the reason that Mr Patterson's employment continued beyond 1 April 2011 and, during that period, the respondent continued to owe duties to Mr Patterson. For example, should the respondent have reviewed its decision in the light of new business information after 23 March or 1 April but before Mr Patterson's notice expired, the respondent would have been under a duty to have reconsidered the decision to dismiss Mr Patterson in the light of the new information. Clearly, it is not practical to apply both tests (the

pre-amendment test to the actions of the employer that took place before 1 April and the post-amendment test to the actions of the employer that took place on and after 1 April), and so I believe it is correct to apply the post-amendment test to all of the actions of the employer.

[38] Therefore, I must disagree with counsel for Mr Patterson and apply the test that was in place when Mr Patterson's employment terminated; namely, 21 April 2011. Therefore, the correct version of the s.103A test to apply is the post-amendment version.

**Was the decision to dismiss Mr Patterson substantially fair?**

[39] The key issue to address in deciding this question is whether, effectively, the redundancy was a sham.

*Anticipation of a downturn*

[40] Ms Ryder submits that a fair and reasonable employer would not have disestablished an applicant's role on the basis of *an anticipation* that there would be a downturn in its business. She submits that a fair and reasonable employer would have waited to see what the actual market conditions were before acting. I do not agree with this submission. It is established law that the Authority and the Courts will not interfere with a business decision of an employer. Basically, provided there were genuine reasons for anticipating a downturn in its business, it is for the respondent to decide that such an anticipated downturn required a saving in overheads which, in turn, required the loss of a position.

[41] Mr Bellamy's conclusion that the business would suffer a downturn did not come out of the blue, but was based on the most significant and destructive earthquake that the city of Christchurch has ever experienced. Although sales had actually increased after the September 2010 earthquake, it is not logical, in my view, to simply assume that the same would occur after the February 2011 earthquake. A significant number of businesses in the central city were severely affected in the immediate aftermath of the February 2011 earthquake and it was readily apparent very soon after the event that a considerable degree of uncertainty had been created by the extent of the destruction. In that sense, the prevailing market conditions were very clear.

[42] Therefore, I am not satisfied that it was unreasonable for Mr Bellamy to have anticipated a downturn in business. Furthermore, I do not believe it was unreasonable for Mr Bellamy to have believed that the loss of a position was not an inappropriate way to deal with such an anticipated downturn. It may be the case that sales were robust during the second half of April and during May 2011, as is asserted by counsel for Mr Patterson, but that could not have been known in February and March.

*The employment of Mr Beatty*

[43] However, having dismissed that argument, a significant question is raised by the fact that Mr Bellamy employed Mr Beatty on 24 March 2011 in a specialised accessories role which, although described as a casual role in the employment agreement, in reality turned into almost a full time position according to the hours he worked as recorded by the respondent.

[44] Mr Beatty's evidence to the Authority was that he had been offered a full time role by Mr Bellamy. (Mr Smith submitted that Mr Beatty had not stated this in evidence, but my notes of the evidence make clear that Mr Beatty had stated in evidence that Mr Bellamy had asked about him *coming on full time*). Mr Beatty had stipulated to Mr Bellamy, however, that he did not want a full time role, but wanted a casual role to give him some freedom. Mr Beatty's evidence was that, although he did work regular hours, that situation had not been his plan in the beginning. He also said that his other condition for accepting the role was that a new computer system called Orion be installed to manage the stock because he was familiar with it and he needed it to implement changes into the business. He could not remember exactly when Mr Bellamy had offered him the role, although it had been a good month after the February earthquake.

[45] Mr Thompson's evidence was that he had offered Mr Patterson a parts and accessories role, with unknown hours, during the meeting on 23 March, whereas Mr Bellamy had stated that an accessories role had been offered. Mr Bellamy had said that the parts role and the accessories role were distinct and that another employee, Mr White, had expertise in the area of parts. These discrepancies do not necessarily suggest that the evidence of Messrs Thompson and Bellamy in this respect is not credible though, as Mr Thompson appeared not to have had a thorough grasp of the respondent's business at the time, and so may have been confused as to what role was available.

[46] However, the discrepancy between Mr Beatty's evidence and Mr Bellamy's evidence in relation to whether Mr Beatty had been offered a full time accessories role or not does raise an issue of credibility. I prefer Mr Beatty's evidence in this respect and conclude that the role offered to Mr Beatty was not the same one as the respondent says had been offered to Mr Patterson.

[47] The respondent installed the Orion computer software programme on 24 March 2011, the day before the respondent says Mr Beatty started working for it. This does suggest some preplanning, as does the fact that Mr Beatty said that he had been offered a full time role. What is of most interest, though, is that the IT report shows that the casual agreement signed by Mr Beatty was created by Mr Thompson's office at 1.02 pm on 23 March 2011. The consultation meeting with Mr Patterson had started at 12.30 that afternoon and must have finished very close to 1.02 pm. The fact that Mr Thompson had been instructed to prepare a casual agreement immediately after the conclusion of the meeting with Mr Patterson suggests strongly that Mr Beatty had already been offered a full time role and had declined it, saying he wanted a casual role, prior to the meeting with Mr Patterson. Mr Beatty did not say in his evidence that the offer to him of the role had been contingent on Mr Patterson being offered it and turning it down first.

[48] Stepping back, and reviewing the overall picture, it appears to me that Mr Bellamy had offered Mr Beatty a full time accessories role before meeting with Mr Patterson. This is supported by the ex post facto evidence of the hours worked and pay earned by Mr Beatty. Mr Beatty said that he had not intended to work such regular hours, but the opportunity to do so had obviously there from the beginning of Mr Beatty's employment. In addition, despite the evidence of Mr Bellamy to the Authority, Mr Beatty's earnings were greater than what Mr Patterson would have been likely to have earned over the same period.

*In conclusion*

[49] I have found it difficult to get to the bottom of what exactly were the intentions of the respondent in respect of Mr Patterson, but I conclude that it is likely to have been as follows. I believe that Mr Bellamy did genuinely have fears about the future of the business in the aftermath of the February 2011 Christchurch earthquake. It was not unreasonable for him to have entertained the fear that there would be a

down turn in business. These fears caused him to review his business model with the help of a business adviser.

[50] Furthermore, I believe that it was reasonable for Mr Bellamy to have concluded that he could absorb Mr Patterson's role of selling motorbikes into his own. His evidence on that was credible. This was a business decision that he was entitled to make. Therefore, I believe that Mr Patterson's role as bike salesman with the respondent was genuinely redundant.

[51] In addition, I believe that it was reasonable for Mr Bellamy to have decided that the business should focus on building up the accessories business, and to install a better computer system in order to assist in that.

[52] However, I believe that Mr Patterson should have been offered the role that Mr Beatty ended up doing, and that that failure to do so, together with an additional failure to make available to Mr Patterson all of the information required under s.4(1A), resulted in Mr Patterson's dismissal being unjustifiable.

### **Was the decision to dismiss Mr Patterson procedurally fair?**

[53] Whilst the Authority cannot criticise Mr Bellamy for having decided that Mr Patterson's role could be absorbed into Mr Bellamy's, and that the business needed a specialist full time accessories manager, the business should have considered more thoroughly whether Mr Patterson could have filled that full time role.

[54] Section 4 (1A) makes clear the duty to disclose relevant information in a situation where an employee's continued employment is at risk:

*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.*

[55] The Employment Court has made clear the wide construction of the employer's duty set out in s.4(1A) in *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37.

[56] The evidence of the respondent is that a role was offered to Mr Patterson, but that he turned it down. The witness testimony on this issue was confused and in conflict. I prefer the evidence as corroborated by Mr Thompson's note, which I believe to be genuine, and made contemporaneously. That evidence shows that a *parts* or a *parts and accessories* role was offered to Mr Patterson with *unknown hours*. I also accept that Mr Patterson turned it down, despite his adamant denial during the Authority's investigation meeting that any post had been offered to him. I do not attribute this to Mr Patterson lying, but to him being confused and stressed during the consultation meeting on 23 March. This is supported by the fact that Mr Patterson was also adamant that he had not read from a prepared statement at that meeting, whereas his own support person at that meeting gave evidence to the Authority that he had done so.

[57] Whilst I am satisfied that a role was offered to Mr Patterson, I do not believe that sufficient information was given to him to have understood it properly and therefore to have enabled him to consider it properly. This is why, I suspect, Mr Patterson turned down the role as offered (a *parts & accessories* role with unknown hours), because he had believed it was like the ad hoc work he had been doing up to that point in helping the other staff member. That may account for why he had seen the offer as a *step back*.

[58] Principally, Mr Bellamy did not discuss with Mr Patterson his plans during the consultation process to develop and expand the accessories department. He did not advise Mr Patterson that a full time accessories role was available but presented it (or let Mr Thompson present it) as a *parts & accessories* role with *unknown hours*. He did not mention the salary that he was planning to pay. No mention was made during the consultation meeting of the new computer system which I believe Mr Bellamy had already discussed with Mr Beatty, and no mention was made of the plan to engage Mr Beatty to assist in the expansion of the accessories business as a consultant (the term used in the casual employment agreement signed by Mr Beatty). .

[59] I find in addition that the failure to mention the possibility of the role in the letter to Mr Patterson dated 18 March 2011 was a significant failure to treat

Mr Patterson fairly and to comply with the respondent's good faith obligations. Furthermore, Mr Patterson remained employed until 22 April 2011, and the respondent had a continuing obligation of good faith towards Mr Patterson. However, no mention was made to Mr Patterson that a full time accessories role had been filled by Mr Beatty.

[60] I do not agree with Mr Smith that *Wrigley* can be distinguished because, in that case, the employees had requested information which had been withheld, and Mr Patterson had not requested any information during the consultation period. The obligation in s.4(1A) of the Act is a positive and proactive one and cannot be said to only apply to information that is requested.

[61] It may be that Mr Bellamy did consider Mr Patterson for the accessories role, and decided that he was not able to bring sufficient expertise to fulfil the needs of the business, but Mr Bellamy should have given Mr Patterson a full opportunity to have made representations about the role. Furthermore, it is likely that, with some training from Mr Beatty (who could have been engaged on a short term basis in the role of a consultant) Mr Patterson could have learned to use the new computer system. (*Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 emphasises the need to consider redeployment, with training if necessary). I am mindful that Mr Patterson had been helping out in covering the parts and accessories roles before the earthquake and of the evidence of Mr Thompson's contemporaneous note which records that either he or Mr Bellamy had said that Mr Patterson was *capable*.

[62] Ms Ryder lists other categories of information in her submissions which she says should have been provided in accordance with s. 4(1A) of the Act, but which was not. Without replicating this list, whilst I do not accept every item on it, I agree that the respondent also failed to provide to Mr Patterson sufficient background information to justify Mr Bellamy's conclusion that there would be a down turn in business.

[63] In conclusion, I find that there has been a significant breach by the respondent of its duty to comply with s.4(1A) of the Act, which did prejudice Mr Patterson, resulting in the consultation being flawed and preventing him from retaining his employment with the respondent. This results in a finding of unjustified dismissal.

**Did Mr Patterson suffer an unjustified disadvantage?**

[64] My finding of unjustified dismissal arising from a flawed consultation process also results in a finding of unjustified disadvantage, although no additional remedies are awarded as a result of that finding as both findings arise from the same set of facts which had the same effects upon Mr Patterson.

**Remedies**

[65] Mr Patterson does not seek reinstatement.

[66] I have concluded that there was a genuine redundancy situation in respect of the role that Mr Patterson had been employed in, but that Mr Patterson's dismissal was unjustified by reason of a materially flawed process. Material to the issue of remedies was the failure of the respondent to make clear that a full time accessories position was available. On the basis of the evidence given by Mr Patterson during the Authority's investigation meeting, I am satisfied that Mr Patterson would have accepted the full time accessories role had it been offered to have avoided his dismissal.

[67] Accordingly, although the decision to make Mr Patterson's bike salesman role redundant was genuine, I have found that Mr Patterson would have retained his employment if he had been offered the full time accessories post. Accordingly, it is appropriate to award Mr Patterson a sum pursuant to s.123(1)(b) in respect of lost wages arising out of the personal grievance.

[68] Ms Ryder submits that Mr Patterson should be awarded lost wages for the period from his dismissal on 22 April 2011 until the date that Mr Patterson found new work, on 1 July 2011, a period of 10 weeks. I accept that Mr Patterson made efforts to mitigate his loss, and agree that this is an appropriate time period to use in calculating lost wages.

[69] Ms Ryder also submits that Mr Patterson's base salary should be that of Mr Beatty, who earned more than Mr Patterson. Here I must disagree. Mr Beatty was a very experienced salesman of bike accessories, and if Mr Patterson had been offered the role, it is likely that Mr Bellamy would have engaged Mr Beatty as a consultant to train Mr Patterson in the use of Orion and to advise on the expansion of that part of the business. In such a case, he is unlikely to have offered Mr Patterson more than the

salary he was already on. Therefore, the salary that Mr Patterson was earning when he was dismissed should be used. On that basis, the loss over that period equates to a gross sum of \$8,750.

[70] Ms Ryder submits that commission should be added to the calculation, on the basis that Mr Patterson earned around \$8,000 per annum in commission on his bike sales. However, the contract given to Mr Beatty does not include commission. Furthermore, Mr Patterson had indicated during the consultation meeting that he had been willing to accept a new salary package without commission to save his job. In those circumstances, it is speculative to imagine that Mr Bellamy would have offered Mr Patterson commission in the new accessories role, or what rate that commission would be at. Therefore, I decline to award a further sum based on commission earnings.

[71] Ms Ryder also argues that the Authority should exercise its discretion under s. 128(3) of the Act and order the respondent to pay a further sum for a period exceeding three months' ordinary time remuneration reflecting a continued loss of \$75.06 gross a week between 1 July 2011 and 7 January 2012, the date when Mr Patterson's salary in his new employment rose to \$900 gross a week. On 1 July 2011 Mr Patterson found a new job selling motorbikes in a business venture with an associate. Motorbikes seem to be his first love. I believe therefore that it is possible that Mr Patterson would have left the employment of the respondent on or around 1 July 2011 to take part in the business venture if he had been undertaking the accessories role and so decline to exercise the discretion under s 128(3) of the Act.

[72] I now turn to s 123(1)(c)(i) of the Act, namely, an award of compensation for humiliation, loss of dignity and injury to the feelings of the employee. Mr Patterson and his partner gave evidence of the effects upon him of losing his employment. He had been employed since 2007 in an employment he enjoyed. His dismissal left him feeling puzzled as he could not understand how he could be made redundant when he had believed the company to have been so busy up to the February 2011 earthquake. He also suffered a knock to his confidence and self esteem and had difficulty sleeping and concentrating. I accept all this evidence.

[73] It is very likely that some of these feelings could have been prevented had fuller information been made available to Mr Patterson, and the consultation process

been more thorough, even if it had ended up with a decision to dismiss Mr Patterson for redundancy.

[74] Taking these factors into account, I believe that the compensatory sum of \$10,000 should be awarded.

[75] I must next consider whether either of these remedies should be reduced by any contributing behaviour by Mr Patterson, pursuant to s. 124 of the Act. The only possible way in which Mr Patterson could have contributed to the situation that gave rise to the personal grievance is his refusing to take a parts and accessories role with uncertain hours. However, I believe that it would have been likely that Mr Patterson would have accepted the accessories role had it been explained to him that it was intended to be a full time, significant role within the respondent's business. Therefore, I do not believe that it would be just for Mr Patterson's remedies to be reduced on the basis of refusing an offer that was not accurate in any event.

[76] Finally, Ms Ryder submits that interest should be awarded on the reimbursing award of lost wages. The Authority has the power to award interest under clause 11 of the second schedule of the Act. That permits the Authority to order interest at the rate prescribed under the Judicature Act 1908, currently 5% per annum. Mr Patterson's award of lost wages relates to the period ended on 1 July 2011. However, over a year has elapsed between that date and the date of this determination, which cannot be attributed solely to the respondent. For example, the investigation meeting did not take place until May 2012, and the IT report took several weeks to be commissioned and produced. All in all, I do not consider it just to award interest on the reimbursing award.

## **Orders**

[77] The respondent must pay Mr Patterson the following sums:

- a. The gross sum of \$8,750; and
- b. The compensatory sum of \$10,000.

**Costs**

[78] The parties should seek to agree how Mr Patterson's legal costs are to be dealt with. In the absence of an agreement within 28 days of the date of this determination, Ms Ryder is to serve and lodge a memorandum in respect of the contribution to costs sought from the respondent and Mr Smith shall have a further 28 days from receipt of that memorandum to serve and lodge a reply

David Appleton  
Member of the Employment Relations Authority