

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI A TARA ROHE**

[2025] NZERA 317  
3311240

BETWEEN                      HENRY PENNY  
   Applicant  
  
AND                                FRELLO LIMITED  
   Respondent

Member of Authority:        Sarah Kennedy-Martin  
  
Representatives:              Dave Cain, advocate for the Applicant  
   Daniel Erikson, counsel for the Respondent  
  
Investigation Meeting:        4 March 2025 in Tauranga  
  
Submissions received:        5 March 2025 from Applicant  
   11 March 2025 from Respondent  
  
Determination:                 6 June 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Henry Penny was employed at Frello Limited (Frello) as a software architect in the software developer team until his position was made redundant and his employment ended on 8 November 2023. He says the decision to make him redundant was predetermined because there had already been resignations in the team negating the need to reduce the overall team numbers. This meant there was a failure to genuinely consult with him about the redundancy proposal or any potential redeployment opportunities and therefore his dismissal was not justified. He seeks compensation and lost wages.

[2]     Frello says the decision to make Henry Penny's position redundant was justified because there were genuine financial reasons for the restructure and a thorough

selection process using a matrix was applied to determine which members of the software developer team would remain. The selection criteria was consulted on and the process followed was therefore fair and reasonable.

### **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from Henry Penny and on behalf of Frello from Rodd Penney. The witnesses answered questions under affirmation from the Authority and the parties' representatives. The representatives also provided written and oral closing submissions.

[4] 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**

[5] The issues requiring investigation and determination were:

- (a) how was the decision to make Mr Penny redundant reached and was it made for genuine business reasons?
- (b) was the procedure followed by Frello fair and reasonable and consistent with the good faith obligations, including how it selected Mr Penny's role for redundancy?
- (c) was the decision to dismiss Mr Penny on the grounds of redundancy justified?

### **Mr Penny's employment at Frello**

[6] Frello creates and sells digital software for sports and hobby clubs, associations, and non-profit organisations. Henry Penny was initially employed by Friendly Manager Limited as a Software Developer from 26 July 2021. His employment transferred when Friendly Manager Ltd and another entity merged to become Frello.

[7] Rodd Penney was initially an advisor to the Board at Frello. Rodd Penney says the company was in poor financial state. He advised the Board to undertake a

restructure to address the financial situation. A Human Resources company was engaged to assist. Rodd Penney was also appointed to the position of CEO on 24 October 2023 and the next day the restructure proposal was communicated to staff.

[8] Henry Penny worked remotely from home and the employment agreement contained a work from home clause that was negotiated when he started his employment in 2021:

Place of work

The employee will work remotely from their home, or other suitable location of their choice.

The employer may ask the employee to travel for work from time to time, but they don't have to agree.

[9] The employment agreement has no specific clauses dealing with redundancy but four weeks' notice was required and the employer could decide to pay the employee instead of the employee working out their notice period.

*The restructure proposal*

[10] On 25 October 2023, Henry Penny attended a meeting and learned of the restructure and then received the written proposal from Rodd Penney attached to an email. The document set out the background to the restructure proposal with reference to the current economic environment in New Zealand impacting on Frello as well as "challenging client contractual changes" meaning Frello needed to alter its projections for the future. It was recorded that in order to remain a viable business Frello's board and senior management team had reviewed the ongoing needs of the business and reducing staffing to a level that ensured Frello could realise its business opportunities while remaining a viable business was one of the goals listed.

[11] The proposal set out that the software developer team was to be reduced to three positions by reducing the team by two. Two other positions were to be disestablished (Chief Technology Officer and Lead Product Designer) and a new position of Principal Engineer would be created. All the software developer roles were to be based in the office full-time in Tauranga.

[12] Because the software developer team were all in the same situation in terms of being in a pool of people who may have their position disestablished, a selection criteria process was to be followed. The selection criteria were set out:

- Length of service with higher score for longer service.
- Industry service, not just experience with Frello.
- Attendance with lower scores for higher sickness absence levels.
- Performance with lower scores given if there are any recorded performance issues, and lowest score for formal performance issues or disciplinary issues.
- Increased or decreased performance over the last six months that has been discussed with the staff member during that 6- month period.
- Attitude, work ethic and teamwork
- Demonstrated additional skills
- Achievement in relation to set goals
- Professionalism.

[13] The selection criteria were set out in a matrix and each person was to be assessed against the matrix and with a final score being reached this would be compared with other developers. A brief interview would be held allowing each team member to state their case and discuss the selection criteria ratings.

[14] Two possible outcomes were recorded:

1. That you be included in the assessment of the criteria for the 3 contestable Developer roles, which would mean you were agreeing to become a Permanent Full-Time employee and be located at the Tauranga office, should you be successful. Otherwise, if you were not successful, it is likely you would be made redundant.
2. Unfortunately, we are unable to see an alternative to redundancy if you do not select option 1, but if you are able to make any alternative suggestions, we would be happy to discuss these with you.

[15] Feedback was requested by 30 October and Frello hoped to confirm what it would be doing by 1 November.

#### *Consultation and application of the selection criteria*

[16] Henry Penny gave initial written feedback on 26 October. He made it clear he wished to be considered for option one above. He stated he would be available to work in the Tauranga office full time and be in the office two to three days a week in accordance with what the rest of the team were currently doing. While he was currently contracted to work 36 hours a week from home he was happy to change this to 40 hours

a week from the office. He also considered he had the right skill set for working on the various platforms Frello used after the merger of Friendly Manager and Hello Club.

[17] Rodd Penney contacted Henry Penny and asked him to complete the matrix before they met to discuss their respective matrix results. Henry Penny completed his assessment against the matrix and returned it on 3 November. They met over AVL the following Monday 6 November. There was agreement Henry was very experienced and was considered a senior software developer in the team. He had 25 years of industry experience and was able to work on the different platforms the company used. There were no issues with his performance or approach to his work and he enjoyed a good working relationship with his colleagues. Rodd Penney confirmed in his evidence Henry had scored highly and was considered to be a very experienced member of the team.

[18] Henry Penny was aware that one of the five software developers in the team had already resigned. Frello's evidence was that this employee actually resigned on 10 October 2023 which is prior to the redundancy proposal circulated on 25 October.

[19] On 8 November, Rodd Penney and HR met with Henry Penny and informed him he had been unsuccessful in retaining his position and he was to be made redundant. The overall outcome of the proposal was recorded in the letter to him as follows:

- The reduction in the number of developers from 5 to 3 positions and these roles are Tauranga based.
- The disestablishment of the Lead Product Designer role.
- The change of Position name from Chief Technology Officer to Principal Engineer.
- Reporting line change for the Developers to Head of Product.
- Reporting line change for the Hardware Specialist to the Chief Executive Officer.

[20] On 8 November, the same day Henry Penny was made redundant, a second employee in the software development team told Henry Penny they had also resigned earlier in the week. Rodd Penney's evidence was slightly different in that he says the second employee was considering resigning but they did not actually resign until 8

November and importantly this was after Henry Penny had been informed he was selected for redundancy.

[21] Rodd Penney described the situation with the second employee as more akin to that of an employee advising they were looking at options. Rodd Penney was keen to discuss career advancement with all employees and decided to have such a discussion with the second employee once the restructure was finalised. He was confident he could convince the second employee to stay but he was of the view he could not have that discussion until after the restructure proposal had been decided on.

[22] Henry Penny produced an email which sets out the second employee's recollection of events. The second employee did not give evidence so questions about the contents of that email were not able to be asked by Frello or the Authority and because of that little weight can be placed on it.

[23] In any event matters were brought to a close very quickly once the decision was made that Henry Penny was selected for redundancy. A letter was emailed to him the same day (8 November) confirming his redundancy and recording his employment had also ended that day. He would be paid in lieu of the four week notice period. He also received his final pay and an appreciation payment of a further two weeks salary on 8 November.

[24] Henry Penny referred to a supportive message from another employee and arrangements he considered that were being made to outsource work he had been doing that contributed to his view his redundancy was predetermined. He raised a personal grievance claim with Frello on 26 January 2024.

### **Redundancy**

[25] An employer is entitled to terminate an employment agreement due to redundancy if the termination can be genuinely justified based on valid commercial reasons. In addition to having genuine and sound reasoning a redundancy must be carried out in a procedurally fair manner. This includes fair and consistent application of selection criteria and consultation about the changes, redeployment opportunities and notice.

[26] When employers terminate an employee's employment because a position had become superfluous the employer is required to show their actions meet the objective standard in s 103A of the Act when making decisions about redundancy and comply with the overarching good faith obligations in s 4 of the Act. The duty of good faith under s 4(1A) of the Act requires employers proposing to make a decision about redundancy to provide the affected employees with access to information. That includes information that is relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information to their employer before the decision is made.<sup>1</sup>

[27] When selection criteria are used to assist with making decisions in relation to a pool of affected employees, the Court and the Authority have held that the criteria should be clearly communicated and employees given a proper opportunity to respond to them. This can include, if need be, an explanation as to how the various factors are weighted before a final decision about redundancy is made.<sup>2</sup>

[28] The financial reasons for the restructure proposal and redundancy were not challenged by Henry Penny and I note he was offered an opportunity but provided no feedback on the selection criteria. What is being challenged is whether consultation was reasonable and the selection criteria and matrix were applied fairly and this includes whether the resignations from the team were taken into account.

### *The proposal*

[29] The proposal was to reduce the number of software developers in the team from five to three but it transpired that one developer had already resigned prior to the proposal being circulated so the information consulted on was not correct.

[30] This was confirmed in Henry Penny's termination letter because it recorded the outcome of the restructure had been the reduction in the number of developers from five to three when in fact it was a reduction from four to three.

[31] The next issue for Frello is that a second developer indicated an intention to resign just prior to the final decision being made. Then on 8 November, before the final

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<sup>1</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [81]-[82] and [85].

<sup>2</sup> See for example *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [33] and *Smartlift Systems Ltd v Armstrong* [2021] NZEmpC 66, [2021] ERNZ 166 at [97].

meeting with Henry Penny the second developer sent a message via Slack to Rodd Penney that he said he saw was there but did not open until after he met with Henry Penny to convey the termination decision.

[32] That email indicated the second employee was concerned they were being used as a pawn in the consultation process. Rodd Penney replied trying to assure them that had not been the case. His evidence was that the conversations he had had with them were out of genuine concern for them and their career but because he was in the midst of a restructuring process he was unable to have a career discussion with them at that time.

[33] Rodd Penney said he believed the second developer had not made a final decision at that point and he wanted to discuss future Frello opportunities with them after the restructure was completed, given their experience of coding and working closely with Frello's support team. Rodd Penney also said he asked whether they would consider staying to the end of the year and he thought they were receptive to that.

[34] The message on Slack that Rodd Penney did not open until after talking to Henry also contained a resignation from the second developer. Rodd Penney's evidence was that Frello was not aware of the second employee's resignation until after Henry Penny was informed his position was redundant and his employment terminated the same day. As far as Frello was concerned the restructure process was completed.

[35] While Frello's approach was to draw a distinction between the second employee indicating an intention to resign as opposed to actually resigning, that is not a complete answer for Frello given the good faith obligations in the Act. If the proposal was to reduce the team to three and the second developer did resign there would only be three developers left in the team. That means the proposal's objectives could have been met without making any developers redundant.

[36] I understand Frello was in the position where any reduction in salary was going to help it with the situation it was in but the obligation to consult and provide all information relevant to a redundancy decision is fundamental for an employer seeking to justify its actions in redundancy cases. Consulting on incorrect information and failing to consider a significant change in circumstances so close to the final decision

being made in this case has a direct bearing on the genuineness of both the consultation about the restructure proposal and the decision making.

#### *The selection criteria*

[37] Frello prepared and used a matrix to assess the software developers against the selection criteria. Rodd Penney's evidence was that the software developers all had different focus areas and he described these differences between the remaining four employees. When asked how the second employee having communicated an intention to resign was factored into the decision making, he said that employee was earning significantly less than Henry Penny and that he wanted them to stay because of their experience which he had described as being useful for Frello.

[38] Rodd Penney also said that while Henry Penny was a senior developer and he accepted Henry scored highly on the matrix, the role the second employee played in the business was very important because they had "implicit knowledge of Hello Club". He intended to have a career discussion with them and was confident he could convince them to stay. His evidence also went further in that he thought he would be able to retain the second employee because there was a pay review coming up and he wanted to discuss that with them.

[39] When put to Rodd Penney in cross examination that the role the work streams the developers had strengths in, or were a priority for Frello, were not in the selection criteria, he explained he looked at the matrix but "as context and we looked at salaries." Salary was also not listed as a factor in the matrix for consideration.

#### *Working from home*

[40] Frello also wanted all the software developers to be based in the Tauranga office full-time. The submission on behalf of Frello was that all developers were to be in the office full time and that Henry Penny could not commit to that. There was no evidence of any discussion during consultation about his commitment to work in the office.

[41] Henry Penny had up until that point worked from home in accordance with the clause in the employment agreement between the parties but says he agreed to work in the office because he wanted to keep his job. As part of consultation on the proposal

he confirmed by email he was available to do that and said he “could be in the office 2-3 days per week in accordance with what the rest of the team currently do”.

[42] If there were concerns about the 2-3 days per week in accordance with the rest of the team comment in Henry Penny’s initial email and this factor was given weight when selecting Henry Penny for redundancy, a fair and reasonable employer could have been expected to have discussed this during consultation with Henry Penny.

[43] This is especially so when there had been an existing work from home clause in the employment agreement. This likely increased the obligation on Frello to consult fully with Henry Penny about a proposal that would have required him to work in the office full time and even more so if this was a factor that influenced Rodd Penney when he made his final decision.

[44] Given Henry Penny scored very highly against the matrix, that it is unclear which additional factors were taken into account, and the extent to which the second employee was to be supported to stay in the business, genuineness of the decision making and the process undertaken by Frello are called into question.

[45] Selection criteria must be available to the employees, relevant, adhered to and consulted and the Courts and Authority have found that flaws in the process when using selection criteria will render a dismissal unjustifiable.<sup>3</sup>

[46] If the selection criteria and therefore the matrix are considered to be contextual by the employer it is difficult for the employees in the process to know what they were being assessed on. This is critical to a fair process when selection criteria are used to determine who gets made redundant from a pool of employees. This is also key to an employer being able to justify its actions in the context of an unjustified dismissal grievance claim and goes towards the extent to which the obligation of good faith in redundancy situations have been complied with.<sup>4</sup>

[47] I find the dismissal to be both substantively and procedurally unjustified and Henry Penny is entitled to an assessment of remedies.

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<sup>3</sup> See for example *EDS (New Zealand) Ltd v Shaddox* [2004] 1 ERNZ 497.

<sup>4</sup> Employment Relations Act 2000, s 4(4)(bb).

## **Compensation**

[48] Henry Penny seeks compensation for humiliation, loss of dignity and injury to feelings caused by the unjustified dismissal in the amount of \$25,000.00. His evidence was that as a consequence of Frello's actions he suffered a lot of hurt and upset and the speed of the redundancy once the decision was made contributed to that. He was unable to say goodbye to colleagues. He found it difficult to have trust in any new employers having previously thought he was a valued member of the team but was left feeling distrustful because of the way he was let go and so quickly.

[49] In his words it left him feeling undervalued and unappreciated. There was a financial impact with uncertainty around when he would be able to secure new employment. His evidence was that this had a direct impact on his mental health and I accept that evidence.

[50] Given my findings above, considering the finding of unjustified dismissal and the humiliation, loss of dignity and injury to feelings and the general range of awards in similar cases, I consider an appropriate award under s 123(1)(c)(i) of the Act to be \$20,000.00.

## **Lost wages**

[51] Submissions were made on Frello's behalf with reference to *Gafiatullina v Propellerhead Ltd* that in cases where there are good commercial reasons for a restructure, there should be no compensation for lost wages if the unjustified actions of the employer relate only to procedural failings.<sup>5</sup>

[52] I note in *Gafiatullina v Propellerhead Ltd* the Court stated it did not consider a more robust consultation would have seen the employee remain in the business. That is not the case here. Although it is accepted there were genuine commercial reasons for Frello's restructure, it is also not the case that there are only procedural defects.

[53] Henry Penny seeks lost wages equivalent to three weeks wages. He was made redundant on 8 November 2023 and secured new employment which commenced on 8 January 2024. In seeking three weeks lost wages he has taken into account his four

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<sup>5</sup> *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146 at [152].

week notice period and the additional appreciation payment he received which was equivalent to two weeks wages.

[54] His evidence is that he started looking for new work on 8 November. He says he applied for approximately 50 positions but has misplaced the record he kept of these. He did provide evidence in the form of emails in relation to two positions he was interviewed for. I am satisfied reasonable steps were taken to recommence work and direct evidence of steps taken is not always required.<sup>6</sup>

[55] The Authority may provide for the reimbursement to the employee of a sum equal to the whole or any part of wages lost as a result of the grievance.<sup>7</sup> There is a link between the grievance and the loss suffered in this case. I consider an award equivalent to three weeks lost wages is appropriate to compensate Henry Penny for remuneration lost as a result of his grievance.

### **Contribution**

[56] The Authority must consider under s 124 of the Act whether remedies should be reduced if the actions of the employee contributed towards the situation that gave rise to the personal grievance. Redundancy terminations are no fault terminations and it follows that Henry Penny did not contribute to his personal grievance and therefore no deductions to be made to the remedies awarded.

### **Orders**

[57] Frello Limited is ordered to pay Henry Penny within 28 days of this determination:

- (a) The sum of \$20,000.00 without deduction being compensation under s 123(1)(c)(i) of the Act.
- (b) The sum equivalent to three weeks wages (gross) being reimbursement of lost wages under s 123(1)(b) of the Act

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<sup>6</sup> See for example: *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28 at [67].

<sup>7</sup> Employment Relations Act 2000, s 123(1)(b).

## **Costs**

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

[59] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Henry Penny 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 memorandum Frello Limited 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.

[60] 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 upwards or downwards.<sup>8</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>8</sup> [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies)