

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 397
3039675 & 3041871

BETWEEN	RICHARD SELL Applicant
AND	IVISE SOLUTIONS LIMITED Respondent
AND	IVISE SOLUTIONS LIMITED Applicant
AND	RICHARD SELL Respondent

Member of Authority: Eleanor Robinson

Representatives: John Burley, counsel for Richard Sell
Catherine Stewart and Daniel Church, counsel for IVise
Solutions Limited

Investigation Meeting: 27 & 28 March and 28 May 2019

Submissions [and further Information] Received: 29 May 2019 from Richard Sell
29 May 2019 from IVise Solutions Limited

Date of Determination: 04 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Richard Sell claims that he was unjustifiably dismissed by IVise Solutions Limited (IVise).

[2] Mr Sell also claims that IVise breached its good faith obligation towards him by its deceptive conduct in (i) failing to undertake a genuine and bona fide consultation process, (ii) the insufficiency of a credible financial/economic rationale for the proposed disestablishment of his position, and (iii) the failure to explore or provide re-deployment options or opportunities for him.

[3] IVise denies that Mr Sell was unjustifiably dismissed by it and claims that the termination of his employment on the grounds of redundancy was substantively justified and carried out in a procedurally fair way. IVise also claims that it did not breach its duty of good faith towards Mr Sell.

[4] By way of counterclaim IVise claims that Mr Sell breached the duty of good faith which it owed towards it. Specifically, IVise claims that Mr Sell breached his obligation to be active and constructive, pursuant to s 4(1A)(b) of the Employment Relations Act 2000 (the Act), by breaching his obligation not to “do anything ... to mislead or deceive” pursuant to s 4(1A) of the Act.

[5] Mr Sell denies that he breached the duty of good faith he owed to IVise.

The Authority’s investigation

[6] As permitted by s 174E of 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

[7] The issues requiring investigation and determination are:

- (a) Was Mr Sell unjustifiably dismissed by IVise?
 - (i) Did Ivisc have a credible financial/economic rationale for the proposed disestablishment of Mr Sell’s position?
 - (ii) Did Ivisc undertake a genuine and bona fide consultation process?
 - (iii) Did Ivisc unjustifiably fail to explore or provide redeployment opportunities for Mr Sell?
- (b) Did IVise breach the duty of good faith which it owed to Mr Sell pursuant to s 4 of the Act?
- (c) Did Mr Sell breach the duty of good faith which he owed to IVise pursuant to s 4 of the Act?

Background

[8] IVise provides services in information technology, data science, analytics and technological product development. Mr Craig Simpson is the sole director of IVise.

[9] Mr Sell and Mr Simpson had been acquainted for over ten years. During an exploratory meeting on 12 June 2017 Mr Simpson said that Mr Sell had intimated that he would be keen to leave

his existing employer and join IVise. Mr Simpson said that during the meeting he had suggested that Mr Sell could work for IVise in a general management position.

[10] At a further meeting held on 25 June 2017, Mr Sell said he specifically recalled Mr Simpson telling him that IVise was going well and securing a lot of new business. Mr Simpson had told him that he needed someone to help him manage and grow the business as he found himself often without sufficient time to do so.

[11] During the meeting on 25 June 2017 Mr Simpson said that it had been discussed that Mr Sell would be engaged to work at IVise as a General Manager and the details of a draft employment agreement which he had prepared and sent to Mr Sell a few days earlier had been discussed.

[12] Mr Simpson said that Mr Sell had specifically discussed redundancy as one of the terms of the employment agreement and had wanted to add a sentence confirming that the notice period would be four weeks in the event of redundancy.

[13] Mr Sell said that Mr Simpson had told him in a telephone conversation sometime prior to 25 June that he could expect to earn about \$250,000.00 per year, and had also been told prior to the meeting on 25 June 2017 that he would be given an opportunity to advance earlier discussions about his buying into the shareholding of IVise.

[14] Mr Sell said that, being aware that Mr Simpson was proposing to present him with a formal employment agreement, he had emailed Mr Simpson on 23 June 2017, raising some queries concerning the terms of the engagement, of which an alteration of the redundancy clause was merely one of a list of details that needed adjusting.

Offer letter and employment agreement 24 June 2017

[15] Mr Simpson had sent a letter of offer dated 24 June 2017 attaching the written employment to Mr Sell stating:

Dear Richard,

Re: Contract of employment

We are pleased to offer you the position of General Manager with us here at IVise.

...

Remuneration

Your base salary is at a rate of \$140,000 per annum. We will implement a bonus scheme that pays a percentage of the margin made on each resource that is placed within your named account. This bonus will be paid monthly on top of your base salary.

Bonus review

The bonus scheme will be reviewed in three months.

[16] The individual employment agreement (the Employment Agreement) set out as the position title as being the General Manager and clauses included:

3.1 Individual Agreement of Ongoing and Indefinite Duration

This employment agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on **26 July 2017** and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.

7.1 Annual salary

The employee's salary shall be \$140,000 per annum, which shall be paid **monthly** on **Thursday** into a bank account nominated by the employee.

12.5 Redundancy process

In the event the employer considers that the employee's position of employment could be affected by redundancy or could be made redundant, the employer shall, except in exceptional circumstances, consult with the employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as re-deployment to another role). In the course of this consultation the employer shall provide to the employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the employee with an open mind before making a decision as to whether to make the employee's position redundant. Nothing in this clause limits legal rights and obligations of the parties.

12.6 No redundancy compensation payable

In the event the employee's contract is terminated on the basis of redundancy, the employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any additional payment, whether by way of redundancy compensation or otherwise.

Added to clause 12.6 in handwriting was: "The notice period will be four weeks" and this had been initialled by Mr Simpson and Mr Sell.

15.3 Entire agreement

Each party acknowledges that this agreement contains a whole and entire agreement between the parties as to the subject matter of this agreement.

[17] The Letter of Offer had been signed by Mr Sell and dated 25 June 2017.

[18] Mr Sell commenced employment as General Manager with IVise on 17 July 2017 and his principal duties included managing and growing service business for the company, ensuring customer satisfaction, overseeing the hiring and managing of employees, preparing reports, setting budgets and ensuring profitability of the business.

[19] Mr Sell said he was also directly engaged in website development for IVise; business development of a new client at Auckland airport, Aero Park; and contract work in respect of Auckland Council. He said he had gained a very good understanding of the product side of the business that essentially comprised “dynamic pricing” which was the primary product developed by IVise via Callaghan research grant funding.¹ Mr Sell said he was also directly responsible for completing ‘Xero’ invoicing and chasing outstanding contractor timesheets.

[20] Mr Simpson said that at the time Mr Sell commenced employment as General Manager in early July 2017, Auckland Council was IVise’s largest client and comprised about 90% of the project management services side of the IVise business. Mr Sell primarily exercised managerial responsibility for the project management services, and was basically seconded to the Auckland Council to provide value-added oversight of the projects IVise was working on.

[21] While Mr Simpson agreed that Mr Sell did have a small amount of involvement in the other areas of the business, for example dynamic pricing, he said this only comprised about 5% of Mr Sell’s role. He himself handled other areas of the business, including product development, sales processes and data analytics.

[22] Mr Sell disagreed that he spent almost 90% of his time on the oversight of the Auckland Council project business and estimated this at 50% or less. He said the remainder of his time was focused on business development and attending meetings with Mr Simpson for that purpose.

Relationship between Mr Sell and Mr Simpson

[23] Mr Sell said that he had generally enjoyed a good working relationship with Mr Simpson until early 2018. At that point Mr Simpson’s leadership in the business seemed to become more autocratic, leading to him feeling increasingly isolated by Mr Simpson during the months leading up to his dismissal.

[24] Particularly in the two or three weeks prior to a meeting on 30 April 2018, he said that Mr Simpson had made very little contact with him, not answering telephone calls and missing regular scheduled meetings. Although Mr Simpson did respond to some emails during this period, his replies were generally short and somewhat curt. He said he had also discovered that Mr Simpson had removed his visibility from his(Mr Simpson’s) calendar as well as his access to the Seek employer site, which he needed for recruitment purposes, without giving him notice of the changes.

¹ The Callaghan Agency is a government agency supporting hi-tech businesses in New Zealand in the areas of innovation and business development

[25] Mr Simpson said he was the owner of several businesses and was often very busy and not always able to immediately answer telephone calls, text messages or emails. However, while he accepted he did not always respond in a timely manner to Mr Sell, he did respond when this was necessary and he never excluded Mr Sell from any meetings that were relevant to him in his role nor did he instruct Mr Zicheng Song, Business Development Manager, to cancel his meetings with Mr Sell.

[26] Mr Song said he worked closely with Mr Simpson and assisted with organising his diary and setting up client meetings. He had also worked with Mr Sell and had access to his calendar and assisted him with setting up some of his meetings.

[27] Mr Song said that he regarded Mr Sell and Mr Simpson as having a: “really good” relationship and confirmed that Mr Simpson’s availability altered in early 2018 when he became very busy and that it was quite normal for him thereafter not to respond immediately to telephone calls, text messages or emails. He said that Mr Sell was aware that Mr Simpson was often busy with his own schedule and had never complained to him that Mr Simpson was trying to exclude or avoid him.

[28] Mr Simpson, in refuting the claim that he had deliberately tried to isolate Mr Sell, said that on 10 April 2018, he and Mr Sell had travelled together to Wellington for a business meeting, during which time they had sat next to each other on the plane, and shared lunch and taxi cabs together. They had also spent about two hours together in the Air New Zealand ‘Koru’ lounge at the airport. He said there had been no awkwardness between them during that trip.

[29] Mr Simpson said he did not remove Mr Sell’s access to his calendar or to the Seek employer’s site, pointing out that Mr Song managed his calendar.

Events leading to review and restructure process

[30] In early 2018 Mr Simpson said he decided to review the company’s projected revenue forecast. He had realised that business generated from project services, which primarily consisted of the Auckland Council work and comprised around 90% of IVise’s business, had been steadily declining for a period of about eight months. This had not been a surprise to him since he had been aware that existing contracts for Auckland Council work were not being renewed and that new work was not being generated. It meant a gradual decline in the number of employees and contractors that had been seconded to Auckland Council.

[31] As a result he had considered whether it might be prudent to move IVise’s focus away from services-based work and towards product development. Without consulting Mr Sell, General Manager, he sought advice from Mr Gavin Austin, a business consultant. Mr Austin, is a director and shareholder of Austin Associates Limited, and had knowledge of IVise’s operation, having been

associated with IVise since its incorporation in 2012 and having been a director of IVise from August 2015 to November 2016.

[32] Mr Simpson said changes in strategic direction were quite usual for the technological industry and that it was often necessary for technology companies, particularly small businesses such as IVise, to change strategic focus in order to adapt to changing technologies and remain competitive in the market.

[33] Mr Austin said he had advised Mr Simpson that it would be beneficial to work towards transforming IVise into a product development business using data science projects to turn new ideas into potential new products.

[34] Mr Simpson said he had discussed this idea of changing strategic direction with Mr Sell directly, who had seemed to be in agreement with it, and had assisted him in applying for a Callaghan innovation grant to help to secure funding for such a transition to product development.

[35] Mr Simpson said that Mr Sell had emailed him the projected gross revenues and expenses for April and May 2018 on 18 April 2018. Very shortly after sending this email Mr Sell had telephoned him and said “We have a problem”, referring to IVise’s projected revenue. Mr Simpson said he estimates that Mr Sell himself had been responsible for generating, clearly indicated that revenue from Auckland Council was on the decline, which confirmed his view that the company would need to change its strategic direction.

[36] Mr Sell said that IVise’s revenues were down in April and reducing at Auckland Council, however, there were sources of revenue from other areas of the business so that May and June 2018 looked positive. It had been a dip in the financial outlook but only for April and he had sent a further email in relation to revenue to Mr Simpson as a result.

Business Review

[37] Without consulting Mr Sell, Mr Simpson engaged Mr Austin to undertake a review of the IVise operation on or about April 2018, whereby he would come in and conduct interviews with all the employees to seek input as to current performance and formulate a restructuring proposal addressing any changes that might need to be made to cater for the future needs of the business.

[38] Mr Simpson said that he anticipated that a more formal restructure process might eventuate as a result of the feedback that employees provided in face to face meetings with Mr Austin; however he had no firm views prior to employee feedback.

[39] He had agreed that it would be beneficial for Mr Austin to conduct the one-on-one interviews and made arrangements for these to take place on 30 April 2018. Accordingly Mr Simpson said he sent a calendar invitation to all employees, including Mr Sell, on 23 April 2018, inviting them to attend an all staff meeting on 30 April 2018.

[40] When he had received the email dated 23 April 2018 with the reference: “Something is important”, Mr Sell said he had no knowledge of what was to be discussed although he thought that the meeting would be significant and strongly suspected it might concern a restructure and might affect his own position.

[41] Mr Simpson said he had not received a meeting acceptance from Mr Sell so he met with him on 26 April 2018, and discussed the purpose of the proposed 30 April 2018 meeting, informing him that Mr Austin would interview all employees and that he, Mr Sell, would be the first one to be interviewed as he was the most senior employee.

[42] During that discussion he said he had set up a meeting with Mr Sell to come to IVise’s new offices following his meeting with Mr Austin. At the Investigation Meeting Mr Simpson provided a copy of the meeting invitation and a diary entry confirming the ‘catch-up’ meeting between him and Mr Sell was to take place at 10:30am on 30 April 2018.

[43] Mr Sell denied that he had met with Mr Simpson on 30 April 2018 and said that the invitation to a catch-up meeting was a regular event and not significant. However the copy provided to the Authority of Mr Simpson’s g-mail diary page for 30 April 2018 indicates two catch-up meetings, one at 10.30 a.m. and a ‘Weekly Catch-Up’ meeting at 3.30 p.m.

Meetings Monday 30 April 2018

[44] The meeting held on 30 April 2018 opened with Mr Simpson introducing Mr Austin to the employees and explaining that IVise was seeking to change its strategic direction and that as a result there might be some restructuring. He told the employees that Mr Austin would meet with them individually after the meeting to seek their input on how the desired change in strategic direction might be achieved. Mr Austin had then proceeded to give a copy of an organisation chart diagram to each employee showing IVise’s current structure,

[45] Mr Sell said that he had never met Mr Austin prior to the meeting and considered that as General Manager he should have been included in the potential restructuring discussions that had taken place between Mr Simpson and Mr Austin.

[46] At the beginning of the meeting he said that Mr Simpson had advised that company revenues were down and that people were going to be interviewed by Mr Austin with the purpose of their providing ideas on how to add revenue and cut costs, and any other comments.

[47] At the end of the meeting Mr Sell said Mr Simpson informed him that Mr Austin was ready to have the individual meeting with him immediately and that because Mr Sell's office was to be used for conducting the remaining staff interviews, he had told him to go home after his interview.

[48] Mr Sell said he had been concerned by the isolation he had been experiencing from Mr Simpson and had felt under stress with no notice or opportunity to prepare for the meeting with Mr Austin. As a result he had been feeling anxious during the meeting.

[49] Mr Austin said he had opened the following one-on-one meeting with Mr Sell by asking him some non-controversial questions designed to be ice-breakers which constituted his standard procedure in such meetings. From the outset he said Mr Sell had appeared to be quite angry and to take offence at being asked questions such as: "So what's the best thing about IVise?" and what ideas did he have to make IVise more profitable?

[50] Mr Sell had told him in an angry tone of voice that he had already sent Mr Simpson all his ideas about how to increase profit in a spreadsheet. Mr Austin said he was shocked when Mr Sell asked him: "Am I going to be made redundant?" and immediately demanded an exit package of three months' salary. He had replied that he (Mr Sell) was pre-empting an entire process and that no formal proposal had been tabled for consideration at that point, including any decisions regarding potential redundancies.

[51] Mr Sell had commented: "We both know what's going on", and that he hoped that anyone affected by the restructure would be "looked after properly".

[52] Mr Austin said Mr Sell stood up at that point; his face was red and his body language was that of a very angry person. He had felt shocked and physically intimidated and had believed that Mr Sell might punch him. When he had asked if they could keep talking, Mr Sell had exclaimed: "I'm not being part of this process any more" and stormed out of the room.

[53] Mr Sell confirmed that he had been anxious in the meeting but denied that he had been angry. He agreed he had said to Mr Austin that: "We both know what's going on here" and: "I hope you'll look after the staff affected" but denied he had said: "I'm not being part of this process any more" or that he had asked for a three month notice exit package.

[54] Mr Simpson said that Mr Austin had telephoned him after he had met with Mr Sell and told him that Mr Sell had unexpectedly demanded a three month redundancy pay-out and then angrily

stormed out of the room. Mr Simpson said he had been very surprised by this and he told Mr Austin that he would discuss this when he and Mr Sell met at their scheduled meeting, however, Mr Sell did not turn up for the meeting.

[55] Following the meeting with Mr Austin on 30 May 2018 Mr Sell emailed Mr Michael Criscillo at Auckland Council stating:

Thank you for your time this morning. As mentioned there is a restructure happening at IVise and so I am looking to move into a project management contracting role.

I have attached my CV for you as discussed and hopefully you have something suitable coming up. Please let me know.

Outcome of staff feedback

[56] Mr Simpson met with Mr Austin after he completed the employee interviews and received feedback. Mr Austin had told him that one common theme that had emerged was a view by a number of employees that the management was too management heavy and that they would prefer it if the organisation was flattened out to give them more access to him (Mr Simpson), particularly for technical matters.

[57] Based on this feedback Mr Simpson said he had considered that his having more direct managerial oversight might be beneficial, especially if IVise was looking to shift focus from project services to product development, which would require a greater involvement from him because of his experience in data science and analytics.

[58] Ms Joan Jaarsveld, former employee of IVise and Senior Project Manager from 1 February 2017 until 12 October 2018, said she had told Mr Austin during her meeting on 30 April 2018 that the role of General Manager was an expensive overhead that IVise could probably not afford. The reason for that opinion being that she was aware of the decline in the project work of her key client, Auckland Council, and that there was no guarantee of a strong future pipeline of project management or business analytical work in Auckland Council or elsewhere. Her comments to Mr Austin were based on a profitability principle and she said were no reflection on Mr Sell personally.

New structure proposal

[59] Following consideration of the employees feedback, Mr Simpson said he and Mr Austin worked together to formulate a potential new structure. Part of this new structure involved flattening out of the organisation to remove the General Manager position and give Mr Simpson more direct managerial oversight. However, he said the new structure had not been finalised or decisions made on it at that point.

[60] He and Mr Austin had decided to meet with potentially affected staff members the following day to present the proposal and request feedback.

Telephone conversation 30 April 2018

[61] Mr Simpson said that evening he telephoned Mr Sell and explained that he and Mr Austin wanted to meet with him again the following morning. Mr Sell had told him: “You can’t make me redundant ... Do you realise how much damage I could do to your business” and had ended the call

[62] Mr Simpson said he was very taken aback by what Mr Sell had said, especially as he had not been presented with any proposal to make him redundant at that point and he had said nothing about redundancy. He had been shocked by Mr Sell’s threat to do damage to his business.

[63] Mr Sell agreed that Mr Simpson had telephoned him that evening and asked if he would be available for a meeting at 9:30 a.m. the next morning. He strongly denied having made a threat to damage IVise and had confirmed to Mr Simpson that he would be available, and asked who would be attending the meeting, and been informed that it would be Mr Simpson and Mr Austin. He said it had been a short telephone conversation before Mr Simpson had ended it because he said he had other employees to contact.

[64] Mr Sell said that later that evening he received a formal emailed calendar invitation from Mr Simpson at 5:26pm for the meeting the next day. At approximately 9:20pm he had tried to use his mobile phone and noticed that he had been blocked from accessing his work email due to a password issue. There was further notification that someone had signed into his work Gmail account from another app on his work computer. At 9:40pm he attempted to sign into his work email from his work laptop but was unable to do so as his password had been changed three hours prior without notice.

[65] Mr Simpson said he had no knowledge of the reason for the password on Mr Sell’s account being changed that evening or why Mr Sell said he was locked out of his emails. While he had no knowledge of how or why Mr Sell’s password had been changed he noted that Mr Sell had administrative rights to all of his Google services, including email and files, and therefore he had the ability to change his own password. Moreover, as Mr Sell’s personal email address was his recovery address for his work email address, he was able to log into his work email address by re-setting his password.

Meeting between Mr Sell, Mr Simpson and Mr Austin 9.30 a.m. Tuesday 1 May 2018

[66] On the morning of Tuesday 1 May 2018 Mr Simpson said Mr Sell arrived at the IVise office at 9.30 a.m. and they met in the foyer/reception area whilst Mr Austin was waiting for them in the

main meeting room. Mr Simpson said he asked Mr Sell if he felt able to carry out the pending invoicing required that day and Mr Sell had replied: "Not interested".

[67] Mr Simpson said because Mr Sell appeared to be stressed he offered him paid leave following the meeting as well as on the next two days, Wednesday 2 May and Thursday 3 May to which Mr Sell agreed. Mr Simpson said he also told Mr Sell that he would take over responding to his emails and take over the monthly client billing which was normally part of Mr Sell's duties. Mr Sell had replied: "Whatever". He said that he also told Mr Sell to let him know if he needed any support such as counselling services, however Mr Sell did not respond.

[68] At that point Mr Simpson said he told Mr Sell that Mr Austin was waiting for them in the meeting room and asked if he was ready to start. Mr Sell said he first needed to use the bathroom and would meet him in the meeting room.

[69] Mr Simpson said that before Mr Sell came into the meeting he had explained to Mr Austin what he and Mr Sell had discussed regarding his responding to Mr Sell's emails and the monthly billing, He had also told Mr Austin that he had told Mr Sell he could go home for the rest of the day and also take the next two days as paid days off. In the meantime he would perform his duties.

[70] Mr Sell denied that discussions with Mr Simpson prior to the meeting had taken place and also denied that there had been any discussion regarding Mr Simpson doing monthly invoicing.

[71] Just prior to the meeting Mr Sell said his wife had telephoned him and told him to turn his phone on to record the meeting. As a result, Mr Sell had recorded his meeting with Mr Simpson and Mr Austin without informing them that he doing so.

[72] Mr Simpson said that during the meeting Mr Austin outlined to Mr Sell the verbal feedback from the other employees which had been provided the previous day and gave him a copy of the proposed new operational structure in the form of a one page document headed "Proposed Organisational Chart 1 May 2018". A transcript of the meeting recording was provided at the Investigation Meeting.

[73] At the commencement of the meeting as recorded Mr Austin introduced the meeting setting out a new organisational chart, and inviting Mr Sell to provide feedback on it. The transcript of the meeting records the discussion which commenced at 9.30 a.m. as follows:

GA - As a matter of courtesy people who are affected, I tend to invite them to the meeting beforehand so they can choose to come to the all staff meeting or not to. Generally it's more polite for them not to. So in the org chart your position has been deleted and so what we want from you now is to give us feedback to us by 4pm on Thursday, give us your thoughts about the org chart, whether it will work, whether it won't, and any other constructive points you would like to raise.

So what came out of the feedback yesterday is quite a few of the staff want to have direct access to Craig, and they also want to develop the company's values, they want regular team meetings with Craig across the whole of the employees. For some of them it's only the second or third time they've seen the whole team yesterday, and as I said they want improved communications with the Director/CEO. To achieve that what I am suggesting here is a fresh structure and also a push towards a product based company with letting go some of the services based, so the product base will appoint one of the data scientists as a team leader to lead them on and have basically calling out less of the product development team moving towards more data scientists over time.

So welcome your feedback preferably in writing between now and Thursday, Thursday 4 o'clock and with Friday I will let you know the outcome of that feedback.

[74] Mr Sell responded by saying that he needed more time than two days or less, and Mr Austin responded: "That was all that could be allowed because I have to communicate with the other employees".

[75] Mr Sell asked if there were reasons for the restructure and Mr Austin responded that the reasons for the restructure were the ones he outlined the previous day as a move towards the company developing a product-based instead of a services-based organisation.

[76] Mr Austin also communicated Mr Simpson's offer to provide Mr Sell with a positive reference if Mr Sell's position did end up being disestablished and to provide him with support in obtaining a new position.

[77] Mr Sell had asked what Mr Austin and Mr Simpson required him to do that day and Mr Austin had responded:

What I would like you to do today is go home, give some time to reflect on this and provide any feedback you want to provide. We have taken away your email privileges, which are normal for a technology company, and we would appreciate it if you could leave your keys here but that's up to you, no problems with all the other stuff, laptop or your phone."

Mr Choi

[78] Mr Seung Bin Choi, Junior Data Analyst/Developer, was one of the Ivise employees who attended a meeting on 30 April 2018 and said that during his interview with Mr Austin he had told him that IVise was moving to a greater focus on product development and this was an opportunity for it to change direction.

[79] At a subsequent meeting held on 1 May 2018 he was shown the proposed new structure and it was explained to him that if it proceeded, his position would be disestablished. Mr Choi said he agreed with the proposal.

[80] At the 1 May 2018 meeting Mr Choi said he had been offered the option of working out his notice period or of leaving immediately and having his notice period paid in lieu. He had chosen the latter option.

[81] Mr Sell said the only change in the new structure diagram from that in the document he had received the previous day was the removal of his position as General Manager, together with the removal of Mr Choi's position. No other information or documentation on the restructure was provided to him and it appeared to him that project management remained an important part of the new structure.

[82] Mr Sell said that prior to the meeting there had been no mention to him about this major change in the direction of the business. He found this surprising because at that time IVise had only commenced on the product development track and the Callaghan innovation grant was at the funding request stage but had not been approved.

[83] The rest of IVise's profitability had been derived from its project management contracts, predominantly that with Auckland Council. Mr Sell said he had not been provided with any written information explaining why the restructure was necessary, or any financial/economic rationale for the proposed disestablishment of his role.

[84] Mr Sell said that he had found the meeting very stressful but neither Mr Austin nor Mr Simpson had offered him any support.

[85] Mr Simpson said that Mr Sell barely talked during the meeting and appeared unwilling to engage with him. Mr Austin said he had been perplexed by Mr Sell's refusal to engage with himself and Mr Simpson because if Mr Sell had done so, he could have provided his input, shared his initial thoughts on the proposal or asked questions on how he saw the proposed new structure working.

[86] Mr Austin said the only time when Mr Sell had spoken during the meeting was to say he would need a longer period of time to give feedback and to ask for the reasons for the restructure to which he had responded that the reasons were those given at the meeting the previous day.

[87] Mr Austin said that during the meeting he had referred to Mr Sell's email privileges having been removed because he understood from Mr Simpson that he and Mr Sell had discussed this prior to their meeting. He had asked Mr Sell to leave his keys behind at the end of the meeting because IVise was moving out of the office at the end of the week and Mr Simpson needed to collect the keys from all the employees by the end of the week in order to return them to the landlord of the existing premises.

[88] Mr Sell said that he had not been aware that the reason for leaving his keys was because the IVise head office was moving, although he knew that contract staff had been working on-site at another client venue for a time.

[89] Mr Simpson and Mr Austin said the meeting ended with Mr Sell throwing his keys on the table in an aggressive manner and storming out of the room.

[90] Mr Sell denied this had occurred and he placed his keys on the table and left the meeting. He understood that his feedback was to be provided by 4 o'clock on 3 May 2018.

[91] Following the meeting Mr Simpson had emailed Mr Sell stating:

Thank you for meeting with us today.

As explained in the meeting the period for feedback ends 4pm Thursday. This provides over 48 hours for all staff to provide feedback. The feedback/consultation will be considered Thursday evening and a final decision about the outcome of the review will then be made.

I will let you know Friday the outcome.

In the meantime if you require any support services please let me know.

[92] Mr Simpson said he had received a telephone call from Mr Brad Raby, the Head of Solutions Delivery at Auckland Council on 1 May 2018 following the meeting between him, Mr Austin and Mr Sell.

[93] Mr Raby had informed him that Mr Criscillo, one of his direct reports, had spoken to him that day and told him that he was "very concerned about IVise" because Mr Sell had approached him (Mr Criscillo) the previous day and asked if he could be employed by Auckland Council directly in some sort of project management role, and that IVise was no longer focused on its business.

[94] Mr Raby confirmed, when cross-examined at the Investigation Meeting, that Mr Criscillo had told him that Mr Sell had said he was looking for a job and IVise was going in a different direction. Mr Raby said he had been deeply concerned about the fact that a representative of IVise had been telling one of his direct reports that IVise was no longer focused on Auckland Council's business, and by the potential changes that Mr Criscillo had referred to, so he telephoned Mr Simpson and asked him for an explanation.

Wednesday 2 May 2018

[95] When he met Mr Simpson the following day, 2 May 2018, Mr Simpson had explained that due to falling revenue IVise was potentially going to make some changes to its structure, and he was

running the process. Mr Raby's understanding from their conversation was that Mr Sell and one other IVise staff member was being made redundant as a result of this process.

[96] Mr Raby said he believed that Mr Sell's comments to Mr Criscillo had been damaging to IVise because as a result of that conversation Mr Criscillo had subsequently started to look outside IVise for project support. IVise contracts had been phased out as a result and Auckland Council had gone to an agency for staff provision.

[97] Mr Sell denied making any disparaging comment about IVise to Auckland Council. He said that when he had met with Mr Criscillo on 30 April 2018, he had told him that a restructure had been announced that morning at IVise and that he anticipated his position would be declared redundant as a result.

[98] He had sent Mr Criscillo a copy of his CV later in the day by email. He believed that this was an entirely reasonable thing for him to do, given his view of the likely outcome of the announced restructure regarding his position. Mr Sell denied telling Mr Criscillo that IVise was no longer focused on its business.

[99] Mr Sell said that he had contacted Mr Burley, his solicitor, on 2 May 2018.

Events Thursday 3 May onwards

[100] Mr Sell said that he required more time to provide feedback to the proposed changes because he had not been able to access his work emails, files or systems. The change of password had blocked email, calendar and access to all company data, including files. Other systems had also been blocked, including Xero and the Seek website, which meant that he could not work from home, could not view files and systems to review revenue/expenses and sales etc in order to formulate a proper response or work in the office. He had emailed Mr Simpson on Thursday 3 May 2018 stating:

I will be unable to provide you written feedback on the restructure by 4pm today. Access to my work email has been removed and I have had to see my doctor today regarding my health and the stress I am under. I have sought preliminary legal advice and you can expect to hear from my legal representative tomorrow concerning my position in the restructure.

[101] Mr Simpson said that when he had received the email from Mr Sell he had telephoned Mr Austin and asked for his opinion. Mr Austin's response had been that while it was Mr Simpson's decision, he saw no reason not to give Mr Sell a couple of extra days to provide his feedback.

[102] Accordingly, Mr Simpson said he emailed Mr Sell, agreeing for him to extend the time for him to give his feedback until 4pm on Monday 7 May 2018. He observed that this would give

Mr Sell all day Friday, plus the weekend, and most of Monday to formulate any feedback that he wanted to provide. He had emailed Mr Sell that same day, 3 May 2018, stating:

Thank you for the update. We are happy to extend the consultation period to 4pm Monday to help give you time.

I am sorry to hear that you are feeling stressed. Would you like to take us up on the offer of counselling services.

I am pleased now that we helped you out with managing client emails as it will have hopefully relieved some of the stress.

[103] Mr Sell provided his doctor's certificate and Mr Simpson subsequently replied the evening of 3 May stating:

Thank you for this. Please look after yourself and I hope you feel better soon.

I had someone talk to me about the project manager role you applied for and have only positive things to say.

We are happy to give you more time to finalise your feedback on the new structure, so look forward to hearing from you Monday. We have not made a final decision and encourage more feedback from you before we do.

It is important to us that you have every opportunity to communicate any thoughts you have on this decision so that we can help resolve the stressful situation for you as fast as possible.

Please feel free to call me any time if you need anything.

[104] Also on 3 May 2018, Mr Simpson said he received a telephone call from a prospective employer asking him for a reference for Mr Sell who had applied for a project management role with that business.

Friday 4 May 2018

[105] Mr Sell had received a text message from Mr Song on 4 May 2018 which stated: "Hey Richard, sorry to hear about what happened. I enjoyed working with you and I've learnt a lot from you. Let's catch up for coffee sometimes, all the best. Zed."

[106] Mr Simpson said he received a letter from Mr Burley, the lawyer instructed by Mr Sell, on 4 May 2018, the contents and tone of which had been a shock. The letter had alleged that the outcome of the restructuring process was pre-determined and said that the termination of Mr Sell's employment was inevitable. The letter stated:

I am currently taking further instructions regarding that proposal in anticipation of having a detailed response to it and covering related matters to close of business next Tuesday the 8th May. It follows our client is simply not in a position to provide his formal response to the restructure proposal by the extended response date of 7th May,

not least of all, given the extremely short period that he has so far been given to reply to the said proposal, as devoid of detail as it is.

...

As noted earlier, it is our client's firm view that the final outcome of the proposed restructuring has **already** been determined, in clear breach of the good faith obligation owed to him by the company enshrined in sections 4 and 103A of the Employment Relations Act 2000 ...

The empirical data that our client has been provided in being paid bonuses every month since he started with the company is fundamentally at odds with the notified basis for the restructure in terms of adequate return to the business, although Mr Sell does accept that April's results were not as positive as they have previously been. However, the forecasted work, and therefore potential profit to the company this month is looking extremely positive. The apparent financial rationale for the proposed disestablishment of our client's position is somewhat over simplistic, with respect, being focused on cost reduction to the elimination of the highest paid salary of the company.

...

In light of the stress and distress about his future with IVise, Mr Sell is taking the weekend to consider his options including a possible exit from the business on mutually acceptable terms that are both fair and reasonable to both parties. If that is his decision, then our next letter will set out the proposed terms of exit for our client, so that he can leave the company in as dignified a way as possible.

[107] Upon reading the letter Mr Simpson said he began to wonder whether Mr Sell genuinely intended to engage with the process. He said it did not seem worthwhile giving Mr Sell a further extension just so that he could tell him he wanted to leave IVise. In addition he was worried about what Mr Sell might be telling people about IVise and him personally, particularly in light of the fact that he had told one of IVise's major customers that IVise was no longer focused on its business.

[108] Mr Simpson had telephoned Mr Austin to seek his advice and forwarded him a copy of the letter that he had received. He had asked Mr Austin whether he thought he should grant Mr Sell a further extension and whilst Mr Austin advised that was his (Mr Simpson's) decision, he had shared with him his concern that they were not going to receive any feedback from Mr Sell.

[109] Mr Austin had told Mr Simpson that he needed to carefully consider the potential benefits of granting Mr Sell yet another extension against the effect this might have on the rest of the team who were anxious to be informed of the outcome. Mr Simpson said he had still been keen to get feedback from Mr Sell and had not decided what to do about a further extension request when he finished speaking to Mr Austin.

[110] After he had finished the call with Mr Austin he had received a call from a recruiter who advised him that he was aware that Mr Sell was applying for various positions and attending

interviews. This had confirmed to him that Mr Sell simply wanted to leave IVise. Mr Simpson said he had told the recruiter that Mr Sell had not left IVise.

[111] He concluded that Mr Sell had no intention of providing any substantive feedback on the restructure proposal and had no interest in doing so. He had also been concerned that someone who was too unwell to provide him with feedback had yet been well enough to attend job interviews.

[112] He had decided it was futile to grant Mr Sell a further extension to provide feedback, in addition to not being fair on the rest of the IVise employees who were anxious to find out the outcome.

Monday 7 May 2018

[113] Mr Simpson said he had waited until the deadline of 4pm on Monday 7 May 2018 before proceeding with the next step of carefully considering all the feedback he had received from all employees. He had decided to proceed with the restructure proposal, which meant that Mr Sell's employment was to be terminated on the grounds of redundancy.

[114] Mr Simpson confirmed the outcome to Mr Sell in a letter dated 7 May 2018 which stated:

Outcome of feedback sessions

The purpose of this letter is to confirm the outcome of the recent review by IVise of its operational requirements, its new strategic focus, and what this means for you.

Based on feedback received from all staff members interviewed one on one and the written feedback from employees, we have been able to complete a thorough review of the business. The feedback we received was positive in regard to the data science base, new product focus and we also gained confirmation that the outsourced resource business is not growing as expected. A number of employees also wish for us to make this decision as quickly as possible to help reduce the stress it has created.

We would like to confirm that as a result of the week spent evaluating all options the proposed structure we discussed with you will now be the new structure. At your request we took more time with your decision and also gave you extra time to provide feedback.

As a result of a decline in the outsourced service business and new opportunities the products we develop present, the position of General Manager is declared surplus to requirements. Regrettably this means your employment will terminate. We would also like to reiterate what we discussed in the all staff meeting, your one on one and our third meeting with you. In all three meetings we clearly outlined that this was a change in strategic direction and not related to financial performance. This decision is also not a reflection on your performance.

Your employment will end immediately. As per your employment contract the notice period is one month. You will be paid in lieu for your contractual notice period. Your final payslip will be sent to you today.

...

You can drop this laptop off at our new premises at 48 Emily Place at your convenience or I will arrange for one of the staff to pick it up from you at a location convenient to you.

[115] Mr Sell said that the letter terminating his employment had been completely unexpected because of the letter sent on his behalf by Mr Burley dated 4 May 2018 and the request for one extra day to provide feedback and the medical certificate which had linked his sick leave to work-related stress.

[116] There had been no reference in the dismissal letter to possible subsequent options to potentially avoid termination as required under clause 12.5 of the Employment Agreement.

[117] On 11 May 2018 Mr Sell had raised a personal grievance claim for unjustifiable dismissal by letter from Mr Burley.

Was Mr Sell unjustifiably dismissed by IVise?

[118] Mr Sell was dismissed from his employment with IVise by reason of redundancy. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a 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.

[119] The Test of Justification requires that the employer (i) acted in a manner that was substantively and procedurally fair, and (ii) must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

(i) Substantive justification Did IVise have a credible financial/economic rationale for the proposed disestablishment of Mr Sell's position?

[120] Mr Simpson's evidence was that he had become aware after a review of IVise's business in early 2018 that the business generated from project based services which came primarily from one large contract with Auckland Council, was reducing. Mr Sell's evidence confirmed that the revenue from the contract at Auckland Council was reducing.

[121] The evidence of Ms Jaarsveld confirmed that there was a decline in Auckland Council's business but also that there was no guarantee of a future pipeline of project management work in Auckland Council or elsewhere.

[122] The evidence of Mr Simpson, Mr Sell and Ms Jaarsveld points to the rationale for the restructure being motivated by a need to improve the company's financial results and it was considered that a change in IVise's strategic direction from project management to product development could produce such an improvement.

[123] I observe also that Mr Sell as the General Manager had access to IVise financial information; it was he who provided Mr Simpson with projected gross revenues and expenses for April and May 2018.

[124] The restructuring exercise had been motivated by the perception of Mr Simpson that in order to improve IVise's financials the operating focus should move from project management to product development. His evidence was that he had discussed this idea with Mr Sell. Mr Sell's evidence was that he had been aware of the reduction in the revenue generated from Auckland Council and had supported the proposed shift in strategic development as acknowledged by his involvement in the Callaghan research grant application.

[125] Feedback from the employees interviewed individually following the all staff meeting held on 30 April 2018 was that in general terms the IVise operating structure would benefit from a flattening of the management structure and more access to Mr Simpson by staff members directly because his greater experience in data science and analytics would enable product development. As a result Mr Simpson formed the opinion that the requirement for the General Manager role could be subsumed into that of his role with the subsequent financial cost savings.

[126] Whilst at the time of the disestablishment of Mr Sell's position as General Manager there was still ongoing project services work I find that this was reducing. Subsuming Mr Sell's work responsibilities into those of Mr Simpson meant that there was no requirement for the General Manager position and I note that it has not been replaced in the current IVise management structure.

[127] I find the rationale for the proposed disestablishment of Mr Sell's position as General Manager with IVise to be credible and there was substantive justification for the proposed disestablishment of Mr Sell's position with IVise.

(ii) *Procedural Justification Did IVise undertake a genuine and bona fide consultation process with Mr Sell?*

[128] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s.4 of the Act.

[129] The duty of good faith is set out in s.4 of the Act:

s.4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)-

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-
 - (i) to mislead or deceive each other, or
 - (ii) that is likely to mislead or deceive each other

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

- ...
(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

[130] The former Chief Judge in *Simpsons Farms Limited v Aberhart* noted that this compliance with good faith dealing includes consultation: “as the fair and reasonable employer will comply with the law”²

[131] It is a requirement that consultation involves an outline proposal of what is being proposed, giving those involved an opportunity to provide feedback, consideration of that feedback, followed by a decision as to what will be done.

[132] Although Mr Simpson was at the time of his perception of future events was entitled to have a restructuring exercise already in mind, it was necessary that he kept an open mind. In *Simpson Farms Limited v Aberhart* the then Chief Judge Colgan stated;

The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.³

² *Simpson Farms Limited v Aberhart* [2006] ERNZ 825 at [62]

[133] The Employment Court in *Vice Chancellor of Massey University v Wrigley* stated that: “The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made: “ That opportunity must be real and not limited by the extent of the information made available by the employer”.⁴

[134] The duty of good faith applies to both the employer and the employee in an employment relationship. The duty required IVise to consult meaningfully with Mr Sell and Mr Sell to be responsive and communicative.

[135] In regard to the requirement in s 4 (1A) (c)(i) of the Act to provide an employee with access to information relevant to the continuation of his/her employment. As discussed in the preceding paragraphs I find that Mr Sell had access to IVise’s financial information and more importantly, was aware on a day to day basis that the business with Auckland Council was reducing, and was also aware that the rationale for the restructuring was that of a need for a change in strategic focus.

[136] Consultation between the employer and employee is a requirement of a restructuring situation.

[137] On Monday 1 May 2018, a week after Mr Sell received the all staff meeting invitation and a day after that meeting, he had the meeting with Mr Simpson and Mr Austin and his feedback was requested to be provided by Thursday 3 May 2018 at 4 p.m...

[138] Mr Sell had been given time off after the meeting on 1 May until 3May to provide feedback. In examining whether or not the consultation period was sufficient for Mr Sell to adequately respond I observe that Mr Sell’s evidence was that he became aware that his position might be at risk on 23 April 2018 when he received the all staff meeting invitation on 23 April 2018 and suspected a restructure which might affect his own position.

[139] I also note that Mr Sell contacted Mr Criscillo of Auckland Council on 30 April 2018 prior to the meeting with Mr Austin and Mr Simpson on 1 May 2018 informing him that he was interested in applying for a job at Auckland Council as he anticipated his position would be declared redundant as a result of the restructuring taking place.

[140] I consider therefore that as early as Monday 23 April, and by the latest at 30 April 2018, Mr Sell had turned his mind to the implications for his position as General Manager should his anticipation of a restructuring occur.

³ N2 above at [62]

⁴ [2010] NZEmpC 37 at [55]

[141] This view was confirmed at the meeting held with Mr Simpson and Mr Austin on 1 May 2018 which commenced at 9.30 a.m. and would have occupied no more than one hour based on the duration of the transcript recording made by Mr Sell.

[142] The deadline provided for the feedback at the meeting was 4 p.m. on 3 May. From the meeting end on 1 May to the deadline for feedback Mr Sell therefore had almost three full days in which to provide his feedback. This is in addition to the fact that he had had awareness from a week earlier that his position might be at risk and the opportunity to turn his mind to the possibility which he clearly had done.

[143] Considering Mr Sell's evidence that he was unable to obtain the information he needed to provide feedback because his access was blocked I note that the screenshot provided by Mr Sell indicated that he had emails copied onto his laptop computer and could potentially reset his password.

[144] I find Mr Sell's contention that he would have provided feedback if he had not been denied access to the information needed is undermined by that fact that whilst he emailed Mr Simpson on Thursday 3 May 2018 to state that he could not provide feedback as a result of his access to his work email being removed, he did not request that it be restored so that he could do so.

[145] Moreover this request is not a reason given by Mr Burley when he wrote to IVise on Friday 4 May 2018 when the: "extremely short period" that Mr Simpson had been given to do so coupled with his notified sick leave were the reasons provided.

[146] I therefore do not find that Mr Sell's reason for not providing feedback was related to limited time in which to do so or limited access to financial information, in addition he was aware of the financial problems stemming from the reduction of Auckland Councils business.

[147] I accept that Mr Sell was medically certified as unfit to attend work from Wednesday 3 May 2018. However I note that the evidence supports Mr Sell being able during the period from 3 to 8 May 2018 to register with recruitment agencies, apply for jobs, attend for interviews and it is reasonable to infer given Mr Burley's instructions in regard to the detailed letter sent on his behalf to IVise on 4 May 2018.

[148] I find in these circumstances it is reasonable to conclude that Mr Sell would have been capable of providing some feedback to IVise given the week between 1 and 8 May 2018 when he had been capable of undertaking other tasks during that period and that it was therefore not unreasonable for IVise to not extend that period to 9 May 2018 as requested by Mr Sell.

[149] I therefore do not find procedural deficiencies in the process adopted by IVise as regards consultation.

[150] Turning to other aspects of the restructuring process followed by IVise, I note that Mr Austin told Mr Sell:

So in the org chart your position has been deleted and so what we want from you now is to give us feedback to us by 4pm on Thursday, give us your thoughts about the org chart, whether it will work, whether it won't, and any other constructive points you would like to raise.

[151] Whilst the statement that Mr Sell's position had been deleted was followed by a request for constructive points I consider that the wording of that statement inferred a strong bias towards a decision having been made prior to Mr Sell providing input.

[152] During the concluding part of the interview with Mr Sell on 1 May 2018 Mr Austin referred to having taken away Mr Sell's email privileges and asking him to return his keys to the office. Whilst Mr Austin's evidence was that his reference to the withdrawal of email privileges was attributable to Mr Simpson, in that Mr Simpson had offered to deal with Mr Sell's emails for him just prior to the meeting, I observe that there is no reference to it in the meeting transcript which I would have expected had it actually occurred.

[153] Moreover the evidence of Mr Brad Raby, former Head of Solutions Delivery at Auckland Council, was that his understanding from his meeting with Mr Simpson on 2 May 2018 was that Mr Sell and one other IVise staff member were being made redundant as a result of the restructuring. Mr Choi had in fact been made redundant on 1 May 2018.

[154] A request to return office keys can be seen as an indication that the employment relationship is over although I note that Mr Austin did ameliorate the request by the addition of the words: "but that's up to you" and by stating that Mr Sell could retain use of his laptop and mobile phone.

[155] However in addition to the request to return office keys and the withdrawal of email privileges, there is the fact that Mr Sell's position had been deleted from the proposed organisation chart, (albeit with feedback requested from Mr Sell as to 'will it work or not?') and Mr Raby's evidence that his understanding on 2 May 2018 was that Mr Sell and one other staff member were to be made redundant. I also note the evidence of the text message from Mr Song's to Mr Sell sent on 4 May 2018 prior to the feedback deadline which indicated a decision had been made and communicated to other employees.

[156] I find these events are indicators that Mr Simpson had pre-determined that Mr Sell's position would be disestablished prior to receiving any feedback from Mr Sell.

[157] Consequently I find there were flaws in the procedure adopted by IVise that were more than minor.

(iii) Did IVise unjustifiably fail to explore or provide redeployment opportunities for Mr Sell?

[158] Clause 12.5 of the Employment Agreement provided that before a decision to proceed with redundancy was made IVise would consider any alternatives to dismissal such as re-deployment.

[159] In the letter dated Monday 7 May 2018 in which IVise informed Mr Sell of the termination of his employment, it did not present him with any alternatives to dismissal.

[160] The Court of Appeal stated in *AFFCO NZ Ltd v NZMW & Related Trades Union Inc*:

Contracts of employment are subject to the same rules of interpretation as apply to all contracts. The express terms are the central focus of an interpretative assessment.⁵

[161] The wording of clause 12.5 in this case is clear; it required IVise to consult with Mr Sell over possible redeployment before it reached a final decision to proceed with redundancy and consequently his dismissal.

[162] Mr Simpson said that Mr Sell did not express any interest in an alternative role within IVise. However the wording of clause 12.5 of the Employment Agreement places the onus on the employer. I find that the clause required IVise to consult with Mr Sell over possible redeployment before it reached a final decision to proceed with redundancy and consequently his dismissal.

[163] Even if IVise considered no other suitable positions existed, it was necessary for it to comply with clause 12.5 as set out in *Money v Westpac Trust Banking Corporation*:

The contractual obligation must be taken to have been entered into deliberately by the respondent with the intention of honouring it if the occasion arose.⁶

[164] There is evidence that Mr Sell had some experience in the area of product development, however the possibility of Mr Sell working in that area had not been discussed with him.

[165] Mr Sell may not have communicated with IVise regarding redeployment options, however I do not find that this lessened the requirement on IVise to consult with Mr Sell regarding whether or not there were any alternatives to redundancy of his position.

[166] I find that IVise unjustifiably failed to explore or provide redeployment opportunities for Mr Sell.

⁵ *AFFCO NZ Ltd v NZMW & Related Trades Union Inc* [2016] NZCA 482 at [31].

⁶ *Money v Westpac Trust Banking Corporation* [2003] 2 ERNZ 122 (EmpC) at [39].

[167] In all the circumstances I find that there was a lack of procedural justification in Mr Sell's dismissal which rendered it not a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[168] I determine that Mr Sell was unjustifiably dismissed by IVise.

Did IVise breach the duty of good faith which it owed to Mr Sell pursuant to s 4 of the Act?

[169] Having found that procedural flaws in the process adopted by IVise regarding predetermination and a lack of consultation with Mr Sell regarding redeployment, I find that IVise did not act in good faith.

Did Mr Sell breach the duty of good faith which he owed to IVise pursuant to s 4 of the Act?

(a) By refusing to engage in a responsive and meaningful way with the process?

[170] During the meeting with Mr Austin and Mr Sell the meeting transcript establishes that there was minimal engagement in the discussion by Mr Sell. His responses do not indicate an enquiry into the reasons for the proposed restructure or indeed interest in the process or the reasons for it.

[171] The time provided for his feedback was extended by IVise to May 2018. During that time Mr Sell was not attending work so he had time available in which to prepare any feedback.

[172] The possibility of redundancy is a stressful situation for an employee and whilst not minimising the stress that Mr Sell was under which resulted in him attending his doctor, I have noted the actions Mr Sell was able to undertake during that period, namely registering with recruitment agencies, applying for jobs attending interviews and instructing Mr Burley.

[173] I also have found that Mr Sell had the necessary financial knowledge and access to financial information needed to be able to provide feedback.

[174] On that basis I find that Mr Sell had both the opportunity and the capacity to turn his mind to providing feedback, but he failed to do so.

[175] I find this to be a breach of the good faith duty to be responsive and communicative pursuant to s 4(1)(b) of the Act.

(b) By meeting with Mr Criscillo to ask for a job and stating that IVise was no longer focused on its business.

[176] I do not find a breach of good faith in an employee seeking alternative employment during his or her employment, providing that they do so without breaching any aspect of his or her employment agreement.

[177] I have found Mr Raby to be a credible witness and accept his evidence that Mr Criscillo spoke to him about what Mr Sell had told him concerning the change in IVise's focus from the Auckland Council business.

[178] I find this to be not only a breach of the confidentiality provisions of the Employment Agreement but also of the duty of good faith.

(c) By threatening Mr Simpson during the telephone call of 30 April 2018

[179] The threat which Mr Simpson alleged Mr Sell made to him during the telephone conversation of 30 April 2018 was strongly denied by Mr Sell.

[180] There is no independent evidence establishing that threat to damage IVise was made by Mr Sell and in these circumstances I find no breach of good faith by Mr Sell.

(d) By demanding an exit package on several occasions rather than engaging with IVise's processes.

[181] There are no notes of the meeting between Mr Austin and Mr Sell held on 30 April 2018 in which Mr Austin's evidence was that Mr Sell had demanded an exit package.

[182] Mr Sell's evidence was that he had voiced an opinion that he hoped the employees would be looked after. That is not a demand for an exit package and there is no evidence that Mr Sell demanded an exit package at the subsequent meeting at which Mr Simpson was present on 1 May 2018.

[183] The letter from Mr Burley referring to an exit package was written on 4 May 2018. In that letter Mr Burley also requested that Mr Sell be granted one further day to provide feedback. The letter indicated that Mr Sell would be considered a negotiated exit as a possibility over the intervening weekend. The outcome letter dated 7 May 2018 had been sent before any decision had been made by Mr Sell.

[184] I find no evidence of a breach of good faith occasioned by Mr Sell indicating he was considering an exit package as set out in Mr Burley's letter dated 4 May 2018.

(e) By actively searching for other employment including claiming to be too stressed to provide feedback on IVise's restructure proposal

[185] The evidence establishes that Mr Sell was actively searching for employment at the time he was claiming to be too stressed to provide feedback to IVise.

[186] As noted above, I accept that the prospect of redundancy is stressful for an employee, seeking alternative employment involving as it does engaging with recruitment agencies, attending job interviews and waiting for a response is also stressful. Mr Sell was able to fully engage in the latter process whilst representing himself to IVise as requiring more time in which to prepare feedback.

[187] I find that this was misleading and deceptive in breach of s 4(i)(b) of the Act.

(f) Taking a covert recording of part of a meeting held on 1 May without IVise's knowledge

[188] Mr Sell had covertly recorded the meeting attended by Mr Simpson and Mr Austin at which they had discussed with him the restructuring proposal.

[189] IVise contends that there was an earlier part of the meeting which was not recorded, namely the discussion between Mr Sell and Mr Simpson which addressed the invoicing situation.

[190] I have already noted that there was no reference in the recording to an earlier discussion between Mr Simpson and Mr Sell, and there are no meeting notes prepared by IVise. Mr Sell had denied that this earlier part of the meeting occurred.

[191] Turning then to the covert nature of the recording of the meeting between Mr Austin, Mr Simpson and Mr Sell, whilst an employee secretly recording a meeting with his or her employer is not behaviour to be encouraged between an employee and employer and might be considered in some circumstances to constitute a failure in the trust and confidence which exists in an employment relationship, Mr Sell was not asked if he was recording the meeting or denied that he was doing so which would be more persuasive that he not was acting in good faith.

[192] There is also no evidence that IVise indicated to Mr Sell that the meeting was to be confidential or off the record. On that basis I am unable to conclude that Mr Sell recording the meeting was a breach of good faith.⁷

⁷ *Talbot v Air New Zealand Ltd* [1995]2 ERNZ 356 at pg [371]

Remedies

Lost wages

[193] Mr Sell's dismissal on the basis that his position was redundant was substantively justified. On that basis I make no award for lost wages.⁸

Bonus Payment

[194] Mr Sell claims he is owed a bonus of \$1,770.00 for April 2018. Mr Simpson's evidence was that the amount owed as bonus for April 2018 was paid in full to Mr Sell.

[195] I find no basis on which to award Mr Sell any further bonus payment, but if the parties have any further evidence on this issue that they wish to submit, I grant leave for them to do so.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[196] Mr Sell's evidence was that the circumstances which resulted in the termination of his employment made him feel withdrawn, humiliated and traumatised and that it had had an adverse effect on his family life.

[197] I accept that Mr Sell experienced distress at the loss of his employment with IVise.

[198] However I also take into consideration when determining the appropriate level of compensation that Mr Sell had sought alternative employment at the outset of the restructuring process on 23 April 2018 before an engagement with IVise had occurred, and was also able to travel overseas and speak at international conferences.

[199] I order IVise to pay Mr Sell the sum of \$25,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Penalties

[200] Mr Sell is seeking a penalty against IVise in respect of a breach of good faith. The circumstances of the breach of good faith by IVise forms the basis for the unjustifiable dismissal.

[201] As such I have already awarded compensation and regard any further penalty award would be 'double-dipping'.

[202] IVise is seeking a penalties against Mr Sell for various claimed breaches of good faith.

⁸ *Aoraki Corporation Limited v McGavin* CA 2/97

[203] I have found three of the claims to be substantiated:

- (a) By refusing to engage in a responsive and meaningful way with the process
- (b) By meeting with Mr Criscillo to ask for a job and stating that IVise was no longer focused on its business; and
- (e) By actively searching for other employment including claiming to be too stressed to provide feedback on IVise's restructure proposal

[204] I consider that a penalty is appropriate in each of the breaches of good faith detailed above and it is appropriate that each of the penalties imposed be paid to IVise:

- (a) I order Mr Sell to pay to IVise the sum of \$8,000.00;
- (b) I order Mr Sell to pay IVise the sum of \$5,000.00; and
- (se) I order Mr Sell to pay IVise the sum of \$6,000.00 pursuant to s4A of the Act.

Contribution

[205] I have considered the matter of contribution as I am required to do under s124 of the Act. In light of the determination I have made I am unable to conclude that Mr Sell contributed to the situation which resulted in his dismissal.

Costs

[206] Costs are reserved. Given the extent to which both parties have been successful I am of a mind to let costs lie where they fall.

[207] However, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

[208] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority