

NOTE: For the reasons set out at paragraph [3] below, this determination contains an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 519
3303880

BETWEEN

BRETT SIMMONS
Applicant

AND

RAINBOW
CONFECTIONERY LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Michael Smyth, counsel for the Applicant
Janet Copeland, counsel for the Respondent

Investigation Meeting: 4-5 March and 1 April 2025 in Auckland and by audio-visual link

Submissions: 1 April 2025 from the Applicant
5 March 2025 from the Respondent

Determination: 25 August 2025

DETERMINATION OF THE AUTHORITY

What is the employment problem?

[1] This is a claim for unjustified dismissal. Brett Simmons worked as the national sales and marketing manager for Rainbow Confectionery Limited (RCL or the company) from 27 February 2017 to 8 April 2024 when his employment ended due to redundancy. He claims that his redundancy was neither substantively nor procedurally justified.

How has the Authority investigated?

[2] Mr Simmons' case comprise witness statements from himself and his wife and a former RCL work colleague, Sheralee McKee, who worked as a territory manager (TM) for the lower North Island. Ms McKee attended the investigation meeting via audio-visual link. For RCL, witness statements from its general manager Brent Baillie, South Island TM Sharon Bennett and sales manager for convenience and food service Craig Lovell were provided. Ms Bennett and Mr Lovell also attended the investigation meeting by AVL.

[3] During the course of this investigation, information of a personal nature concerning Mr Lovell and a sensitive issue affecting a member of Mr Simmons' family were mentioned. Given the nature of the information, a non-publication order is granted to preserve confidentiality.

[4] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives made oral closing submissions at the end of the investigation meeting which they supplemented with written closing submissions that have been considered.

[5] This determination has not been issued within the three-month period required by s 174C(3) of the Employment Relations Act 2000 (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[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 there a genuine reason behind the restructure?
- (b) Was Mr Simmons given an opportunity to comment on information before RCL made its decision?
- (c) Was Mr Simmons unjustifiably dismissed? Did RCL act as a fair and reasonable employer could have in all the circumstances

- (d) Was Mr Simmons unjustifiably disadvantaged in terms of the redundancy?
- (e) What efforts did he make to mitigate his loss?
- (f) Whether the unjustified disadvantage grievance claim is treated in tandem of the same facts?
- (g) Should either party contribute to the costs of representation of the other party?

What are the relevant facts?

[8] RCL operates as a confectionary manufacturing business that employs approximately 105 full-time and part-time staff. Mr Simmons was initially employed as RCL's sales and marketing manager on 27 February 2017. At some point, his job title changed to national sales and marketing manager (NSMM). Mr Simmons holds a Bachelor of Management Studies degree (majoring in Marketing) from the University of Waikato. For his role, he was paid a total base remuneration of \$190K per annum. At the time of his dismissal in early April 2024, he was paid an annual salary of \$187,460 plus use of a company vehicle and an annual bonus payment of \$9,373.

[9] In January 2019, the company proposed to disestablish Mr Simmons' NSMM role as part of a restructure of its sales and marketing division. Mr Simmons says that the process ended after he raised a personal grievance of unjustified disadvantage through his lawyer, Mr Smyth. Mr Baillie says that the 2019 restructure was the result of reduced sales and after having further discussions with both Mr Simmons and RCL's board of directors, the decision was made to give Mr Simmons a further year to see his work yield results. The company subsequently withdrew its restructuring process and kept Mr Simmons employed as NSMM. The personal grievance was not taken any further.

[10] Four years later in June 2023, RCL embarked upon a nine-week performance improvement process (PIP) for Mr Simmons who did not raise a personal grievance on that occasion but personally responded to Mr Baillie's concerns. This resulted in Mr Baillie deciding in August 2023 that Mr Simmons' performance had improved and that no further action, disciplinary or otherwise, was required.

[11] Towards the end of 2023, a meeting of RCL's board was held on 14 December during which minutes were taken. Under the heading of 'matters arising from the last meeting', the minutes record that Mr Baillie was to contact the company's solicitors for a quote on future actions with a proposal to restructure the sales team and "possibility of disestablishing the NSMM position". Mr Baillie was expected to meet with RCL's counsel, Ms Copeland, the following week and report back to the board in January in the New Year.

[12] A board meeting minute (24 January 2024) records that Mr Baillie had discussed matters with Ms Copeland who provided a cost estimate of \$4K for assessing the process and risks. The minute further records discussion of everyone's views of progressing to next steps with the proposed restructure of the sales team and possible disestablishment of the NSMM position. All directors agreed that they were "aligned" in their decision to continue.

[13] On 21 February 2024, RCL presented a written proposal to Mr Simmons to make changes to its sales and marketing team. The consultation document stated that that the NSMM role may be surplus to business requirements due to:

- a. Major clients being in place with key customers for the next 2-3 years.
- b. Significant changes to Foodstuffs Group's model for sales.

[14] Reference to the Foodstuffs Group above is to a major New Zealand grocery company comprising 2 regional cooperatives: Foodstuffs North Island Limited (FSNI), which is based in Auckland, and Foodstuffs South Island Limited (FSSI) headquartered in Christchurch. Foodstuffs owns and operates Pak'nSave, New World, Four Square, and wholesalers: Gilmours in the North Island and Trents in the South Island.

[15] RCL's proposal stated that because major client contracts (such FSNI, Progressive Enterprises now Woolworths, The Warehouse Group, FSSI, and K Mart in Australia) have been secured and in place for the next 2-3 years, the contracts only need to be maintained in the short term. There was no current requirement to negotiate new sales and/or terms of business with those major clients resulting in a reduced workload for the sales team.

[16] In addition, the proposal noted that Foodstuffs was moving towards “centralised sales” so that FSNI’s head office in Auckland would be RCL’s sole point of contact rather than individual store owners. This would result in not needing to actively service individual customers. The reduction in sales workload would be significant as there would be significantly reduced opportunities for the company to purchase promotional store space to drive sales which would now be managed by Foodstuffs’ head office. Consequently, there would no direct selling to stores as all ordering and invoicing would be through the distribution centres and head office. The consultation document stated:

The effect of this is that we will no longer be servicing directly 69 x individual billing clients, and this will be reduced to dealing with 4 x Distribution Centres and Foodstuffs Head Office.

[17] The consultation document set out the following timeframe:

Action	Date
Presenting this proposal	21 February 2024
Inviting feedback from affected employees about our proposal	21-28 February 2024
Considering feedback received	29 February-1 March 2024
Announce a final decision	4 March 2024

Mr Simmons’ feedback

[18] On 28 February 2024, Mr Simmons provided a fulsome reply to the consultation document pointing out various incorrect assumptions and shortcomings that it had. Briefly stated, the proposal made no reference to the marketing team and how it functioned including the involvement of the sales and marketing administrator who reported to Mr Simmons as NSMM. Due to being suitably qualified in Marketing, Mr Simmons stated that he had improved RCL’s marketability and profitability over and above what the general manager (Mr Baillie) could have done who was not qualified in Marketing and who could not effectively carry out all the key deliverables of his role particularly the marketing activity that was involved.

[19] Mr Simmons further stated that the reasons given for his role being surplus to business requirements appear to be “superficial or ill-considered” because contracts in place with key customers were not ‘set and forget’ for the next 2-3 years and there was no certainty that the Commerce Commission would approve the merger of FSNI and

FSSI. Managing key accounts was not limited to Woolworths NZ, The Warehouse and Foodstuffs which in total made up over two thirds of RCL's business. Mr Simmons stated that as NSMM he managed (directly or indirectly) two-thirds of the business not covered by major client contracts.

[20] Mr Simmons suggested that a third party or someone else independent to the restructuring proposal be involved such as a company director of RCL. Further, Mr Simmons provided a cost comparison in disestablishing his role compared against disestablishing one TM role and the sales manager of convenience and food service role (SMCFS) and suggested that there was a nominal difference in costs savings. Mr Simmons instead suggested that there needed to be a comprehensive time-in-motion study of all sales roles including that of the general manager who had been relieved of his operational duties by the relatively recent recruitment of an operations manager.

RCL's response to feedback

[21] In response to Mr Simmons' feedback, Mr Baillie stated that while Mr Simmons believed that he could do his role to a higher standard because he was better qualified, it remained that major contracts were secured for the next two to three years and that any left-over duties would be absorbed by Mr Baillie as general manager. Mr Baillie confirmed that the board had appointed him to carry out the restructuring process and therefore an independent party would not be appointed. As to Mr Simmons' response concerning the uncertainty with Foodstuffs' merger of its North and South Island businesses, Mr Baillie stated:

"I acknowledge the North Island and South Island businesses are currently separate, and that a proposed merger is under review for clearance by the Commerce Commission. The Commission is expecting to make a decision by 4 April 2024. We anticipate that the merger will go ahead. Regardless of whether it does or not, Foodstuffs North Island is still looking to change its sales model which will significantly reduce our sales workload."

[22] Finally, in response to Mr Simmons comment that his role be retained but that a TM position and the role of SMCFS held by Mr Lovell be reviewed, Mr Baillie stated that the company was not looking at disestablishing lower-level roles as that was not the direction the business was taking. Mr Baillie ended his letter by requesting that if there was anything further that Mr Simmons wished to add that he do so by close of business. The difficulty with that invitation was that Mr Baillie's letter was emailed outside work hours on Friday 1 March 2024 at 5.14 pm.

[23] No further reply or request for an extension was made by Mr Simmons.

[24] On 4 March 2024, Mr Baillie wrote to Mr Simmons to advise him of RCL's final decision. The letter recorded that he had been invited to provide any additional feedback by 1 March 2024 but as no response was received, the decision was to proceed with the proposal to disestablish his role. Mr Simmons was offered the opportunity to be redeployed into any one of three vacant roles: Planning and Procurement Coordinator, Shift Supervisor or Production Operator. Mr Simmons did not apply for any of these roles because they were not based in Auckland where he lived. RCL's letter required Mr Simmons to work his notice period to 8 April 2024.

Personal grievance raised

[25] On 12 March 2024, Mr Simmons' representative, Mr Smyth, raised a personal grievance of unjustified disadvantage and unjustified dismissal on his behalf. It was alleged that, on two prior occasions (2019 and in 2023), Mr Baillie as general manager had attempted to exit Mr Simmons from the business.

[26] It was submitted that Mr Baillie's decision was predetermined; failed to understand the scope and nature of Mr Simmons' marketing role which accounted for 20 percent of his job; was based on a false premise regarding major clients being secured and in place for the next two to three years; that centralisation of Foodstuffs would have little to no adverse impact on Mr Simmons' role but would significantly impact the role of TMs; the appointment of an operations manager in 2023 had made Mr Baillie's role as general manager surplus to requirements; and that Mr Simmons had been denied the opportunity to provide feedback to RCL's letter of 1 March 2024, being sent after business hours and inviting a response before the end of the business day.

[27] On 22 March 2024, RCL responded to Mr Simmons' personal grievance stating that any grievances prior to 12 December 2023 were out of time, his redundancy was for genuine business reasons and followed a fair process, there was no longer a need for a dedicated NSMM, the general manager was best placed to lead the restructure given his knowledge of the business, and that it was the employer's prerogative to decide how to run its business.

[28] The parties attended mediation to resolve the employment relationship problem but were unable to do so. On 17 June 2024, Mr Simmons lodged his statement of problem with the Authority. RCL's statement in reply was filed shortly thereafter on 25 June 2024.

Whether Mr Simmons was unjustifiably dismissed?

[29] The test for whether a dismissal is justified is set out in s 103A of the Act. It requires an objective assessment of whether the employer's actions, and how they were carried out, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:¹

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

Whether the redundancy was for genuine reasons?

[30] Mr Simmons says his redundancy in 2024 was not genuine because his general manager, Mr Baillie, had tried on two previous occasions to exit him from RCL, firstly in early February 2019 and secondly in mid-August 2023. Concerning the 2019 restructure, RCL had through its representative Ms Copeland, advised Mr Simmons in writing (30 April 2019) that without prejudice it was withdrawing its restructuring proposal and confirmed that his (then) role as national sales manager would continue. The most recent restructure proposal on 21 February 2024 occurred some four years later. Given the significant effluxion in time between the two restructures, I find them to be unrelated.

[31] However, there is closer proximity between the end of Mr Simmons' PIP process in August 2023 and the commencement of RCL's restructure in February 2024 some five to six months later. Mr Smyth submits that there was even less 'daylight' between these events because it appeared from RCL's board minutes that its directors

¹ *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

had discussed the restructure before its meeting of 14 December 2023 (see [11] above) and would have done so at its November 2023 meeting.

[32] It was submitted that the reason why RCL did not proceed further with Mr Simmons' PIP in late August was because the company had decided (as early as November 2023) to restructure. However, such a view is not supported by the December 2023 board minutes which record that the only action to be taken at that time was for Mr Baillie to get a quote from its legal advisers on contractual requirements and risks with the restructure proposal.

[33] According to the minutes of the board's next meeting on 24 January 2024, RCL's directors were aligned towards continuing with the proposed restructure of the sales team and disestablishment of the NSMM role. By 21 February 2024, the sales team restructuring proposal had started. It was submitted that the absence of any reasons by the Board in its meeting minutes for the redundancy indicates that the reasons provided in the consultation document were not genuine. However, to give weight to that submission would not be prudent given that the meeting minutes provided to the Authority were heavily redacted to protect commercially sensitive information. To make inferences as to what may or may not have been said in the redacted portions of these minutes would be to speculate and be more prejudicial than probative.

[34] If the predominant motive behind the restructure was to exit Mr Simmons from the business, RCL would have done so in 2023 rather than keep him on for a further five to six months into 2024. Instead, the company continued to pay Mr Simmons during this period and also paid him an additional bonus payment of \$9,373 in April 2024. Payment of the bonus was not an entitlement because under cl 9(c) of Mr Simmons' individual employment agreement, RCL could withdraw the bonus at its discretion. Payment of the bonus was not a matter of right.

[35] For the above reasons, the lack of 'day light' between Mr Simmons' PIP in August 2023 and the announcement of the sales team restructure in February 2024, are two coincidental but unrelated events also.

[36] It was submitted that the assumptions that underpinned the proposed redundancy were misleading and false in that major client contracts were not secured

for the next two to three years and that the Foodstuffs merger of its North and South Island businesses did not proceed in the end. This was due to the Commerce Commission's determination in October 2024 (some six months after Mr Simmons' departure) to decline the merger.

[37] I was not provided with a copy of RCL's contracts with its major clients. Even so, it appears that these contracts are short-lived but they continue to roll over as they have done in the past. Because these contracts appear to renew on a regular basis, and it has not been shown by Mr Simmons that one of these major customers has not renewed its contract with RCL, the consultation document was correct that major contracts were secured.

[38] It is common ground that Mr Baillie was incorrect about the merger of FSNI and FSSI. However, his reply letter of 1 March 2024 to Mr Simmons anticipates that he could be wrong about the merger but even if it did not proceed, FSNI was looking to change its sales model which would significantly reduce RCL's sales workload. On that score, Mr Baillie is correct; FSNI's sales model has moved to a centralised sales model where head office controls a store's buying operations as the single buyer.

[39] Compounding matters further for suppliers was "category review" in which Foodstuffs collected customer data to better align its products with customer needs. There was evidence at the investigation meeting of considerable 'chatter' between different territory sales representatives of different companies about category review and how this would adversely affect their ability to negotiate with head office. Mr Simmons would have been aware of this "chatter" as his TMs had informed him of their predicament being the subject of teasing by in-store staff. Mr Simmons conveyed this information to Mr Baillie which prompted RCL to pivot and restructure its sales team as a result.

[40] Centralisation and category review were terms that were used interchangeably by witnesses during the investigation meeting. It is understood that for RCL, Foodstuffs completed its category review of its products in June 2024. This was a long drawn out process but RCL TMs in the North Island could see the 'writing on the wall' for themselves. Despite this, the effects of category review has yet to filter down to the South Island and consequently, it has been business as usual for FSSI, Foodstuffs' route

trade business (the non-supermarket business) of Gilmours Wholesales in the North Island, Trents Wholesales in the South Island, and Four Square.

[41] When I take into account the adverse impact centralisation and category review would have on RCL's ability to negotiate with individual Foodstuffs stores in the North Island, the restructure of RCL's sales team in February 2024 which resulted in the disestablishment of the NSMM role, was one motivated by genuine business reasons.

Was Mr Simmons given a reasonable opportunity to comment?

[42] Mr Simmons submits that his opportunity to provide further feedback was cut short because RCL's letter in reply to his feedback was sent outside of normal business hours. In explanation, Mr Baillie stated that he was still working and did not register what the time was when he emailed his reply to Mr Simmons. However, in any event, Mr Simmons was known to communicate with RCL customers outside of normal work hours. Evidence of previous emails between him and various customers show this to be the case and Mr Simmons also accepted that as a senior employee it was not uncommon for him to work after 5 pm. He also accepted that he could access his work emails on his mobile phone.

[43] Mr Simmons would have known the timeline for submissions (see [17] above) and this is apparent from his decision to submit his reply to the consultation document on the last day for feedback which was 28 February 2024. He elected to respond to the consultation document without the assistance of his lawyer Mr Smyth who had aided him previously in 2019. Mr Simmons' nine-page reply to the consultation document was detailed, methodical and comprehensive. From the timeline, he would have known that RCL would consider his reply by 1 March 2024 and make its final decision on 4 March 2024.

[44] It is acknowledged that Mr Baillie's reply letter of 1 March 2024 invited further comment from Mr Simmons when the time to do so had already passed. Section 103A(5) of the Act states that the Authority must not determine a dismissal or an action to be unjustifiable because of defects in the process that were minor and did not result in the employee being treated unfairly.

[45] Strictly speaking, the timeframe set out in RCL's consultation document did not expressly allow for additional feedback from Mr Simmons once he provided his initial comments to the proposal. However, if he wished to provide further feedback before 4 March 2024, it would have been considered but no further comments were received and nor did Mr Simmons request an extension of time from RCL as he had done in an earlier restructure four years earlier in 2019.

[46] When asked about this, Mr Simmons stated that he considered Mr Baillie's response on 1 March 2024 a *fait accompli* and that there was nothing more he could have said. He may have assumed that Mr Baillie would grant him an extension but Mr Simmons did not expressly request this from RCL. As a senior employee, he can reasonably be expected to have asked this of his employer but he did not do so. Consequently, RCL has proceeded to make its final decision based on all the information and material it had before it at the time of the dismissal.

[47] I accept Mr Baillie's evidence that at the time he emailed his reply letter to Mr Simmons, he did not realise that it was already past 5 pm on a Friday afternoon. This was an honest mistake on his part but in any case should it be incumbent on RCL to rectify Mr Baillie's error? The answer lies in what a fair and reasonable employer could have done in the circumstances which includes notifying employees of specific allegations, providing a real opportunity to respond, and ensuring an unbiased impartial consideration of any explanation given.

[48] This is what Mr Baillie has done. His written reply albeit concise let Mr Simmons know that he had consulted the sales and marketing administrator; that major contractors were secured and he would absorb any of Mr Simmons' leftover duties; no independent third party would be appointed by the board to lead the process; whether the Foodstuffs merger went ahead or not FSNI was still looking to change its sales model; that a time-in-motion study was not necessary; and disestablishing a TM role and SMCFS position instead of the NSMM position was not the direction the company had for its sales team.

[49] Had Mr Baillie introduced some new material that Mr Simmons was not aware of and which he had not been given the opportunity to comment, it would be fair and reasonable for a right of reply to have been afforded to him. However, there was

nothing of that nature in Mr Baillie's reply who was merely responding to Mr Simmons' comments. While an error was made, it has not resulted in unfairness for Mr Simmons.

Whether the entirety of Mr Simmons' role was properly understood?

[50] Mr Simmons stated that 20 percent of his role as NSMM involved marketing which was significant but not fully understood or given sufficient weight by Mr Baillie. I accept that Mr Simmons had a marketing budget of approximately \$20K but this is a modest sum representing 0.69 percent of RCL's annual revenue of \$29M. Although marketing was part of Mr Simmons' job title, it was secondary to his primary role as a sales manager. In any event, marketing was limited to social media. There was no television advertising as such and the social media advertising was primarily done by the sales and marketing administrator.

[51] I prefer Mr Baillie's evidence that marketing went "hand in hand" with sales and given the very modest budget that Mr Simmons had at his disposal, it cannot be said that marketing was a significant component to his day-to-day duties to warrant greater weight or consideration by RCL.

Whether Mr Lovell had taken over Mr Simmons' duties?

[52] Mr Simmons stated that Craig Lovell, who was the SMCFS (Sales Manager of Convenience & Food Service) at the relevant time had "zero responsibility" for any of his supermarket clients such Foodstuffs, Progressive Enterprises (now Woolworths), the Warehouse Group, and K Mart and that there was no crossover between their respective clients. As SMCFS, Mr Lovell was responsible for RCL's 'route trade' business which was its non-supermarket customers such as Gilmours, Trents and Four Square.

[53] Mr Simmons claims that Mr Lovell has now taken over all visible duties in relation to supermarkets and third-party contracts which is contrary to the statement made in the consultation document that the general manager (Mr Baillie) would absorb all of his left-over duties. In the circumstances, Mr Simmons considers the consultation document to be misleading and deceptive.

[54] When Mr Simmons was cross-examined, he admitted that he was not sure that Mr Lovell had taken over his duties because he no longer had visibility over RCL.

However, it was Sheralee McKee's evidence that after Mr Simmons left, TMs who previously reported to the NSMM were now reporting to Mr Lovell. According to Ms McKee, she felt that he was now her line manager to whom she was required to send her weekly territory and sales reports.

[55] However, Mr Baillie stated that TMs were not sending reports to Mr Lovell because he had become their line manager but because he was responsible for RCL's route trade and it was important that he be across all sales in the business. As noted above, category review has yet to affect RCL's route trade business and nor has it filtered down to the South Island to affect Sharon Bennett who is responsible as TM for that part of the country.

[56] I find that it makes good commercial sense for Mr Lovell to be aware of all sales across RCL's business, both supermarket and non-supermarket customers alike. This is particularly so given the impact category review and centralisation continue to have on Foodstuffs stores in the North Island. Knowing at a higher level what sales were being made would give Mr Lovell as SMCFS every reason to do what he could to maintain and promote the route trade business so as to make up for any lost ground in the North Island.

[57] Both Mr Lovell and Ms Bennett denied the assertion that Mr Lovell had inherited Mr Simmons' reporting duties. As a witness, I found Mr Lovell credible. When it was put to him that he had been 'singled out' by Mr Baillie as someone that TMs now needed to report to, he disagreed with that proposition stating that "power is knowledge" and that the more that information is spread across the team, the more powerful or effective the team was. Whether Mr Lovell knew it or not, Mr Baillie had earlier that same morning said the same thing referencing power as knowledge. This appears to be an attitude that Mr Baillie has sought to instil in his sales team following Mr Simmons' departure. That philosophy now appears to have been imbibed by Mr Lovell.

[58] I am not satisfied that Mr Lovell has taken over Mr Simmons' responsibilities. As part of a new mantra of sharing knowledge across the team to improve its effectiveness, I find that Mr Lovell is assisting Mr Baillie but TMs are not reporting to him, they report to Mr Baillie as general manager.

[59] Mr Simmons submits that RCL could not afford to lose a senior role such as his over one TM and Mr Lovell's position because his role was required to drive growth outcomes whereas TMs merely implemented his sales and marketing strategies. Mr Simmons further submits that the hiring of an operations manager in 2023 had freed Mr Baillie from his duties which meant that his role as general manager was no longer required. However, these are matters lie in the purview of RCL's board of directors. In the absence of evidence of an ulterior motive, it is not for the Authority to second guess the board or to substitute its own decision for that of the board's.

Conclusion

[60] When Mr Simmons' dismissal on the grounds of redundancy and the actions that RCL took at the time are seen through the lens of the test of justification at s 103A of the Act, I find the dismissal to be what a fair and reasonable employer could have done in all the circumstances at the time. The analysis does not change when the grievance is pleaded in the alternative as an unjustified disadvantage given that the background facts are so inextricably woven to be one and the same.

Costs

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

[62] If they are not able to do so and an Authority determination on costs is needed RCL may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Simmons would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Peter Fuiava
Member of the Employment Relations Authority

² See www.era.govt.nz/determinations/awarding-costs-remedies.