

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 94
3197559

BETWEEN JANET SIMONSEN
Applicant

AND TALLEY'S GROUP LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Steven Zindel, counsel for the Applicant
Graeme Malone, counsel for the Respondent

Investigation Meeting: 20 July 2023 in Nelson

Submissions and Information received: 11 August 2023 & 23 November 2023 from the
Applicant
21 July 2023 & 31 August 2023 from the Respondent

Determination: 21 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Janet Simonsen was employed by Talley's Group Limited (TGL) from December 2017 until her employment was terminated by notice given in June 2020.

[2] Ms Simonsen raised her personal grievance claim of unjustified dismissal in July 2020. Ms Simonsen says that her dismissal was by way of a “sham redundancy” with an unfair process. To settle her personal grievance, Ms Simonsen seeks reimbursement of lost remuneration from July 2020 to January 2021 together with compensation of \$40,000.00 for humiliation, loss of dignity and injury to feelings as a result of the grievance.

[3] TGL says that it terminated Ms Simonsen’s employment as a result of her position becoming redundant. The dismissal was procedurally and substantively justified.

Issues

[4] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether TGL’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[5] I must consider whether TGL sufficiently investigated the matter considering available resources; whether TGL raised its concerns with Ms Simonsen before deciding to dismiss her; whether TGL gave Ms Simonsen a reasonable opportunity to respond to the concerns before dismissing her; and whether TGL genuinely considered Ms Simonsen’s responses before deciding to dismiss her.

[6] I may consider other factors if appropriate.

[7] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[8] I will first outline events leading to TGL’s decision to give context to applying the statutory test of justification for the dismissal.

Context

The employment

[9] The following is largely apparent from documents.

[10] Ms Simonsen was initially employed as a Claims Management Technical Advisor. The signed employment agreement described it as casual employment. In July 2018, Ms Simonsen was appointed as a Senior Technical Advisor on a permanent basis. There is also an employment agreement dated 11 December 2019 for permanent employment. It was unsigned by both parties but included the outcome of the 2019 salary review. Otherwise, it largely mirrored the July 2018 agreement.

[11] The permanent agreements provide for redundancy on the same terms. To paraphrase, TGL was obliged consult with Ms Simonsen a reasonable time in advance over its intention before deciding to give notice of dismissal for redundancy. It had to give operational reasons for the intention and reasons for selection of Ms Simonsen. If TGL decided to declare the position redundant, it had to engage further with Ms Simonsen about alternatives. TGL had to allow reasonable time off during the notice period for Ms Simonsen to seek alternative employment. Notice of one month or pay in lieu was required, plus a redundancy payment under the “then prevailing Company Staff Redundancy policy (if applicable)”.

[12] There was an applicable position description for the permanent position. Ms Simonsen as Senior Technical Advisor reported to TGL’s ACC Partnership Manager. The purpose of the position was to provide expert advice on ACC law and policy to ensure good quality decision making by TGL. Key accountabilities and relationships were listed, together with essential experience and qualifications.

[13] Nathan Howes was TGL’s Group HR Manager and Rebecca Plum the Manager of the Injury Management Unit (IMU) at relevant times.

[14] Ms Simonsen brought her considerable experience in ACC matters and was involved with the set up and implementation of TGL's IMU from the time of her initial appointment. Ms Simonsen also filled in as acting manager of the IMU for three months up until November or early December 2019.

[15] During those three months, Ms Plum was appointed to the vacant IMU manager role and Ms Simonsen returned to her position as Senior Technical Advisor.

Proposed Redundancy

[16] A Covid-19 lockdown ended on 14 May 2020.

[17] On Friday 22 May 2020, Mr Howes gave Ms Simonsen a letter headed "Proposed Redundancy". In summary, the letter said that TGL had been reviewing operations including the IMU, in part as a result of the Covid-19 situation. Mr Howes said that as part of the review he and Ms Plum had reached a preliminary view that the IMU no longer required a Senior Technical Advisor. They considered that claims managers should be able to handle assigned claims, with technical assistance contracted in if required. The letter set out benefits for the work of the IMU from that approach.

[18] Ms Simonsen's response, either in writing or by meeting, was sought by 29 May 2020, with TGL looking to make a decision by 1 June 2020. The letter also referred to the possibility of consultation about alternatives to redundancy if TCL decided to make Ms Simonsen's position redundant.

[19] Ms Simonsen first became aware of her "Proposed Redundancy" when she was given the letter on 22 May 2020, so was taken by surprise and reacted accordingly. Ms Simonsen asked and was permitted to go home.

[20] Ms Simonsen sent Mr Howes an email on 25 May 2020. She described the Friday meeting as an "ambush", but now had questions. Ms Simonsen queried the relevance to the proposal of the Covid-19 situation and whether (and with whom) it had been discussed prior

to Covid-19. Ms Simonsen asked about what “contracted in” services would look like and queried the meaning of a specific emphasis in Mr Howes’ letter. Ms Simonsen also asked about financial implications for her and the timeline. Ms Simonsen queried what was meant by “alternatives” and why they were not to be considered prior to a decision to make her redundant. She sought information about when and by who the proposal had first been raised. Ms Simonsen did not wish Ms Plum to be involved in any further meetings.

[21] Mr Howes replied later on 25 May 2020. He responded to Ms Simonsen’s criticism of being ambushed and explained that she could take time off as required by request, to be treated as special leave. Mr Howes confirmed that the proposal had not arisen before the effect of Covid-19. TGL had felt financial effects with market closures, had not qualified for Government subsidies and the Directors had required all areas of the business to look for efficiencies.

[22] Mr Howes answered Ms Simonsen’s other questions. He considered that claims managers were capable of handling all claims, without needing to largely hand difficult claims to Ms Simonsen. Claims managers would benefit from dealing directly with external providers. Mr Howes thought that contracted-in advisors as specialists in each field were more likely to have up-to-date knowledge. If TGL implemented a redundancy, there would be 6 weeks’ notice. The possibility of redundancy was first discussed between Mr Howes and another manager (Mr Gerrard) about two or three weeks earlier. Mr Howes asked why, but left open the possibility that Ms Plum might not be present at a meeting. He corrected the advised decision date (from 1 June to 2 June), but foreshadowed the possibility of a longer period depending on Ms Simonsen’s response.

[23] There was a meeting on 29 May 2020 also involving TGL’s and Ms Simonsen’s lawyers. The correspondence covers what was canvassed in the meeting.

[24] In the evening on 1 June 2020 Ms Simonsen sent Mr Howes a paper under the heading “What value I can add as Technical Adviser”. She outlined some history and comprehensive details of why she considered the role was important for the business.

[25] Mr Howes acknowledged Ms Simonsen's response early on 2 June 2020 and confirmed he would respond further later that day.

Termination of employment

[26] Later in the afternoon the same day, Mr Howes sent Ms Simonsen an email confirming the decision to disestablish the role of Senior Technical Advisor, resulting in Ms Simonsen's redundancy, subject to any redeployment options. Mr Howes gave Ms Simonsen six weeks' notice of termination, starting from Friday 5 June 2020. Ms Simonsen could remain on special leave for the remainder of the current week and Mr Howes said he would consider garden leave or payment in lieu of notice thereafter. He offered a positive written reference.

[27] A discussion between Mr Howes and Ms Simonsen on 3 June 2020 was followed by an email exchange between them. As requested, Mr Howes confirmed notice of six weeks, either as garden leave or payment in lieu. He stated that TGL had not had a Company Staff Redundancy policy for some time, so Ms Simonsen's agreement did not provide a further payment. He agreed to provide a positive reference by the end of the week.

[28] On 5 June 2020 Ms Howes sent Ms Simonsen the reference and confirmed an arrangement for pay in lieu of notice. There followed emails between them clarifying that Ms Simonsen preferred payment on a Garden leave basis, which was agreed.

[29] Ms Simonsen returned company property, but did not otherwise return to work.

The personal grievance was raised

[30] Ms Simonsen raised a personal grievance on 3 July 2020. I will summarise points.

[31] Ms Simonsen considered it a sham redundancy with an unfair process. It was predetermined, given the short consultation period. Her work remained, but the staff left to do it would not be able to handle busy periods or complex claims. The decision was made at

a quiet time for IMU work. The role of Senior Technical Advisor was seen as important by external auditors. Ms Simonsen had been discouraged from applying for the IMU manager job, even though she filled it on a temporary basis. The decision that the role was surplus was made at a time when Ms Simonsen was very busy. Ms Simonsen understood that an IMU claims manager who had recently resigned had been re-employed in a role that covered some of her former work. Claims managers lacked the skills to do Ms Simonsen's role. If they did review work, it would negatively affect relationships. Ms Simonsen understood that hers was the sole administrative role made redundant of TGL's 7,000+ employees so could hardly be explained by costs savings. Contracting out her work would be expensive. The employment agreement was misleading, referring to a redundancy agreement when there was not one. The timing of the decision decreased Ms Simonsen's prospects of finding replacement work.

[32] There was a later exchange between respective lawyers which included comment from TGL responding to Ms Simonsen's points. It is not necessary to canvass the response.

[33] Despite mediation, matters were not resolved.

Redundancy was the genuine reason for the dismissal

[34] Ms Simonsen says that she was interested, but Mr Howes discouraged her from applying for the role that Ms Plum was appointed to, telling her that she was required in the technical area rather than as a manager.

[35] However, I accept Mr Howes' evidence that he told Ms Simonsen that the position had a focus on people management. Ms Simonsen said that was not her area of strength and was the part of the role she least enjoyed when she was the interim manager. Ms Simonsen took her interest in the role no further, of her own volition. I also prefer Mr Howes' evidence that he did not tell Ms Simonsen that she was required in the technical area.

[36] Ms Simonsen was well regarded as an employee for TGL by Mr Howes and others. There is no specific evidence of difficulty between Ms Plum and Ms Simonsen, after Ms

Plum's appointment. The present case is not one where redundancy has been used as a pretext for dismissing a disliked employee.¹

[37] However, there was an interaction between Ms Simonsen and Ms Plum shortly after 9.00am on Tuesday 26 May 2020. In evidence are separate notes made by Ms Simonsen and Ms Plum shortly after the incident. Ms Simonsen summarises the interaction as a "power play" by Ms Plum. Ms Simonsen had arrived late, Ms Plum spoke with her about that and a work matter. The exchange escalated somewhat. Soon after, Ms Simonsen left the workplace.

[38] From the outset, Ms Simonsen attributed the motivation for her dismissal to Ms Plum. That explains why the 26 May 2020 interaction escalated. However, the evidence does not support Ms Simonsen's view that Ms Plum was the motivation.

[39] Mr Howes' evidence is that his 22 May 2020 "Proposed Redundancy" letter was drafted in consultation between himself and TCL's lawyer on 20 May 2020, copied to Mr Gerrard (another manager) and Ms Plum and Ms Plum noted only two typographical errors. There is no reason to doubt this evidence. It indicates that Ms Plum was involved in but not the driver of the proposal.

[40] Mr Howes' evidence is that there had been instructions to senior managers from the directorship to develop efficiencies. A newsletter dated 8 May 2020 includes mention of a need to look for efficiencies in the business. Mr Howes told Ms Simonsen in his 25 May 2020 email that the proposal had first been discussed between him and Mr Gerrard about "two or three weeks ago". The newsletter provides support for Mr Howes' evidence about the timeframe, which I accept. The evidence also shows that Ms Plum did not initiate the redundancy proposal.

[41] There is a submission that Mr Howes (and Mr Gerrard) had limited understanding of Ms Simonsen's position. There is also a submission that Ms Plum had little ACC knowledge.

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

It is likely correct that they did not have the detailed knowledge required to perform Ms Simonsen's job. However, that did not disqualify Mr Howes (with Mr Gerrard and Ms Plum) from exercising judgment about TGL's on-going business need for a Senior Technical Advisor as part of its IMU.

[42] Submissions are made about the absence or non-disclosure of selection criteria. I am referred to several decided cases. However, Ms Simonsen was the only person in the role of Senior Technical Advisor. The other employees who were part of the IMU were claims managers. The redundancy proposal did not involve reducing the number of employees engaged on the same or similar work. The principles set out in decided cases about criteria, assessments and disclosure of that information as part of fairly selecting which employees would be made redundant are not part of considering justification here.

[43] Ms Simonsen says that she was the only administrative employee in a very large company who was made redundant, purportedly due to a need to achieve costs savings. Ms Simonsen considers that out-sourcing necessary technical advice would have increased TGL's costs. Those circumstances are thought to support the contention that the true reason for the dismissal was something else.

[44] Ms Simonsen is mistaken that TGL made her redundant just or even mainly to achieve cost savings. Mr Howes' 22 May 2020 letter referred to the "Covid-19 situation" as the context for TGL's review of its operations. When asked, Mr Howes explained to Ms Simonsen that directors had required managers to look for efficiencies to address lost revenues. However, Mr Howes in his correspondence also sets out why he considered that Ms Simonsen's role was no longer required by the IMU. He considered that benefits that would come from claims managers retaining responsibility for difficult claims and reviews, rather than handing them over to a Senior Technical Advisor. Ms Simonsen's proposed redundancy was in the context of lost revenue as a result of Covid-19, but it involved a reorganisation of the way the IMU would do its work. Mr Howes' judgment was that the reorganisation would enhance IMU's efficiency.

[45] I also accept Mr Howes' evidence that Ms Simonsen's role was not the sole administrative role to be disestablished by TGL at the time.

[46] In this investigation, TGL's evidence mirrored what it had said to Ms Simonsen at the time of its decision to disestablish her position. TGL has shown its decision to dismiss Ms Simonsen was genuinely for redundancy. A fair and reasonable employer could have concluded that it no longer required the role of Senior Technical Advisor.

TGL adopted a fair procedure

[47] In submissions the "Process is questioned", given the short period between the proposal being raised by TGL and then adopted.

[48] The obligation to consult is part of good faith as well as a term in the employment agreement. The principles are not in dispute. Consultation requires more than prior notification, must not be a charade and must allow reasonable time. Sufficiently precise information must be given. The employer must keep an open mind and there must be genuine efforts to accommodate employees' views.

[49] TGL provided details of its thinking by its 22 May 2020 letter and its 25 May 2020 reply to Ms Simonsen. I find that TGL through these communications met the requirement to provide sufficiently precise information to enable Ms Simonsen to state her views.

[50] In both items of correspondence, TGL indicated an openness to extending time for a decision if needed in light of what Ms Simonsen might say. Ms Simonsen did not ask for additional time, but comprehensively responded to the "Proposed Redundancy" before 2 June 2020. Ms Simonsen may have been assisted to do so by taking special leave from her work. Mr Howes acknowledged receipt of Ms Simonsen's response at 8.13am on 2 June 2020, before announcing the decision by email at 4.34pm the same day.

[51] Mr Howes took less than a working day to consider Ms Simonsen's response. The proposal involved disestablishing one position, devolving responsibility to claims managers

and engaging external specialist advice such as medical, rehabilitation or legal services if required. Ms Simonsen in substance challenged TGL's view that this would be more efficient, lead to better outcomes and was achievable in light of the turnover and relative inexperience of claims managers. The issue was a matter of business judgment. Mr Howes' prompt decision does not indicate that the consultation was a charade, that his mind was closed or that he was not prepared to accommodate Ms Simonsen's views.

[52] TGL genuinely considered Ms Simonsen's explanation. At the meeting on Friday 29 May, Ms Simonsen asked if others had been consulted about the effect on the IMU of disestablishing her position. Following the meeting, Mr Howes did so. On 2 June 2020, Mr Howes reported to Ms Simonsen that the general consensus was that they could manage without a Senior Technical Advisor. Ms Simonsen now says that it was a breach of privacy and trust. However, I accept it was appropriate for Mr Howes to seek the views of other staff, in response to Ms Simonsen raising the point.

[53] Ms Howes 2 June 2020 email also demonstrates that he considered the merit of but did not accept Ms Simonsen's view that her position should be retained.

[54] I find that TGL followed a fair process in reaching its decision to disestablish Ms Simonsen's position.

Consultation about alternative positions

[55] Ms Simonsen says that recently hired and inexperienced staff were given preference over her.

[56] Events in late 2019 external to the IMU was the genesis of TGL's decision to create a new role within the IMU for a Compliance Officer. Ms Plum's evidence is that she obtained approval on 26 March 2020 to create the role of Compliance Officer. There is evidence that a position description for the role was sent to the appointee on 14 May 2020. However, Ms Plum's says that this document was created on 12 May 2020 and was the sixth version. There

is no reason to doubt that evidence. Ms Plum is not able to say when the first of those earlier versions was created.

[57] A claims manager (who I will refer to as HR) had given notice of resignation on 17 January 2020. There are emails from HR dated 17 March 2020 and 9 April 2020 by which HR agreed to extend the end of the employment until 17 April 2020 and then 1 May 2020. HR continued in the role of claims manager, to allow TGL to handover HR's work to a new claims manager.

[58] An email dated 1 May 2020 confirms that HR had by then accepted a new role. The role was Compliance Officer.

[59] Ms Simonsen says that, despite her greater experience and skills, tasks were taken from her and given to HR. Ms Simonsen considers that she should have been offered the position of Compliance Officer.

[60] I accept Mr Howes' evidence that the role of Compliance Officer was different to the position occupied by Ms Simonsen.

[61] The obligation to consult with Ms Simonsen about the proposed redundancy first arose when TGL came to the view that it might disestablish her position. This was after 8 May 2020. Further contractual and good faith consultation obligations followed. The evidence establishes that the new role of Compliance Officer had been filled by 1 May 2020. TGL was not obliged to consult with Ms Simonsen about the role of Compliance Officer at the time it was created or filled.

[62] In its 22 May 2020 letter to Ms Simonsen, TGL foreshadowed the possibility of consultation about "alternatives" in the event it decided to make her position redundant. Ms Simonsen questioned what was meant and Mr Howes explained that TGL sought any alternatives to the proposal and, if the proposal proceeded, whether there were alternative roles for Ms Simonsen.

[63] Ms Simonsen in reply set out why the position of Technical Advisor should be retained. TGL decided to proceed with making Ms Simonsen's position redundant. Mr Howes asked Ms Simonsen if she wanted to discuss any other roles that may be available. Ms Simonsen did not take up that invitation.

[64] I find that TGL met its obligation to consult with Ms Simonsen about alternative positions.

Summary

[65] TGL justifiably dismissed Ms Simonsen so no personal grievance arises.

[66] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, with regard to those submissions and the Authority's general approach to costs.

Philip Cheyne
Member of the Employment Relations Authority