

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 296
3080274

BETWEEN DANIAL VINCENT
Applicant

AND CARTER'S TYRE SERVICE
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Stephen Corlett, counsel for the Applicant
Penny Swarbrick, counsel for the Respondent

Investigation Meeting: 11 June 2020 at Auckland

Submissions Received: 15 June 2020 from the Applicant and from the Respondent

Date of Determination: 31 July 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Danial Vincent, claims that he was unjustifiably dismissed by reason of redundancy by the Respondent Carter's Tyre Service Limited (CTSL).

[2] Mr Vincent further claims that he was unjustifiably disadvantaged by CTSL:

- (a) Unilaterally withdrawing his vehicle privileges on 14 August 2019;
- (b) Failing to provide all relevant information to him as required under s 4(1A) of the Employment Relations Act 2000 (the Act); and
- (c) Discriminating against him as a result of his physical injury.

[3] CTSL denies that Mr Vincent was unjustifiably dismissed or unjustifiably disadvantaged in his employment and claims that its actions in relation to Mr Vincent were reasonable and fair in all the circumstances.

The Authority's investigation

[4] 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.

Issues

[5] The issues requiring investigation are whether or not Mr Vincent was unjustifiably dismissed and/or unjustifiably disadvantaged in his employment.

Background

[6] CTSL is in the business of supplying and maintaining vehicle tyres, wheels and suspension. It operates in the commercial, agricultural, and retail sectors. There are currently 44 CTSL branches throughout New Zealand. CTSL operates 21 branches, six of which are in the North Island. The others are independently owned and operated under licence agreements. The CEO is Mr Matt Carter.

[7] Mr David Dellabarca, General Manager, said that the main base for CTSL is at its Highbrook Drive branch in Auckland. This is the 'flagship' store of CTSL, it is the largest branch and is where the head office is located.

[8] Mr Dellabarca explained that traditionally branches have had their own management structure with the branch manager being responsible for local purchasing and staff decisions in addition to the day to day management of the branch and servicing of customers. However in recent years CTSL has been moving away from its previous mode of operation towards more cohesive and centralised management arrangements which Mr Dellabarca said it believes provides more efficient operations and better customer services.

[9] As part of the new process CTSL has amalgamated small branches into nearby larger branches in both the North Island and the South Island. Mr Dellabarca said that, although not uniformly successful, CTSL has found that this has enabled more efficiency in terms of time management of staff, movement of stock from one branch to another store, compliance issues, improved clarity and removal of any confusion as to which branch was responsible for which customers or callouts and has overall improved customer service.

[10] Mr Dellabarca said that in practice what had happened was that the smaller branch simply became part of the operation of the larger branch and the combined branches were managed by the manager of the larger branch.

[11] Mr Vincent commenced working with CTSL on 1 July 2013. Initially this was in a trainee position but over the years he had progressed into more senior roles. He had experience in managing various branches during the incumbent resident manager absence, and in August 2017 he was appointed as Branch Manager of the Papakura branch.

[12] Mr Vincent was provided with an amended individual employment agreement (the Employment Agreement) to reflect his position as the Branch Manager of the Papakura branch. This had a commencement date of 6 November 2017.

[13] Clause 6 of the Employment Agreement headed "Tools of the Trade" stated:

6.1 Any tools of trade will be specified in schedule 2 to this agreement. For the avoidance of doubt, tools of trade are provided to you in order that you may perform your duties and do not form part of your remuneration or benefits.

[14] Schedule 2 of the Employment Agreement stated that Tools of the Trade comprised: "Mobile Phone, Company Vehicle, Key Holder."

[15] Mr Vincent said that he was provided with a company vehicle in 2017 and had been informed at that time that he could use the vehicle for work and personal purposes and, on occasion with the company's consent, he had used the vehicle for recreational purposes on weekends.

[16] Mr Vincent explained that before he commenced as the branch manager at the Papakura store its turnover was between \$100,000.00 to \$150,000.00 per month and this increased under his management to approximately \$220,000.00 per month. The staff consisted of two fleet servicemen, two staff members inside the shop and a part-timer.

[17] Mr Vincent said he was often asked to cover for managers at other branches including Mt Wellington and also at Highbrook Drive where he covered for Mr Mark Tapper the branch manager in Mr Tapper's managerial role and the 2IC/dispatch role.

[18] Mr Dellabarca said that there are frequent requirements for managers to cover for each other in the cases of holiday or sick leave absence, or when people had other work commitments. He explained that when managers cover for each other it is a caretaking arrangement, the relieving manager does not become actively involved in the substance of the branch's business. Mr Dellabarca that even senior management help out in stores with servicing when it has been necessary to do so. This is a managerial expectation in CTSL.

Injury and sickness absence from 2018

[19] On 20 January 2018 Mr Vincent suffered a non-workplace injury to his back. As a result of his injury his doctor placed him on sick leave for a month, the injury did not improve and as a result he was issued with a number of ACC medical certificates certifying light duties until 29 July 2019. ACC then certified him as fully unfit for work for the period 12 July 2019 to 12 August 2019 followed by a certification that he could resume moderate duties from 12 August 2019. However on 14 August 2019 ACC certified Mr Vincent as fully unfit for work for the period 14 August 2019 to 11 November 2019.

[20] Mr Alan Burton, Northern Operations Manager, said that in Mr Vincent's absence the branch management tasks such as staff management were carried out by Mr Tapper and himself. He carried out the branch audits and Mr Tapper did the paperwork. The telephone calls received at the Papakura branch were diverted to the Highbrook Drive branch.

[21] Mr Vincent returned to work on Monday 12 August 2019 subject to the ACC medical certificate conditions that he performed light duties only and work four hours per day, five days per week for eight weeks.

Withdrawal of use of Company vehicle

[22] Mr Vincent said the company vehicle he used had been left for use by other CTSL personnel at the Papakura branch during his sickness absence, and he collected it from the Papakura 2IC on the evening of 11 August 2019.

[23] Mr Burton spoke to Mr Vincent on 14 August 2019 and asked him to leave the company vehicle for use at the Papakura branch during working hours. Mr Vincent alleged that the instruction that he could no longer use the company vehicle for personal use was made without any prior consultation or forewarning and left him feeling shocked and distressed.

[24] Mr Burton said that the vehicle driven by Mr Vincent was a company vehicle and a tool of the trade. This was as set out in the Employment Agreement and it was a standard requirement for all managers at CTSL. The general rule is that company vehicles being tools of the trade are available for company use during work hours. There is no absolute right to personal use, but if staff who have a vehicle ask to use it for personal use after work hours, this is often agreed. Where managers go on leave the vehicle is often left at the branch for use on company business by employees.

[25] Mr Vincent had use of the vehicle to drive to and from work and he would periodically ask Mr Burton for permission to use the vehicle during the weekends. Mr Burton said he cannot remember ever having declined such a request.

[26] Mr Burton said that when Mr Vincent returned on light duties for part days only, the fact that the company vehicle was at his home for the rest of the working day made it operationally inconvenient for the Papakura branch because of the need to transport tyres to customers which was an important part of customer service, unpredictable and happened at short notice. Mr Vincent returning to work on light duties with reduced hours and taking the company vehicle home during the working day meant it was not available at the branch when it might be needed and this situation could last for some weeks.

[27] As a result, on 14 August 2019 Mr Burton telephoned Mr Vincent to discuss this with him. Mr Vincent had not been receptive when asked to leave the company vehicle at the Papakura branch during the working day and had been concerned at how he would travel to and from work without the use of the company vehicle.

[28] Mr Burton said he had told Mr Vincent he was comfortable at his having personal use of the company vehicle outside the normal work hours and told Mr Vincent that he would be prepared to consider a proposal from him as to the use of a company vehicle for personal use that would not disadvantage the company or involve significant cost to CTSL.

[29] He had been expecting Mr Vincent to telephone him when he had decided upon a proposal however he had been surprised when Mr Vincent arrived at the Highbrook Drive branch where he was based at about 2:00 p.m. that day to drop off some tyres.

[30] Mr Burton said he had questioned Mr Vincent about being still at work when he was not supposed to exceed the shorter hours recommended by his doctor, and told Mr Vincent he did not want him working in contradiction of his doctor's advice.

[31] A further discussion followed about the use of the company vehicle. Mr Burton said he wanted to reach agreement on a plan with Mr Vincent and he had asked him for his suggestions. Mr Vincent had told him that it was his view that CTSL either buy another company vehicle for him to use on a personal basis, or compensate him for not having the personal use of the company vehicle.

[32] Mr Burton said he considered the suggestion to be unrealistic and he reminded Mr Vincent that the company vehicle was a Tool of the Trade as per his Employment Agreement, and was not part of his remuneration package.

[33] Mr Vincent's response was that he would call his lawyer, and his doctor to sign him off on ACC. Mr Vincent confirmed during the Investigation Meeting that he had spoken to his lawyer and seen the doctor that afternoon and been declared medically unfit for work. The medical certificate from ACC stated that Mr Vincent would be fully unfit from work from 14 August 2019 until 11 November 2019.

Advice regarding the Restructuring Proposal

[34] Mr Burton stated that he had been inexperienced about the process to be adopted in regard to a restructure and he had therefore contacted Mr Phil Jackson, National HR Manager, for advice.

[35] He had been aware that Mr Vincent was going to be absent on sick leave until November 2019 and thought it advisable to conclude the restructuring process prior to his return.

[36] In an email to Mr Jackson dated 20 August 2019 with the subject heading: “Papakura Danial V” Mr Burton wrote:

When you have some feedback on how to move forward here let me know. Daniel is due back to work in November. Ideally this won't happen as I prefer to keep the cost out of the region. With the time frame a re-structure takes, I guess we are cutting things fine?

[37] In a response email dated 22 August 2019 with the subject heading: ‘possible restructure’ Mr Jackson including the following comments::

You said you no longer have a need for a dedicated Papakura Manager’s role, particularly as the duties of that role are currently being picked up by the Highbrook Branch Manager, whilst the Papakura Manager is on ACC. It appears that the Papakura Manager duties have been easily absorbed by the Highbrook manager, who already has a large role as the Highbrook Branch is much bigger than the Papakura branch. In the circumstances, based on my understanding of the situation, it would be artificial to disestablish both roles and have the managers compete for a single role, when the reality seems to be that the Papakura role can be accommodated without any significant change to the Highbrook Manager role. Thus, the restructure proposal should be to disestablish the Papakura role and absorb the operation of the Papakura branch into the Highbrook Manager’s role. ...

If you were to proceed with a restructure and the Papakura Manager role is disestablished, you may be able to redeploy the Papakura Manager to another role, but it is likely to be less responsible and paid less. ...

If the decision was to disestablish the Papakura role you would need to consult with him about whether there was an alternative role for him in the business. I recommend that such discussions would be in relation to him taking up any new role once he is fully fit.

Restructure Proposal

[38] Mr Burton said the proposal to restructure was made in September 2019. The proposal was to disestablish the Papakura Branch Manager role and absorb the operation and management of the Papakura branch into the Highbrook Drive Manager role.

[39] This meant that all the responsibilities of the Papakura branch manager role including profitability, asset and stock management, customer maintenance, sales and HR would be absorbed into the Highbrook Drive Manager role. This was consistent with previous successful amalgamations of other branches in the company.

[40] Mr Burton said a further aspect considered was that the Papakura branch had been operating without a branch manager since approximately July 2019 because of Mr Vincent being absent from work on ACC during which time the branch management tasks had been carried out by Mr Tapper and himself.

[41] Mr Dellabarca said that the Papakura branch is a small branch in comparison with the Highbrook Drive branch which is the flagship branch, a much larger operation with a thriving retail aspect, whereas the Papakura branch was established primarily to service Winstone Aggregates who were CTSL's major customer in that area and for that reason was located adjacent to the Winstone Aggregates site in Papakura.

[42] During the period when Mr Vincent was the Branch Manager, the Papakura branch employed two fleet servicemen, one full-time shop employee and one part-time shop employee. Whereas the Highbrook Drive branch employed a manager, five fleet servicemen, three people in the car bay, two people in the truck bay, an administration person and a storeman.

[43] Highbrook Drive branch also had a very large retail element to its revenue which Papakura did not have. Mr Dellabarca said the retail side was the most time consuming part of running a branch and Highbrook Drive branch's retail revenue was ten times that of the Papakura branch.

[44] Mr Burton said he consulted with both Mr Tapper and Mr Vincent to receive their feedback on the proposal before any final decision was made.

[45] As Mr Vincent was absent on ACC Mr Burton said he had telephoned him on 16 September 2019 to advise that he would be receiving an email with a written proposal attached setting out the details of the restructure. Mr Burton said that Mr Vincent did not seem surprised.

[46] Mr Burton also sent Mr Vincent a letter setting out the restructured proposal in writing together with the current and proposed organisational charts, and suggesting Mr Vincent attend a meeting to provide feedback at a meeting scheduled for 23 September 2019. The proposal was also provided to Mr Dellabarca and Mr Tapper.

[47] The letter dated 13 September 2019 was headed 'Proposed Restructure' and included the following:

Proposal:

Currently we have a separate manager role for the Highbrook Drive branch and for the Papakura branch. We are proposing to disestablish the Papakura branch manager role held by you and to absorb the operation and management of the Papakura branch into the Highbrook Drive manager role. This has been the reality since 12/07/19 without any apparent operational impact or issues. We have set this out in the attached current and proposed organisational charts.

This will mean that all the duties and responsibilities of the Papakura branch manager role, such as the day-to-day running of the branch, its profitability, assets and stock management, its customer maintenance, sales and HR will be absorbed into the Highbrook branch manager role.

I must stress that no decisions have been made about this proposal. We would like to hear your thoughts about the proposal in the next few days, once you have had a chance to think about your responses. You can either provide your feedback in writing, at a meeting or over the telephone given that you are currently absent from work following your gym injury.

Impact on You:

Should the proposal go ahead and your role as Papakura branch manager is disestablished, we would discuss your options with you and if there are any other suitable roles to which you could be redeployed.

[48] Mr Vincent responded by email dated 18 September 2019 which opened with a statement: “After reading through the proposal, I can see how this restructure would benefit the company in the long run and I do see its potential merits.” Mr Vincent continued:

However I have noticed that I wasn’t even considered to fulfil the role. Seeing as the Highbrook manager role and my role (Papakura manager) are both similar positions I believe I should be entitled to apply for the newly managed role as an opportunity to move forward within the company if this proposal were to come to fruition.

From reading what is written, my understanding is that there is a pre-determined outcome of which the Highbrook manager has already successfully been given this role if the proposal is accepted by Carters Tyre Services management.

[49] Mr Vincent concluded the letter by asking that the meeting be postponed until 26 September 2019 when his support person would be available to attend.

[50] Mr Burton responded by email on 19 September 2019 confirming that the meeting would take place on 26 September 2019 and reiterated that no decisions had been made about the proposal and that there had been no pre-determination of an outcome. Mr Burton added:

In addition, I would like to clarify that from our perspective the two manager’s roles are not equivalent to each other and – while there are similarities, the Highbrook Drive role is a much larger one with greater responsibilities, consistent with the size of the branch. That is something we can discuss when we meet. Our proposal is based on the proposition that if it goes ahead, it would involve a relatively minor change to one role (Highbrook Drive manager role) and the disestablishment of another role (Papakura branch manager role). Therefore, we are not proposing to disestablish both roles and create a new “merged role” as you seem to be suggesting and no “new role” has been given to the Highbrook manager. He is merely managing the Papakura branches as well as you know in your absence. If the proposal were to go ahead it would mean that the Papakura role is disestablished and there would be no competition for any new roles.

26 *September 2019 meeting*

[51] Mr Vincent attended the meeting on 26 September 2019 with Mr Burton and another CTSL employee as note taker. He was accompanied by his father Mr Chris Vincent as his support person.

[52] During the meeting Mr Vincent said he asked a number of pre-prepared questions including his wanting to receive more information on the proposal and whether or not CTSL had thought of other solutions as an alternative to undertaking a restructure.

[53] Mr Burton confirmed that Mr Vincent had provided some written questions in advance of the meeting and said that during the meeting he had discussed with Mr Vincent the current structure, the proposed new structure and highlighted the key points for the proposal.

[54] He had also explained that CTSL had previously found that amalgamations between large and smaller branches had worked well and it was a concept that CTSL thought could potentially be applied to the Papakura and Highbrook branches. He had explained that the proposal was that the responsibilities of the Papakura manager were to be absorbed into the responsibilities of the Highbrook Drive manager and the position of Papakura Branch manager disestablished.

[55] He said that Mr Vincent had not suggested any alternatives to the proposal CTSL had put forward, nor had he challenged the fact that the Papakura Branch Manager role was not equivalent to the Highbrook Drive Branch Manager role.

[56] Mr Vincent said that Mr Burton had not provided any evidence to prove that the proposal could be effective and had offered no genuine business reason for the restructure.

[57] Mr Burton considered that he had answered all of Mr Vincent's questions during the meeting, in particular he had explained that the proposal was an efficiency CTSL considered had been successfully implemented throughout the company.

[58] He said Mr Vincent had been interested in next steps and asked about redeployment. The meeting ended on the basis that CTSL would consider Mr Vincent's feedback and meet again with him to confirm its decision.

[59] Following the conclusion of the meeting on 26 September 2019 Mr Burton sent Mr Vincent the notes of the meeting and asked him to let him know if there was anything he wanted to add to them or if he thought there had been anything omitted. However, he had not heard back from Mr Vincent.

Monthly compliance report

[60] On 26 September 2019, which was the same day as the meeting, Mr Vincent said he received a monthly compliance report for all the branches under Mr Burton's management. He immediately noticed that the Papakura branch had been removed from the report and its figures had already been allocated to the Highbrook Drive branch. The date on the report was 30 August 2019 which he considered indicated that CTSL had made the decision to proceed with the amalgamation and thus his redundancy even before the restructuring process had started in mid-September.

[61] Mr Burton said that it was incorrect that the decision to dismiss for redundancy was predetermined at that stage. He said he would send branch managers in his region a monthly compliance checklist by email to remind them to carry out the compliance checks e.g. vehicle audits and stocktake for the branch. When he sent the checklist on 26 September 2019 he did not include the Papakura branch as he was monitoring this branch himself in Mr Vincent's absence. He therefore already had the information he needed about the Papakura branch and did not need the reminder. He said the Papakura branch continues to be included on the full monthly compliance report and continues to be on the compliance report list for all branches.

30 September 2019 meeting between Mr Burton and Mr Dellabarca

[62] Mr Burton met with Mr Dellabarca on 2 October 2019 to discuss the comments and feedback from both Mr Vincent and Mr Tapper and wrote the minutes of the meeting on 2 October 2019.. He said neither Mr Tapper nor Mr Vincent had provided any alternatives to the proposed structure. Mr Tapper had accepted the proposal with some minor queries as to the duties and Mr Vincent's main comments had been concerned that the managerial tasks of the Papakura branch manager would not be able to be covered by one manager overseeing both branches.

[63] Mr Burton said he and Mr Dellabarca considered the tasks which would be absorbed and handled by Highbrook Drive branch and concluded that the duties could be readily covered by one person with appropriate delegations in place.

[64] They had discussed the efficiencies which would be made and the cohesion that would be achieved by absorbing the Papakura branch into the Highbrook Drive branch and noted that the same structures were working positively with some branches and there had been a positive influence on the team environment. They considered this would be a similar outcome when merging the Papakura and Highbrook Drive branches.

[65] Mr Burton said CTSL intended to confirm the proposed restructure on the following day, 3 October 2019, and he had prepared the correspondence advising of the decision for Mr Vincent. However before he could send it, Mr Vincent had sent him an email on the evening of 2 October raising

issues about the process, confirming that he wished to raise a personal grievance and asking for urgent mediation. Mr Vincent had also requested that CTSL suspend continuation of the current restructure process pending the outcome of the mediation.

[66] Mr Vincent said he had emailed Mr Burton on 2 October 2019 reiterating his view that because the roles of the Papakura Manager and the Highbrook Drive Manager were being merged, a contested process should be adopted, and stating that he wanted to apply for the newly combined role. He considered he had the necessary skills and experience to be a successful candidate. He had also raised a personal grievance because he considered he was being treated unfairly by CTSL and had asked that the process be suspended pending urgent mediation.

Restructure Confirmation

[67] Mr Burton said that because the letter from Mr Vincent had not provided anything new in terms of feedback or any alternatives to the proposed restructure and did not appear to intend to do so, CTSL decided to proceed with the restructure.

[68] Mr Vincent said he received an email from Mr Burton dated 3 October 2019. The email contained a decision concerning the proposal and stated:

At the time of receipt of your email, the decision regarding the proposed restructure had already been made and the letters had been drafted to send today. We have nevertheless considered the points you have made in your email. We do not however consider that they are such as to change the company's decision to proceed with the restructure as proposed.

The points you raise in your email are consistent with the feedback you have provided in your email of 18 September 2019, and at our meeting with you on 26 September 2019, and we have discussed these with you and considered them before making our decision. We do not agree with the points you have raised, as discussed with you.

[69] The letter proposed a meeting to take place on 8 October 2019 to discuss the effect of the decision on Mr Vincent and any redeployment options. In regard to the personal grievance claim the email stated that CTSL did not consider there had been any unfairness to Mr Vincent or that he had a valid personal grievance claim as a result of which it did not agree that mediation was required. Mr Burton stated:

... There will be plenty of opportunity for discussion between us. You are still an employee and we wish to continue to discuss with you whether there are any suitable roles to which you can be redeployed now the Branch Manager Papakura role no longer exists.

[70] Mr Vincent said he was completely shocked by the decision and very hurt and disappointed.

[71] Mr Burton said that they had been intending to meet with Mr Vincent on 8 October 2019 to discuss redeployment however, on 7 October 2019 CTSL received a letter from Mr Vincent's lawyer seeking an urgent mediation. The parties attended the mediation in October 2019.

Redeployment

[72] On 17 December 2019 CTSL's lawyers wrote to Mr Vincent's lawyers regarding potential redeployment to the newly created role of Group Product Procurement Manager in relation to which a meeting was held on 29 January 2020. Mr Burton said this was because Mr Vincent had not made himself available to meet with CTSL before that date and had provided further medical certificates certifying him as fully unfit for work until January/February 2020.

[73] At the time of the decision to disestablish the Papakura branch manager role in October 2019 there were no other branch manager roles to which CTSL could have redeployed Mr Vincent. The only available role in Auckland at that time was in the Highbrook Drive branch car bay. However that would have meant less remuneration, require a change of conditions of the Employment Agreement and for Mr Vincent to be fully fit for work.

[74] In December 2019 CTSL formalised a new procurement role entitled Group Product Procurement Manager which it said was equivalent in seniority to a branch manager role.

[75] Mr Dellabarca explained that CTSL had been considering the need to have a dedicated procurement person for some time. The purpose of the role was to solve the problem of individual branches having either the wrong stock, too much stock or old stock that was unusable. He said this created unnecessary cost and was not efficient. CTSL realised that there needed to be a role dedicated to addressing those issues which would represent a major change to the way in which the branches operated.

[76] Mr Dellabarca considered that this was a role ideally suited to Mr Vincent's strengths because Mr Vincent had good knowledge of the company's operations and product, and the interactions he would need to have with supplier's managers and senior management would assist him to develop his maturity and leadership skills.

[77] The establishment of the role was confirmed by a CTSL management group in November 2019 at which point it could be discussed with Mr Vincent. Mr Dellabarca said CTSL had perceived no urgency for the discussion because it was aware that Mr Vincent had been certified as fully unfit for work until at least the end of January 2020.

[78] Mr Burton met with Mr Vincent and Mr Chris Vincent on 29 January 2020. At the meeting he said he had discussed the requirements of the Group Product Procurement Manager role. He had explained that the role essentially involved controlling stock in branches in order to maintain margins and improve profitability for CTSL, forecasting monthly tyre sales across the company, relationship building with customers and effective communication staff and customers through branch managers.

[79] He had explained that initially there would be no staff reporting to the role, and that it was a process driven role which CTSL believed Mr Vincent would be suitable to undertake. He explained that CTSL regarded it as a crucial role due to the constant issues with stock management.

[80] It had been explained to Mr Vincent that the role involved dealings with customers and managers throughout the country and it was envisaged some overseas travel would be necessary to inspect and source product. Mr Burton explained that the role was considered to be equivalent in seniority to a branch manager role and offered the same level of remuneration, with a company mobile phone and a company vehicle for work purposes.

[81] Mr Burton said he confirmed that Mr Vincent would be provided with training and supported with customer relationships and communication as this was an essential skill for the role.

[82] Mr Burton said Mr Vincent had been interested in whether the role came with a company vehicle as part of the remuneration package. He confirmed that it did not but that a vehicle would be available for work use.

[83] Mr Vincent said that he thought he would be fit to work in late February 2020 subject to his surgeon's approval. Mr Burton said the meeting conclusion was that Mr Vincent would consider about the role, examine the job description, raise any queries, and advise CTSL if he was interested in accepting the offer of redeployment to the Group Product Procurement Manager role which was formally offered to him on 31 January 2020.

[84] Mr Vincent said after some consideration he did not accept the role because he considered: (i) his career development and direction would be considerably hindered; (ii) the role excluded the use of a vehicle on a permanent basis and without the use of a vehicle his personal costs would increase; (iii) the position was based with the distances significantly greater than before and would take an additional forty-five minutes travelling time; and (iv) he was awaiting approval from his surgeon regarding an actual return to work date.

[85] During the Investigation Meeting Mr Vincent explained that he: "hated stock" and he did not perceive the position as having the same level of seniority as a branch manager.

[86] Mr Burton said after Mr Vincent rejected the Group Product Procurement Manager redeployment offer CTSL had looked at whether they had another position they could offer him. On 20 February 2020 Mr Vincent was offered a further role as a tyre technician, the only other role available. Mr Vincent declined this role on 25 February 2020 on the basis that he regarded it as being a retrograde step in his career.

[87] On 25 February 2020 CTSL's lawyers confirmed that Mr Vincent's employment with CTSL was to be terminated on 4 March 2020. The letter stated:

Thank you for your email confirmation that your client declines the offer of redeployment to a technician role. As there are no other suitable opportunities within the company, we are instructed by this letter to formally, through you, provide Mr Vincent with notice of termination of his employment.

Was Mr Vincent unjustifiably dismissed by CTSL?

[88] Mr Vincent employment was terminated on 4 March 2020 by way of written notification given on 25 February 2020, the reason given was '*....termination by reason of redundancy*' However in a submission made on behalf of the Respondent it is submitted that despite the disestablishment of his role Mr Vincent's employment was terminated because he unreasonably refused to accept suitable redeployment.

[89] I shall first consider the termination by reason of redundancy.

[90] Redundancy was defined in *GN Hale & Sons Ltd v Wellington Caretakers IUOW* as being the termination of employment because the position occupied by the employee is, or will be, superfluous.¹ The case was revisited by the Court of Appeal in *Grace Team Accounting Ltd v Brake* and was confirmed as remaining good law in respect of the definition of redundancy.²

[91] Mr Vincent's position as Branch Manager of the Papakura branch became superfluous as a result of the restructure proposal being made effective. The letter dated 2 October 2019 confirmed that unless Mr Vincent was able to be redeployed to a different role, or he did not accept any redeployment offered, his employment would terminate due to redundancy.

[92] 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.

¹ *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA)

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [47]

[93] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer 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.

Was the Restructuring Proposal and redundancy genuine?

[94] Mr Vincent was informed in the letter dated 2 October 2019 that unless he was redeployed into a different role or did not accept any redeployment offered, his employment would terminate due to redundancy. The letter dated 25 February 2020 confirmed that because he had declined an offer of redeployment, Mr Vincent's employment had been terminated: "by reason of redundancy"

[95] There must be a substantive justification for dismissal based upon genuine grounds. CTSL's evidence was that the restructuring of its business was undertaken for genuine commercial reasons in order to create efficiencies within the business by amalgamating a smaller branch operation into that of a larger branch. The restructuring proposal did not express that the business was in any financial difficulties.

[96] It is for CTSL to make decisions about its policy to amalgamate smaller branch operations into larger branch operations, the Authority does not substitute its own view for the business judgement of the employer and I base my determination on whether or not CTSL's decision in this case was based on a genuine business rationale, how that decision was reached, and what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[97] Papakura branch was a much smaller operation than that of Highbrook Drive branch. As part of the Restructuring Proposal, Papakura branch would no longer have a dedicated branch manager and its operation would be absorbed into the Highbrook Drive branch operation with one branch manager having responsibility for the amalgamated branches operation.

[98] The Highbrook Drive branch manager had been overseeing the operation of both branches during the period when Mr Vincent had been on full-time sick leave and no operational difficulties had been experienced during this period.

[99] The policy of amalgamation of branches undertaken by CTSL was not a new concept to the company, CTSL having undertaken some restructuring on the same basis prior to the Papakura/Highbrook Drive branches amalgamation being proposed. This policy was known to employees within CTSL, including Mr Vincent.

[100] During the Investigation Meeting Mr Vincent confirmed that he was aware of the process of other similar amalgamations being undertaken by CTSL. He also acknowledged in his feedback response email dated 18 September 2019 that the process proposed in relation to Papakura and Highfield

branches could benefit CTSL and stated: “I can see how this restructure could benefit the company in the long run and I do see its potential merits.”

[101] I note that no financial information showing the reduction in costs as a result of the restructuring has been produced either to the Authority or to Mr Vincent. However in his written evidence Mr Burton stated that: ‘If there was to be an amalgamation of the Highbrook Drive and Papakura branches that would remove a salary cost from my regions cost centre.’

[102] I accept the evidence put forward by Mr Dellabarca and Mr Burton relating to the reasons for the proposed restructuring and I find that the reason for the Restructuring Proposal was genuine. As a corollary, reducing the two roles of branch manager into one i.e. the redundancy of one role, I find to have also been a genuine proposal.

Was the process followed by CTSL procedurally fair?

[103] CTSL must not only have genuine reasons for undertaking the restructuring, but it was obliged to follow a fair procedure in respect of Mr Vincent.

[104] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

- (i) access to information, relevant to the continuation of the employees’ employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

Access to information

[105] Mr Vincent first became aware of the proposal to merge the operations of the Papakura and Highbrook Drive branches and disestablish his position as branch manager of the Papakura branch in a letter from CTSL dated 13 September 2019. There was no other relevant information provided with the letter apart from copies of the proposed organisation charts and a request for Mr Vincent’s feedback.

[106] Mr Burton confirmed that prior to the meeting held on 26 September 2019 Mr Vincent had provided a list of questions in writing. The questions provided sought information which included: (i) information which had led CTSL to its view that that there would be: “no apparent impact or issue”;

- (ii) whether or not Mr Vincent had been provided with all the information relative to the proposal; and
- (iii) what other solution to reduce costs CTSL had considered.

[107] During the meeting held on 26 September 2019 Mr Vincent requested this further information. According to the minutes of the meeting issued by Mr Burton, he had responded by discussing the reasons for the proposal, explained that CTSL had previously found that amalgamations between large and smaller branches had worked well, and provided brief responses to the questions asked by Mr Vincent.

[108] CTSL did not provide Mr Vincent with any financial or other detailed information. Mr Vincent's evidence was that whilst aware that other branch mergers had taken place, he had not realised that a merger was a possibility for Papakura branch which he had believed to have been performing well and which had expanded during his management. He also believed it to be financially successful.

[109] I consider that the provision by CTSL of some further information of the rationale for the Restructuring Proposal, including financial projections, cost savings, and information on the improved efficiency gains of other merged stores, which would have been relevant to the continuation of Mr Vincent's role as Papakura Branch Manager, would have assisted Mr Vincent to a better understanding and acceptance of the Restructuring Proposal, and such information should in good faith have been provided to him.

[110] Mr Vincent's view was that one person could not undertake the duties required to be undertaken by one person carrying out the duties and responsibilities of both the Papakura Branch Manager and the Highbrook Drive Manager. In support of this view he pointed to the fact that the Papakura 2IC role remained and Papakura branch administration functions were to be handled by the Highbrook branch administrator.

[111] I do not find that this establishes that CTSL was not accurate in its statement in the 13 September 2019 letter that: "... all duties and responsibilities of the Papakura branch manager role ... would be absorbed into the Highbrook branch manager role."

[112] In considering this issue I note that as a branch manager himself Mr Vincent would have been aware that the duties and responsibilities of a branch manager did not require the branch manager to carry out all the duties associated with the smooth operation of a branch him or herself. A management position carries the responsibility of ensuring that delegated duties are carried out properly, and the manager has the responsibility of direction and oversight.

[113] However I consider that had CTSL provided Mr Vincent with a full job description for the amalgamated position and details of the full financial benefits resulting from the amalgamation, this

would have assisted his understanding of how the Papakura Branch Manager's responsibilities would be carried out following the amalgamation and the cost savings that would result.

Should a new role have been created by disestablishing both current branch manager roles?

[114] Mr Vincent was of the view that the amalgamation of the two branches required both the Papakura and the Highbrook Drive Branch Manager positions to be disestablished and a new role created.

[115] I find that this was not a situation in which the restructuring proposal was for the creation of a new position. Rather management operations at the Papakura branch as the smaller branch were being absorbed into the existing Highbrook Drive operation which was a substantially larger operation.

[116] The management structure for the two branches is a matter for CTSL and as such I find that a new management role was not being created because the Highbrook Drive Manager's role remained with increased responsibilities rather than both roles being disestablished and a new role created.

Predetermination

[117] Procedural fairness obligated CTSL as a fair and reasonable employer to consult with Mr Vincent about the proposal and to genuinely consider his feedback before making a decision to confirm the Restructuring Proposal.

[118] A fair and reasonable employer consults with an affected employee, by providing the employee with an opportunity to comment on the proposal before a decision is made, and the fair and reasonable employee genuinely considers that feedback before making a decision.

[119] Mr Vincent had been provided with emails between Mr Burton and Mr Jackson during 2019 as a result of a request for disclosure made under the Privacy Act 1993. As a result he believed that the decision made by CTSL to disestablish his position was predetermined.

[120] Mr Burton's evidence was that he sought advice from the National HR Manager about the process to be followed for the Restructuring Proposal because he was inexperienced in that area. His evidence was that CTSL recognised that one branch manager could operate both branches without operational difficulties during Mr Vincent's absence on sick leave, and this formed the basis for the Restructuring Proposal.

[121] An email dated 20 August sent by Mr Burton to Mr Jackson 2019 is headed: "Papakura-Danial V" and in it Mr Burton states:

When you have some feedback on how to move forward let me know. Danial is due back to work in November, ideally this wont happen as I prefer to keep the cost out of the region. With the time frame a re-structure takes, I guess we are cutting things fine?

[122] I find that the words: “ideally wont happen” and ‘the reference to: “we are cutting things fine” to indicate that Mr Vincent was not being considered for any role in the restructuring proposal.

[123] In a response email dated 22 August 2019 Mr Jackson refers to Mr Burton having informed him that there was no longer a need for a dedicated Papakura branch manager.

[124] These emails predate the restructuring proposal which was put to Mr Vincent by letter dated 13 September 2019 and prior to Mr Vincent presenting any feedback for consideration. Although the letter dated 13 September 2019 states: “I must stress that no decisions have been made about this proposal”, the email exchange between Mr Burton and Mr Jackson indicates that a decision had been made prior to Mr Vincent providing any feedback or it being considered by CTSL.

[125] I find that a decision to proceed with the restructuring proposal, disestablish Mr Vincent’s position, and to make Mr Vincent redundant, had been made prior to any meaningful consultation with Mr Vincent or his feedback being fully considered by CTSL. In these circumstances I find the decision by CTSL to proceed with the restructuring proposal was predetermined.

Redeployment

[126] The fair and reasonable employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists³. There was therefore an obligation on CTSL to consider any alternatives in the form of redeployment opportunities to making Mr Vincent redundant.

[127] CTSL considered alternative redeployment options for Mr Vincent following the outcome of the restructure proposal as it was required in good faith to do.

[128] By December 2019 CTSL had finalised the position of Group Procurement Manager and Mr Vincent was contacted in order to discuss the position.

Group Product Procurement Role

[129] CTSL offered Mr Vincent the role of Group Product Procurement Manager, however Mr Vincent rejected it as not being suitable.

³ *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

[130] CTSL considered that the position was suitable alternative employment because the level of seniority was equivalent to that of a branch manager, and its importance to CTSL was highlighted by the fact that Mr Dellabarca as General Manager, had been undertaking it.

[131] The remuneration package for the role was the same as that Mr Vincent had enjoyed as Branch Manager. The role involved contact with customers and suppliers and the possibility of overseas travel.

[132] CTSL's evidence was that the Group Product Procurement Manager position had not been confirmed until November 2019 and until that point it had not been possible to discuss it with Mr Vincent. It also stated that it had taken into consideration the fact that Mr Vincent was not certified as fit to return to work until January or February 2020.

[133] Mr Vincent confirmed at the Investigation Meeting that his reasons for not accepting the role included that he was awaiting approval from his surgeon regarding an actual return to work date.

[134] I find that the position of Group Product Procurement Manager was a suitable redeployment role for Mr Vincent, and that CTSL acted in good faith by offering it to Mr Vincent.

Tyre Technician Role

[135] CTSL offered the role of Tyre Technician to Mr Vincent on 20 February 2020 even though his absence was covered by an ACC medical certificate which certified him as: "unable to resume any duties at work for 90 days from: 13.01.2020."

[136] CTSL did not claim that this role was suitable because it was inferior to a branch manager role and below the level of remuneration of a branch manager.

[137] This role was rejected as unsuitable by Mr Vincent.

[138] I find that even though the role was deemed not a suitable redeployment option for Mr Vincent and he was not fit at that point to undertake it, CTSL nonetheless acted in good faith by offering the role for Mr Vincent's consideration.

2IC role at Papakura

[139] Mr Vincent claimed that he should have been offered the role of 2IC at Papakura when it became vacant in December 2019 on the basis that it was well within his capabilities and he was willing and able to perform it.

[140] In considering whether or not that role constituted suitable alternative employment I note that the role of 2IC, like that of Tyre Technician, involved physical activity and that in December 2019 Mr Vincent was still fully unfit for work. He had also already rejected the Tyre Technician role.

[141] I find that CTSL did not act unreasonably in not offering Mr Vincent the 2IC role following his rejection of the Tyre Technician role, it was not considered as suitable alternative employment and at the time he had been certified as fully unfit and on that basis unable to carry out the physical work the position entailed.

[142] I do not find a breach of good faith in CTSL not offering the position of 2IC to Mr Vincent.

[143] I determine that CTSL acted in good faith in respect to examining redeployment options for Mr Vincent.

Termination of employment

[144] The restructuring process resulted in the decision that the position of Papakura Branch Manager was superfluous to requirements and would result in the termination of Mr Vincent's employment unless he accepted an offer of redeployment.

[145] Although I have found the role of Group Product Procurement Manager constituted a suitable redeployment option, the letter dated 2 October 2019 confirmed that if Mr Vincent did not accept any redeployment offered, his employment would be terminated due to redundancy.

[146] There was no proviso stated in the letter that Mr Vincent's employment would not terminate by reason of redundancy if he did not accept a position considered to be a suitable redeployment option. Mr Vincent refused all offers of redeployment and therefore I find his employment terminated: "due to redundancy".

[147] I have found that in regard to the redundancy process there was a lack of information concerning the rationale for the restructuring proposal presented to Mr Vincent, and that the decision to disestablish his position as Papakura Branch Manager was predetermined. These were not minor considerations.

[148] I determine that CTSL did not act as a fair and reasonable employer could have done in all the circumstances at the relevant time of the redundancy, and that Mr Vincent was unjustifiably dismissed by reason of redundancy.

Was Mr Vincent unjustifiably disadvantaged by CTSL:

[149] Disadvantage grievances are assessed in light of s103 (1)(b) of the Act which states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[150] The elements of s103 (1) (b) are twofold:

- (a) An unjustifiable action by the employer, which
- (b) Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[151] Mr Vincent must therefore establish that there was some unjustifiable action or actions by CTSL which affected his terms and conditions of employment to his disadvantage.

(i) *Unilaterally withdrawing his vehicle privileges on 14 August 2019?*

[152] Mr Burton informed Mr Vincent on 14 August 2019 that the company vehicle needed to be left at the Papakura branch during working hours.

[153] Mr Vincent confirmed during the Investigation Meeting that he was aware that the company vehicle was a tool of the trade and that during Branch operational hours it was used by himself and other employees on company business, primarily the transportation of tyres.

[154] Mr Vincent had been allowed the personal use of the company vehicle for travelling to and from work since August 2017 when he was appointed manager of the Papakura branch as agreed by a previous member of management. Mr Burton confirmed this and added that on occasions Mr Vincent would also have the personal use of the vehicle on weekends.

[155] Although the Employment Agreement with the tools of the trade clause was issued and signed some months after Mr Vincent was given use of the company vehicle, I note that Mr Vincent made raised no query about, or objection to, the tools of the trade clause before signing the Employment Agreement.

[156] During the periods Mr Vincent had been absent on sick leave he had left the company vehicle for use at the Papakura branch and did not have personal use of it, collecting it from the Papakura 2IC on the evening of 11 August 2019.

[157] After Mr Burton raised the issue of the company vehicle being available at the Papakura branch for use during working hours, Mr Vincent raised an objection. Mr Burton told Mr Vincent that he was

prepared to consider an alternative proposal from him providing it did not have any serious cost implications for the company..

[158] I find that it was reasonable of CTSL to require the company vehicle to be available at the Papakura branch when Mr Vincent was absent on sick leave, and note that Mr Vincent had already complied with this whilst on sick leave prior to 11 August 2019.

[159] I further find that Mr Burton was prepared to engage in a discussion that offered workable options, but that having made two suggestions which were not accepted, Mr Vincent forestalled any further discussion by leaving the workplace, being placed on ACC, and not returning to the workplace.

[160] I accept that it was by custom and practice that Mr Vincent had the personal use of the company vehicle after working hours and that at other times the vehicle would be available at the Papakura branch in accordance with its designation as a 'tool of trade'. The matter was not pursued because Mr Vincent was placed on sick leave by ACC and did not return to the workplace.

[161] I determine that Mr Vincent was not disadvantaged by CTSL Unilaterally withdrawing his vehicle privileges on 14 August 2019.

Remedies

Lost wages

[162] I have determined that the restructuring proposal by CTSL was substantively justified but procedurally unfair to Mr Vincent. In these circumstances there is no compensation for loss of a job, and I make no award for lost remuneration.

Compensation pursuant to s 123 (1)(c)(i) of the Act

[163] In September 2019 Mr Vincent had been informed about the proposal to amalgamate the Papakura and Highbrook Drive branches which, if it proceeded, would result in the loss of his job. At that time of the restructuring proposal Mr Vincent was on sick leave, and remained so for some months.

[164] It was not until almost five months later that Mr Vincent had been informed on 25 February 2020 that his employment with CTSL would be terminated on 4 March 2020.

[165] Mr Vincent said that during the interim period he had suffered from physical symptoms including sleeplessness and mental symptoms including anxiety, distress, embarrassment and feelings of worthlessness. This was undoubtedly compounded by the fact of his injury, the pain associated with it, and the consequent and prolonged period of absence from the workplace.

[166] I also observe that although Mr Vincent had been notified on 2 October 2019 that his position as Papakura Branch Manager had been disestablished with effect from 10 October 2019, the position of Group Product Procurement Manager had not been discussed with him until 17 December 2019. Whilst I accept that the position had not been finalised prior to December, the lack of communication about the existence of any alternative option for ongoing employment added to the anxiety and distress experienced by Mr Vincent.

[167] I find that Mr Vincent suffered significant feelings of hurt and humiliation consequent upon the proposed and actual loss of his job with CTSL.

[168] **CTSL is ordered to pay Mr Vincent the sum of \$20,000.00 as compensations pursuant to s 123 (1) (c) (i) of the Act.**

Contribution

[169] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[170] I have found the Group Product Procurement Manager presented a suitable redeployment option for Mr Vincent which, had he accepted it, would have provided him with an equivalent level of seniority and the same level of remuneration.

[171] However it was a different role to that of Branch Manager in terms of management responsibility because there were no employees reporting to it and I find Mr Vincent, who was concerned about its implications for his career development, did not act unreasonably in refusing it.

[172] I find no contributing conduct by Mr Vincent and there will be no reduction in the remedies ordered.

Penalty

[173] Mr Vincent is seeking a penalty in respect of a breach of good faith by CTSL.

[174] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty if a breach has been established. The considerations include whether the breach was intentional, inadvertent or negligent, and the nature and extent of any loss or damage suffered by the breach.

[175] The Employment Court set out further considerations in relation to penalties in the cases of *Borsboom v Preet PVC Limited*, *Nicolson v Ford* and *A Labour Inspector v Daleson Investment Limited*.⁴

[176] I have found that CTSL did not act in good faith in respect of the failure to provide information to Mr Vincent and by predetermining the outcome of the restructure proposal.

[177] Mr Burton's evidence was that he considered he had provided all relevant information to Mr Vincent both prior to and during the meeting held on 26 September 2019 although during the investigation meeting he accepted that it would have been helpful to Mr Vincent to have provided him with more information prior to the meeting held on 26 September 2019.

[178] Certainly no financial information was provided to Mr Vincent prior to 26 September 2019 but I consider the breach to have been due to a lack of experience on Mr Burton's part rather than to have been a deliberate omission. However the failure to provide the information added to Mr Vincent's anxiety at a difficult time when he was still incapacity by his injury and concerned for his future.

[179] Predetermining the outcome of the restructure was deliberate and, whilst not known by Mr Vincent until after the decision had been made, added to his distress over the loss of his job when known. It also impacted upon his self-confidence and sense of worth.

[180] There is no evidence before me that CTSL would not be able to pay a penalty should one be awarded.

[181] Having fully considered all the circumstances and carefully balancing the competing factors, including that there has been no breach of minimum standards and Mr Vincent was fully paid all his entitlements upon termination, I determine that any damage caused to Mr Vincent by the breaches of good faith have contributed to the basis of the finding of unjustifiable dismissal and have been recognised in the award made in respect of the compensatory amount awarded for his hurt and injury to feelings.

Costs

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

[183] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the

⁴ *Borsboom v Preet PVC Limited* [2016] EmpC 143; *Nicolson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

written determination in this matter. From the date of service of that memorandum the Respondent 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.

[184] 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