

Attention is drawn to the order prohibiting publication of information in this determination (refer para [20]).

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 359  
3011971

BETWEEN                      GREGOR SEDLMEIER  
Applicant

A N D                              ENGINEERING RGV 2016  
LIMITED formerly named  
ENGEX LIMITED  
Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:              Michael Smyth, Counsel for Applicant  
Vanessa Bainbridge, Representative for Respondent

Investigation Meeting:      20 and 21 September 2017 at Auckland

Submissions Received:      25 September 2017 from Applicant  
29 September 2017 from Respondent

Date of Determination:      16 November 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A.      Engineering RGV 2016 Limited (Engineering RGV), formerly named Enjex Limited, acted unjustifiably in how it gave Mr Gregor Sedlmeier notice of dismissal on the grounds of redundancy.**
- B.      In settlement of his personal grievance for unjustified dismissal, Engineering RGV must pay Mr Sedlmeier within 28 days of the date of this determination, the sum \$20,000 as compensation for humiliation, loss of dignity and injury to feelings caused by dismissing him and in the manner it was carried out.**
- C.      Costs are reserved.**

## **Employment relationship problem**

[1] Gregor Sedlmeier was employed as a Senior Process Engineer by Engineering RGV from 26 September 2016 until his dismissal for redundancy on 7 April 2017. Mr Sedlmeier says the redundancy was not genuine and the process by which he was dismissed was not fair. Engineering RGV disputes the claims.

[2] Engineering RGV is a small family business. Mr Robert Vaughan is the director and shareholder, his son is the IT support person and the HR person, Ms Jennifer Harding, is Mr Vaughan's partner.

According to its website:

Since 1997, ENGEX has delivered innovative process engineering solutions throughout New Zealand, Asia Pacific and America... ENGEX focuses on the food, beverage and nutraceuticals industries.

The business provides

product solutions” for its customers in the food, beverage and wine industries including designing, fabricating and delivering stainless steel plant equipment, tubing, piping and valves.<sup>1</sup>

[3] Mr Sedlmeier was employed to manage the projects that Engineering RGV was involved in, including the people involved in the projects and to oversee aspects of design. Mr Sedlmeier was also employed to assist with the setting up of Engineering RGV's:

lean manufacturing systems and policy<sup>2</sup>.

[4] From September to mid – December 2016, Engineering RGV's financial position had steadily worsened. By early February 2017, Mr Sedlmeier was very concerned about the Engineering RGV's financial position and met with Ms Harding to discuss steps to address the situation.

### **Mr Sedlmeier's claims**

[5] During a telephone conference on 12 February 2017 between Mr Sedlmeier, Mr Vaughan and Ms Harding, there was a discussion about Engineering RGV's financial position. Mr Sedlmeier says he was informed by Mr Vaughan that he had

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<sup>1</sup>

[www.engex.co.nz](http://www.engex.co.nz)

<sup>2</sup>

Job description attached to individual employment agreement dated 21 September 2016

decided to make his role redundant. Mr Sedlmeier says he was shocked, there had been no consultation with him and he considered the redundancy decision to be predetermined and unjustified.

[6] When Mr Sedlmeier disputed the decision, Engineering RGV conducted a consultation process which resulted in his dismissal for redundancy on 7 April 2017. Mr Sedlmeier says the consultation process was not fair, critical financial information was not provided to him and his resulting redundancy was unjustified. Mr Sedlmeier says Mr Vaughan was annoyed that he had been proactive in analysing Engineering RGV's accounts and became angry with him after the 12 February 2017 telephone conference. Mr Sedlmeier says his redundancy on 7 April 2017 was not genuine and was not carried out fairly. He says Mr Vaughan had ulterior motives for making his position redundant.

[7] Mr Sedlmeier seeks orders from the Authority that his dismissal by Engineering RGV was unjustified. Mr Sedlmeier seeks distress compensation, and compensation for loss of benefits as a result of his dismissal. Mr Sedlmeier also seeks reimbursement for lost earnings.

[8] Mr Sedlmeier claims that actions undertaken by Mr Vaughan after the telephone conference on 12 February 2017 amounted to unjustified disadvantages. Mr Sedlmeier says Mr Vaughan's actions in removing his computer and work tools and withdrawing his letter of support to the German Consulate in respect of his dual citizenship application, amounted to unjustified disadvantages for which remedies are sought.

[9] Mr Sedlmeier seeks an order from the Authority that a penalty be imposed on Engineering RGV under s.4A of the Employment Relations Act 2000 (the Act) in respect of the withdrawal of the letter to the German Consulate which he says was a deliberate and serious attempt to undermine him.

### **Engineering RGV's response**

[10] Mr Vaughan says he was aware of the worsening financial situation during the latter part of 2016 and was monitoring it closely. Mr Vaughan says after advice from his accountant in January 2017 that Engineering RGV was overstaffed, he further analysed the financial accounts. During the telephone conference on 12 February

2017, Mr Vaughan says as part of the discussions concerning Engineering RGV's financial position, he told Mr Sedlmeier that he may have to make his role redundant.

[11] Mr Vaughan says no decision as to redundancy had been made. However, Mr Sedlmeier sought clarity about his ongoing role. It was at that point that he says he and Mr Sedlmeier reached an agreement that Mr Sedlmeier's role would be redundant. Under the agreement Mr Vaughan would provide Mr Sedlmeier with a reference and a letter of support in respect of his application for dual German and New Zealand citizenship.

[12] Mr Vaughan says after being provided with the letter of support, Mr Sedlmeier changed his mind, disputed the redundancy and required Engineering RGV to undertake a consultation process. A consultation process was undertaken which resulted in a decision on 7 April 2017, to make Mr Sedlmeier's position redundant with effect from 21 April 2017.

[13] Engineering RGV asserts Mr Sedlmeier's position was made redundant for genuine commercial reasons following a fair consultation process, as requested by Mr Sedlmeier. With regard to the letter written to the German Consulate, this was written in accordance with an agreement with Mr Sedlmeier about the termination of his employment for redundancy. When Mr Sedlmeier decided not to be bound by the agreement, the letter was withdrawn.

[14] Engineering RGV disputes Mr Sedlmeier's claims for remedies.

### **The issues**

[15] The issues for investigation and determination by the Authority are:

- (i) Was Mr Sedlmeier's dismissal for redundancy by Engineering RGV substantively justified based on genuine business reasons and carried out fairly?
- (ii) If the dismissal was unjustified, what remedies should be awarded to Mr Sedlmeier?
- (iii) Did the removal of Mr Sedlmeier's work tools and the sending of the letter to the German Consulate by Engineering RGV amount to unjustifiable disadvantages?

- (iv) If so, what remedies are available?
- (v) If any remedies are awarded by the Authority, is a reduction required under s.124 of the Act for any blameworthy conduct by Mr Sedlmeier that contributed to the situation giving rise to his grievances?
- (vi) Did Engineering RGV breach its obligations under s.4 of the Act, to act towards Mr Sedlmeier in good faith when it sent a letter to the German Consulate withdrawing support for his application for dual citizenship?
- (vii) If there was such a breach, should a penalty be imposed?

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

[16] For the purposes of the Authority's investigation, witness statements were lodged by Mr Sedlmeier, Mr Robert Vaughan and Ms Jennifer Harding. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their written statement and answered questions as required.

[17] As permitted by s.174E of the Act, this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. However, this determination has not recorded all the evidence and submissions received.

### **Non-publication order**

[18] A non – publication order was sought by Engineering RGV at the outset of the investigation meeting in respect of its financial records which it asserts contain commercially sensitive material. There was no objection by Mr Sedlmeier.

[19] The Authority has a wide discretion to prohibit the publication of evidence<sup>3</sup>.

[20] I accept the financial information is commercially sensitive and should be subject to a non-publication order. Accordingly, I make a non- publication order in

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<sup>3</sup> Schedule 2, clause 10(1) of the Act

respect of Engineering RGV's financial records in its name and/or in its former name, Engex Limited.

### **First issue**

**Was Mr Sedlmeier's dismissal for redundancy by Engineering RGV substantively justified based on genuine business reasons and carried out fairly?**

### **Financial situation – December 2016/January 2017**

[21] Mr Sedlmeier became aware of Engineering RGV's deteriorating financial position in mid-December 2016. Mr Sedlmeier was seated next to Ms Hong Li, the accounts person at Engineering RGV, and overheard discussions she was having with creditors. The discussions caused him concern about the ongoing financial viability of Engineering RGV.

[22] Mr Sedlmeier's concerns escalated in early 2017 and he initiated discussions with Ms Harding and Mr Vaughan about Engineering RGV's financial situation.

[23] As the business owner, Mr Vaughan was also concerned about Engineering RGV's financial position and its cash flow crisis. Mr Vaughan was seriously concerned that Engineering RGV may not be able to pay wages in January 2017.

[24] At the Authority's investigation meeting, Mr Vaughan explained the poor financial situation as being a combination of factors. They were that one of Engineering RGV's largest clients had a project which had run over budget and could not be completed. This caused a serious cash flow problem. There was a lighter workload in December and annual leave was higher than normal in the December/January 2016-2017 period.

[25] Mr Vaughan met with his accountant three times in the period between November 2016 and February/March 2017. Mr Vaughan says the meetings were to primarily talk about the cash flow crisis. The advice that Mr Vaughan received from his accountant was that Engineering RGV was overstaffed and there needed to be a reduction in office positions, as they were not producing income.

### **Workshop – 8 February 2017**

[26] Mr Sedlmeier proposed to Mr Vaughan that he and Ms Harding have a workshop in order to:

review ... the situation of the company (financially, organisationally, market position, policies, risks, etc) as well as how to address and improve its position<sup>4</sup>.

Mr Vaughan was supportive of the workshop as he wished to have a cash flow forecast in order to raise further funds from the bank.

[27] The workshop took place on 8 February 2017 at Ms Harding's house. Ms Harding and Mr Sedlmeier concluded that Engineering RGV had a debt of

about \$200,000 and the current revenue forecast was less than \$200,000 for the coming two months with fixed expenses of approximately \$40,000 per month. We concluded that something needed to be done<sup>5</sup>.

[28] Mr Sedlmeier took it upon himself to analyse the customer base so that there could be a focus on targeting higher revenue customers.

### **Telephone conference - 9 February 2017**

[29] A telephone conference was held on Thursday, 9 February 2017. Mr Vaughan, Mr Sedlmeier and Ms Harding participated in the call. The minutes of the meeting record discussions around Engineering RGV's financial situation, wages, cash flow and debts. A further meeting was scheduled for the following day, 10 February in order to progress steps in relation to the financial situation. The meeting on 10 February did not occur because Mr Vaughan was not able to attend as he was "hands-on" on a customer project. Mr Sedlmeier thought it was necessary to arrange a meeting to further discuss the steps needed to address the financial concerns. A telephone conference between Mr Vaughan, Ms Harding and Mr Sedlmeier was accordingly scheduled for Sunday, 12 February 2017.

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<sup>4</sup> Sedlmeier witness statement

<sup>5</sup> Sedlmeier witness statement

[30] Ms Harding says that the telephone conference meeting on 9 February 2017 was to discuss Engineering RGV's financials and other business. Ms Harding says after that telephone discussion Mr Sedlmeier pushed for a further telephone conference as he wanted "clarity" about his future. This occurred on 12 February 2017.

### **12 February 2017 - telephone conference**

[31] Mr Sedlmeier was anxious for the telephone conference to be held on 12 February 2017. This was because he had become very concerned about Engineering RGV's financial situation and its ongoing viability. Meetings on Sundays were unusual but Mr Sedlmeier felt the situation required an urgent discussion.

[32] Mr Sedlmeier says that during the conference call, Mr Vaughan talked about the financial difficulties Engineering RGV was undergoing. Mr Sedlmeier says Mr Vaughan then stated that as a consequence he had made the decision to make Mr Sedlmeier's role redundant. Mr Sedlmeier says he was shocked. Mr Sedlmeier did not confront Mr Vaughan about the decision and stated:

I know the company's hardship. I take this as agreement for me to enter into the job market and I am asking Bob to provide a reference.

[33] Mr Sedlmeier says Mr Vaughan agreed to provide a reference and instructed Ms Harding to prepare a letter of termination of his employment on the grounds of redundancy. Mr Sedlmeier says that:

Although I realised at this stage that no consultation had occurred, I decided not to make any comment because I wanted to take some legal advice.

[34] Mr Vaughan and Ms Harding have a different recollection of events to that of Mr Sedlmeier in respect of the telephone conference on 12 February 2017.

[35] Ms Harding says Mr Vaughan talked about Engineering RGV's poor financial situation. Mr Sedlmeier wanted to know what was going to be done about it and was told by Mr Vaughan that he was considering making Mr Sedlmeier's role redundant. Ms Harding says the discussion was uncomfortable and that Mr Vaughan was very apologetic about the situation. According to Ms Harding, the discussion then moved on to giving Mr Sedlmeier clarity about proposed dates of redundancy. Mr Sedlmeier asked Mr Vaughan for a reference which was agreed to. He then asked Ms Harding

“in her HR capacity” to prepare the letter of redundancy setting out the date of termination.

[36] Mr Vaughan says during the telephone conference he talked about Engineering RGV’s financial situation. Mr Sedlmeier asked him how long it would be before Engineering RGV was no longer able to pay the wages, and asked him how he was going to rectify the situation. Mr Vaughan says he told Mr Sedlmeier that his accountant had advised him that some jobs would have to go and having analysed the wages situation, his wage was the largest and he was the least chargeable. Mr Vaughan says Mr Sedlmeier agreed with his analysis.

[37] Mr Vaughan told Mr Sedlmeier that it was likely that his position would be the one to be made redundant. According to Mr Vaughan, Mr Sedlmeier wanted an answer immediately on what he was going to do, he wanted clarity and he wanted to know whether he could go out into the employment market.

[38] Mr Vaughan says it was at this point that they agreed that Mr Sedlmeier’s position would be the first one to be “pruned” to save the company costs. He would be made redundant and would receive a reference. Mr Vaughan agreed to sign a letter of support for Mr Sedlmeier’s application to the German Consulate for dual New Zealand/German citizenship. Mr Vaughan says he thought that an amicable agreement had been reached as to Mr Sedlmeier’s redundancy.

[39] In accordance with this agreement, Mr Vaughan says he signed the letter to the German Consulate dated 31 January 2017 provided to him by Mr Sedlmeier. This letter was emailed to Mr Sedlmeier the next day, 13 February 2017.

[40] Mr Sedlmeier denies there was an agreement in respect of his redundancy.

### **Events on 13 February 2017**

[41] Mr Sedlmeier went to work as usual on 13 February 2017, and found a handwritten list of tasks from Mr Vaughan. One of the tasks was to support Ms Harding with preparing a reference letter. Mr Sedlmeier received a signed copy of the letter of support to the German consulate.

[42] Later in the day, Mr Sedlmeier received a text message from Ms Harding as follows:

Hi Gregor... I am so sorry to be writing your notice letter now 😞 if you want to chat? Or just make sure all the info is covered.. please call me when you get a minute? THX

[43] Mr Sedlmeier says he rang Ms Harding to tell her that there were no grounds for a notice letter because:

Enjex had not followed a consultation process with me. I said to her that my request for a reference was not an agreement on my part to dispense with a proper redundancy process.

[44] Ms Harding says that the telephone call made by Mr Sedlmeier to her was abusive and she was shocked by it. Ms Harding responded to the text after the phone call as follows:

Thanks for the chat earlier Gregor as discussed I have not continued with the letter I have advised Bob we will need to chat further re options available in our meeting tomorrow Jennifer.

[45] Ms Harding says she was not capable of telling Mr Sedlmeier not to speak to her in the manner that he had and her text thanking him for the “chat” was not reflective of their discussion. She was very upset as they had worked very well together.

[46] Ms Harding is the part-time administrator for Engineering RGV, she was not experienced in human resources (HR), had never been involved in employing or dismissing staff and had never been involved in a consultation process when redundancy was proposed. Accordingly, Ms Harding sought external human resources, employment advice and assistance from Employsure in respect of the redundancy consultation process that she says Mr Sedlmeier was insisting upon.

[47] It is my view that Mr Sedlmeier was acutely aware of Engineering RGV’s poor financial position and that it had become serious by early February 2017. Mr Sedlmeier wanted clarity about his ongoing employment and pushed for the telephone conference on Sunday, 12 February 2017.

[48] In my view, it was more likely than not that during the conversation on 12 February 2017, Mr Vaughan informed Mr Sedlmeier, that his position would most likely be made redundant. Mr Sedlmeier asked for clarity about his position. It was at this point the conversation moved to a discussion about Mr Sedlmeier’s position being terminated for redundancy and the terms on which this would occur.

[49] Mr Vaughan agreed to provide a reference and to sign the letter to the German Consulate in support of Mr Sedlmeier's application for dual German/New Zealand citizenship. I do not consider there was an agreement that in return Mr Sedlmeier could not challenge the decision to terminate his employment.

[50] Mr Sedlmeier was not dismissed on 12 February 2017, he remained in employment during the course of the consultation process until he was dismissed for redundancy on 7 April 2017.

[51] Mr Sedlmeier did challenge the proposal to make his position redundant and sought a consultation process. A consultation process is of course required of a fair and reasonable employer before terminating an employee's employment on the grounds of redundancy. Mr Vaughan understood that Mr Sedlmeier was aware that Engineering RGV was in financial difficulty, his position was at risk because he was the most highly paid and was not "chargeable" so he agreed to redundancy.

[52] When this did not occur and Mr Sedlmeier made it clear that a consultation process was required, Mr Vaughan and Ms Harding initiated the consultation process. This took place with the assistance of Employsure over a period of two months.

[53] Mr Sedlmeier says because of the statement he believes was made by Mr Vaughan during the telephone conference of 12 February 2017, that his position was redundant, the final decision to terminate his employment for redundancy was pre-determined and therefore unjustified.

[54] I do not accept that to be the case. Mr Vaughan had formed a view that Mr Sedlmeier's position may become redundant. Mr Vaughan says because of the way in which Mr Sedlmeier responded during the telephone conference on 12 February 2017, this view became an agreement between him and Mr Sedlmeier that his role was to be made redundant. When on 13 February 2017 Mr Sedlmeier made it clear that this was not the case, a consultation process was undertaken by Engineering RGV which resulted in Mr Sedlmeier's redundancy on 7 April 2017.

### **Consultation process**

[55] The consultation process included two proposals. The first proposal was the disestablishment of Mr Sedlmeier's position and the reduction in hours of other roles regarded as "non-chargeable", such as in accounts, administration and human

resources. The second proposal was a restructure of Mr Sedlmeier's area of work and the consideration of his role as Senior Process Engineer being made redundant.

### **First proposal to restructure – 20 February 2017**

[56] The "proposed restructure information" document attached to the first proposal stated:

Dear ENGEX team members

As you have been made aware, the management team have recently been faced with a financially challenging environment due to several factors, including recently having created a number of new roles within the company, also there have been delays in completion of work and so charging out (which has affected cashflow) and finally some jobs having a number of changes to scope and work.

While this can be a usual business environment, this combination of factors in a short time has caused the management team to look for solutions to ensure the long-term sustainability of the business. Therefore, a restructure of the current roles is proposed and we advise the following.

This proposal will have the effect of reducing non-chargeable wages (office based) to be redirected into chargeable wages (workshop base) to enable more work to be completed in a faster time frame thus positively affecting cashflow and allow the business to trade out of its current financial issues.

Some roles are therefore proposed to be changed or removed from the existing structure to allow the proposed changes to happen. These roles are identified in the proposed company structure.

#### ***Why restructure?***

It's important to regularly check that our business is structured the best way for success. Having the right roles structured the right way means we can meet the needs of our customers and take our business to the next level. We think a new structure could improve the way our business operates.

This doesn't necessarily mean making employees redundant (though that could happen) but it might mean peoples' roles change.

[57] On 24 February 2017, a telephone conference was held with Mr Sedlmeier in relation to the first proposal. Ms Harding conducted the conference call. Mr Sedlmeier attended with his lawyer, Mr Smyth. Ms Harding sought feedback from Mr Sedlmeier in respect of the first proposal by 1 March 2017.

[58] Mr Smyth expressed concern that Mr Vaughan who he understood was the decision maker was not on the call. Mr Smyth stated that the outcome was

predetermined as Mr Vaughan had told Mr Sedlmeier on 12 February 2017 that his role was redundant. Mr Smyth also indicated to Ms Harding that he had questions about Engineering RGV's financial position and told her the timeframe by which feedback was to be provided was too short. This was reiterated to Engineering RGV in a letter from Mr Smyth on 27 February 2017.

### **Second proposal**

[59] On the same day as the telephone conference held to discuss the first proposal, Mr Sedlmeier received a letter from Mr Vaughan with a second proposal. The letter attached a

restructure proposal" and stated that in the circumstances, "...we confirm that we are considering making your role as Senior Process Engineer redundant.

A request was made for a meeting on 1 March 2017 to discuss the second proposal.

[60] The "Restructure proposal" stated:

As you have been made aware, the management team have recently been faced with a financially challenging environment due to several factors. This includes recently having created a number of new roles within the company.

The management team has had to look for solutions to ensure the long-term sustainability of the business.

As part of this, the restructure is proposing to make the role of Senior Process Engineer redundant. This role was initially implemented in the business to do internal work around the Company systems (including management team support, and information gathering and analysis to assist company direction to be set, and reviewing and improving the internal computer file storage and retrieving systems). The Company has identified that no further work is currently needed on these systems, and as such consider the role surplus to staffing requirements.

Further to this, the salary of the Senior Process Engineer is not chargeable to customers, putting further financial strain on the Company....

### **Response on behalf of Mr Sedlmeier**

[61] Mr Smyth's letter of 27 February 2017 raised concerns about the second proposal and sought answers to questions in respect of it. Questions were raised in respect of the financial basis of the proposal and the length of time it would take for

Engineering RGV to “trade out of” the cash flow crisis. A request was made for a 12 month cash flow forecast.

### **Response on behalf of Engineering RGV**

[62] On 30 March 2017, Ms Harding responded to Mr Smyth’s letter. Ms Harding stated that the purpose of the restructure was to make “financial savings” and that Engineering RGV was unable to continue to pay the salary for the Senior Process Engineer role. Proposed savings were claimed to be \$90,000. Ms Harding refused to provide the cash flow forecast requested on the basis it was commercially sensitive information. In the letter from Employsure on 4 April 2017, the request for financial information requested on behalf of Mr Sedlmeier was again refused for the same reason, that it was confidential. The letter stated that the restructure would create an additional 4,000 billable hours and provide an extra \$300,000 per annum.

[63] Mr Sedlmeier was invited to provide feedback by 3.00pm on 5 April 2017. An extension was subsequently granted for feedback to be provided by Mr Sedlmeier by 7.30am on 6 April 2017. This was provided in writing by Mr Sedlmeier on 6 April 2017.

### **Dismissal for redundancy – 7 April 2017**

In a letter to Mr Sedlmeier dated 7 April 2017, Mr Vaughan confirmed that Mr Sedlmeier’s role was redundant with effect from 21 April 2017. Mr Sedlmeier was given 2 weeks’ notice which was paid to him in lieu of working.

### **The Law**

[64] The standard for assessment of the genuineness of a redundancy decision is whether the decision is what a fair and reasonable employer could have done in the circumstances, based on business requirements, and was not used as a pretext for dismissing a disliked employee<sup>6</sup>.

[65] The financial accounts provided to the Authority show that there was a significant decline in Engineering RGV’s net profit in the period October 2016 to January 2017. This was accepted to be the case by Mr Sedlmeier who took steps to address the situation.

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<sup>6</sup> *Grace Team Accounting Limited v Brake* 2014 NZCA 541 (CA) at [85]

[66] A discussion was held with Mr Sedlmeier in early February 2017 about the financial situation and that his role may be made redundant. After Mr Sedlmeier raised his concerns about the process being undertaken by Engineering RGV in relation to his proposed redundancy, Engineering RGV embarked upon a redundancy process which included consultation with him and discussions about other options that may be available.

[67] Mr Vaughan took into account the cashflow crisis and the poor financial position Engineering RGV was in, the fact that Mr Sedlmeier's role was not one in which Engineering RGV could charge its customers, his salary was the highest, and advice from Engineering RGV's accountants that it was carrying too many staff and reductions were necessary, as factors which led to his decision that Mr Sedlmeier's position was to be made redundant.

[68] Following the consultation process, Mr Sedlmeier's position was terminated for redundancy on 7 April 2017.

[69] The consultation process was hasty and was not carried out well by Engineering RGV. To ask for feedback about one proposal and before obtaining that feedback, to introduce a second proposal for feedback was clumsy and gave Mr Sedlmeier the impression he was being targeted unfairly and for an ulterior motive.

[70] Mr Sedlmeier says the decision to make his position redundant was for ulterior motives, namely, Mr Vaughan wished to "get rid" of him. Mr Sedlmeier says Mr Vaughan had already pre-determined the decision on 12 February 2017 and was extremely angry over what he saw as a "reneging" by Mr Sedlmeier of an agreement entered into with him on 12 February 2017. Mr Sedlmeier points to the letter written by Mr Vaughan to the German Consulate withdrawing his support for Mr Sedlmeier's dual citizenship as another factor which demonstrated that Mr Vaughan wished to dismiss Mr Sedlmeier for reasons other than genuine reasons of redundancy.

#### **Letter to German Consulate by Mr Vaughan**

[71] Mr Sedlmeier was anxious to have a signed letter of support for his application for dual New Zealand and German citizenship. Mr Sedlmeier prepared a letter in draft and provided it to Mr Vaughan on 25 January 2017. Following the telephone conference on 12 February 2017, Mr Vaughan signed a second different letter dated 31 January 2017 provided to him by Mr Sedlmeier. Mr Vaughan did not read the

second letter, he signed it in accordance with what he believed to be an agreement with Mr Sedlmeier in respect of his redundancy. Upon receipt of the signed letter, Mr Sedlmeier applied to the Consulate for dual citizenship on 23 February 2017.

[72] On 26 February 2017, Mr Vaughan wrote to the German Honorary Consulate in Auckland stating that he was not the author of the document and that he had no record of the document.

[73] Mr Vaughan stated:

...I would like to point out I signed this letter under extreme duress, as the company is currently restructuring, and the roll [sic] proposed to be dis-established is currently filled by this employee. Gregor has threatened the company with legal action in the form of a personal grievance. I feel like I have been blackmailed, into signing a document which was not created on our Engex company system, and was specifically worded to create the illusion that dual citizenship was necessary to his continued employment...This letter is a fantasy and tantamount to Fraud...Engex cannot, and does not support the letter, in any form, and does not support Mr Sedlmeier's appalling, intimidating and threatening methods, on reflection I should never have signed this, however was driven to do so, in an effort to save 10 other jobs from becoming at risk, if legal action is pursued by Mr Sedlmeier...I am also copying in NZ immigration of this letter, and am seeking advice as to whether I should file complaint with the New Zealand Police.

[74] Mr Sedlmeier was understandably shocked and upset by the contents of the letter and felt it gave support to his concern that Mr Vaughan was trying to get rid of him. Mr Vaughan accepted signing the letter to the German Consulate, it was his responsibility to read it and accept its contents. Mr Sedlmeier was entitled to expect that Mr Vaughan had read the letter and agreed with its contents before signing it. Mr Vaughan's actions during the consultation process were not fair and in my view were designed to prevent Mr Sedlmeier obtaining dual citizenship. This, in my view, was in retaliation for Mr Sedlmeier not accepting that "an agreement" had been reached about his redundancy on 12 February 2017 and insisting on a consultation process.

[75] This is a matter which I will take into account when I consider the personal grievance claim of unjustified dismissal.

#### **Genuine business reasons for restructure?**

[76] I do not accept the redundancy decision made by Mr Vaughan had an ulterior pretext. Up until 12 February 2017, Mr Sedlmeier and Mr Vaughan had a very good

working relationship. Mr Sedlmeier had received a very positive performance review within the first 3 months of his employment by Engineering RGV and his work was valued. When Mr Vaughan spoke to him on 12 February 2017 about his position and the possibility of redundancy, it is my view this was as a result of discussions with his accountant over the financial circumstances the company was in.

[77] Mr Sedlmeier says that Engineering RGV's accounts show that the financial situation in December 2016/January 2017 was a cash flow crisis which improved over the following few months. Mr Sedlmeier says the decision to make his role redundant was premature, if Engineering RGV had waited until the cash flow had righted itself, there would not have been genuine grounds for making his position redundant.

[78] I disagree. Mr Vaughan was closely monitoring the cashflow crisis. However, after further analysis and after taking advice from his accountants, he decided that Engineering RGV was "carrying" too many staff. Mr Sedlmeier was a recently employed staff member, on a high salary and his role was not able to be charged out to customers.

[79] A decision was made in those circumstances to disestablish Mr Sedlmeier's position on the grounds that the position was surplus to the requirements of its business<sup>7</sup>. That position no longer exists at Engineering RGV. Mr Sedlmeier's position has not been replaced nor have other positions where employees have resigned. Mr Vaughan says the current structure of Engineering RGV has been slimmed down considerably as a result of the financial crisis in January/February 2017. Engineering RGV's net loss as at 31 March 2017 was -\$30,573.00. The decision to terminate Mr Sedlmeier's position was made a few days later.

[80] I consider the decision to make Mr Sedlmeier's position redundant on 7 April 2017, was one which Engineering RGV was entitled to make on its assessment of its business requirements at that time. Mr Sedlmeier's redundancy was based on genuine business reasons.

### **Did Engineering RGV carry out a fair process?**

[81] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing

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<sup>7</sup> (As redundancy is defined in Mr Sedlmeier's employment agreement.)

and maintaining a productive employment relationship in which they are responsive and communicative.

[82] The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before a decision is made.

[83] I consider Engineering RGV was in breach of its obligation to act in good faith. Mr Sedlmeier sought access to financial information which was denied. Specifically, Mr Sedlmeier wished access to a 12 month cashflow forecast as he was of the view Engineering RGV may be able to trade out of its financial difficulties. This information could have been provided to him confidentially but was not. Financial information was only provided to the Authority, following the filing of the current proceedings and following a direction by the Authority.

[84] Mr Sedlmeier accepted that Engineering RGV was in financial difficulty in January/February 2017 and there were concerns about the payment of salaries. Mr Sedlmeier was concerned about his own position and sought clarity about his future in early February 2017.

[85] While the consultation process which ensued was clumsy and ultimately I conclude unfair, Mr Sedlmeier was given the opportunity to and did provide his feedback over a period of approximately 6 weeks. Mr Sedlmeier's feedback was taken into account by Mr Vaughan.

[86] It is my view that Mr Vaughan was able to make a decision about Engineering RGV's future as a result of the financial crisis of January/February 2017. Even if Engineering RGV was able to trade out of the cash flow crisis as Mr Sedlmeier envisaged, Mr Vaughan was able to make structural changes to Engineering RGV at the time he did, to prevent a similar eventuality occurring. Mr Vaughan was strongly committed to safeguarding the financial viability of Engineering RGV and he made a decision which he concluded would ensure such financial viability

[87] The cash flow situation may or may not have improved. In any event it is not for the Authority to substitute its own business judgment for that of the employer.<sup>8</sup>

[88] The structural changes made included the disestablishment of the Senior Process Engineer's position.

[89] However, for the reasons given, I consider Engineering RGV, in failing to comply with its statutory obligations to act in good faith, and in the way it acted when reaching its decision to dismiss Mr Sedlmeier for redundancy, were not the actions of a fair and reasonable employer.

[90] Mr Sedlmeier was presented with 2 separate restructuring proposals within a very short period of time. Before he was able to provide feedback on the first proposal, a second proposal was presented to him. Mr Sedlmeier sought financial information which was denied. In addition during the course of the consultation process Mr Vaughan sent a letter to the German Consulate which was inflammatory and understandably gave Mr Sedlmeier the view that he wanted to get rid of him.

[91] These were not the actions of a fair and reasonable employer. I consider in the circumstances, Mr Sedlmeier's dismissal was unjustified.

## **Second Issue**

### **If the dismissal was unjustified, what remedies should be awarded to Mr Sedlmeier?**

[92] As a dismissal for redundancy could justifiably have been made for genuine business reasons, if carried out in a procedurally fair manner, Mr Sedlmeier cannot be said to have lost wages that he might have otherwise earned beyond the end of the two week notice period provided in his employment agreement for termination due to redundancy. He would not have earned wages in that position after that time.

[93] Mr Sedlmeier gave evidence of the emotional impact on him of being dismissed, and a resulting loss of confidence in seeking other work. Mr Sedlmeier says the way in which he was treated made him feel as if he was a "criminal" and that he had never been treated in such a way in his life before.

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<sup>8</sup> *GN Hale & Sons Ltd v Wellington etc Caretakers* IUOW [1991] NZLR 151).

[94] Mr Sedlmeier spoke of his distress, inability to sleep and humiliation which made his life a misery in the weeks leading up to his dismissal and beyond. The letter to the German Consulate only made matters worse for him as did the removal of work tools which he perceived as retaliation for not proceeding with the “agreement” of 12 February 2017

[95] Mr Sedlmeier has been attempting to find other work and has been unsuccessful. This too has caused him a great deal of stress.

[96] I accept Mr Sedlmeier was extremely distressed by the way in which he was treated. Mr Vaughan was contemptuous of Mr Sedlmeier. This was demonstrated by the strong language used by him about Mr Sedlmeier in his witness statement and at the investigation meeting.

[97] I consider in all the circumstances an appropriate award of compensation to be \$20,000 for the loss of dignity, humiliation and injury to feelings resulting from the poorly carried out consultation process and the manner of dismissal. Subject to any contribution by Mr Sedlmeier to his dismissal, I order Engineering RGV to pay Mr Sedlmeier the sum of \$20,000 within 28 days of the date of this determination.

### **Third Issue**

#### **Did the removal of Mr Sedlmeier’s work tools and the sending of the letter to the German Consulate by Mr Vaughan amount to unjustifiable disadvantages?**

[98] Mr Sedlmeier claims he was unjustifiably disadvantaged when his access to Xero and 0365 and his computer was removed. The claims were disputed by Mr Vaughan. Mr Sedlmeier claims the letter to the German Consulate amounted to an unjustified disadvantage.

[99] I do not accept that on the balance of probabilities these actions were unjustified or that Mr Sedlmeier’s employment or conditions of employment were affected to his disadvantage. Mr Sedlmeier remained in employment and continued to be paid during the consultation process.

[100] The letter by Mr Vaughan to the German Consulate related to Mr Sedlmeier’s application for dual New Zealand and German citizenship. It did not relate to Mr Sedlmeier’s employment by Engineering RGV or conditions of employment and

therefore he cannot raise a personal grievance claim in respect of the sending of the letter, in my view.

#### **Fourth Issue**

**If so, what remedies are available?**

[101] This issue does not require determining given the findings above.

#### **Fifth Issue**

**If any remedies are awarded by the Authority, is a reduction required under s.124 of the Act for any blameworthy conduct by Mr Sedlmeier that contributed to the situation giving rise to his grievances?**

[102] Mr Sedlmeier's employment was terminated on the grounds of redundancy, it was a "no-fault" dismissal. For that reason no reduction could be required for any conduct by him that contributed to the situation that gave rise to his dismissal.

#### **Sixth Issue**

**Did Engineering RGV breach its obligations under s.4 of the Act, to act towards Mr Sedlmeier in good faith when it sent a letter to the German Consulate withdrawing support for his application for dual citizenship?**

[103] The sections of the letter from Mr Vaughan to the German Consulate which Mr Sedlmeier found most objectionable are set out in para [73] of this determination. The duty of good faith in section 4 of the Act requires parties to an employment relationship to deal with each other in good faith, not mislead or deceive each other, to be "active and constructive in establishing and maintaining a productive employment relationship".. and to be "responsive and communicative".

[104] Section 4A of the Act provides for the imposition of a penalty on a party to an employment relationship who fails to comply with the duty of good faith in section 4(1) of the Act if the failure was deliberate, serious, and sustained or intended to undermine an employment relationship.

[105] I consider the letter to the German Consulate was completely unacceptable and inappropriate. However, it was written in respect of a matter unrelated to Mr Sedlmeier's employment by Engineering RGW. It was a single event and was not sustained action, it did not amount to a breach for which a penalty should be imposed.

[106] However, I do consider the letter was written in a manner which was unnecessary and caused Mr Sedlmeier added stress and humiliation. This has been taken into account in respect of the award of compensation made under s.123 of the Act.

### **Seventh Issue**

#### **If there was such a breach, should a penalty be imposed?**

[107] This issue does not require a finding.

#### **Costs**

[108] Costs are reserved. The applicant has 14 days from the date of this determination to file a memorandum as to costs. The respondent has 14 days within which to respond.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**