IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 280
3030512

	BETWEEN	SIMONA STEFANOVIJK Applicant
	AND	CHRYSOLYTE APE-ESERA Applicant
	AND	DANIAL NEHO Applicant
	AND	AKINA TRADING LIMITED Respondent
Member of Authority:	Tania Tetitaha	
Representatives:	R Walters, counsel for the Applicants D Green, counsel for the Respondent	
Investigation Meeting:	12 and 13 February 2019 at Auckland	
Submissions [and further Information] Received:	1 March 2019 from the Applicants 1 March 2019 from the Respondent	
Date of Determination:	10 May 2019	

DETERMINATION OF THE AUTHORITY

A. Having regard to the evidence there are proven breaches by Akina Trading Limited of s81(2)(c),(d),(g),(h) and(l) Holidays Act 2003 and s130(1)(g) Employment Relations Act 2000.

B. I order Akina Trading Limited to pay a penalty of $10,000 into the Authority's bank account within 7 days. I then direct $5,000 of the penalty is to be paid to the applicants.

C. I order Akina Trading to pay the following amounts of holiday pay to each of the applicants within 7 days of the determination:

a) Simona Stefanovikj $955.79

b) Chrysolyte Ape-Esera $3,031.92

c) Daniel Neho $792.82

D. The applicants were justifiably dismissed for redundancy. The personal grievance application is dismissed.

E. Costs are reserved. If a party seeks costs it must apply within 14 days of this decision. The other party shall have 14 days thereafter to file any reply.

Employment Relationship Problem

[1] The applicants were employed by Akina Trading Limited (Akina) to work in "Pop Up" shops throughout the North Island. Akina operate "Pop Up" shops or sales events around New Zealand an E Commerce business selling cosmetics and fragrances. Each event is typically staffed by two people.

[2] All three applicants were salaried employees in management positions.

Simona Stefanovikj

[3] Simona Stefanovikj was employed on a casual basis on or about 23 March 2015 to work at the "Pop Up" shops. On 10 May 2016 Ms Stefanovikj signed an employment agreement appointing her assistant store manager. There is an issue regarding the intersection of the applicants' hours of work and holiday pay entitlements. The relevant clauses are set out below:

> **6 Hours of Work**
>
> **6.1 Full time hours with an obligation to perform overtime as necessary but without extra payment.**
>
> The employee's normal hours of work shall be three weeks on and one week off, during on weeks the employee is required to work between Monday to Sunday. The employee may also be required to perform such overtime as ma be reasonably required by the employer in order for the employee to properly perform their duties. The employee's salary shall fully compensate them for all hours worked.

8 Holiday and leave entitlements

8.1 Short form clause on annual leave as set out in the Holidays Act

The employee shall be entitled to be paid annual leave of four weeks per year after 12 months continuous employment with the employer, in accordance with the Holidays Act.

If the employee leaves the employment before becoming entitled to an annual holidays to cover the amount of annual holidays they took in advance:

- The employer may recover the amount paid to the employee for holidays taken in advance that is not covered by the employee's annual holiday entitlement.

- This clause is subject to the Wages Protection Act 1983. The employee's signature will satisfy the written consent requirement of s 5 of the Wages Protection Act 1983.

[4] On 1 May 2017 the parties signed a new employment agreement. This employment agreement appointed Ms Stefanovikj as a retail manager. However, it substantially changed her hours of work and her holiday and leave entitlements below:

6 Hours of work

6.1 Full time hours with an obligation to perform overtime as necessary but without extra payment.

The employee's normal hours of work shall be three weeks on and one week off, during on weeks the employee is required to be available for work between Mondays to Sunday however the event schedule will dictate actual days of work and actual days off. Days off will be deducted from accrued rest/holiday days as out lined in clause 8.1. The employee may also be required to perform such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. The employee's salary fully compensates them for all hours worked.

8 Holiday and leave entitlements

8.1 Annual leave and rest days

The employee shall be entitled to be paid annual leave of 5 weeks per year in accordance with the Holidays Act.

The employee shall be entitled to 2 rest days for every week worked. This totals 104 rest days in a calendar year.

Combining rest days and annual leave, this entitles the employee to 129 rest days and annual leave days combined. These will accumulate on a pro-rata basis for every day or part day worked.

> Every day that the employee is not working will be deducted from this balance.
>
> At the employer's discretion holiday/rest days may be taken in advance.
>
> If the employee leaves their employment before becoming entitled to enough annual holidays to cover the amount of annual holidays they took in advance:
>
> - The employer may recover the amount paid to the employee for holidays taken in advance that is not covered by the employee's annual holiday entitlement.
>
> - This clause is subject to the Wages Protection Act 1983. The employee's signature will satisfy the written consent requirement of s 5 of the Wages Protection Act 1983.

Chrysolyte Ape-Esera

[5] Ms Ape-Esera was employed as a store manager on or about 15 February 2018. She started her employment on or about 8 March 2017.

[6] She signed an employment agreement. Her hours of work and holiday leave entitlements were the same as Ms Stefanovikj.

Daniel Neho

[7] Daniel Neho was employed on 4 July 2017. He signed an employment agreement. His hours of work and holiday leave entitlements were the same as Ms Stefanovikj and Ms Ape-Esera.

Records & wage arrears

[8] On or about early 2018 the applicants engaged a lawyer who raised concerns about their pay and leave balances. They wrote to their employer requesting copies of their wage and time records on or about 16 March 2018. Some records have been provided in the form of Excel spreadsheets. The applicants alleged these were inadequate or wrongly recorded hours worked.

[9] The applicants filed proceedings in the Authority on 24 May 2018 alleging inadequate and inaccurate wage and time records. They sought "back-pay and interest", penalties and costs.

Redundancy

[10] Following the filing of proceedings Akina advised the applicants they were being considered for redundancy. On 9 July 2018 Damian Green, Akina director and manager, wrote to the applicants outlining the proposal to disestablish the applicants' roles and create 2 new roles of Store and Export Manager based in the Hastings warehouse and attached a job description. The basis for the restructuring proposal was increased competition in the discounted fragrances market and increased costs. It proposed reducing the number of pop up events from 8 to 4 per month and focusing on growing the online platform. Staff would be centralised to the Hastings warehouse and cover warehouse/shipping duties, E-commerce support and run the pop up stores. Feedback was requested by 13 July 2018.

[11] Mr Neho had left on approved leave that same day. He was not due to return to New Zealand until 22 July 2018. He instructed the same lawyer as the other applicants.

[12] On 11 July 2018 the applicants lawyer sought mediation to discuss the restructuring proposal. Akina noted the restructure was a proposal only. It was implied by this email that Akina saw no point in attending mediation.

[13] The applicants replied through their lawyer on 13 July 2018 questioning the genuineness of the restructuring proposal and consultation. They raised various concerns including that the redundancy was in retaliation for their wage arrears action. It noted the applicants had not been rostered to work beyond that week and sought information on the alleged financial constraints.

[14] Mr Green replied with further financial information and disagreed the restructuring was not genuine. The applicants replied seeking withdrawal of the restructuring proposal. Instead Mr Green extended the time for feedback to 18 July 2018.

[15] On 16 July Ms Stefanovikj received a roster for work. The other applicants were on pre-planned leave. Ms Stefanovikj received advice another employee and his wife were

working with her at the pop up shop. She understood the respondent intended hiring the employee's wife to replace Ms Stefanovikj and the other applicants.

[16] Ms Stefanovikj emailed Mr Green and another manager on 17 July 2018 regarding the proposal. She suggested retaining staff but with two shows per month, two weeks on and the third week off, flying straight to next show instead of home again, getting rid of security and setting monthly sales targets. She also raised a personal grievance about bullying by another employee.

[17] The parties continued to exchange information about the restructuring proposal up and until 23 July 2019.

[18] On Tuesday 24 July 2018 Akina sent a letter to the applicants directly advising they would proceed with the restructuring. The applicants' employment ended effective 8 August 2018. None of the applicants sought appointment to the new position. This is because it was based in Hastings and they lived elsewhere in New Zealand.

[19] The applicants filed a statement of problem in the Authority on 24 May 2018. An amended statement of problem was filed on 1 November 2018.

Issues

[20] In a telephone conference on 14 December 2018 the following issues were set down for determination:

a) Does the respondent have compliant wage and time records?
    (i) If not, should a penalty issue?
    (ii) Are there any wages owed?
    (iii) Was there an unjustified dismissal for redundancy?

[21] The redundancy raises two sub-issues:

(a) Was there substantive justification or genuine reasons for the redundancy? And

(b) Was the process followed a fair and reasonable one?

Complaint wage and time records

[22] Akina has admitted that it did not fully comply with its obligation to keep holiday and leave records under s 81 of the Holidays Act 2003. This is because they kept a record of the combined running total of the rest days and holiday leave combined for each employee and did not separate out the holiday leave entitlement as required by the Holidays Act 2003.

[23] The failure to separately record the holiday entitlements breaches of s 81 of the Holidays Act 2003:

> **81 Holiday and leave record**
>
> (1) *[Repealed]*
> (2) An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer, the following information:
> (a) the name of the employee:
> (b) the date on which the employee's employment commenced:
> (c) the number of hours worked each day in a pay period and the pay for those hours:
> (d) the employee's current entitlement to annual holidays:
> (e) the date on which the employee last became entitled to annual holidays:
> (f) the employee's current entitlement to sick leave:
> (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
> (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
> (ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable):
> (hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable):
> (i) the dates of, and payments for, any public holiday on which the employee worked:
> (j) the number of hours that the employee worked on any public holiday:
> (ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred
> (k) the date on which the employee became entitled to any alternative holiday:
> (l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
> (m) the cash value of any board or lodgings, as agreed or determined under section 10:
> (n) the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):

(o) the date of the termination of the employee's employment (if applicable):
(p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
(q) any other particulars that may be prescribed.

(3) The holiday and leave record must be kept—
(a) in written form; or
(b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.

(3A) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (2)(c) if those usual hours and pay are stated in—
(a) the employee's wages and time record kept under section 130 of the Employment Relations Act 2000; or
(b) the employee's employment agreement; or
(c) a roster or any other document or record used in the normal course of the employee's employment.
(3B) In subsection (3A), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.
(3C) Despite subsection (3B), the employer must record any additional hours worked that need to be recorded to enable the employer to comply with the employer's general obligation under section 4B(1) of the Employment Relations Act 2000.

(4) Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.

(5) The holiday and leave record may be kept so as to form part of the wages and time record required to be kept under section 130 of the Employment Relations Act 2000.

[24] Akina admitted it had not maintained a separate holiday leave record from the rest days employees are allocated. The holiday record produced appears to have been created to meet the requirements of s81 Holidays Act 2003. During hearing it emerged the applicants were considered to be working a seven-day week of which they were entitled to two rest days or 104 rest days per year. Once the rest day allocation was exhausted, they were then required to use their holiday leave for days they had no work. The record does not accurately show the numbers of rest days as opposed to annual leave days used.

[25] Further there is no reasonable basis for the respondent to have assumed days in excess of the rest days were needed to cover days the applicants did not work. This is because the

respondent did not require the applicants to keep records of their days worked. It appears to have utilised a roster to record the days they believe have been taken off.

[26] Further the respondent issued a Memorandum to staff in March 2018 stating employees were rostered to work 39 weeks and the remaining 13 weeks would be 4 weeks annual leave in advance and paid time the employees are not required to work. This did not take account of any work required on public holidays. The holiday leave record produced does not identify payment for public holidays worked or taken and/or alternative leave. The pop up shops operated on a Thursday to Sunday. Some but not all public holidays fall outside of the rostered working week on Monday's.

[27] Having regard to the evidence there are proven breaches by Akina Trading Limited of s81(2)(c),(d),(g),(h) and(l) Holidays Act 2003 and s130(1)(g) Employment Relations Act 2000.

[28] Section 130(1)(g) requires the wage and time record contain "the number of hours worked each day in a pay period and the pay for those hours". This is because it did not keep a record of the hours worked other than relying upon the rosters.

Penalties

[29] The Court has now set a 7 step statutory test to be applied under s133A Employment Relations Act 2000 combined with 4 additional steps drawn from a pre-s133A case known as *Preet*.[1] There appears to now be an 11 step test in determining penalties.

[30] In the interests of brevity I record I have considered all 11 steps but have identified the most relevant steps to determination of the level of penalty below:

Statutory considerations under s133A

Nature and extent of breach

[31] The breaches are of s81(2) of the Holidays Act 2003 by the leave record failing to record:

- the number of hours worked in each day and the pay for those hours (s81(2)(c);

[1] *Labour Inspector v Daleson* [2019] NZEmpC 12 citing s133A and *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

- the current annual leave entitlement (s81(2)(d);
- the dates on which any annual holiday has been taken (s81(2)(g);
- the amount of payment for any annual holiday that has been taken (s81(2)(h);
- the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay (s81(2)(l).

[32] The breach of s130(g) Employment Relations Act 2000 pertaining to the wage and time record is similar to the breach of s81(2)(c) Holidays Act 2003. I intend for these purposes treating them the same breach. Therefore there are 5 breaches.

Intentional, inadvertent or negligent

[33] The breach appears negligent. The respondent ought to have known its records were incorrect. It is required by law to ensure they meet minimum standards.

Losses

[34] The breaches affected all of the applicants to their detriment. As noted below they are all owed annual leave.

Compensation, reparation or restitution

[35] The respondent has made remedial payments. There has been a dispute regarding whether further wage arrears were owed set out below. Payment has been directed to occur within 7 days.

Circumstances of breaches

[36] Employees are vulnerable when inaccurate or defective records are kept. They do not know their current annual leave entitlement which makes it difficult for employees to plan when to take leave at all.

Person involved in similar conduct before the Authority

[37] The respondent has appeared before the Authority once regarding an application for penalty under s81 Holidays Act 2003. A penalty of $100 was awarded.[2]

***Preet* steps**

[38] The maximum penalty each of the 5 breaches is $20,000 making $100,000 in total.

[39] In terms of aggravating factors, other than general non-compliance and incorrect annual leave payments, no others were identified. No uplift should be given for this factor.

[40] In terms of mitigating factors, there was an early admission from the respondent about non-compliance of the wage and time and holiday record in its statement in reply. There was a dispute about the amounts owed in wage arrears that needed determination. However the respondent remained able and willing to pay any underpayments. This should be reflected by a significant discount.

[41] There is no information on the respondents' finances that would affect the amount payable.

[42] In terms of proportionality the Court has identified two factors (i) proportionality of the final penalty to the amount originally at issue, and (ii) whether there was any real prospect that the final amount would be paid.

[43] The losses caused by the breaches for the applicants range from $955.79 to $5,052.32. From the hearing it is likely these amounts shall be paid within the timeframe imposed.

[44] The applicants seek $60,000 ($20,000 each) for the breaches. This is substantially disproportionate to their losses. I also note for similar offending by this respondent the Authority only awarded $100.

[45] In my view a global penalty of $10,000 is appropriate. This matter arises out one set of defective records namely the wage, time and leave record. All applicants have suffered to a similar extent.

[2] *Abdallah v Akina Trading Limited* [2018] NZERA 344.

[46] I am not persuaded to pay the entire amount to the applicants. 50% of the amount is appropriate in the circumstances.

[47] Accordingly I order Akina Trading Limited to pay a penalty of $10,000 into the Authority's bank account within 7 days. I then direct $5,000 of the penalty is to be paid to the applicants.

Wage arrears

[48] The combined total of rest and holiday leave entitlements gives rise to a wage arrears dispute about the employer's requirement employees use holiday leave when their 104 rest days have been exhausted. The applicants' dispute there was any agreement to the use of their holidays in this manner.

[49] The deduction of holidays when rest days are exhausted is not provided for within the Holidays Act 2003. Section of the Holidays Act 2003 sets out when they are to be taken:

> **18 Taking of annual holidays**
>
> (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
>
> (2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.
>
> (3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.
>
> (4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.

[50] The parties have a clause that purports to give consent to holiday entitlement being used when rest days were exhausted. This clause cannot on its own allow meet the requirements of s18 Holidays Act 2003 and allow the deduction of annual leave without consultation with the employee. This is because an employee could have worked on the rostered days off or may wish to preserve their annual leave by taking leave without pay.

[51] There are defects in the holiday leave record produced. For example it does not record the applicant's actual hours of work on each day of the pay period as required by s81(2)(c) Holidays Act 2003. It also does not set out the dates when the applicants have taken annual leave as required by s81(2)(g) Holidays Act 2003 as opposed to a rest day. This

has resulted in the applicants being unable to bring an accurate claim regarding any annual leave entitlements still owed.

[52] From the evidence Akina assumed the applicants worked the rostered days that were usually 5 days on 2 days off per week. Sometimes there were more than 2 rest days noted.

[53] The applicants' evidence sought to contradict this. They allege they were required at times to wait for freight trucks bringing stock and shop fittings and/or travel to and from events on their rostered rest days as well. The inference was that they worked at times 6-7 days per week and were not on rest days or taking leave as alleged by Akina. Ms Stefanovickj also gave specific evidence she worked days in February 2018 and was not on leave as recorded. The absence of any recorded hours of work makes it difficult to resolve this matter other than in the applicants favour. I prefer the evidence of the applicants about the amounts of leave taken.

[54] Ms Stefanovikj accepted she took 7.1 weeks leave during her employment. Ms Ape-Esera and Mr Neho accept during the annual shutdown they took two weeks leave.

[55] Therefore the applicants are owed payments for holiday leave following termination as set out below:

Name	Holiday leave entitlement	AWE[3] vs OWP[4]	Leave taken/paid	Balance
S Stefanovikj	8 weeks for the period 23/8/2015 to 23/8/2017 Plus Gross earnings 23/8/17 to 24/7/18 19,893.53 x 8% = $1,591.48	AWE 1/52 of $54,091.34 = $1,040.22 OWP 3,674.02 /4 = $918.51 AWE $1,040.22 to be used[5]	7.1 weeks x AWE $1,040.22 plus payment on termination $1,571.89 Total $8,957.45	8 weeks x AWE $1,040.22 = $8,321.76 Add 8% gross earnings $1,591.48 = $9,913.24 Subtract leave taken/paid $8,957.45

[3] Section 5 Holidays Act 2003 (HA) definition average weekly earnings
[4] Section 8 HA definition ordinary weekly earnings
[5] Section 21(2)(b) HA calculation of annual HP at a rate based on the greater of OWP or AWE for previous 12 months.

				Balance owed $955.79
Chrysolyte Ape-Esera	5 weeks for the period 8/3/2017 to 8/3/18 Gross earnings from 8/3/2018 to 24/7/18 $21,495.14 x 8% = $1,719.61	AWE 1/52 of $52,530.21 - $1,010.20 OWP 3,661.52 /4 = $915.38 AWE $1,010.20 to be used[6]	2 weeks taken = $2,020.40 HP Payment on termination $1,718.29 Total $3,738.69	5 weeks x AWE $1,010.20 = $5,051.00 Add 8% gross earnings $1,719.61 = $6,770.61 Subtract leave taken/paid $3,738.69 **Balance owed $3,031.92**
Daniel Neho	4 weeks for the period 26/6/2017 to 26/6/2018 Gross earnings from 26/6/2018 to 24/7/18 $4,477.54 x 8% = $358.20	AWE 1/52 of $46,615.34 = $896.45 OWP $3,493.64 /4 = $873.41 AWE $896.45 to be used[7]	2 weeks taken = $1,792.90 Payment on termination $2,254.73 Total $4,047.63	5 weeks x AWE $896.45 = $4,482.25 Add 8% gross earnings $358.20 = $4,840.45 Subtract leave taken/paid $4,047.63 **Balance owed $792.82**

[56] Accordingly, I order Akina Trading to pay the following amounts of holiday pay to each of the applicants within 7 days of the determination:

a) Simona Stefanovikj $955.79

b) Chrysolyte Ape-Esera $3,031.92

[6] Section 21(2)(b) HA calculation of annual HP at a rate based on the greater of OWP or AWE for previous 12 months.

[7] Section 21(2)(b) HA calculation of annual HP at a rate based on the greater of OWP or AWE for previous 12 months.

c) Daniel Neho $792.82

Redundancy

Were the reasons for redundancy genuine?

[57] Redundancy arises where an employee is superfluous to the business's needs. This could arise where an employer seeks to make the business more efficient. The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.[8]

[58] A decision to make an employee redundant must be shown to be genuine where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee. If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with that could be expected to satisfy the s 103A test. The subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer could have done in the circumstances.[9]

[59] The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.[10]

[60] The timing of the redundancy decision following the applicants wage arrears application to the Authority appears suspicious. However it would be speculative to view the timing as having any significance without any further supporting evidence.

[61] The respondent supplied a significant amount of financial information regarding the viability of the pop-up shop events. It showed the pop-up shop events were running at a financial loss. Conversely e-commerce sales were increasing. These were managed out of the respondent's Hastings warehouse. Its proposal to reduce the number of pop-up events and staffing appears to have an evidential basis.

---

8 *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54].

9 *Grace v Brake Team Accounting* [2014] NZCA 541 , [2015] 2 NZLR 494, (2014) 10 NZELC 79-049, [2014] ERNZ 129, (2014) 12 NZELR 219 at [85].

10 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37]

[62] The applicants disputed the financial information regarding declining sales. It provided primarily anecdotal evidence that they did not perceive any reduced sales. No other evidence was produced to show the financial information Mr Green provided to the applicants was flawed or so inaccurate it could not be relied upon.

[63] The applicants seem to rely upon the fact the respondent gross sales exceed the direct expenses of the pop-up shops and therefore they should retain their employment. The direct expenses of the pop-up shops were nearly one third of gross sales. Other expenses such as general overhead and costs of goods sold were not included in those direct expenses. It was likely that the costs of the pop-up shops were greater than one third of gross sales.

[64] When faced with increased costs and reduced profits a reasonable employer could consider business efficiencies including reducing numbers of pop-up shop events and combining staffing of the Hastings Warehouse with the staffing of the pop-up events. In my view there were genuine reasons for the redundancy.

Was the process leading to redundancy

[65] Once it is accepted the applicants employment was terminated the evidential burden falls upon the employer to justify if its' action were, what a fair and reasonable could have done in all the circumstances at the time the dismissal or action occurred (s 103A(2). In applying this test the Authority must consider the matter set out in s 103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond in genuinely considered the employer's explanation prior to dismissal.

[66] There is little dispute the respondent's concerns were raised. The applicants submit there was unfairness because the consultation took place during a period one applicant (Daniel Neho) was out of the country on unpaid leave. Given he had instructed a lawyer and did not raise this as a concern during consultation any defect was minor in the circumstances and did not cause unfairness.

[67] The applicants also referred to the failure to provide the respondents "financial modelling" that it relied upon to conclude the pop-up events were unprofitable and that it needed to undertake an analysis to show "how much it needed to save and how much the

proposal would save". The respondent had provided financial information that showed it was operating the pop-up shop events at a loss.

[68] The applicants also sought the respondent's gross profit, EBITDA and "the last 3 years financial data". The respondents noted the gross profit and EBITDA were "well down" and running in the negatives. It stated it would produce these to an Authority Member if required but no such order was sought by the applicants. The inference was the information was confidential information. Akina's was entitled to protect its financial information from unfettered disclosure because this could impact upon its business.

[69] Even if there was a breach, it was minor and did not cause unfairness. This is because no evidence was produced to dispute the reduced profitability of the pop-up events. I am also uncertain what value the financial information requested would have had unless an expert had been engaged to review and give evidence about it. None was engaged prior to or at hearing.

[70] Only Ms Stefanovikj provided feedback on the proposal. This was considered prior to the decision for redundancy.

[71] The notice and consultation requirements have been met. The applicants were justifiably dismissed for redundancy. The personal grievance application is dismissed.

[72] Costs are reserved. If a party seeks costs it must apply within 14 days of this decision. The other party shall have 14 days thereafter to file any reply.

TG Tetitaha
Member of the Employment Relations Authority