IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 513
3064512

	BETWEEN	SUELLEN LUGG Applicant
	AND	GLAXOSMITHKLINE CONSUMER HEATLTHCARE NEW ZEALAND ULC Respondent
Member of Authority:	David G Beck	
Representatives:	Kirsty Petersen and Adam Mapu, advocates for the Applicant Laura Scampion and Julia MacGibbon, counsel for the Respondent	
Investigation Meeting:	30 November 2020	
Submissions Received:	26 May and 30 November 2020 from the Applicant 12 June and 30 November 2020 from the Respondent	
Date of Determination:	9 December 2020	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Suellen Lugg claims that she left the employment of Pfizer Consumer Healthcare (now trading as GlaxoSmithKline Consumer Healthcare – "GSK"), in response to her Southern Territory Sales Manager role being restructured. The restructure resulted in territory and workload being expanded and Ms Lugg feeling that she was compelled to apply for the changed role that GSK appointed her too. Ms Lugg believes that GSK was obliged to pay her redundancy compensation as per her employment agreement.

[2] By contrast, GSK considers that Ms Lugg was not redundant as her employment was ongoing, albeit with an expanded territory. GSK contends that Ms Lugg did not properly

engage about the scope of her changed role, she resigned prematurely to obtain alternative employment and that the restructuring was carried out in a substantively and procedurally fair manner that accommodated Ms Lugg's individual circumstances.

[3] GSK assert generally, that Ms Lugg was redeployed to a substantially similar role invoking the technical redundancy provision of her employment agreement disentitling her to redundancy compensation.

[4] Ms Lugg also initially claimed that GSK unjustifiably dismissed and/or constructively dismissed her. Ms Lugg seeks payment of redundancy compensation (plus interest) and compensation for hurt and humiliation believing the restructuring to be pre-determined and implemented without due regard to statutory good faith obligations.

[5] GSK's statement in reply contended Ms Lugg's employment did not end by reason of redundancy, as she:

1) resigned after obtaining alternative employment; and

2) was appointed to a substantively similar role prior to resigning and was therefore not entitled to access redundancy compensation as she was only 'technically' redundant.

[6] GSK identified a counter claim seeking a penalty in the sum of $10,000 for breach of good faith, contending that Ms Lugg's communication during the restructuring was deficient.

[7] After case management teleconferences on 16 September 2019 and 13 March 2020 Ms Lugg's advocate conceded that the constructive dismissal claim had been raised out of time. This was withdrawn and an amended claim lodged suggesting that Ms Lugg had been:

1) unjustifiably dismissed;

2) unjustifiably disadvantaged by the restructuring: being pre-determined, effected unfairly, having no genuine consideration of feedback from Ms Lugg and that Ms Lugg had been the subject of an unfair selection "criteria and process" that imposed an unreasonably expanded territory upon her existing role and thus created a new role that was substantively different to the one she formerly

occupied that consequently should have entitled Ms Lugg to an option of redundancy compensation.

[8] A 1 April 2020 investigation meeting did not proceed due to the Coronavirus lockdown, so at a 12 May 2020 teleconference parties agreed that the Authority could determine the preliminary matter of whether Ms Lugg had access to a contractual redundancy payment in the circumstances of her employment relationship with GSK ending.

[9] However, after considering submissions that I found useful on all matters, I determined that the additional dismissal and disadvantage claims impinged upon the question of whether a redundancy situation was evident and I convened an investigation meeting on 30 October 2020 to hear from Ms Lugg and GSK managers, Andrew Jenkin, John Sawicki and Lance Barnes. The party's representatives made further oral submissions at the investigation meeting.

[10] Pursuant to section 174E of the Employment Relations Act 2000 ("the Act") I make findings of fact and law and outline conclusions but I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, appearance at the investigation meeting and documentation provided.

The questions that will determine if Ms Lugg has access to redundancy compensation

[11] The first and central issue for determination is the interpretation and application of key sections of the employment agreement between Ms Lugg and GSK.

[12] Questions I asked the parties to address in initial written submissions were:

a) Is Ms Lugg entitled to redundancy compensation on the basis that she was compelled to accept a role she considered to be substantially different to the one she formerly occupied, or was the altering of the role a permissible unilateral variation of Ms Lugg's former role, consistent with clause 1.3 of her individual employment agreement?

b) Was Ms Lugg in a technical redundancy situation (because she turned down an offer of redeployment) and thus disentitled to redundancy compensation.

c) Is Ms Lugg estopped from pursuing her claim by her expressed interest in the changed role offered and her subsequent act of accepting and commencing alternative employment?

d) At what point in time did the employment relationship end and who brought it to an end.

e) Whether costs should be awarded to the successful party.

[13] GSK's counsel also asked that I consider a further issue that was generally whether Ms Lugg's "employment ended for redundancy".

What caused the employment relationship problem?

[14] Ms Lugg commenced employment with GSK's previous incarnation around 1996 as a sales representative servicing pharmacies. At the time of the restructuring (late 2018) an individual employment agreement dated 23 September 2014 prevailed, recognising continuous service since her employment commenced up to her last position of Southern Sales Territory Manager.

[15] Ms Lugg, based in Christchurch, had a territory encompassing the South Island excluding the Marlborough region. The role involved regular travel including being away from home up to seven nights every six weeks. GSK before the restructuring, divided New Zealand into four territories serviced by four territory managers (three located in the North Island and one in the South Island).

[16] In mid-November 2018, Ms Lugg recalled a call from her Auckland based manager, Lance Barnes, inviting her to a Christchurch meeting with him and John Sawicki, a sales director of GSK based in Sydney.

[17] At the meeting of Friday 23 November, Ms Lugg says she was told by Mr Sawicki that her employer intended to combine her existing sales territory with the Wellington/Wairarapa one and reduce the New Zealand sales workforce by one person.

[18] The rationale for change was presented as being to align the revenue of the two combined territories with the other two North Island territories (Auckland and Bay of Plenty). Ms Lugg recalls being told that the changes must be in place by 1 December 2018 to coincide with a New Zealand/Australia business announcement scheduled for 29 November prior to a company sales conference in Australia. Ms Lugg was then apprised of a sales role vacancy in Queensland and says she was asked to consider over the weekend which of the two proposed roles she wanted and being told that the conversation was confidential and should not be discussed with her colleagues.

[19] Mr Sawicki recalls being briefed about the proposed changes on 21 November and then being tasked with meeting Ms Lugg and Kendall Hewetson, the Wellington/Wairapara territory manager. Mr Sawicki provided the Authority with a copy of an HR prepared script for the meetings. He conceded that prior to the meeting no purpose for the meeting was disclosed to Ms Lugg and says that was a deliberate strategy.

[20] Mr Sawicki claimed that he followed a provided HR script at the meeting with Ms Lugg and did not in his written brief, recall mentioning the Queensland role and that the discussion should remain confidential. However, during the investigation meeting both Mr Sawecki and Mr Barnes acknowledged they made a mistake due to their mutual inexperience in handling a restructuring situation and they did go ‘off script’ and alluded to the Queensland position at the first meeting. Mr Sawicki explained that confidentiality was being sought from their perspective to protect Ms Lugg’s privacy.

[21] Mr Sawicki and Mr Barnes deny telling Ms Lugg that she had the weekend to consider both roles as optional offers. No notes were taken of this meeting but I consider it more likely than not that Ms Lugg misunderstood the detailing of potential options at this stage.

[22] Ms Lugg was not provided with any documentation at the first meeting so, later that day she emailed Mr Barnes seeking clarity, including: whether her role was being made

redundant and if either role was turned down - would she be made redundant and if so, what were the terms covering this situation. She acknowledged an offer of EAP counselling.

[23] Rather than specifically address Ms Lugg's queries, except to state that the company retrenchment policy would apply if "…..your employment ends due to redundancy", Mr Barnes email reply of 26 November, entitled "Proposed Restructure", briefly described the rationale behind the proposed changes and sought feedback prior to any final decision. A meeting of 28 November was suggested and Ms Lugg was encouraged to bring a representative or support person. The email concluded that Ms Lugg would "….be informed of any decisions as soon as possible after the meeting".

[24] In giving evidence, Mr Barnes said that he had no hand in drafting the responses to both Ms Lugg and Ms Hewetson's queries and that he had to elicit such from HR and others in Australia. Generally, Mr Barnes who had only been in his role for three months, said he played no role in formulating the restructuring proposal and he was only the New Zealand based 'messenger' or conduit between the parties.

[25] Mr Barnes addressed Ms Lugg's questions by a further 27 November email, detailing specific responses including disclosing responses to Ms Hewetson's questions. The penultimate sentence of this email said "It is important to know that the business will make a decision by COB Friday 30th November 2018".

[26] Of some confusion to Ms Lugg, was the response to her question: what if she turned down an offer? – which Mr Barnes responded: "Out of two NZ territories one individual's role will be made redundant" and "The impacted individual will however will be [sic] able to be redeployed to the position in the Gold Coast".

[27] Ms Lugg responded the same day (27 November) indicating no interest in the Gold Coast role, that she understood the proposal and financial rationale to merge her role with Wellington and 'its greater area', that she did not want to meet and would prefer a WebEx discussion.

[28] Ms Lugg also stated:

> Given that the new role won't have a salary increase and the time travelled 8-10 days per month and calling on 142 stores, it's a huge stretch to cover and I believe I'm unable to carry this role out and do it well. I feel anxious about it's enormity and I'd like to except redundancy [sic].

[29] Ms Lugg, later on 27 November, participated in a WebEx discussion with Mr Sawicki, Mr Barnes and Andrew Jenkin the General Manager of GSK's Australia/New Zealand operations. Ms Lugg recalls expressing concern about the size of the job, whereas Mr Jenkin recalls trying to reassure her that GSK had not made any decisions on the number of customers to be serviced how they would be canvassed, call frequencies and the amount of travel to be undertaken.

[30] In giving evidence Mr Jenkin, Mr Sawicki and Mr Barnes conceded that the detailed work to analyse how the new territory would be covered had not been completed before the proposal was put to Ms Lugg.

[31] Mr Jenkin's expectation was the successful appointee would work with GSK to develop the mechanics of the role after being appointed. When pressed on the necessity of completing the restructuring consultation phase in such a tight timeframe, Mr Jenkin affirmed it was so that the successful appointee would be able to attend a sales conference in Australia knowing that they had a secure future and the unsuccessful candidate would not be required to attend.

[32] Not reassured by the WebEx discussion, Ms Lugg emailed Mr Barnes stating that she did not want to apply for the combined role as:

> … it is considerably different to what I currently do. I don't wish to be away from home 8/10 days per month and cover such a huge area and with more customers than I have now. The travel distance and aspects of that are substantially different to current role.

[33] Ms Lugg, the next morning emailed Mr Barnes:

> I've had a sleepless night and the things keep going over and over in my mind are mentioned below and it's significantly changed without extra pay to do this role. The travel distance is longer even if the customer count could be the same. I mentioned the timing and seperating from my Partener [sic]. One of the reasons

> was my travel and impacting on how much time we can spend together. I need a work life balance. Life's too short.

[34] Mr Barnes who gave evidence that he was unaware of Ms Lugg's previous relationship issues up to this point, response was:

> The work life balance is important and you need to think about all of this with yourself at the centre. Thank you again for your openness and honesty.

[35] Mr Barnes later that morning (28 November) asked Ms Lugg to supply a breakdown of "you cycle and your nights away? [sic]". Ms Lugg responded describing her South Island travel as being 10 nights away in a 12 week cycle.

[36] Mr Sawicki then emailed Ms Lugg late afternoon of 28 November, suggesting that the consultation period was still ongoing and that final feedback was being sought by the evening of 29 November but the "successful candidate" and proposed changes including the identity of the successful candidate, would be announced "….. by COB Friday 30th November 2018". The email then said whilst 8-10 days travel would be "extremely challenging" this had been reassessed and he said "Whilst there will be a change in the geographical definition of the new territory":

> … we would work with the colleague placed into the role to ensure that the amount of country trip travel is maintained at a similar level to your current territory. As a result, there would not be a major difference in the role.

[37] GSK asserts that the above, displayed a willingness to change the proposal in consultation with the successful candidate and that once appointed, Ms Lugg failed to engage on this offer. I find that the change to the geographical territory mooted was not detailed and it would appear at this point, GSK did not know exactly what the exact scope of Ms Lugg's job was to be and the discussion on how her concerns about excess travel could be potentially accommodated was deferred until after an appointment. However, Ms Lugg did not seek further clarity on the given assurances and at this point she accessed EAP counselling.

[38] Mr Sawicki concluded his email indicating that no "voluntary redundancy" was being offered and if Ms Lugg did not contest the role then this would be considered a resignation without redundancy compensation. Ms Hewetson indicated that she received the same message after expressing similar concerns about the scope of the new role.

[39] Ms Lugg says she discussed the situation over the weekend with Ms Hewetson and was aware that she was seeking legal advice but at this point Ms Lugg said she felt isolated and distressed and did not raise a grievance as she had a mortgage to pay and lived alone so she feared having no income or access to redundancy pay. Too keep her options open, Ms Lugg decided to express an interest in the new position by an 11:22 am email to Mr Sawicki on 29 November (cc'd to Mr Barnes and Mr Jenkin), indicating that although she did not understand the selection criteria, she wished to be considered "for the new territory" and did not want to resign, she concluded:

> I do how ever feel anxiety and feel stressed about my current 108 allocated stores to be stretched to 142, with the same or similar travel 7.5 nights away in a 6 week period.

[40] Ms Hewetson also applied for the new position with similar reservations.

[41] GSK subsequently advertised the role in dispute in early March 2019, stating that the "Wellington and South Island" role has a "Very targeted customer base (137 stores) with: 'Approximately' 8-10 nights away a month".

[42] Prior to the imposed deadline for consultation, the decision to finalise the restructuring was announced by Mr Jenkin in a WebEx discussion of Australian and New Zealand sales staff at 2pm on 29 November. The New Zealand personnel changes were flagged as "TBC". Mr Jenkin explained during the WebEx that the company was in discussion with both Ms Lugg and Ms Hewetson as to who would be appointed South/South Island Territory Manager.

[43] On the same day at 5:53pm, although not disclosed at the time to Ms Lugg, GSK's Mr Jenkin and Mr Barnes received a comprehensive breakdown of the sales territories under review prepared by an external consultant that they referred to in submissions as an IMS analysis. This document would have greatly assisted Ms Lugg and Ms Hewetson in making a submission and I find it was a significant breach of good faith in GSK not disclosing it – particularly when in making a submission on the preliminary issue before me, GSK's counsel suggested that this document was used later to adjust territorial boundaries and client call expectations.

[44] In giving evidence, Mr Jenkin acknowledged the non-disclosure and indicated this was partly because he did not agree with some of the suggestions made in the IMS report. This reinforces my view that GSK had not fully developed their restructuring at the time of concluding consultation and had hastily made significant disruptive staffing changes without adequate information being shared.

[45] Mr Jenkin then undertook a "desktop selection" of the two candidates on the night of 29 November – no selection criteria was disclosed and no interviews took place.

[46] The decision to appoint Ms Lugg was communicated in a further WebEx hosted by Mr Sawicki and Mr Barnes at 9am the next day.

[47] Ms Lugg recalls bursting into tears and then she consulted her GP describing acute anxiety symptoms. She forwarded a medical certificate to Mr Barnes indicating that she was stressed by the outcome of the decision and could not attend the upcoming sales conference. The medical certificate indicated that she was unfit for a week and then she provided a further one by email on 11 December, indicating that she was "on stress leave until 22 December". GSK asserted this prevented any consultation around the territorial scope of the job offer but they provided Ms Lugg with no appointment documentation or the IMS report setting out any basis for such further consultation.

[48] I find from the evidence given by Ms Lugg that her reaction was understandable given the poor communication and lack of clarity on the role changes and the compressed timeframe in which she was expected to respond.

[49] Ms Lugg said that she quickly realised, before the decision to appoint her to the new role at GSK that she would have to look at alternative external job opportunities. One immediately came up on 27 November from a friend at another drug company asking if he could put her name forward for a role he was vacating – Ms Lugg agreed to this.

[50] Ms Lugg and Ms Hewetson then jointly raised a personal grievance of unjustified dismissal and unjustified disadvantage in a letter of 14 December 2018 to Lance Barnes.

[51] On Ms Lugg's behalf, after indicating that she was currently unwell and stressed by the process and uncertain when she could return to work, her advocate identified the key issue

of the newly created position being substantially different to her existing position and asserted that as a consequence:

> "Ms Lugg is not obligated to accept the substantially different role being offered to her and Pfizer [now GSK] has not shown how the role is substantially similar or why Ms Lugg was the successful colleague.
>
> . . .
>
> [As] it stands now, Ms Lugg is being forced to accept a role that she feels is unrealistic in its demands…."

[52] Ms Lugg did not seek further engagement over the disputed role and instead sought a redundancy payment as the advocate posited that "her original role is superfluous to requirements and that she had been made redundant."

[53] In submissions GSK's counsel suggested that the PG letter somehow confused the situation by failing in its introduction to raise an unjustified dismissal claim for Ms Lugg and indicating as of writing that she was still uncertain "as to when she would return to work". Counsel also made the point that at this point in time, Ms Lugg had begun to seriously explore alternative employment.

[54] Ms Lugg was interviewed on 11 December and received a formal offer from another major pharmaceutical company dated 19 December to take up a similar sales role based in Christchurch (the one her friend had recommended she express an interest in), commencing 20 January 2019. Ms Lugg signed an employment agreement accepting this offer on 20 December 2018 but did not communicate this to the respondent.

[55] Ms Lugg's advocate countered that her allusion to when Ms Lugg may return to work was made because Ms Lugg feared not having employment options if not appointed elsewhere. I consder that the PG letter was overly discursive and confusing in part, but I reason that experienced counsel (as GSK had), could certainly discern from the tenor of the letter that Ms Lugg considered her position with GSK to have become untenable and that she had clearly articulated the key disputed issue of Ms Lugg being forced to accept an expanded role without the choice of redundancy compensation.

[56] Ms Lugg's evidence was that she believed that her position with GSK was redundant from 30 November 2018 and that had triggered her one month notice period. Further, Ms

Lugg asserted that her employer had been made aware of her stance in her advocate's letter of 14 December and that this could not be construed as acceptance of the offer made to appoint her to the newly expanded role.

[57] Ms Lugg claimed that she had not resigned as she was not presented with any formal documentation or asked to sign a variation of her existing terms and conditions.

GSK's position

[58] GSK's view of the grievance was set out by counsel in a 21 December 2018 letter. Confusingly it first described it as an amended role although comparable and then, that it was "the same role with a variation to the territory". The letter then suggested that GSK had an unfettered right to expand Ms Lugg's work boundaries by quoting clause 1 of her employment agreement, asserting: "she is required to work at alternative locations to suit our business requirements". Further, it stated: "[If] we think that is in the best interests of the business we may move you to a different position, transfer you to different premises within the region…" Mr Jenkin's statement repeated this assertion by quoting the same contractual clause claiming this allowed for flexibility to "make necessary changes". Mr Jenkin also quoted the redundancy provisions of Ms Lugg's employment agreement that clearly departs from an unfettered approach and conceded GSK could only "…move employees into roles on substantially similar terms".

[59] In submissions, GSK's counsel suggested that at this point in time GSK was still 'finessing' the role offered to Ms Lugg but was reluctant to engage with an employee on sick leave.

[60] In considering this explanation, I observe that GSK's 21 December letter was not conciliatory in tone and did not convey the impression of an employer willing to adjust a position to suit an employee's concerns. Objectively viewed, the letter stoutly defended GSK's position and provided justification for the restructuring decision and asserted GSK's view that what was being offered was not a substantially different position.

[61] After reciting email exchanges and comprehensively denying Ms Lugg's grievance and defending actions undertaken by GSK, counsel did conclude in a constructive tone by indicating their client was willing to attend mediation.

[62] The offer of mediation was not immediately responded to. During the next period of the dispute, the respondent was aware that Ms Lugg was on scheduled annual leave from 22 December to 9 January (GSK's imposed annual closedown period).

The ending of the relationship

[63] Despite the existence of the dispute that he was aware of and having conceded that he knew the contents of the PG letter, Mr Barnes claimed that he was expecting Ms Lugg back at work on 9 January and thought that she had returned. Mr Barnes recalls the first contact of the new-year was an email from Ms Lugg of 15 January that asked when she could drop off company property including the respondent's vehicle.

[64] Mr Barnes claimed in his emailed response that he was "completely shocked" by Ms Lugg's 9 January email but in evidence acknowledged that his response and thereafter all subsequent responses, had had input from GSK's counsel.

[65] I observe that the email exchanges brought a degree of 'artificiality' to the situation as both party's representatives sought to 'jockey' for the best position to suit their clients' take on the situation.

[66] Mr Barnes responded the next day and the exchange of emails spilled over into 17 January. Mr Barnes stated that he was unclear why Ms Lugg sought to return property as she was still an employee and if she was resigning she would have to give notice. Mr Barnes sought a discussion of the matter but in response Ms Lugg suggested contact be between respective representatives and reiterated her intention to return company property.

[67] The following Monday morning (21 January) counsel for the respondent emailed Ms Lugg's advocate asking whether Ms Lugg had resigned given that she had been absent from work since 9 January. The email concluded that if there was no clarity by close of business that day then the employer was treating "this as a resignation from 9 January 2019". I

observe that this was an attempt to construct a narrative that did not fit with what had been communicated about Ms Lugg's view of the situation.

[68] Ms Lugg's advocate, in a response of 22 January then contended that Ms Lugg had been "unjustifiably dismissed" by changes imposed upon her role and that she had not resigned. Ms Lugg's advocate failed to mention that she had already accepted an alternative offer of employment on 20 December and had actually commenced working for another employer.

[69] GSK's counsel, in a letter of 30 January, summarised recent exchanges and reiterated the respondent's alternative view of the situation, claiming Ms Lugg had not been dismissed or given notice of redundancy and cited the fact that Ms Lugg had provided two medical certificates after 30 November (accessing paid sick leave before commencing a period of annual leave) rather than signalling her employment had ended. The letter indicated that the respondent was treating the employment as having ended on 9 January by way of a resignation. GSK's counsel indicated a termination payment would be made (with a deduction for an overpayment of salary made between 9 January and 31 January).

[70] The letter concluded with a request for information to clarify the respondent's understanding that Ms Lugg had obtained alternative employment.

[71] Ms Lugg's advocate responded on 14 February and after reiterating Ms Lugg's position, suggested that GSK "not act on a false assumption to terminate her employment by way of resignation" as mediation was pending.

[72] The advocate further confirmed that Ms Lugg had been offered alternative employment on 20 December and taken this up on 20 January 2019.

[73] The parties attended mediation on 28 March 2019 but the disputed matters remained unresolved.

The employment agreement provisions in dispute

[74] It is acknowledged that in some circumstances an employee turning down an offer of redeployment may abrogate their right to a contractual redundancy payment. In such disputes

the resolution will turn upon the specific wording of the employment agreement but some limits will apply. The relevant employment agreement provisions that incorporated a letter of offer are:

1. The Role

1.1 We are employing you to work as a Sales Representative. You will report to David Acott, Commercial Manager – NZ. You will normally be based in Christchurch. However, we may require you to work at alternative locations to suit our business requirements.

1.2 You agree to carry out other work that we reasonably ask you to do.

1.3 If we think it is in the best interests of the business we may move you to a different position, transfer you to different premises within the region, change the duties you perform, change the person to whom you report or direct you to cease some or all your duties.

. . .

6. Ending Employment

Redundancy

6.6 We may end your employment at any time if your position is redundant. If we end your employment because your position is redundant, we must pay you redundancy compensation (calculated on the basis of your salary, excluding other benefits).

6.7 The compensation is payable as specified in Schedule 1. If you are dismissed for another reason or resign during the redundancy period, we do not have to pay the redundancy payment.

Schedule 1

Benefits & Allowances Details

Notice Period I month

Redundancy In the event of a redundancy the Employer shall give the Employee one months' notice of termination of the Employee's employment or the Employer may elect to make a payment in lieu of such notice. The Employee is also entitled to a redundancy payment equal to one months' pay, together with an additional month's pay for each year of service or part thereof and overall capped to 24 months (less tax deducted at the appropriate rate). The Employee will also receive a payment for any unused annual or long service leave on a pro rata basis.

GSK's perspective

[75] GSK initially claimed by their response letter of 14 December 2018 and in Mr Jenkin's brief of evidence, a general contractual right of managerial prerogative arising from clause 1.3 of Ms Lugg's individual employment agreement.

[76] Apart from my observation that clause 1.3 was not alluded to until Ms Lugg raised a personal grievance, I do not consider it a basis for justifying the changes imposed. This is because GSK effected the proposed change through a restructuring process with attendant consultation obligations and not through imposing what may have been arguably a unilateral variation. I consider that GSK tried to 'switch horses' and effectively assert that despite the process they had adopted they had the right to impose the change anyway.

[77] In passing, I do observe that I may have found the above clause read in context, may have limited the flexibility perceived by GSK to within Ms Lugg's existing 'region' (the South Island). This view is reinforced by Ms Lugg's appointment letter of 23 September 2014 that indicated "You will normally be based in Christchurch. However, we may require you to work at alternative locations to suit our business requirements". I find this to be a reference to Ms Lugg's base location in Christchurch and any change to such base would have had to have been within reasonable commuting distance.

[78] GSK evidently consider that cl 1.3 allows complete management prerogative over how they approached imposing changes during the restructuring.

[79] For completeness, the use of such a prerogative in a matter decided under the Employment Contracts Act 1991 and where the employment agreement was less prescriptive than here, is discussed by then Chief Judge Goddard in *Green v Schering-Plough Animal Health Limited*[1] who commented:

> Managerial prerogative necessarily applies in the main to decisions how the employer requires the work to be performed and, within reason, where. What is within reason depends on the contract and all the circumstances.

[80] I reiterate my observation that GSK cannot reasonably rely on a contention that they merely sought to expand Ms Lugg's role within her existing job description because they

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[1] *Green v Schering-Plough Animal Health Limited* [1999] 2 ERNZ 733.

followed a restructuring process that disestablished both Ms Lugg's and Ms Hewetson's position.

[81] GSK then created a new positon that both had to compete for. This view is reinforced by referencing the HR provided "suggested scripting" that Mr Barnes and Mr Sawicki used for the first meeting. This gave advice under the heading "Individual Impact" that the managers should say:

> **THE PROPOSAL IS THAT** the territory you are responsible for is amalgamated into other territories. [This] may mean that your position will no longer exist in the organisation and will be deemed redundant".

[82] Although containing little guidance on process matters, the definition of redundancy in Ms Lugg's employment agreement (clause 6.6) also supports the view that it is the 'position' and not the person who can be deemed surplus to requirements. This construct is an established common law principle that the Court of Appeal found in *GN Hale & Son Ltd v Wellington, etc, IOUW* [2] and upheld in *Grace Team Accounting v Brake*[3].

Was Ms Lugg 'technically' redundant?

[83] GSK also suggest that Ms Lugg was only 'technically redundant' as the redeployment offered was 'on substantially similar terms'. I was not persuaded by a submission that Ms Lugg's previous IEA cl 23.1 was carried over and I use the latest IEA dated 23 September 2014, that states:

> **Technical Redundancy**
>
> 6.8 You are technically redundant if all or part of our business is purchased, amalgamated, reorganised, or contracted out and you are offered work in the purchased, amalgamated, reorganised or contracted out business on substantially similar terms to your current employment.
>
> 6.9 If you accept the offer of employment you are not entitled to redundancy compensation.
>
> 6.10 If you refuse the offer of employment and are made redundant, we must give you the usual notice payment in place of notice, but you will not be entitled to receive any redundancy compensation.

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[2] *GN Hale & Son Ltd v Wellington, etc, IOUW* [1991] 1 NZLR, per Cook P at [155].
[3] *Grace Team Accounting v Brake* [2014] NZCA 541.

[84] In assessing how the above clause should be interpreted and applied, I consider the term "reorganised" to include a restructuring situation as the terms are synonymous.

Discussion

[85] Clause 6.8 first defines a situation where the employee is deemed "technically redundant" by defining an offer on "substantially similar terms" being made, then to bring into play a situation where an entitlement to redundancy compensation is negated, the employee must either at cl 6.9: accept the offer of an alternative role that is substantially similar or as per cl 6.10: "refuse the offer of employment".

[86] On the facts, Ms Lugg did not formally accept the offer of alternative employment – she expressed an interest in the position created after being advised that she could not access redundancy compensation. There was no evidence of a formal written offer being made for Ms Lugg's consideration that set out the terms of the expanded territory and travel expectations. Therefore 'offer and acceptance' had not been completed.

[87] Whilst not a requirement of the employment agreement, the absence of a written offer setting out the new terms and scope of the role, does not assist GSK. That is partly because I consider that the act of GSK automatically appointing Ms Lugg is not the same as an offer of employment as envisaged by cl 6.8 of the employment agreement. Authority Member Craig, in *Timms v Suncorp New Zealand Limited* [4] reached the same conclusion albeit whilst considering a more detailed redeployment provision.

[88] Further GSK had a good faith obligation to be "responsive and communicative" and provide "access to information" when making a decision that may have an adverse impact on an employee. To fulfil this obligation I consider that GSK should have clearly set out their offer including detailing the claimed adjustments they had made to the original proposal.[5]

[89] When advised of the selection process being concluded on 30 November 2018 and that she was to be appointed to the new role, Ms Lugg sought legal advice and responded negatively to what was I find effectively a 'directive' that she was redeployed.

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[4] *Timms v Suncorp New Zealand Employees Limited* [2019] NZERA 255 at [32].
[5] Section 4 (1A)(b)&(c)(i) Employment Relations Act 2000.

[90] Ms Lugg's response was communicated in her 14 December 2018 personal grievance letter, in unequivocal terms:

> Ms Lugg is not obligated to accept the substantially different role being offered to her as Pfizer has not shown how the role is substantially similar or why Ms Lugg was the successful colleague.

[91] I find that Ms Lugg's position was disestablished on Friday 29 November 2018 when GSK coincidentally announced the restructuring would proceed and this was the end of the consultation process.

[92] Ms Lugg then effectively rejected the redeployment offer made to her on 14 December and I find that she should have been issued notice from this date of one month as it was clear that no other redeployment options within New Zealand existed.

[93] GSK, in not declaring Ms Lugg redundant on 14 December, effectively breached Schedule 1 of Ms Lugg's employment agreement that provided:

> In the event of redundancy the Employer shall give the Employee one months' notice of termination of the Employee's employment or the Employer may elect to make a payment in lieu of such notice. The Employee is also entitled to a redundancy payment equal to one months' pay, together with an additional month's pay for each year of service or part thereof and overall capped at 24 months….

[94] During the notice period, the parties could have then met and mutually explored whether the role rejected was a suitable redeployment option or a technical redundancy. This could have usefully included consulting the other two territory managers in the North Island who soon thereafter had their territories adjusted. Instead, GSK sought to simply impose their view of the situation by appointing Ms Lugg to the new role without defining its full scope.

[95] GSK's counsel submitted that "the law in New Zealand" requires two stages for there to be a redundancy (a position being disestablished that the employment being terminated by the employer). I find this assertion to be too simplistic and unhelpful in this context. I find a more nuanced approach is required rather than simply concluding that an employer giving notice of termination is a prerequisite to redundancy. I also note above that I have found that GSK should have given Ms Lugg notice on 14 December.

Was the 'imposed' appointment on substantially similar terms?

[96] Turning to whether the latter part of cl 6.8 is operative (an offer of work "on substantially similar terms to your current employment"), Ms Petersen succinctly summarised Ms Lugg's negative view of the proposed changes in passages contained in the 14 December 2018 personal grievance letter stating:

> The territory ….will stretch from its southernmost tip in Invercargill with its most northern point being New Plymouth, and will stretch across to Hawkes Bay in the East. Despite the substantial geographic and client base increases, Pfizer have indicated to Miss Lugg that she will be expected to cover her territory with "no more nights away than [she] does currently".
>
> The newly created South/South Island Territory Manger position is substantially different ….It will increase her client base by over 30% and it will require travelling over a greater territory than she does currently. It will require her to spend additional time away from home, and she will be required to change the way she has (in custom and practice) completed her role historically. Miss Lugg feels that these changes ….will have an unfavourable impact on her personal life.
>
> . . .
>
> Ms Lugg considers that her existing role is superfluous to requirements and that she has been made redundant.

[97] GSK's response was brief and peremptory. In a letter of 21 December, that I also do not find to be a timely response given the pressing circumstances, GSK's counsel suggested that "The amended role is a comparable role. It is the same role with a variation to the territory". The letter then contended that "The number of clients increasing from 107 to 142 is not significant and is only one factor in a raft of other considerations re comparability". The 'raft of considerations' alluded to was not elaborated upon and instead clause 1.3 of the employment agreement was referenced.

[98] The central issue at this point becomes the dispute on whether the position Ms Lugg was appointed too was substantially similar to the one Ms Lugg occupied.

Consideration of the degree of changes between the roles

[99] From the parties helpful submissions I need to embark on a 'fact and degree' approach to the central issue of how substantial the changes were to Ms Lugg's then current 'terms of employment'. Case law is of some assistance and particularly Chief Judge Inglis comment in

Waikato District Health Board v Archibald [6] on how to use an objective standpoint, approaching a comparability dispute:

> I approach the issue on the following basis. Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment?[7] Each case is fact dependent. That means that only limited assistance can be gained from reference to earlier cases. [8]

[100] Put another way, as it was in *Sanson v Auckland Regional Council*,[9] the Employment Court (affirmed by the Court of Appeal) has held that if a purported change or request to alter duties is such that the employee's original position disappears or is significantly diminished or altered to such a degree that it no longer exists, then the redundancy provisions of the relevant employment agreement would take effect.

[101] The ability of an employer to change duties is not open-ended. Ms Petersen in her submission helpfully summarised Ms Lugg's concerns about the:

> ….size and scope of the new role and the expected increase in;
>
> a. Travel;
> b. The number of nights she would be required to fulfil the expectations of the position;
> c. Hours she knew would be required to fulfil the expectations of the position;
> d. Time spent in transit;
> e. Administrative work and logistical planning.

[102] There are features of Ms Lugg's situation that are distinguishable from decided cases pertaining to restructuring but there is useful analogous material to draw upon in the Employment Court decision *Green v Schering-Plough* [10] that although a constructive dismissal case, discusses imposed changes in a sales representative's territory.

[103] However in determining this matter I will use the approach adopted in *Archibald* by first looking at the travel issue, then the workload aspects of the changes, and finally the personal circumstances of Ms Lugg.

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[6] *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [39].
[7] *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984, (EmpC) at 995.
[8] *Westpac Banking Corp v Money* [2014] 1 ERNZ 576 (CA).
[9] *Sanson v Auckland Regional Council* [1999] 1 ERNZ 708 9EmpC, ERNZ 597 9 CA.
[10] *Green v Schering Plough* [1999] ERNZ 2 at 739 and 742-743.

Travel Issues

[104] A distinction with cases that have come before the Authority or Employment Court (aside from *Green*), is that Ms Lugg was already embarking upon significant travel in her existing role and such was an essential feature of the role.

[105] In categorising her job, Ms Lugg was essentially a 'travelling sales representative'. I am thus not wholly attracted to an argument that travel to the North Island per se, would be outside of the contemplation of the parties as Ms Lugg's normal scope of work involved occasional air travel and some North Island locations are geographically closer to Christchurch than Otago and Southland. This distinguishes the case from others that mainly involve either commuting distance disputes such as *Westpac Banking Corp v Money* [11] or as in *Archibald*[12] where significant additional travel within a closed geographical area (an extra 202 km per working day) was at issue.

[106] Without considering the personal impact of additional workload, the expanded territory did not require Ms Lugg to relocate her home base and the necessity to travel component arguably remained the same and her job description was unaltered (in terms of tasks to be performed – a point Ms Petersen conceded in her submission).

[107] Conceptually, GSK could have at any time, imposed reasonable additional travel requirements on Ms Lugg's South Island role (such as incorporating the Nelson region). Travel of up to seven nights in a six week period may objectively not be described as onerous in a sales role and unlike Ms Archibald, Ms Lugg did not advance any physical health reasons why she could not undertake additional travel.

[108] I find I am not greatly persuaded by the concept that Ms Lugg covering the lower North Island was, in itself, a substantial change in her role as the expectation of significant travel and disruption to her personal life would have been contemplated by Ms Lugg when she initially took the role up. It was a core component of her job.

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[11] *Westpac v Banking Corp v Money* [2004] 1 ERNZ 576 (CA).
[12] at [40].

[109] I do note GSK's response claiming they were willing to mitigate the impact of additional overnight trips and an unsubstantiated claim in the 21 December 2018 response to the grievance, that they had amended the proposal.

[110] I also have considered the suggestion that Ms Lugg did not engage in this discussion by taking stress leave. I was however, not wholly convinced by this, as GSK's expectation that Ms Lugg maintain the existing profitability of two territories still prevailed and at the time they 'appointed' her how GSK intended to accommodate Ms Lugg's concerns was not coherently expressed.

[111] GSK suggested that they could not finalise their proposal on how the new position would operate, including expectations around client contact, because the siting of the job depended upon who secured the position. Apart from lending credence to the notion that what GSK ideally wanted was a newly located role, it did not convince me that by the end of the consultation period the proposal had been properly formulated.

[112] In *Archibald,* Judge Inglis found that it was unreasonable for the DHB to impose an effective "suck it and see" approach to change[13], and here it looked like GSK wanted to impose conceptual change and then try and accommodate concerns as they arose. This was partially due to the inexplicable haste by which the proposed changes were imposed and a failure to appreciate that Ms Lugg was entitled to a fully formed proposal before she could contemplate accepting or rejecting the new role.

[113] I find no reasonable employer could expect an employee to take up a new role in the hope that they may be able to convince their employer it was unsustainable at some future date. Mr Jenkin suggested that Ms Lugg, upon accepting the job and then it not working out, could then approach GSK HR to revert back to a redundancy entitlement. Apart from this not being communicated to Ms Lugg at the time (and lack of direct HR involvement in the process) I was not convinced by this assertion as it would involve Ms Lugg legally foregoing an opportunity to choose redundancy for a potentially unenforceable future claim.

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[13] At [40].

[114] Unfortunately, GSK failed to properly explore these issues with Ms Lugg and as suggested by her, extending the consultation to include the remaining sales territory managers. The appropriate time for defining the role was before making any decision to disestablish positions (including Ms Hewetson's) and this could have been achieved by extending the short consultation period.

[115] I acknowledge that Ms Lugg did raise an issue of the stress overnight travel was placing on her relationship with her former partner. I however return to an essential element of the employment relationship that was Ms Lugg could be expected to undertake significant travel, including overnight absences, as a core component of her role. This was not, as in *Archibald*, being imposed as an additional feature of the employment relationship.

Workload

[116] I consider the extent of being required to service unspecified additional clients to be of more significance as it could reasonably and objectively be construed as placing an additional workload burden on Ms Lugg and potentially breaking the essential continuity of her employment. Colloquially, it became a 'bigger job', in addition to her existing territory Ms Lugg was being asked to take on an additional territory formerly serviced by another employee.

[117] GSK, as they are entitled to do, reorganised to increase their profitability across two regions by reducing the overheads of maintaining an additional Territory Manager's salary and other costs (including vehicle provision). One assumes that this was a significant saving. GSK did not specifically reveal what this was, beyond disclosing the sales figures for the respective territories and Mr Barnes stating in his 27 November email that it was "…due to the size of the territories, which are significantly smaller in dollar value to the next smallest territory across ANZ. As a consequence, due to the size, we are unable to sustain two individuals".

[118] Overall a productivity gain was clearly the aim but GSK, when pressed by both territory managers, did not offer an increase in base remuneration or commission to share the proceeds of this envisaged productivity gain.

[119] It is also difficult to objectively see how Ms Lugg could increase productivity (or profitability) to the level envisaged without significantly expanding her workload or, as she suggested, compromising her ability to increase an incentive component of her earnings package.

[120] I have considered GSK's submission that they envisaged Ms Lugg undertaking her client contact cycle by different methods and that she was to concentrate on more lucrative clients but once again an outline of this was not presented in any significant detail prior to appointing Ms Lugg to the role.

[121] I find a parallel with the situation of the plaintiff in *Green* exists and the comment by Chief Judge Goddard apt, that the changes proposed were just as drastic an imposition as that of a change of residence.[14] Here arguably the expansion of territory was greater than what Mr Green was expected to take on and the evidence supplied by Mr Hewitt (who subsequently took up the new role) and Mr Dunn (North Island Territory Manager) albeit untested, suggests that the changes became unsustainable but I do understand that due to changes in the business that a direct comparison is problematic.

Personal circumstances

[122] Ms Lugg, at an early stage indicated that she feared the additional travel away from home would impact her health and she was clearly upset at being compelled to apply for the new role and the additional work it entailed in covering a wider territory. Whilst I do accept that at the time GSK were not fully apprised of how much Ms Lugg feared the new position being imposed upon her, they were made bluntly aware of her initial misgivings (and Ms Hewetson's) and instead of pausing the process to better explore this they merely forced both candidates into one option by indicating that they would have been deemed to have resigned if they did not apply for the positions. Evidence was led by Mr Jenkin that 'globally' the company had signalled a blanket exclusion on considering voluntary redundancies. When pressed, Mr Jenkin claimed that this was to deter talent from exiting the business. I find such an approach was not consistent with the contractual obligations owed and good faith.

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[14] [1999] 2 ERNZ at 742.

Weighing up the three elements

[123] On balance, I conclude that the potential and largely ill-defined increase in workload and to a lesser extent the impact upon Ms Lugg's personal circumstances, outweigh considerations of just requiring additional travel that may have just been reasonably within the scope of a territorial sales role. This objectively altered Ms Lugg's 'terms' of employment beyond what an employer could reasonably impose. It follows that the position offered was not substantially similar to the one Ms Lugg previously occupied and the two latter factors (workload and personal circumstances not being sufficiently addressed) are sufficient to break the continuity of employment.

[124] I also find, as in *Westpac Banking Corporation v Smythe*, [15] that a failure of GSK to properly engage in discussion with Ms Lugg on her differing view of comparability, breached good faith obligations. Once Ms Lugg had identified her concerns (and I consider that point was when she signalled that she did not want to apply for the position) there should have been more open discussion and the consultation period should have been extended. This is reinforced by my finding that GSK, by the time they decided to appoint Ms Lugg, had clearly not formulated key elements of how the new position would operate.

[125] On the facts, GSK ploughed ahead with the decision to select Ms Lugg to a position when it was patently clear that she had significant reservations and that such was impacting upon her emotional well-being. What GSK then did, was assume Ms Lugg had accepted her lot and that she would return to work on 9 January 2019. I do not consider that this was a reasonable or fair assumption in the face of Ms Lugg's communicated personal grievance, or the actions of a fair and reasonable employer.

Estoppel

[126] I now turn to GSK's suggestion that Ms Lugg seeking and accepting alternative employment whilst her employment was supposedly ongoing estopps or prevents her claim for redundancy compensation as per cl 6.7 of the employment agreement ("…or resign during

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[15] *Westpac Banking Corporation v Smythe* AC 54/05 [2005] NZEmpC 107.

the redundancy notice period, we do not have to pay the redundancy compensation") and whether this was a breach of good faith on her part.

[127] For an estoppel to be established the elements to be met are set out in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*[16] which are:

> The three main elements relevant to relief stem from the ingredients necessary to establish equitable estopell in the first place. These are the quality and nature of the assurances which gave rise to the claimant's expectations; the extent and nature of the claimant's detrimental reliance on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given.

[128] The Court went on to suggest "…the clearer and more explicit the assurance is, the more likely it is that a court will be willing to grant expectation-based relief"[17].

[129] In this situation GSK claim, in Ms MacGibbon's submission, that Ms Lugg advising of her wish to apply for the amended role "created an expectation that the applicant wanted the Amended role and would continue to engage with Pfizer over adjustments to territorial scope to reflect her consultation feedback". Further that this led to a belief by GSK that Ms Lugg would take on the role when offered and continue discussions about the scope in territory.

[130] Examining this claim, and with the hindsight of examining the reasonableness of GSK's view that the positions were comparable, I find GSK effectively compelled Ms Lugg to apply for the role knowing that she had grave reservations on such. In this context it would be unreasonable to find that GSK could rely on Ms Lugg to accept the role offered.

[131] Ms Lugg was under no obligation to give any assurance that she would not seek alternative employment or to disclose that she was doing so. Only if Ms Lugg had explicitly accepted the new position would she have been expected to give an assurance that she was not simultaneously seeking an alternative role. That might give rise to a claim that GSK was impliedly relying on such an assurance or alternatively that Ms Lugg was acting in breach of good faith obligations.

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[16] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [114].
[17] At [115].

[132] In the circumstances, no assurance was necessary so none could be detrimentally relied upon by GSK and it follows that no unconscionable departure from any assurance has occurred and the issue of any detriment to GSK (in an estoppel context) does not arise – they brought the detriment upon themselves by their approach to the restructuring.

[133] I find no estoppel is made out.

Did Ms Lugg resign during the notice period?

[134] A further premise supporting a view that Ms Lugg should not access a redundancy payment is if she resigned during the redundancy notice period (cl 6.7 of the employment agreement).

[135] There is authority to support GSK's stance in Judge Couch's decision of *Westpac Banking Corporation v Smythe*[18] where Ms Smythe's role was formally disestablished and she then refused what her employer considered to be a comparable position. Westpac then invoked the notice period declaring Ms Smythe to be redundant and Ms Smythe then resigned during the notice period. Judge Couch found that whilst the positon offered was not comparable Ms Smythe was unable to access a redundancy payment as she had resigned a day before her notice period expired and did not consequently pursue an alternative claim for constructive dismissal.

[136] The problem for GSK by contrast with *Smythe,* is that GSK did not invoke any notice period to rely upon cl 6.7 of Ms Lugg's employment agreement. [19]

[137] The employment agreement has no general definition of 'redundancy' such as when a position is surplus to the needs of the employer, but at cl 6.6 there is a permissive statement indicating: "We may end your employment at any time if your position is redundant".

[138] As I found earlier, I consider the point that the 'position' was redundant to have been reached on Friday 29 November 2018, although GSK did not issue any notice of termination, I have found that they were obligated to do so before exploring redeployment options.

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[18] *Westpac Banking Corporation v Smythe* [2005] NZEmp c 107.

[19] Clause 6.7 of the employment agreement provided that if Ms Lugg should "resign during the redundancy notice period, we do not have to pay the redundancy compensation".

[139] Here Ms Lugg was placed in limbo, her existing position had been disestablished but no notice was issued and she had verbal advice of being appointed to a new expanded role that she had made clear by 14 December that she did not feel obligated to accept. I have found that by this stage Ms Lugg should have been declared redundant and given notice as she had not accepted the position offered, was not contractually obliged to do so, and no other reasonable redeployment options were available (Ms Lugg had also signalled the Queensland option was impractical).

Consideration of submissions

[140] Both parties submissions alluded to the Employment Court decision *Wills v Goodman Fielder NZ Ltd*[20] where Judge Corkill, albeit in the context of a constructive dismissal claim, rejected a claim by the employer that redundancy was not a choice for the employee to make. The Judge instead deemed it the employer's responsibility to properly apply the relevant provisions of the employment agreement and act in good faith where no fair and reasonable employer could conclude that it was unnecessary to disestablish Mr Wills' position in the prevailing circumstances.

[141] Judge Corkill distinguished *Smythe* and regarded past authorities as emphasising a need to take a broader contextual view involving "….the necessity of objectively analysing the reality of a purported resignation".[21] I prefer Judge Corkill's more expansive approach and have applied it to Ms Lugg's circumstances, including a finding in the context of when the restructuring initially arose that a fair and reasonable employer could have concluded Ms Lugg's position was surplus and that the decision to not make this call appeared to be motivated by a desire to compel her to apply for a role that she clearly did not want.

[142] I also observe that it is not uncommon for an employee, having been apprised of their position being disestablished, to seek alternative employment. Many employers accept this premise and often help with job-search assistance including time off work to attend interviews (often a contractual provision). In GSK's case the timing was fortuitous as it was approaching an annual closedown period and GSK did not appear to have needed Ms Lugg to

[20] *Wills v Goodman Fielder New Zealand Ltd* [2014] 12 NZELR 651 at [115].
[21] At [83].

work during what should have been her notice period and in any case, Ms Lugg furnished sick leave certificates and was not available for work during this period.

[143] At best for GSK, there is an argument that had one month notice been given by GSK the employment would have ended at the latest on 11 January 2019. Ms Lugg accepted her new employment on 20 December 2018 and could have been deemed to have resigned during her notice period. However, the difficulty with this is Ms Lugg did not take up the new role until 20 January 2019 and during her notice period she was on a combination of paid sick leave supported by a medical certificate and pre-approved annual leave (during a closedown period).

[144] In addition, having found that the employment relationship was effectively terminated by GSK's actions, I can reject, as did the employment Court in *Westpac Banking Corporation v Stephen* [22] and *Wills*, any suggestion that Ms Lugg was somehow declaring herself to be redundant.

[145] I take the view that there was no evidence that Ms Lugg voluntarily resigned her position – she merely reacted to her position being declared redundant by raising a personal grievance to affirm her contractual right and sought alternative employment to secure her future.

[146] I find that the attempt to redeploy Ms Lugg against her will repudiated the employment agreement and Ms Lugg did not accept such. This finding, in context, sets aside any issue of whether Ms Lugg gave sufficient contractual notice.

[147] For completeness, Ms Lugg did not take up her alternative position until 20 January 2019 by which time GSK already knew or ought to have known, that she was not going to return to work and simply assume a new and expanded role.

[148] In the circumstances, GSK should have given notice as provided in Schedule 1 of Ms Lugg's employment agreement. Whilst it could be implied that Ms Lugg's alternative offer influenced her decision to not fully explore the redeployment offered by GSK and she lacked candour in not revealing such, it would be a big stretch to use this as a reason to disentitle her

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[22] *Westpac Banking Corporation v Stephen* [2000] 1 ERNZ 566,568.

to a redundancy payment – the reasons for Ms Lugg not taking up the new role offered by GSK were articulated by Ms Lugg early in the consultation process and were I find, objectively reasonable in all the circumstances.

[149] In *Stephen,* although decided during the Employment Contracts Act era, Chief Judge Goddard did observe generally that an employee taking up another offer of employment without being open with his [sic] employer was excusable on the basis of the employee exercising a "commercial advantage" and being "….as much entitled to the benefit of it as was the appellant to take advantage of the right to make employees redundant on terms or seek to re-deploy them, within reason in other roles."[23]

[150] Ms Petersen's submission neatly sums up my finding:

> [T]he Applicant's role of Southern Territory Manager was not amended, it was disestablished; it did not continue to exist alongside the new position of South/South Island Territory Manager once the structure came into effect. The original roles of Wellington/Wairarapa Territory Manager and Southern Territory Manager were superfluous to business requirements….

Finding on access to redundancy compensation payment

[151] For the reasons outlined, I find that Ms Lugg is contractually entitled to a redundancy payment as per schedule 1 of her individual employment agreement of 23 September 2014, this is on the basis of GSK not providing such being a 'breach of contract'. A finding I am entitled to pragmatically consider under s 122 of the Act despite the manner by which this was pleaded, as I consider this finding best reflects the type of personal grievance I am being asked to consider on a preliminary basis. I do no not consider that this categorisation of the issue disadvantages GSK as their submissions were wide ranging and I have carefully considered all elements of such.

[152] I may have been persuaded otherwise by GSK's insistence that Ms Lugg had effectively disengaged from consultation and that they were prepared to adjust the role for her but in context I found such consultation should have properly occurred prior to Ms Lugg's role being disestablished, which may have led to a different outcome. Sadly, the manner by

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[23] At [9].

which GSK hastily approached the restructuring and failed to share information led to a situation where they destroyed the trust in them of an otherwise loyal employee.

Interest claim

[153] Interest should be paid on the outstanding amount on the basis that Ms Lugg has been deprived of the use of the redundancy compensation money from the time it fell due. I reject GSK's submission that a delay in filing this matter with the Authority and further delays in eventually accepting the Authority's suggestion to have this matter heard 'on the papers' should mean that interest not be levied. I do so, on the grounds that the original grievance promptly identified and by the time the suggestion was made to determine the matter on the papers an investigation date had been identified.

[154] Section 123(1)(b) of the act allows the Authority to consider reimbursing "other money lost" by the employee flowing from a grievance and interest plainly falls under this category of remedy.

[155] In awarding redundancy compensation for a breach of contract I do so under s 123(1)(c)(ii) of the Act in accord with the wider interpretation of it being a prospective benefit that the "worker might reasonably have been expected to obtain" rather than a simple 'loss of chance' situation as GSK's counsel concedes in her submission discussing what the Court of Appeal found in *Telecom South Ltd v Post Office Union (Inc.).*[24]

The alternative claims of unjustified dismissal and disadvantage

[156] In addition to claiming that she was entitled to a contractual redundancy compensation, Ms Lugg has also claimed that she was unjustifiably dismissed and/or unjustifiably disadvantaged by a restructuring process that she alleges was enacted without due regard to good faith principles and that no genuine reason for the redundancy was made out. If successful in establishing her assertions Ms Lugg seeks additional remedies under s 123(1)(c)(i) of the Act.

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[24] *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA) at 284.

An unjustified dismissal?

[157] The issue I need to determine for the second limb of Ms Lugg's claims is:

> was the restructuring process enacted for a genuine reason and effected having regard to the relevant contractual provisions and carried out in a substantively and procedurally fair manner in accord with both the s 103A Test of Justification and s 4 of the Act's good faith requirements?

[158] As I understood the situation, Ms Lugg claimed that her employment was not brought to an end by reason of a genuine and procedurally fair redundancy and that she is essentially claiming that the eventual outcome was pre-determined. This would involve her establishing an unorthodox claim that her employer essentially retained her employment for an ulterior motive (being a preference to presumably end her colleague's employment or force them both to resign).

[159] I have found at the outset that the challenge to the substantive nature of the redundancy is the least credible element of Ms Lugg's claim. GSK had a simple and compelling economic reason to reorganise their business and they were upfront about such. At the time Ms Lugg stated that she understood and accepted the rationale for the reorganisation (the merging of regions). In giving evidence Ms Lugg confirmed that she understood and accepted that the amalgamation of territories was logical given that their separate profitability margin was not comparable to the other two North Island territories. Ms Lugg, when asked to clarify her claim during the investigation meeting, advised her concerns were procedural including lack of genuine engagement, transparency concerns, unanswered queries and the haste of the consultation period.

[160] The Court has clarified in recent times that although an employer is entitled to make its business more efficient, and a worker does not have a right to continued employment if the business can be run more efficiently without them, the merits of a business decision is not off limits for scrutiny and that considerations of s103A and good faith also apply in this context. A fine line has to be drawn to avoid the Authority simply substituting it's business judgment

for that of the employers unless that decision is one motivated by an ulterior motive. In *Scarborough v Micron Securities Products Ltd* [25] the Employment Court said;

> Section 103A(2) of the Act provides that the test for justification 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. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. 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 court is not to substitute its business judgment for that of the employer.

Finding

[161] I am not persuaded that this is a situation where a finding of unjustified dismissal is warranted on the basis of the reorganisation not being genuine or enacted for an ulterior motive. I also note that had I found this was an unjustified dismissal, Ms Lugg suffered no loss of income.

[162] I do accept Ms Lugg's and Ms Hewetson's significant concerns about their abilities to take on the expanded role's additional travel and workload but how that was handled and presented to them, I find, is a procedural fairness issue. With this in mind, I now have to deal with the issue of whether GSK acted as a fair and reasonable employer could have in all the circumstances, consistent with contractual and statutory obligations.

Unjustified disadvantage claim

[163] As a starting point, the requirements set out in s 103A of the Act apply to both dismissal and disadvantage personal grievances (s 103A(1)). [26] This 'justification' test requires the Authority, in context, to undertake an objective assessment of whether GSK's actions and how it acted during the restructuring, were what a fair and reasonable employer could do in all the circumstances at the time of the grievance arising.

[164] In applying the test the Authority must consider a number of factors including in these circumstances, the resources available to the employer and whether GSK gave Ms Lugg a

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[25] *Scarborough v Micron Securities Products Ltd* [2015] NZEmpC 39 at [37].

[26] Section 103A(1) Employment Relations Act 2000 states "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).

genuine opportunity to comment on the proposal to alter the employment relationship, and whether that comment was genuinely considered.

[165] Section 103A(4) of the Act also allows the Authority to "…consider any other factors it thinks appropriate". An examination of an allegedly defective process under s 103(5) however, cannot lead to an overly pedantic outcome "….if the defects are minor; and did not result in the employee being treated unfairly".

[166] Process wise, to ensure a redundancy is enacted in a fair manner, good faith obligations also apply, as set out in s 4(1A) of the Act. These include a positive disclosure obligation requiring that an affected employee is provided with access to all relevant information supporting the reason for the redundancy, detail of how it is proposed it will be implemented in a timely manner, and crucially an employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised.

[167] In *Stormont v Peddle Thorp Aitken Ltd* [27] the Court set out key consultation requirements at as:

> Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[168] Further, the Court of Appeal in *Grace Team Accounting v Brake* [28] asserted that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons, and when looking at applying the s 103A tests has said:

> If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

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[27] *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].
[28] *Grace Team Accounting v Brake* [2014] NZCA, [2015] NZLR 494 at [85].

[169] On the evidence, I find that the handling of the restructuring was deficient in a number of procedural respects that did cause Ms Lugg unnecessary distress and that those defects were not minor. I deal with such sequentially:

The first meeting

[170] I find it is unwise, and in certain circumstances a breach of good faith, to convene an initial meeting, other than to present basic information, without foreshadowing the purpose of the meeting and without providing the affected employee with the opportunity to obtain support or representation. As here, this often leads to disputation and misunderstanding about what was conveyed.

[171] Ms Lugg recalled being offered an alternative position in Queensland at the first meeting of 23 November. Although denied by Mr Sawicki that it was presented so baldly, he did concede that the Queensland role was mentioned. I do have some sympathy for Mr Sawicki at being tasked with this meeting without HR presence and note that whilst no meeting notes have been produced, he did claim that he followed an HR provided script (that was silent on the mentioning any redeployment opportunities at this stage). It would appear that Mr Sawicki, without any degree of ill intent, misunderstood what stage he was at in the script as alternatives were supposed to be discussed at the second meeting.

[172] I observe that GSK is a well-resourced company and this was not a simple reorganisation to implement. GSK may have avoided consequent problems had an HR specialist attended and properly recorded the first meeting. I observe that howsoever unwittingly disclosed, holding out options at such an early stage can cause distress and confusion at a time when the focus should be on giving feedback to a proposal.

[173] It was also apparent that at this early stage, GSK had a fixed view on what overall outcome they were seeking and the timeline. They could have presented more information at the first meeting including a written outline of the proposal. This would have given Ms Lugg more time and the opportunity to seek legal advice.

[174] As a result of the lack of notes, I could uncritically accept Ms Lugg's evidence that she was offered a choice of two roles at the first meeting which would signal pre-

determination. I note in her contemporaneous email of the same day of the first meeting at 3:56 pm to Mr Barnes, that she refers to being "offered" either the Gold Coast or the Southern and combined regions role.

[175] Mr Barnes in his response of 26 November fails to disavow Ms Lugg of her assertion or assumption. Ms Lugg then repeats to Mr Barnes her lack of interest in the Gold Coast role in an email of 27 November and refers to a discussion that morning which suggests the offer was put to her again. Mr Barnes had also emailed Ms Lugg on the morning of 27 November setting out answers to her various queries only opaquely suggesting if either of the two individuals wanted to relocate to the Gold Coast it would be accommodated. Also, after the WebEx discussion of 27 November that Mr Jenkin and Mr Sawicki attended, Ms Lugg received an email from the latter on 28 November that does not address the Gold Coast offer in terms of Ms Lugg's alleged misunderstanding of it being presented as an optional offer.

[176] I however, note that Ms Hewetson claimed she was given the same choices that she understood as mere "options" at her first meeting on 21 November and was told to think about both during the weekend.

[177] I can reasonably conclude that this was either inexperience being shown by two managers unused to this type of meeting or an ill-conceived attempt to ascertain what each party was interested in to see if the redundancy could be avoided.

[178] I do not impute any personal ill intent and on balance, unless I accept Ms Lugg's evidence that she was actually offered both roles, it was simply a situation of two managers trying to present potential options too soon in the process without HR assistance. I lean toward this conclusion and that Ms Lugg was understandably confused by the invite to consider the options and wrongly perceived that she was being offered a choice of appointments.

[179] However it could be reasonably implied that at this point that GSK had closed off their minds to any alternative options and that the form of the restructuring was at that stage a 'fait accompli'. I observe that where an employer intends to compress a consultation period, it is vital that sufficient information is provided upfront and in a timely fashion. The power imbalance inherent in such situations is best redressed by allowing an employee to be

represented at all key meetings. This can take time, including allowing an employee a sufficient opportunity to get legal advice. In this instance, I do not consider due regard was had by GSK to Ms Lugg's right to procedural fairness and the process was rushed which implies scant attention was given to the principles of genuine consultation.

Was feedback genuinely considered?

[180] I have found that the timeframe was unnecessarily compressed and appears to have been rigidly working to an imposed deadline set outside New Zealand. I could see no reason not to extend the deadline as what was proposed essentially involved two existing workloads being dealt with by one person. This cried out for a more in-depth analysis and such seems not to have occurred. I am left with the impression this was a pre-determined headcount reduction.

[181] Ms Lugg and Ms Hewetson appear to have raised very legitimate and commonly impacting issues, about their ability to practically and logistically cope with the merged areas at a time when they were clearly affected by having to emotionally come to terms with the prospect of no access to redundancy compensation should one of them be compelled to take on the expanded role without additional remuneration. This warranted a deeper contextual analysis other than simply repeating the contrast with Australian territories. More time spent on consultation and meaningful engagement of all parties involved was required.

[182] In passing, I also find that the direction that the two affected parties were not speak to each other or share information was unrealistic and an unjustified restriction. Objectively, alternative and perhaps more rational options were available to be explored that may have led to the same head count reduction desired – an obvious one being to expand the South Island coverage to include Marlborough and rejig the North Island into two territories or even consider sharing the South Island territorial responsibility between all the North Island territory managers. This could sensibly have involved wider consultation with all the New Zealand based sales managers.

[183] Mr Jenkin gave unconvincing but frank evidence that the decision to not involve the other two North Island sales staff was driven by a fear that involving them may have impacted

upon GSK's ability to retain them in employment – this was simply an unreasonable approach.

[184] In *Waikato District Health Board v Archibald*[29], a similar leading case involving additional travel considerations and a prescriptive contractual redeployment provision, Employment Court Chief Judge Inglis made the point that a correct approach to fair consultation and decision-making is for an employer to consider the overall context and a person's individual circumstances before "reaching a concluded view".

[185] Whilst it is accepted that some assurances were made to Ms Lugg on additional travel in the initial 28 November 2018 email, they were reactive and not, objectively viewed, grounded in a thought out plan or specific proposal other than that GSK "would work with the colleague placed into the role to ensure that the amount of country trip travel is maintained at a similar level…". I find this was more akin to "let's just get you in the role and sort out the travel issue later" rather than appreciating that it was a fundamental issue to Ms Lugg. Mr Jenkin acknowledged this was the situation but somewhat naively suggested that, provided trust in the organisation was high, this was not untoward.

[186] The expanded workload issue and expectation that the successful applicant's client base would significantly expand, though obvious, was thus not adequately 'teased out'.

[187] I do not accept the notion put forward by GSK that Ms Lugg should bear some responsibility for not engaging by her taking stress leave – this was after the decision had been made to significantly expand her South Island role.

[188] The 28 November email ostensibly setting out the proposal also failed to make clear on what contractual basis GSK believed Ms Lugg could not access a redundancy payment. It confusingly refers to not offering "voluntary redundancy" and pointing out that if she was appointed and chose not to accept the role, she would have been deemed to have resigned. It does not point to any specific contractual provision or even explain the later articulated belief, that GSK's stance was based on a view that the positions were substantially similar. At no time was GSK's 'global' policy of resisting voluntary redundancy applications disclosed.

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[29] [2017] ERNZ 791 at [47].

[189] I find that, as in *Archibald*, GSK had at this point in time (28 November) "…prematurely resorted to an assertion that redeployment into the new role would apply".[30] This conclusion is reinforced by my finding of the existence of a discussion of a Gold Coast option at the first meeting.

Disclosure Issues

[190] Mr Barnes' earlier 27 November emailed response to Ms Lugg's specific question on access to redundancy was even more opaque. It was later exposed during the investigation meeting that Mr Barnes unwittingly narrowed the scope of the consultation by indicating "…we would appreciate any additional feedback on ideas/considerations on how to reduce the headcount by 1 x TMs in NZ" rather than simply asking for comment on the efficacy of the proposal.

[191] Whilst never formally advising Ms Lugg of the timeline for consultation ending, Mr Barnes claimed that he was affording Ms Lugg extra time until Thursday evening (29 November) with a final decision by close of business on 30 November. In the event this assurance was transgressed and the decision was announced at 2pm on 29 November to a wider group of unaffected employees.

[192] I also observe that on Thursday 29 November, Mr Jenkin and Mr Barnes were provided with a summary document headed "Pfizer Territory Alignment" containing essential background information that was not disclosed to Ms Lugg during the consultation process.

[193] I find the rushing and truncating of the process and failure to properly disclose all material relied upon by GSK in a timely manner, to be procedurally unjustified and in breach of s 4(1A)(b) good faith obligations to be constructive and responsive.

[194] Access to relevant information must be ensured by an employer to facilitate rather than hinder an employee's ability to comment, and the onus of timely provision is on the employer as part of an essential element of reducing the inequality of power in a restructuring

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[30] at [54].

situation (as the Employment Court has observed in *Vice Chancellor of Massey University v Wrigley*). [31]

Selection Criteria

[195] A further issue, although arguably not necessarily material to a negative outcome for Ms Lugg, was GSK not consulting Ms Lugg or Ms Hewetson on the criteria they intended to use in selecting who would be appointed to the new role. Ms Lugg's email of 29 November 2018 had specifically alerted GSK to her need to have such disclosed.

[196] The necessity to consult over a selection criteria is well established and has been held to be a breach of procedural fairness.[32] I find that this failure to disclose did not meet the s 103A test of the Act as an essential aspect of procedural fairness, and is 'prime facie' a breach of s 4(1A)(c)(i) and (ii) of the Act that imposes a positive obligation to disclose when contemplating a decision that may have an adverse effect on the continuation of employment, and, a requirement to provide an opportunity for the employee to comment on such information before a decision is made. Ms Lugg was only provided with the selection criteria after she raised her personal grievance.

Finding

[197] Although I have determined Ms Lugg accepted that the reorganisation GSK undertook was for a genuine business effectiveness reasons, I have found significant breaches of good faith around how it was procedurally effected, sufficient to conclude that Ms Lugg has been unjustifiably disadvantaged by GSK's actions and omissions and that her disadvantage claim under s 103(1)(b) of the Act has been established.

Did Ms Lugg breach good faith obligations owed to GSK?

[198] This consideration turns on whether Ms Lugg's lack of candour, in not communicating that she had obtained alternative employment and her not engaging in 'ongoing' consultation, could be seen as breaching a good faith obligation to be responsive and communicative – a

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[31] *Vice Chancellor of Massey University v Wrigley* [2011] ERNZ 138 at [48].
[32] *Coutts Cars v Baguley* [2002] 2 NZLR 533 (CA).

reciprocal duty owed to her employer by s 4(1A)(b) of the Act for which GSK has sought a penalty action.

[199] I find this to be a generally unsustainable assertion of GSK taking all of the circumstances into account. Ms Lugg did openly communicate her negative view of the redeployment option both during and after the restructure was completed.

[200] At the point Ms Lugg had secured alternative employment I do however, find that she breached good faith in not apprising GSK of this fact in a timely manner and that such caused GSK some inconvenience in terms of having a delay in commencing recruitment of a new employee. I do not though, find that a good faith duty should extend to an employee disclosing one is 'job hunting' but Ms Lugg could have dispelled any ambiguity (largely created by her advocate's unnecessarily discursive communication) by advising GSK as early as 20 December 2018 that she had accepted a new role.

[201] The breach also caused a degree of doubt about her return to work on 9 January 2019. Looking at the situation broadly and in context (as the Court did in considering a similar claim in *Ritchies Transport Holdings v Merennage*), [33] by 14 December 2018 GSK objectively knew Ms Lugg's position on the redeployment offer (she did not feel bound by it and had raised a personal grievance) and GSK's counsel had suggested mediation.

[202] I find, on balance, that GSK could not have reasonably expected Ms Lugg to return to work to take up the newly created position but may have wrongly considered her still 'technically' in their employ, hence GSK cautiously did not remove her from the payroll. A confusing factor for GSK was Ms Lugg undertook travel and client contact in her initial period of sick leave.

[203] Ms Lugg's lack of communication after indicating that she would keep GSK apprised of her circumstances is curious, as the 21 December letter from GSK's counsel offering mediation: "…to assist in her continued engagement with Pfizer in her role…" came a day after she had accepted a new job. At this point, the situation could have been clarified by Ms Lugg without compromising her right to pursue a personal grievance. I can only reasonably

[33] *Ritchies Transport Holdings v Merennage* [2015] ERNZ 361

assume that she feared GSK may have sought to jeopardise her appointment with a competing pharmaceutical company. In context, Ms Lugg knew that she could not take up the expanded role and she prudently sought alternative employment that did not commence until 20 January 2019.

A penalty?

[204] Having found Ms Lugg breached an owed good faith obligation to communicate more openly, I turn to whether a penalty for this breach is appropriate. The test or 'threshold' for liability, is found in s 4A(a) and (b) of the Act which indicates that a failure to comply must be "…deliberate, serious and sustained; or the failure was intended to undermine the applicable employment agreement or the employment relationship". It is often overlooked that this is a high threshold – statutorily reflecting the fact that a penalty is a punitive measure.

[205] In assessing the overall situation I find that Ms Lugg may have reasonably thought that matters were being handled between her advocate and GSK's counsel, she genuinely believed on reasonable grounds that the employment relationship with GSK was at an end and apart from her inadvertently getting paid for a week by GSK (which was recovered), I do not perceive Ms Lugg gaining any tactical advantage by deliberate deceptive conduct.

[206] Ms Lugg clarified her situation by her action of returning company property on 15 January and her advocate confirmed the fact of her new employment by 14 February 2019 (in response to a request that implied GSK already knew this fact).

Finding

[207] The threshold test to impose a penalty has not been overcome. I also observe that in seeking such a penalty that it is by its nature also an equitable remedy – here I find GSK is not approaching the matter equitably with 'clean hands' and was colloquially the 'author of its own downfall' by placing Ms Lugg in an untenable position.

Remedies

[208] Ms Lugg detailed the significant worry, uncertainty and upheaval in her life created by the actions of GSK during the period of the restructuring. This included exacerbated anxiety

and sleeplessness and during the investigation Ms Lugg expressed genuine remorse for the fact that her long association with GSK and its predecessors had been peremptorily ended.

[209] In essence Ms Lugg felt that she had not been listened to and questions she had asked had not been properly addressed. As a result Ms Lugg perceived that GSK was deliberately trying to manoeuvre her out of a job she enjoyed and had been successful in by obtaining several sales awards. GSK witnesses gave what I perceived to be compelling evidence that they recognised Ms Lugg's level of achievement and genuinely wanted to retain her services – sadly for reasons outlined above they manifestly failed in this task and although perhaps unwittingly, caused Ms Lugg significant distress.

[210] However, the negative impact on Ms Lugg was during a relatively short timeframe and she was able to quickly move on and find alternative and comparably remunerated employment. As Chief Judge Inglis noted in *Archibald*[34] in cases "….involving a substantively justified but procedurally flawed dismissal for redundancy the injury or loss which would likely have followed in any event must be put to one side" and the focus must be on the extent of the injury or loss sustained flowing from the employer's unjustified actions or omissions.

[211] I have found that the restructuring process was rushed, consultation was cursory and Ms Lugg suffered unnecessary distress to a significant degree when she was compelled to apply for an expanded position that she felt unable to manage. I am also convinced that at the time Ms Lugg, a long serving and successful employee, suffered humiliation, loss of dignity and injury to feelings by the inadequate approach taken by GSK to her legitimate concerns and the impliedly coercive manner by which GSK approached the issue of forcing her to apply for a positon she clearly did not want and as I have found, wrongly threatening to withdraw access to a redundancy payment. These were not the actions of a fair and reasonable employer and effectively caused Ms Lugg to feel discarded and disempowered. However, Ms Lugg has now been able to move on with no lasting economic ill effects of this experience.

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[34] at [97]

[212] Taking into account the circumstances and awards made by the Authority and Court in similar cases (such as *Archibald* where the distress caused was of a higher magnitude) I consider Ms Lugg's evidence warrants moderate compensation in the sum of $8,000 under s 123 (1)(c)(i) of the Act.

[213] In addition to the above and for the reasons explained, I also find GSK must pay Ms Lugg redundancy compensation with interest as per her employment agreement on terms described, as a remedy pursuant to s 123(1)(c)(ii) of the Act as this was a benefit Ms Lugg was reasonably likely to have obtained if her personal grievance had not arisen as she was not technically redundant when she did not take up the redeployment offer.

Contribution

[214] I make no finding in the circumstances that Ms Lugg contributed to the situation that gave rise to her personal grievance and leave the remedies awarded undisturbed.

Summary of findings

[215] **I find GSK must pay Ms Lugg redundancy compensation as per her employment agreement on terms described as a remedy pursuant to s 123(1)(c)(ii) of the Act. Interest is to be paid on the sum agreed in accordance with Schedule 2 of the Interest on Money Claims Act 2016 from 11 January 2019 up until the date the disputed amount is paid in full.**

[216] **In addition, GSK must pay Ms Lugg $8,000 pursuant to s 123 (1)(c)(i) of the Act as compensation for the distress they caused in effecting the restructuring that led to Ms Lugg's position being redundant.**

[217] **I have not found that Ms Lugg breached good faith obligations sufficient to warrant the awarding of a penalty to GSK.**

[218] The parties should be able to resolve the methodology and quantification involved in making the contractual redundancy payment but in the event that they are unable to do so I give leave for either party to return to the Authority on any disputed issue pertaining to such.

Costs

[219] Costs are reserved and I invite the parties to try and resolve the matter by agreement. Should this not be possible, a submission by memorandum seeking costs is to be made by Ms Lugg within 14 days from the date of this determination and GSK shall have a further 14 days to file a memorandum in response. I will then issue a costs determination but I make the point that the parties can expect the Authority to approach this on its usual daily tariff basis unless any compelling factors are identified that justify a departure from this practice.

David Beck
Member of the Employment Relations Authority