

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 362  
3117833

BETWEEN                      EDWARD DUFF  
   Applicant

AND                              GYM SPORTS NEW  
   ZEALAND INCORPORATED  
   trading as GYMNASTICS  
   NEW ZEALAND  
   Respondent

Member of Authority:      Peter Fuiava

Representatives:            James Turner, counsel for the Applicant  
   Andrew McCormick, counsel for the Respondent

Investigation Meeting:     18 May 2021

Determination:              13 August 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Edward Duff’s claims of unjustified dismissal and unjustified disadvantage are dismissed**
- B. Costs are reserved**

**Employment relationship problem**

[1]     On 11 April 2011, Edward Duff commenced working for Gym Sports New Zealand Incorporated (Gym Sports), as its finance manager. Mr Duff’s employment agreement (signed 11 April 2011) included a job description which set out the purpose of his role:

“PURPOSE To lead and manage the planning, processes, systems and reporting of financial operations and management for GSNZ (Gym Sports).”

[2] On 20 December 2019, after approximately nine years in the role, Mr Duff was made redundant and his role was restructured into the new part-time position of financial operations manager.

[3] Mr Duff claims that his dismissal was unjustified. He further claims that he was unjustifiably disadvantaged as a result of his employer requiring him to undertake, without reasonable compensation, the work of the national office coordinator and operations manager after their incumbents left the organisation.

[4] Gym Sports denies each of Mr Duff's claims.

### **Relevant Facts**

[5] Gym Sports is the national body responsible for the development, promotion and leadership of gymnastics in New Zealand. As a not-for-profit entity, the organisation relies on grant funding and membership fees from local clubs for revenue. Gym Sports' single largest donor is Sport New Zealand (Sport NZ).

[6] In December 2015, Gym Sports was advised by Sport NZ that it was cutting its grant funding by \$1.6 million over the next four years. In order to assist Gym Sports make the transition to operating on a significantly reduced level of funding, Sport NZ provided two transitional payments of \$200,000, the last of which Gym Sports received in 2019.

[7] Sport NZ's cut in funding had a significant impact on Gym Sports which saw the number of its full-time equivalent staff fall from 23 in 2016 to 16 in 2019.

[8] In December 2018, Gym Sports was advised of a further funding cut by Sport NZ in the amount of an additional \$100,000 per year.

[9] In 2019, the issue of how the above additional funding cut would be addressed was discussed by Gym Sports' senior management team which comprised Mr Compier as chief executive, Mr Duff as finance manager, Andy Adams as operations manager and Danielle Halliday as senior relationship manager. Although there was much open-ended discussion within the team, all of whom knew that the additional cut in funding could affect any one of them, including the chief executive, no consensus was reached.

[10] In May 2019, Mr Adams, who had been working on a database project that automated most of Gym Sports' day-to-day administrative functions, resigned as operations manager. Although this was unexpected, Mr Duff considered that his departure saved the organisation from paying Mr Adams' salary of at least \$90,000 per year.

*First meeting – 1 November 2019*

[11] On 1 November 2019, Mr Compier called Mr Duff into his office for a meeting. Also present, was Lisa De Coek, a member of Gym Sports' board of directors and chair of the audit and risk committee.

[12] During the meeting, Mr Compier gave a PowerPoint presentation entitled "Proposal for Change" in which Mr Duff was initially informed that Gym Sports was considering restructuring the finance manager role from a full-time to a part-time position. Mr Compier's PowerPoint presentation set out the following rationale for doing so:

Gymnastics New Zealand needs to make costs savings and is looking at options to secure savings in this specific area to the range of approximately \$30,000.

With the introduction of new automated systems including a national database and integrated Xero accounting software, Gymnastics New Zealand believes it no longer needs a full-time Finance Manager role and can operate with a Finance Manager in a part-time role.

[13] The PowerPoint presentation set out the due dates for feedback on the proposal (6 November 2019) and when the new structure was to be confirmed by (13 November 2019). Apart from making a flippant query about whether he would receive a 'pay out', Mr Duff's response to the proposal was muted. The Power Point presentation invited his feedback on the proposal and reminded him that he could bring a support person or a representative with him to any future meeting.

*Second meeting – 6 November 2019*

[14] On 6 November 2019, Mr Duff, Mr Compier and Ms De Coek met for a second time for Mr Duff to provide his feedback on the proposal. He took strong exception to the proposal, challenging Mr Compier's understanding of the finance manager role because he had failed to implement a formal review process of Mr Duff's performance.

[15] Mr Duff further stated that there was no financial case for his role to be disestablished because Mr Adams had resigned as operations manager which saved the organisation from having to pay a salary at senior management level.

*External consultant engaged*

[16] In light of Mr Duff's feedback, Mr Compier, on 12 November 2019, commissioned Lee Frew, an external consultant and accountant, to assess how much time was required for the finance manager role to be performed.

[17] Ms Frew worked alongside Mr Duff for two days (14 and 15 November 2019) for a total of nine-and-a-half hours in order to understand the quantum of his role. Mr Duff expressed that he felt comfortable working with Ms Frew.

[18] In a report dated 18 November 2019, Ms Frew concluded that the finance manager role required no more than 30 hours per week to perform. Mr Duff did not dispute Ms Frew's findings.

*Third meeting – 20 November 2019*

[19] On 20 November 2019, Mr Compier had an informal meeting with Mr Duff to advise him of the outcome of Ms Frew's report and that the decision had been made to disestablish his role as a result. Mr Compier followed up his discussion with Mr Duff with a letter (21 November 2019) which stated:

Dear Edward,

As you are aware, we have been in discussions since 1 November 2019 regarding a proposal to disestablish the Finance Manager role. Having been provided the opportunity for feedback and input, no suggestions have been presented by you regarding any possible alternatives.

I have however taken your feedback regarding substantiating the rationale behind the proposal and engaged a consultant, Lee Frew, to review the requirements of the role. I would acknowledge at this point your valuable input and insight into this process. Attached is a report from Lee's review that in short, confirms the viability of the proposal to disestablish the role and restructure to a 30 hour per week function. I am satisfied that under the proposed new structure it will not leave Gymnastics NZ short of the necessary expertise.

The guiding principle for this process has been to ensure Gymnastics NZ has the right structure for the future. As such, I am informing you that Gymnastics NZ has decided to proceed with the proposed disestablishment of the Finance Manager role – effective 20 December. This means that your employment in

the current role will terminate at that time and all entitlements owed will be paid to you on or about that date.

[20] The letter further advised Mr Duff that during his notice period he may wish to be considered for the new role or take time off to attend job interviews.

#### *Financial Operations Manager*

[21] The new role to which Mr Compier's letter referred was that of financial operations manager. It was a new part-time position that amalgamated the roles of the finance manager and operations manager, providing Mr Compier, as chief executive, both the financial and operational support that was lost with Mr Adams' resignation as operations manager and the disestablishment of Mr Duff's finance manager role. The new role of financial operations manager had its own job description which stated:

#### PURPOSE

The Financial Operations Manager is responsible for supporting Gymnastics New Zealand's Chief Executive in the effective management of day to day office operations, managing all financial and system aspects of Gymnastics New Zealand. The position will ensure compliance to New Zealand law, financial regulations, best practice and Accounting standards and procedures.

[22] On 21 November 2019, a staff-wide meeting was held at Gym Sports. Mr Compier attended the meeting via Skype as he was in Japan at the time. Ms Halliday, the senior relationship manager, chaired the meeting and Ms De Coek was present to answer any questions. Staff were advised that the finance manager position was to be disestablished. Mr Duff stated that he left the meeting feeling humiliated and that his contributions to the organisation had not been properly acknowledged.

[23] On 17 December 2019, Mr Duff was given his notice of dismissal. His last day of employment at Gym Sports was on 20 December 2019.

[24] Mr Duff subsequently applied for the new role of financial operations manager. He was shortlisted for an interview and was interviewed by a panel that consisted of Mr Compier, Ms Frew and Ms Halliday.

[25] Mr Duff's job interview was unsuccessful because he had not demonstrated that he had the right skill set for the new role.

[26] On 22 January 2020, Mr Duff raised a personal grievance with his employer concerning the disestablishment of the finance manager role. On 2 September 2020, Mr Duff's statement of problem was lodged with the Authority. A statement in reply from Gym Sports was subsequently lodged on 21 September 2020.

### **The Authority's Investigation**

[27] The applicant's case consisted of a written statement and oral evidence from Mr Duff. For the respondent, witness statements were received from Mr Compier, Ms De Coek and Ms Frew, all of whom also gave evidence. Ms Frew was granted leave to attend the investigation meeting via Zoom because she was working in Vanuatu at the time.

[28] On the morning of the investigation meeting, Mr Turner provided me with a set of financial accounts for Gym Sports that covered the financial periods from 31 December 2018 to 31 December 2020. During Ms De Coek's evidence later that same day, a print out of Gym Sports' cash reserves from 2017 to 2019 was provided. Copies of the various documents were made available to the other side.

[29] All witnesses answered questions under oath or affirmation from the Authority and from counsel. At the end of the investigation meeting, the Authority heard oral closing submissions from counsel.

[30] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The Issues**

[31] The issues requiring investigation and determination are:

- (a) Was Mr Duff's dismissal on the grounds of redundancy on 17 December 2019, and how the decision to dismiss him was reached, what a fair and reasonable employer could have done in all the circumstances at the time?

- (b) Was it fair and reasonable for Gym Sports not to have offered Mr Duff the new role of financial operations manager?
- (c) Was Mr Duff's personal grievance for unjustified disadvantage raised with his employer within the required statutory period and with sufficient information for the grievance to be addressed?

### **Whether Mr Duff was Unjustifiably Dismissed?**

[32] The onus is on Gym Sports to show that, at the time of the dismissal, its actions were what a fair and reasonable employer could have done in all the circumstances. Section 103A of the Act sets out the test of justification:

#### 103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[33] In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:<sup>1</sup>

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, 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.

[34] Although redundancy is not defined in the Act, Mr Duff's employment agreement contains the following definition:<sup>2</sup>

Redundancy means a situation where an employee's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.<sup>3</sup>

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<sup>1</sup> *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

<sup>2</sup> Clause 6.9.

<sup>3</sup> Almost verbatim of s 184(5)(a)(i) of the long-repealed Labour Relations Act 1987.

### **Was the decision for genuine business reasons?**

[35] Mr Compier's PowerPoint presentation to Mr Duff on 1 November 2019 provided the rationale behind the disestablishment of the finance manager role: to secure savings of approximately \$30,000. At the investigation meeting, Mr Compier accepted that he had said to Mr Duff that he (Mr Compier) had wanted to secure savings of \$50,000. While this was what Mr Compier had hoped for, his Power Point presentation expressly recorded savings of \$30,000 which in the end was achieved because the newly-established role of financial operations manager was paid \$30,000 less than Mr Duff's annual salary of \$90,000 as finance manager.

[36] Mr Duff submitted that there was no genuine business reason to disestablish the finance manager role due to the resignation of Mr Adams as Gym Sports' operations manager in May 2019. Mr Adams was paid a salary of \$90,000 per annum, which did not include the cost of his employer's contributions to KiwiSaver and the use of a leased vehicle.

[37] Mr Duff also submitted that Gym Sports was in a good financial position because its financial accounts showed equity had increased from approximately \$805,000 in December 2018 to approximately \$839,000 in December 2019. Further, Gym Sports had recorded an annual profit/surplus of over \$150,000 in December 2018, and some \$34,000 in December 2019.

[38] While I take into account the above submissions, for the following reasons I find that, at the material time, Gym Sports had genuine business reasons to disestablish the finance manager role.

[39] I accept the evidence of Mr Compier who stated that, even after Mr Adams' resignation as operations manager in May 2019, there were still a number of "amber" items in the budget that needed attention. That statement is corroborated by the cash reserve information Ms De Coek provided me, which showed that in 2017, Gym Sports' net cash reserves stood at \$879,864. In 2018, I note that this figure had reduced by approximately 50 percent to \$400,135. By 2019, net cash reserves had fallen by a further 25 percent to \$297,896. At the time of the restructuring of Mr Duff's position,

Gym Sports had a genuine cash flow crisis on its hands that required further costs savings to be made.

[40] As for what appears to be a healthy set of financial accounts for the year ending 31 December 2019, these cannot be taken at face value and must be understood in their proper context. Sometime during the 2019 financial year (1 January 2019 to 31 December 2019), Gym Sports received the last transitional payment of \$200,000 from Sport NZ (see above at [6]). Here, I make two observations. First, the \$200,000 payment was a cash injection that was unlikely to be repeated again and as such, could not be counted as a regular source of income. Second, the payment had the effect of inflating Gym Sports' true financial position as at 31 December 2019 because without it, a loss/deficit of approximately \$166,000 would have been made instead of a profit/surplus of some \$34,000 that was ultimately recorded.

[41] Further, while there was equity in the amount of approximately of \$839,000 as at 31 December 2019, this was a value that existed on paper only. If all of Gym Sports assets were liquidated and its debts and liabilities paid, the organisation would not be left with \$839,000 especially when about 20 percent of its assets in 2019 consisted of intangible assets (trademarks and software). As a non-commercial enterprise, it is unlikely that a third party would have been prepared to pay Gym Sports approximately \$257,000 for its trademarks and software.

[42] As noted above, the organisation's cash reserves had fallen significantly over three consecutive financial periods. Although Mr Adams had resigned as operations manager in May 2019, which saved the organisation from paying a salary at senior management level of at least \$90,000, the organisation's net cash reserves continued its downward spiral.

### **Whether Mr Duff should have been offered the new role?**

[43] Mr Duff submits that he should have been offered the new role of financial operations manager because it was substantially the same role. While I note that the description of the financial operations manager role as recorded on Gym Sport's website ([www.gymnasticsnz.com](http://www.gymnasticsnz.com), accessed on 17 May 2021) is similar to the description of the finance manager role, I accept the possibility that the website does

not capture everything about the role. The website description is not the best evidence and is not determinative.

[44] The position description for the role of financial operations manager states that “30 %” of the role required the prospective candidate to “develop a revenue plan with managers”. The job description further states:

Revenue including grants at risk Lead and set revenue targets with CEO, and management. Lead and manage Grant and funding compliances, ensured the organisation identified early and report of progress against the revenue plan monthly highlighting any issues or concerns against annual plan assumptions for CEO & Board. Reports regularly and on-time.

[45] In light of the significant funding cuts Gym Sports had experienced with Sport NZ, there was a clear focus on the financial operations manager having the ability to develop, maintain, and monitor revenue streams and identify and minimise risk to the organisation. Given that 30 percent of the new role would be taken up by this activity alone, this was a substantial point of difference with the finance manager position.

[46] This was not a junior finance manager role that could have been offered to Mr Duff. The new role required someone who had the ability to develop, maintain, and monitor different revenue streams for the benefit of Gym Sports. This was a role that Mr Duff had not done previously as finance manager where he was primarily required to record day-to-day financial transactions. The new role required much more. It required a higher level of analytical and strategic focus that went well beyond financial record keeping.

[47] There was the evidence of Ms Frew (see [16] to [19] above). In addition to reviewing the quantum of Mr Duff’s role as finance manager, Ms Frew created the interview template that was used by the interview panel to ask questions of the prospective candidates for the financial operations manager role. Such a template would not have been necessary if the new role and the finance manager role were substantially the same, which they were not.

[48] I have considered *Wang v Hamilton Multicultural Services Trust* where the Employment Court found that Hamilton Multicultural Services Trust (the Trust) had made a critical mistake by not redeploying Mr Wang into the newly-established position

of finance manager.<sup>4</sup> The Trust had instead invited Mr Wang to apply for the role which he ultimately chose not to do. However, the Trust's own witnesses conceded that Mr Wang could perform the new role.<sup>5</sup>

[49] Such a concession was not present here. Unlike Mr Wang, Mr Duff did apply for the new role but was found wanting. Neither Mr Compier nor Ms Frew, both of whom were on Mr Duff's interview panel, felt that he satisfied the requirements of the new role. This was the direct result of his advice to the panel that, as financial operations manager, he would not do anything different. Mr Duff repeated that same response to me at the investigation meeting. However, given the torrid last few years Gym Sports had experienced with significant funding cuts, which resulted in a number of staff redundancies, the new role required someone who could develop, maintain and promote revenue streams as well as minimise future funding risks to the organisation.

[50] Such a response from Mr Duff, that he would adopt a business as usual approach to the new role, made the interview panel's decision not to appoint him one fair and reasonable in the circumstances. Moreover, given Mr Duff's repetition of that response during the investigation meeting, even if the interview panel had decided differently, it is unlikely he would have lasted in the role because of its focus on revenue development.

### **Was the process Gym Sports followed fair and reasonable?**

[51] On 1 November 2019, Mr Compier met initially with Mr Duff where he was shown a PowerPoint presentation entitled "Proposal for Change". A further 'feedback' meeting was held on 6 November 2019, the outcome of which was the commissioning of Ms Frew on 12 November 2019 to review Mr Duff's duties as finance manager.

[52] At the investigation meeting, Mr Duff raised no objection to Ms Frew's review with whom he had worked alongside for a total of nine and a half hours over a two-day period. Mr Duff agreed with Ms Frew's findings as recorded in her report of 18 November 2019 which found that his role could be performed within a 30-hour week. In light of Gym Sports transition to an automated database and Xero accounting, such a finding would not have come as a complete surprise to Mr Duff.

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<sup>4</sup> [2010] ERNZ 468.

<sup>5</sup> Above at [42]

[53] On 20 November 2019, Mr Compier met with Mr Duff to advise him of the decision to disestablish the finance manager role as a result of Ms Frew's report. I note that Ms Frew has previously served on Gym Sports' audit and risk committee, but she had left the committee in approximately 2018, which was well before she was commissioned to review Mr Duff's role as finance manager. There is no conflict of interest with her appointment.

[54] On 21 November 2019, staff were advised of the final decision. Mr Duff says that he left the staff meeting on 21 November 2019 feeling hurt and humiliated. If he felt that way, it was not intended. Gym Sports had an obligation to its remaining staff to keep them informed of what was happening and how the change could impact on their work. Ms Halliday and Ms De Coek were present to answer any questions from staff. As was Mr Compier who attended the meeting remotely via Zoom.

[55] Although the decision to disestablish his role would have come as a disappointment to Mr Duff, I find no evidence of bad faith or an ulterior motive from Gym Sports. What happened here was the direct consequence of two successive and significant funding cuts by Gym Sports' largest donor, Sport NZ.

[56] I am satisfied that, under sections 4(1A) and 103A of the Act, the process Gym Sports followed was one that gave Mr Duff access to relevant information concerning the continuation of his employment and an opportunity for him to comment on the proposal before a decision was made. I find that the decision to dismiss Mr Duff as finance manager on the grounds of redundancy to be substantively justifiable in terms of above statutory provisions.

### **Unjustified Disadvantage**

[57] Mr Duff claimed that he suffered an unjustified disadvantage when he was allegedly required by his employer to undertake the duties of the national office coordinator (from December 2018 to May 2019) and the operations manager (May 2019 to December 2019) when their incumbents left the organisation. Mr Duff says that he was never paid any reasonable compensation for undertaking these additional duties.

[58] It has not been necessary for me to consider this alternative claim because it is time barred under s 114 of the Act. Mr Duff's personal grievance letter of 22 January

2020 to Gym Sports does not expressly mention anything about his undertaking of work of two other employees without reasonable compensation. The grievance letter referred expressly to the disestablishment of the finance manager role only.

[59] There was insufficient information in Mr Duff's personal grievance letter to bring to Gym Sports' attention this particular grievance to address. The respondent does not consent to this grievance being raised now which, as previously stated, is out of time.

### **Costs**

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

[61] If they are not able to do so and an Authority determination on costs is needed Gym Sports may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Duff would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>6</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].