

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2021] NZERA 467
3123194

BETWEEN JONATHAN FLINT
Applicant

AND FLINT CPS INKS NEW ZEALAND
LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Kylie Dunn, counsel for the Respondent

Investigation Meeting: 29 June 2021 in Christchurch

Submissions Received: 29 June 2021 from the Applicant
29 July 2021 and 15 September 2021 from the Respondent

Date of Determination: 21 October 2021

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Jonathan Main claims he was unjustifiably dismissed in a procedurally and substantively unfair manner during a redundancy process that he believes had a pre-determined outcome and led to the ending of his employment on 31 March 2020.

[2] By contrast, Flint CPS Inks New Zealand Limited (Flint CPS) contend that the redundancy process was initiated for genuine reasons absent of pre-determination. Flint CPS says the decision was based upon Mr Main's position being superfluous to the company needs and that Mr Main's termination of employment was effected in a procedurally fair manner.

[3] The parties were unable to resolve their differences in mediation. Mr Main has asked the Authority to resolve matters by a finding that he was unjustifiably dismissed and granting him lost wages and compensation.

The Authority's Investigation

[4] The investigation took half a day in Christchurch and I heard evidence 'in person' from Jonathan Main, his partner Louise Main and from Flint CPS: Paul Lamberti, Director (Mr Main's direct report) and Frederick Knowles, Human Resources Manager Australia and New Zealand both by video conference as they were based in Australia and unable to travel.

[5] I received helpful submissions and additional documentation from both parties following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter in dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicant's claims.

Issues

[6] The issues I have to resolve are:

- i. Was Mr Main unjustifiably dismissed and/or disadvantaged or was the employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner? - including questions of:
- ii. Whether there were genuine business reasons for the restructure?
- iii. Did Flint CPS comply with the relevant provisions of Mr Main's employment agreement?
- iv. Did Flint CPS breach any good faith obligations?
- v. Is there any evidence that the restructuring was pre-determined?
- vi. If an unjustified dismissal claim is established, what remedies should be awarded and should they be reduced by Mr Main's contribution, if any, to the situation that gave rise to his personal grievance?

- vii. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[7] Flint CPS is part of a group of companies that manufactures and distributes printing products worldwide. The New Zealand entity imports, blends and distributes inks and coatings to the commercial publication and sheet fed printing market.

[8] Mr Main was latterly engaged as the Key Account Manager in New Zealand reporting to Mr Lamberti who is based in Melbourne.

[9] Mr Main commenced employment with Flint CPS's predecessor Flint Group NZ in May 2015 in the South Island as an Account Manager based in Christchurch. After a company group restructure, Mr Main was appointed to NZ Key Account Manager, a position recorded by way of an employment agreement signed on 5 September 2018. A variation to this employment agreement designated Flint CPS as Mr Main's new employer and the position required that he travel regularly to Auckland.

Events leading up to redundancy

[10] Mr Main received a 12 February 2020 email invite from Mr Lamberti to attend a meeting in Auckland at noon on 26 February for a meeting described as: "S.F Meeting" ("SF" being Sheet fed).

[11] Two minutes later, Mr Lamberti emailed Mr Main and three other employees, inviting them to attend a meeting on 26 February at 3pm entitled "Orora Discussion" (a Flint CPS client account).

[12] Mr Flint says he thought nothing untoward was going on. Mr Flint had other scheduled work matters to deal with in Auckland on 26 February before attending the meeting at noon. The meeting was conducted by Mr Knowles and he was joined by Mr Lamberti by phone from Melbourne. Mr Main recalled a brief conversation around tough market conditions and being told Flint CPS was not meeting sales targets before then being informed that his position was being disestablished. Mr Knowles then provided Mr Main with a document dated 26 February titled "Business Review and Restructure Proposal".

[13] No notes of the meeting were produced by either party. Mr Knowles said he took no notes during the meeting and made no follow up notes to record what was said. He also indicated Flint CPS had been criticised in the past for not giving people advance notice and they specifically decided to meet with Mr Main first to give him a “heads up” on the proposal. Mr Lamberti also indicated that they normally did not pre-warn individuals of proposals and said he would have spoken about assisting Mr Main with preparing a curriculum vitae.

[14] Mr Main in his application to the Authority of 30 October 2020 provided notes he had prepared of a timeline of events that indicated during the meeting he was told his role “was being disestablished. However there is a procedure to follow, I was also advised that I was being given prior notice before everyone else within the business was told”.

[15] When pressed Mr Main said the language used at the meeting was about a ‘proposal’ but also his role would be disestablished following a process. Mr Main acknowledged that Mr Knowles on presenting the proposal took him through its contents (Mr Knowles said he read it through verbatim). Mr Main indicated that the decision to move away from directly supplying some product removed around 30-40% of his work.

[16] Mr Main perceived the decision had already been made and this was reinforced by a call he says he received shortly after the meeting from a Christchurch co-worker that indicated he had been apprised by another Melbourne based manager “that I was in a meeting and being let go by the company”. Whilst the co-worker who was still employed by Flint CPS did not attend the investigation meeting he provided a letter indicating a Melbourne based manager (who also did not attend) had informed him around noon on 26 February “that Johnny had been let go buy (sic) Flint Group CPS”.

[17] Mr Lamberti and Mr Knowles did not address the above issue in their written briefs despite Mr Main doing so. Mr Lamberti accepted when questioned that the Melbourne based manager was aware of the proposal at the time and had advised Mr Main’s Christchurch colleague but said he failed to impress upon the colleague that this was a proposal. Mr Knowles also accepted the Melbourne manager made a call to Mr Main’s colleague and said it was so the colleague would not be blindsided by the announcement of the restructure.

[18] Whilst I accept that a first meeting to present a proposal is often fraught, I conclude from the above that even if this was a genuinely open attempt to present a proposal for

consultation, the phone call from the Melbourne manager destroyed any trust Mr Main had in the process and it understandably affirmed his belief that the process was pre-determined.

[19] Matters were not assisted by non-disclosure of financial information. Mr Lamberti claimed in evidence that part of the New Zealand business (Sheet fed) was losing a significant amount of money but he did not share that at the time with Mr Main – Mr Lamberti indicated they “generally do not disclose profitability figures to employees”.

[20] When questioned on his understanding of good faith disclosure requirements in redundancy process, Mr Knowles indicated an employer has to put a proposal outlining what a restructuring might look like and has an obligation to consult to give staff an opportunity for to make submissions. When pressed on the need to disclose financial information Mr Knowles claimed he was not aware of this requirement and that Flint CPS “do not provide as a matter of course”. Both Mr Lamberti and Mr Knowles indicated that no legal advice was sought by the company on New Zealand employment law distinctions.

[21] I also note that the 26 February restructure document had a paucity of financial reasoning behind the proposal other than stating “Further cost reductions must be implemented” before introducing a structural change proposal impacting on Mr Main: “Due to the reduction in direct CPS business”. The case for a change in the organisational structure was however, succinctly explained and presaged by an outlined decision to change the New Zealand Sheet fed supply model by contracting with a current distributor. The impact of this was described as a reduction in direct Flint CPS business and that “the Key Account Manager NZ role is no longer necessary”. A Product Manager based in Christchurch was to now report to Paul Lamberti rather than Mr Main’s role. Whilst the 26 February proposal document was couched in employee plural terms, only Mr Main’s position was to be disestablished.

[22] As an indication of what Mr Main took as the finality of the decision, after outlining the proposed timing, the document stated: “Until March 31 the Key Account Manager NZ will focus on implementing and supporting the distributor arrangement”.

[23] Louise Main gave evidence that around 1pm on 26 February Mr Main rang her in a state of shock indicating he had just been made redundant during a meeting where he had no idea what was going to be discussed.

[24] A further meeting at 3 pm on 26 February was attended by Mr Main with two Auckland colleagues and a Christchurch one joining by phone, to be advised by Mr Knowles and Mr Lamberti of the proposal to disestablish Mr Main's role. All attendees were provided with the 26 February restructure document that included a "Consultation Phase – all meetings to be conducted by telephone with Rick Knowles", followed by details of times for meetings with three employees on 4 March – Mr Main being first, followed by the two Auckland based employees. The "Final Phase" was then described as occurring at 1pm on 5 March with a "Final decision and announcement".

[25] The 26 February document's last paragraph alluded to "Redundancy Support" from Work and Income and contacts for such. I observe however, no EAP counselling was offered by the company. The document also had appendices being: Proposed Structure Chart-NZ, Request form for Voluntary Redundancy and a NZRT Superannuation withdrawal form.

Phone calls from Mr Lamberti and Mr Knowles

[26] Mr Lamberti on 28 February rang Mr Main. Mr Lamberti says this was to "check to see how he was doing" and to confirm with Mr Main that the "proposal wasn't a result of his performance".

[27] Mr Main's recollection of the call was similar in that he accepted Mr Lamberti called to "see how I was doing" but he also claimed Mr Lamberti asked him to book flights to Auckland on 11-12 March to discuss his transition out of the business. Mr Main says he responded that he was not keen to travel anymore for the business. Mr Main says this conversation reinforced his belief that consultation was not genuine.

[28] Matters were compounded when Mr Main says he received a phone call from a Flint CPS Sydney based product manager on 4 March advising he was taking over Mr Main's NZ accounts and wanted information around key personnel and product requirements.

[29] At this point in time Mr Main had not heard from Mr Knowles to complete the consultation phase. The call scheduled for 4 March was delayed to the next day by Mr Knowles.

[30] Mr Main recollected he resolved not to make any comment on the proposal to make him redundant believing the decision had already been made. He recalled Mr Knowles calling around 2pm on 5 March, apologising for the call being delayed and then mentioning

his redundancy would go ahead and that he could finish up on Friday 27 March and that he would email final pay details and provide a letter of redundancy. Mr Main recalled being told he could keep his phone and a consultancy firm would be calling him to assist with future employment.

[31] Mr Knowles recollection of the 5 March call was brief – he recalled Mr Main not providing any feedback on the proposal and then “passing this on” to Mr Lamberti and “left him to make the decision on whether or not to proceed”. Mr Knowles confirmed no other employees gave feedback on the proposal.

[32] Mr Main says he then received a call from a consultancy company at 3:53 pm on 5 March wanting to set up an appointment and then an email from Mr Knowles at 5:16 pm. The email attached a letter of the same date signed by Mr Lamberti, confirming that the restructure would proceed “driven by reduction in local profitability” and: “It is believed that the workload can be covered by CPS’s local distributor. Local CPS staff will now report to the Product Manager ANZ CPS Inks based in Sydney”.

[33] The 5 March letter also confirmed Mr Main’s effective date of redundancy as 31 March 2020 and attached an outline of “the expected redundancy payout”. Mr Main’s employment agreement contained a redundancy formulae that entitled him to four weeks’ compensation for his first year of service and two weeks’ pay for every completed year thereafter and this was paid.

Employment agreement provision

[34] Mr Main’s employment agreement at clause 13.1 under the heading “Redundancy” permissively defines what a potential redundancy situation is and gives four examples where the company may terminate employment “being attributable, wholly or mainly, to the fact that:

- a) The position filled by the Employee is, or will become, superfluous to the needs of the Company or;
- b) That the position held by the Employee has changed significantly, for example through technology or restructuring, whereby the Employee is unable to meet the requirements of the position, notwithstanding the variation in duties allowed for in this agreement or;

- c) That the expectations of the position held by the Employee has changed to the extent that the Company considers it in the best interests of the Company to restructure the role creating an opportunity to make the Employee redundant or;
- d) Where it becomes necessary for the Company to reduce the total number of permanent employees.

[35] Whilst not specifically alluded to in the 5 March 2020 letter terminating Mr Main's employment, the nature of the proposal and focus on the position Mr Main occupied tends to suggest it generally fell under clause 13.1 a). The agreement then indicated, at clause 13.4, notice and redundancy compensation provisions. Mr Main's employment agreement contained no detailed redundancy process requirements.

The law

[36] There is no statutory definition of redundancy but it has long been established in common law that a redundancy arises where a specific position is superfluous to the needs of an employer's business to establish an abstract construct that it is the position and not the person that is redundant.¹ However, this is only an overarching definition that does not necessarily address the spectrum of how a redundancy arises and in what context and what a fair process should be.

[37] In the Employment Court decision *Stormont v Peddle Thorp Aitken Ltd*, Chief Judge Inglis outlined key consultation principles 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.²

[38] Where Mr Main's employment agreement is relevantly deficient, is in not detailing that an employer has statutory good faith obligation to amongst other requirements, share

¹ *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZLR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.

² *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].

economic information.³ The employment agreement is thus of limited assistance, so to determine the matter I must apply statutory considerations of justification and good faith to the above facts and consider any other contextual factors.

Section 103A

[39] In order to justify termination of employment or an employer's actions, including in a redundancy situation, Flint CPS must meet statutory requirements set out in s 103A of the Act. This is commonly referred to as the 'justification test'. In *Stormont* in the context of a redundancy case the court indicated:

In order for a redundancy to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The Court must consider whether the employer met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.⁴

Section 4 good faith

[40] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act. These include a positive disclosure obligation enabling employee access to all relevant information supporting the reason for the redundancy and detail of how it will be implemented. Further and crucially, a fully informed employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised and once the decision has been made, redeployment options should be explored.

[41] The Court of Appeal in *Grace Team Accounting v Brake*⁵, has ruled 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 s 103A, O'Regan J said:

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

³ *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102.

⁴ [2017] ERNZ 352 at [52].

⁵ *Grace Team Accounting Ltd v Brake* [2015] 2NZLR 494 (CA) at [85].

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.⁶

[42] In essence, the above requires the Authority to determine first if the redundancy was genuine (an assessment that has to exclude any ulterior motive) and then whether it was enacted in a procedurally fair manner.

[43] Being guided by *Stormont* and taking into account s 103A and s 4(1A) of the Act some questions I need to reflect upon are:

- a) Did Flint GPS set out its restructuring proposal of 26 February in sufficient detail for Mr Main to be able to understand it and make a submission on?
- b) Did Flint CPS provide Mr Main access to relevant information that led to the formation of the proposal?
- c) Was Mr Main given a sufficient opportunity to respond before the decision to terminate his employment was made?
- d) Did Mr Main have a good faith obligation to raise his concerns that the decision was in his view, pre-determined before the decision was made during the consultation phase?
- e) Overall, was the restructuring approached with an open mind by the decision-maker, free of pre-determination or bias?

Assessment

Was sufficient and specific information disclosed?

[44] Flint CPS failed to disclose any economic information that they based their decision upon and appeared to be unaware of or opposed to, this obligation. A disclosure of information on the claimed declining profitability of the Sheet fed side of the New Zealand operation and the scope of this, would have better allowed Mr Main to comprehend the proposal and allay any suspicions he had about pre-determination.

[45] Mr Main claimed he was unaware of the specific financial difficulties Flint CPS was facing, which he said was compounded by a lack of any earlier and timely briefings on such.

⁶ At [85].

He did disclose he was never paid a bonus component of his remuneration package, although he stated he had no way of tracking this. Mr Lamberti suggested he shared monthly sales and budget information and that “the deteriorating performance of the business should not have been a surprise”.

[46] I was not persuaded during the investigation meeting by for example further disclosure of financial information that Flint CPS made out a fair and reasonable assessment of their current and projected financial situation at the time the decision was made to disestablish Mr Main’s position. I was however, and Mr Main did not challenge this, persuaded as to the logic organisationally of deeming the role potentially surplus due to the proposed changes in the supply model. This was a feature of the proposal Mr Main chose not to comment on or challenge the logic of at the time or during the investigation meeting.

[47] A failure to disclose relevant information is a specific breach of s 4(1A)(i) of the Act and although no penalty is sought I need to consider whether this apparently deliberate failure to disclose financial information disadvantaged Mr Main in the sense of preventing him from making an informed submission during the consultation phase of the restructuring particularly when the proposal was said to be advanced because of ‘tough economic conditions’.

Opportunity to respond

[48] I am not satisfied on the facts and the gaps in information, that Mr Main had sufficient opportunity and time to respond to the initial proposal even though he chose not to do so. I do observe that the proposal letter of 26 February did not directly alert Mr Main to his right to seek representation for the next meeting. It obtusely referred to all employees being consulted and “will receive the right to have representation and a full opportunity to provide their comments on the proposal” which suggested a more prolonged process. I could also level criticism at Mr Knowles failure to set up an ‘in person’ meeting during the consultation phase as being insensitive, but Mr Main did not raise this and he did not engage on the proposal.

Mr Main’s good faith obligations

[49] Good faith ‘runs both ways’ and is expressed in s 4 of the Act as a reciprocal duty that parties be active and constructive in maintaining the employment relationship and neither

party should engage in conduct that is likely to mislead or deceive.⁷ On the latter issue, I note the Employment Court in *B v Virgin Australia (NZ) Employment and Crewing Ltd*, has held albeit in the context of disclosing details of a police investigation, that good faith obligations are couched in “mandatory, not discretionary” terms where the disclosure of relevant information in a disciplinary context is at stake.⁸ In *Alatipi v Chief Executive of the Department of Corrections* Judge Ford opined that the duty to be responsive and communicative included an obligation to answer questions advanced in disciplinary proceedings.⁹

[50] The question here is in the context of a redundancy process that was likely to end the employment relationship and it raises an issue of whether Mr Main’s non-engagement during the consultation phase breached an obligation to communicate his concerns.

[51] In answering the above, I note that a redundancy situation is a ‘no fault’ situation and arguably distinct from the contextual examples given above. It was evident that Mr Main did not give Flint CPS the opportunity to address his concerns about pre-determination during the process as he did not identify them. However, I conclude that Mr Main would have been in a vulnerable state of mind and in the circumstances his inaction was understandable and not a breach of good faith.

Pre-determination and lack of bias

[52] Mr Main essentially argued that the consultation exercise was a sham as the decision to make him redundant had already been pre-determined because it was communicated to others before the decision was finalised. In an employment context, the absence of pre-determination is a component of procedural fairness, similar to the unbiased consideration that should be given to an employee’s explanation when considering disciplinary action – an approach that “must be free from pre-determination and uninfluenced by irrelevant considerations”.¹⁰ This principle and others pertaining to ‘procedural fairness’ are codified in s 103A(3) of the Act.

⁷ Section 4(1) and 4(1A)(b) Employment Relations Act 2000.

⁸ *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [158].

⁹ *Alapiti v Chief Executive of the Department of Corrections* [2015] NZEmpC 7, (2015) 13 NZELR 95 at [106].

¹⁰ See *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35 (CA).

[53] In assessing the evidence and correspondence, I find Mr Main has not established any compelling evidence to suggest the rationale behind his redundancy was unconvincing or that the decision was influenced by irrelevant factors such as taking his performance into account. He affirmed regular (weekly) contact with Mr Lamberti occurred and no performance issues were raised and also that Mr Lamberti visited New Zealand in early January 2020 with nothing untoward being discussed. Mr Lamberti did not challenge this evidence.

[54] What was apparent and can be distinguished from deliberate pre-determination cases, was that the communication around the proposal and when the decision was actually made, was badly handled. Mr Main's claim is hampered by the fact that he chose not to give feedback on the proposal to disestablish his role and the reasons for such and he did not indicate his belief at the time that this was because he considered the decision to have been made prior to 5 March 2020 when it was communicated to him.

[55] Notwithstanding, I fully accept Mr Main's reasons for believing he was wasting his time in making a submission on the proposal to disestablish his role, but that is not the same as establishing that his employer had already pre-determined the outcome of consultation or that bias was apparent in the eventual decision.

[56] The 'leaks' of information by Mr Main's co-worker can just as easily be explained by the perception that the proposal was a 'fait accompli' and a misunderstanding of process matters. The timing of the approach from the Sydney based manager was however, symptomatic of poor communication. At the point the Sydney based manager approached Mr Main, Flint CPS had presented a simple and logical restructuring proposal pertaining only to Mr Main, sought his feedback within a sufficient period of seven days and received none. However, Mr Main was not afforded the dignity of being advised of the final decision before the Sydney based manager.

[57] What Mr Knowles and possibly Mr Lamberti impliedly did, was brief the Sydney based manager on their final decision and that manager unwittingly called Mr Main a day before the decision was scheduled to be made to discuss transition matters clearly unaware of the fact that Mr Knowles had delayed his final consultation meeting. This unsurprisingly caused Mr Main distress and fuelled his belief that the matter had been pre-determined.

Alternatives to dismissal

[58] Flint CPS in addition to consultation obligations, also had a duty to consult over alternatives to dismissal and whilst none were apparent, I saw no evidence of any discussion of such before or after the decision to terminate Mr Main's employment was made. Flint CPS did to their credit, assist with providing Mr Main external job search support.

Summary

[59] Flint CPS's counsel submitted that the dismissal overall was carried out in a procedurally fair and reasonable manner in the absence of any feedback from Mr Main and cited the Employment Court case of *Ikundabose v McWatt Group Ltd* as an example of minimum statutory process being met where the employee chose not to engage and a justified dismissal for redundancy was upheld. However, in *Ikundabose* the court found that the employer had collated information and carried out a careful and comprehensive review before determining a redundancy and they shared this information with Mr Ikundabose setting out the full reasoning for the decision.¹¹ Here, Flint CPS presented a proposal with scant detail on how they arrived upon the decision and they disclosed no financial information despite advancing the proposal as a cost saving measure.

[60] However, I accept that the decision to stop directly providing product to a client in favour of contracting with a supplier to take on this task was a legitimate business decision that Flint CPS was entitled to make and the Authority cannot substitute its judgment in this area.¹²

Overall Finding

[61] I find that whilst Flint CPS has made out a case that this was perhaps a genuine redundancy on a rational organisational restructuring basis, it was not effected in a procedurally fair manner. This was due to a failure to properly detail the initial proposal by not disclosing financial information. This meant Flint CPS did not take the crucial step of making out a 'financial case' too Mr Main, including not telling him what savings would be made by their proposal. I also find there was poor communication prior to the decision being issued that caused an embarrassing situation where before he was advised of the final

¹¹ *Ikundabose v McWatt Group Ltd* [2019] NZEmpC 193 at [29].

¹² *Op cit* at [31].

decision, a co-manager had already been told and instructed to approach Mr Main to discuss transition issues. Whilst Mr Main has not established any evidence that the decision was pre-determined due to bias or other factors, it was evidently made and communicated to a person other than Mr Main just prior to the ending of the consultation phase. The totality of these factors is my finding that Flint CPS did not meet all the procedural requirements of s103A (3) of the Act and they also breached a key good faith obligation.

[62] I am also obliged to also consider s 103A (4) and (5) of the Act to determine if any other appropriate factors prevailed and whether the dismissal or an action is unjustifiable because of the defects I have identified and to consider if the defects were minor and “did not result in the employee being treated unfairly”.¹³

[63] I have traversed the fact that Mr Main did not communicate his concern about pre-determination and the reasons for such that impacted upon the consultation period. I have to attribute Flint CPS’s lack of due regard to confidentiality around Mr Main’s situation as a contributing factor. A logical thing to do would have been to solely deal with Mr Main first and not discuss any proposal with the wider group when Mr Main’s role was the only one under the threat of disestablishment.

[64] In looking at s 103A (5) my finding is the defects were not minor and could have been resolved by Flint CPS obtaining legal advice around disclosure obligation, prior to embarking on the disestablishment of Mr Main’s position. Considered in context, the defects in process resulted in Mr Main being treated unfairly.

[65] As a result of considering all contextual factors, I find Mr Main was unjustifiably dismissed and is entitled to a consideration of remedies.

What remedies should Mr Main be awarded?

Lost wages

[66] The difficulty with Mr Main’s claim for lost wages is that he did not challenge the genuineness of the decision to disestablish his position on financial or organisational grounds.

¹³ Section 103A(5) Employment Relations Act 2000.

[67] Thus had Flint CPS properly consulted Mr Main and carefully detailed a financial case for his redundancy including disclosing the claimed losses in the New Zealand operation and been careful around confidentiality and preserving Mr Main's dignity during the whole consultation phase, then the resulting loss of position would very likely still have occurred. This means that Mr Main's situation falls into the very rare type of cases where a significant award of lost wages may not be appropriate as the loss of the position was inevitable despite the procedural errors. In coming to this conclusion I have had regard to the recent Employment Court decision *Butler v Ohope Chartered Club Incorporated*, where despite a complete lack of consultation in a genuine redundancy situation, only two weeks' lost wages were awarded and reference was made to *Telecom New Zealand v Nuttner* where the Court of Appeal said:

..... where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed....

[68] Here the consultation period was relatively short and in the circumstances Mr Main understandably thought it was perfunctory. I find an award of some lost wages is appropriate, but only to reflect that there should have been a reasonable period of further consultation that allowed Mr Main a real opportunity to seek advice and request financial information to engage in further consultation including on any alternatives to dismissal, as there appeared to be no evidence that the disestablishment of his position required urgency.

[69] I consider it would be equitable in all of the circumstances, to award Mr Main four weeks lost remuneration calculated on Mr Main's normal daily pay rate of \$355.18 - a total of \$7,103.36 (gross).

Compensation for humiliation, loss of dignity and injury to feelings

[70] I heard from Mr Main and his partner on how debilitating the impact of the decision was on him and the shock at the speed of the process and the embarrassment when co-workers appeared to know what was going on. This included anxiety over being unable to secure alternative employment and strain on family relationships.

[71] I found Mr Main to be a credible witness who has taken some significant steps to manage his distress and try and move on with his life and build resilience in difficult

circumstances as the redundancy coincided with the emergence of Covid -19 in New Zealand that limited his opportunities for seeking alternative employment.

[72] Having considered Mr Main's evidence I am convinced that the impact of the dismissal was transitory and he at the time suffered significant loss of dignity, humiliation and injury to feelings caused by the manner by which he was treated and denied a full explanation of the reasons why his role was disestablished.

[73] In considering analogous cases of both the Authority and the Courts that discuss compensatory issues to be assessed, including *Stormont* and *Zhang v Telco Asset Management Limited*, that deal with redundancies found to be either close to disingenuous (*Stormont*)¹⁴ or not effected in accord with good faith requirements¹⁵ I consider that Mr Main's level of distress at the impact of the dismissal warrants a moderate amount of compensation, I fix that amount at \$12,000 pursuant to section 123(1)(c)(i) of the Act.

Contribution

[74] Section 124 of the Act indicates that I must consider the extent to which, if at all, Mr Main's actions contributed to the situation that gave rise to his personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no cogent reason to reduce the remedies awarded above.

Outcome

[75] Overall I have found that:

- a) Jonathan Main was unjustifiably dismissed from his employment and his employer breached good faith disclosure obligations owed to him.
- b) Flint CPS Inks New Zealand Limited must pay Mr Main the sums below within 28 days of this determination being issued:
 - i. \$7,103.36 gross lost wages;
 - ii. \$12,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;

¹⁴ At [71].

¹⁵ *Zhang v Telco Asset Management Ltd* [2019] ERNZ 438 at [154] at [107].

Costs

[76] Costs are at the discretion of the Authority and here Mr Main represented himself during the investigation meeting and the preparation for such, so no costs issues arise other than I find Mr Main is entitled to recover his Authority application fee from Flint CPS Inks New Zealand Limited in the amount of \$71.56c.

David G Beck
Member of the Employment Relations Authority