

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 313  
3118372  
3119193  
3119332

BETWEEN	JACQUELINE UNSWORTH Applicant 3118372
	DAVID LIBEAU Applicant 3119193
	WHITNEY TOWERS Applicant 3119332
AND	HELLOWORLD TRAVEL SERVICES (NZ) LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Dean Organ, advocate for Applicants  
Alastair Espie and Lilli Wilkinson, counsel for  
Respondent

Investigation Meeting: 23 – 25 March 2022  
12 April 2022 (by audio visual link)

Submissions and further  
information received: At the investigation meeting

Determination: 12 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This employment relationship problem arises from circumstances of the COVID-19 pandemic and the impact on Ms Unsworth, Mr Libeau and Ms Towers' employer Helloworld Travel Services (NZ) Limited (Helloworld). Helloworld operates

a travel business with a particular focus on cruises. They were all employed in roles with a similar focus.

[2] Ms Unsworth, Mr Libeau and Ms Towers bring two broad claims before the Authority.

[3] Firstly, they say Helloworld's purported reliance on the Holidays Act 2003 closedown provisions to close the business on 27 March 2020 and the reduction in their usual pay from that date until their employment ended unjustifiably disadvantaged them in their employment for which they seek arrears of wages and compensatory damages. They say a penalty is warranted for breach of the duty of good faith. At the closing submissions they sought arrears of holiday pay entitlement they were directed to take.

[4] Secondly, they say their dismissals for redundancy were unjustified because Helloworld followed a procedure that resulted in an outcome which was flawed and unjustified and there were no genuine grounds to disestablish their positions because there were suitable alternative positions available. They seek remedies of wage arrears, compensatory damages, an award of a penalty for breach of the duty of good faith and a contribution towards the costs of representation they have incurred.<sup>1</sup>

[5] Helloworld denies the remedies sought or that it has breached any term of Ms Unsworth, Mr Libeau or Ms Towers' employment. It says the dismissals for redundancy were substantively and procedurally justified and throughout the relevant period they were treated fairly and reasonably. In the alternative it says given the COVID-19 pandemic circumstances in which the employment relationship problems arose, any defects in process were minor and inconsequential, any remedies should reflect those circumstances and there are no grounds for a penalty to be awarded.

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

[6] By consent the applications lodged by Ms Unsworth, Mr Libeau and Ms Towers are heard together. The Authority heard evidence from Ms Unsworth, Mr Libeau and Ms Towers, Chris Dillon, Ms Towers' partner, Nigel Unsworth, Ms Unsworth's husband, Simon McKearney, who was the CEO of Helloworld at the relevant times and

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<sup>1</sup> Ms Unsworth seeks an award of lost wages.

attended under summons and Alex Trifonidis, group general manager human resources, Helloworld Travel Limited, the parent entity based in Australia.

[7] 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.

### **Issues**

[8] The issues identified for investigation and determination are:

- a) Did Helloworld reduce Ms Unsworth, Mr Libeau or Ms Towers remuneration without their consent in breach of the parties' employment agreement?
- b) Did Helloworld close down the business on 27 March 2020 in breach of the Holidays Act 2003?
- c) If either breach is established did Helloworld's unjustifiably disadvantage either Ms Unsworth, Mr Libeau or Ms Towers in their employment?
- d) Did Helloworld unjustifiably dismiss Ms Unsworth, Mr Libeau and/or Ms Towers by way of redundancy?
- e) If so, are they entitled to a consideration of remedies sought including:
  - i. Lost wages pursuant to section 123(1)(b) of the Act?
  - ii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- f) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by either Ms Unsworth, Mr Libeau or Ms Towers which contributed to the circumstances which gave rise to their grievance?
- g) Did Helloworld breach the duty of good faith owed to either Ms Unsworth, Mr Libeau or Ms Towers by breaching terms of their employment agreement or predetermining the redundancy dismissal decisions?

- h) If a breach of the duty of good faith is established is a penalty warranted and should any portion be ordered to be paid to Ms Unsworth, Mr Libeau and/or Mr Towers?
- i) Is either party entitled to an award of costs?

## **Background**

### *March 2020 – Helloworld shut down and wages reduced*

[9] On Monday 23 March 2020 Andrew Burnes, the chief executive officer of the global Helloworld business wrote to all New Zealand staff providing an update from the business on the impact of the COVID-19 pandemic. The letter included that the business was to close from Friday 27 March 2020:

...

The tragic reality is that due to circumstances beyond any of our control, travel demand has evaporated and apart from processing cancellations, we have no work for most of you at the moment.

Helloworld is in a sound financial position right now, but with the forecast massive drop in revenue, we have to make difficult decisions to reduce costs and guarantee the future of the business.

We have taken the hard decision to bring forward our annual close down period. Effective 5pm 27 March 2020 we will be all but closing down Helloworld NZ for a 9 week period and looking to open 1 June 2020. I understand this is short notice, however your safety and health is important to us and respects the guidance of our government.

During this time, you will be required to take annual leave. If you have booked leave, it will be paid accordingly. If you don't have enough annual leave, you need to take this time as unpaid leave. We will have a very small team working through to cover all our divisions to ensure we continue to beat our heart.

[10] Also on 23 March the Helloworld New Zealand executive general manager, Mr McKearney, wrote to all staff with answers to anticipated questions arising from Mr Burnes announcement.

[11] Prior to this, on 13 March 2020 Mr McKearney had written to all staff advising the pandemic was a crisis for the business and there would likely be an impact on staff. His email includes:

...

I have spoken to our leadership team and have asked that we now use the 3 levers available to us to right size the balance of our people. This process began a few weeks back but in brutal summary, those 3 levers are:

- 1) **Annual leave** – All staff should have now committed to have a balance under 80 hours by 30 June. There is no 1 July or 1 August in this equation – it is 30 June and I sincerely thank you for making these efforts to achieve this. For those that were trying to find the spot for leave this will now be selected for you.
- 2) **3 to 4 day working weeks** – Again many of you have moved to this for which I thank you. Yes this is a reduction in your wages by circa 20% for each day, but that enables us to obtain more oxygen for this fight. Use that day to spend with family, rest away from the workplace and take care of yourselves. **I need to actively encourage all senior leaders at a minimum to consider this option – no it can't be forced, but you can consider the impact for your colleagues.**
- 3) **Redundancy** – Despite the above 2 levers we must also actively engage the final lever of letting our people go. Again I have asked our exec team to examine and consider their area outlooks and adjust our people accordingly. This process is now underway in many areas.

[12] Helloworld had had a closedown within the previous 12 months over the 2019/2020 Christmas New Year period.

[13] While Mr McKearney's email could be seen as foreshadowing to Ms Unsworth, Mr Libeau and Ms Towers that there may be changes to their employment circumstances as a consequence of the COVID-19 pandemic there is no dispute Helloworld did not consult with New Zealand based staff on the business closedown or the direction to take annual leave (paid or unpaid) from 27 March 2020. At this time the evidence suggests the business was actively considering which staff might be directly effected by a restructuring – Mr McKearney's email to Mr Libeau dated 16 March includes:

...are you able to "price up"...the redundancy costs of at least 5 of the marketing team...

[14] Helloworld applied for and received the government wage subsidy for the relevant period. On 26 March Mr McKearney wrote to all staff advising of this and provided the closedown rationale:

...

5) **Please explain how the company can enforce a 9-10 week closure without 14 days' notice (this a secondary closure for the company, as the Christmas/New Year is our annual close down.**

These are exceptional circumstances that allow for exceptional approaches. We made our decision based on Govt advice and the probability they would be entering an all in lockdown. This surrounds our compliance to their requirements but also protects your health and safety.

[15] On 9 April 2020 Mr McKearney wrote to Mr Libeau seeking to reduce his hours of work from full time to 24 hours per week with a concomitant reduction in his salary. Mr Libeau did sign and return the variation as requested by Mr McKearney's letter. He said he did not sign it because he did not agree to the proposed reduction in hours or salary.

[16] On 27 April Mr Burnes wrote to all staff globally with a general update regarding Helloworld's response to the pandemic including information about the company's financial status.

[17] On 14 May Mr Burnes wrote identical letters to Ms Unsworth, Mr Libeau and Ms Towers (and, it is understood, other effected staff) advising the business would continue to be closed until 31 July 2020 including:

...

Following the Government's decision to place New Zealand at Alert Level 4, we initiated a closedown of Helloworld offices for a 12 week period until 31 May 202. Unfortunately, the impacts on the tourism and travel industries are yet to subside and we do not anticipate there to be work for staff following 31 May 2020. However, we wish to retain skills and have as many of you as possible as part of the Helloworld journey once the tourism industry picks back up and Helloworld's workflow starts to increase again.

Following an assessment of our options going forward, we are seeking your consent to maintain the status quo through until **31 July 2020**. Between 31 May and 31 July, while some offices remain closed, you would remain at home and would continue to be paid at the rate of the wage subsidy. This period would continue to contribute to your continuity of service with Helloworld, for the purposes of calculating any accrued entitlements. This period will also allow the company to carefully conduct an organisational review of our operations so that we can try and preserve as many jobs as possible.

[18] The letter ended by inviting any questions about the status quo proposal for June be directed to the New Zealand based human resource manager, asked that consent to the proposal be provided by return email by 20 May. This was the first notice Ms Unsworth and Ms Towers received that a restructuring review would be undertaken.

[19] As invited by the 14 May letter, both Ms Unsworth and Ms Towers wrote to the New Zealand based human resource manager. On 15 May Ms Towers wrote to her with the following questions:

Has the government approved Helloworld to receive the additional 8 week extension of the wage subsidy?

Is it guaranteed that I will continue to receive a minimum of \$585 per week if the business remains closed down until 31 July 2020?

Is this extended closedown date of 31 July 2020 confirmed and will I be able to commence work at my full contracted salary effective Monday 3 August, with no further extension to the closedown period?

What happens if I do not consent to the 31 July 2020 date?

In New Zealand is there a legal maximum period of time that a business can be closed down for?

[20] On 19 May Ms Unsworth wrote to the human resource manager copying in her manager Mr Libeau:

The notice given is very short as this is only 4 working days to seek legal advice and consider all possible consequences and outcomes. I feel rather rushed and don't feel we have the full picture to make this decision.

I have the following questions that I would like answers to please:

1. If we agree to this continued shut down will the company guarantee to start again on Monday 3<sup>rd</sup> August?
2. If [we] do return to work on Monday 3<sup>rd</sup> August and are expected to agree to a further shutdown – how long would this be estimated for?
3. When the company does an organisational review will we be informed prior to 31 July or after this date?

...This shutdown has had huge implications for my family and we really need some clarity on the above.

Once I have these answers then I can give an answer to the questions about the proposed shut down period.

[21] On 20 May Mr Libeau received another letter under Mr McKearney's name seeking to vary his terms of employment as had been proposed by the 9 April letter. Mr Libeau did not agree to the variation as proposed and did not sign and return the variation.

[22] Ms Towers and Ms Unsworth did not receive a response to their emails to the human resource manager. On 8 and 15 June they respectively wrote to the human resource manager asking for a reply. They both expressed their disappointment and frustration at the lack of response.

[23] The human resource manager replied to their follow up emails on 9 and 15 June respectively – the situation was being managed by the global human resource team based in Australia, their feedback had been received and was being reviewed by the “group executive team”, expressing understanding at their frustration and thanking them for their patience.

[24] On 16 June Ms Unsworth received a response to her further email from “Human Resources Helloworld” acknowledging her email, apologising for the delay in response, and providing answers to the questions she had posed including the situation was being assessed and the business would prefer not to have to extend the close down. Ms Unsworth was dissatisfied with this response because it did not answer the specific questions she had raised. She emailed the New Zealand based human resource manager on 27 June including:

- the situation was taking a financial and emotional toll on her and she felt she was living in limbo;
- she had not agreed to a closedown or suspension of salary;
- she believed Helloworld’s treatment of her was appalling particularly given her years of service;
- asking Helloworld to “comply immediately with the terms of my employment (including reinstatement of my remuneration and payment of outstanding amounts from march this year)”; and
- asking for a response within 3 working days and for all future correspondence to be by email.

[25] On 29 June the human resource manager replied – it was a difficult time for everyone, decisions were being made at head office in Australia, in the coming weeks there would be announcements and until then the wage subsidy would continue to be paid.

[26] On 2 July Ms Towers wrote to the human resource manager:

- the lack of communication from Helloworld was enhancing the extreme stress she was experiencing, this was effecting her mental wellbeing and the closedown was causing serious financial hardship;
- she had not agreed to stop working, consented to the closedown or been asked to or signed an amendment to her contracted salary rate;
- she was still waiting for answers to her earlier questions and the lack of response “is unjust and quite frankly an appalling way to treat an employee with 12 years of service”;
- asking for payment of her unpaid wages calculated from 30 March 2020 and to continue to be paid her full contractual salary; and
- asked for a response by 6 July.

[27] She did not receive a reply.

*July 2020 - restructuring process and redundancy*

[28] Also on 2 July a standard form email under Mr McKearney’s name was sent individually to effected employees including Ms Unsworth and Ms Towers asking them to attend a meeting at 12.15pm on 6 July in person or by teleconference “...to commence a consultation process to discuss proposed changes in the business that may affect your employment with the company.” The email invitation goes on to say proposed changes to the business will be outlined at the meeting and an opportunity would be provided to give feedback and ask questions before a final decision was made. The email also invited them to attend the meeting with a representative or support person.

[29] On 3 July Ms Unsworth advised she could not attend the meeting at the proposed time and asked for an alternative date.

[30] The meeting proceeded as proposed. Ms Towers attended by teleconference along with a number of other employees. The meeting was led by Mr Libeau. As she had advised Ms Unsworth did not attend. Ms Towers’ evidence was she blindsided to hear at the meeting that her position was to be disestablished. A meeting was held later

that day with Ms Unsworth. Her evidence was she was told her's was one of the positions to be disestablished.

[31] Following the meeting Mr Libeau sent a document to the marketing team by group email – the restructuring pack. In his email he describes the document as “the proposed marketing structure and timeline”. He also said the human resource manager would “send out the official communication on this later today”.

[32] The proposed marketing structure document sets out the rationale for the restructuring which includes that the lack of revenue caused by the impact of COVID-19 had ‘forc[ed] the business to review its headcount.’ Of the six roles proposed to be disestablished two were those held by Ms Unsworth and Ms Towers. The timeline provided required feedback to be sent by 10 July and that the final decision on the changes would be made by 17 July.

[33] Ms Unsworth and Ms Towers did not provide any feedback. They said in evidence they did not apply for any of the redeployment options because, respectively, the roles were not suitable and were roles held by co-workers. They also both said they were told at the 6 July meetings their positions were to be disestablished.

[34] On 17 July Mr Burnes emailed the effected staff including Ms Unsworth and Ms Towers confirming the proposal. The next steps outlined in the email included that interviews for the contestable roles within the new structure would start on 20 July, interview times would be communicated shortly and the final outcome would be advised by 28 July.

[35] On 22 July Mr Libeau wrote to Ms Unsworth that her position was disestablished and her last day of employment would be Friday 24 July.

[36] On 23 July Mr Libeau wrote similarly to Ms Towers – her position was disestablished and her last day of employment would be 24 July.

[37] Attached to these emails are near identical letters under Mr Libeau's name confirming the details of their redundancies. Ms Unsworth and Ms Towers both received their final pay on 24 July 2020. There is no dispute they have received all their

contractual entitlements arising from their employment ending by way of redundancy the issue of wage arrears aside.

[38] On 31 July Mr McKearney wrote to Mr Libeau purporting to confirm his role with the varied terms and conditions of employment and to, in effect, suspend his employment with a view to retaining his skill set by his taking a period of extended, unpaid leave from 1 August 2020 until 31 March 2021. The rationale set out in the letter was that due to the impact of the COVID-19 pandemic restrictions there would be insufficient work to maintain his role for the balance of 2020 and into 2021.

[39] On 6 August Mr Libeau wrote to Mr McKearney:

- while acknowledging the situation was a difficult one for the business the proposal that he go on unpaid leave for seven months came as a complete shock;
- that he could not be without employment as proposed;
- he had never agreed to or signed a variation to his terms of employment and had not agreed to a reduction in salary;
- the first proposal to vary his terms of employment came five weeks after his salary was reduced by 40%;
- he was finding his employment situation very difficult;
- he wished his remuneration immediately reinstated;
- all outstanding salary paid; and
- that these matters are addressed without delay.

[40] On 17 August Mr McKearney wrote to Mr Libeau referring to a discussion they had held the week before regarding changes to his role, restating the unpaid leave offer and Mr Libeau's advice he would not accept it. The letter goes on:

Unfortunately, we have been unable to identify suitable alternative employment for you or any other way in which your redundancy could be avoided. It is a matter of regret to us that this situation has occurred. As a result, your last day if employment will be 25 August 2020.

[41] Mr Libeau duly received his final pay on 25 August 2020. As with Ms Unsworth and Ms Towers, he received all his contractual entitlements in his final pay arising from his redundancy, the issue of wage arrears aside.

[42] Ms Unsworth raised her personal grievance and wage arrears claim with Helloworld by letter from her representative dated 28 August 2020. On 10 September Ms Towers raised her personal grievance and wage arrears claim with Helloworld by way of letter from her representative. Mr Trifonidis acknowledged the raising of the claims, denied them and advised Helloworld's intention to defend the claims. An offer to attend mediation was extended. The Authority understands the parties have attended mediation.

[43] On 4 September Mr Libeau raised his personal grievance claims through his representative. Mr Trifonidis responded as he had done to Ms Unsworth and Ms Towers.

## **Discussion**

*Did Helloworld close down the business on 23 March 2020 in breach of the Holidays Act 2003?*

[44] Under the Holidays Act 2003, after the end of each 12 months of continuous employment, employees are entitled to 4 weeks' paid annual holidays ("annual leave").<sup>2</sup> An employer and an employee should reach agreement on how an employee's entitlement to annual leave is to be met. If they are unable to reach agreement, an employer must give an employee no less than 14 days' notice that they are to take annual leave.<sup>3</sup> A closedown period involves an employer's operations closing or discontinuing for a period and requires effected employees to take all or some of their annual holidays.<sup>4</sup> An employer may only have one closedown period in any 12-month period.<sup>5</sup>

[45] In their respective employment agreements Ms Unsworth, Mr Libeau and Ms Towers are each entitled to four weeks annual leave and with respect to when that annual leave could be taken:

If you and the company are unable to reach agreement as to when you will take your annual leave, the company may require you to take leave on 14 days' notice.<sup>6</sup>

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<sup>2</sup> Section 16 Holidays Act 2003.

<sup>3</sup> Section 19 Holidays Act 2003.

<sup>4</sup> Section 29 Holidays Act 2003.

<sup>5</sup> Section 30 Holidays Act 2003.

<sup>6</sup> Ms Unsworth IEA schedule 3, Ms Towers' IEA clause 6.1 and Mr Libeau IEA schedule 3.

[46] Helloworld has breached the obligation it owed Ms Unsworth, Mr Libeau and Ms Towers by failing to at least an attempt to try to reach agreement on taking annual leave. A statutory close down was not available to Helloworld because it had already had one which effected Ms Unsworth, Mr Libeau and Ms Towers in the relevant period. The purported closedown was in breach of requirements under the Holidays Act.

*Did Helloworld reduce Ms Unsworth, Mr Libeau or Ms Towers remuneration without their consent in breach of the parties' employment agreement?*

[47] Ms Unsworth, Mr Libeau and Ms Towers' individual employment agreements all provided that they were permanent, full-time employees to be paid a specified annual salary.<sup>7</sup> Ms Towers' employment agreement has a wage deduction clause which includes she must give written consent to any deduction from remuneration as required by s 5 of the Wages Protection Act 1983.<sup>8</sup>

[48] With respect to changes to the terms of employment the employment agreements all include "Changes or additions to this agreement will not be binding unless mutually agreed and recorded in writing".<sup>9</sup>

(i) *Ms Unsworth and Ms Towers*

[49] Ms Unsworth and Ms Towers did not agree to the reduction in their hours of work and/or the reduction in their salary. Their consent to these variations was not sought or given. The parties' employment agreements remained in place and were binding on the parties. Helloworld's actions in reducing their hours or work and salaries was a unilateral variation to those binding terms, and I find in breach of those terms of employment.

(ii) *Mr Libeau*

[50] With respect to Mr Libeau's claim, Helloworld says the proposal to reduce his hours of work and remuneration was appropriately proposed to him and that he

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<sup>7</sup> Ms Unsworth IEA schedule 1, Mr Libeau IEA schedule 1 and Ms Towers clause 11.

<sup>8</sup> Ms Towers IEA clause 11.1.

<sup>9</sup> Ms Unsworth IEA clause 22.3, Mr Libeau IEA clause 24.3 and Ms Towers' IEA clause 16.1.

consented to the reduction through his actions. Helloworld accepts no written agreement was entered with Mr Libeau recording the variation.

[51] In support of this submission Helloworld relies on the two letters provided to Mr Libeau proposing to reduce his hours dated 9 April 2020 and 20 May 2020, that Mr Libeau worked in accordance with this arrangement and his open reference to the arrangement being for the longer-term. In particular, Helloworld seeks to rely on Mr Libeau's email to Mr McKearney dated 24 April 2020 which includes "Of course some are going to pick it in anyway if they cannot be offered full time work but realistically I don't expect any of us are going to have that for at least the next 3 months or more". It also emphasises the lack of evidence of Mr Libeau's opposition to the proposed reduction in hours - his 6 August email objecting to the arrangement coming four months after the arrangement was out in place.

[52] It is not accepted Mr Libeau by his actions acquiesced to the reduction in his remuneration. Firstly, there is insufficient evidence his hours of work reduced to or about the proposed 24 hours – his evidence was he continued to work hours necessary to fulfil the duties of his role and there is no evidence Helloworld knew what hours he was in fact working. In light of this not a lot of weight can be placed on the 24 April letter – Mr Libeau says little more than his team cannot expect full time work in the coming three-month period – he does not say what hours of work they could expect, or reduction in hours.

[53] Secondly, the wording of the 9 April and 20 May variation letters make it clear that signature indicated acceptance of the variation. The absence of such signature, given the clear wording of the letters, the drafting of which it is understood was wholly within Helloworld's control, can reasonably be understood as non-acceptance. This is not a situation where Mr Libeau's actions have led Helloworld to think he agreed to the variation, indeed his action in not signing, given the wording of the letters, indicates his non-acceptance.

*Did these breaches of the employment agreement by Helloworld cause Ms Unsworth, Mr Libeau and Ms Towers to be unjustifiably disadvantaged in their employment?*

[54] While it is accepted Helloworld suffered substantial impact to its business and cash flow over the COVID-19 lockdown period and this led it to seek to reduce its overheads including wages it was incumbent on it to ensure any variation to terms of employment were reached fairly with effected employees within the express terms of their employment agreements and statutory obligations.

[55] On the information before the Authority this did not occur and there is insufficient information before the Authority that Ms Unsworth, Mr Libeau or Ms Towers agreed to vary their terms and conditions of employment to reduce their hours of work or salary. It is accepted these breaches of their employment agreements caused them stress, uncertainty and caused them to lose confidence that their employer would treat them fairly and reasonably. They have established personal grievances for unjustified disadvantage and are entitled to be paid the following arrears for the period of claim calculated at their salary rates as set out in their respective employment agreements:

Jacqueline Unsworth	\$20,125.47 (gross)
David Libeau	\$21,464.77 (gross)
Whitney Towers	\$8,489.77 (gross)

*Were Ms Unsworth, Mr Libeau and Ms Towers unjustifiably dismissed by way of redundancy?*

[56] The next part of Ms Unsworth, Mr Libeau and Ms Towers' employment relationship problems concern their personal grievances for unjustified dismissal. They say the process was so unfair and unreasonable as to render their dismissals unjustified.

[57] Helloworld submits the context of Ms Unsworth, Mr Libeau and Ms Towers' redundancies is the ongoing COVID-19 pandemic and the direct and substantial impact it had on its business. It also submits the evidence shows restructuring was being actively considered at a senior level as a response to the situation and this was signalled to all staff, including Ms Unsworth, Mr Libeau and Ms Towers from an early stage.

[58] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The legal principals to apply to such a consideration are set out in the following statements of the Court of Appeal in *Grace Team Accounting Limited*:

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. 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. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.<sup>10</sup>

[59] In assessing the justifiability of a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.

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<sup>10</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

(i) *Were Ms Unsworth and Ms Towers' redundancies genuine?*

[60] I am satisfied there was a genuine business reason for the decision to restructure and disestablish Ms Unsworth and Ms Towers' roles which have resulted in their dismissals for redundancy. The evidence is clear that Helloworld's business was significantly affected by the COVID-19 pandemic and that this had a direct impact on their positions which substantially involved cruise marketing activity.

(ii) *Has Helloworld complied with the notice and consultation requirements of s 4 of the Act?*

[61] No. Helloworld's consultation process for these redundancies and approach to the provision of relevant information was rushed, unfair and unreasonable. Given the business reason for the restructuring and redundancies had been extant for some months it is unclear why the restructuring process could not accommodate individual consultation meetings where sufficient information was provided to allow Ms Unsworth and Ms Towers to consider and comment particularly given their positions were directly affected by the proposed restructuring. The negative impact of the rushed process and the proposal announcement being made without prior individual notice to these directly effected employees is clear and was compounded by the lack of meaningful information being provided at the meetings and the lack of response in the proceeding months to the reasonable questions Ms Unsworth and Ms Towers had asked, having been invited to do so by Helloworld using the process it had put in place. In the absence of a fair opportunity for meaningful consultation it is little wonder Ms Unsworth and Ms Towers felt there was some motivating link between the questions they raised and repeated and the restructuring process. I also accept Ms Unsworth and Ms Towers evidence that they were told on 6 July their positions were to be disestablished. Even if this was a misapprehension, it was incumbent on Helloworld to ensure the process was clear and supported by sufficient information provided at an appropriate time. This did not occur and has resulted in Ms Unsworth and Ms Towers forming a view the key decision regarding their roles had already been made which has had the unfortunate consequence of cutting them off from the rest of the restructuring process. Given the high level of resource available to Helloworld to manage this process these clear flaws are difficult to understand.

[62] Helloworld's actions have left it vulnerable to criticism. The flaws in the consultation process are not, on an objective assessment, minor or inconsequential – they denied Ms Unsworth and Mr Towers a fair and reasonable opportunity to understand why their positions had been selected for restructuring and to engage in a meaningful way with the restructuring process. The process was unreasonably rushed. On the evidence before the Authority these dismissals for redundancy are unjustified.

(iii) *Mr Libeau*

[63] Helloworld submits Mr Libeau, as a senior member of the New Zealand team was actively involved in discussions around and the design of the restructuring proposal which was presented to effected staff. It says further he elected to be made redundant when the variation proposal was not acceptable to him.

[64] Mr Libeau's criticism of his redundancy centres on his discovery of a role titled 'Retail Marketing' in the new structure which, he says was substantially similar to his role and had been offered to another colleague. He says further that it was unfair and unreasonable that he was not offered what was clearly a redeployment opportunity. In respect of his dismissal for redundancy he says this came out of the blue after he declined the unpaid leave proposal, it was never discussed with him, he was never invited to provide feedback and he questions the substantive basis of his dismissal when his colleague was offered the 'Retail Marketing' role on 31 July, the same day he was advised he was to go on unpaid leave for seven months because "there was no substantial workload to maintain your role...".

[65] Helloworld is unable to demonstrate it has followed a fair and reasonable process with respect to Mr Libeau's redundancy and the flaws are so serious as to render his dismissal unjustified. I accept Mr Libeau's evidence that the 'Retail Marketing' role was unknown to him and came as a surprise. I also accept his assessment that the role could well have been a redeployment opportunity if he had been given the opportunity to consider it. I also accept the redundancy notice of 17 August came 'out of the blue', there was no feedback opportunity or discussions as referred to in the notice of dismissal letter. Helloworld seeks to rely on a spreadsheet which purports to record Mr Libeau's preference for redundancy in the face of unpaid leave and/or reduced hours. The spreadsheet is not direct evidence of Mr Libeau's view and is not otherwise

sufficiently supported by the ‘realistic alternative’ analysis. Again, given the level of specialised resource available to Helloworld the clear and serious flaws in this process are difficult to understand.

## **Remedies**

[66] Ms Unsworth, Mr Libeau and Ms Towers have established personal grievances for unjustified disadvantage and unjustified dismissal for redundancy. They are entitled to a consideration of the remedies sought.

### *Reimbursement*

[67] Ms Unsworth seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act.<sup>11</sup> I am satisfied the appropriate period of claim runs for 12 weeks from her final date of employment being 1 August 2020.

[68] After reviewing the evidence of loss and Ms Unsworth’s attempts to secure employment, the Authority is satisfied she is entitled to an award of three months lost remuneration to be calculated at her contractual salary rate. This is not to be off set against her redundancy compensation which is a contractual entitlement.<sup>12</sup>

[69] I decline to exercise my discretion to award more than three months lost earnings in Ms Unsworth’s favour. While I accept it has been difficult for Ms Unsworth to find alternative employment, given the very likely impact on job prospects of the ongoing effects of the COVID-19 pandemic, this is not a consequence to be visited on Helloworld.

### *Compensation for humiliation, loss of dignity and injury to feelings*

[70] Having established personal grievances for unjustified disadvantage and unjustified dismissal, Ms Unsworth, Mr Libeau and Ms Towers are entitled a consideration of the remedies sought. A global approach to setting this remedy is appropriate.

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<sup>11</sup> Mr Libeau and Mr Towers do not seek awards of lost earnings.

<sup>12</sup> *Muru v Coal Corp of NZ Ltd* (1997) 5 NZELC AEC 19/97.

*Ms Unsworth*

[71] Ms Unsworth contextualised her claim for hurt and humiliation in her career in the cruise industry in which she had worked for Helloworld for almost 21 years. She said she had been a loyal, dedicated and hardworking employee of Helloworld who had made a substantial contribution to building the cruise business in New Zealand, had an excellent reputation in the industry and was widely respected in New Zealand and Australia for her knowledge and skill. She said she is still grieving for the loss of her career.

[72] With respect to the wage reduction Ms Unsworth says the 23 March notice of a shutdown came as a shock, there was no consultation and when she raised questions over the next two months, she felt her emails were ignored and this gave her the impression she was being deliberately ignored. She said this caused immense stress and anxiety to her and her family. She said when the shut down was extended she sought to raise questions as asked within the short time frame and was again ignored. She said she never gave consent to the shut down or to not be paid her salary and that the situation left her in a state of limbo and uncertainty.

[73] The restructuring of her role was announced to all her team-mates without her present and before the impact of the restructuring on her role was discussed with her. She said the process was quick, that it felt pre-determined, and she felt utterly abandoned and discarded, as if her entire career had been for nothing.

[74] Ms Unsworth was hurt not to receive any acknowledgement or thanks from a manager or director of Helloworld. She says its refusal to issue a press release about the reasons for her departure felt deliberate and made her feel as if she had never existed in respect of the business. She found it humiliating and degrading to have to inform industry contacts herself of the reasons her employment had ended, and the process made her feel worthless and has shattered her confidence. She said when she heard Helloworld had purchased another cruise business this “added insult to injury” and made her wonder why she had been made redundant.

[75] Ms Unsworth said the situation had been financially very tough for her family, they had to reduce mortgage and cut insurance payments which has had negative

consequent effects. She says she now has difficulty sleeping and believes the employment experience with Helloworld for which personal grievances have been found, has had a huge impact on her life and she is struggling to get back to the person she was before.

[76] She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$20,000.00.

*Mr Libeau*

[77] Mr Libeau said after 47 years in the travel industry his experience with Helloworld has left him feeling undervalued, shocked, hurt and humiliated. The reduction in his salary caused financial and emotional stress particularly given he continued to perform the work necessary to fulfil his role. He said his role had effectively been given to someone else and the restructuring was never discussed with him and he was not given the opportunity to apply for the role. He was not thanked or recognised for his contribution to Helloworld. After his employment ended Mr Libeau said his life felt very empty and he felt directionless and worthless. At this stage in his life he knew this was the end of his career in travel.

[78] He said the months following and up to the investigation meeting have been a roller coaster of emotions and he has experienced a deep sense of loss and sadness which has damaged his overall confidence and wellbeing. He said prior to these events he had thoroughly enjoyed his role at Helloworld, had been a loyal and hardworking employee and led a successful team of which he was extremely proud. He had hoped to be part of the recovery from COVID-19 for the business.

[79] He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$18,000.00.

*Ms Towers*

[80] Ms Towers acknowledged COVID-19 was a significant upheaval for everyone but said she felt the way she was treated by Helloworld from the start of the COVID-19 impact through her restructuring was wrong “from start to finish”. She said the way she was treated caused undue stress to herself and her partner and caused her to pull

away from family and friends. She said the financial uncertainty caused by Helloworld's lack of communication and questions not being answered gave her a sense she was being strung along and caused many sleepless nights. She said as a loyal and hardworking employee with more than twelve years' service, the way she was treated took a negative toll on her and has tainted her happy memories of her work at Helloworld.

[81] Ms Towers said the circumstances of first learning of the restructuring proposal was particularly hurtful and humiliating – she felt disrespected to first hear her position was to be disestablished on a conference call with all her colleagues and does not understand why she could not have been advised in a one-on-one setting. She said these feelings of stress and hurt at losing her job were compounded when she heard Helloworld had purchased a cruise wholesale business in November 2020.

[82] Ms Towers said this experience has changed her as a person, that she struggles to trust in new situations, still experiences poor sleep and is worried about being let down.

[83] She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$20,000.00.

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Unsworth, Ms Towers or Mr Libeau that contributed to the situation giving rise to his grievance?*

[84] No deduction from the remedies awarded is to be made under s 124 of the Act. Ms Unsworth, Mr Libeau and Ms Towers dismissals were “no fault” redundancies and their raising of concerns about their work circumstances did not contribute in a blameworthy way to the situation giving rise to their personal grievances.

*Arrears*

[85] Wage arrears are awarded as set out in paragraph [55] above. The holiday pay reimbursement claim is not properly before the Authority and is not allowed.

## *Interest*

[86] Ms Unsworth, Mr Libeau and Ms Towers are entitled to an award of interest on the wage arrears ordered in their favour. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[87] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[88] Helloworld Limited is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:<sup>13</sup>

- (i) Interest on the total arrears calculated from 24 July 2020 for Ms Unsworth and Ms Towers until the date payment is made in full and from 25 August 2020 for Mr Libeau until the date payment is made in full.

## **Penalty**

[89] Did Helloworld breach the duty of good faith? If so, should the Authority order it to pay a penalty?

[90] It is not clear to the Authority how the claim for breach of good faith is distinct from the personal grievance claim for unjustified disadvantage and unjustified dismissal which are addressed above. The penalty claim is declined.

## **Summary of orders**

[91] Helloworld Limited must pay the following amounts within 21 days of the date of determination:

Ms Unsworth

- (i) \$20,125.47 (gross) in wage arrears;
- (ii) \$20,000 under 123(1)(c)(i);

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<sup>13</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator)

- (iii) Three months wages under s 123(1)(b); and
- (iv) to calculate and pay interest on total arrears.

Mr Libeau

- (i) \$21,464.77 (gross) in wage arrears;
- (ii) \$18,000 under 123(1)(c)(i); and
- (iii) to calculate and pay interest on total arrears.

Ms Towers

- (i) \$8,489.77 (gross) in wage arrears;
- (ii) \$20,000 under 123(1)(c)(i); and
- (iii) is to calculate and pay interest on total arrears.

### **Costs**

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed any party seeking costs 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 the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so has been sought and granted.

[93] 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.

Marija Urlich  
Member of the Employment Relations Authority