

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 352
3146245

BETWEEN ATHOLENE HOUSTON
Applicant

AND REXEL NEW ZEALAND
LIMITED for REDEAL LTD t/a
IDEAL ELECTRICAL
SUPPLIERS
Respondent

Member of Authority: Eleanor Robinson

Representatives: Bernie McIntyre, advocate for the Applicant
Simon Laphorne, counsel for the Respondent

Investigation Meeting: 1 July 2022 in Whangarei

Submissions and/or further
evidence 6 July 2022 from the Applicant
14 July 2022 from the Respondent

Determination: 28 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Atholene Houston, claims that she was unjustifiably dismissed by the Respondent, Rexel New Zealand Limited (Rexel) for Redeal Ltd t/a Ideal Electrical Suppliers (Ideal) as a result of a restructuring of the Whangarei branch.

[2] Ms Houston further claims that she was unjustifiably disadvantaged as part of the process undertaken; unjustifiably discriminated against by reason of her age; and that Rexel breached the Employment Relations Act 2000 (the Act).

[3] Rexel denies that it unjustifiably dismissed, unjustifiably disadvantaged, unjustifiably discriminated against Ms Houston, or that it breached the Act.

The Authority's investigation

[4] The Authority received oral evidence from Ms Houston, and written and oral evidence from Mr Darryn Hansen (Branch Manager), Whangarei and Ms Cherie Hargreaves (National HR Manager) for the Respondent. Mr Hansen provided his oral evidence by Zoom.

[5] I also received submissions from the representatives for the Applicant and the Respondent.

[6] 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

[7] The issues requiring investigation are whether or not Ms Houston was:

- Unjustifiably dismissed by Rexel?
- Unjustifiably disadvantaged by Rexel?
- Unjustifiably discriminated against by reason of age? And:
- Whether Rexel breached the duty of good faith it owed to Ms Houston?

Background

[8] Ideal is a registered New Zealand company and a wholly owned subsidiary of the Rexel Group. Rexel's head office is in Paris, France, and the Group provides multichannel distribution of electrical products and services to key clients in the residential, commercial and industrial sectors.

[9] Ideal provides electrical wholesale services nationwide and supplies electrical equipment and accessories to its customers. From 31 March 2000 to 24 August 2011 Ideal's name was Redeal Limited. A decision was made to change the name back to Ideal Electrical Supplies because this name was the more well known in New Zealand.

[10] Ms Houston commenced employment with Ideal on 1 April 1992 at the Whangarei branch. By June 2021 when her employment ended Ms Houston was employed as the Administrator/Counter Sales person, managing financial and transactional processes for the branch, customer accounts administration, filing and storing branch financial records and customer service. Ms Houston also undertook counter sales.

[11] Ms Houston worked full-time between 7.30 a.m. and 4.30 p.m. She said she would open or close the branch when required, but this was not often, and she said she had not wanted to do so on a permanent basis.

[12] Ms Houston signed an individual employment agreement on 14 September 2007 (the Employment Agreement) which provided the following clause:

1. The Position

- 1.1. You are employed in the position of a Administration / Counter Sales person for Ideal Electrical Suppliers, a division of the Company. Your job description is attached to this agreement as Appendix A.
- 1.2. You shall be responsible to the Ideal Whangarei Branch Manager

12. Termination of Employment

- 12.1. One month's written notice of termination of employment shall be given by yourself or the Company. In the absence of such notice, the equivalent of one month's salary shall be paid or forfeited by the defaulting party.
- 12.2. On receiving or giving notice of termination, the Company may, at its sole discretion:
 - a. Elect to pay salary in lieu of notice for all or any remaining part of the notice period, in which case your employment shall be deemed to have terminated on the date on which payment is made; or

[13] The Branch employed four team members in addition to Mr Hansen and reporting to him. These were a Branch Sales Support person, Mr Bill Blithe, a counter sales/Warehouse person, a Counter Salesperson, and a Counter Sales/Administrator, Ms Houston. There was also a sales representative who reported to a national sales manager, but was often in the Whangarei branch.

[14] Mr Hansen said that during the second half of 2020 and the start of 2021 there had been an increase in walk-in traffic at the Branch. In particular he said that docket numbers had increased by 18% during the last 7 months of 2020 and sales growth for the whole of 2020 had increased by 8%. The growth had continued into 2021 and the docket numbers had increased by 22% compared to pre-COVID levels.

[15] Mr Hansen said that as a result of this significant growth in business, some of the team were having to work outside of their normal working hours. Ms Houston confirmed that as demand increased most staff worked through their lunch hours.

[16] Mr Hansen said his ability to leave the branch in order to visit customers was restricted because there was no 2IC position which could cover the Branch operations in his absence. In particular there were only three employees who could open and close the Branch. As a result of these factors he said it became clear that the staffing requirements at the Branch needed to be reviewed.

[17] Ms Hargreaves said that as National HR Manger she was responsible for delivering the people strategy at Ideal, providing staff members with HR advice and support. At the end of April 2022 she said she was asked to assist Mr Hansen with a proposed restructuring of the Whangarei branch.

[18] She had discussed with him the challenges he was experiencing at the Branch, and the possibility of creating a new role as 2IC, the purpose of that role being to assist with, and assume some of Mr Hansen's people and branch management responsibilities.

[19] Specifically the role was intended to provide Mr Hansen with the opportunity to visit more customers and to provide additional resource to assist with opening and closing the branch.

[20] Ms Hargreaves said she and Mr Hansen, together with Mr Tym Matangi, Regional Manager, worked on the Restructure Proposal, which required budget approval, over a number of weeks.

[21] Ms Hargreaves said a Consultation Document was produced which outlined the business case for the Restructure Proposal, proposed a possible outcome and which advised:

This is a **proposal** only – we are seeking feedback on the proposed changes before a decision is made on the final outcome

[22] The Consultation Document also advised that the timeline and that questions, could be referred to Mr Hansen, Ms Hargreaves or Mr Matangi.

Meeting 20 May 2021

[23] On 19 May 2021 Mr Hansen emailed Ms Houston to invite her to a meeting to discuss: “a proposal for the future structure of the Whangarei branch.” Ms Houston was advised that she was welcome to bring a support person with her to the meeting since her future employment could be affected.

[24] Ms Houston said she was shocked to receive the email because she assumed that it meant Ideal intended to “get rid of me” although there had been no criticism of her work or any issues with the other team members.

[25] The meeting held on 20 May 2021 was attended by Mr Hansen, Mr Matangi and Ms Houston and her sister.

[26] Mr Hansen said he provided a copy of the Consultation Document which had been prepared to Ms Houston and read through it with her. In addition to outlining the rationale for

the proposed restructure, it advised that the position of Administration/Counter Sales would be disestablished and a new role of 2IC created; stating: “Should the proposal go ahead, the role of 2IC will be open to any internal applicants and advertised externally”.

[27] Mr Hansen said the initial view was that the 2IC position was a ‘step-up’ in terms of salary level and responsibilities from the position of Administration/Counter Sales. The 2IC position would cover the responsibilities of the Administration/Counter Sales role and in addition, be responsible for running the branch in his absence and have people management responsibilities. As such the new role had a significantly higher salary than that of the Administration/Counter Sales role.

[28] He said he had been unsure if Ms Houston would want the additional responsibility of the additional tasks and hours, but if she had expressed interest in applying, he would have talked to her about the role and what it entailed.

[29] During the meeting it was covered that the Consultation Document was a proposal only and feedback was invited on the proposed changes before a decision on the final outcome was made.

[30] Ms Houston said she had assumed that she would not be considered for the 2IC role because of her age. She said her sister had asked that due to Ms Houston’s age was there any chance she would be given the job. Mr Hansen and Mr Matangi had not replied, but she believed that was the case given their body language.

[31] Mr Hansen said he did not recall any question about Ms Houston’s age being raised during the meeting.

[32] Mr Hansen said Ms Houston’s sister sought confirmation that Ms Houston’s position as Administration/Counter Sales would not exist in the new structure which he gave, and queried whether or not redundancy provisions applied in light of Ms Houston’s long service at the Branch. He had agreed to check the Employment Agreement.

[33] He said Ms Houston mentioned that she had been considering reducing her hours from full-time to part-time. Ms Houston confirmed in the Investigation Meeting that she had done so.

[34] Mr Hansen advised Ms Houston that she had a week to provide her feedback. The meeting concluded with Ms Houston being offered the remainder of the afternoon off and his agreeing as requested to deliver a copy of the Employment Agreement to her home that evening.

[35] Mr Hansen said he saw Ms Houston and her sister when he dropped the Employment Agreement at her home in the evening. He told them there was no redundancy provision, but a four week notice provision. They had commented that was disappointing.

[36] Ms Houston said she had been more upset that she would not complete 30 years' service with Ideal and receive a payment made in recognition of it, which would have been due in April the following year.

[37] Mr Hansen said he had told Ms Houston that no final decisions had been made and he would raise the 30 year payment with a senior member of the management team who was due at the Branch the following week.

[38] Mr Hansen emailed his notes of the afternoon meeting with Ms Houston and her sister and of his visit to Ms Houston's home in the evening of 20 March 2021 to Ms Hargreaves.

[39] In relation to Ms Houston working part-time, Ms Hargreaves said she asked Mr Hansen if (i) someone working part-time would assist the Branch if the issue was more hours being required to cover opening and closing hours, and (ii) whether the Branch could cover the cost of an additional head count doing part-time hours in addition to the added costs of creating a new 2IC role.

[40] However she said that given the budget restraints imposed by Ideal it was unlikely a part-time position in addition to a 2IC position would be approved.

[41] Accordingly she advised Mr Hansen that he should encourage Ms Houston to give her feedback and any other suggestions.

Events 21 May to 28 June 2021

[42] On 21 May 2021 Mr Hansen received a telephone call from Ms Houston's sister informing him that Ms Houston had become upset the previous night the more she had thought about "what the company thinks of her", and that she was going to visit her doctor. A medical certificate was subsequently provided dated 21 May 2021 which advised that Ms Houston was unfit to attend work until 8 June 2021 but gave no reasons for her absence.

[43] On 25 May 2021 Mr Hansen said he had telephoned Ms Houston to check on her well-being, to confirm how she wanted her absence to be treated (as annual leave or sick leave without pay), and to ask if she had any feedback on the restructuring proposal.

[44] He said Ms Houston told him she would not be coming into the branch, and that she would prefer to receive the outcome of the restructure process by telephone.

[45] Ms Houston confirmed at the Investigation Meeting that she had not asked Mr Hansen to delay the process, and she had said she was willing to take a phone call for feedback and for confirmation of the outcome.

[46] Ms Houston confirmed at the Investigation Meeting that she had been happy for Mr Hansen to contact by her by telephone to discuss her feedback and that she had not requested for the process to be delayed pending her return to work. Nor did she ask Mr McIntyre to do so when she had instructed him to act on her behalf.

[47] Ms Houston said that her view was that if Ideal had wanted her in the 2IC role, she should have been offered it. She felt aggrieved, and on that basis did not provide any feedback.

[48] Mr Hansen received another medical certificate from Ms Houston on 27 May 2021. It was dated the same date as the first and signed by the same doctor, but this time advised that Ms Houston was unable to attend work due to work related stress. When questioned in the Investigation Meeting Ms Houston said that she had asked the doctor to re-issue the medical certificate to state her absence was due to work related stress.

[49] On 27 May 2021 Mr Hansen consulted with the other team members about the proposed restructure. In the feedback notes Mr Hansen emailed to Ms Hargreaves on 28 May 2021, he summarised that the general team feedback was that the proposed change would be good, especially in regard to opening and closing times.

[50] The feedback noted as received from Mr Bill Blithe, previous branch manager then working in the role of Branch Sales Support, was that he "... just wants us to hurry up and cover the gaps before we are left in a hole."

[51] Mr Hansen also telephoned Ms Houston that same day, 28 May 2021, and again invited her to provide feedback on the proposed restructure, but she responded that there was "nothing in the proposal for me".

[52] When questioned at the Investigation Meeting if there could have been something for her if she had applied for the 2IC position, Ms Houston said that she could not work the hours required for the role.

[53] Ms Houston said she considered she was being told she was useless and was too emotional to act on her own behalf, so she engaged Mr McIntyre to act for her.

[54] On 31 May 2021 Mr McIntyre emailed Mr Hansen advised he had been authorised to act for Ms Houston and requested a copy of Ms Houston's employment agreement and a job description for the 2IC role.

[55] Ms Hargreaves responded by email dated 2 June 2021 providing the requested documents. She advised that the outcome meeting was scheduled for that day, and that Ms Houston had said she preferred to receive the information by telephone, and asked if she should be contacting Mr McIntyre instead of Ms Houston.

[56] Ms Hargreaves also suggested that it might be good to have a chat by telephone, and asked when would be a good time to call him, and provided her contact number. However Mr McIntyre did not call her or provide her with a contact number, although he did respond with an email asking that all communications were to be sent to him. Ms Hargreaves responded asking for a telephone number on which she could contact him, but again did not receive the information.

[57] Mr McIntyre said he did not consider that any contact by telephone rather than by email was necessary, so he had not replied to Ms Hargreaves' request.

[58] On 2 June 2021 Mr Hansen emailed Ms Houston and Mr McIntyre attaching an outcome letter and the Confirmation Consultation Outcome document. The letter dated the same date, 2 June 2021, stated:

We met with you on Thursday 20 May 2021 to commence a consultation process to discuss the proposed changes in the Whangarei branch that may affect your employment. Tym Matangi, Regional Manager, was present along with myself and your sister as your support person.

In summary, we proposed to dis-establish the Counter Sales/Administration role and establish a 21C position to assist the manager with the daily operations of the branch and free up time to grow the customer base. We also require the role to be a full time 45-hour week to ensure cover for planned and unplanned leave and also cover for counter sales.

You were invited to give feedback, however, we note that you felt there was not much you could say to the proposal.

After careful consideration we have made the decision to implement the proposal as outlined in the document you received on 20 May. As a result of these changes, this means that your role will be disestablished, and we are giving you notice that this will be effective 2 July 2021.

We will pay you your normal salary throughout the notice period (up to Friday 2 July 2021), and upon leaving you will be paid all outstanding holiday pay owed to you. Although you are not automatically entitled to a redundancy payment, we would like to pay you an additional ex-gratia payment of 4 weeks salary. Furthermore, we would like to include a \$600 prezzy card normally provided to those with 30 years of service, in recognition of your 29 years of service attained in April 2021. The final payments will be paid on Wednesday 30 June 2021, including any outstanding holiday pay.

We kindly ask that prior to leaving, all company property is returned to your line Manager.

We appreciate this is a difficult time for you and would like to thank you for your contribution to the Company over the years. We wish you all the best for the future.

Should you have any further queries please let me know.

[59] The Confirmation Consultation Document advised that the new role of 2IC was open for applications until 4 June 2021.

[60] On 8 June 2021 Mr Hansen received a further medical certificate advising that Ms Houston had been signed off for work related stress leave until 22 June 2021.

[61] On 10 June 2021 Mr Hansen emailed the team at the branch and advised that Ms Houston's position as Administration/Counter Sales had been disestablished and recruitment was being undertaken to recruit a 2IC position for the branch. Mr Hansen acknowledged Ms Houston's long service and wished her well for the future.

[62] Also on 10 June 2021 Ms Hargreaves emailed Mr McIntyre confirming receipt of the medical certificate dated 8 June 2021 and the understanding that she would not be attending work again. Ms Hargreaves stated:

We would like to wish her well and would like to know if she would like a farewell from the branch. I know people would like to say goodbye to Del if she is up for a morning tea or some form of celebration of her time with Ideal.

[63] Mr McIntyre responded on 11 June 2021 confirming that Ms Houston did not want to attend a farewell function which she had made clear to Mr Hansen. Mr McIntyre stated that Ms Houston had been "extremely hurt and humiliated over the disestablishment of her position" and suggested that Ms Houston should have been 'gifted' the 2IC role until 1 April 2022 being her 30 year anniversary. Mr McIntyre concluded by advising that he had been authorised to raise a personal grievance on Ms Houston's behalf.

[64] Ms Hargreaves replied by email dated 11 June 2021 acknowledging the information concerning a personal grievance. Ms Hargreaves stated:

As was advised in the meeting, the role is open for applications and she is welcome to apply for the 2IC role, however, given she was on medical leave suffering from stress, we did not want to pressure her.

[65] Ms Houston did not apply for the 2IC role. By letter dated 28 June 2021 Mr McIntyre proceeded to raise Ms Houston's personal grievance.

Was Ms Houston unjustifiably dismissed by Rexel?

[66] Ms Houston's employment with Ideal ended as a result of her position as Administration/Counter Sales being disestablished.

[67] An employer in that situation must act as a fair and reasonable employer could have done in all the circumstances at the time dismissal or action occurred, and must act in good faith. The employer must also have genuine reasons for the action it takes.

[68] It is not the Authority's role to substitute its view of how an employer is to run its business, but evidence of a genuine and proper evaluation by the employer of its business situation, and of the options available to the employer, must be examined to establish that a dismissal for redundancy is justifiable. This was set out in *Grace Team Accounting v Brake*¹

[69] Further the employer considering a possible redundancy situation must follow a fair process and be constructive and communicative. The employer must let potentially affected employees know what is proposed. It must provide those employees with access to relevant information about the situation and give them a reasonable opportunity to provide their views before any decision is made.

[70] In *Grace Team* the Court of Appeal observed at that:

...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.²

Was the Restructuring Proposal and redundancy genuine?

[71] In *Brake v Grace Team Accounting Limited* the Court of Appeal clearly stated that redundancy can arise in the situation in which an employee is superfluous to the needs of the business, which may arise from an employer's decision to make the business more efficient.³

... This Court was clear that the Labour Court's restrictive interpretation was wrong: what was required was that the employee was superfluous to the needs of the business. This could arise where the employer sought to make the business more efficient.

[72] Ideal's evidence and of Mr Hansen as set out in the Consultation Document was that the restructure of its business was undertaken for genuine commercial reasons. Mr Hansen's evidence was that there had been an increase in walk in traffic and significant sales growth which was resulting in some team members working extended hours.

[73] This evidence was confirmed by that of Ms Houston, who gave evidence of an increase in retail clients and team members working throughout their lunch breaks.

[74] Mr Hansen's evidence, and accepted by Ms Houston, was that he was unable to leave the branch and visit customers because he was one of only three team members who opened

¹ *Grace Team Accounting v Brake* [2014] NZCA 541, [2014] ERNZ 129 .

² Above n 1 at [85]

³ Above n 1 at [47]

and closed the branch, and because there was no one who he could deputise for branch and staff management.

[75] The restructure proposal was devised to ensure the branch had sufficient resources to cover these exigencies by creating the role of 2IC to support Mr Hansen and maintain branch operations whilst he was away from the branch visiting customers. By the requirement to work 45 hours a week, the role would also provide additional cover to assist with the branch opening and closing times, and thus reduce the excessive hours being worked by the other employees.

[76] As part of the Restructuring proposal, there would be a disestablishment of the Administration/Counter Sales role because the proposal envisaged Ms Houston's administrative functions being absorbed into the 2IC role which would also have responsibility for staff and operational management. These latter responsibilities were not part of Ms Houston's role. In addition there was a requirement for the incumbent of the 2IC role to work a 45 hour week to cover branch opening and closing times which was not a requirement of the Administration/Counter Sales role.

[77] I find there were genuine reasons for the restructure. It arose from a need to increase efficiency to meet increasing customer demands, reduce the need for employees to work outside their contractual hours to meet that demand, and free up Mr Hansen to visit customers by ensuring there was cover for all aspects of his position while he did that.

Was the process followed by Ideal procedurally fair?

[78] An employer who is proposing to restructure its business must not only have genuine reasons for undertaking the restructuring, but must follow a fair procedure in respect of affected employees.

[79] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made." s4 (1A)(i) and (ii).

Access to information

[80] There was an explanation and presentation of the Consultation Document during the meeting held on 20 May 2021, and the timeline was explained.

[81] Ms Houston was given a copy of the Consultation Document to take away with her and Mr Hansen was available to, and did provide, answers to questions both at the meeting and on his subsequent visit to Ms Houston's home on the evening of 20 May 2021.

[82] The Consultation Document provided information relating to the evidence of the increased customer business at the branch, and advised that any questions could be referred to Mr Hansen, Ms Hargreaves or Mr Matangi.

[83] Ms Houston did not ask any questions about the restructure, or request further information. She did not provide any feedback despite being repeatedly being given the opportunity to do so.

[84] I find Ms Houston's evidence confirmed that she understood the rationale for the restructure. I further find that Ms Houston was provided with information relevant to the Restructuring Proposal.

Opportunity to comment

[85] Ms Houston was provided with invitations and opportunities to provide feedback on the restructuring proposal: firstly in the Consultation Document and thereafter during the telephone calls to Ms Houston on 25 and 28 May 2021.

[86] Ms Hargreaves had also requested to speak to Mr McIntyre prior to the feedback meeting when he could have provided feedback on Ms Houston's behalf.

[87] Ms Houston's evidence was that she had not provided any feedback or asked questions about the restructuring proposal because she had assumed she would not be considered for the 2IC role because of her age and her view that if Ideal had wanted her in the 2IC role, she should have been offered it. She did not provide any feedback because she considered 'there was nothing in the proposal for me'.

[88] I find that Ms Houston was provided with opportunities to provide feedback but failed to avail herself of those opportunities. I find this arose primarily from her view that she was considered too old for the role. However I note that there appears to have been no basis for this view: Ms Hargreaves' evidence was that Ideal has a significant number of older employees, Mr

Blithe was of similar age to Ms Houston, and the successful applicant for the 2IC role is over 60 years of age.

[89] I find that Ideal acted in good faith by providing Ms Houston with a genuine opportunity to not only request further information on the Restructuring Process, but to provide feedback on the information provided before a decision to proceed with the Restructuring Process was made.

Redeployment

[90] Ms Houston's role of Administration/Counter Sales was disestablished because it was surplus to requirements after it had been decided to proceed with the restructure proposal.

[91] It was submitted on behalf of Ms Houston that because her role had been disestablished, she had an automatic entitlement to redeployment under clause 13.4 of the Employment Agreement.

[92] I note that clause 13.4 applies to the situation in which an employee whose employment is terminated on the grounds of redundancy is offered suitable alternative employment by the company, or new employment in a restructuring which involves all or part of the company's business being sold, transferred or contracted out to another person or entity. The latter did not apply in Ms Houston's case.

[93] An employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists.⁴ In that respect an employer is entitled to determine whether or not the applicant for redeployment has the requisite skills and experience for the role sought.

[94] The Restructuring Proposal contained a proposal to disestablish Ms Houston's role of Administration/Counter Sales and establish a new role of 2IC. The key responsibilities of the new role of 2IC were significantly different to Ms Houston's role because they included:

- a. operations management – assisting the branch manager and managing the branch in his absence;
- b. employee performance and development, including recruitment and selection of new employees,; management of individual and team performance; development of staff; and management and communication within the team;
- c. commercial management, including ensuring that the branch meets corporate compliance policy requirements; and

⁴ *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

- d. health and safety, ensuring that the branch complies with health and safety standards and procedures, and that team members are inducted and trained in all health and safety matters.

[95] Mr Hansen's evidence was that the 2IC role carried more responsibility than that of Administration/Counter Sales, and therefore the role was not automatically offered to Ms Houston. I find that Ideal was not obliged to offer the role to Ms Houston, although it did invite her to apply for it.

[96] Ms Houston's evidence was that she did not apply for the 2IC role or ask any questions about it because she did not want to work the hours required by the role, and would prefer to work on a part-time basis.

[97] Ms Houston having mentioned part-time working, Mr Hansen had followed that up with Ms Hargreaves, as a fair and reasonable employer acting in good faith.

[98] Ms Hargreaves' evidence was that there were strict budget constraints imposed by Ideal and an additional part-time role at the branch in addition to the 2IC role was not a possibility given the increased cost of the 2IC role.

[99] I find that Ms Houston was treated fairly by Ideal. She was provided with information on the 2IC role, told she could apply for it and given a full opportunity to do so. She chose not to do so.

Unfair discrimination on the basis of her age

[100] Ideal proposed the disestablishment of the Administration/Counter Sales role and creation of the new role of 2IC on the basis of genuine business needs. There is no suggestion that Ms Houston was other than a valued member of the team.

[101] Ms Houston was invited to apply for the 2IC role. There is no evidence that the invitation to do so was not genuine.

[102] Further as observed in paragraph [88] Ideal had a number of employees over the age of 65, including Mr Blithe who worked at the Whangarei branch and was older than her. Ms Houston accepted this evidence. Further I note that the 2IC role incumbent is over 60.

[103] I find no evidence that Ms Houston was discriminated against on the basis of her age.

[104] In conclusion I find that the restructuring and redundancy process followed by Rexel was procedurally fair.

[105] I determine that Ms Houston was not unjustifiably dismissed by Rexel by reason of redundancy.

Was Ms Houston unjustifiably disadvantaged by Rexel?

[106] I find no basis for an unjustifiable disadvantage claim.

Did Rexel breached the duty of good faith it owed to Ms Houston?

[107] I find that Ideal acted throughout the restructuring process in good faith towards Ms Houston.

Costs

[108] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[109] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[110] 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.⁵

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].