

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 459
3136440

BETWEEN

DENISE FAYE HUNTER
Applicant

AND

METROS PUBLISHING GROUP (NZ)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Bradley McDonald and Sally Cunneen, counsel for the Applicant
Murray Dempsey, advocate for the Respondent

Investigation Meeting: 2 June 2022 at Christchurch

Submissions Received: 15 and 30 June 2022 from the Applicant
23 June 2022 from the Respondent

Date of Determination: 14 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Denise Hunter commenced employment with Metros Publishing Group (NZ) Limited (Metros) in 2017. She signed an employment agreement on 28 August 2017 with a start date of 1 September 2017. Her position was described as production assistant. Prior to Ms Hunter commencing employment with Metros, she had worked for the previous owner and publisher as a graphic designer since 2001.

[2] Metros is a duly incorporated company that carries on the business of magazine publication. The sole director of Metros is Murray Dempsey.

[3] During the 2020 Covid-19 lockdown Metros concluded that it needed to change the structure of the business to deliver additional and new value to customers to meet their needs and ensure the sustainability of its business. Primarily it was identified that Metros needed to be able to effectively deliver the value customers wanted from advertising and have the right products for the sales team to sell the customers. A process to review, re-design, and restructure the production function that consisted of editorial, advertising and magazine design followed.

[4] After staff meetings for feedback on 6 July and 20 July 2020, a proposal document for the restructure of the production function was produced. It provided that all the roles in the production area would change to some degree. It was proposed Ms Hunter's role described in the proposal as advertising designer be disestablished and a new role as marketing graphic designer be created.

[5] If the restructuring proceeded, it was proposed a process for the selection and appointment of the best qualified person who is the best fit for the new role would begin. Internal and external candidates for the new role would be considered. A summary of the requirements of the proposed role was attached to the proposal.

[6] Ms Hunter felt confident that she could undertake the role of marketing graphic designer based on the work she was currently performing and the criteria she had been provided with attached to the proposal. She prepared to present this feedback to Mr Dempsey at the next scheduled feedback meeting on 5 August 2020. Ms Hunter did not consider the meeting went well.

[7] After the meeting Ms Hunter was on sick leave and did not return to work before her employment was terminated. Two medical certificates were provided.

[8] The restructuring proceeded.

[9] On 11 August 2020, Ms Hunter was provided with an updated restructure proposal which included a comparison of the key tasks of the advertising designer role and the marketing graphic designer role and selection criteria for the marketing graphic designer role. Mr Dempsey set out in an email to Ms Hunter on 11 August, amongst other matters, that if there was no further feedback Ms Hunter's position would be disestablished from Friday 14 August 2020. Her position was disestablished on that date.

[10] In an email dated 17 August 2020 to Mr Dempsey Ms Hunter's then advocate raised concerns over the genuineness of the redundancy and the procedural fairness. The advocate stated that the role of marketing graphic designer is very similar to the position that Ms Hunter undertook, and she should be offered the role without having to apply. Mr Dempsey did not accept the new role was very similar but rather that it was fundamentally different. There was agreement to consider Ms Hunter's knowledge, skills, and abilities against the selection criteria and against the requirements in the job description for the role which had been provided to the advocate.

[11] It was concluded by Metros that Ms Hunter lacked the skills, knowledge, or abilities on several of the critical requirements for her to be competent and perform well in the role of marketing graphic designer. Further it was concluded that even with training and support she was not capable to attain the skills, knowledge, or abilities quickly enough to be effective in the role.

[12] Mr Dempsey confirmed the outcome of the assessment to Ms Hunter's advocate on 19 August 2020 and attached the notes with the assessment. It was stated that as from 19 August 2020 Ms Hunter's employment was to be terminated with four weeks' notice.

[13] The marketing graphic designer role was advertised from on or about 21 August 2020. Ms Hunter did not apply.

[14] A personal grievance was raised on 12 November 2020.

[15] It is from the restructure process which ended in Ms Hunter's redundancy that the employment relationship problems of unjustified dismissal and unjustified actions flow.

[16] In an amended statement of problem lodged when Mr McDonald was instructed, the following claims are made:

That Metros unjustifiably disadvantaged Ms Hunter in:

- (i) The flawed restructure process;
- (ii) Failing to properly consider her feedback and skillset;
- (iii) Forming a predetermined view as to her suitability for the new role;

- (iv) Disestablishing her from a role, advertising graphic designer, that she did not formally hold;
- (v) Failing to offer her the new role created despite this being a role that she could have undertaken with little or no retraining; and
- (vi) Failing to pay for her four week notice period.

[17] Ms Hunter says that she was unjustifiably dismissed from her role and that there was a breach of good faith obligations in responding to her concerns, properly considering her ability to undertake the new role and a failure to pay her for her notice period. Mr McDonald in final submissions states that the claims of disadvantage could be absorbed in the alleged unjustified dismissal claim or alternatively considered separately.

[18] Ms Hunter seeks reimbursement for lost wages after her employment was terminated and a compensatory payment. She also seeks an award of costs and reimbursement for the unpaid period of notice for four weeks.

[19] Metros does not accept that the dismissal of Ms Hunter was unjustified. It says that it needed to make the changes and that an appropriate business case for change is made out. Metros says that there was a thorough process to understand the situation and change to achieve the aims for the organisation in a fair and reasonable manner.

[20] Metros says that the role created was significantly different to that which Ms Hunter held and had a fundamentally different focus and outcome. It says that assessed against the role description and selection criteria Ms Hunter was not considered suitable for the role. There were no redeployment opportunities for her, no redundancy payment was due and there was no requirement for paid notice as she had exhausted her sick pay.

The investigation process

[21] The Authority heard evidence from Ms Hunter and her partner Mr Widgery and from Mr Dempsey at its investigation meeting and was subsequently provided with detailed written submissions.

[22] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to

dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[23] The Authority needs to determine the following issues:

- (a) Was the dismissal of Ms Hunter for reason of redundancy justified?
- (b) This will include an assessment of the following issues:
 - (i) What is the legal framework to be applied in assessing the justification of a termination for redundancy?
 - (ii) What are the material provisions of the employment agreement?
 - (iii) Was there a genuine business case for change?
 - (iv) Was the role of marketing graphic designer the same or similar to the role that Ms Hunter was performing?
 - (v) Was the process undertaken fairly with proper consultation and adequate information provided?
 - (vii) Was the decision by Metros not to offer redeployment that which a fair and reasonable employer could have made in all the circumstances?
 - (xi) Was Ms Hunter entitled to paid notice?
- (c) Alternatively, were there unjustified actions on the part of Metros that caused Ms Hunter disadvantage from the process.
- (d) If the dismissal was unjustified or there were unjustified actions that caused disadvantage, what remedies is Ms Hunter entitled to and are there issues of contribution or mitigation.

Was the dismissal of Ms Hunter for reason of redundancy justified?

The legal framework to be applied in assessing the justification of a termination for redundancy.

[24] The Authority is required to apply the test of justification in s 103A of the Employment Relations Act 2000 (the Act) and objectively assess whether what Metros' actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[25] In a redundancy setting the Court of Appeal in *Grace Team Accounting v Brake* has confirmed that employers are required to show that the decision to make an employee redundant is genuine and based on business requirements.¹ Once those matters are established and an employer concludes the employee's position is surplus to its needs, then the Authority is not to substitute its business judgment for that of the employer.²

[26] Section 4 of the Act requires the parties to deal with each other in good faith when restructuring. This includes being responsive and communicative. The statutory obligation of good faith requires employers to provide affected employees with access to information relevant to the continuation of their employment and an opportunity to comment on that information before the decision is made.

[27] The main issue for the Authority to determine in this matter is about the role of marketing graphic designer. The Authority needs to assess whether it is the same or similar to the role which Ms Hunter had been performing.

[28] Metros accepted that there were some similarities between the marketing graphic designer role and that Ms Hunter was performing some of the required work of the new role. It says however that the marketing graphic designer role was a new and different role and even with training and upskilling, Ms Hunter was not capable of performing it effectively.

[29] In assessing whether the changes in a role are significant enough to constitute a redundancy situation, the test that has been applied in the Court and Authority is:

Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment?³

[30] If the changes to the role are significant enough to constitute a redundancy situation, the next issue is whether the role should have been offered by way of redeployment. There

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

² *Innovative Landscapes (2015) Ltd v Popkin* [2020] ERNZ 55 at [7].

³ *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984 (EC) at 995.

was reference to the proactive approach to redeployment required by the duty of good faith in a recent Employment Court judgment.⁴ It was stated in the same judgment with reference to *Wang v Multicultural Services Trust* that “differences in the terms, duties, remuneration and skillsets may or may not be an encumbrance on redeployment..”⁵ In *Wang* for example the Employment Court found that an employee should have been redeployed to a role that was at a higher salary.⁶

The material provisions of the employment agreement

[31] Clause 14 of the employment agreement provides for redundancy and restructuring situations.

[32] Redundancy and redundant is defined in clause 14(a) as:

Means a situation in which the Employer has staff (excluding casual employees) surplus to its requirements whether arising from the restructuring of the whole or any part of its business, the adoption of new technology or downturn in demand for its products or services for whatever reason or where the Employer requires a reduction in its permanent workforce.

[33] Clause 14(c) was headed redundancy and provided as follows:

- i) Where the Employer proposes to implement a redundancy, the Employer shall, where practicable, consult with those employees affected or likely to be affected (together with their representatives, if applicable) as a result of the redundancy.
- ii) In the event that your position is declared by the Employer to be redundant after consultation, the Employer will give notice of termination in accordance with clause 12(a)(ii) above. The Employer may elect to pay your salary in lieu of your working your notice.
- iii) if you are made redundant, you will not be entitled to any compensation or other entitlements beyond the express terms of this agreement.

[34] Clause 12(a)(ii) provided for four weeks’ notice. Clause 12 (ii) provided that the employer could at its discretion make a payment in lieu.

Was there a genuine business case for change?

[35] The focus for the restructuring was to achieve greater efficiencies, retention and growth in advertising dollars. The main strategy for Metros was to proactively work with clients to

⁴ *Gafiatullina v Propellerhead Limtied* [2011] NZEmpC 146 at [111] with reference to *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102; *Wang v Hamilton Multicultural Services Trust* [2010] ERNZ 468 and *Ritson-Thomas t/a Totara Hills Farm v Davidson* [2013] ERNZ 55.

⁵ Above n 4 with reference to *Wang* at [43].

⁶ Above n 4 with reference to *Wang* at [43].

improve their advertising. As described in the email to staff dated 6 July 2020 at the commencement of the review and restructure, Covid-19 had changed the market and for the company to remain successful it needed to deliver more. It was noted in the email, with the magazine market impacted there was an opportunity to position the magazine to new readers and clients and current and new advertisers. The strategy was to increase native advertisements.

[36] An increase in the offering and publication of native advertisements was one of the key focuses of the restructuring. Mr Dempsey described native advertisements in his written evidence as those that resemble editorial content and fit the style and tone of the magazine. They are designed to stand out and attract reader attention. Compared to design advertisement which are image based, native advertisements are usually word based and tell a story.

[37] Mr McDonald is critical in submissions that financial records to support the issues and concerns Metros was facing at the time of the restructuring were not provided. I will not expand on these financial issues to preserve commercial confidentiality. I am not satisfied that s 4(1A)(c) of the Act required disclosure of the financial information of the company as relevant information in the circumstances where there was a reorganising of functions and duties proposed.

[38] I accept that there was a genuine business case for change at Metros. To the extent that Mr McDonald submits otherwise, I conclude that the rationale for the business case was disclosed during the restructuring.

Was the role of marketing graphic design the same or similar to that which Ms Hunter was performing?

[39] Ms Hunter did not have a position description. There is an email dated 29 October 2018 from Mr Dempsey about a pay increase for Ms Hunter to \$27 per hour. The email states:

For the record the change is to reflect the increased responsibility and accountability Denise Hunter has accepted since change in the Design Team structure and roles, over last 3-4 months. Specifically, since Warren went on holiday.

Specific responsibilities of Denise, now include;

Coordinating inflows of adverts requests and changes

Ensuring all adverts are made and new adverts are put to Ian and Sian to be designed.

Proofing all adverts ensuring changes are made and all adverts receive client approval.

[40] Ms Hunter did not accept that this email contained all her duties. I accept her evidence about that as more likely, this is supported by the word “include”.

[41] Ms Hunter said in her oral evidence the nature of her duties grew after she commenced her employment with Metros. She considered she had a bigger role than simply a production assistant and undertook more graphic design and was accountable for the customer’s needs. After the 2020 Covid lockdown, Ms Hunter gave evidence that she produced native advertisements and more new advertisements. In answering a question, she considered that about 85-90 percent of advertisements were at that time standard and 10 per cent were native advertisements, although her evidence was that it varied for each magazine issue.

[42] She explained marketing for clients was undertaken when she liaised with them about advertisements for their products and service and provided advice about the design and nature of the advertisement. Ms Hunter said that she had undertaken copywriting for the 19 years that she had worked for the magazine.

Comparison of the two roles

[43] Mr Dempsey accepted that there were some similarities between the two roles during the restructuring. In an email dated 11 August 2020 sent during the restructuring process to Ms Hunter, he agreed that the new proposed role includes some of the same tasks as the current role but stated that it has “significantly changed in its focus and the additional skills and abilities required.” He then went on to refer to a lack of ability at the current time to increase native advertisements because of a lack of capability in the team to do that effectively and efficiently. There was reference to the need to build capability quickly to service current native advert clients and to enable more to be sold.

[44] Similarities between the roles included ensuring adverts and repeat adverts were processed, attending to advertisement changes and design. There was some disagreement about the extent to which Ms Hunter designed new advertisements. Mr Dempsey said such occasions were limited to when the then part-time contractor was unable to attend to the new advertisements. The part time contractor graphic design role ended after the restructuring. I accept Ms Hunter designed some new advertisements when there was a requirement to do so. She referred to some of the advertisements still appearing in the magazine to the current time.

There was some overlap of duties and responsibilities when required for production function. Ms Hunter interacted with customers and in doing so considered the design and type of copywrite for advertisements that would best market the product or services. She undertook copywriting. There was proofing required although the nature of that was to be extended.

[45] Objectively assessed, the main difference between the roles was the focus on improving the marketing and copywriting capabilities at Metros to enable the production of more native advertisements. Further changes in the production process meant that the marketing graphic design role had increased responsibility for new clients and advertisements and did not have responsibility for more administrative duties such as coordinating job bags and sending out repeats.

[46] Ms Hunter did not maintain the two roles were the same. Rather she said that she was undertaking many of the duties in the new role and was confident that she could perform the new role with little or no training. She did not necessarily disagree some upskilling may have been required. Individual feedback from the first restructure meeting with staff on 6 June contained in an email from Mr Dempsey dated 17 July 2020 refers to limited marketing expertise in the business and the need for marketing copywriting capability

[47] A reasonable person considering the requirements of the marketing graphic design role could conclude there was sufficient difference between it and the role Ms Hunter held to break the essential continuity of the employment. On that basis the disestablishment of Ms Hunter's position was genuine. It was a situation as defined in clause 14 (a) of the employment agreement where the position held by Ms Hunter was surplus to its requirements because of the restructuring.

Ulterior motives

[48] Mr McDonald submits that Ms Hunter was targeted and her redundancy resulted from an ulterior motive. This was based on issues raised at the time of restructuring and in evidence about errors, weekend work no longer being required and the unsatisfactory nature of several advertisements. Ms Hunter confirmed in her evidence that such concerns had not been raised with her in a performance related manner.

[49] Some of these concerns could relate to Ms Hunter's work but the issues were raised generally as well throughout the process. I could not rule out that the weekend work issue was

something Mr Dempsey had reflected on rather than having been a concern at or before the time of restructuring. The 6 July 2020 email from Mr Dempsey to staff that preceded the staff meeting referred to errors and concerns about design in a general manner. I could not safely conclude from the evidence that Ms Hunter rather than her position was deliberately targeted for redundancy.

[50] In determining the matter in accordance with the justification test in s 103A of the Act the Authority is required to objectively review all actions of an employer up to and including the decision to dismiss.⁷

[51] Submissions on behalf of Ms Hunter are to the effect that there was procedural unfairness that was more than minor and resulted in Ms Hunter being treated unfairly. Further, the good faith requirements were not satisfied. It is also submitted that Ms Hunter should have been offered the role of marketing graphic designer as an alternative to dismissal rather than it being advertised for internal and external candidates to apply. These matters require assessment before reaching conclusion as to whether what Metros did and how it did it was what a fair and reasonable employer could have done in all the circumstances at the time.

Was the process undertaken fairly with proper consultation and adequate information provided?

Feedback opportunities?

[52] There were opportunities for Ms Hunter to feedback to the proposed restructuring initially at staff meetings on 6 July and 20 July 2020. There were emails preceding both meetings on 6 and 20 July 2020 that contained the basis for the commencement of the restructuring and key points from the meeting on 6 July and conclusions from the feedback. There was an opportunity after the proposal was provided on 31 July to Ms Hunter for further feedback on 5 August. At the 5 August meeting there was a proposal that there be a further meeting involving the whole production team suggested by Ms Hunter's partner Mr Widgery. Ms Hunter was unwell, and no meeting went ahead. There was an opportunity for feedback to the updated proposal provided on 11 August 2022.

⁷ *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102 at [38].

Record of the meetings

[53] There is an issue as to whether the written notes of the meetings on 31 July and 5 August 2020 supplied by Ms Hunter to Mr Dempsey on 10 August can be relied on. Mr Dempsey says that he raised some issues about the notes in a conversation with Mr Widgery. Any concerns about the content of the notes were not committed to writing. No other notes were provided. I find that the notes that were provided from Ms Hunter to be the best record of the meetings.

Proposal for restructuring

[54] Ms Hunter was provided with the proposal for restructuring on 31 July 2020 at a meeting when she was accompanied by Mr Widgery. Ms Hunter said she felt shocked, upset, and disappointed about the proposed disestablishing of her role. There were some changes to the other roles proposed but not to the extent of her role. The evidence from Mr Dempsey was that two contractors involved in graphic design were also impacted by the restructure, but they were not in an employment relationship with Metros. The notes reflect that Ms Hunter was advised when she was provided with the proposal that she could apply for the role but that Metros wanted to advertise it “to see who is out there.”

5 August meeting

[55] Ms Hunter intended to approach the meeting on 5 August as an opportunity to put forward that she would be an “excellent candidate” for the new role. She considered the summary of the role description of the marketing graphic designer that was in the proposal and felt that she was already undertaking the duties as set out.

[56] Ms Hunter attended the meeting on 5 August 2020 with Mr Widgery. Mr Dempsey was present at the meeting with the creative director and the general manager came to the meeting part way through.

[57] Ms Hunter’s feedback at the meeting appears to have conflated feedback to the restructuring proposal including whether her position should be disestablished with feedback about her ability to perform the proposed new role. This may have been because her evidence was that she concluded from the proposal that the disestablishment of her position was not simply a proposal. I am not satisfied of that when the proposal is read overall.

[58] Ms Hunter went through the work she was doing in her current role at the meeting and set out that she was already doing work in line with the criteria set out in the proposal for the marketing graphic design role. She presented feedback that she had received from a customer regarding a native advertisement she had written to be published in the next issue that they “loved her work.” She referred to work with another client to develop the layout and design of the advertisement and branding which resulted in a three-page feature in the latest issue. Ms Hunter said that the examples she gave demonstrated that she had great skills in working with clients, branding, marketing, and design. Ms Hunter presented a book called “The Christchurch Botanic Gardens” that she was author of and had published to demonstrate her skills in photography, designing, illustration work and writing.

[59] She also provided a certificate to demonstrate that she had undertaken a screenwriting course of her own volition in May 2020. Ms Hunter presented an award she had won for the magazine when she received third place for “best graphic designer” in the advertising New Zealand community newspaper awards in 2019. Publications throughout New Zealand had submitted work for this award and Ms Hunter received her award for advertisements that Ms Hunter had designed throughout 2019. The comments about her work were “great use of imagery and well considered positioning of logos and typography to work with the images.”

Mr Dempsey’s reaction

[60] Ms Hunter and her partner observed that Mr Dempsey did not appear engaged during the presentation and did not ask questions. Their evidence was that he did not acknowledge Ms Hunter or look at what she was presenting. Ms Hunter felt that Mr Dempsey disagreed that anything she was currently doing was required by the new role and felt he had rejected her application for the role. Mr Dempsey indicated that the new role required a lot more copywriting work for new native advertisements and less design work on current advertisements.

[61] Both Ms Hunter and Mr Widgery recalled Mr Dempsey got loud and swore about having a mortgage and his home being at risk if the company failed. I accept their evidence that something along those lines was said. Mr Dempsey did not disagree that he got somewhat “excited” and maybe was distracted because he was “very stressed.” Mr Dempsey said that the meeting then got back on track.

Meeting gets back on track

[62] The notes reflect that once the meeting got back on track the general manager said clients prefer one point of contact from production and wanted that considered in how workflow will happen. Ms Hunter suggested upskilling the production team in copy writing to benefit the skill base of the copywriting for the native advertisements. She referred to lack of instructions from the sales team. Mr Widgery suggested outsourcing copywriting and that the whole production team should meet, as there is a crossover of work and workflow.

[63] In his written evidence Mr Dempsey considered Ms Hunter was asserting that she was already performing the new role and he considered that at odds with what had been agreed on at staff meetings that there was not the resources, skills, and capabilities to deliver native advertisements in the business. He said that was not in accordance with the purpose of the meeting which was to provide feedback to the proposal.

Conclusion on consultation

[64] The meeting with Ms Hunter on 5 August 2020 was to hear her individual feedback as an affected employee.

[65] Mr Dempsey considered it had already been agreed following the feedback from 6 and 20 July 2020 staff meetings that the main skills for the new role were not in the business. It is likely therefore that as Ms Hunter and Mr Widgery said in their evidence, he appeared disengaged when Ms Hunter discussed her work, skills, and successes. The way the meeting unfolded on 5 August 2020 supports a closed mind to what Ms Hunter had to say about the tasks she was currently undertaking and her skills and successes.

[66] A fair and reasonable employer could have been expected to have engaged with Ms Hunter on 5 August as she spoke about her skills and day to day work. A fair and reasonable employer could have been expected to have wanted to ensure no information had been missed about duties and skills and to understand what was seen as a change from any earlier agreements following staff meetings about skills in the business. Consultation requires an open mind and a willingness to even change what is proposed. Statutory good faith obligations include being active and constructive in maintaining a productive employment relationship. Section 103A requires in subs 3(c) and(d) that not only is an employee to have a reasonable

opportunity to respond to concerns, in this case a proposal, but an employer should genuinely consider what the employee has to say.

[67] I could not conclude consultation at the meeting was full and fair for the reasons set out above. That is not a minor failing because even if unlikely to have changed the ultimate result, it caused unfairness. Ms Hunter felt ignored and that Mr Dempsey had strongly disagreed that what she was doing in her current work would be required in the new role. She concluded it was clear Mr Dempsey did not want her for the new role. The evidence supports Ms Hunter took what was said or not said at the meeting on 5 August very personally and it resulted in her needing time off work as she was unwell.

[68] In terms of resources Mr Dempsey said that the business was a small one however he did accept when questioned that he had some access to legal advice at stages during the process

Failure to undertake earlier investigation of Ms Hunter's suitability for the new position before concluding it would be advertised externally

[69] Mr McDonald submits that Mr Dempsey failed to undertake a review or assessment of Ms Hunter's role and duties before the restructuring with her input. He was critical of the early proposal that the new role be advertised for external candidates as well as internal. Mr Dempsey said that he knew what Ms Hunter did and in submissions stated that she had been doing the same sort of work for many years. Further, that there was agreement about the lack of marketing and copywriting skills in the business for native advertisements, including from Ms Hunter. I accept at the staff meetings held before the restructuring proposal was provided that the feedback was to the effect that marketing/copywriting capability was required for the business. In those circumstances I do not accept the criticism levelled by Mr McDonald about that matter, particularly weighed with an opportunity for individual consultation.

Adequate time for feedback?

[70] The process and timelines set out in the original proposal were as follows. After provision of the proposal on 31 July 2020 there was to be feedback between 3 and 5 August 2020 from affected employees. Feedback was to be considered between 6 and 7 August 2020. A decision on implementation of the proposal was to be announced on 10 August 2020.

[71] Although proposed that Ms Hunter could provide some further feedback on 11 August, that meeting did not take place. Ms Hunter remained unwell.

[72] An updated restructuring proposal was provided to Ms Hunter on 11 August 2020. A significant aspect was that another role absorbs some of the work Ms Hunter had previously carried out rather than that being undertaken as part of the new role. The updated proposal also contained a selection criterion for the role of marketing graphic designer and a summary of feedback to that point. It contained a summary of key tasks in the current advertising designer role and marketing graphic role in a comparison format that was not in the original proposal. Additional feedback was to be provided by 5pm 12 August 2020, which would be considered on 13 August and then a decision announced on the restructuring by 3pm 14 August 2020. Ms Hunter did not provide feedback within the timeframe. Her position was disestablished on 14 August 2020. The timeframe was very tight.

[73] In assessing the time for feedback, I have focused on the updated proposal. I weigh several matters. Ms Hunter's role was the most significantly impacted by the proposal. The updated proposal was the first time there had been a written comparison of the key tasks of Ms Hunter's role and the new role. It was also the first time that it was proposed some of her other duties would be absorbed by another role. The original proposal had a summary of the role description for marketing graphic design role whereas the updated proposal contained a detailed selection criteria and requested feedback. It was known Ms Hunter was unwell. Objectively assessed, two days for feedback on an updated proposal was insufficient time in all the circumstances to either provide feedback and/or instruct a representative. I conclude the timeframe was unfair in that regard.

Disestablishing a position that Ms Hunter did not hold

[74] Mr McDonald points out in his submission Ms Hunter's position as described in her employment agreement of production assistant was not disestablished but rather the role of advertising designer. No issue was raised by Ms Hunter about this when she was provided with the proposal. In the notes of the 31 July and 5 August meeting that she provided to Mr Dempsey she refers to advice that the graphic design role is to be disestablished. In brackets under that is written (current role Denise is performing). I do not find that unfairness arose from that matter, however it is a matter that informs the importance and need for proper consultation.

Failure to consider suggestions made by Ms Hunter and Mr Widgery

[75] Mr McDonald submitted that there was a failure to address suggestions more than once, such as upskilling current staff and other suggestions from Ms Hunter and Mr Widgery. Feedback was considered in the updated restructuring proposal with a summary of the feedback themes, notes and management comments on the feedback attached. There was no failure in that regard. To the extent that Ms Hunter said she asked for but did not get other employee feedback, I accept that was also in the feedback summary.

Breaches of good faith in communications after 5 August whilst Ms Hunter was unwell

[76] There was criticism from Ms Hunter and Mr Dempsey about the conduct of each other whilst Ms Hunter was unwell. Each alleged that the conduct did not accord with good faith obligations. Ms Hunter said that after the 5 August meeting she found it hard to cope and went to see her doctor the following day. She was provided with a medical certificate stating that she was medically unfit from 6 August to 17 August 2020 and then another from 13 August until 16 September 2020.

[77] Mr Dempsey sent text messages and left phone messages. Ms Hunter said in evidence that she started to feel harassed and bullied. Mr Dempsey was concerned that Ms Hunter was failing to be responsive and communicative about the nature of her illness and when she could return.

[78] On 7 August 2020 Ms Hunter responded with a text message that she was following her doctor's advice and looking after herself. Mr Dempsey in an email of 10 August to Ms Hunter indicated concern at the speed of the illness and its seriousness requiring two weeks off work. He stated he would have appreciated more communication on the nature of the illness and a likely return date. He referred to some changes that had been made because of staff shortages. Ms Hunter said she felt some responsibility for pressure at work because of her absence. Ms Hunter advised in an attachment to an email dated 10 August that she was working with the doctor and planned to be back on 17 August 2020. On 11 August 2020 Ms Hunter sent an email to Mr Dempsey that "following doctor's advice I am on full stress leave and ordered complete rest and not to focus on any current work matters."

[79] Mr Dempsey responded to that email on 11 August. He stated that he understood that Ms Hunter was feeling stressed, and it was a difficult time. He wrote that it would have to be

a very serious medical condition to prevent her giving feedback. He stated there was nothing in the medical certificate that suggested she was unable to consider the letter that had been sent to her on that date and if he did not hear anything further from her then her position would cease to exist from Friday. She would then be invited to apply for alternative positions or would be made redundant.

[80] Mr Dempsey felt frustrated because he was progressing with the restructuring process and Ms Hunter did not provide feedback or attend meetings. In a response to Ms Hunter's then advocate in an email dated 18 August 2020 he set out in some length his disappointment that Ms Hunter had failed to communicate about her health and any matters leading to the restructure. Ms Hunter was concerned by this.

[81] Ms Hunter provided two medical certificates with return-to-work dates. She initially advised an earlier return to work date but then advised she was on full stress leave and was not to focus on work matters. The clauses in the employment agreement as they relate to sick leave and medical assessments did not refer to further obligations on Ms Hunter's part.

[82] Criticism cannot be levelled at the content of all of Mr Dempsey's communications over that period. Ms Hunter gave evidence that she found the number and some of the content of Mr Dempsey's communications distressing as she dealt with mental health issues.

[83] The last communication from Mr Dempsey following Ms Hunter's advice that she was on full stress leave and not to focus on work matters was not constructive. It was unlikely to maintain a productive employment relationship in accordance with good faith obligations. Ms Hunter then obtained a further medical certificate. The number of communications from Mr Dempsey was also somewhat excessive.

Conclusion about process

[84] In conclusion, the process was unfair in some but not all aspects as outlined above. There was a failure to consult properly on 5 August about Ms Hunter's current work duties and her skills before her role was disestablished and she was required to compete for a new role with other external and internal candidates. The timeframes for feedback to the updated proposal were too short. When Ms Hunter became unwell the communications were not all constructive and caused some distress to Ms Hunter when she was vulnerable. These matters

viewed separately or together are not minor failings and they did cause unfairness. Once a position is disestablished, the focus then turns to whether there are any alternatives to dismissal.

Redeployment to the marketing graphic role?

[85] Ms Hunter's then advocate in an email dated 17 August 2020 to Mr Dempsey stated that if there was a redeployment opportunity within the company that Ms Hunter could perform with little or no training, then it should be offered to Ms Hunter.

[86] It is likely there was some other interaction between the advocate and Mr Dempsey perhaps by telephone before the advocate in an email later that same day on 17 August 2020 asked that Ms Hunter be considered for the marketing graphic designer role. Mr Dempsey then stated in a lengthy email dated 18 August 2020 to the advocate that there were no roles within the business where Ms Hunter could be redeployed with little or no training and that the only vacancy was the marketing graphic designer role. He referred again to the point that it had been agreed when the restructuring process first started that no-one had the skills in marketing and copywriting required for the new structure.

[87] Mr Dempsey concluded in an assessment of Ms Hunter for the role that she did not have the skills, knowledge, or abilities when assessed for several of the critical requirements in the new role. Further, that it was not considered even with training and support that she was capable of attaining the skills to competently perform effectively in the role.

[88] As Ms Hunter was on sick leave and could not provide feedback or be consulted directly, the identified procedural unfairness at the 5 August meeting impacted on this process as well. Mr Dempsey formed a view contained in an email he sent to Ms Hunter's then advocate on 19 August and in the assessment itself that "the core of Ms Hunter's thinking is that she sought to maintain her previous role within the new organisation." Ms Hunter did not accept that was her view. Proper engagement on 5 August would have clarified that matter.

[89] Mr McDonald submits that Ms Hunter should have been offered the role of marketing graphic designer. He submits that a fair and reasonable employer could be expected to offer a role to a person with the skill and experience to perform it even if some training and upskilling is required. Clearly Ms Hunter is talented, creative, and hardworking which is evident from her feedback on 5 August 2020. She had been associated with Metropol's publications for 19 years and employed by Metros for a little over three of those years.

[90] Mr McDonald refers to an Employment Court judgment in *Wang v Hamilton Multicultural Services Trust* to support that the need for upskilling does not mean the position should not have been offered by way of redeployment.⁸ I accept that submission. In *Wang* unlike this matter, the Judge concluded it was clear from the evidence of both Mr Wang and the employer that most functions of the new position were within the capabilities of Mr Wang.⁹ Further, that the employer accepted that with up-skilling Mr Wang could “easily” perform the new role.

[91] Whilst the evidence from Ms Hunter was that she could assume the new role with little or no training, that was not the evidence from Metros. The evidence was different to that therefore in *Wang*. I find that a level of upskilling would have been required for Ms Hunter particularly with the focus on copywriting and marketing. Whether Ms Hunter could have been upskilled within a reasonable time to meet the needs of the business is a consideration. Under questioning about skills, Mr Dempsey accepted that he knew about upskilling options. For example, he had rejected a copywriting course based on quality and cost. It appears there has subsequently been some internal upskilling in copywriting for at least one other position. He concluded the time for upskilling Ms Hunter would not enable the business needs to be met.

[92] I have carefully considered the evidence. Considering the evidence overall I could not be satisfied that Ms Hunter could have been upskilled within a reasonable period to meet the needs of Metros. I cannot be satisfied to the required standard she should have been offered the new role by way of redeployment in all the circumstances.

Failing to pay four weeks’ notice period

[93] Ms Hunter had exhausted her sick leave entitlement and the return-to-work date on the second medical certificate meant that she was on sick leave for the duration of the notice period commencing on 19 August and ending on 15 September 2020. In the ordinary course of events there is no requirement therefore for notice to be paid. This issue arises in a particular context that requires some assessment.

[94] In the letter of 19 August 2020 Mr Dempsey advised Ms Hunter’s then advocate that she would not be offered the new role of marketing graphic designer and her employment would be terminated on notice. There was a statement that Metros was prepared to consider

⁸ Above n 4.

⁹ Above n 4 at [43].

providing Ms Hunter with paid notice of four weeks, a positive reference, all assistance to find alternative employment, a farewell event and support to apply for the Covid-19 income relief package.

[95] There was no response to this letter by the then advocate. The next communication was an email to Ms Hunter dated 24 August 2020 from Mr Dempsey to acknowledge receipt of her key and key fob and to advise that the notice period would be unpaid.

[96] Another advocate then raised a personal grievance on 12 November 2020. I am not satisfied that the preparedness to consider payment of notice in the 19 August 2020 letter goes as far as an agreement to pay. It is more akin to an offer that was not accepted and then withdrawn a few days later. I do not find that there is four weeks payment for notice owed. Ms Hunter was unwell and had exhausted her sick leave for the notice period.

Conclusions

[97] I have found that the disestablishment of Ms Hunter's position was substantively justified. I have found the process was unfair and not in a minor way in two key aspects and that not all communication during Ms Hunter's sick leave was that of a fair and reasonable employer. I have not gone so far as to conclude that Metros was required to offer Ms Hunter redeployment to the new role created from the restructuring.

[98] The issue becomes whether Ms Hunter suffered unjustified disadvantage or an unjustified dismissal. I intend to adopt the approach of the Chief Judge in *Innovative Landscapes (2015) Limited v Popkin* and view the actions as giving rise to an unjustified dismissal. In this matter that approach absorbs the separate unjustified disadvantage claims.¹⁰

[99] Ms Hunter has made out her grievance was that she was unjustifiably dismissed and is entitled to an assessment of remedies.

¹⁰ *Innovative Landscapes (2015) limited v Popkin* [2020] NZEmpC 409 at [15].

Remedies

Lost wages

[100] Ms Hunter was without employment and income from the date of advice that her employment would be terminated on 19 August 2020 until she obtained new part-time employment on 1 April 2022.

[101] Section 123(1)(b) of the Act provides where the Authority determines that there is a personal grievance, it may order reimbursement of a sum equal to the whole or any part of the wages lost by the employee because of the grievance. Applications for positions were provided with evidence of attempts to mitigate loss.

[102] This is a case where the Authority has concluded that even with a fair process it is likely that Ms Hunter would still have been dismissed because the decision to dismiss was substantively justified. Further, a conclusion was not reached that the new role should have been offered to Ms Hunter. I cannot be satisfied that the unfair process was the cause of Ms Hunter's loss for this entire period. Ms Hunter's evidence was that the impact to her mental wellbeing continued beyond her termination date. The only medical evidence before the Authority is the two medical certificates. The Authority is unable to draw a causal link beyond those certificates to unwellness flowing from the procedural unfairness beyond 16 September 2020.

[103] The consultation period for feedback I have concluded was too short after the updated proposal was provided. I consider that could have been extended for a further week without significant impact on the process. Further, had there been proper consultation on 5 August and more constructive interactions during sick leave then it is likely Ms Hunter would have either remained at work or returned before she was given her four weeks' notice period on 17 August 2020. She would have then been paid for the notice period.

[104] On that basis Ms Hunter is entitled to reimbursement of lost wages for a period of five weeks. Mr McDonald has averaged earnings for Ms Hunter at \$4,012.80 gross per month which is \$1003.20 gross per week.

[105] Subject to any issues of contribution, Ms Hunter is entitled to reimbursement of lost wages in the sum of \$5,016.00 gross.

Compensation

[106] Ms Hunter seeks an award under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Care must be taken that the award reflects the findings. In this matter the evidence about the financial difficulties and an extended period without a job cannot be linked to the procedural deficiencies found by the Authority.

[107] Ms Hunter's evidence was that she was very upset at what had occurred during the meeting on 5 August and her view was that what she had said had been ignored and not considered. In turn that led to her attending her doctor and being placed on sick leave for an initial and then a further period of sick leave. Her feelings at that time of humiliation, loss of dignity and injury to feelings were corroborated by Mr Widgery. At the time of the second medical certificate Ms Hunter was prescribed medication for anxiety and her sick leave was extended. Ms Hunter attributed that to the pressure some of the communications from Mr Dempsey were causing. I conclude that this period of stress and anxiety did flow from the procedural unfairness both from the 5 August meeting and during the sick leave period. I accept that Ms Hunter felt the process was very unfair and was distressed, lost confidence, and became unwell as a result. I accept Ms Hunter felt very undervalued by the process.

[108] I have considered awards made in two Employment Court judgements that I have referred to above that concluded a redundancy was substantively justified but procedurally unfair. The first case is *Innovative Landscapes (2015) Limited* where the award of \$15,000 under s 123(1)(i) of the Act made by the Authority was upheld.¹¹ The second is *Gafiatullina* where there was an award of \$20,000 under s 123(1)(i) of the Act.¹² In *Innovative Landscapes* the evidence of harm was not as extensive as that in the current matter. In *Gafiatullina* there was an additional factor of an undignified exit. I do weigh in this case that there were offers of assistance with job searches and a reference. I conclude an appropriate award sits above that made in *Innovative Landscapes* but not quite at the level made in *Gafiatullina*. Subject to any issue as to contribution, an appropriate award is \$18,000.

¹¹ Above n 10 at [22].

¹² Above n 4 at [168].

Contribution

[109] The Authority is required to consider whether Ms Hunter contributed to the circumstances that gave rise to her personal grievance. Under s 124 of the Act, I do not find that she did. The above awards for lost wages and compensation are not reduced.

Summary of orders made

[110] Metros Publishing Group (NZ) Limited is ordered to pay to Denise Faye Hunter the sum of \$5,016.00 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[111] Metros Publishing Group (NZ) Limited is ordered to pay to Denise Faye Hunter the sum of \$18,000 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c)(i) of the Act.

Costs

[112] I reserve the issue of costs.

[113] If costs cannot be resolved, then Mr McDonald may lodge and serve a costs submission within 14 days from the date of this determination. Mr Dempsey will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[114] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[115] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.¹³

Helen Doyle
Member of the Employment Relations Authority

¹³ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>