

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 471
3116492

BETWEEN	PAULA SUNDIN Applicant
AND	HELLOWORLD TRAVEL SERVICES (NZ) LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	David Marriott, counsel for the Applicant Alastair Espie, counsel for the Respondent
Investigation Meeting:	16 and 17 June 2022
Submissions received:	At the investigation meeting
Determination:	19 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Paula Sundin was employed by Helloworld Travel Services (NZ) Limited (Helloworld) from July 2016 until her dismissal by way of redundancy on 29 October 2020. She says her dismissal was unjustified. Ms Sundin also says she was unjustifiably disadvantaged in her employment by Helloworld's actions in seeking to vary her employment agreement. She seeks compensatory damages to remedy her personal grievances and the award of a penalty for breach of the statutory duty of good faith under s4(1A) of the Employment Relations Act 2000 (the Act).¹

¹ Ms Sundin's claim regarding reduced hours and wages has been resolved between the parties.

[2] Helloworld denies that Ms Sundin was unjustifiably dismissed or disadvantaged and denies that it breached the statutory duty of good faith in relation to Ms Sundin. It says the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances.

The Authority's investigation

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Ms Sundin, Victoria Casabuenas, who at the relevant time held the position of human resource advisor to Helloworld, Simon McKearney, attending under summons and who at the relevant time was Helloworld's chief executive. The Authority also heard evidence form Alex Trifonidos, Helloworld's Australian parent company's general manager human resources.

[4] 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

[5] The issues requiring investigation and determination were:

- a) Was Ms Sundin unjustifiably disadvantaged in her employment and/or unjustifiably dismissed?
- b) If so, is she 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?
- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Sundin which contributed to the circumstances which gave rise to her grievance/s?
- d) Is any party entitled to an award of costs?

Background

[6] Helloworld is part of a wholesale and retail travel business. As stated above Ms Sundin worked for Helloworld from 4 July 2016 until her dismissal by way of redundancy on 29 October 2020. She held senior roles throughout her employment with Helloworld holding the position of Associate Network Leader at time of dismissal. In this role she was responsible for the 250 retail stores located in New Zealand which were not branded 'Helloworld'.

[7] Subsequent to the 23 March 2020 Covid-19 level 4 lockdown announcement, on 27 March Helloworld notified staff, including Ms Sundin, that the business would go into close down with immediate effect. On 30 March Ms Sundin was advised she was one of the skeleton team who would remain working. In addition, from 28 March her hours of work were reduced from full time hours to 24 per week (0.6 FTE) with a concomitant reduction in pay. This occurred without any discussion with her or her agreement. Ms Sundin said given her workload and responsibilities she continued to work full time hours and 'topped up' her reduced pay with annual leave. By letters dated 20 May and 9 April Helloworld wrote to Ms Sundin seeking her agreement to the variation of her terms of employment. The letters are titled "TEMPORARY VARIATION TO EMPLOYMENT DUE TO IMPACT OF COVID-19". She did not sign and return the variations.

[8] In early June Mr McKearney, to whom Ms Sundin reported, tendered his resignation. On 23 June Ms Sundin was contacted by another New Zealand based Helloworld manager, purportedly relaying information he had received from the Australia-based chief executive (the CEO) of the global Helloworld business that he (the general manager) was considered the most senior employee in the New Zealand business, that the CEO 'rated' Ms Sundin and she was to be appointed to a role 'Branded and Associate Network Leader'. Ms Sundin said she was blind-sided by this information because the role did not exist and she had understood from discussions in recent months that the current structure would not change. In the same conversation the manager outlined other changes to the business structure and identified employees who would move into those roles or out of roles they currently held. He also told her she was not to share any of this information on the directive of the CEO. Ms Sundin said she found this conversation concerning and stressful.

[9] In an attempt to allay her concerns she asked Mr McKearney if a restructure was likely and he assured her there would not be, including to her role. I accept what Mr McKearney told Ms Sundin was accurate as to the extent of his knowledge at that time.

[10] Notwithstanding, on 29 June Helloworld announced a business restructure review to commence 1 July. At an executive team meeting Ms Sundin attended with Mr McKearney on 30 June, he assured her the retail structure would not change and specifically, there would be no change to Ms Sundin's role or that of her direct report. He said, to that end they were not required to provide feedback on the to be proposed structure.

[11] The restructuring process did not commence until 6 July when the CEO held a conference call with all staff, including Ms Sundin. During the call the CEO said after the restructuring, return to full time hours was some time off and 0.6 FTE would be the starting point for the remaining roles.

[12] When in due course Ms Sundin received the proposed restructure document, it showed no change to her role, as Mr McKearney had advised. She did not see any need to provide feedback because she was not directly impacted. A feedback process for staff then followed.

[13] On 17 July the CEO emailed all staff that the feedback received agreed with the proposed structure and the restructure process was to proceed. A timeframe was outlined for interviews for new roles with outcomes to be announced by 28 July. This process was then extended to 31 July. While aware the restructuring process was underway Ms Sundin said she was not concerned because her role was not affected.

[14] On the morning of 31 July Mr McKearney telephoned Ms Sundin to advise the proposed structure was confirmed and she would receive a confirmation letter later that day. He then advised her she would be back to full time salary in a new role titled 'Retail Marketing'. When Ms Sundin said there had been no consultation or conversation with her about the role change Mr McKearney said this was it.

[15] At 5.50pm that evening Ms Sundin received a letter from Helloworld which included:

Dear Paula

VARIATION TO EMPLOYMENT

The parties to the Individual Employment Agreement:

Helloworld Travel Services (NZ) Limited, the Employer

And

Paula Sundin, the Employee

Further to our recent discussions we wish to confirm the following change to your current employment terms and conditions which will be effective from 01 August 2020.

- **Position Title**

Your position will be 'Retail Manager'

- **Annual Salary**

[a figure representing a 20% reduction on current salary]

In accordance with the Employment Relations Act you are entitled to a reasonable opportunity to seek independent advice on the change of conditions set out in this letter. We encourage you to do so.

If the above terms and conditions are acceptable to you please sign one copy of this letter signifying your acceptance and return to this office as soon as possible. You should retain the other original of this letter for your own records.

Yours sincerely,

Simon McKearney

[16] The letter ended with a portion for Ms Sundin's signature titled "NOTIFICATION OF ACCEPTANCE" and a declaration of acceptance of the conditions, acknowledgement of having had the opportunity to seek independent advice and sufficient time to do so. The letter did not include a position description, reporting lines or whether the changes arose from the restructuring process. The letter requested that she indicated her acceptance by signature and return the executed letter.

[17] Ms Sundin said she was speechless. She said though this role had been 'floated' by the general manager in the 23 June conversation it had not been included in the restructuring proposal and from this she had understood it was discarded. Ms Sundin also said she did not know what had happened to her current role 'Associate Network Leader' because it remained in the proposed structure – she did not know if it had been disestablished or given to someone else. Given the lack of clarity she continued to perform her role.

[18] Ms Sundin immediately sought legal advice and on 10 August through her representative wrote to Helloworld seeking wage arrears and raising a personal grievance with Helloworld for unjustified disadvantage and unjustified dismissal, setting out compensation sought and inviting a response.

[19] On 20 August Helloworld announced by email to staff and external customers that Ms Sundin was leaving the business. On 21 August the announcement of her departure from Helloworld was included in an industry publication. The email chain shows the announcements were not approved by Ms Sundin, rather she indicated her understanding the decision had been made to issue them.

[20] The parties held without prejudice discussions which did not resolve the employment relationship problem.

[21] On 29 October 2020 Helloworld wrote to Ms Sundin advising she was dismissed with immediate effect. The reason for her dismissal was redundancy following her not accepting the proffered alternative position. When her employment ended Ms Sundin received all notice, redundancy compensation and accrued annual leave payments as required under the terms of the parties' employment agreement.

Discussion

Was Ms Sundin unjustifiably disadvantaged by Helloworld's actions on 31 July 2020?

[22] Ms Sundin says the events of 31 July 2020 undermined her confidence that her employer would treat her fairly and reasonably and amount to an unjustifiable disadvantage. It is accepted Mr McKearney told her that day her role was changing without prior discussion or consultation. The confirmation letter provided that evening contained an apparent conflict with that advice and internally – while purporting to seek Ms Sundin's agreement to the change in role and provide the opportunity to seek advice it also advised the new role would commence the following day. Further, Ms Sundin was not provided with a role description. It was not fair or reasonable to propose a variation to employment without providing sufficient detail to allow Ms Sundin to understand the requirements of the new role.

[23] Helloworld says the events of 31 July must be seen in the context of and as an extension of the restructuring proposal. I do not accept this is the case because Ms

Sundin's role was not included in the restructuring proposal, she received repeated assurances her role would not be effected by the restructuring proposal and the 31 July letter frames the role change as a variation to her employment. The situation appears to be that Helloworld has run a parallel 'variation' process concerning Ms Sundin - deciding to exclude Ms Sundin from the restructuring proposal likely because it wished to retain her skills but still needed her role to change to reduce costs. I say 'appears' because there was no direct evidence provided by Helloworld as to the reasoning behind the approach it adopted to Ms Sundin's employment. The spreadsheets Helloworld seek to rely on assist only to the extent they record Helloworld's intent to reduce Ms Sundin's salary.²

[24] Helloworld's actions towards Ms Sundin on 31 July were not those of a fair and reasonable employer – having told her her role was not impacted by the restructuring proposal, she was, out of the blue, told her role was to change, then her agreement was purportedly sought but without time or sufficient detail to fairly consider the purportedly proposed variation. It is accepted these actions have undermined Ms Sundin's confidence that her employer would treat her fairly and reasonably. Ms Sundin has established a personal grievance for unjustified actions causing disadvantage in respect of the events of 31 July 2020.

Was Ms Sundin unjustifiably dismissed by way of redundancy?

[25] The next part of Ms Sundin's employment relationship problem concerns her personal grievance for unjustified dismissal. She says the dismissal was in response to raising a personal grievance and that the process was so unfair and unreasonable as to render her dismissal unjustified.

[26] Helloworld submits the context of Ms Sundin's dismissal for redundancy 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 Sundin from an early stage. It says the procedural requirements of consultation and notice, calibrated to these circumstances, have been met.

² Refer document 'A' 27 July 2020.

[27] 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.³

[28] 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.

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

[29] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act’s legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act’s objects of “acknowledging and addressing the inherent inequality of power in employment relationships”. The provisions specified included s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[30] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law.”⁴

(i) *Was Ms Sundin’s redundancy genuine?*

[31] The evidence is clear that Helloworld’s business was significantly affected by the COVID-19 pandemic. Helloworld submits this context and the subsequent restructuring of the business establish the genuineness of Ms Sundin’s dismissal for redundancy. While it is accepted Ms Sundin’s dismissal occurred in this context it is unclear if this is the reason for her dismissal given the situation arose from Helloworld’s offer of variation which I have found was a process parallel to the restructuring process and the events subsequent which have resulted in Ms Sundin’s dismissal on 29 October 2020. There is insufficient evidence to satisfy the Authority Ms Sundin’s dismissal was for a genuine business need.

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

[32] No. Helloworld has failed in the consultation obligations owed to Ms Sundin. Her position was not included as one of those effected by the proposed restructuring and she was given repeated reassurances that this was not the case during the

⁴ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

restructuring period. It is accepted the 31 July discussion with Mr McKearney and subsequent letter offering Ms Sundin a new role on a reduced salary came as a shock.

[33] The events subsequent to the 31 July variation offer lack sufficient clarity to satisfy the Authority the consultation requirements have been met – for example a revised restructure was not put to Ms Sundin to comment on and she was not given an opportunity to consider any further redeployment opportunities within the confirmed structure. These actions were all within Helloworld’s control and those actions have left it vulnerable to criticism. The lack of a consultation process with Ms Sundin is not, on an objective assessment, minor or inconsequential – it denied Ms Sundin a fair and reasonable opportunity to understand why her position had been excluded from the restructuring and then apparently included and to engage in a meaningful way with the restructuring process. This unfairness is compounded because the assurances Ms Sundin received that her role would not be effected shut her out of the consultation process including excluding her consideration of a possible redeployment option in the proposed structure. Helloworld submits it would have been futile to have consulted with Ms Sundin after 31 July. Such a view ignores the fact that Helloworld was responsible for and wholly in control of the process which has led to a situation which could render consultation futile. Such an approach is not consistent with the obligations it owed Ms Sundin under the terms of the employment agreement or under statute. On the evidence before the Authority Ms Sundin’s dismissal for redundancy on 29 October 2020 was unjustified.

Remedies

[34] Ms Sundin has established personal grievances for unjustified disadvantage and unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement

[35] Ms Sundin seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. I am satisfied the appropriate period of claim runs for 12 weeks from her final date of employment being 29 October 2020 and is to be calculated at her salary rate applicable at that date. The counter-factual argument that any lost wages award should be calculated at the variation rate is not accepted because the variation was not agreed by the parties.

[36] After reviewing the evidence of loss and Ms Sundin'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.⁵

[37] I decline to exercise my discretion to award more than three months lost earnings in Ms Sundin's favour. While I accept it has been difficult for Ms Sundin 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

[38] Ms Sundin has established two personal grievances. A global approach to setting remedies is appropriate given the successive nature of the grievances.

[39] Ms Sundin said the whole process concerning the events of her grievances has been hugely stressful for her and it has had a significant impact on her health and wellbeing for which she had had to seek medical advice. She also says the financial uncertainly consequent to her grievances has added to her stress particularly given her personal circumstances. She points to specific actions of Helloworld which have added to her distress including purporting to vary her employment agreement without consultation or discussion, failing to respond to her personal grievance, notifying staff and the industry that she was leaving before she had resigned or had been given notice of termination, not giving her a fair opportunity to consider a potential redeployment opportunity within the confirmed structure, cancelling her mobile telephone contract whilst she was still employed and dismissing her without consultation or warning and following a dispute resolution process. Ms Sundin said she feels Helloworld has the 'upper hand' in how she is perceived in the travel industry and having spent her entire working life in travel the prospect of finding a new career is daunting.

[40] I accept the circumstances of her personal grievances have had a profound and negative impact on Ms Sundin. She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$30,000.00.

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

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

[41] No deduction from the remedies awarded is to be made under s 124 of the Act. Ms Sundin's dismissal was a "no fault" redundancy and she did not contribute in a blameworthy way to the situation giving rise to her personal grievances.

[42] There are no deductions from the monetary remedies for reasons of contribution.

Penalty

[43] The penalty sought for good faith breach has not been claimed with sufficient clarity to extend to the events leading up to Ms Sundin's dismissal. The penalty claim applied to the wage reduction issue which the parties advise has been wholly resolved and is no longer before the Authority.

Summary

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

- (i) \$30,000 under 123(1)(c)(i); and
- (ii) three months wages under s 123(1)(b).

Costs

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

[46] If they are not able to do so and an Authority determination on costs is needed Ms Sundin 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 Helloworld NZ Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[47] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.⁶

Marija Urlich
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.