

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 181
3359623

BETWEEN	ANDREW BYRNE Applicant
AND	RUSHMORE DISTRIBUTORS (NZ) LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Paul Pa'u, advocate for the Applicant Mark Ho, representative for the Respondent
Investigation Meeting:	24 March 2025 (by audio-visual link)
Determination:	28 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rushmore Distributors (NZ) Limited (RDL) is a leading distributor of network, communication technology and electrical products across New Zealand. Mr Byrne was employed as a product manager by RDL from June 2022 until he received notice of termination of employment by reason of redundancy on 14 February 2025. Mr Byrne did not work out his notice period and his last pay was received on 14 March.

[2] On 24 February Mr Byrne lodged a statement of problem claiming unjustified dismissal and seeking remedies including permanent reinstatement. An application was also lodged for interim reinstatement along with a supporting affidavit and undertaking as to damages.

[3] By statement in reply dated 10 March RDL denies Mr Byrne was unjustifiably dismissed. It opposes the remedies sought including permanent and interim reinstatement.

[4] This determination deals only with Mr Byrne's application for interim reinstatement.

The Authority's investigation

[5] On 26 February, the parties were directed to attend mediation by 12 March. Following advice from the parties on 11 March that mediation had not resolved the employment relationship problem, on 12 March the Authority held a case management conference with the parties' representatives to set a timetable to progress Mr Byrne's interim reinstatement application. By consent the investigation meeting was held by audio-visual link. Material identified as privileged has been removed from the Authority file.

[6] In determining this matter affidavit evidence of Mr Byrne and for RDL, Mark Ho, general manager, Fletcher Prendergast, general manager of sales, Rochelle Carlyle, marketing manager, Brennan McAlpine, central North Island account manager and Paikea Heremaia, warehouse manager, have been considered as have the parties' statements of problem and reply, the documents attached thereto and the parties' submissions.¹ Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

The relevant law

[7] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Mr Byrne's application for interim reinstatement the Authority is required to consider the following:²

¹ Less weight has been put on the affidavits filed by RDL outside the timetable given Mr Byrne did not have an opportunity to file a reply affidavit.

² *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

- (i) Does Mr Byrne have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Byrne and RDL will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[8] As the Court observed in *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.³

[9] It is with this in mind that applications for reinstatement are to be dealt.

Arguable case of unjustified dismissal and unjustified disadvantage

[10] The first question for consideration is whether there is an arguable case Mr Byrne was dismissed unjustifiably and that he will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.⁴ The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice...⁵

³ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, at [5].

⁴ *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁵ *McInnes* above n 1, at [9].

[11] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether RDL's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Byrne being treated unfairly.⁶ The Authority's task is to examine objectively RDL's decision-making process and determine whether what RDL did and how it was done were steps open to a fair and reasonable employer.

[12] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The legal principles 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

⁶ Section 103A Employment Relations Act 2000.

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.⁷

[13] The statutory good faith obligations and in particular s 4(1A)(b) are relevant in a redeployment setting because throughout an employment relationship an employer has an obligation to be active and constructive in maintaining the relationship.⁸ The Authority's role in considering a refusal or failure to redeploy includes an assessment of whether the reasons are substantively justified or whether the process followed to reach those reasons was fair and reasonable. The Court has described this assessment in the context of the statutory good faith obligations as follows:⁹

Where an employer has not actively and constructively sought to maintain the employment relationship in breach of s 4(1A)(b) or the reasons for not redeploying were not justifiable, a dismissal will be unjustified.

This does not mean that there is an absolute duty to offer redeployment in all cases.

Typically, where an employer has carried out a robust consultation process and has actively and constructively considered redeployment, has been responsive and communicative throughout the process and then has good reasons for not redeploying, it will be difficult for an employee to claim that they have been treated unfairly and that the decision is unjustified.

[14] To ensure that the redundancy process is procedurally fair, employers should ensure they comply with their good faith obligations when making selection decisions. In accordance with s 4(1A)(c) the proposed selection criteria should be consulted on. The final selection criteria should be applied fairly and consistently to make a redundancy decision and affected employees should have an opportunity to respond and discuss assessments.¹⁰

Background

[15] The parties have a written employment agreement which includes:

36. Redundancy

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

⁸ Employment Relations Act 2000, s 4(1A)(b).

⁹ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, [72] – [74].

¹⁰ *Jinkinson v Oceana Gold* [2009] ERNZ 225.

36.1 Employees declared redundant shall receive notice of the termination of their employment as noted in Schedule 4. In lieu of such notice the employee shall receive the relevant number of weeks ordinary pay.

...

36.3 For the purposes of this clause, redundancy is a condition in which the company has manpower surplus to requirements because of the closing down or reorganisation of the whole or part of the company's operation due to a change in plant, method, material, process or products, reorganisation, economic circumstances or like cause requiring either a permanent reduction in the number of employees or a change in duties and roles. Redundancy may also occur by reason of the sale, transfer or merger of part or the whole of the company's business.

36.4 The company will consult with affected employees to ascertain possible alternative employment conditions.

...

[16] The relevant policy document includes a high-level approach to restructuring with key considerations being justification, ensuring a fair and transparent process, the principles of good faith and impact on staff.¹¹

[17] On 21 January 2025 Mr Byrne received an invitation to discuss a proposal to reorganise the sales and product management structure of the division of RDL in which he was employed of which there are two. Mr Byrne's representative wrote to RDL asking for the detail of the proposal which RDL advised was not yet able to be provided. Mr Byrne averred this was a stressful time waiting for the meeting to hear the detail of the proposal.

[18] On 28 January Mr Bryne attended the meeting without his representative, who was unavailable. Mr Ho and Ms Carlyle attended for RDL. The restructuring proposal was provided which included:

- (i) the reasons why the business was looking to restructure the division including the need to reduce operating costs due to decreased sales which had left the business "...unable to justify a dedicated sales team and product manager";
- (ii) a wish to improve operating efficiencies by merging the two divisions to have one sales and product management team; and

¹¹ Marshire Investments (NZ) Limited Employee Guidance, 13 February 2024.

(iii) RDL expected the new structure to improve sales and customer service.

[19] The consultation pack had a table of the 13 roles affected by the restructuring proposal. Three of the roles were product manager roles - Mr Byrne's and the two product manager roles in the other division. Diagrams of the current and proposed sales and marketing structure were included as was:

- (i) a timeline running to 7 February, when final decisions would be announced; and
- (ii) a proposed assessment criteria for which feedback was sought and included that "a copy of the assessments can be provided on request".

[20] The transcript for the meeting has been provided, as has the transcript for the similar meeting held with the other affected product managers. The transcript shows Mr Bryne, Mr Ho and Ms Carlyle discussed the proposal in some detail. Mr Bryne asked for the job description for the new role. In the consultation pack, the meeting and subsequently the impact on Mr Bryne was acknowledged and an offer of external support made, which Mr Bryne has taken up. Feedback on the restructuring proposal was sought in writing by 3 February. Mr Bryne was provided with a recording of the meeting.

[21] Detailed correspondence was subsequently exchanged and Mr Bryne's representative requested information including relevant policies and procedures, information about the decision to include Mr Bryne's role in the restructuring and raised the concern about the proximity of the November events and the January restructuring and whether the change relating to Mr Bryne was a response to his personal grievance raised in November about his work situation and the work environment. A concern was also raised as to the justifiability of the restructuring given it was understood discussions in November had been about how to manage work volume. Mr Ho provided a response by return including sales figures into January 2025, information about an agency loss effecting Mr Bryne's division and its revenue share and details of meetings and events which had led to the January restructuring proposal. In his response Mr Ho denied the restructuring related to Mr Bryne's personal grievance and stated there was a financial and operational need to disestablish his role.

[22] RDL varied the timeframe to accommodate the consultation process.

[23] On 10 February Mr Byrne attended a feedback meeting accompanied by his representative. RDL was represented by a human resources consultant, Mr Ho and Ms Carlyle. Mr Byrne raised a range of matters including:

- (i) a concern the restructuring so soon followed the November abandoned restructuring proposal and had not been raised sooner when likely in RDL's knowledge early in the New Year;
- (ii) the personal grievance he had raised in respect of the November process remained unresolved and Mr Byrne felt this new restructuring proposal was a way to exit him because he had raised a personal grievance;
- (iii) he was stressed and distressed by the process;
- (iv) there was sufficient work for three product managers; and
- (v) information requested had not been provided including policies and procedure document.

[24] On 12 February RDL had made a decision and wished to communicate it to Mr Byrne. Mr Byrne's representative by reply advised a face to face meeting was not sought and requested the decision be provided in writing.

[25] The restructuring proposal was confirmed and then RDL moved to assess the affected employees, of whom Mr Byrne was one. The assessments were not conducted or collated by the decision maker, Mr Ho and were completed by the three assessors individually.

[26] On 14 February Mr Ho wrote to Mr Byrne advising he had "...been unsuccessful in the suitability assessment for the two product manager roles available, and therefore your employment is declared redundant effective 14 February 2025". It is understood Mr Byrne did not return to work. His last pay day was 14 March and on that date he returned his work car.

[27] Mr Byrne says his dismissal was unjustified on the following grounds:

- (i) it came as a surprise when he received the 14 February letter – he had been unclear what the process was beyond the 12 February advice his role was redundant;

- (ii) it was for mixed motives;
- (iii) the process was unfair and unreasonable including when the proposal details were provided and that Mr Byrne met alone with RDL on 28 January and the other product managers were met with together;
- (iv) selection criteria was not objective and not fairly implemented;
- (v) he does not accept his job is surplus to business needs;
- (vi) consultation was inadequate;
- (vii) RDL failed to provide adequate information; and
- (viii) failed to consult on or consider other options including redeployment.

[28] RDL does not accept Mr Byrne's has an arguable case that his dismissal was unjustified. It says the redundancy was genuine given the underlying business reasons for the dismissal and RDL have complied with the notice and consultation requirements in section 4 of the Act.

[29] With respect to how RDL reached the decision to make Mr Byrne's position redundant there are questions as to whether it has complied with the obligation to provide relevant information and if Mr Byrne has been treated fairly in respect to other employees in affected roles. There are questions as to whether Mr Byrne was provided a reasonable opportunity to comment on the selection assessment and significantly, given the requirements in the employment agreement, whether RDL has discharged its duty to fairly consider Mr Byrne for redeployment. These are issues which go to the reasonableness and justifiability of the restructuring decision.

[30] The Authority is satisfied Mr Byrne has an arguable case to be tried in respect of his claim of unjustifiable dismissal.

Arguable case for permanent reinstatement

[31] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy¹². The question is whether it is feasible

¹² Section 125(2) of the Employment Relations Act 2000.

or practical to re-impose the employment relationship. It is not sufficient to show resistance and strained circumstances to avoid reinstatement.¹³

[32] Mr Byrne says he was a loyal and hard-working employee who wishes to be reinstated, that he has good working knowledge of RDL product categories and is capable of re-training into a different role given his many years' experience in this sector. Given reinstatement is a primary remedy his submission is he has a case for permanent reinstatement.

[33] RDL submits permanent reinstatement is not only not practicable or reasonable it is impossible because Mr Byrne's role no longer exist. It says the business is operating in challenging times and the current structure may face the same uncertainty.

[34] Can the employment relationship be successfully re-imposed?¹⁴ There is evidence before the Authority that Mr Byrne's enjoyed his role, was hard working and had a good relationship with his direct manager. There is also evidence Mr Byrne has serious concerns about the work environment as described in his unresolved personal grievance and RDL has concerns about his ability to reintegrate. Such concerns, at this stage at least may not preclude re-establishment of the employment relationship.

[35] Is it reasonable to require Mr Byrne to return? Mr Byrne has worked for RDL for over two years. His untested evidence suggests he is capable of working in a number of roles in the sales and marketing team. Though current trading conditions are challenging RDL's evidence is that it believed, at least at the time Mr Byrne received notice of redundancy that the restructuring would benefit the business through operational savings and improved sales. There is a serious question to be tried that Mr Byrne should be reinstated.¹⁵

[36] Mr Byrne has established there is a serious question to be tried in regard to his claim for reinstatement.

Balance of convenience

[37] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might

¹³ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Limited v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

¹⁴ *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 at [20].

¹⁵ *Genysis Telecommunications Laboratories Limited v Brendon Scott* [2019] NZEmpC 113.

happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[38] Mr Byrne says the balance of convenience favours him:

- as was hard working loyal employee who sincerely hopes to renew the employment relationship;
- he is capable of being retrained into another role, including a sales role given his many years' experience in the industry;
- the business is substantial employing 60 people and owned by an international electrical supply distribution business; and
- he is dependant in his income from RDL and is concerned about finding alternative employment given his age.

[39] If Mr Byrne was reinstated on an interim basis this would, on the affidavit evidence, be a financial and operational burden for RDL because in the short term there is no product manager role for him to step into and he would likely need to undergo training in another role. These issues go to the financial viability and operation of RDL and weigh in its favour. Also weighing in favour of RDL in the balance of convenience assessment is the information before the Authority that subsequent to Mr Byrne's redundancy the business may have to undergo further adjustment in response to changed circumstances.

[40] Careful consideration has been given to Mr Byrne's submission of the impact of his dismissal on his financial circumstances. Mr Byrne's affidavit evidence is his salary from RDL was a substantial contributor to his household income and without it the household will likely have difficulty meeting its outgoings including paying rent. There is little evidence of steps taken or attempted to mitigate the deficit. Mr Byrne lives with his adult son. There is no information before the Authority as to his contribution to the household. This factor, though serious, weakly favours Mr Byrne.

[41] Mr Byrne has raised concerns that his redundancy is retaliatory to his raising a personal grievance which remains unresolved and in which he raises serious claims. RDL has raised concerns about Mr Byrne's possible return to work. Such issues are

likely to be challenges to the re-establishment of the employment relationship however, it cannot be said at this stage it would not be possible. This is a neutral factor.

[42] Considering all the relevant factors the balance of convenience favours RDL. Mr Byrne is assessed as able to bear the burden of not being reinstated in the period until his substantive claim is able to be heard by the Authority.

Overall justice

[43] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.¹⁶

[44] Mr Byrne has established he has an arguable case his dismissal was unjustified and an arguable case for permanent reinstatement. It is accepted the loss of his job and income is devastating to Mr Byrne and has a negative impact on his household. However, albeit on untested evidence, reinstatement to a job with RDL is unlikely given the challenges the business faces and the financial impact may well be met by damages.

Outcome

[45] Mr Byrne's application for interim reinstatement is declined.

[46] The parties are directed to mediation.

[47] If, following mediation, Mr Byrne wishes the investigation of this employment relationship problem to continue, he should advise the Authority. A case management conference will then be convened to timetable an investigation meeting of the substantive employment relationship problem. An investigation meeting can be held in the weeks commencing 7 and 14 July 2025.

¹⁶ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

Costs

[48] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Urlich
Member of the Employment Relations Authority