

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2025] NZERA 54
3281419

BETWEEN

DAVID PHILLIPS
Applicant

AND

STEELFORT ENGINEERING
COMPANY LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Nikkii Flint, counsel for the Applicant
Alastair Hall and Joelle Avery, counsel for the
Respondent

Investigation Meeting: 1 October 2024 in Palmerston North

Submissions: 7 November 2024 by AVL

Determination: 3 February 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Phillips raises claims he was unjustifiably disadvantaged by Steelfort Engineering Company Limited (SEC) in relation to changes to his role and reporting line, and the restructuring process that led to his redundancy, and unjustifiably dismissed by SEC. Mr Phillips also claims SEC breached its employment agreement with him by failing to annually review his salary.

[2] SEC denies it unjustifiably disadvantaged Mr Phillips, says its restructuring process which led to his redundancy was justified and denies breaching his employment agreement.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by Mr Phillips and his wife Zara Olliver, and for SEC by Gavin Lowndes, General Manager, Haylee Taylor, National Sales and Marketing Manager, and Michael Scotson, ICT Manager. Mr Phillips, Ms Olliver, Mr Lowndes, Ms Taylor and Mr Scotson answered questions, under oath or affirmation, from me and counsel.

[4] At the conclusion of the investigation meeting I timetabled for evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for submissions to address. The directed information was provided, with written submissions then spoken to by counsel over AVL on 7 November 2024.

[5] 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

[6] The issues requiring investigation and determination are:

- (a) Whether Mr Phillips was unjustifiably disadvantaged or unjustifiably dismissed by SEC in relation to:
 - (i) Changes to Mr Phillips' role and reporting line; and
 - (ii) The restructuring process that led to Mr Phillips' redundancy?
- (b) Did SEC breach its employment agreement with Mr Phillips by failing to annually review his salary?
- (c) If SEC's actions were not justified (in respect of disadvantage or dismissal) or SEC breached its employment agreement with Mr Phillips, what remedies should be awarded, considering:
 - (i) Lost wages under ss 123(1)(b) and 128 of the Act, subject to quantification and evidence of reasonable endeavours to mitigate Mr Phillips' losses;
 - (ii) Compensation under s123(1)(c)(i) of the Act; and
 - (iii) Penalties for a breach of Mr Phillips' employment agreement under s 133 of the Act?

- (d) Should remedies be reduced under s 124 of the Act for blameworthy conduct by Mr Phillips that contributed to the situation giving rise to his grievance?
- (e) Should either party contribute to the costs of representation of the other party?

Was Mr Phillips unjustifiably disadvantaged or unjustifiably dismissed by SEC?

[7] Mr Phillips claims he was unjustifiably disadvantaged in relation to changes to his role and reporting line, and the commencing of SEC's restructuring process that led to his redundancy. He also claims his redundancy was both procedurally and substantively unjustified.

Relevant law

[8] For Mr Phillips' unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires:

- a. that his employment, or one or more conditions of their employment, was (in this case, as his employment has since ended) affected to his disadvantage; and
- b. This was due to some unjustifiable action by SEC.

[9] In assessing this, I must apply the test of justification under s 103A of the Act, being whether SEC's actions, and how SEC acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. Section 103A(3) requires I consider:

- a. having regard to the resources available to it, did SEC sufficiently investigate before taking action?
- b. did SEC raise concerns it had with Mr Phillips before taking action?
- c. did Mr Phillips have a reasonable opportunity to respond? and
- d. did SEC genuinely consider Mr Phillips' explanation or comments?

[10] I may also take into account any other factors I think are appropriate under s 103A(4). I must not determine an action to be unjustifiable where there were defects in SEC's process that were minor and did not result in Mr Phillips being treated unfairly under s 103A(5).

[11] In considering Mr Phillips' unjustified dismissal claim in relation to his redundancy the test for justification set out at s 103A of the Act also applies. I must

assess the reasons given to Mr Phillips by SEC including the business reasons and decide, on an objective basis, whether SEC's actions were reasonable.

[12] The Court of Appeal said in *Grace Team Accounting Ltd v Brake* if an employer can show the redundancy was genuine, and notice and consultation requirements have been met, the s 103A test may well be satisfied:¹

[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.

[13] 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".²

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

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 at [65].

[14] The Court of Appeal referred in *Grace Team Accounting Ltd v Brake*³ to the duty of good faith in s 4 of the Act, relevant provisions of which state:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2) —
- (a) must deal with each other in good faith; and ...
- (1A) The duty of good faith in subsection (1) —
- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
 - (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; and
 - (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees’ employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made. ...

Was Mr Phillips unjustifiably disadvantaged in relation to changes to his role and reporting line?

[15] Mr Phillips was employed by SEC on 29 May 2000 as a process worker and had been employed as Technical Product Development and Compliance Manager since May 2020. Mr Phillips said his duties included “higher level relationship building, development and initiative driven managerial functions”.

[16] SEC had moved its manufacturing to China, which it said “was really the ‘death knell’ for the production manufacturing roles” at SEC, with Mr Phillips’ role being the last role in his division at SEC from July 2020. SEC employed Graham Allen in a National Technical Product Manager role commencing January 2023, which Mr Lowndes said was a differently focused “new role specifically to develop and manage the aftermarket spare parts service, on a global scale”. Both Mr Phillips and Mr Allen reported to Mr Lowndes.

[17] Mr Phillips said he was instructed in how to undertake parts of his duties by Mr Allen by April 2023 and he “had become aware Mr Allen had taken over his duties related to interacting with overseas suppliers around product development and improvement”. Mr Phillips said he had spent a lot of time on working with overseas suppliers including on product development and testing, but a lot of this work was taken away from him when Mr Allen was hired. Mr Phillips also said changes to his reporting

³ Above n1 at [80].

line were not “an official thing” rather it was a “feeling put on me re how [Mr Allen] came in and started instructing me, the way he was talking implied he was going to be my senior”. Mr Phillips specifically referred to the testing of new line trimmers where Mr Allen told him how to test and reports were to be sent to Mr Allen rather than Mr Lowndes.

[18] Mr Phillips said his role was reduced to “a position more closely resembling the vacant Technical Support Officer role, which he had previously managed”. Mr Lowndes’ delegation of parts of his own role to Mr Allen was said to amount to a unilateral variation to Mr Phillips’ reporting line without notification or consultation. While Mr Phillips accepted he did not raise an issue at the time, he said this reflected his nature of getting on with things which he did not know what to do about. In any event, it was said to be SEC’s responsibility to follow a proper and fair process, which it did not do when it knew Mr Allen was taking over several of Mr Phillips’ responsibilities, particularly when Mr Lowndes said he had been considering, prior to employing Mr Allen, the ongoing need for Mr Phillips’ role.

[19] SEC said there was no change in reporting line, with Mr Phillips continuing to report to Mr Lowndes. While acknowledging Mr Phillips “occasionally had instructions or questions” from Mr Allen, SEC said this “does not establish a reporting line”. SEC also said while the words in Mr Phillips and Mr Allen’s “job descriptions may be the same, what they meant for each role, in context, were vastly different in the timescale of product development”. Mr Phillips was said to have accepted Mr Allen had been doing things which Mr Lowndes would previously have done, meaning any duties taken over were those of Mr Lowndes not Mr Phillips.

[20] I find while there was some overlap in the job descriptions of Mr Phillips’ role and Mr Allen’s role, there is insufficient evidence to support the claim there was a change to Mr Phillips’ role and reporting line. I consider the evidence supports Mr Allen’s role being at a different level to Mr Phillips’ role, consistent with Mr Allen’s role being focused on broader strategic issues and developing the “aftermarket spare parts service”, including in relation to Australasian operations.

[21] While there could have been better communication with Mr Phillips about the establishment of Mr Allen’s role and how it differed from his own role, I do not consider this amounts to a disadvantage to Mr Phillips. It follows that remedies do not need to

be considered in relation to these elements of Mr Phillips' unjustified disadvantage claims.

Was Mr Phillips unjustifiably disadvantaged in relation to the commencing of SEC's restructuring process or unjustifiably dismissed when he was made redundant?

[22] Mr Phillips was advised on 30 August 2023 that SEC was commencing a restructure, with his position the only one affected and proposed to be disestablished. Initially a part-time role with less responsibility was provided as a potential redeployment option, without details of remuneration or hours of work. Mr Phillips provided initial feedback and sought more information, which SEC responded to with Mr Phillips then seeking further information, which was not provided.

[23] On 21 September 2023 Mr Phillips was provided a preliminary decision that his role be disestablished and was advised of a further redeployment option, although again with no written details of remuneration or hours of work. On 26 September 2023 Mr Phillips role was disestablished and he was given notice of redundancy, though he was not required to work out his notice period.

[24] Mr Phillips said "the disestablishment of [his] role was unjustified on both a procedural and a substantive basis, as was his redundancy" due to failures to provide relevant information and an opportunity to comment on that information as required under subs 4(1A)(c)(i) and (ii) of the Act. Specifically, Mr Phillips said the actual reason for the proposal was not provided to him, with Mr Lowndes clarifying the reason for the proposal in oral evidence at the investigation meeting. Mr Phillips also said when further information relevant to the proposal was requested including cost modelling, it was not provided. This denied Mr Phillips the opportunity to comment on the actual reason for the proposal and all relevant information. SEC's process was also said to be unfair and unreasonable in relation to the initial meeting to discuss the proposal and failures to protect Mr Phillips' confidentiality during the process, although these defects were accepted to not be as significant as those alleged with other aspects of the process.

[25] The substantive justification for Mr Phillip's redundancy was also challenged, as he said his higher-level responsibilities had been transferred to Mr Allen and this, combined with false premises about Mr Phillips' remaining responsibilities, predetermined the outcome of the restructuring. Insufficient information was said to have been provided about redeployment options, with the part-time role offer unlikely

to be acceptable and Mr Phillips' decision to reject the redeployment options being reasonable.

[26] SEC said it worked through a reasonable restructuring process and following consultation made a reasonable and sensible business decision to disestablish Mr Phillips' role. SEC referred to the Court of Appeal's judgment in *Grace Team Accounting Ltd v Brake* in relation to the Authority's role in reviewing redundancy situations and said the product manufacturing part of SEC was operating at a loss and had been under review since 2020 when manufacturing was moved to China. Following the restructuring and disestablishment of Mr Phillips' role, this division has remained closed. This was said to evidence the genuineness of the restructuring and redundancy decisions.

[27] SEC acknowledged it was required to provide sufficiently precise information and an opportunity for Mr Phillips to comment on the information, and said it had done so. SEC said "There is no requirement for a full audit and costings to support decisions being made" and other information Mr Phillips said he was seeking was not clear and would not have made any difference to its business decision. SEC said the type of detailed information Mr Phillips appeared to have been seeking was information he would have been best placed to provide, such as detailed timing and task lists, and this was not something SEC had taken into account in making its decisions.

[28] SEC also said advance notice about the initial meeting to discuss the proposal was not required, referencing the Court's judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*, which said:⁴

The emphasis is on substantial fairness and reasonableness, as opposed to pedantic scrutiny by the Court of a process followed by an employer. The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and to actively consult with affected employees prior to making a final decision.

[29] SEC said it had met its obligations in relation to redeployment, with the first redeployment option created "solely as a mechanism to allow [Mr Phillips] to stay employed" while the second redeployment option "had just become a redeployment option for him due to an internal vacancy, on the same hours and pay". SEC accepted there was no documentary evidence about the terms and conditions of the second option but said Mr Lowndes had provided information about salary and hours in conversation.

⁴ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [60], footnotes omitted.

SEC also said it appeared in any event, given Mr Phillips' negative attitude at the time, it would have been unable to convince him to accept any redeployment option.

[30] I consider SEC had reasonable grounds to commence the restructuring process it undertook in relation to Mr Phillips' role and substantially justified its business decision to close the product manufacturing division. The proposal document and correspondence following clearly identified the cost savings which could be made from disestablishing Mr Phillips' role, being the salary associated with that role, reorganising how technical product support would be provided and utilising freed up workshop space for other purposes. I find however SEC did not fully disclose all of the material considerations which went into its decision making, particularly the view Mr Lowndes expressed at the investigation meeting that SEC's China partner was capable of operating without need for a New Zealand based product manufacturing division, as sufficient trust and confidence had been established in that partner's products and processes.

[31] As a consequence, discussion with Mr Phillips was focused narrowly on the impacts on his role, with Mr Phillips' feedback and questions focused on what was involved in his role and how various tasks or activities would be carried out rather than considering the broader implications and full reasons for the proposal. When Mr Phillips asked about cost-modelling he did not receive further information, with other questions receiving limited responses.

[32] On balance I do not consider SEC's actions undermined the substantive justification for the restructuring proposal, which I consider was for genuine business reasons. I also accept SEC's evidence the proposal was not a reflection on Mr Phillips' capabilities, rather was an evolution of operations following the moving of manufacturing to China with improved confidence in SEC's China partner.

[33] I find SEC's process was however not that of a fair and reasonable employer as Mr Phillips was not made aware of SEC's full reasoning and was therefore denied an opportunity to engage with this reasoning. While such an opportunity may have been unlikely to have changed SEC's decision, it still means SEC's process was procedurally unjustified and contributed to Mr Phillips' perception the restructuring proposal was a *fait accompli*. The consequences of this are addressed further in relation to remedies at paragraphs [57] to [63] below.

[34] I also find SEC's proposal was also not fair or reasonable to Mr Phillips in relation to how redeployment opportunities were presented to him, particularly in relation to the lack of details about remuneration for the second redeployment position. Mr Phillips was adamant details were not provided about this position, with Mr Lowndes saying the details were discussed verbally.

[35] On balance, I consider it more likely than not these details were not provided to Mr Phillips. His feedback on the proposal had been focused on its unfairness given his long service and he had clearly stated the part-time redeployment offer was embarrassing. I consider it unlikely he would have accepted the second redeployment option even if more information had been provided, given his evidence the opportunity was presented "last minute" when he was "already embarrassed, [felt SEC was a] horrible place to work, too late to stick around".

[36] I consider however SEC's failure to provide details of remuneration for this position means Mr Phillips was denied the opportunity to fully assess and respond to this option. The consequences of this are addressed further in relation to remedies at paragraphs [57] to [63] below.

[37] For completeness Mr Phillips also raised concerns his confidentiality was not adequately respected during the process, but I do not consider there is sufficient evidence to support findings this occurred. Mr Phillips and Ms Taylor presented contrary views of whether Mr Phillips discussed the proposal with other staff members, who and when. I consider it more likely than not Mr Phillips had done so at some stage, based on Mr Phillips' evidence at the investigation meeting accepting he had responded to questions from other staff members, though he downplayed this and said he did not discuss details or initiate those discussions.

[38] In addition, Mr Phillips' request to not work out his notice period referred to people inquiring about what was happening and he acknowledged having had some discussions with other people during the restructuring process, although said he did not go into details and responded to questions only. While I accept it is possible there was an open door during one of the meetings Mr Lowndes had with Mr Phillips, which Mr Lowndes has apologised for, there was no evidence this actually resulted in a confidentiality breach. I would have classified this as a minor procedural breach in the circumstances.

[39] I do not consider there is sufficient evidence that SEC's decision to commence the restructuring proposal constituted an unjustified disadvantage. Mr Lowndes' evidence was he had been monitoring the performance of the division since manufacturing was moved to China and while this may not have been directly raised with Mr Phillips earlier, I do not consider commencing the restructuring proposal was unfair or unreasonable in itself. Neither do I consider the evidence establishes that SEC's restructuring proposal was predetermined.

[40] Finally, SEC's submissions addressed Mr Phillips' evidence he thought there may have been ulterior motives for the restructuring proposal in retaliation to his refusing to undertake certain tasks. This argument was not focused on in submissions for Mr Phillips and I make no findings in relation to this point, though observe it did not appear likely to have formed part of SEC's decision making and Mr Lowndes firmly denied this was the case.

Mr Phillips was unjustifiably dismissed when he was made redundant but was not unjustifiably disadvantaged in relation to the commencing of SEC's restructuring process

[41] For the reasons above, I find while SEC's restructuring process was substantially justified, Mr Phillips was unjustifiably dismissed due to procedural failings by SEC which were not minor and resulted in Mr Phillips being treated unfairly. I also find Mr Phillips was not unjustifiably disadvantaged in relation to SEC commencing the restructuring process.

Did SEC breach its employment agreement with Mr Phillips by failing to annually review his salary?

[42] Clause 9.1 of Mr Phillips' 2020 employment agreement starts with the following:

The employee's salary/wages will be reviewed annually. However, there is no automatic entitlement to a pay increase as a result of a review.

[43] Mr Phillips said he received pay increases on 7 June 2020 and 4 December 2022. The first of these pay increases was contemporaneous with Mr Phillips signing the employment agreement for his role as Technical Product Development and Compliance Manager on 8 June 2020.

[44] Mr Phillips said two reviews should have been conducted during this time period and at least one review was required. Mr Phillips said there were no communications with him regarding pay review during this time period.

[45] SEC said:

... clause 9.1 cannot be interpreted as requiring a formal review process or requiring a process that the employee is even aware of: it requires no more than an annual review. It does not even require that review to take place by a certain time.

[46] SEC said only one pay review was required in the relevant timeframe, being in 2021, and referred to Mr Lowndes' evidence that "A review in 2021 resulted in no change in pay, for any employee at [SEC], because the company was dealing with the impact of Covid". While Mr Lowndes said this would have been discussed at a SEC Executive Management Team (EMT) meeting there were no records of this discussion, however, SEC said this was not required by Mr Phillips' employment agreement.

[47] I was referred to another Authority determination *Brown v Your Success Ltd* which found a review had occurred and, while the employee was not informed, this did not mean the contractual obligation to review pay was not met.⁵ Reference was also made to the Court's judgment in *Zhang v Telco Asset Management Ltd*⁶ where it was found a failure to conduct a contractually required pay review did not necessarily mean a penalty was appropriate.

[48] Mr Lowndes said SEC's EMT discussed pay reviews for 2021 in the context of the COVID-19 environment where it was a "pretty tough time" and felt the most prudent action was not to process any pay increases and to see what the next period held. Mr Lowndes also said he felt he "kept people up to date re COVID, salaries and the main focus being on the company surviving". While Mr Lowndes checked for records of either the SMT discussion or communication to SEC's staff, as noted above, none were able to be located.

[49] I consider it more likely than not, given the context of COVID-19, there was some form of pay review in 2021 for SEC staff as outlined by Mr Lowndes. While it would have been preferable there was documentary evidence supporting this, there was no policy which required a specific process be followed for Mr Phillips' pay review,

⁵ *Brown v Your Success Ltd* [2017] NZERA Christchurch 134.

⁶ *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151.

including communicating with him that the pay review had occurred, and his contractual provision does not require a specific process.

[50] I consider SEC's actions were not consistent with the duty of good faith under s 4(1A)(b) of the Act which:

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; ...

[51] I consider however SEC's actions can be distinguished from those in *Zhang v Telco Asset Management Ltd* where the Court said:⁷

The Authority made an unchallenged finding that the failure to conduct the remuneration review was not a minor or technical breach, given the clear obligation on Telco to do so.

[52] In this matter I have found on the balance of probabilities SEC more likely than not undertook some form of pay review. Any failure or breach on SEC's part would relate solely to its failure to communicate it had done so, which is more akin to a breach of the duty of good faith. While penalties are available for certain breaches of the duty of good faith under s 4A of the Act, I do not consider SEC's actions would have met the standard required, being either a failure which was deliberate, serious, and sustained or a failure intended to undermine an individual employment agreement or employment relationship.

[53] In reaching this view I have also taken into account the Court's observations in *Zhang v Telco Asset Management Ltd* that had Mr Zhang raised the failure to conduct a remuneration review "it is more likely than not that the review would have been conducted; and that the result would have been the same" meaning "a decision not to award a penalty was one which was legitimately open to the Authority when exercising its wider discretion under s 135 of the Act".⁸

[54] I consider in this matter had SEC communicated with Mr Phillips that there would be no pay increase and had he challenged this at the time as being a breach of his employment agreement, the result would likely have been confirmation that given the context of COVID-19, he would not receive a pay increase.

⁷ Ibid at [168].

⁸ Ibid at [171] and [172].

No breach of Mr Phillips' employment agreement has been established

[55] For the above reasons I find SEC did not breach Mr Phillips' employment agreement in relation to the requirement in cl 9.1 for an annual pay review. It follows remedies do not need to be considered in relation to this claim.

What remedies should be awarded to Mr Phillips in relation to his unjustified dismissal?

[56] Having determined Mr Phillips was unjustifiably dismissed, I need to consider what remedies should follow. Mr Phillips sought three week's lost wages in the amount of \$3,613.20 under ss 123(1)(b) and 128 of the Act, and compensation at "the higher level of the spectrum" for hurt and humiliation under s 123(1)(c)(i) of the Act, with reference also to compensation under s 123(1)(c)(ii) of the Act.

[57] Mr Phillips said he "felt he had lost face with his friends within the company, and as the only one affected, had to endure their pity without having an explanation for them". Mr Phillips also said he had "been largely unable to recover from the humiliation suffered and his loss of dignity and reputation which has affected his emotional, and financial wellbeing". Reference was made to *Vincent v Carters Tyre Service Limited* where the Authority determined that the restructure was substantively justified but procedurally unfair, where compensation of \$20,000 was awarded.⁹

[58] Mr Phillips' evidence was he was very embarrassed and there were impacts on his behaviour at home, which was corroborated by Ms Olliver. He also referred to the ongoing impacts of this matter, despite having moved on from SEC.

[59] SEC said in the event I found Mr Phillips' redundancy to be procedurally unjustified but substantively justified then, following the Court of Appeal's judgment in *Coutts Cars Ltd v Baguley*¹⁰ I "should distinguish between hurt and humiliation from the manner in which the dismissal was handled and hurt and humiliation which likely would have been suffered in any event from loss of employment". SEC referred to other Authority determinations where compensation of \$5,000 had been awarded, which it said were comparable.¹¹ SEC also said Mr Phillips had failed to mitigate his losses by rejecting a re-deployment offer and, citing the Court's judgment in *Gafiatullina v*

⁹ *Vincent v Carters Tyre Service Limited* [2020] NZERA 296 at [162] to [168].

¹⁰ *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 at [52] and [53].

¹¹ *Liu v Navigator Accounting NZ Ltd* [2020] NZERA 293 at [52] and [53] and *Robinson v A-Z Rigging and Scaffolding Ltd* [2020] NZERA 118 at [52] and [53].

Propellerhead Ltd, said where a dismissal is “unjustified purely on procedural grounds” then “the unfair process would not be causative of the employee’s loss”.¹²

[60] As I have found Mr Phillips’ redundancy was substantively justified but unjustified based on procedural defects, this limits the scope of any award of lost wages. In this case, I have found two procedural defects in relation to SEC not providing Mr Phillips with its full reasoning for the restructuring proposal, discussed at paragraphs [32] and [33] above, and not providing Mr Phillips with the details of remuneration for the second redeployment option, discussed at paragraphs [34] to [36] above.

[61] Following the approach of the Court in *Gafiatullina v Propellerhead Ltd*¹³ and *Butler v Ohope Chartered Club Inc*¹⁴ I do not consider SEC’s consultation process would have been significantly lengthened had it addressed these two procedural defects. Mr Phillips is entitled to lost wages for a period to reflect the time it would have taken to remedy these procedural defects, which I consider two weeks would have been sufficient to address. Mr Phillips’ claim for three week’s lost wages, based on the full period of time he was out of work, was quantified at \$3,613.20 gross. I reduce this by a third to reflect my finding two weeks would have been sufficient to remedy the procedural defects in SEC’s consultation process. Mr Phillips is therefore entitled to payment of \$2,408.87 gross for lost wages under ss 123(1)(b) and 128 of the Act plus any holiday pay or KiwiSaver contributions, if applicable.

[62] I have considered the evidence of impact on Mr Phillips in relation to the effects of the procedural unfairness associated with his dismissal on him and consider these to be more moderate than claimed in submissions for Mr Phillips, but more significant than those suggested in submissions for SEC. While I have considered the cases referred to, as well as other determinations where a dismissal has been found to be procedurally unjustified but substantively justified, for example *Heine v Chief Executive of the Department of Corrections* where compensation of \$10,000 was ordered.¹⁵

[63] I fix the amount of compensation under s 123(1)(c)(i) which Mr Phillips is entitled to at \$15,000 taking into account other comparable cases in the Authority and Court.

¹² *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146 at [153].

¹³ *Ibid* at [154].

¹⁴ *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80 at [32].

¹⁵ *Heine v Chief Executive of the Department of Corrections* [2018] NZERA Christchurch 87 at [85].

Should remedies be reduced under s 124 of the Act for blameworthy conduct by Mr Phillips that contributed to the situation giving rise to his grievance?

[64] I am required to consider if remedies should be reduced under s 124 of the Act for blameworthy conduct by Mr Phillips that contributed to the situation giving rise to his grievance.

[65] In this matter, when assessing if Mr Phillips' actions contributed to the situation that gave rise to his grievance I am looking for a causal link between his actions and the situation that gave rise to the unfair process. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.

[66] I do not accept Mr Phillips' actions contributed to the procedural unfairness of his redundancy. SEC were solely responsible for failing to disclose its full reasoning for the restructuring proposal and failing to disclose the full details of the second redeployment option. No reduction in remedies is ordered.

Summary of outcome

[67] I have found:

- a. while there was some overlap in the job descriptions of David Phillips' role and Graham Allen's role, there is insufficient evidence to support Mr Phillips' claim he was unjustifiably disadvantaged in relation to changes to his role and reporting line;
- b. while Steelfort Engineering Company Limited's (SEC) restructuring process was substantially justified, Mr Phillips was unjustifiably dismissed due to procedural failings by SEC which were not minor and resulted in Mr Phillips being treated unfairly;
- c. Mr Phillips was not unjustifiably disadvantaged in relation to SEC commencing the restructuring process; and
- d. SEC did not breach Mr Phillips' employment agreement in relation to the requirement in cl 9.1 for an annual pay review.

Orders

[68] For the above reasons I order Steelfort Engineering Company Limited to pay David Phillips within 28 days of the date of this determination:

- a. \$2,408.87 gross for lost wages under ss 123(1)(b) and 128 of the Act, plus holiday pay and KiwiSaver contributions if applicable; and
- b. \$15,000 in compensation under s 123(1)(c)(i) of the Act, without deduction.

Costs

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

[70] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Phillips may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum SEC will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[71] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹⁶

[72] As the investigation meeting for this matter took one full-day with evidence concluding at approximately 7pm, with submissions taking approximately a further hour and a half, my preliminary view is the notional daily rate for one full-day and a further part-day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

¹⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1