IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 161
ARC 11/11

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
BETWEEN	RUSH SECURITY SERVICES LIMITED Plaintiff
AND	MARCUS COVERDALE Defendant

Hearing: 26 July 2011
(Heard at Auckland)

Appearances: Larissa Rush, advocate for the plaintiff
Paul Blair, advocate for the defendant

Judgment: 5 December 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The defendant, Mr Marcus Coverdale, was employed by the plaintiff security company as a control room operator. He was classified as a level rank 1, security officer. Rank 1 was the lowest ranking. There was only one other security officer, Mr Jarred Wilson, in the control room who also held a rank 1 position. In September 2009, the company recruited an additional rank 1 security officer for control room work. The new recruit commenced his employment on 14 September 2009. Two days later, the company gave notice that it was proposing to disestablish the positions of two of the control room rank 1 security officers. Mr Coverdale and Mr Wilson were made redundant. The new employee was kept on.

[2] Mr Coverdale commenced proceedings before the Employment Relations Authority (the Authority) claiming that he had been unjustifiably dismissed on the grounds of redundancy. He claimed that the decision to disestablish his position was not made for genuine commercial reasons. The Authority Member recorded that the issues for resolution by the Authority were whether the redundancy was genuine or predominantly for an ulterior motive such as poor performance and whether the decision or how it was made was unjustified and if so, what remedies were available to Mr Coverdale.

[3] In a determination[1] dated 20 January 2011, the Authority found that the decision to disestablish the two positions in the control room was made for "predominantly genuine commercial reasons".[2] The Authority concluded, however, that there were significant failures of fairness in the procedure followed by the company in the redundancy process, in particular, in terms of its obligation to consult and consider alternative positions. It accepted that Mr Coverdale had been unjustifiably disadvantaged by the company's failure in this regard and it awarded him $3,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[4] In its pleadings in this Court, the plaintiff did not seek a full de novo hearing but it challenged that part of the Authority's determination which concluded that Mr Coverdale had been unjustifiably disadvantaged by the company's alleged failure to adequately consult and by its failure to consider alternative employment options. There was no cross-challenge by Mr Coverdale.

Background

[5] Mr Coverdale commenced working for the plaintiff in May 2009 at the company's alarm response centre in Newmarket. He was employed under an individual employment agreement. He had previously worked elsewhere as a security guard and he wanted the chance to expand his skills in an industry which he saw as a future career. Ms Rush interviewed Mr Coverdale for the position and advised him that if he was offered the role then he would be given on-the-job

[1] [2011] NZERA Auckland 27.
[2] At [26].

training and he would also be expected to attend NZQA accredited security industry training courses from time to time. There was a specific clause in the employment agreement requiring the employee to be available to attend training courses. It also provided that in the event of employment termination for whatever reason within 12 months from the employee's start date, the employee would be required to reimburse the employer a "job induction training" fee set at $1,000.

[6] Mr Coverdale worked mainly on day shifts between 6.00 am and 6.00 pm and occasionally from 4.00 pm to 12.00 midnight. Within a few weeks of starting his employment it was left to him to operate the centre for long periods of time on his own and without supervision. He told the Court that he enjoyed the job and the only serious concern he had was the lack of decent breaks on what were long 12-hour shifts. He said:

> 6. My main role was to respond to alarm activations and deploy staff to attend. I was given initial training in the systems of the centre and I picked up the job quickly.
>
> 7. Within a few weeks it was left to me to operate the centre for long periods of time by myself without supervision.
>
> 8. I enjoyed the job and the only serious concern I had was the lack of decent breaks on what were long 12-hour shifts.
>
> 9. Because the centre was usually sole charge I was unable to take proper breaks and often would go for six or seven hours without a proper break. If I went to the bathroom for example I had to take a radio & telephone with me and return to the centre immediately if alarm activations came through.
>
> 10. I raised the issue of not getting proper breaks with the centre manager Larissa Rush but she was unsympathetic. She told me it was part of the security industry and we had a tense discussion about it.
>
> 11. I also asked about the company providing training I was promised but Larissa now said "the training was quite expensive and the company would not provide it until I had worked at the centre for a year".

[7] There was evidence about some performance issues involving Mr Coverdale. In his own evidence, Mr Coverdale described a "tense exchange" between himself and Ms Rush when he queried "why a person would have to pay back $1,000 in training if they left the company within 12 months, as per the contract, when they didn't receive any NZQA training." He also described a disagreement he had with Mr Darien Rush over some comments he and another staff member had made about

a third staff member. In her evidence, Ms Rush told the Court that it did not appear to her that Mr Coverdale enjoyed his job and that "he was quite often unfriendly and grumpy." Ms Rush also referred to an occasion when she had a discussion with Mr Coverdale about his performance. It was alleged that he did not dispatch a guard and as a result the company lost a customer. In relation to the disagreement with Mr Rush, Ms Rush said that the incident followed on from a complaint the company had received from the night-time patrolman that Mr Coverdale "was rude, arrogant and unhelpful." Ms Rush gave some additional hearsay evidence in relation to that incident. Mr Rush did not give evidence in the case.

[8] There were conflicts in the evidence in relation to most of these performance issues. In cross-examination by Ms Rush, Mr Coverdale explained that he did enjoy his job but he didn't like the work culture environment which he said, "was the view that was shared by most of my workmates". He disputed many of the other allegations put to him in cross-examination but he did volunteer that the only conversations he had with Mr Rush were tense and "they were often about other employees or things that he thought I had said or not said to them." In relation to the incident involving comments made about another staff member, Mr Coverdale explained:

> It was involving an employee who had been given an instruction to attend a wedding and be the sole guard in the car park responsible for looking after the cars and given the address he went to somewhere completely different and therefore didn't fulfil the job.
>
> ...

Mr Coverdale admitted describing the employee to another staff member as "an idiot". That remark was subsequently reported back to Mr Rush. Mr Coverdale apologised to the guard who he had called an idiot but he did not apologise to Mr Rush and, for that reason, he was accused in cross-examination of being "unapologetic".

[9] In the relatively short period of time Mr Coverdale was employed by the plaintiff, there were two particular developments in relation to the operation of the control room which became the focus of much of the evidence before me. They related to a new telephone routing system which provided electronic options for

inbound calls, thus, as Ms Rush described it in her submissions, "significantly reduced" the number of inbound calls for the control room to process. The other initiative involved reallocating the technical service scheduling from the control room to the technical services department. I will deal with each in turn.

New telephone system

[10] Mr Coverdale explained in evidence, which was not challenged, how the new telephone system was introduced:

> 14. Shortly after starting the job I made some suggestions to Larissa that the system could be made more efficient if calls that were meant for other sections were directly sent there rather than through the alarm response centre. Many of the calls I had to re-route and this made the job particularly hectic.
>
> 15. Larissa thanked me for the suggestion and said that they would investigate upgrading the phone system. She did not speak to me about any possible effects on my job or the staffing of the call centre.
>
> 16. Some weeks later the phone system was changed and fewer calls needed redirecting.

[11] In her evidence, Ms Rush confirmed that the new telephone re-routing system was introduced sometime in July 2009. She accepted that the change to the phone system resulted in a reduction of calls handled by alarm monitoring staff. In her submissions, Ms Rush accepted that there was no consultation in relation to the change in the telephone routing system but she claimed that the company "did not foresee that the change would have a significant impact on staff requirements for the Control Room although staff were aware of the planned change."

Technical scheduling

[12] The evidence relating to the technical scheduling development was more controversial. Ms Rush described the situation in these terms:

> 16. It was always the Company's intention that the technical scheduling function be conducted by the Technical Services department. This was the way that the function had been conducted in the past, but because of a vacancy which the Company had been unable to fill, the Control Room Manager carried out this role for a period of time.

> 17. The Company initially advertised the position of Technical Services Coordinator in December 2008 and was not successful in filling this role until August 2009.
>
> 18. In the period between December 2008 and August 2009, the function of the Technical Services Coordinator was performed by a Control Room Manager.
>
> 19. The Control Room Manager was aware that this arrangement was temporary, until the Technical Services Coordinator role could be filled permanently.
>
> 20. The technical services function had no impact on [Marcus'] position or the other Control Room Operator – Rank 1 – Security Officer positions.
>
> 21. Control Room staff were aware of the change to the technical functioning scheduling in terms of reallocating this back to the Technical Department, but these staff were not formally consulted over the change because it did not involve or impact on the majority of the Control Room positions and in any event it was common knowledge that this function was only with Control Room on a temporary basis.

[13] Throughout most of her cross-examination, Ms Rush was adamant that the removal of technical scheduling to the technical services department would not have affected the workload of the alarm monitoring staff because it was only the control room manager, Mr Gareth Purdy, who had been responsible for technical scheduling pending the appointment of a technical scheduling co-ordinator. At one point, however, she did acknowledge that the changes to both the telephone system and technical scheduling "did reduce the workload" of the control room monitoring staff. The evidence was that the new co-ordinator for the technical scheduling job, referred to only as Barry, was appointed in July and commenced employment on 3 August 2009.

[14] Mr Coverdale told the Court that he was not consulted about the implications or impact of shifting the technical scheduling to the technical department "despite the fact it would be a significant change in our role and would make a big difference to our work." Commenting on Barry's appointment, Mr Coverdale said in evidence:

> 17. Around this time the company also changed the way it handled calls for technical support such as when an alarm was malfunctioning.
>
> 18. One of the jobs of the alarm response centre staff was to schedule technicians to service malfunctioning alarm systems.

19. The company employed another person called Barry to schedule this technical support. Instead of being consulted we were told by Larissa that these calls would now be directed to the technical department rather than through the alarm response centre.

20. Barry was appointed Technical Scheduling Manager, but he was still training in this role. This required me to still print the scheduling sheets for technicians to attend daily jobs because Barry could not do it.

21. Barry's position was a Monday to Friday role, meaning weekend scheduling of technicians and the scheduling sheets were still the sole responsibility of the weekend Alarm Monitoring staff including myself. We still answered all weekend calls, for various staff who worked 9 a.m. – 5 p.m. on weekdays only.

22. We were not consulted about the implications or impact of the shifting of the technical scheduling to the technical department despite the fact it would be a significant change in our role and would make a big difference to our work.

23. We were not given a reason for the change and neither was I told that there could be an impact on my job.

[15] In cross-examination, it was put to Mr Coverdale by Ms Rush that technical scheduling was not part of the job description in his employment agreement. Mr Coverdale accepted that proposition but he explained that it was still something that he was required to carry out on a daily basis as part of his duty to provide basic alarm troubleshooting for company customers. Mr Coverdale also explained that having been trained in the job by Mr Purdy, the control room manager, until Mr Purdy's position "was disestablished" he had "developed a skill set" in technical scheduling work.

The new recruit

[16] Ms Rush told the Court that the offer of employment for a third control room operator was made to Mr Ronnie Shayler on 2 September 2009 and he commenced his employment on 14 September 2009. She explained that: "there was no anticipation at the time that Ronnie accepted employment there would be impact on jobs or any change to the roster system hence there was no need to hold a consultation." That statement was made by Ms Rush in response to evidence from Mr Coverdale about the lack of consultation. Mr Coverdale had said:

> 27. At no stage was I told there would, or could, be any impact on my employment at the appointment of Ronnie and there were no discussions or consultation from management prior to or after the appointment of Ronnie as to how this new appointment might affect the overall operation.

[17] Mr Coverdale said that the workload had decreased by late August 2009 and the call centre went from having two staff "working frantically to just one staff member who could handle the alarm monitoring as their main role". Expanding on that statement, Mr Coverdale explained that the manager's position had been restructured and the manager, Mr Purdy, had been appointed a night-time supervisor. Mr Coverdale said that he was, therefore, able to do the job on his own.

The redundancies

[18] Ms Rush said in her evidence-in-chief:

> 28. In the week ending 12 September 2009, the Control Room roster was scrutinised with a view to improving efficiency in this area whilst maintaining overall quality.
>
> 29. We were approaching Christmas and a slower season and decided to conduct a review of Control Room operations to look at our efficiency. This review followed a number of other organisational reviews and restructures conducted during 2009, some of which had affected the Control room, but none of which had affected the Control Room Operator – Rank 1 – Security Officer positions.
>
> 30. The Alarm Monitoring part of the Control Room was, at that time, staffed by three full-time Control Room [Operators] – Rank 1 – Security Officer positions. A draft management plan was developed to reduce the Control Room budgeted hours from 370.5 per week to 250.5 per week, creating a total reduction of 120 hours per week. Under this proposal, the reduction of two full time Control Room [Operators] – Rank 1 – Security Officer positions was contemplated.

[19] Ms Rush referred in the above passage of her evidence to the control room being staffed by three full-time control room operators during the week ending 12 September 2009 but the evidence was that Mr Shayler (the third control room operator) did not commence his employment until 14 September 2009. Ms Rush elaborated on the situation:

> The things is with the start date time Your Honour is that we – we already – he accepted an offer of employment on 2 September so to us after that we were looking at the roster and because he already accepted employment I

> couldn't treat him any different to anyone. To me in the eyes of the law the start date is not relevant –

[20] It is not clear from the evidence who, out of Mr Wilson and Mr Coverdale, was the longest serving employee. Mr Coverdale said in evidence that Mr Wilson was appointed "shortly' before he (Mr Coverdale) was employed. However, among the documents produced by consent, was a company restructuring proposal which showed Mr Wilson as having three months' experience as a control room operator, level 1, alarm monitoring, compared with Mr Coverdale having 3.5 months' experience in the same position. In all events both Mr Wilson and Mr Coverdale were made redundant about the same time. Mr Coverdale told the Court that Mr Wilson was "made redundant slightly before I was, [say] a couple of days maybe a week before".

[21] Mr Coverdale told the Court how he came to learn about the proposed restructuring and the redundancy decision:

> 30. However on 16th of September I received a letter from the company saying they were proposing to restructure the alarm response centre and it would lose two full-time positions. I was very surprised because the company had only just employed an extra person.
>
> 31. The letter said the company was concerned about performance issues in the centre and that this had precipitated the restructure.
>
> 32. I was not aware of any "performance" issues in the centre and no such issues had been raised with me at any stage of my employment. I was confident and trusted to run the centre on my own for long periods of time. My performance was never questioned or criticised.
>
> 33. I attended a consultation meeting with my union organiser John Minto and we asked how it could be a genuine redundancy when the company had only just employed another person and then within a week or so considered making two positions redundant.
>
> 34. The company said the business was changing rapidly and had to respond rapidly to changes in security. This made no sense to me because there were no significant fluctuations in the work required at the centre during the time I was employed there.
>
> 35. The consultation process and consideration of alternatives to dismissal/redundancy was to turn up for a meeting where I received my letter of redundancy.
>
> 36. The criteria for considering positions to be made redundant were firstly the level of experience and secondly whether there were any rostering constraints for the three staff affected.

37. I had no rostering constraints and had a greater length of experience in this particular monitoring centre compared to Ronnie. I knew the client list and at that stage could handle calls more efficiently than other staff.

38. I asked the company to consider me as the most experienced and to utilise the principle of last on – first off for redundancy because we were all trained to the same level. The company said they would consider what I said and would also consider the suggestion that they first ask for voluntary redundancies.

39. However a few days later I received a letter telling me I was being made redundant. A month later I noticed an advertisement for a call centre operator at Darien Rush Security.

[22] The letter Mr Coverdale received from the company dated 16 September 2009 was produced in evidence. The letter commenced:

> Dear Marcus,
>
> **Invitation for a consultation meeting: re. Restructuring Proposal**
>
> It has become apparent to management in the last few months that the Control Room performance was falling short of the company's expectations with regards to quality performance. This has prompted management to rethink the way the company's Control Room operates from both: cost and seniority perspectives and the required quality assurance standards. Consequently the business is proposing a number of changes to improve both criteria, including restructuring of the Control Room Operation.
>
> As a result of the restructure, 2 Full Time Equivalent roles are proposed to be disestablished, based on the following criteria:
>
> 1. Scope of restructure: Alarm Monitoring
> 2. Positions to be restructured: Security Officers (Rank 1) with least experienced operators to be considered first for redundancy
> 3. Any rostering constraints
>
> ...

The letter, written by Ms Rush, continued to point out that, based on the criteria mentioned, Mr Coverdale's position was likely to be affected and Mr Coverdale was invited to a "consultation meeting" the following day to discuss the proposal and the criteria for redundancy that had been put forward.

[23] Mr Coverdale asked for two adjournments of the proposed meeting because his support person was not available. The meeting eventually took place on Monday, 21 September 2009. Later that same day, Mr Coverdale received another letter from

Ms Rush. In response to Mr Coverdale's suggestion at the meeting that the "recently hired employee should be made redundant first based on the length of service with the company", Ms Rush said in her letter that it had been decided that the business needed to retain "people with the most amount of industry experience" rather than length of service with the company. In her evidence, Ms Rush told the Court that Mr Shayler had had "6+ years of experience" in the industry. In response to the suggestion Mr Coverdale had made that he be given training to gain more experience, Ms Rush noted that that suggestion failed to address the requirement to reduce costs. Finally, in response to the issue Mr Coverdale had raised at the meeting as to whether the redundancy was genuine, Ms Rush stated: "Cost control and tight monetary discipline are key in today's tough environment and we have to react promptly to the situation to ensure that the company remains within its performance targets." Ms Rush concluded her letter by confirming that Mr Coverdale's position was disestablished as from that afternoon.

Legal Principles

[24] A redundancy is a dismissal and, as with any dismissal or personal grievance claim, when challenged, an employer must be able to establish that its actions were justifiable according to the test for justification prescribed in s 103A of the Act. The test for justification under the former s 103A was whether, on an objective basis, the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time. That test in turn involves other considerations such as the employer's duty of good faith under s 4 of the Act and its compliance with any specific contractual obligations under the relevant employment agreement. The test has equal application to considerations of substantive justification for a redundancy as well as to justification of the process. For practical purposes that means that not only must an employer act genuinely and in good faith in making a redundancy decision but in implementing the decision it must also act in good faith and with procedural fairness.

[25] In the recent full Court decision in *Vice-Chancellor of Massey University v Wrigley*,[3] s 4 was described as "one of the key provisions of the Act".[4] It has

[3] [2011] NZEmpC 37.
[4] At [34].

particular relevance to redundancy situations and is relied on by the defendant in this case. I set out the relevant provisions:

> **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
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (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.

[26] The full Court in *Wrigley* accepted a submission from one of the counsel that s 4(1A)(c) could properly be characterised as a "natural justice provision".[5] The Court also accepted counsel's further submission that "the core right is the opportunity to comment – the access to information is facilitative so as to ensure that the opportunity to comment is real".[6] In accepting that characterisation, the Court added:[7]

> ... The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the

[5] At [54].
[6] At [54].
[7] At [55].

> decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.

[27] Earlier in its judgment, the full Court explained the objects of the Act and stressed: "the strong and fundamental emphasis on good faith as the principal means of achieving successful employment relationships".[8] It went on to make an observation which has particular relevance to redundancy situations:

> [48] Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

[28] Finally, the company in the present case had specific contractual obligations under clause 33 of the individual employment agreement in relation to redundancy. The relevant provisions state:

> 33.0
>
> A redundancy situation arises when the employment is terminated due to the fact that the position held by the employee is, or will become, surplus to the needs of the employer.
>
> In such cases, the employer will follow a fair procedure, will consult with the affected employees and explore any alternative options before terminating the employment.
>
> ...

Discussion

[29] At the one and only meeting Mr Coverdale had with his employer in relation to the redundancy issue, he and his support person, Mr Minto, queried the genuineness of the redundancy. The issue of the company's motive and genuineness was also clearly before the Authority. There was no challenge, however, to the Authority's finding that the plaintiff had genuine commercial reasons for dismissing Mr Coverdale on the grounds of redundancy. The one and only challenge before the Court is the challenge by the plaintiff to the Authority's findings that there were

[8] At [47].

"significant failures of fairness in the procedure followed"[9] by the plaintiff. The Authority held that those procedural defects gave rise to a disadvantage grievance entitling Mr Coverdale to the compensation it awarded.

[30] The Authority identified three specific areas in which the plaintiff had failed to act in a procedurally fair manner in implementing the redundancy decision:[10]

> (i) inadequate consultation about the likely impact of shifting technical scheduling to the technical department and introducing a new telephone system; and
>
> (ii) inadequate consultation about the appointment of a third Level 1 security officer only a fortnight before the redundancy proposal; and
>
> (iii) inadequate consideration of alternatives to the redundancy and dismissal.

[31] The three issues identified by the Authority were, understandably, the principal subject of the evidence before me. The plaintiff acknowledged that there was no consultation concerning the appointment of a third Level 1 security officer. The thrust of Ms Rush's submissions in relation to these matters was that the plaintiff was not required to consult with Mr Coverdale because the control room changes and the decision to appoint the new security officer occurred prior to the plaintiffs "development of the restructuring proposal". The restructuring proposal was said to have followed on from a review of the control room roster during the week ending 12 September 2009. The plaintiff submitted that, in any event, other staff members were aware of the changes in the control room.

[32] In terms of the legal position, Ms Rush submitted that the decisions the plaintiff made were made honestly and that any adverse effect on employment was not foreseen. Ms Rush relied upon and cited various passages from the Court of Appeal's judgment in *Auckland City Council v New Zealand Public Service Association Inc*.[11] In reliance on a statement made at [25] of the *Auckland City Council* judgment, Ms Rush submitted:

> The Plaintiff cannot be reasonably required to demonstrate *"energetic and positive displaying of good faith behaviour"* with regard to its everyday

[9] At [28].
[10] At [28].
[11] [2003] 2 ERNZ 386.

> business decisions with all employees, particularly where there is no foreseeable effect of those decisions on the employees.

[33] As noted, however, by Chief Judge Colgan in *Maritime Union of New Zealand Inc v Ports of Auckland Ltd*,[12] the statements of the Court of Appeal in the *Auckland City Council* case dealing with consultation in relation to any proposed restructuring, must now be read in the light of s 4(1A) of the Act which Parliament passed in response to the effect of the Court of Appeal's judgment.

[34] I have no hesitation in concluding from the evidence that the changes made to the control room operations in July and early August 2009 resulted in a significant reduction in the control room workload. Those changes saw the re-routing of many of the calls which would otherwise be directed to control room security officers and the removal from the control room of the technical support function. As Mr Coverdale told the Court (at [17] above), by the end of August 2009, the workload in the control room had reduced to the extent that it could be handled by one security officer. Ms Rush endeavoured through her evidence to downplay the effect of the control room changes stating that the technical support function change affected only the manager but I do not accept that it was only the manager's workload that was affected by the change. In this regard, I accept the evidence of Mr Coverdale in relation to the prior involvement of control room security officers in the technical support function. I should add that I found Mr Coverdale to be an impressive and entirely credible witness. With one or two inconsequential exceptions which I accept could be explained by the time delay since the events in question, I accept all of Mr Coverdale's evidence.

[35] I am satisfied that Ms Rush would have been aware at the time of the significant reduction in the control room workload that would have resulted from the two control room changes in July 2009. She was also aware at the beginning of September, because she made the statement in her examination-in-chief, that in the period up to Christmas, the company was approaching the "slower season". Given those considerations, the actions of Ms Rush in appointing a third security officer to the control room in early September without consulting the two existing security

[12] [2010] NZEmpC 32 at [81].

officers seems quite bizarre. I waited in vain during her evidence to hear some sensible explanation from Ms Rush for her actions in this regard but none was forthcoming.

[36] Having regard to the developments I have just mentioned which resulted in a significant downturn in control room work, as well as to the approach of the slower season, it was inevitable that the decision to appoint an extra person to the control room staff at the beginning of September 2009 was likely to have an adverse effect on the continuation of employment of the existing two control room security officers, including Mr Coverdale. The company had a statutory and contractual obligation to act fairly and to allow the employees affected a meaningful opportunity to comment on the proposal to employ Mr Shayler. Mr Coverdale was not given that opportunity. Had he been given such an opportunity, I am confident that he would have responded responsibly and would have soon persuaded Ms Rush as to the foolishness, in all the circumstances, of her proposal to employ a third person for the control room.

[37] This case highlights rather dramatically the commonsense elements behind the good faith provisions in s 4 of the Act, particularly the provisions in s 4(1A)(c) which require an employer to provide employees likely to be affected by an adverse decision with access to information about the proposal and the opportunity to have meaningful input before the final decision is made. As the Authority found, at the time Mr Coverdale was made redundant, there was a surplus of staff in the control room. The reality, however, is that that situation had only very recently come about because of what could fairly be described as an irrational decision by the employer to employ another control room officer. There was simply no demand at the time Mr Shayler was appointed for an extra staff member in the control room and there had been no consultation whatsoever with other staff likely to be affected by the appointment. Those are not the actions of a fair and reasonable employer.

[38] Having reached these firm conclusions in relation to the failure of the company to consult with Mr Coverdale about the appointment of Mr Shayler, it is unnecessary for me to go into any detail about the other two findings of the Authority of procedural unfairness. For the record, however, I agree with the

Authority Member that Mr Coverdale was entitled to be formally consulted about other matters, particularly the decision to shift technical scheduling from the control room to the technical department. Coming on top of the introduction of the new telephone system, it should have been obvious to the company, as a fair and reasonable employer within the terms of the s 103A test of justification, that the proposal was likely to have an adverse effect on the existing workforce in the control room. I also agree with the Authority's conclusions that there was inadequate consideration of alternatives to the redundancy and dismissal decision.

Conclusions

[39] The plaintiff fails in its non-de novo challenge. I agree with the Authority's conclusion that the procedural deficiencies identified in its determination were significant, resulting in unjustifiable disadvantage to the defendant. As there was no cross-challenge seeking any increase in the Authority's compensation award of $3,000, compensation under s 123(1)(c)(i) of the Act is confirmed in that sum.

[40] The defendant is entitled to costs and disbursements. If agreement cannot be reached on this issue then Mr Blair is to file a memorandum within 21 days and Ms Rush will have a like time in which to respond.

A D Ford
Judge

Judgment signed at 12.30 pm on 5 December 2011