IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 180
EMPC 259/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HELLOWORLD TRAVEL SERVICES (NZ) LIMITED Plaintiff
AND	JACQUELINE UNSWORTH First Defendant
AND	WHITNEY TOWERS Second Defendant

Hearing:	17–18 July 2023 (Heard at Auckland)
Appearances:	A Espie and J Gray-Smith, counsel for plaintiff D Organ, advocate for defendants
Judgment:	25 October 2023

JUDGMENT OF JUDGE KATHRYN BECK

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[1] This judgment resolves a non-de novo challenge to a determination of the Employment Relations Authority which found, amongst other things, that Helloworld Travel Services (NZ) Ltd (Helloworld) had unjustifiably dismissed Jacqueline Unsworth and Whitney Towers when it made them redundant in July 2020.[1] Helloworld challenges only some aspects of that determination. It said the Authority was wrong in fact and law in finding that the dismissals of Ms Unsworth and Ms Towers were unjustified and also, even if they were justified, in finding that Ms Unsworth was entitled to three months' lost earnings.

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1 *Unsworth v Helloworld Travel Services (NZ) Ltd* [2022] NZERA 313 (Member Urlich).

[2] If it is successful, it asks that the Court order that the amounts that have been overpaid to the defendants be repaid to it.[2]

Issues

[3] The issues for determination in this proceeding are:

(a) whether the Authority erred in concluding that the first and second defendants were unjustifiably dismissed;

(b) if the answer to that question is no, whether the Authority erred in awarding the first defendant three months' lost remuneration;

(c) if the answer to the first question is yes, whether the Authority erred in awarding costs to the first and second defendants; and

(d) if the answer to any of the above questions is yes, whether the relief sought (declarations and orders to repay money) should be granted.

Background

[4] As noted above, this is a non-de novo challenge. The initial proceeding in the Authority involved two broad claims that:[3]

(a) Helloworld's reliance on the closedown provisions in the Holidays Act 2003 to close the business on 27 March 2020, and the reduction in the defendants' pay from that date until their employment ended, unjustifiably disadvantaged them, for which they sought arrears of wages and compensatory damages; and

(b) the defendants' dismissals for redundancy were unjustified both procedurally and substantively for which they sought remedies of lost earnings, compensation and a penalty for breach of good faith.

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2 Helloworld has paid all amounts ordered by the Authority, including amounts relating to the unjustified dismissals.

3 *Unsworth v Helloworld Travel Services (NZ) Ltd*, above n 1, at [3]–[4].

[5] Helloworld denied all claims. The defendants were successful in all their claims, with the exception of the claim for a penalty for breach of good faith.[4]

[6] Ms Unsworth was awarded:[5]

(a) $20,125.47 (gross) in wage arrears;

(b) $20,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

(c) three months' wages under s 123(1)(b); and

(d) interest on total arrears.

[7] Ms Towers was awarded:

(a) $8,489.77 (gross) in wage arrears;

(b) $20,000 under s 123(1)(c)(i) of the Act; and

(c) interest on total arrears.

[8] In a later determination, the defendants were awarded costs of $11,500, to be divided between them and the third respondent in the matter in the Authority.[6]

[9] Helloworld has not challenged the findings in relation to disadvantage or arrears of wages and holiday pay.

[10] In relation to the unjustified dismissal, the Authority found:

> *(i) Were Ms Unsworth and Ms Towers' redundancies genuine?*
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> [60] I am satisfied there was a genuine business reason for the decision to restructure and disestablish Ms Unsworth and Ms Towers' roles which have resulted in their dismissals for redundancy. The evidence is clear that

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4 At [66] and [90].
5 At [91].
6 *Unsworth v Helloworld Travel Services (NZ) Ltd* [2022] NZERA 371 (Member Urlich).

> Helloworld's business was significantly affected by the COVID-19 pandemic and that this had a direct impact on their positions which substantially involved cruise marketing activity.
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> *(ii) Has Helloworld complied with the notice and consultation requirements of s 4 of the Act?*
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> [61] No. Helloworld's consultation process for these redundancies and approach to the provision of relevant information was rushed, unfair and unreasonable. Given the business reason for the restructuring and redundancies had been extant for some months it is unclear why the restructuring process could not accommodate individual consultation meetings where sufficient information was provided to allow Ms Unsworth and Ms Towers to consider and comment particularly given their positions were directly affected by the proposed restructuring. The negative impact of the rushed process and the proposal announcement being made without prior individual notice to these directly effected employees is clear and was compounded by the lack of meaningful information being provided at the meetings and the lack of response in the proceeding months to the reasonable questions Ms Unsworth and Ms Towers had asked, having been invited to do so by Helloworld using the process it had put in place. In the absence of a fair opportunity for meaningful consultation it is little wonder Ms Unsworth and Ms Towers felt there was some motivating link between the questions they raised and repeated and the restructuring process. I also accept Ms Unsworth and Ms Towers evidence that they were told on 6 July their positions were to be disestablished. Even if this was a misapprehension, it was incumbent on Helloworld to ensure the process was clear and supported by sufficient information provided at an appropriate time. This did not occur and has resulted in Ms Unsworth and Ms Towers forming a view the key decision regarding their roles had already been made which has had the unfortunate consequence of cutting them off from the rest of the restructuring process Given the high level of resource available to Helloworld to manage this process these clear flaws are difficult to understand.
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> [62] Helloworld's actions have left it vulnerable to criticism. The flaws in the consultation process are not, on an objective assessment, minor or inconsequential – they denied Ms Unsworth and Mr Towers a fair and reasonable opportunity to understand why their positions had been selected for restructuring and to engage in a meaningful way with the restructuring process. The process was unreasonably rushed. On the evidence before the Authority these dismissals for redundancy are unjustified.

[11] Helloworld said the Authority erred in fact and law in relation to the findings in [61] and [62].

[12] The finding in [60] that there was a genuine business reason for the decision to restructure and disestablish Ms Unsworth's and Ms Towers's roles, has not been challenged and therefore remains on foot.

Facts

[13] Helloworld is an international travel company. It is part of a larger group based in Australia.

[14] Ms Unsworth was employed by it as cruise marketing manager. She had been with the company since November 1999 and at the time her employment ended, she had worked for it for more than 20 years. She reported to Mr Libeau, head of the New Zealand marketing team.

[15] Ms Towers was employed as a database consultant, and held a cruise marketing executive position at the time of her dismissal. She started with the company in June 2008 and at the time her employment ended, she had worked for it for more than 12 years. She reported to Ms Unsworth.

The closedown

[16] This case emerges against a backdrop of the first stages of the COVID-19 pandemic in New Zealand. New Zealand entered alert level 3 on 23 March 2020 and alert level 4 on 25 March 2020. On 23 March 2020, Helloworld announced a nine-week annual closedown, effective 27 March 2020. The closedown was later extended to 31 July 2020.

[17] If employees did not have leave accrued, they were required to take leave without pay. Once the company had applied for the wage subsidy, employees, including Ms Unsworth and Ms Towers, received the subsidy in full but no other wages (other than holiday pay where it was available).

[18] Employees were invited to contact human resources (HR) in Australia if they had any queries or concerns about any aspects of the closedown. Both defendants, on numerous occasions, emailed HR but received either no response at all, or a belated pro forma response that did not answer their questions.

[19] The Authority found that the above actions of Helloworld were unjustified and awarded both defendants reimbursement for lost earnings and compensation for hurt, humiliation and injury to feelings pursuant to s 123(1)(c)(i) of the Act.[7]

[20] Helloworld accepts that it did things wrong in relation to the closedown and how it was handled. It has therefore not challenged these findings. The actions do, however, provide context for events that followed.

The restructure

[21] Over the period 13 March to 14 May 2020, Simon McKearney, Helloworld's executive general manager for New Zealand, and Andrew Burnes, chief executive officer based in Australia, sent various emails, market updates and letters to employees advising about the difficulties faced by the travel industry, and Helloworld in particular.

[22] The correspondence advised that income and business had essentially evaporated – revenues were around five per cent of previous levels and the company was expecting to incur losses of $1.5–2 million per month.

[23] In late May/early June 2020, Mr Libeau and Ms Unsworth corresponded in relation to the possible cancellation of the annual Cruise Expo which was scheduled for November of that year.

[24] In June 2020, Helloworld formed the view that it needed to consider a restructure of its operations, in light of the ongoing impacts of COVID-19 on the business.

[25] On 11 June 2020, Mr Trifonidis, group general manager human resources based in Australia, wrote to members of the Helloworld leadership team, including Mr McKearney, regarding the intended restructure of the New Zealand business as follows:

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7 See above at [6] and [7].

> As you're aware, we have been asked to downsize the headcount of our NZ business. *Could you please provide me with a listing of your proposed impacted staff (those to be made redundant)* by close of business Tuesday 16 June. @David, I know yours will be provided post end of fin year when you complete the finance review.
>
> (Emphasis added)

[26] In his evidence in response to questions, Mr Trifonidis initially agreed that he would have received a list of staff from Mr Libeau or Mr McKearney in response to that email.[8] However, on further investigation, which he undertook during an adjournment, he amended his evidence to say there was no record of him ever receiving any email response to this request.

[27] On 23 June 2020, Mr Libeau wrote to all Helloworld travel owners and managers, advising that the Cruise Expo was not proceeding. However, he noted that there may still be some form of marketing activity or instore cruise event depending on how things tracked. Ms Unsworth advised the New Zealand marketing team (including Ms Towers) of the decision. The reasons given were uncertainty in both the cruise industry and as to when international borders would open.

[28] On 29 June 2020, Mr Trifonidis sent an email with a restructure proposal template to Mr McKearney and others. Mr McKearney then sent it to his heads of department, including Mr Libeau, later that day, noting that they were required to have it completed by the end of the week.

[29] On Thursday, 2 July 2020, Mr McKearney wrote to all members of the marketing team, including Ms Unsworth and Ms Towers, inviting them to a meeting on Monday, 6 July 2020, either in person or via telephone conference. The purpose of the meeting was stated as being to commence a consultation process to discuss proposed changes in the business that may affect their employment with the company. They were told that during the meeting, the company would outline the proposed changes and its rationale and that, following the meeting, it would be seeking feedback with any questions, comments or alternatives which would be taken into consideration before any decision was made.

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8 No such list was provided as part of disclosure.

[30] On 3 July 2020, Mr McKearney's personal assistant sent a copy of the change proposal Mr Libeau had prepared for the marketing team to Victoria Casabuenas, HR business partner in Australia.

[31] That proposal consisted of eight slides (two being pictorial header and final pages) which set out:

(a) a very brief four-bullet point summary of the impact of COVID-19 on the business and advised that the lack of revenue was forcing a review of headcount;

(b) the proposed changes – a headcount reduction of four FTEs;

(c) who would be impacted –

(i) the disestablishment of the online manager,[9] with the online marketing executive reporting directly to the general manager marketing;

(ii) the disestablishment of the positions of cruise marketing manager and cruise marketing executive;[10] and

(iii) reduction of the graphic design team from three to two FTE and the disestablishment of the junior graphic designer role; and

(d) the current and proposed organisation charts illustrating the removal of the roles.

[32] A further slide set out the next steps/indicative timeline. It advised that feedback would be sought about "any questions, comments or alternatives which [would] be taken into consideration before any decision [was] made." Feedback was sought by 10 July 2020, with a decision on proposed changes to be made on 17 July 2020.

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9 This position was currently vacant in any event.
10 Ms Unsworth and Ms Towers's roles.

[33] The restructure document was not provided to employees until after the meetings with them.

[34] What occurred at the conference calls on 6 July 2020 is a matter of dispute.

[35] Ms Towers attended the call along with other members of the marketing team. She says her meeting was scheduled for 15 minutes but took less than that. Further, she says at the meeting she was told her role was planned to go and that four positions were disestablished.

[36] Ms Unsworth was unable to attend the meeting at the proposed time of 12.15 pm. Instead, she had a separate individual telephone conference with Mr Libeau and Mr McKearney later that afternoon.

[37] Ms Unsworth said the call she had on 6 July 2020 with Mr McKearney and Mr Libeau was very brief, no longer than 10 minutes. Her evidence was that during that call, she was told that the two cruise positions were being disestablished.

[38] She said she was upset and surprised because the other brands (Flight Centre and House of Travel) were not disestablishing these kinds of roles.

[39] That afternoon, Mr Libeau emailed a copy of the restructure document to members of his marketing team and at 4.56 pm Ms Casabuenas also sent a copy of the document to all members of the team.

[40] The company says what was said at the meeting would have been consistent with that document. That is, it was a proposal only at that stage.

[41] However, neither Mr Libeau nor Mr McKearney was called to give evidence. The company relies on an email sent on 6 July 2020 by Mr McKearney to the management team in Australia, after the various meetings[11] had taken place, as a record of what was said at the meetings with Ms Unsworth and Ms Towers.

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[11] There were meetings with other departments as well as marketing.

[42] While they received the restructure document, both Ms Unsworth and Ms Towers said they saw no point in providing feedback as the decision had already been made, and when they had attempted to correspond with the company previously (in relation to the closedown and salary issues), they had been ignored. Ms Unsworth said she did not believe the company was genuine and did not feel it would listen to anything she had to say.

[43] On 17 July 2020, Mr Burnes wrote to all members of staff, advising that the company had reviewed all the feedback and would continue with the process.

[44] Interviews in relation to contestable roles were to begin on 20 July 2020, to be conducted by managers, with final outcomes to be communicated by 28 July 2020. Questions were to be directed to HR.

[45] Neither Ms Unsworth nor Ms Towers applied for any roles. Ms Unsworth said the only role that was possibly appropriate was already filled by somebody else based in Auckland. Further, Ms Unsworth says she was told she was unlikely to be successful against the incumbent. Ms Towers said the roles they claimed were available were not suitable.

[46] On 22 July 2020, Mr Libeau emailed Ms Unsworth, advising that her position was disestablished and that her last day of employment would be 24 July 2020.

[47] Ms Towers was sent a similar email on 23 July 2020, advising her of the termination of her employment the next day.

[48] Both were paid four weeks' remuneration in lieu of notice and 12 weeks' redundancy compensation in accordance with the terms of their employment agreements.

[49] Ms Unsworth wrote to the company on 28 August 2020, raising her personal grievances (including for unjustified dismissal), and Ms Towers did the same on 9 September 2020.

[50] Helloworld denied the claims.

Analysis

Did the Authority err in concluding that Ms Unsworth and Ms Towers were unjustifiably dismissed?

[51] The Authority's finding that the plaintiff had genuine business reasons for the disestablishment of the defendants' position stands. Accordingly, the question is whether it followed a fair and reasonable process in dismissing Ms Unsworth and Ms Towers.

[52] The plaintiff said the Authority's determination contained a range of repeating or overlapping criticisms of the process undertaken, each of which was an error of fact or law or both. These are:

(a) the Authority's view that prior individual notice was not provided;

(b) the Authority's view that the plaintiff could not accommodate individual consultation meetings;

(c) the Authority's view that the information provided to the defendants was not sufficient or meaningful;

(d) the Authority's view that the defendants were told their roles would be disestablished;

(e) the Authority's view that the process was rushed;

(f) the Authority's view that the consultation was unfair and/or unreasonable;

(g) the Authority's view that any flaws were not minor and inconsequential; and

(h) the weight placed by the Authority on earlier communication issues/the defendants' other personal grievances.

Prior individual notice and individual meetings

[53] The plaintiff said the Authority erred in stating, at [61] of the substantive determination, that the proposal announcement was made without individual notice to those directly affected employees and was critical of the company in not accommodating individual consultation meetings.

[54] It argues that both defendants were given prior individual notice in the form of an email sent on 2 July 2020, and that there was no legal requirement for it to give the employees any prior notice of them being personally impacted, or to have an individual one-on-one meeting with them. It also said that process itself contemplated the individuals providing feedback in a face-to-face or online meeting if they preferred.

[55] It is correct that the defendants were provided with email notice of the meeting on the Thursday (2 July 2020) which was to take place on the Monday (6 July 2020). That email gave notice that the purpose was to discuss proposed changes in the business that may affect their employment. They were told that the proposed changes would be outlined during the meeting. I consider that is sufficient to advise them both of the nature of the meeting and its purpose. It was not unfair.

[56] Mr Espie noted that it may be that the Authority was suggesting individually impacted employees should have been notified separately rather than with others (as was the case with Ms Towers), or after others (as was the case with Ms Unsworth).

[57] Counsel submitted that there is no legal precedent that would suggest that a restructure proposal may only be distributed to impacted employees in individualised meetings. He also submitted that there is a range of ways in which a change proposal may be delivered and that it can be difficult for an employer to choose an approach which cannot be subjected to criticism.

[58] There is merit in the suggestion that Ms Unsworth and Ms Towers, either separately or together, as the individuals directly impacted by the change proposal, should have been advised about the proposal before the other members of the team. Had the company taken such a step, and met with them in this individualised way, it could also possibly have avoided the various criticisms that have subsequently followed. It would have been able to say with clarity what each one of them was told and when. It would also have been able to address what they have both said was the shock of hearing that their roles were intended to be disestablished. Ms Towers, in particular, said she found it deeply distressing to be hearing this alongside her colleagues who were not so impacted. Ms Unsworth heard it later and was equally distressed that others knew before her. These are understandable human reactions but avoidable in a properly managed process.

[59] Mr Espie pointed to the fact that individual meetings were available to employees. It is correct that the company's process specifically contemplated individual meetings in the second stage. However, the Authority's criticism is aimed at their absence at the first stage.

[60] These are not matters that would, on their own, render a process unfair. But taken in the round, or looked at on a cumulative basis, they may add to a finding of an unfair process.

Failure to provide sufficient or meaningful information

[61] The law requires that employers provide employees with access to information relevant to the continuation of their employment, as well as an opportunity to comment on that information before any decision is made.[12]

[62] The plaintiff submitted that the information provided to the employees was meaningful. Mr Espie argued that the restructure document provided an adequate explanation of the change proposal, the reasons for it, and the right of the employees to provide feedback.

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12 Employment Relations Act 2000, s 4(1A)(c)(i).

[63] The restructure document contained only brief bullet points in relation to the business reasons behind the proposal.[13] However, in the context of the COVID-19 pandemic, and against the backdrop of information already provided, I agree that this was sufficient to provide a basis for the need to change.

[64] The information that is lacking, however, is the rationale behind selection of the particular roles chosen for disestablishment. There was no information provided about why both cruise roles were to be disestablished, as opposed to just one of the two (as was the case with the online marketing positions and the graphic design positions) or why cruise roles were disestablished as opposed to other marketing positions. The evidence was that all marketing positions had been impacted by the COVID-19 pandemic. Why was it that these particular roles were selected?

[65] Nor was any information provided about which of the remaining (apparently contestable) positions would take on the duties or responsibilities of the cruise roles.

[66] This meant that the information was insufficient to enable Ms Unsworth and Ms Towers to enter into any meaningful consultation. The Authority's conclusion in that regard was not an error of fact or law.

Ulterior motive

[67] The plaintiff's failure to provide information has contributed to the defendants' suggestion that there was an ulterior motive in the selection of the two cruise positions. The defendants submit that their positions were selected by way of retribution for their responses to the unlawful closure of the business.

[68] They rely on an email from Mr McKearney to the Australian management team about risks within the New Zealand senior management team. However, the referenced correspondence appears to relate to the senior management team as opposed to employees like Ms Unsworth or Ms Towers. Accordingly, while it may indicate a problematic mindset in the case of intended treatment of others, there is no evidence it related to these particular employees.

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13 See above at [31].

[69] In any case, as already noted above, the Authority has found that there were genuine business reasons for the disestablishment of the roles, and it is not open to the Court to overturn that finding as it has not been challenged.

Were the defendants advised on 6 July 2020 that their positions would be disestablished?

[70] The plaintiff's position is that on 6 July 2020, the defendants were informed that the plaintiff was proposing to disestablish their roles and that this was subject to consultation. It said that, based on the weight of evidence before the Authority and now the Court, the Authority's finding that the employees were told that their positions were disestablished was an error.

[71] Helloworld submitted that the wording of the restructure document and the email from Mr McKearney all support its position that the employees would have been told that it was a "proposal" only at that stage.

[72] That, however, is not the weight of evidence before the Court. As noted above, neither Mr McKearney nor Mr Libeau, who were present at the meeting, gave evidence in this proceeding. The email from Mr McKearney that the plaintiff relies on is general in nature. It refers to all of the conference calls that had been completed. It does not purport to be a record of the specific meetings with Ms Unsworth and Ms Towers. Further, it is not unequivocal on the point. While it talks about "proposing" significant changes, it also notes that the impact "will disestablish" in the vicinity of a further 80 to 90 roles. Ms Unsworth and Ms Towers both gave very clear evidence of what was said to them on their calls which was that their positions were being disestablished.[14] I do not consider this was a misapprehension; it was what they were told.

[73] Both were cross-examined extensively on the point and remained firm in their views.

[74] Ms Towers was asked in cross-examination whether she was told it was a proposal, but she was firm in her response that she was told it was a plan and that was

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[14] See above at [35] and [37].

what was happening. She says this was a shock to her and particularly upsetting, given that she was told on a call with all of her colleagues present.

[75] Ms Unsworth, too, was clear that she was told the two roles were being disestablished, and she was upset because she could not understand why.

[76] They both made appropriate concessions as to the nature of the information they were provided. They agreed that once they received the restructure document (after the meeting), it stated it was a proposal and they could provide feedback. Both, however, considered this was not genuine and that their past experience with providing feedback or asking questions meant they (not unreasonably) considered this would be a waste of time.

[77] I have direct and strong evidence of what was said at the meetings. Mr McKearney's email is not sufficient to displace such evidence; nor does the email invitation leading up to the meetings and the restructuring document that followed displace the direct evidence of what was said to the employees in the meetings they attended.

[78] The Authority also had the benefit of Mr Libeau's evidence and made the finding it did.

[79] On the evidence before me, there is no reason to displace its finding. There was no error of fact or law.

[80] I consider that both Ms Unsworth and Ms Towers were told on 6 July 2020 that their positions were to be disestablished. Accordingly, the matter was predetermined.

Was the process rushed?

[81] Ms Unsworth and Ms Towers were given a meeting invitation on 2 July 2020 and were provided with a notice of redundancy on 22 or 23 July 2020. I agree with the plaintiff that, in the circumstances, the timeline followed would be acceptable had there been genuine consultation in between those dates. The issue is not the timing of the process but the nature of the consultation.

[82] I consider the Authority erred on this point.

Was the consultation fair and reasonable?

[83] The plaintiff says the Authority erred in finding that the consultation was not meaningful.

[84] Given my findings above, I find that there was a sound basis for the Authority's findings. The consultation was not fair or genuine.

[85] The plaintiff did not have an open mind. It had already determined that the defendants' positions were to be disestablished. Accordingly, they did not have a reasonable opportunity to meaningful engage and provide feedback. They regarded the invitation[15] to do so as not being genuine. They cannot be criticised for that view.

[86] Nor, as suggested by the plaintiff, can they be criticised for failing, in an excess of caution, to ask questions and provide feedback in any event. That course of action had not been at all effective in the previous few months. They were presented with a fait accompli. The fact that they did not challenge it at the time is not a criticism that can be sheeted home to them, particularly in the circumstances of this case.

[87] The plaintiff has also submitted that the issue of predetermination cannot be within the scope of the hearing, given the finding in relation to the genuine business reasons. I do not agree. The issue of predetermination goes to the genuineness of the consultation process and the question, which is at the heart of this matter, as to whether the defendants were in a position to meaningfully engage in the restructure process. Having determined (arguably for good business reasons) that their positions were to be disestablished, Ms Unsworth and Ms Towers were deprived of the opportunity to present alternatives or attempt to change Helloworld's mind. This is despite the restructure document disingenuously advising them that they had the opportunity to do so.

[88] The Authority did not err in finding that the consultation was not meaningful.

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[15] Which they received once the restructure document was provided later that afternoon.

Were the flaws in the consultation process minor and inconsequential?

[89] The plaintiff submitted that the Authority erred in concluding that the flaws in its consultation process were not minor or consequential. I do not agree.

[90] The errors I have found above, particularly the predetermination, failure to provide sufficient information, and consequential failure to meaningfully engage in good faith with the defendants, were significant breaches of the plaintiff's good faith obligation to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. Further, it meant that Ms Unsworth and Ms Towers did not have access to information relevant to the continuation of their employment; nor did they have a genuine opportunity to comment on it before the decision to disestablish their positions was made.[16] These breaches go to the heart of a fair and reasonable process; in particular, one relating to terminations for redundancy.

What is the relevance of the earlier unjustified actions?

[91] The plaintiff also submitted that the Authority erred in finding that the various breaches were compounded by the earlier lack of response in the preceding months to the defendants' various questions.

[92] I agree that the lack of response is not directly relevant to the restructuring process. However, it is an answer to the plaintiff's criticism of the defendants for not themselves being responsive and communicative, or proactively providing feedback and asking questions in the face of being told that their roles were disestablished.

[93] To that extent, there is a compounding effect of the predetermination and the previous failure to answer questions. In the face of being told that their roles were disestablished, even if it was inconsistent with the document that they were subsequently provided, they were unlikely to question what they had directly been told. The invitation in the documentation to do so was fairly regarded as misleading at worst, and disingenuous at best.

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16 Employment Relations Act, s 4(1A)(b)–(c).

Conclusion

[94] For the reasons set out above, the Authority did not make an error of fact and law in declaring that the plaintiff's decision to make the defendants redundant was not one that a fair and reasonable employer could have made in all the circumstances.

Remedies

Compensation

[95] Having found that the Authority did not err in either fact or law in ruling the dismissals of Ms Unsworth and Ms Towers unjustified, it is not necessary to revisit the compensation awards.

[96] While it would have been preferable for the Authority to have separated out what compensation it was awarding for unjustified disadvantage, and what for the unjustified dismissal, there is no reason for me to disrupt the findings.

[97] Accordingly, the awards of $20,000 compensation under s 123(1)(c)(i) to both Ms Unsworth and Ms Towers stand.

Reimbursement of lost earnings

[98] Ms Towers did not seek any reimbursement of lost earnings.

[99] Ms Unsworth, as noted above, was awarded three months' lost earnings pursuant to ss 123(1)(b) and 128 of the Act.[17]

[100] Ms Unsworth's annual salary was $130,279.11; six months' pay equalled $65,139.55; and three months' pay equalled $32,569.77.

[101] In her evidence in the Authority and before the Court, Ms Unsworth provided detail of income from a variety of sources over the six-month period following termination as follows:

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17 *Unsworth v Helloworld Travel Services (NZ) Ltd*, above n 1, at [67]–[69].

(a) Work and Income Covid relief benefit – $5,810.00;

(b) Electoral Commission – $2,899.86;

(c) Tall Poppy – $6,787.74;

(d) redundancy payment – $30,064.42; and

(e) four weeks' pay in lieu of notice – $10,021.47.

[102] She says her lost earnings for the purposes of s 128 were $54,452.02 excluding redundancy and payment in lieu of notice. She also disregarded the Covid relief payment, noting it as "NA".

[103] It appears that the Authority found that the actual loss was greater than three months' remuneration but determined that it was not appropriate to award lost earnings for the full period. It then determined that three months' ordinary time remuneration under s 128(2) of the Act was appropriate.

[104] That reasoning is not set out in detail in the determination, and other than the decision not to take into account the redundancy compensation payment due to it being a contractual payment,[18] it is unclear what payments were taken into account when concluding that more than three months' earnings had been lost.

[105] Before entering into those calculations, it is necessary to first consider the plaintiff's submissions that even in the event the dismissal is found to be unjustified, the Authority erred in:

(a) concluding that the first defendant suffered loss as a result of her dismissal;

(b) concluding that 12 weeks' lost earnings should be awarded at the first defendant's full salary rate;

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[18] The Authority cited *Muru v Coal Corp of NZ Ltd* EmpC Auckland AEC 19/97, 12 March 1997.

(c) omitting to offset income, earned by the first defendant in respect of the 12-week period beginning 1 August 2020, including payment in lieu of notice and alternative earnings, from the award of lost earnings;

(d) omitting to offset redundancy compensation received by the first defendant from the award of lost remuneration; and

(e) awarding lost earnings that were in excess of the first defendant's own evidence as to the quantum of her lost earnings.

Did Ms Unsworth suffer loss as a result of her dismissal?

[106] The plaintiff argues that having determined that there were genuine business reasons for the decision to restructure and disestablish Ms Unsworth's role, the procedural deficiencies that I have identified above cannot have caused her loss. The company argues that procedurally justified or not, Ms Unsworth would still have lost her job and therefore would still have lost earnings. It said it was the business situation and decision to disestablish her role (which has been found to be justified) that resulted in her loss, not the procedural deficiencies that have been identified.

[107] It is correct that all contingencies must be considered.[19] However, it is often the case with these situations that it is difficult to apply a counterfactual. It can be inherently speculative, particularly in a situation such as the present where some but not all employees in a business are being made redundant and where the choice of why some employees are being made redundant over others is not necessarily self-explanatory.[20]

[108] It is correct that the Authority found (and this finding stands) that there was a genuine business reason for the decision to restructure and disestablish Ms Unsworth's

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19 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81].

20 As a result of these factors, the facts of *Gaffiatullina v Propellerhead Ltd* [2021] NZEmpC 146, [2021] ERNZ 654, which was relied on by the plaintiff, are not directly relevant. In that case, there was only one employee involved in the redundancy process, and they were a clear choice for redundancy in light of the fact that they did not directly contribute to the company's profit.

role. That must of course be the case, given the impact of COVID-19 on the business.[21] However, that is not the end of the analysis.

[109] It is difficult to determine what Ms Unsworth would have done had she not been told that her position was to be disestablished; that is, not been presented with a fait accompli. Further, it is not clear what would have happened had the company provided information in relation to its rationale for the selection of the two cruise positions, as opposed to any of the other marketing roles, or information in relation to how the various duties and responsibilities would then be allocated, given the remaining roles.

[110] The restructure document invited feedback, questions, comments or alternatives. It is impossible to determine what could have happened to Ms Unsworth's employment in the context of the restructure, had she not been presented with a fait accompli and the company had had a truly open mind as to the outcome – in particular in relation to alternatives to disestablishing her role.

[111] The company is critical of Ms Unsworth for not raising questions or making comments to Mr Libeau or Mr McKearney once she received the restructure document. However, given the response (or lack thereof) to such invitations in the past, and in the face of being told that her position was disestablished, this is not a criticism that can be fairly levelled at her. It was not unreasonable for her to take Mr Libeau at his word and to therefore not engage in the purported "consultation".

[112] Ms Unsworth was also criticised for failing to put her name forward for any redeployment opportunities. While it is correct that part of the reason for her not doing so was her desire to remain in Tauranga, it was also her evidence that the role she would have been interested in (advertising and campaign manager) was already filled and she was told she was unlikely to get it. Further, there was no information that would explain to her in what way this (or any of the others) was a new role[22] or, indeed, what the duties and responsibilities would be. Again, we can only speculate about what Ms Unsworth's action would have been in those circumstances, and whether she

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21 See above at [63].

22 Which would explain them being contestable.

would have sought redeployment and so avoid dismissal notwithstanding the disestablishment of her role.

[113] Helloworld's procedural failures resulted in the loss of an opportunity for Ms Unsworth to engage in a true consultation in relation to the disestablishment of her role and the impact on her ongoing employment.

[114] While the disestablishment of her role may well have been for genuine business reasons, she was not provided with an opportunity to look at alternatives to the termination of her employment. She suffered loss as a result of her dismissal.

[115] Accordingly, when considering what would or could have happened had Helloworld followed a fair and reasonable process, it is not clear that the process would have resulted in the termination of Ms Unsworth's employment. Therefore, I agree with the Authority that Ms Unsworth lost remuneration as a result of the personal grievance. In those circumstances, s 128 of the Act applies.

Should Ms Unsworth have been awarded 12 weeks' lost earnings?

[116] The Authority ordered that Ms Unsworth be paid three months' salary at her normal contractual rate, not 12 weeks' salary. As noted above, it did that on the basis that more than three months' remuneration had been lost but that, in the circumstances, any difficulty in finding alternative employment was subject to the likely impact on job prospects of the ongoing effects of the COVID-19 pandemic, a consequence which the Authority did not wish to visit on Helloworld.[23] It then awarded three months' salary under s 128 of the Act.

[117] Even if I am wrong about how the Authority reached that conclusion that three months' salary was an appropriate remedy, it is not immediately clear that the result was in error. In *Board of Trustees, Southland Boys High School v Jackson*, the Court stated the correct approach:[24]

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[23] *Unsworth v Helloworld Travel Services (NZ) Ltd*, above n 1, at [67]–[69].

[24] *Board of Trustees, Southland Boys High School v Jackson* [2022] NZEmpC 136, [2022] ERNZ 565 at [52] (footnotes omitted).

[52] In summary, the analysis required in a case such as this is as follows:

> "• step 1 — did the employee have a personal grievance?
>
> • step 2 — an assessment of lost remuneration as a result of the personal grievance = x;
>
> • step 3 — an assessment of what three months' ordinary time remuneration equates to = y;
>
> • step 4 — a comparison between x and y to see which is smaller; the smaller number (z) is the deemed figure for lost remuneration;
>
> • step 5 — nevertheless, should a greater sum than z be ordered in the particular circumstances? If so, that is the figure for assessed lost remuneration."

[118] Three months' ordinary time remuneration for Ms Unsworth was a sum of $32,569.77. Following the approach set out above, if Ms Unsworth's total loss exceeded that amount, then she was entitled to that sum pursuant to s 128(2) of the Act. Therefore, it is necessary to consider what her total losses were. This point is considered below.

Did the Authority omit to offset income?

[119] It would have been preferable had detail been provided as to how the Authority reached its decision that Ms Unsworth had lost more than three months' remuneration. However, I have seen the evidence before the Authority in relation to lost earnings and note that the lost earnings over that period do not only relate to the first 12 weeks after the loss of employment, but to the whole period of six months following termination.

[120] When calculated as a whole, excluding the redundancy compensation (which I will deal with below), it is apparent that over the six-month period claimed, Ms Unsworth lost at least the sum of $39,620.48, which is more than three months' lost remuneration.[25]

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[25] $32,569.77. See above at [100].

Six months' remuneration under contract:	**$65,139.55**
Less earnings over six month period:	$5,810.00
	$2,899.86
	$6,787.74
	$10,021.47
	($25,519.07)
Total:	**$39,620.48**

[121] Accordingly, the Authority was required to exercise its discretion as to whether to order that amount or the lesser amount of three months' remuneration. It chose to order the lesser amount of three months' remuneration.

[122] This was a decision that was open to it; it did not make an error of fact or law in this instance.

Should the Authority have given Helloworld credit for redundancy compensation?

[123] Mr Espie, counsel for the plaintiff, argued that the true character of the redundancy payment meant that it operated as a bridge or cushion between the loss of a role and finding new work and should be taken into account as earnings for the purposes of calculating lost remuneration. He relied on the recent decision of the Chief Judge of this Court in *Board of Trustees, Southland Boys High School v Jackson.*[26]

[124] However, Mr Espie has mischaracterised the true character of the redundancy payment. In *Re New Zealand Seafarers' Union Retirement and Welfare Plans,* McGechan J specifically indicated that redundancy payments are not designed to "bridge losses" within a broader discussion of the concept of redundancy payments:[27]

> In principle, redundancy payments are compensation for the loss of a job through its disestablishment as superfluous. Redundancy payments are not payable if the position continues to exist, filled by another employee. Redundancy payments are not extra wages, or wages in lieu of contractual notice due. Redundancy payments are not superannuation. Redundancy payments are not some compassionate distribution designed to bridge losses until a new job is found, like an unemployment benefit: redundancy payments

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[26] *Board of Trustees, Southland Boys High School v Jackson*, above n 24.

[27] *Re New Zealand Seafarers' Union Retirement and Welfare Plans* [1996] 1 ERNZ 259 (HC) at 270 (emphasis in original).

> are due even if the employee finds new employment immediately. Redundancy is payable because the job — the opportunity to earn — disappears, and modern attitudes to industrial relations consider compensation is appropriate. Certainly, the employee receives the payment because he/she was an employee in that position. The employee hardly would receive the payment if a stranger. That, however, does not determine. In principle, the employee does not receive the payment as *remuneration from* employment. The employee receives it as *compensation for the loss* of the very employment opportunity in itself. The payment, so identified, is compensatory, not remunerative.

[125] Subsequently, in *Muru v Coal Corp of NZ Ltd,* Judge Finnigan, while discussing *Queenstown Lakes District Council v Edmondson*,[28] held:[29]

> … if redundancy compensation is paid for a job loss then that does not rule out compensation for humiliation, loss of dignity and injury to feelings; neither does it rule out reimbursement of any proved remuneration loss, if one or both is justly payable on its own grounds in the particular facts of any case. The fact that compensation for loss of the job has been paid is said by the Court *not* to eliminate compensation and/or wage reimbursement; it is simply a factor which in the particular facts of any case may justly be brought into account if and when those other remedies are being assessed. …

[126] Judge Finnigan proposed that each case must be decided within the context of its own facts. In *Board of Trustees, Southland Boys High School v Jackson*, the Court was dealing with a very different set of circumstances and a specific contractual provision. In that case, it was a long service payment, the balance of which had to be repaid in the event the teacher obtained another role. It can be distinguished from the case in this instance where there is a standard contractual redundancy provision with certain amounts payable on redundancy.

[127] Turning to the present case, I find that the redundancy compensation was paid as compensation for the loss of Ms Unsworth's job. It was not intended as compensation for lost remuneration, and I do not consider that it was intended to operate as a bridge or cushion between the loss of a role and finding new work. Therefore, the redundancy compensation does not prevent the Court from ordering any compensation for proved loss of remuneration.

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[28] *Queenstown Lakes District Council v Edmondson* EmpC Christchurch CEC 12/95, 31 March 1995.

[29] *Muru v Coal Corp of NZ Ltd*, above n 18, at 9 (emphasis in original); see also at 7–8.

[128] The Authority did not make an error of fact or law in this instance.

Did the Authority award lost earnings in excess of Ms Unsworth's evidence?

[129] Given the matters I have set out above, it is apparent that Ms Unsworth's evidence disclosed all amounts received by her over the period 1 August 2020 to 31 January 2021. One of those amounts was not income that should be taken into account for the purposes of s 12 of the Act, such as the redundancy compensation.[30]

[130] When all other amounts were deducted (including the Covid relief payment), Ms Unsworth was left with a loss, for the purposes of s 128 of the Act, of $39,620.48.

[131] This amount is more than three months' remuneration. Accordingly, the Authority did not err in fact or law in awarding the lesser amount of three months' remuneration.

[132] Therefore, the declarations and orders sought by the plaintiff in relation to repayment are declined.

Outcome

[133] The plaintiff is unsuccessful in its challenge. The Authority's determination is upheld in full.

Costs

[134] Costs are reserved. In the event the parties are unable to agree on costs, the defendants will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further

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[30] I agree with Mr Espie that, given Ms Unsworth was told by the Ministry of Social Development that she would not be required to repay the Covid relief payment, this should be taken into account. See *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57. However, that does not alter the outcome.

14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 4 pm on 25 October 2023.