



ISSUE

334

January 2023

a regular newsletter for clients of
mcphail gibson & zwart ltd

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Gotta have (good) faith

Janes v Fire and Emergency New Zealand **[2022] NZERA 606**

Mr Janes was employed by Fire and Emergency New Zealand (“FENZ”) as a Senior Risk Advisor. On 4 February 2019 he was informed of a proposal for changes to the organisational structure. The process was “lengthy and complex”, finally completing on 27 September 2021.

Eventually, Mr Janes was made aware that his role would be disestablished, and the closest equivalent to the role he held was the role of Group Manager. He therefore went through the selection process for the Group Manager role.

Mr Janes was ultimately informed that he was ineligible and unsuitable for the role of Group Manager due to his low interview scores. Following Mr Janes being unsuccessful, FENZ decided to redeploy him into Senior Risk Advisor Role (with a reduction to his previous salary of around \$34,000).

Mr Janes raised a personal grievance claiming that he was unjustifiably disadvantaged due to not being appointed to the newly established role of Group Manager. His claim was that “[He] did not have to be either ‘best suited’ or the ‘preferred candidate’ to be redeployed into the GM position. [His] skills, experience and qualifications [were] in fact relevant and transferable to the GM position”.

There is one particular aspect we will focus on from this decision: the application of good faith in the context of selection processes within a redundancy process.

It is well settled that redundancy can be justification for termination of employment. However, this requires the decision was one that a fair and reasonable employer could have made in all the circumstances. This means, that there is substantive justification for the decision, and that the decision was procedurally fair.

Where redundancy is being proposed, there is an obligation of good faith between the parties to the employment relationship provided under the Employment Relations Act 2000 (“the Act”). This means there is a duty to be “*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*” (section 4(1A)(b) of the Act).

Furthermore, there is a positive duty under section 4(1A)(c) of the Act which 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 to provide the employees affected with access to relevant information and an opportunity to comment on that information, before a decision is made.

In the context of a selection process there is an additional onus placed on an employer. This was noted in *Jinkinson v Oceania Gold (NZ) Ltd (No 2)*, where Judge Couch stated “*It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process*”. In *Jinkinson*, the Court also noted there should be no distinction between the application of good faith in situations where a redundancy process is being undertaken to downsize, compared to where an employer undertakes a selection process for redeployment to alternative positions.

The Authority was required to consider whether FENZ had sufficiently investigated whether Mr Janes was capable of being deemed suitable for redeployment into the Group Manager role. It highlighted the following issues relating to the selection process adopted by FENZ:

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

Contact Details:

Level 2
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

Jane Taylor
E: jane@mgz.co.nz
M: 021 1539 147

Deborah Hendry
E: deborah@mgz.co.nz
M: 027 247 4274

Jane Jarman
E: jane.jarman@mgz.co.nz
M: 027 279 4936

- 1 The first point raised was that the comparison of Mr Janes' current role and the new Group Manager role had not been undertaken with sufficient regard to his existing duties. Further, the comparison was too limited, relying mostly on the job description for each role. In particular, the Authority noted *"it should have involved wider exploration of what the contrasting roles involved"*, and this *"could only have been achieved by interviewing Mr Janes and/or his managers or subordinates"*.
- 2 As to assessing Mr Janes' capabilities against his suitability for the Group Manager role, the Authority found that there was not sufficient investigation of Mr Janes' references and nor did FENZ seek comment on Mr Janes' performance. The information that was relied upon was input from a manager who had *"limited dealings"* with Mr Janes.
- 3 There were also concerns held by the interview panel which were not put to Mr Janes to comment on, and nor were these tested more widely (such as by completing reference checks). For example, a comment made by one interview panel member that *"Mr Janes' leadership examples he expounded on at the interview 'would not have made a difference given our concerns about the language and comments he used at the interview'"*. The Authority noted the concerns were *"highly subjective and may have been baseless"*.
- 4 Following Mr Janes being informed of being unsuccessful in his application to be appointed to one of the new Group Manager roles, on 25 March 2021, he requested documentation relating to the interview process. However, a response was not provided to Mr Janes' request until 27 April 2021, in which FENZ stated they had opted to extend the timeframe for their response.

Flowing from this, some interesting points relating to good faith were raised by the Authority:

- 1 The Authority found FENZ was *"obstructive in not providing timely information to justify a decision not to appoint Mr Janes to the Group Manager role"*. In referring to section 4(1A)(b) of the Act, the Authority highlighted that Mr Janes was in an ongoing employment relationship.
- 2 The Authority noted *"the response [to Mr Janes' request for information] unnecessarily used the Privacy Act as a 'shield' to avoid providing information in a timely manner – this breached known good faith obligations"*.

- 3 In respect of the obligation under section 4(1A)(c) of the Act, the Authority noted the importance of *"timely disclosure"*, stating *"It is not a game of 'cat and mouse' where the employee makes specific requests and the employer responds at their own pace – the onus is on the employer to provide information"*.
- 4 The Authority stated, *"Whilst FENZ amply consulted on the restructuring proposals and provided voluminous background information (sometimes too complex) and developed evolving protocols on appointment processes, I find that FENZ was obstructive and at times uncommunicative in sharing vital information with Mr Janes after it decided to disestablish his PRFO role not re-assign then not redeploy him, into a vacant Group Manager role"*.

The Authority found that in light of the above factors, FENZ had breached its obligations of good faith owed to Mr Janes. Further, in not having full, open and timely communication with Mr Janes through the selection process and thereafter, the decision not to redeploy Mr Janes to the Group Manager role was not one a fair and reasonable employer could have reached in all the circumstances, and unjustifiably disadvantaged Mr Janes.

A key takeaway from the case is that at all times you've gotta have good faith, including *full, open and timely communication*. Even in cases where redundancy is inevitable, an employer will not be relieved of their obligations of good faith.

Bills & Laws Update

Fair Pay Agreements

The Fair Pay Agreements Act 2022 came into force on 1 December 2022. At this stage, the following applications for FPAs have been submitted to MBIE:

- Hospitality related – General
- Interurban, rural and urban bus transport – Bus and coach drivers
- Supermarket and grocery store – General

These applications will be assessed and, once approved, the bargaining sides will form.

ER Seminars – 2023

As a few clients have asked when we will be running our popular 2 Day Employment Relations Course in 2023 we have set the following dates:

**Wednesday 22 and Thursday 23 March 2023;
Wednesday 21 and Thursday 22 June 2023 (subject to demand); or
Tuesday 12 and Wednesday 13 September 2023**

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training If you wish to enroll simply email your registration and contact details to carey@mgz.co.nz