

Redundancy Rationale Revisited

In recent times there have been a number of determinations focussing on procedural aspects surrounding the process to follow when proposing to restructure, including the requirement to provide wide-ranging information based on s.4(1A)(c) of the Employment Relations Act 2000. Recently, however, the Employment Court in **Totara Hills Farm v. Davidson** [2013] NZEmpC 39 has clarified and refined the extent to which the Authority and Court are able to inquire into and test the rationale provided by employers for declaring an employee's position redundant.

The earlier leading Employment Court case (**Simpson Farms Ltd v. Aberhart** [2006] ERNZ 825), assessing the test of justification provided for in s.103A of the Employment Relations Act 2000 in a redundancy setting, determined that:

"... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A."

The Chief Judge in the *Totara Hills* case indicated that its previous judgement in *Simpson Farms* had led to employers asserting that the Authority or Court were not entitled to inquire further into the reasons which they had provided for declaring an employee redundant, if the employer had been able to satisfy the Authority or Court that "business reasons" were the genuine basis for the termination. The Chief Judge held:

"[53] Section 103A does require the Court to inquire into a decision to declare an employee's position redundant... The statutory mandate does not, however, go as far as the Labour Court did in GN Hale, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done, and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards."

[54] It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances."

The facts before the Court concerned Mr Davidson who was employed in August 2009 as a Unit Manager on the employer's Hawkes Bay Farm known as Totara Hills. The farm operated two separate units. Other staff employed included a senior stock manager who was responsible for the other unit and a shepherd.



During the early stages of Mr Davidson's employment there had been discussions concerning Mr Davidson's performance where an 'improvement plan' had been agreed upon and Mr Davidson was warned that his employment would be in jeopardy if he did not meet the requirements sought in the improvement plan.

In July 2010 the employer met with his lawyer to determine how he could go about reducing the employment of one or more of his staff for redundancy and subsequently in September 2010 the employer met with his bank to discuss reducing farm expenditure.

On 3 September 2010 the employer met with all of the staff and stated he needed to reduce expenditure because of several years of draught, poor prices and "the fact that the outlook was not good". The employees were asked to suggest ideas on ways for costs to be reduced. On 7 September 2010 at a further meeting the staff made a number of suggestions.

On 1 November 2010 the employer advised staff that one of the Unit Managers positions would be made redundant and that he would make a decision after the Stock Manager and Mr Davidson had considered his proposal. On 8 November 2010 the staff were invited to make input into the proposal and then on 9 November 2010 the employer told Mr Davidson that he was going to be made redundant due to "market and seasonable factors".

Mr Davidson contended that the real reason for his dismissal was due to his employer's dissatisfaction about his performance and not for redundancy.

The Court determined that the employer did not have ulterior motives for the dismissal however stated that "there were other aspects of the dismissal and the way the plaintiff went about it that need to be examined in the assessment of the justification".

In this case the employer had created a new junior shepherd position which was paid at approximately \$6,000.00 less than Mr Davidson's role. The employer alleged the savings achieved would result in a 10% reduction in the wage bill, which "together with some other savings, would tackle the undesirable position that the farm was in."

However the Court determined that there was no evidence to support the alleged savings of 10% and consequently that the decision to dismiss the employee was not one that a fair and reasonable employer would have made:

[64] Although this was not explained by Mr Rittson-Thomas, if his advice to staff was correct and a 10 per cent saving was \$6,000 per annum, then the farm's wages bill must have been in the region of \$60,000. Without further evidential explanation, however, that is incomprehensible on the other evidence presented."

The Court therefore determined that the employer had failed to justify Mr Davidson's dismissal for redundancy and consequently determined it to have been unjustified.

In a subsequent Employment Court determination **Brake v. Grace Team Accounting Ltd** [2013] NZEmpC 81 the Court approved the test for justification as detailed in the *Totara Hills* determinations, the conclusion again being reached on the facts before it that the employer was unable to justify the termination of employment on the basis of the following facts:

1. The employee commenced working for Grace Team Accounting Ltd on 5 October 2009.
2. On 9 April 2010 Mr Lindsay Grace, the company's founder, prepared a report showing that the annual turnover was significantly down on forecast, that the company had *"made an apparent loss, that they had time efficiency issues and their cash revenue was down by \$100,000.00 from the same position in previous years"*.
3. On the basis of these concerns the employer initiated a restructuring process with three of its employees, including Ms Brake.
4. During the course of this process, in response to information requested by Ms Brake, the employer asserted that the turnover was down by *"\$99,799 in 2010 from 2009 and the wages were up by \$19,084.00"*.
5. Further information was provided:

"[39] The letter concluded that the turnover was \$200,000 short of what was expected and while two employees had resigned, resulting in a saving of approximately \$93,600, the firm was still "around" \$100,000 short of what had been projected..."
6. The employer ultimately reached a decision to disestablish Ms Brake's position for economic reasons.



7. Subsequently the employee found that Mr Grace's figures were incorrect. In this regard the Court noted:

[43] . . . it produces quite a different picture to that presented to her at the time of the meetings and, in particular, to the figures in the letter of 28 April. There was not a \$100,000 decrease in turnover for the year ending 2010 and in fact the turnover figure should have been increased by \$120,000. Further the result of the two other employees resigning meant a saving of another \$93,600. The figures therefore used to justify the redundancy of the plaintiff had turned out to be inaccurate. . ."

"[60] There was no convincing evidence that GTA's financial situation substantially deteriorated, either as a result of the recession or as a consequence of the loss of clientele, in the six months following the plaintiff's employment. Only one client's loss was mentioned and that was as a result of taxation advice, not the recession. Those fees lost were not, I find material when considering the defendant's total turnover. The turnover figures were miscalculated by more than \$120,000."

The Court determined, taking in to account a number of the factors including the incorrect figures relied upon, that the actions of the defendant were not what a fair and reasonable employer would have done in all of the circumstances at the time that the dismissal occurred and that consequently the dismissal was unjustified.

It is important to note that the Court in both of the cases referred to above agreed that the employer's motives were genuine however they were not able to justify the redundancy determinations.

Taking into account the nature of the inquiry which the Authority and Court will now take into the reasons provided for a redundancy, it will be essential that the rationale for declaring an employee redundant will stand up to scrutiny and that any information relied upon, financial or otherwise, is completely accurate.

Parental Leave Payments Increase from 1 July 2013

The maximum amount of parental leave payment for eligible employees will increase from \$475.16 to \$488.17 a week.

The minimum amount of parental leave payment for self-employed persons will also increase, from \$135.00 to \$137.50 a week.

