

Getting redundancy right, 28 May 2013

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Recent high profile redundancies in some of New Zealand's largest businesses and organisations, including Telecom, New Zealand Post and the Department of Conservation, have meant that redundancy processes have been in the news.

The Employment Court has recently issued guidance on appropriate redundancy processes. The two cases noted below illustrate the requirement for employers to justify redundancies substantively and procedurally. An employer who fails to carry out a proper process will be liable for potentially significant remedies including compensation, penalties, lost remuneration and reinstatement (perhaps years later) of the employee to his or her former position.

Statutory background

The Employment Relations Act 2000 (the Act) provides a test to be used in determining whether the actions of an employer in dismissing or disadvantaging an employee were justifiable. The question must be determined on an objective basis. The test, contained in s [103A](#) of the Act, is

whether the employer's actions, and how the employer acted, were what a fair and reasonable employer *could* have done in all the circumstances at the time the dismissal or action occurred.

(emphasis added)

The section lists a number of factors that the Employment Relations Authority or the Employment Court must consider when applying the test. All relate to conduct preceding the dismissal or other action. They are (s [103A\(3\)](#)):

- whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee
- whether the employer raised the concerns the employer had with the employee
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns, and
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against him or her.

The Authority or Court can consider other factors it thinks appropriate. Section [103A\(5\)](#) states that a dismissal or action must not be determined to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

The justification test set out above came into effect on 1 April 2011. Before that date, s [103A](#) provided:

the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether 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 the dismissal or action occurred.

Substantive justification for redundancy

In *Rittson-Thomas trading as Totara Hills Farm v Davidson* [2013] NZEmpC 39 (*Totara Hills*), the Chief Judge of the Employment Court considered the law of redundancy in New Zealand and clarified the effect of the leading case on redundancy under s [103A](#) of the Act: *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (*Simpsons Farms*). Both cases were decided under s [103A](#) as it stood before it was amended on 1 April 2011.

In *Totara Hills* the Court found the employee's dismissal for redundancy was unjustified, essentially because the employer misunderstood the cost savings the redundancy would achieve. As a result, the employer failed to satisfy his evidential burden to show the dismissal was substantively justified and was what a fair and reasonable employer would have done.

Facts and issues

Mr Rittson-Thomas owns a farm in Hawke's Bay which was operated as two separate units. Mr Davidson was employed as a unit manager in August 2009. Other staff included a senior stock manager responsible for the second unit and a shepherd. During his employment, some performance issues were raised with Mr Davidson.

In September 2010, the employer announced that costs savings needed to be made on the farm because of several years of drought and poor prices. Mr Rittson-Thomas requested ideas from the staff as to how costs could be reduced and feedback was given. In November 2010, the employer announced that the unit manager positions would be made redundant, with either Mr Davidson or the other unit manager retained. A new junior shepherd position would be created. There was a further opportunity for feedback and the employer selected Mr Davidson for dismissal. Mr Davidson was given the opportunity to apply for the more junior position but declined to do so.

Mr Davidson believed that the real reason for his dismissal was his employer's dissatisfaction with his performance and his challenges to Mr Rittson-Thomas's allegedly demeaning and bullying conduct towards him. However, the Court found that these were not the causes of his dismissal and that the redundancy could not be said to be a charade. The Court also found that Mr Davidson was owed holiday pay and KiwiSaver contributions.

Redundancy law restated

The Chief Judge restated the law of redundancy in New Zealand. In *Simpsons Farms*, the Court said that when s [103A](#) was passed in 2004, s [103A](#) did not affect the longstanding principles that the employer has a prerogative to restructure its business and that the Court will not substitute its decision regarding the redundancy decision for that of the employer.

In *Totara Hills*, the Court emphasised that these principles still applied. However, it said the decision in *Simpsons Farms* did not mean that all an employer had to do was convince the Court that the redundancy was a genuine business decision in the sense that it was not a charade. Indeed, the Court pointed out that, in *Simpsons Farms* itself, it had applied s [103A](#) to the business decision of the employer and did not simply accept that the redundancy was what a fair and reasonable employer would do.

Summarising the law, the Court held that while the Court cannot substitute its decision for the employer, it will not be sufficient for the employer simply to say that the business decision was genuine and the Court cannot inquire into the merits of it. The employer will bear the burden of satisfying the Court that what it did and how it did it were what a fair and reasonable employer could do in the circumstances.

Redundancy unjustified

Mr Rittson-Thomas's written advice to his employees was that, by disestablishing Mr Davidson's position and creating a new junior shepherd position, the wage bill would reduce by almost 10%. However, the employer failed to put full financial information before the Court justifying this rationale. The Court therefore undertook

its own calculations based on the limited information provided and found the difference in salaries between the two positions was \$6,000, which the Court estimated was more in the region of 6% of the wage bill.

In addition, staff had suggested other ways of making savings but these were rejected by Mr Rittson-Thomas. There was no evidence before the Court about these suggestions or how they compared with the estimated \$6,000 wage bill savings. In essence, the Court considered that the employer had failed to justify the redundancy by the standards that he had set himself for the restructuring process and the dismissal of Mr Davidson was unjustified. The Court emphasised that evidence justifying the redundancy was “scant” and found that the employer had failed to provide solid reasons to the Court for terminating the employee’s employment.

The Court also found that the new junior shepherd position should have been offered to Mr Davidson given that he could have performed the job.

Because Mr Davidson found new employment relatively quickly, his lost remuneration was limited to \$3,000 and he was awarded \$4,000 compensation for distress under s [123\(1\)\(c\)\(i\)](#) of the Act.

Procedural justification for redundancy

The Court’s decision in *Gilbert v Transfield Services (New Zealand) Ltd* [2013] NZEmpC 71 (*Gilbert*) (also decided under s [103A](#) prior to its amendment on 1 April 2011) focused on the redundancy procedure followed by the employer. The Court found there were severe failings such that, had the employer conducted the process properly, Mr Gilbert would not have been dismissed. As a result, the Court reinstated Mr Gilbert and awarded him his entire lost remuneration of more than three years with interest from the time of the dismissal until his reinstatement.

Facts and issues

In August 2009, after Transfield Services (New Zealand) Ltd (Transfield) had lost telecommunications service contracts, it announced a proposed restructure and redundancies to cut costs and increase productivity. After consultation, the employer decided to move ahead with redundancies and to implement a three-step programme. First, employees who were to form part of the selection pool for redundancy would be identified. Secondly, those employees would be subjected to psychometric testing. In the last stage, employees would be interviewed and evaluated.

Seventeen technicians, including Mr Gilbert, were placed in the Canterbury redundancy selection pool. Mr Gilbert was informed his position was redundant in October 2009 and he was dismissed.

In *Gilbert*, the genuineness or reason behind the proposed redundancies was not challenged. However, Mr Gilbert argued that the employer breached the provisions in the collective agreement relating to redundancy, failed to provide him with adequate information and relied on improper and flawed information in dismissing him. Mr Gilbert also argued that he was discriminated against in his employment because his dismissal was motivated by his union activities and leadership. However, the Court rejected that last claim, finding that Mr Gilbert’s union associations and involvement were not a “material ingredient” in his dismissal.

Serious procedural flaws

The Court found that Transfield had breached the redundancy provision in the collective agreement which provided that redundancy was a situation where the “position filled by the Employee” becomes superfluous. The Court accepted that Transfield had incorrectly classified Mr Gilbert’s position as a general field technician position rather than the more specialised technical position Mr Gilbert actually held. Transfield also had the right to select employees for redundancy based on their “skills and attributes”, but Transfield had incorrectly decided that technical skills would not be used to distinguish candidates for redundancy because it decided it had sufficient technical skills in the workforce already. As such, the Court held that Mr Gilbert’s redundancy was flawed from the outset because Transfield misunderstood its contractual obligations.

The Court also found that Transfield had failed to take into account relevant criteria (technical skills, past positive performance reviews, experience) and had taken into account irrelevant criteria (psychometric testing, adopting stereotypical assumptions about long-serving employees such as Mr Gilbert) in dismissing the employee.

Further, the Court found that Mr Gilbert had not been provided with information relating to his redundancy nor with sufficient opportunity to comment on that information before decisions were made. Transfield failed to provide accurate and adequate information about:

- how the redundancy pools were selected and the identities and designations of others in the selection pool
- scoring information about Mr Gilbert
- test results of the psychometric testing relating to Mr Gilbert and other employees
- interview notes and spreadsheets comparing the candidates
- the factors which would be taken into account by the employer in its decision-making, and
- the reasons why Mr Gilbert was finally selected for redundancy.

The Court also commented on the failure to disclose information about, and Transfield's own lack of understanding of, the psychometric testing results it relied on. This was said to be inconsistent with the Act's requirements of "information sharing, disclosure, and objective rationality".

The Court concluded that if the correct process had been followed, and Mr Gilbert assessed fairly and objectively, he would not have been dismissed.

Reinstatement and lost remuneration

The Court found that reinstatement was practicable in the circumstances and ordered this remedy, noting that a manager who stated he could not work with Mr Gilbert would not directly manage Mr Gilbert.

The Court also found that, had Mr Gilbert not been dismissed, he would have remained employed by Transfield and pointed to the fact Transfield had hired other new employees to perform Mr Gilbert's role since his dismissal. The Court therefore awarded Mr Gilbert the full extent of his lost remuneration for the period from dismissal in October 2009 to the date of his reinstatement plus interest. That amount was not quantified but more than three years' salary plus interest would be a substantial figure. Lastly, the Court ordered \$15,000 in compensation for distress and injury to feelings.

The s 103A test

As noted, both these cases applied the previous test of what a fair and reasonable employer would do under s [103A](#) rather than the new test of what such an employer could do. However, it is unlikely that a different result would be reached under the new test. In *Totara Hills*, the employer failed to present sufficient information to justify the dismissal under either test. In *Gilbert*, no fair and reasonable employer would or could breach the requirements of the Employment Relations Act and the collective agreement during the redundancy process.

Justifying dismissal for redundancy

While these two decisions are warnings to employers to conduct a lawful redundancy process, they do not fundamentally change the law of redundancy. The employer still enjoys a right to restructure its business. But if it wishes to do so, it must comply with procedural fairness and act on adequate and valid financial information which must be able to withstand scrutiny in the Employment Relations Authority or Court.

Therefore, employers engaged in a redundancy process should:

- make sure the redundancy proposal is based on sound business reasons and the employer fully understands the business case for its proposal (those reasons should be clearly articulated to employees and must be based on an accurate understanding of the facts)
- ensure that the process and decision-making is compliant with the procedures and criteria set out in any employment agreements
- ensure all information relevant to the reasons for the decisions the employer makes throughout the process and its outcome is disclosed to affected employees
- consider carefully employee feedback and articulate reasons why that feedback is not accepted
- ensure the redundancy selection criteria are rational and clearly explained, and
- consider redeployment of existing employees.

Employers must be aware that, if a redundancy process is challenged, the employer will have to justify its redundancy decision, including substantiating its business case and the procedures it followed. As the Court noted in *Gilbert*, complex, lengthy and expensive processes are no substitute for getting it right when it comes to redundancy dismissals. A simpler process may well be the better one.