

## Redundancies in a Covid-19 climate

### There have been a number of recent cases in the Employment Relations Authority and Employment Court dealing with restructuring and redundancy situations flowing from the Covid-19 climate.

None of the rulings have been particularly surprising. As always, the focus of the Authority and Court is on whether there is a genuine business reason and whether the employee has been afforded fair process. There has been surprisingly little case-law involving challenges to truncated timeframes for consultation.

The distinction between an unjustified redundancy dismissal which is substantively justified and one which is not, can be significant in financial terms. Where a redundancy dismissal is substantively justified, any compensation is strictly limited to the distress caused by the procedural unfairness, not the dismissal itself.<sup>1</sup>

#### *Smartlift Systems*<sup>2</sup>

Smartlift Systems Limited specialised in repair work due to the Christchurch earthquake. A restructuring occurred which resulted in 2 out of 6 foremen being made redundant. The Authority found that the redundancies were substantively justified and that the consultation was largely fair. Sufficient information was provided together with an opportunity for the employees to respond with their feedback. The feedback was also properly considered and responded to.

However, the Authority found that the consultation was not fair as there was no real discussion about the

scores awarded in the selection process which resulted in 4 of the foremen retaining their jobs and the other 2 losing theirs. The unsuccessful employees were deprived of a fair and reasonable opportunity to provide feedback on their scores when compared with those of the successful employees.

On appeal, the Court upheld the Authority's decision.

#### *Solly's Freight*<sup>3</sup>

In this case the Employment Relations Authority commented that employees' rights and employers' obligations were not suspended during the Pandemic. Solly's Freight applied for the Government Wage Subsidy but then proceeded with a restructuring proposal.

Solly's Freight did not consult about the redundancies and made a decision to disestablish positions while still waiting on its application for the Wage Subsidy. Solly's Freight tried to argue that the standard expected of a fair and reasonable employer was significantly altered by the context of the Global Pandemic and consequent economic turmoil.

However the Authority found that the dismissals were unjustified, especially given the declaration that Solly's Freight had given when applying for the Wage Subsidy that it would *use its best endeavours to keep all staff employed*. The failure to consult with the potentially affected employees meant that all the terminations were procedurally unjustified.

#### *Evandale Gardens*<sup>4</sup>

Evandale embarked on a restructuring proposal due to significant downturn in demand during Level 4 Lockdown.

<sup>1</sup> *Coutts Cars v Bagley* [2002] 2NZLR 533 (CA)

<sup>2</sup> *Smartlift Systems Limited v Brock Armstrong* [2021] NZEmpC 66

<sup>3</sup> *de Wys & Jenney v Solly's Freight (1987) Limited* [2020] NZERA 285

<sup>4</sup> *Amos Ors v Evandale Plant Productions Limited T/A Evandale Gardens* [2021] NZERA 414

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## Redundancies in a Covid-19 climate (Continued)

The GM of 11 years formed a view of staff reductions that could be achieved by moving from separate teams to one, multi-disciplinary team, ultimately resulting in redundancy for several employees. He formed this view based on his operational knowledge of the business and staff expertise.

During the consultation process reference was made by Evandale's HR Advisor to selection criteria and ratings. While these had not formed part of the GM's initial view, they were retrospectively created and provided to the employees' representative. Subsequently Evandale tried to explain to the employees' representative that the selection criteria and scoring were not the primary basis for the decision-making.

The Authority ruled that disclosure of scoring left an impression that the employees had been contrasted with others in some form of objective / subjective selection process. While the employer was entitled to have a working organizational plan in mind before issuing this for consultation, it did not allow the employer to have already considered the personal attributes of individual workers before any feedback had been received.

During the consultation process none of the employees challenged or gave alternatives to the proposal. The Authority commented that what struck it as entirely valid was the applicants' perceptions, given the process adopted, that the decision to make each of them redundant had been predetermined before they were consulted and this tainted any process of genuine consultation.

The Authority found that the redundancies were unjustified due to flaws in the process, notwithstanding a genuine business rationale.

### **Cho v TGH Mt Eden Limited**<sup>5</sup>

Mr Cho occupied the role of Central Kitchen Support Team Leader. TGH Mt Eden proposed to reduce the

number of positions in Central Kitchen from 28 to 20. The Authority ruled that there were significant flaws in the process leading to Mr Cho's termination but that there was a reasonable commercial basis for the decision.

The proposal letter told Mr Cho that his position had been disestablished from the Structure. The Authority ruled that this was a decision already made without proper consultation.

The proposal letter also failed to include a section put in letters sent to other staff identifying positions that were proposed to be retained and inviting staff to reapply for these.

The Authority found that the flaws, in combination, resulted in Mr Cho being unjustifiably disadvantaged in the process. He was provided with insufficient opportunity to respond to the proposal however this did not mean that the outcome of the process amounted to an unjustified dismissal. The employees who were retained were largely those already carrying out the roles. Therefore the decision not to retain Mr Cho was not unreasonable.

### **Mosscar Services**<sup>6</sup>

Mr Crombie was employed as a Vehicle Sales Consultant. Mosscar Services proposed to disestablish his position and sought feedback. During the feedback process, no mention was made of selection criteria although it was proposed that the Sales Team be reduced from 8 to 5.

During the process Mr Crombie was advised he had been made redundant. Mr Crombie raised issues with the lack of notice about the redundancy meetings. In response, Mosscar Services provided him with a further opportunity to provide feedback and also offered counselling. Mr Crombie declined both offers.

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<sup>5</sup> *Cho v TGH Mt Eden Limited & Anor* [2021] NZERA 476

<sup>6</sup> *Crombie v Mosscar Services Limited* [2021] NZERA 585

## Redundancies in a Covid-19 climate (Continued)

The Employment Relations Authority determined that the decision to dismiss Mr Crombie on the grounds of redundancy was substantively justified due to a significant downturn in business with the investment of \$1.1m by the employer to keep the business viable. However the process was flawed as the proposal failed to include selection criteria. It was not for Mr Crombie to discern what the selection criteria were. It was for Mossca Services to provide him with the detail of this. Therefore Mr Crombie was held to have been unjustifiably dismissed.

The Authority also commented that there should be no reduction for Mr Crombie's contributory conduct (refusing to engage in a further offer to provide feedback). Redundancy is a no-fault situation and therefore a reduction in remedies is not warranted.

### *Kenderdine Electrical*<sup>7</sup>

Kenderdine Electrical Limited advised Mr Van Kuyk that his position as Workshop Supervisor was to be disestablished and that there were no other roles available. KEL identified two options for ending the employment. The first was to pay out his notice period. The second was to run out the notice over an extended 12-week period with KEL seeking a Covid-19 Emergency Wage Subsidy for the role.

The Authority found that the decision to disestablish Mr Van Kuyk's role was announced before the date for receiving feedback. This was a defect in the process. However, the Authority found that if Mr Van Kuyk had provided feedback, it would not have made a substantive difference to the outcome.

As part of the process, Mr Van Kuyk refused to provide feedback claiming that it was just a false promise. The Authority found that as he was still an employee, he had good faith obligations to be active and communicative and his failure to engage in the feedback process reduced the extent to which he was treated unfairly.

KEL did make mistakes in its process but it tried to remedy its errors. However Mr Van Kuyk chose not to use the retrieved opportunity to influence the outcome. The Authority found that the flawed consultation process was not minor but, in light of KEL's attempts to remedy, it was of limited and narrow effect.

The Authority found that there was no unjustified dismissal but that there was an unjustified disadvantage during the course of the process. As there was no unjustified dismissal, there was no remedy for lost wages but a modest remedy for losing the opportunity to provide feedback before the decision was made (\$2,000).

### The learnings

- Always consider alternatives to redundancy before starting a process;
- Is there a sound business rationale for the redundancy/restructuring?
- Provide the employee with all information relevant to the potential decision and allow the employee an opportunity to provide feedback on that information. Consider that feedback in good faith before making any final decision;
- Circulate selection criteria, weightings and information about the process and decision-makers, and seek feedback on that before finalising;
- Consider redeployment, upskilling, retraining options before finalising any redundancy decision.

### Want to know more?

If you have any questions about restructuring or redundancy please contact our specialist [Employment Team](#).

<sup>7</sup> *Van Kuyk v Kenderdine Electrical Limited* [2021] NZERA 525