

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2021] NZEmpC 146
EMPC 199/2020**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN LINARA GAFIATULLINA
 Plaintiff

AND PROPELLERHEAD LIMITED
 Defendant

Hearing: 10–12 and 19 February 2021
 (Heard at Auckland)

Appearances: MC Donovan and KD Kumar, counsel for plaintiff
 P Robertson and C Child, counsel for defendant

Judgment: 8 September 2021

JUDGMENT OF JUDGE KATHRYN BECK

[1] This is a challenge to a determination of the Employment Relations Authority.¹

[2] Ms Gafiatullina was employed by Propellerhead Ltd. Her employment commenced on 11 November 2016 and ended by way of redundancy on 22 March 2019.

[3] From August 2018, Propellerhead began to experience significant financial issues leading to the company to review its payroll spending in the course of restructuring the business.

[4] As a result of this review and restructure, Ms Gafiatullina was made redundant.

¹ *Gafiatullina v Propellerhead Ltd* [2020] NZERA 227 (Member Arthur).

[5] She claims that her dismissal was unjustified and that the restructure was both procedurally unfair and substantively flawed. She also takes issue with Propellerhead's failure to consider a number of redeployment options which she claims were available at the time of her dismissal. She seeks lost wages, and compensation for humiliation, loss of dignity, and injury to her feelings.

[6] Propellerhead says that the restructure arose out of the serious financial circumstances faced by the company and that it followed a fair process. It says that Ms Gafiatullina was not suitable for redeployment into any of the roles vacant at the time.

[7] The question for the Court is whether Ms Gafiatullina's dismissal was justified and, if not, what remedies should be awarded.

The issues

[8] The key issues for determination can be divided into three parts:

- (a) The disestablishment of Ms Gafiatullina's position;
- (b) the decision not to redeploy her into a Quality Analyst or Product Owner role; and
- (c) remedies.

Disestablishment of position

[9] The issues for determination are:

- (a) Was the disestablishment of Ms Gafiatullina's position substantively justified – are there genuine reasons?
- (b) Was the process followed fair and reasonable?

[10] Whatever the answer to these questions, the issue of redeployment is key in this case.

Decision not to redeploy

[11] Was the decision not to redeploy Ms Gafiatullina, and to therefore terminate her employment, one a fair and reasonable employer could have made in all the circumstances at the time?

[12] In particular:

- (a) Did Propellerhead investigate in good faith options which would prevent any loss of employment for Ms Gafiatullina?
- (b) Did Propellerhead support and closely work with Ms Gafiatullina to explore her options, including redeployment opportunities within the organisation?²

[13] In the event the answer to any of the above questions is No, we turn to the issue of remedies.

Remedies

[14] If Ms Gafiatullina was unjustifiably dismissed, what (if any) remedies should be awarded?

[15] In particular:

- (a) Is Ms Gafiatullina entitled to reimbursement of lost wages? If so, how much?
- (b) Is Ms Gafiatullina entitled to compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act)? If so, how much?
- (c) Should any award be reduced under s 124 for contributory behaviour on Ms Gafiatullina's part which led to the dismissal? If so, by how much should it be reduced?

² As it said it would do in the consultation paper dated 1 March 2019.

Disestablishment of position

[16] Section 103A(2) of the Act provides that the test for justification 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. While the Court may inquire into the merits of a redundancy business decision, the inquiry is directed at ensuring that the decision, and how it was reached, were what a fair and reasonable employer could have done in the relevant circumstances.³

[17] Once that is established, if an employer concludes that the employee's position is surplus to its needs, the Court is not to substitute its business judgement for that of the employer.⁴

Background

[18] Propellerhead's business is designing, developing and deploying computer software for customers. It employs a large team to work on highly technical and complex projects for a number of clients.

[19] The company utilises an alternative organisational structure known as a "Holocracy". The nature of this system and how it works is relevant to the decision to disestablish part of Ms Gafiatullina's position and redistribute the remaining roles.

[20] The system decentralises decision-making responsibility across small self-governing teams and roles. The business and its employees were divided into groups called "Circles". The different circles existed within a 'nesting structure'; there was a "Super-Circle" encompassing the entire organisation, smaller circles reflecting the different limbs of the business, and further smaller sub-circles within those limbs. The circles on each level could overlap and an individual employee could have a range of responsibilities

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129 at [84]. See also *Caddy v Vice-Chancellor University of Auckland* [2021] NZEmpC 129 at [16].

⁴ *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40, [2020] ERNZ 55 at [7].

[21] Once a client agreed to a Statement of Work for a project, the project would be allocated to a Product Team. Each Product Team was comprised of a Product Owner and Service Owner. Each pair of Product Owners and Service Owners would create work for two Development teams.

[22] Roles within the organisation are not as defined as is common under a traditional management structure. The accountabilities for each position are not written or overseen in a manner where precise instructions or directions are given. Instead, the system seeks to enable employees to utilise their skillsets and best judgement in performing their role. Where necessary, roles are deconstructed into more precise sub-roles in order to ensure clarity around individual responsibilities. The majority of employees hold more than one role and can hold several minor roles.

[23] It was clear from the evidence that the roles and responsibilities held by Propellerhead's staff were fluid and subject to frequent change. A web application called Glassfrog was utilised to store role and policy documentation. The application details the various roles, the responsibilities involved, and who was currently assigned to that role. It was said to provide a framework for proposing and reviewing changes to roles and then communicating those changes to the wider organisation.

[24] Ms Gafiatullina began her employment with Propellerhead on 11 November 2016. She held various roles while there. At the time of her dismissal for redundancy, she held the roles of Portfolio Manager, Delivery Lead Link, Product Lead, Holacracy Coach, Scrum Master, Pioneering Lead and Onboarding.

[25] Her employment was terminated by reason of redundancy on 22 March 2019. She raised her personal grievance for unjustified dismissal on 17 April 2019.

Was the disestablishment of Ms Gafiatullina's position substantively justified – are there genuine reasons?

(a) *Financial circumstances*

[26] The company has largely relied on its financial circumstances to justify making Ms Gafiatullina redundant.

[27] Mr Weston, one of Propellerhead's directors, gave evidence that he first became concerned about the financial position of the company in July 2018. He says that between August 2018 and January 2019, Propellerhead's expenses were exceeding its income by an average of \$30,500 per month. He says that Ms Gafiatullina was made aware of these growing concerns at regular management meetings and through direct conversations he had with her.

[28] Various steps were taken to rectify Propellerhead's losses. A contract with Russian developers was terminated in October 2018, saving Propellerhead \$40,000 per month in operating expenses. In January 2019 a contract for services was terminated with a contractor, saving \$4,497 per week. In March 2019 a Spending Authorisation Policy was put into place in an attempt to limit the amounts spent out of company resources.

[29] These steps did not resolve the issues. In February 2019 it was considered necessary to begin reviewing salary and contractor costs which contributed to 80 per cent of Propellerhead's outgoings. Mr Weston's review led to him identifying the Portfolio Manager role held by Ms Gafiatullina as potentially no longer being necessary.

[30] The Portfolio Manager was one of seven non-revenue-generating roles. Mr Weston decided that, given the financial concerns, it did not make sense to disestablish revenue-generating roles. Ms Gafiatullina was a very highly-paid non-income-generating employee on a salary of \$170,000 per annum. Given the urgent need to cut costs and his impression that the workload of the role had been reduced, it was decided that the role of Portfolio Manager would be reviewed.

[31] I accept there were sound financial reasons for reviewing the necessity of her position.

[32] Ms Gafiatullina says more could have been done elsewhere to save costs. That may well be the case, but that does not provide a basis for taking her role out of consideration. She also says that other actions taken by the company were inconsistent with its alleged dire financial circumstances. In particular, she points to pay increases

given to other non-income-generating roles and Mr Weston as a director, as well as the creation of a new role in March 2019.

[33] The company's evidence was that these roles were necessary to support the income-generating elements of the business and operate at a sustainable level – existing staff were overworked. The increases were necessary to ensure retention, with staff turnover being a cost in itself.

[34] In relation to Mr Weston, he says that he changed how he was paid from drawings to a salary on his accountant's advice, and that the net effect on the company was a positive one.

[35] These were decisions that were open to Propellerhead. They are not inconsistent with the company's stated negative financial situation. The roles in question were all paid significantly less than Ms Gafiatullina and determined by the company to be necessary to its operation. The costs attributed to the pay increases and new role were still less than Ms Gafiatullina's salary.

[36] The company submits that the disestablishment of Ms Gafiatullina's position resulted in a considerable savings over and above those additional costs. I accept that was the case.

(b) Was the disestablishment of Portfolio Manager and redistribution of the Delivery Lead Link roles justified from an organisational perspective?

[37] The key issue for the plaintiff in relation to substantive justification is whether Ms Gafiatullina's role of Portfolio Manager could justifiably be disestablished and her Delivery Lead Link role allocated to another staff member to perform as part of their existing role. She says they did not properly understand what she was doing in her role at the time.

[38] Ms Gafiatullina began employment with Propellerhead on 11 November 2016. She was initially employed as Project Manager and Scrum Master, roles which overlapped significantly.⁵

⁵ Her salary was \$120,000 per annum.

[39] In approximately June 2017 Ms Gafiatullina was assigned the further role of Portfolio Manager. In August 2017 she received a significant pay increase of \$30,000 which she understood to be in recognition of the change she had achieved in her brief time in that role.

[40] On 18 July 2017 she was allocated the further role of Delivery Lead Link. Propellerhead noted that her employment agreement erroneously recorded the job title as “Delivery Lead”. It says there was never a Delivery Lead role within the business. I agree that the evidence establishes that this role was the Delivery Lead Link role. I will refer to it as such throughout this judgment.

[41] In October 2017 Ms Gafiatullina received a further pay increase of \$20,000 which she says was in recognition of her work in the Delivery Lead Link role.

[42] Ms Gafiatullina’s evidence was that the Delivery Lead Link role occupied 75 per cent of her working time. The Portfolio Manager role, which she admits overlapped with the Delivery Lead Link role, was said to take 15 per cent of her time. The remaining 10 per cent, she says, was divided amongst the various other roles she held at any given time.

[43] Ms Gafiatullina says that when she stepped into the Delivery Lead Link role, it was “in a disastrous state” as a result of the previous holder of the role, Mr Weston, not having time to give it attention due to his responsibilities for the overall General Company Circle (GCC).⁶ She says that at the time her employment ended, Propellerhead had a stable Delivery Circle that was in line with best practices. She admits that in a mature and stable Holocracy, a Delivery Lead Link role would only take approximately 10 per cent of a fulltime equivalent. However, she is adamant that such conditions did not exist at that time, leading to a far greater portion of her capacity being occupied by that role.

[44] Ms Gafiatullina signed a new employment agreement on 19 February 2018. It confirmed her Lead Link (Delivery), Portfolio Manager (Delivery) and Scrum Master

⁶ The GCC is made up of three other primary subsets, or Circles: Revenue Circle (which focused on sales), Delivery Circle, and the People Circle.

(Delivery) roles. It also recorded two new key roles – Holocracy Coach (GCC) and Onboarding (People).⁷ The agreement confirmed her salary at \$170,000 per annum.

[45] On 23 February 2018 Ms Gafiatullina went on parental leave with an expected return date of 14 March 2019. During this period her roles were assigned to other Propellerhead employees. In particular, the Delivery Lead Link role was assigned to Petar Bodor and the Portfolio Manager role was assigned to Mr Weston.

[46] Ms Gafiatullina returned to work in July 2018 and was reallocated the Delivery Lead Link role. She says this area had regressed in her absence. She quickly returned to full-time work.⁸

[47] Ms Gafiatullina says that her busyness when she returned to work highlighted that the Delivery Lead Link was her primary role. She says that the responsibility of the Portfolio Manager had been reduced already by that point, and her busyness illustrates it was the Delivery Lead Link role that commanded her time.

[48] She says that between July 2018 and February 2019 she continued performing the roles of Delivery Lead Link, Portfolio Manager, Product Lead, Holacracy Coach, Scrum Master, Pioneering Lead and Onboarding. However, it appears that some of these minor roles may not have been reassigned to her when she returned to work. This is of little consequence as both parties are in agreement that the roles were minor.

Portfolio Manager

[49] The Portfolio Manager role, in general terms, involved matching delivery teams to new client work. The role had oversight of the projects assigned to each team, the costs of each team, revenue for each piece of work, as well as forecasted work and revenue. When a new piece of work came in, Ms Gafiatullina was responsible for identifying the team best placed to undertake that work. This also required the Portfolio Manager to keep tabs on the respective workloads, capabilities

⁷ At some point Ms Gafiatullina also took on minor roles as Product Lead Link and Pioneering Lead Link.

⁸ I note that there was some dispute as to whether Ms Gafiatullina was hurried back to work by Propellerhead. I make no finding on that issue as I do not think it is relevant to the issues to be determined.

and revenue generated by each team. Ms Gafiatullina used a spreadsheet to keep track of this data.

[50] The 2019 financial year had seen a limited amount of new work coming in. A new Work Allocation Policy had also been implemented. This policy required the various teams to self-assess their current workloads and skillsets to determine their capability of taking on the work. The teams also consult with one another during this process. Mr Weston says this process was usually successful in identifying one team as the clear candidate to undertake the work and that disputes were rare.

[51] Propellerhead developed a piece of software called the Practice App which provided this information in a format similar to a spreadsheet. It was clear from the evidence that Propellerhead considered the Practice App reduced the importance and workload of the Portfolio Manager, a contention that Ms Gafiatullina strongly disputes. The Practice App was under constant development, but the evidence was that it was operating at a level where it added utility from early 2018 onwards.

[52] While Ms Gafiatullina was on parental leave, the other staff were able to manage workloads using the Practice App. She delegated the ability to assign tickets to Product Owners with teams taking the lead to choose which streams of work they would take on. This enabled teams to organise themselves and their work priorities. When she returned from leave, she did not take this responsibility back, despite having the authority to do so.

[53] The company's evidence was that the remaining responsibilities of the role, such as the assignment of new work, happened infrequently – once or twice a year – and could be dealt with appropriately at the time.

[54] Ms Gafiatullina accepts that these things made her Portfolio Manager role more efficient and reduced the time required to be spent on it. However, she says they did not erase her role altogether. She says that the Practice App could not make decisions about work allocation and that even after Product Owners were assigned the responsibility to allocate tickets, she was still busy with this part of her role. She

considers that this aspect of her role was taken on by the new Sourcing role which was created on 8 April 2019 and not discussed in the consultation with her.⁹

[55] Even on Ms Gafiatullina's evidence,¹⁰ it is apparent that this role had significantly reduced over time, due largely to her own excellent work and also the impact of the development of the Practice App.

[56] I accept that the company had good reasons for disestablishing the role of Portfolio Manager.

Delivery Lead Link

[57] Ms Gafiatullina's greater concern was the company's belief that her Delivery Lead Link role was "minor" and therefore could be allocated to Mr von Bargaen to perform, along with his existing duties.

[58] Ms Gafiatullina says that Mr von Bargaen's view that the role is mostly a governance role, and Mr Weston's view that the role ideally should be reduced to nothing, are inconsistent with the accountabilities stated in her employment agreement and in Glassfrog. She notes that the purpose of the role was to help clients create useful software by, among other things, prioritising work and relieving the technical overhead ("technical debt").

[59] She says that Mr Weston did not know or understand how much work she did in her role of Delivery Lead Link. When she returned from her parental leave, she quickly returned to 40 hours per week with the company's agreement because that was what was needed to get the work done. She says at the time of the review she was busy addressing issues such as technical debt which demanded a significant amount of her time.

[60] Propellerhead says it considered Ms Gafiatullina's assertion that she had sufficient work to do and was busy in the role but determined that it did not require the time commitment she said it did.

⁹ I deal with this when considering the issue of redeployment at [116]–[118] below.

¹⁰ Her evidence was that it was 15 per cent of her time by the time she left.

[61] Mr Weston says he performed the role himself when Ms Gafiatullina was on parental leave and estimated that it occupied about five per cent of his time per week. He considered he was in the best position to assess the requirements of the role for Propellerhead.

[62] Ultimately, the company determined that the Delivery Lead Link role should only occupy 10 to 15 per cent of someone's time. Mr von Bargaen was told that the role would take only three to five hours per week; his evidence is that this was sufficient. The company's view is that what Mr Weston and Mr von Bargaen are doing in the role is adequate.

[63] It is open to an employer to choose where to put their resources and what responsibilities and tasks have priority over others. A restriction of the role to 15 per cent of someone's time may well compromise the level to which the role is being performed. However, that is a matter for the employer. It is a decision that is open to it.

[64] Accordingly, I find there were good genuine reasons for the reallocation of Ms Gafiatullina's duties in the Delivery Lead Link role, rendering her position redundant.

[65] Before I am able to say whether the termination is substantively justified, however, I must first consider the process followed by the company, as Ms Gafiatullina submits that failures to consult properly with her call into question the justification for the decisions made.

Was the process followed fair and reasonable?

[66] On 20 February 2019 a "general catch-up" took place between Ms Gafiatullina and Ms James, an employment consultant contracted to provide human resources services to Propellerhead. Ms James was aware of Mr Weston's thoughts about the reduced workload of the Portfolio Manager role. She says that Ms Gafiatullina made it clear to her that she was not operating at capacity, telling her that she was busy on Mondays and Fridays but that she had almost no work on Thursdays. She also expressed an interest in taking on more client-facing work and a "Coach" role that Propellerhead was considering establishing. Ms James said she later became aware

that Ms Gafiatullina had spoken to other staff members about her ability to take on further Onboarding tasks.

[67] Ms Gafiatullina recalled this meeting differently. She says she only considered Thursdays free insofar as she had no meetings. She accepts she expressed interest in or agreement to taking other roles but made it clear that she was at capacity so any arrangements would either need to be temporary or her current workload would need to be reduced. The meeting was not of any note to her at the time.

[68] Shortly after the meeting Ms James expressed concerns to Mr Weston and Propellerhead's other director, Ms Kaminski, that fulltime staff member on a significant salary was potentially not working at capacity. She says she queried whether there may be further roles that could be undertaken by Ms Gafiatullina to make use of this capacity.

[69] On 21 February 2019 a meeting took place attended by Mr Weston, Ms Kaminski, Ms James, Ms Wyatt (Propellerhead's Recruitment Strategist) and Ms Mitchell (Office Manager and Recruitment). The financial concerns were discussed along with the workload of the Portfolio Manager role. It was agreed that Ms James would begin drafting a proposal to disestablish the Portfolio Manager role. It was agreed that Ms Gafiatullina's other roles could be distributed to other members of staff.

[70] Ms Gafiatullina first became aware that a redundancy process was on foot on 25 February 2019 when she was informed by Ms James. She was told that she would receive a written proposal to that effect in the near future and would need to attend a meeting with Mr Weston and Ms Sherwin, another human resources consultant, on 1 March 2019. Ms Gafiatullina is highly critical of the fact that the process was undertaken based on the short exchange with Ms James during their weekly catch-up. This is a fair criticism.

[71] On Wednesday 27 February 2019 Ms Gafiatullina was sent an email requesting that she attend a meeting on Friday 1 March 2019 to discuss a change proposal, a draft of which was attached.

[72] At that meeting Ms Gafiatullina was presented with a document, “Change proposal Portfolio Manager”. The proposal set out the concerns around cashflow and the perceived decrease in the workload of the Portfolio Manager role. It proposed the disestablishment of the Portfolio Manager role and that the other roles and responsibilities held by Ms Gafiatullina, including the Delivery Lead Link role, be dispersed amongst the other staff. It set a timeline for the process, allowing for feedback, a meeting to discuss consideration of the feedback, and then an outcome meeting. If the proposal did proceed, Ms Gafiatullina was told she would receive her contractual four weeks’ notice.

[73] At the meeting on 1 March 2019 Ms Gafiatullina inquired about redeployment. She says she was told that there were no redeployment opportunities if her role was disestablished.

[74] The deadline for feedback was extended from five to 11 days at Ms Gafiatullina’s request.

[75] Ms Gafiatullina submitted her written response to the proposal on 12 March 2019. The response took issue with a number of aspects of the proposal. Among other things she disputed that the Portfolio Manager role could be replaced by the Practice App and delegation to Product Owners. She disagreed that the Delivery Lead Link role was minor and challenged whether it could be redistributed in the way proposed.

[76] No inquiry or investigation was undertaken with Ms Gafiatullina in relation to her assertions about her work or workload.

[77] Propellerhead responded with an initial written response to each of the concerns raised on 15 March 2019. Among other things it said that the Practice App was performing to a strong standard and other roles within the company were capable of supporting and improving teams in utilising it. It disagreed with her categorisation of the Delivery Lead Link role, pointing out that it had not formed a large part of the workload of the employee who had covered it while she was on parental leave.

[78] A feedback meeting was held in person on 18 March 2019 in which the feedback was reiterated.

[79] The alternative roles specifically raised by Ms Gafiatullina in her correspondence were discussed with her; no others were discussed. I will return to the redeployment later.

[80] The redundancy decision was confirmed at a meeting on 20 March 2019, attended by Ms Gafiatullina, her lawyer, Mr Weston and Ms Sherwin. Ms Gafiatullina's lawyer indicated that a personal grievance would be raised. During this meeting Ms Gafiatullina vocally expressed disappointment and frustration, criticising Mr Weston's management skills.

[81] Ms Gafiatullina requested that she be able to work out part of her notice. The company said it would consider it but, shortly afterwards, refused and paid her in lieu.¹¹ Her employment ended on 22 March 2019.

[82] The defendant says it followed a full and fair consultation process it set out in its proposal, provided sufficient information to enable Ms Gafiatullina to respond, gave her an opportunity to provide feedback, discussed and considered that feedback,¹² and then made a decision to disestablish part of her role and redistribute the rest. It says this was not personal and regrets that Ms Gafiatullina thinks it was.

[83] In relation to how her employment ended, it says it had the right to pay in lieu of notice and it did so.

[84] Ms Gafiatullina raises a number of concerns with the process and says that these failures undermine the company's factual rationale for its belief that her position could be disestablished. She says it calls into question whether Propellerhead had

¹¹ In a letter provided to her on 21 March 2019.

¹² With the plaintiff also being supported by her lawyer.

evidence that it could rely on, or that it conducted reasonable inquiries.¹³

[85] Ms Gafiatullina submits that the process failures lay in five areas:

- (a) The failure to consult on the possibility of redeployment to the role of Quality Analyst;
- (b) the failure to disclose relevant information in relation to redeployment;
- (c) the failure to act according to its own commitment in relation to redeployment;
- (d) the failure to discuss her duties with her to ascertain an accurate picture of her capacity; and
- (e) abruptly and unnecessarily exiting her from the business without allowing her to work out her notice.

Failure to consult on redeployment

[86] The first three of these alleged failures all relate to redeployment. I deal with the issue of redeployment below.¹⁴

Failure to inquire into and discuss her duties

[87] Propellerhead disestablished Ms Gafiatullina's position of Portfolio Manager and decided to redistribute her other duties (including those related to Delivery Lead Link) on the basis of its belief that she had capacity due to the Portfolio Manager role being largely taken over by the Practice App and that the Delivery Lead Link role was "minor".

¹³ The plaintiff relies on *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14, [2018] ERNZ 27 at [27].

¹⁴ See below at [110]–[144].

[88] It formed this view based on the discussion between Ms Gafiatullina and Ms James, the experience of the company while she was on parental leave and Mr Weston's observations from sitting beside her in the office.

[89] The meeting on 20 February 2019 did not involve a direct discussion about capacity or workload and Ms Gafiatullina was unaware of the conclusions that Ms James had drawn from those discussion or the importance of the meeting until the consultation document was provided to her.

[90] When the view that the Direct Lead Link role was minor was initially put to Ms Gafiatullina, it was apparent from her response in her letter of 12 March 2019 that she had a significantly different perspective on both her capacity, the focus of her energies and the duties she was undertaking on a day-to-day basis. Despite this, there was no inquiry made or further engagement with her in order to understand the basis for her perception, including whether she was undertaking other duties that the company may have been unaware of.

[91] In evidence, the company relied on Mr Weston's personal observations of her to support its view that she had capacity and that what she was doing could be redistributed to others. He considered he had the capacity to undertake her role "even at the increased workload [she had] described in [her] feedback". This formed part of the basis for the response to Ms Gafiatullina's feedback and the ultimate decision. However, this was not disclosed to her in either the correspondence itself or the meeting that followed. His observations, and the basis for them, were not discussed with her before final views were formed.

[92] A proper inquiry into the work Ms Gafiatullina was doing on a day-to-day basis, followed by further discussion would have helped her understand the company's view that these duties should only be given approximately five hours per week and any 'extra' duties she was doing could be done by others within their existing roles. Likewise, the company could have assured itself that there was nothing it was missing. Such an inquiry and discussion were particularly necessary in a workplace where there was fluidity between roles and an overlap of duties and responsibilities. Failure to do

this was unfair in the circumstances and lent weight to Ms Gafiatullina's feeling that this was personal.

[93] I accept that the company had its own view as to where Ms Gafiatullina's two main roles now sat within it and that any other duties could be absorbed by others. However, it needed to take the time to fully discuss that with her and, in the face of her feedback, explore whether it had all the information it needed to make its decision. It did not do so.

[94] I do not regard this failure as minor in the circumstances. It significantly impacted Ms Gafiatullina and, while not being likely to alter the outcome, gave her the understandable impression that this process was about her and not her role.

Abrupt exit - Subsequent events

[95] At the end of the termination meeting on 20 March 2019 the company advised Ms Gafiatullina that she was not required to work out her notice. She requested that she be able to work at least part of it to do a handover. The company said it would consider her request.

[96] Ms Gafiatullina agrees she was told she did not need to return to work that day, but her preference was to do so.

[97] It is not clear whether the company understood that to be her intention, but in any case, it was still apparently considering whether she would work out her notice. Accordingly, when, on her way back to the office,¹⁵ Ms Gafiatullina received a text from Ms James asking if she wanted her personal belongings collected and delivered to her offsite, she was understandably disturbed and confused and replied "No".

[98] A colleague then informed her that her profile on the company's internal messaging app had been disabled. She says that once she returned to the office and while making lunch in the staff kitchen, she was approached by Ms James. She says she was repeatedly asked to leave and did so after having lunch. She says she was not

¹⁵ The meeting was held offsite.

provided an opportunity to farewell her colleagues or to take her personal files from the computer.

[99] This recollection was contested by Ms James who agrees she said it was best that Ms Gafiatullina leave the office, but says she realised Ms Gafiatullina was upset and angry and, as a result, decided not to actually ask her to leave. Her evidence was that it was general practice for an employee affected by a redundancy notice to be paid in lieu and that there was no need for Ms Gafiatullina to perform any handover tasks. She said she was told that Ms Gafiatullina had advised she would be raising a personal grievance, had behaved aggressively in the meeting and there was concern as to what her behaviour would be like on return to the office.¹⁶ It was implied that there was a risk she might misuse confidential data or interfere with information that might weaken her personal grievance claim.

[100] I consider these concerns would have coloured how Ms James dealt with Ms Gafiatullina at the time. I accept Ms Gafiatullina's evidence that she was asked to leave.

[101] Ms Gafiatullina was a senior and trusted employee who had worked in the company for over two years without issue. There was no basis for Ms James's concerns other than Ms Gafiatullina's stated desire to send an email to her colleagues, which could have been managed.

[102] The company wrote to Ms Gafiatullina on 21 March 2019, confirming the termination of her employment due to redundancy, and advising that it did not require her to work out her notice and that she would be paid in lieu.

[103] Ms Gafiatullina's exit was unnecessarily abrupt and hurtful. It is correct that Propellerhead had the right to pay her in lieu of notice. However, having said that it would consider her request to work out her notice, it was unreasonable for the company to cut off access to its electronic systems and effectively require her to leave the office before notifying her of its decision in relation to that notice period.

¹⁶ Ms James was not at the meeting.

[104] The company says this was because Ms Gafiatullina was angry and upset in the dismissal meeting and said that she was going to raise a personal grievance. Ms Gafiatullina was upset but there is no evidence that she was abusive or threatening. The fact that she was raising a personal grievance cannot be a basis for the company taking adverse action against her.¹⁷

[105] In the circumstances, an employee, having been told that their employment is terminated and facing the prospect of losing their income and a job and employment relationship that is often an important part of their life (as it was for Ms Gafiatullina), should not be criticised for reacting emotionally. This will manifest itself in different ways (including anger) for different people but, provided that does not go beyond what is reasonable, it should be put in perspective. An appropriate and empathetic response would be to recognise the heat of the situation and suggest a cooling off period before returning to the office – not to text, asking if she wanted her belongings delivered offsite when she was still waiting to hear if she could do a handover.

[106] The company's actions were not the actions of a fair and reasonable employer. While the employment relationship was coming to an end, at that stage it remained on foot. Those obligations did not lessen at all with the impending termination; if anything, it was more important for the employer to conduct itself in a fair and reasonable manner.

Conclusion

[107] This was not a fair and reasonable process. The failure to properly consult about the nature of Ms Gafiatullina's work and workload, and the way in which it exited her from the company were not the actions of a fair and reasonable employer.

[108] The failures do not, as suggested by the plaintiff, however, have the effect of undermining the substantive justification for the ultimate decision to disestablish the role of Portfolio Manager and redistribute her other duties. There were good reasons for the decision. The disestablishment was substantively justified.

¹⁷ Sections 104(1) and 107(1)(e). See *Hines v Eastland Port Ltd* [2018] NZEmpC 79, [2018] ERNZ 224 at [128] and [131].

[109] In this case that is not the end of the inquiry. Having disestablished the role, the company was obliged to consider whether Ms Gafiatullina could be redeployed into another role.

Decision not to redeploy

[110] It is now well established that the relationship between ss 4 and 103A requires a fair and reasonable employer to behave in a manner consistent with the statutory duty of good faith when undertaking a redundancy process. Section 4(1A)(c) requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment to provide them with access to information relevant to the continuation of their employment and an opportunity to comment on this information.

[111] The case law illustrates the proactive approach to redeployment required by the duty of good faith.¹⁸ A fair and reasonable employer will consult and explore reasonable opportunities for redeployment for the affected employee. Differences in the terms, duties, remuneration and skillsets required may or may not be an encumbrance on redeployment;¹⁹ what is required is for an employer to identify and consult with the employee on the reasonableness of redeployment in the circumstances. An employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation.

[112] The Court of Appeal has previously said that, in some circumstances, the failure to consider redeployment opportunities may cast doubt on the genuineness of a redundancy and its timing.²⁰

[113] Ms Gafiatullina says there were a number of viable redeployment opportunities available at the time the redundancy decision was made. She claims she was led to

¹⁸ *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102; *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [2010] ERNZ 468; and *Ritson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55.

¹⁹ See for example *Wang*, above n 18, where it was found an employee should have been redeployed to a higher salaried position as only limited training would have been required to facilitate this.

²⁰ *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA) at 294.

believe there were no vacancies into which she could be redeployed and to have later found out this was not the case.

[114] A number of roles were highlighted in this regard. The key ones are a Product Owner role (that Ms Gafiatullina asserts was open) and a Quality Analyst role. Two others that were mentioned can be dealt with briefly.

[115] At the feedback meeting on 18 March 2019 Ms Gafiatullina inquired about a “Coach” role in which she had previously expressed an interest. The company said at the time – and I am satisfied the evidence establishes – that plans for this role had been at a conceptual stage and a decision had been taken at the time that it was not viable to progress it given Propellerhead’s financial circumstances. There was no obligation to redeploy Ms Gafiatullina into a role that did not exist.

[116] The other was the Sourcing role created in Glassfrog on 8 April 2019, during what would have been Ms Gafiatullina’s period of notice and shortly after the Portfolio Manager role was deleted from Glassfrog.

[117] Ms Gafiatullina says that the responsibilities attached to that role were much the same as those that she performed in the Portfolio Manager role. The company’s evidence is that this role title simply defined a pre-existing function of the People Circle and did not have the level of crossover with the Portfolio Manager role that Ms Gafiatullina suggests.

[118] I am satisfied that this was not the same role. Ms Wyatt, an existing employee who was assigned the Sourcing role, gave evidence that the role was created in order to capture tasks and accountabilities that she performed but which did not fall under a then-defined role. This role was a minor function of the People Circle which had been performed for many years. It was not a fulltime role and was not a viable redeployment opportunity that needed to be discussed with Ms Gafiatullina.

[119] Even if that was the case, I do not consider it would be inconsistent with Propellerhead’s redundancy proposal that elements of Ms Gafiatullina’s disestablished position were redistributed elsewhere. It had indicated that such steps would be taken.

Product Owner role

[120] The Product Owner role was charged with understanding the high-level business objectives of a software project over time and planning the prioritisation of business time based on return-on-investment business considerations.

[121] There was some debate as to whether or not Ms Gafiatullina had the skills and experience to make redeployment as a Product Owner a viable consideration. Mr Goldie, a recruitment consultant for Propellerhead, suggested that he did not consider Ms Gafiatullina to be suitably qualified and/or experienced for a Product Owner role. However, the evidence of a number of Propellerhead's witnesses appeared to accept that Ms Gafiatullina could have performed the Product Owner role and that she had temporarily covered such a role in the past. I accept that she could have performed the role of Product Owner with a reasonable level of training and support.

[122] The key question is whether or not such a role was vacant at the time of Ms Gafiatullina's dismissal.

[123] Propellerhead was running an advertisement on its website for a Product Owner role. Ms James gave evidence, supported by other witnesses, that this was part of the company's recruitment strategy, which was to regularly advertise for positions even where there was no immediate or foreseeable need to hire in those positions. This strategy was attributed to Propellerhead's high staff turnover.

[124] Propellerhead says it was advertising to test the market in case a position became available. It says that in reality, there was no vacancy for a Product Owner at that time.

[125] Mr Robertson, counsel for Propellerhead, pointed to *Kiteley v Carbine Aginvest Co Ltd* as being analogous on this point.²¹

²¹ *Kiteley v Carbine Aginvest Co Ltd* [2020] NZEmpC 106.

[126] In November 2018 two new Product Owners, Ms Blinova and Ms Higginbotham, had been employed by Propellerhead to start at a later date. Ms Higginbotham's agreed start date was 3 April 2019.²²

[127] Ms Blinova advised Propellerhead on 21 January 2019 that she would be unable to relocate to New Zealand and take up her role. This was considered a fortunate development by Propellerhead who had no open Product Owner role for her to move into at the time.

[128] Ms Gafiatullina believes that at the time of her dismissal there was a need for Product Owners. She kept a spreadsheet of the Delivery Circle which recorded the resources needed to support the current and future workloads. This was used to keep the People Circle informed of those needs. At the time she had recorded that there was a need for two further Product Owners.

[129] Propellerhead says that the Product Owner roles on that spreadsheet may simply have been reflective of the company's regular need to fill those positions. It notes that the spreadsheet does not list a team requiring those services and that this was likely because none was available.

[130] Ms Gafiatullina had also become aware that Mr Littlewood, a Product Owner, was looking to leave Propellerhead. The possibility that he may leave had also been discussed at the catchup with Ms James on 20 February 2019. She says there was a discussion on the extent to which she could cover his role.

[131] Ms Higginbotham began work as planned at the beginning of April 2019. Shortly afterwards, as Ms Gafiatullina predicted, Mr Littlewood resigned from his Product Owner role, on 12 April 2019. Ms Gafiatullina says that if she had been able to work out her notice period, she would have still been working at Propellerhead at the time. An advertisement for a Product Owner role was advertised the same day.

²² Both were outside of New Zealand and, once hired, commenced the immigration process with Propellerhead's support.

[132] Ms Gafiatullina says that if she had still been at work further consultation could have taken place with a view to redeploying her into his role. However, Propellerhead did not hire another Product Owner until a year later, in February 2020. In fact, the company's evidence was that the resignation was fortunate as it meant there was an equivalent number of Product Owners to workstreams, which had reduced.²³

[133] I accept that, at the time of the dismissal, there was no vacant Product Owner role and that Propellerhead was not actively seeking to recruit one. On that basis, there was no obligation to redeploy Ms Gafiatullina into such a role. Mr Littlewood's resignation did not create a vacancy.

Quality Analyst role

[134] It was accepted that there were at least two Quality Analyst roles available at the time of dismissal. Two new employees were hired in that position in April 2019.

[135] A Quality Analyst was responsible for understanding and communicating how the finished software should function. This involved working with the Product Owner and clients to document the acceptance criteria for each of the functions of the user software. The Quality Analyst defined the strategy and methodology for testing the software and bore primary responsibility for the testing efforts within a team.

[136] The role was described as critical to Propellerhead's business in that those in that role helped to ensure that the product was delivered to the client's satisfaction, both in terms of cost efficiency and functionality. This required a balance of commercial acumen and technical skills.

[137] Ms Gafiatullina believes she had sufficient experience to undertake that role and that Propellerhead had her Curriculum Vitae and cover letter which would have provided that information.

[138] She referred to two software development methodologies, Agile and Waterfall, and attempted to establish that her Business Analyst experience was equivalent to the

²³ Mr Weston gave evidence that some current workstreams were ended by the client concerned and that another expected project did not come to fruition.

requirement of the Quality Analyst role. Propellerhead utilises the Agile methodology whereas Ms Gafiatullina's previous experience as a Business Analyst had been under the Waterfall method. Ms Gafiatullina claims the "overall work" performed in both roles was the same. She is certified in both methodologies and points out that neither Mr Weston nor Mr Goldie was, implying that she had a more developed understanding of the differences in roles under the different systems.

[139] Propellerhead formed the opposite view, deciding that she did not have the required level of skill and experience to be redeployed into such a role. As such, it did not raise the Quality Analyst positions as redeployment opportunities during the consultation process. It was also critical of Ms Gafiatullina's failure to raise this possibility if she genuinely felt she was suitable for the role.

[140] In terms of Ms Gafiatullina's suitability for a Quality Analyst role, I found the evidence of Mr Goldie very helpful. He rejected Ms Gafiatullina's evidence with respect to the similarity between Business Analysts and Quality Analysts, pointing out that there was significant material available on the differing development methodologies outside of official certification. He notes that he has dedicated his career to critically evaluating what elements of those methodologies work and which do not in a practical and commercial context. He says that it was widely accepted within the software industry that there was a significant difference in terms of function and career skills between the two roles.

[141] Mr Goldie gave evidence that he considered approximately 10 years' experience to be a prerequisite for this role, which Ms Gafiatullina did not have. He also pointed out that while Ms Gafiatullina had been exposed to testing in her career due to a previous role as a Project Manager, she did not have the hands-on experience that Propellerhead required of its Quality Analysts. He estimated that it would have taken an extended period of time to train her to the necessary level, a length of time that was not viable given the financial pressures on Propellerhead at the time.

[142] I accept Mr Goldie's evidence that Ms Gafiatullina did not have the necessary training and experience to undertake the role, and that it would not have been reasonable for the company to invest the time and resources necessary in equipping

her for the role. Mr Weston also gave evidence that Propellerhead had encountered difficulty, both in terms of performance and upskilling, in the past when it had appointed Quality Analysts with more limited experience.

[143] However, I am not satisfied that Propellerhead adequately met its good faith obligations to consult with Ms Gafiatullina before reaching that conclusion. There was clearly a conversation to be had about her suitability for the role and she should have been given an opportunity to convince it of that, should she have wished to pursue it.²⁴

[144] I do not accept that because Ms Gafiatullina was aware of the vacancy, it was incumbent on her to raise it in her feedback to the proposal. Such an expectation would reverse the onus placed on employers under s 4(1A)(c) of the Act. An employer cannot rely on the silence of an employee to absolve their own failure to adhere to a positive statutory duty.

Conclusions

[145] A fair and reasonable employer would have raised the Quality Analyst role during the consultation process.

[146] While I accept that, on the evidence, it was reasonable for Propellerhead to decide she was not suitable for redeployment in that role, the failure to discuss it with her and seek her feedback on that conclusion was procedurally unfair and a breach of the employer's good faith obligations.

[147] Further, such failure was in breach of Propellerhead's specific commitment to Ms Gafiatullina that it would support and closely work with her to explore her options, including redeployment opportunities within the organisation.²⁵

[148] This failure was not minor in the sense considered by s103A(5), in the context of the issues discussed above, it further contributed to the procedural unfairness faced

²⁴ Her suitability was the subject of significant evidence and debate in the hearing – it was not straightforward.

²⁵ See above n 2.

by Ms Gafiatullina throughout the process. It cannot be viewed in isolation from those flaws. It contributed to her perception that the motivations behind it were personal and her failure to properly understand the reasons for the redundancy.

[149] Having found that the dismissal was unjustified, I turn to the issue of remedies.

Remedies

Lost wages

[150] Ms Gafiatullina seeks an order under s 123(1)(b) that Propellerhead pay her all lost remuneration arising from her dismissal, including holiday pay and KiwiSaver.

[151] She claimed lost wages for the period between 17 April 2019 and 23 September 2019, when she eventually found new employment. She gave evidence that she put significant effort into finding new employment and mitigating her loss but was hampered by Propellerhead's reputation in the market and the lack of any reference from them.

[152] However, I have only found the process to be procedurally deficient. Propellerhead was clearly facing financial difficulties and, despite the procedural failings, I do not consider the result of a more robust and fit-for-purpose consultation would have seen Ms Gafiatullina remain with the business.

[153] Where a dismissal is regarded as unjustified purely on procedural grounds, allowance must be made for the likelihood that if a proper process had taken place, the employee would have still been dismissed. In such a situation, the unfair process would not be causative of the employee's loss.²⁶

[154] Propellerhead's consultation process took approximately three weeks. I consider that had it followed a more appropriate consultation process, including undertaking a more thorough review of what Ms Gafiatullina's roles and day-to-day

²⁶ See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA); *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA); *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [26]; and *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80 at [16]–[32].

work comprised of, it would not have extended beyond a further two weeks. The cashflow concerns were not so urgent as to make this impracticable.

[155] Ms Gafiatullina is entitled to payment of two weeks' lost wages plus any holiday pay or KiwiSaver contributions if applicable.

[156] Interest on that amount is payable, calculated in accordance with the Interest on Money Claims Act 2016.²⁷

Compensation for humiliation, loss of dignity, and injury to feelings

[157] Ms Gafiatullina also seeks an award of compensation under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings.

[158] As a preliminary point, it should be noted that any award under s 123(1)(c)(i) must be causally linked to the unjustifiable conduct.²⁸ This means that consequences which can be seen to be the inevitable result of a dismissal for redundancy, as opposed to the flawed process, cannot be compensated.²⁹

[159] Ms Gafiatullina gave fulsome evidence of the hurt and humiliation she felt. She says she felt immense stress throughout the redundancy process and her subsequent period of unemployment. This led to her becoming depressed and irritable and having difficulty sleeping. Her husband also gave corroborating evidence, saying that she had become withdrawn and had experienced self-doubt and depression. Both mention the financial stresses involved with meeting mortgage payments and other financial obligations while she was out of work.

[160] Insofar as the evidence relates to Ms Gafiatullina's financial stresses and the impact of unemployment, these cannot be causally linked to the flawed process undertaken by Propellerhead.

²⁷ Employment Relations Act 2000, sch 3, cl 14.

²⁸ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (CA).

²⁹ *Butler*, above n 26, at [41].

[161] However, Ms Gafiatullina's evidence went beyond simply noting the difficulties she faced as a result of the loss of her job. It was clear that she was confused and hurt by the way in which the process was carried out. She felt her contribution to the organisation had not been recognised and experienced self-doubt, questioning her own performance and where she had gone wrong. This is unsurprising given Propellerhead's failure to undertake any sort of process with her to understand where her time was being spent.

[162] Ms Gafiatullina says this was exacerbated by the way in which her exit was handled. She was unable to farewell her colleagues properly or collect personal files from her computer and was embarrassed by the way in which her hurried exit allowed room for conjecture amongst her colleagues as to the reasons for her dismissal. She described feeling treated as if she was "a dangerous animal everyone should be afraid of." I have already expressed my dissatisfaction at Propellerhead's handling of the situation. It was unfair, unreasonable and lacked empathy. I accept that Ms Gafiatullina experienced these feelings as a result.

[163] Finally, it was clear that she was hurt by what she perceived as personal motivations behind the redundancy. While I acknowledge that personal motives did not underlie the decision, a more thorough and thoughtful process may well have prevented such perception from forming. It is understandable that she felt that way in the circumstances.

[164] For the above reasons I accept Ms Gafiatullina experienced humiliation, loss of dignity and injury to feelings caused by the procedural flaws in Propellerhead's process.

[165] The Court has adopted a banding approach to the quantification of an award under s 123(1)(c).³⁰ There are three bands: Band 1 involving low-level loss or damage, Band 2 involving loss or damage in a midrange and Band 3 involving high-

³⁰ *Waikato District Health Board v Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

level loss or damage.³¹ In *Richora Group Ltd v Cheng*, Band 1 was assessed at \$0–\$10,000, Band 2 at \$10,000–\$40,000, and Band 3 at over \$40,000.³²

[166] Propellerhead says that any distress caused by its actions was at a low level and should fall into Band 1.

[167] Ms Gafiatullina sought an award of \$40,000. I note that amount was cited in the context of the claim for both a substantively unjustified and procedurally unfair dismissal.

[168] I consider Band 2 to be the correct banding in the circumstances. The distress caused to Ms Gafiatullina went beyond what could be described as “low level”. An award of \$20,000 is appropriate.

Contribution

[169] The question of contribution under s 124 can be dealt with briefly.

[170] Propellerhead submitted that Ms Gafiatullina’s failure to raise the vacant Quality Analyst role in consultation should lead to a 50 per cent reduction for contributory conduct. As I have made clear, the responsibility to provide information on redeployment opportunities is placed firmly on the shoulders of the employer by s 4(1A)(c)(i). A reduction on those grounds would clearly be inappropriate.

[171] Propellerhead’s statement of defence also raised Ms Gafiatullina’s conduct at the meeting on 20 March 2019. However, it appeared in submissions that Propellerhead was not seeking to argue it. I deal with that argument for completeness.

[172] Ms Gafiatullina’s conduct at the meeting had no causal connection to the majority of the procedural defects leading to this award.

³¹ *Archibald*, above n 30, at [62].

³² *Richora*, above n 30, at [67].

[173] As I have already noted, it is not surprising that an employee may react emotionally to being informed of the termination of their employment.³³ Her response does not form a basis for a finding of contribution.

[174] There was no contributory conduct under s 124. The compensatory award remains \$20,000.

Conclusion

[175] The challenge is successful in part. The Authority's determination is set aside and the following orders are made in the plaintiff's favour:

- (a) The defendant must pay the plaintiff the equivalent of two weeks' wages within 21 days of the date of this judgment.
- (b) The defendant must pay the plaintiff the sum of \$20,000 by way of compensation under s 123(1)(c)(i) of the Act within 21 days of the date of this judgment.

[176] Costs are reserved. In the event that the parties are unable to agree on costs, the plaintiffs will have 14 days to file and serve any memorandum and supporting material, with the defendant having a further 14 days to respond. Any reply should be filed within seven days.

Kathryn Beck
Judge

Judgment signed at 4.30 pm on 8 September 2021

³³ See above at [105].