IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 57
EMPC 134/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND STEEL LIMITED Plaintiff
AND	RA'ED HADDAD Defendant

Hearing:	30 May–1 June 2022 and 1–2 August 2022 (Heard at Auckland)
Appearances:	P Skelton KC and C Pearce, counsel for plaintiff S Lapthorne and Meilun Chen, counsel for defendant
Judgment:	5 April 2023

JUDGMENT OF JUDGE KATHRYN BECK

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[1] Ra'ed Haddad worked for New Zealand Steel Limited (NZ Steel) as Process Computing Manager for seven and a half years.

[2] In 2019 the Information Technology (IT) department of NZ Steel was restructured. The restructure took place in two phases. Among other things, it resulted in the disestablishment of the position of Process Computing Manager and the creation of three new managerial roles. Mr Haddad says the disestablishment of his position was predetermined.

[3] Mr Haddad, along with others, was invited to apply for the new managerial roles. He applied for all three, although he indicated a preference for one. He also indicated interest in roles outside of Information Services (IS).

[4] Mr Haddad declined to be interviewed for the new IS roles as he thought NZ Steel should simply confirm him into one of them and, he says, because, despite his suitability for the roles, it was apparent to him that the exercise would be futile and humiliating.

[5] NZ Steel did not ultimately appoint Mr Haddad to any of the roles because, it says, in the absence of an interview, it was not able to determine his suitability for any of them and was entitled to appoint the best person for the job(s). It terminated Mr Haddad's employment for redundancy.

[6] Mr Haddad brought a grievance for unjustified dismissal in the Employment Relations Authority. He was successful and awarded reinstatement, three months' lost earnings and compensation of $15,000.[1]

[7] NZ Steel is challenging that decision. It says there was no obligation to redeploy Mr Haddad into a role that was substantially different from the one held by him previously. Having disestablished Mr Haddad's role, when he refused to engage in the interview process, it was justified in terminating his employment for redundancy.

Issues

[8] There are a number of issues to be considered in order to answer the question of whether the termination was justified or not.

(a) Did NZ Steel follow a fair and reasonable process in taking the step to disestablish Mr Haddad's role of Process Computing Manager?

(i) Did NZ Steel properly consult or was the decision predetermined?

(ii) Did NZ Steel fail to provide Mr Haddad with all relevant information?

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1 *Haddad v New Zealand Steel Ltd* [2021] NZERA 106 (Member Urlich).

(b) What were NZ Steel's obligations to Mr Haddad concerning redeployment under cl 12 of the individual employment agreement and under ss 4(1A)(b) and 103A of the Employment Relations Act 2000 (the Act)? Are these obligations impacted by the right to freedom of association?

(c) Did NZ Steel breach those obligations?

(d) How similar were the three new IT managerial roles to the role of Process Computing Manager?

(e) Did Mr Haddad have the skills and experience for the managerial roles?

    (i) Could this be established without interviewing?

(f) In light of the above, was NZ Steel obliged to offer Mr Haddad any of the roles without an interview/did Mr Haddad need to put NZ Steel to the test?

(g) If not, was asking Mr Haddad to interview justified/was it an action that a fair and reasonable employer could have taken in the circumstances at the time?

(h) If any of the above result in a finding of unjustified dismissal or disadvantage, the Court needs to consider the appropriate remedies:

    (i) Reinstatement;

    (ii) lost earnings and benefits;

    (iii) compensation; and

    (iv) interest.

(i) Should any remedies be reduced for contribution?

(j) How should the redundancy compensation (already paid) be treated?

Did NZ Steel follow a fair and reasonable process?

[9] Mr Haddad does not necessarily agree with all of the decisions made in relation to the new structure of the IS department, but he does not now take issue with the genuineness of the restructure as a whole. He does, however, take issue with the process followed in relation to the restructure, particularly as it related to him and his department. He says the disbanding of his department and disestablishment of his position were predetermined.

[10] He says this and other factors were the context for the position he took in relation to attending an interview.

[11] NZ Steel denies that the decision to disestablish the role was predetermined and says it followed a fair and reasonable process.

Facts

[12] Mr Haddad worked for NZ Steel as Process Computing Manager from 16 July 2012. In this role, he was responsible for managing 14 Process Computing engineers, three level 3 software developers and two casual project managers. The Process Computing department managed the ongoing provision, maintenance and improvement of NZ Steel's Process Computing systems and applications (which automate steel production for NZ Steel and for the Waikato North Head iron sand mining site).

[13] In May 2019 Mike Johnson (Manager of IT at NZ Steel) and Jason Dale (NZ Steel's Chief Financial Officer) were in discussion about changing the structure of the Information Services area. By mid-June 2019, Jonathon Lewis (Interim Manager of Business Applications) was preparing the preliminary documents for the proposed restructure. This included preparing various position descriptions including those for three new managerial roles – Business Engagement Manager, Legacy Platform Support Manager and Platform Integration Manager. On 1 July 2019, a draft change proposal was prepared which set out a roadmap for change. Among other things, it

also proposed moving process engineers back to the plants and disestablishing the position of the Process Computing Manager. It referred to two phases. Phase one was to establish the "target state" for Information Services.[2] Phase two proposed to reconfigure Process Computing by shifting the Process Computing engineers and developers to various other teams and disestablishing the position of Process Computing Manager.

[14] On 7 August 2019, an updated change proposal was prepared. This proposal began the process for putting into effect what was referred to as "phase one" in the July draft. It did not propose any changes in Process Computing. This proposal was approved by Gretta Stephens (Chief Executive Officer) on 12 August and reconfirmed on 14 August 2019.

[15] On 12 August 2019, Mr Haddad commenced a period of annual leave until 20 September 2019, returning to work on 23 September 2019.

[16] Phase one of the restructure was presented to the IT team (excluding Process Computing) on 21 August 2019 and confirmed without any changes on 3 September 2019.

[17] It substantially restructured the IS department. It created three new managerial roles alongside the renamed IS Operations Manager and the BI & Data Governance Manager. The effect on existing employees was to change reporting lines. There were no redundancies.

[18] On 11 September 2019, Mr Johnson, Alex Ross (General Manager of Primary Operations), Grant Huggins (General Manager of Mining and Services), Tom Harper (Manager of Mills and Coating), Jonathon Lewis (Interim Manager of Business Applications) and Dana Toeke (People Manager, Talent & Capability) met to discuss the future of Process Computing.

[19] On 12 September 2019, Mr Johnson sent an email to those same people which detailed the outcome of the meeting and set out what was proposed in relation to each

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[2] Part of the restructure proposal was to rename the department from IT to Information Services.

of the individual Process Computing team members, including what teams they should move to and who was due for retirement. In relation to Mr Haddad's role of Process Computing Manager, the email noted that the position was proposed to be disestablished. This was unchanged from the early iteration of both phases one and two of the IS restructure.

[20] Mr Johnson asked that the recipients of the email discuss it with their "people". At this point a concern was raised by Ms Toeke about the widening group of people involved in these discussions. She noted in an email that they "don't want wind of this getting back to the Process Computing team".

[21] On 17 September 2019, Mr Johnson had further discussions with Mr Ross and Mr Harper and followed up with them about their views in relation to Process Computing.

[22] On 23 September 2019, Mr Haddad returned to the office after being on leave. He was unaware of the discussions that had been taking place about his department. He was advised about the restructure of the rest of the IS department, but he says that he was told Process Computing was "out of scope". The proposed structure in the circulated consultation document similarly described Process Computing as being "out of scope". I consider it likely he was shown the final organisational chart in this document.

[23] On 25 September 2019, Mr Johnson again emailed Mr Ross and Mr Harper, confirming what was proposed in relation to members of the Process Computing team and where they would move. He asked that they confirm back to him. They did so on 27 September 2019, with both confirming that they had discussed it with their teams and that it worked.

[24] Although Mr Haddad had returned from leave, he remained unaware of these discussions and was not involved in them at all.

[25] On 1 October 2019, Mr Haddad was invited to a meeting which was to take place the following day in relation to a proposal to restructure Process Computing. At

the meeting on 2 October 2019, he was presented with the restructure proposal in relation to the Process Computing department. The proposal he was given contained the same wording as the one prepared by Mr Lewis on 1 July 2019 in relation to Process Computing, with the added detail of where individual team members would shift to. Like the 1 July 2019 document, it proposed that the position of Process Computing Manager be disestablished for the same reasons as stated in that initial draft. Feedback was sought by 11 October 2019, although this date was later extended to 15 October 2019.

[26] Mr Haddad was clear at the meeting and in subsequent correspondence with Ms Toeke and Mr Johnson that he did not want redundancy and wanted to be redeployed. I will come to that later.

[27] Both Mr Haddad and various team members provided feedback raising concerns about the proposal. Mr Haddad also wrote to Ms Stephens setting out some of his concerns and asking her to review the proposal. Apart from personal concerns about his role, Mr Haddad was primarily concerned that decentralisation would lead to compartmentalisation of knowledge which could lead to decreased support of several plant areas.

[28] On 18 October 2019, Mr Johnson went back to the Process Computing team and thanked them for their feedback. He advised that the feedback would be discussed with "stakeholders". On 21 October 2019, he met with Gary Brake (Rolling Mills Maintenance Superintendent), Sonny Singh (Finishing Maintenance Superintendent) and David Ronaldson (Slab-making Technical Superintendent). At that meeting, a new support model was agreed to deal with the concerns raised. This was circulated to Messrs Brake, Singh, Ronaldson, Ross and Harper for feedback, and a new page was prepared for the restructure pack dealing with "sitewide governance and support".

[29] Mr Haddad was not involved in any of these discussions. Nor was any of the discussion material put to him for comment.

[30] On 24 October 2019, Ms Toeke and Mr Johnson met with Mr Haddad confirming the restructure of the Process Computing department and the

disestablishment of his position of Process Computing Manager, effective 1 November 2019. He was provided with a document setting out the "confirmed Process Computing Team Structure. The Computer Processing team was advised the following day.

[31] The disestablishment of Mr Haddad's position was then confirmed in a letter to him dated 29 October 2019.

Did NZ Steel properly consult or was it predetermined?

[32] Mr Haddad says that by the time NZ Steel purported to consult with him on the disestablishment of his position, the decision had already been made. I agree.

[33] It is accepted by NZ Steel that it did not consult at all with Mr Haddad in relation to phase one. That is a problem for NZ Steel. Phase one set the scene for phase two and the outcome in relation to Mr Haddad's position became inevitable. Phase two brought Process Computing into line with what had already been determined as the optimal structure for the IS department.

[34] It is apparent that once the restructure of the IT department was confirmed (phase one), the restructure of Process Computing – in particular, the disestablishment of the Process Computing Manager role – was going to follow. The only aspect of phase two that appeared at all open for discussion was where individual team members would move to.

[35] Significant work and time were put into dealing with the best placement for the Process Computing team members. Even after Mr Haddad returned from leave, he was not involved in these discussions at all. This is despite his peers within the plant being involved in the analysis along with their reports.[3] In particular, they were told about the proposal to disestablish Mr Haddad's position.[4]

[36] The use of the word "proposed" was semantic only. There is no evidence of an open mind or discussion around that aspect of the restructure. The wording in

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3 Messrs Ross and Harper.

4 They were told about the proposal for Mr Haddad's position before he was.

relation to the disestablishment of that role remains the same from 1 July through to 2 October 2019.

[37] Further, in subsequent discussions with "stakeholders", there is no evidence of an open mind or even discussion in relation to the disestablishment of the Process Computing Manager position. Any further discussion was only focused on ensuring that the arrangements would still allow information sharing and employees to work in other areas where necessary once the team was disestablished. The reference on 4 October 2019 (only two days after the initial presentation of the restructure proposal, and during the consultation period) by Mr Johnson to Mr Haddad "Saving his bacon" by applying for that role, also evidences a mindset that Mr Haddad's position would not survive the restructure.

[38] The disestablishment of Mr Haddad's position of Process Computing Manager was predetermined by the time NZ Steel came to consult with him on 2 October 2019.

[39] Accordingly, such consultation was flawed and failed to meet the obligations of good faith required by the Act.[5]

Did NZ Steel fail to provide all relevant information?

[40] As already noted above, NZ Steel did not involve Mr Haddad in any of the discussions in relation to his team, even after he had returned from leave. Nor was he made aware of the content of those discussions. The only information he was provided with was what was in the restructure pack.

[41] Further, Mr Haddad was not involved in the subsequent discussions with "stakeholders" or provided with any information in relation to those discussions which took place during the consultation period in response to issues raised by him and his team. Such information was clearly relevant to the decision to confirm the overall proposal. This is despite Mr Haddad raising questions about the discussions with such stakeholders, asking who they were and noting that the team might need to talk to them as well.

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5 Sections 4 and 103A(3).

[42] Such failure is a breach of the obligations of good faith under the Act.

[43] Accordingly, in relation to the decision to disestablish Mr Haddad's position of Process Computing Manager, NZ Steel did not follow a fair and reasonable process.

[44] That, however, is not the end of the analysis. Having concluded that NZ Steel did not follow a fair process when it disestablished Mr Haddad's position, the next issue is: did NZ Steel meet its obligations in relation to redeployment? A failure to consider redeployment opportunities may cast doubt on the genuineness of a redundancy and its timing, and when redeployment obligations are breached, it can further contribute to procedural unfairness arising during the redundancy process.[6]

NZ Steel's obligations concerning redeployment

The law

[45] The preliminary legal issue that must be addressed is: what were NZ Steel's obligations concerning redeployment under cl 12 of the employment agreement, case law and under ss 4 and 103A of the Act?

Contract

[46] Under the terms of his employment agreement, NZ Steel's obligation to Mr Haddad in relation to redeployment in a redundancy situation was:[7]

> The first option is to consider redeployment should your position become surplus. You will be treated fairly and reasonably in any selection process, taking into account such things as skills, experience and employment record.

[47] As noted above, NZ Steel submitted that the clause does not oblige it to offer redeployment but only to consider redeployment. It accepts that such consideration must be fair and genuine.

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6 *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146, [2021] ERNZ 654 at [112] and [148]; and *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276 (CA) at 294.

7 Individual Employment Agreement, 14 May 2012, cl 12.

[48] The wording of the provision, however, makes it clear that such consideration is given primacy in the event of a position being disestablished.[8]

Statute

[49] Section 103A states:

> **103A Test of justification**
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> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test 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.

[50] As noted in both parties' submissions, the test in s 103A was amended in 2011 from "would" to "could".[9] The full Court in *Angus v Ports of Auckland Ltd (No 2)* held:[10]

> [23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[51] However, as noted by counsel for Mr Haddad, the Court also included an important caveat:[11]

> [35] Whereas, under former s 103A, the Court and the Authority were required to determine a single outcome (what a fair and reasonable employer in all the circumstances would have done and how such an employer would have done it), the new test allows for more than one possible justifiable outcome and more than one possible justifiable methodology. That is not to say that there will always be more than one possible consequence justifying dismissal or making a dismissal unjustified.

[52] Section 4 is also relevant, which I will refer to below.

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8 By referring to it as "the first option".

9 Employment Relations Amendment Act 2010, s 15.

10 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [22]–[23]; and affirmed in *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295 at [41]–[46].

11 At [35].

Cases

[53] NZ Steel in essence submitted that absent a contractual requirement, there is no obligation to redeploy at common law or under statute.

[54] In particular, it relies on *New Zealand Fasteners Stainless Ltd v Thwaites*, a decision of the Court of Appeal, which it submitted is still good law and should be followed despite being decided under the Employment Contracts Act 1991.[12]

[55] Specifically NZ Steel relies on the following:[13]

> [25] In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment.

[56] Here the Court of Appeal held that a failure to offer an employee a different position could not constitute an unjustified dismissal under the Employment Contracts Act because the employer's obligations only extend to the employee within their present (contracted) role. NZ Steel submitted that principle still holds today and subsequent legal developments are in error. It is therefore necessary to consider whether legislative developments have shifted this position.

[57] There is no dispute that the Court of Appeal also held that there was a duty to consult and consider redeployment and that failing to do so could undermine an employer's justification of dismissal for redundancy or lead to a finding of disadvantage, even if not a finding of unjustified dismissal.[14]

[58] Both parties also made detailed submissions about this Court's decision in *Jinkinson v Oceana Gold (NZ) Ltd*.[15] In that decision, Judge Couch considered a

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12 *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 (CA).
13 At [25].
14 At [22] and [27].
15 *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102.

situation where the plaintiff had worked for a gold mine as a grade controller. The mine decided to merge her role into that of another role. Staff were told they would need to interview for new positions. After interviewing, the plaintiff was not employed into the new position – primarily because the relevant managers considered that her team-work skills were not good. She was subsequently dismissed.

[59] The Court noted that there were two distinct steps leading to the plaintiff's dismissal. First, the mine disestablished her existing position and incorporated her duties into a new position; and secondly, the mine decided that she should not be appointed to one of the new positions.[16] The employer accepted that the process of the first step could be reviewed but submitted that, following the decision of the Court of Appeal in *Thwaites*, it was not open for the Court to review the merits of its redeployment decision so long as it had genuinely considered the plaintiff for redeployment, a similar argument to that run by the plaintiff in this case.

[60] However, the Court held that the law had progressed since *Thwaites* with the introduction of the Act and in particular ss 4 and 103A. In respect of s 103A, the Court noted that it must objectively review all the actions of an employer up to and including the decision to dismiss. As the decision not to redeploy the plaintiff led to her dismissal, the process that was utilised when considering redeployment needed to be reviewed when considering whether the dismissal was justified.[17]

[61] The Court held:[18]

> The relationship between s 4(1A)(c) and s 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply s 4(1A)(c) will not be justifiable.

[62] The Court's conclusions can be summarised as follows:

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16 At [34].
17 At [38].
18 At [42].

(a) Redeployment must be considered when an employer is restructuring.

(b) When considering redeployment, the employer must comply with the good faith obligations in s 4, and in particular the employer must comply with the duty to consult in s 4(1A)(c).

(c) When considering an employer's decision not to redeploy an employee, the Authority and the Court may consider the merits of the employer's decision under s 103A.

[63] The first principle set out above is not controversial. It is consistent with the Court of Appeal's decision in *Thwaites* as well as the employment agreement between Mr Haddad and NZ Steel. The parties to the current proceedings agree that redeployment must be considered.

[64] The second principle also ought not to be controversial as it builds on *Thwaites* without rejecting that decision. NZ Steel acknowledged that it was required to "genuinely" consider redeployment and treat Mr Haddad "fairly and reasonably". In meeting these obligations, NZ Steel must comply with s 4(1A)(c) because doing so is a necessary part of genuinely considering redeployment. In the context of s 4(1A)(c), it is not necessary to distinguish between the "would" or "could" tests in s 103A because a fair and reasonable employer must comply with s 4(1A)(c). Therefore, for the purposes of the relationship between s 4(1A)(c) and s 103A, the position has not changed since the amendment of s 103A in 2011.

[65] The third principle, however, is more controversial. The first and second principles primarily relate to the procedure to be followed by an employer, but the third principle relates to the merits. As noted above, counsel for the mine in *Jinkinson* submitted that it was not open to the Court to consider the merits of the decision not to redeploy the plaintiff. However, the Court disagreed. It held that the position had developed since *Thwaites*. In particular, it held:

> [37] The decision in *Thwaites* was made in the context of the Employment Contracts Act 1991 and the jurisprudence relating to personal grievances as it was in early 2000. The subsequent enactment of the Employment Relations Act later in 2000 and, in particular, the amendments made to it in 2004 have substantially altered the law in this area.
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> [38] The most significant change has been the enactment of s 103A set out above. As the full Court made clear in *Air New Zealand v V*: "In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss." In this case, a critical step in deciding to dismiss Ms Jinkinson was the decision that she would not be appointed to one of the mine technician positions. Put another way, had Ms Jinkinson been appointed to one of the mine technician positions, she would not have been dismissed. Thus, the selection process and its outcome must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.

[66] A number of criticisms of this approach have been made by the plaintiff: first, NZ Steel suggests that the law has reverted to what it was when the Court of Appeal decided *Thwaites*; secondly, it says that s 103A does not explicitly refer to redeployment; and thirdly, it says that any obligation concerning redeployment should be interpreted restrictively to ensure consistency with the right to freedom of association.

[67] NZ Steel submitted that the law is or should be, if applied correctly, the same as what it was when the Court of Appeal decided *Thwaites* because s 103A was amended in 2011 to the present wording of "could" rather than "would". It says that when the Court of Appeal decided *Thwaites*, it was in essence applying the "could" test.

[68] It is correct that *Jinkinson* is distinguishable insofar as it applied the "would" test rather than the "could" test. However, that does not mean that *Jinkinson* is no longer good law. NZ Steel's submission ignores the entirely different statutory frameworks within which each case was decided. As noted by the Court in *Jinkinson*, the introduction of the Employment Relations Act with its subsequent amendments (not just the introduction of s 103A) substantially altered the law in this area.

[69] Section 4(1A)(a)–(c) states:

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[70] This can be compared with the Court of Appeal's statements in *Thwaites* that the obligation to deal fairly with the employee does not extend beyond the job in which the employee is contracted to be employed.[19]

[71] The Employment Relations Act moves away from a focus on the contract between parties to not only a recognition but a promotion of good faith employment relationships. The effect of s 4(1A)(b) is that an employer has an obligation to be active and constructive in maintaining an employment relationship with its employees. This is clearly broader than the narrow obligation referred to by the Court of Appeal in *Thwaites* where the focus is on the position held by the employee and the terms of the contract, rather than the relationship between the parties. Therefore, I consider that *Thwaites* can correctly be distinguished.

[72] However, if s 4(1A)(b) provides the basis for a merits review of a redeployment decision, it should not be over-applied. When reviewing the merits of a decision, the role of the Court is proscriptive rather than prescriptive. The Court is not always well placed to conclude whether redeployment should be offered, but it can, after considering the reasons for a refusal or failure to redeploy, conclude that those reasons were not substantively justified or that the process that was followed to reach them was not fair and reasonable. Where an employer has not actively and constructively

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19 *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 12, at [25].

sought to maintain the employment relationship in breach of s 4(1A)(b) or the reasons for not redeploying were not justifiable, a dismissal will be unjustified.

[73] This does not mean that there is an absolute duty to offer redeployment in all cases.

[74] Typically, where an employer has carried out a robust consultation process and has actively and constructively considered redeployment, has been responsive and communicative throughout the process and then has good reasons for not redeploying, it will be difficult for an employee to claim that they have been treated unfairly and that the decision is unjustified.

[75] As noted in NZ Steel's submissions, the test requires the Court to assess whether an employer could take the action they did, not whether a fair and reasonable employer would take that action. The substantive merits of the decision must be considered in that context. This test is well established. It is applied by the Authority and the courts on a regular basis.

[76] Chief Judge Inglis has summarised it helpfully in the recent decision of *Wilson-Grange Investments trading as The Grange Bar and Restaurant v Guerra* as follows:[20]

> An employer's actions are to be measured against those that a notional fair and reasonable employer could have taken. That may usefully be conceived of as a target. The bullseye of the target is "employer best practice" and the outer circles of the target comprise "acceptable action". Towards the outer edges of the target lie the danger zones. Anything off the target is not what a fair and reasonable employer could have done. The size of the target will depend on "all of the circumstances at the time", as s 103A(2) expressly states.

[77] NZ Steel also submitted that *Jinkinson* is in doubt because if Parliament had intended to create redeployment obligations with s 103A, it would have done so explicitly. However, this submission does not engage with the reasoning in *Jinkinson* where the Court focused on the relationship between s 4(1A)(c) and s 103A. Section 4(1A)(c) applies to redeployment obligations in the context of redundancy because any decision concerning redeployment will adversely affect the continuation

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[20] *Wilson-Grange Investments trading as The Grange Bar and Restaurant v Guerra* [2023] NZEmpC 39 at [41].

of the employee's employment, and s 103A applies s 4(1A)(c). Therefore, s 103A necessarily has an effect on redeployment obligations. Similar reasoning applies in respect of s 4(1A)(b).

[78] Further, if we are in any doubt, s 4(4)(e) specifically states that the duty of good faith in s 4(1) (which includes s 4(1A)) applies when making employees redundant.[21]

[79] NZ Steel also submitted that *Jinkinson* is in doubt because it restricts the right to freedom of association, which is protected in s 17 of the New Zealand Bill of Rights Act 1990. However, the right to freedom of association is often restricted by the rules of employment law. In most cases, it is clear that those limitations are demonstrably justifiable under s 5 of the New Zealand Bill of Rights Act. Where a limitation on a right is justified, it is not necessary to subsequently assess whether there are rights consistent with interpretations available under s 6 of that Act.[22]

[80] The test for whether a limit on a right is justified was set out by the Supreme Court in *Hansen v R*.[23] This is that:

(a) it is prescribed by law;

(b) it serves a sufficiently important objective or purpose to warrant limiting the protected right or freedom;

(c) the means chosen to achieve the objective must be proportionate to the importance of the objective – this has several elements:

(i) rational connection – is the limiting measure rationally connected with its purpose?

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21 It also applies during consultation (s 4(4)(c)) and when making a proposal that might impact on employees (s 4(4)(d)).

22 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [37]–[53].

23 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1. The Court adopted the approach of the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103.

(ii) minimal impairment – does the limiting measure impair the right or freedom no more than is reasonably necessary to achieve that purpose?

(iii) proportional effect – the benefits achieved by the measure must not be outweighed by the significance of the limitation of the right.

[81] When considering whether a limitation is prescribed by law, it is necessary to consider how the limitation arose. In the present case, the right is limited by a combination of ss 4(1), 4(1A), 4(4)(c)–(e) and 103A of the Act. The nature of the limitation in this instance is that before an employer can dismiss an employee due to redundancy, they must consider whether the employee can be redeployed. While considering redeployment, the employer must consult in accordance with s 4(1A)(c) and do so in a way that is active and constructive in maintaining a productive employment relationship (s 4(1A)(b)).

[82] The limitation clearly serves the object of the Act, which is to build productive employment relationships through the promotion of good faith.[24] Similarly, it is clear that the limitation is proportionate to the importance of the object as it only requires employers to act fairly and reasonably in accordance with their duty of good faith. As there is no strict obligation to redeploy where a fair and reasonable employer could choose not to do so, the limitation of the right is not over-broad and does not outweigh the benefit of requiring employers and employees to act in good faith towards each other. As a result, I consider that the limitation is justified and that it is not necessary to consider whether the limitation may be avoided by other interpretations of s 4 or s 103A.

Conclusion

[83] I do not accept NZ Steel's submission that *Thwaites* remains good law and that *Jinkinson* was decided in error which has subsequently been perpetuated. The legislation and legislative framework has changed significantly resulting in *Thwaites*

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[24] Section 3(a).

being superseded. However, *Jinkinson* also needs to be applied with care given the amendments to s 103A in 2011. The right to freedom of association does not change this analysis in any way.

[84] The proper approach for employers when considering redeployment is that, when considering whether to dismiss an employee after their position has been made redundant, an employer must consider whether to redeploy the employee. When considering redeployment, the employer must comply with the good faith obligations in s 4 and, in particular, must consult with the employee in accordance with s 4(1A)(c). Finally, when deciding whether to redeploy the employee, the employer must be active and constructive in maintaining the employment relationship in accordance with s 4(1A)(b) including being responsive and communicative.

[85] For completeness, I observe that these obligations arise during the redundancy process. As was held in *Gafiatullina v Propellerhead Ltd*: "An employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation."[25] Therefore, where these redeployment obligations are breached, the fairness of the entire redundancy process will be affected.

[86] The question in this case is did NZ Steel meet those obligations?

The facts

[87] As already noted above, phase one of the restructuring of the IS department was confirmed on 3 September 2019.

[88] On 2 September 2019, the position of Area Project Manager in Engineering Services at Glenbrook was advertised, with applications closing on 15 September 2019. At the same time, another Area Project Manager role within NZ Steel's subsidiary Pacific Steel was advertised.

[89] Mr Haddad returned to work from leave on 23 September 2019.

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[25] *Gafiatullina v Propellerhead Ltd,* above n 6, at [111].

[90] On 24 September 2019, a company-wide email was sent seeking expressions of interest for the three newly created managerial positions.[26] The notice advised that the link was open to NZPI (New Zealand & Pacific Islands) employees only.

[91] Expressions of interest had already been received from Brett Wyatt, a member of the IT infrastructure team for the positions of Platform Integration Manager and Legacy Platform Support Manager. Mr Wyatt submitted these on 30 August 2019 (before the restructure was confirmed) because he was going to be away on leave for an extended period of time.

[92] As already noted above, on 2 October 2019, Ms Toeke and Mr Johnson met with Mr Haddad to advise him of the proposal to restructure the Process Computing department and, among other things, disestablish his position.

[93] Mr Haddad made it clear from the outset that he wished to be considered for redeployment.

[94] On 3 October 2019, he emailed Ms Toeke advising her that it was logical for him to apply for the Legacy Platform Support Manager role where he could still contribute to IS and NZ Steel.

[95] On 4 October 2019, by way of an email to Ms Toeke, he confirmed that if the proposal went ahead, he did not want redundancy. He made it clear that he was open to discussing any potential position at the same level as his current position or better within the company, not only the IS current open positions.

[96] On the same day Mr Johnson sent an email to Mr Dale, updating him on the recruitment to date. He noted that he had a few internal people apply for the new IS roles, stating:

- Platform Integration Manager
  - [Name] – Currently at Pacific Steel IT. Could probably do the job but I'd like to give him some specific, measurable goals to see if he would fit.

[26] Business Engagement Manager, Legacy Platform Support Manager and Platform Integration Manager.

- Business Engagement Manager
  - [Name] – Long term contractor. I don't see him as leadership material
  - [Name] – Not technical but would work well from a Service Provider viewpoint
- Legacy Platform Manager
  - Brett Wyatt – Would be a good opportunity for him and he understands the platform.[27]
  - [Name] – Not leadership material and is basically looking for more money.
  - *[Ra'ed] Haddad – Saving his bacon.*

If possible, it would be good for you to interview [name] & [name] next week to get your viewpoint. *I would be happy to appoint Brett to the Legacy Platform Manager* and appoint [name] as interim manager with specific objectives.
[emphasis added]

[97] On 11 October 2019, Kathryn Nicholas (People and Capability Business Partner, Primary Operations and Mining Services) interviewed both an internal and external applicant for two Project Manager roles.[28]

[98] On the same day, Mr Haddad wrote to Ms Toeke attaching his CV and cover letter, expressing his interest in applying for other positions within NZ Steel. He noted that his skillset, along with his 21 years of professional experience, was easily transferrable into other roles within the company, and advised that he was especially interested in the Project Manager role in Engineering Services, as well as the newly created Legacy Platform Support Manager role. He also noted that he was open to exploring other available roles which might suit him, or opportunities that might promote his personal development within the company.

[99] On 14 October 2019, Ms Toeke thanked Mr Haddad for his feedback and CV details. She advised him that she and Mr Johnson would be reviewing the feedback with Mr Dale before bringing the team back to discuss next steps and that once the structure was confirmed, they could then meet and, if necessary, discuss what current vacancies there were.

[100] Ms Toeke did not take any steps in relation to Mr Haddad's interest in the Project Manager roles.

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[27] Despite Mr Wyatt applying for both the Legacy Platform Support Manager and Platform Integration Manager roles, in this correspondence, Mr Johnson only noted him as applying for the Legacy Platform Manager role.

[28] See [88] above.

[101] On 15 October 2019, Mr Johnson emailed Mr Dale. He noted that there had been three applicants for the Legacy Platform Manager role, including Mr Wyatt and Mr Haddad, with CVs attached, and that there had been one applicant for the Platform Integration Manager role. He omitted to advise that Mr Wyatt had applied for both the Legacy Platform Support Manager and Platform Integration Manager roles or that Mr Wyatt considered his skills better suited to the Platform Integration Manager role.

[102] On 18 October 2019, Mr Haddad emailed Ms Toeke, noting that the Project Manager vacancies were no longer advertised and that he was not sure how this was going to affect him since he had not heard anything. She still did not take any steps in relation to his inquiries about the project management roles.

[103] On 22 October 2019, on his return from leave and at the request of Mr Johnson, Mr Wyatt provided an updated copy of his CV and a letter of application for the Platform Integration Manager role.[29] Later that day, he also emailed a letter of application for the additional role of Legacy Platform Support Manager consistent with his previous advice but noted that he considered the Platform Integration Manager would be most suited to his skill and knowledge level.

[104] On 22 October 2019, an offer of employment was made to an internal applicant for the Project Manager role in the Engineering Services team. He later declined this offer.

[105] On the same date, Mr Haddad emailed Ms Toeke following up on his email and a phone call he had made the previous Friday (18 October 2019), asking whether Ms Nicholas[30] had answered questions in regard to the Project Manager role.

[106] On 23 October 2019,[31] Ms Toeke finally responded in relation to the Project Management roles and advised Mr Haddad that the Project Manager role for Glenbrook had been appointed and that the Project Manager role for Pacific Steel was under offer. Mr Haddad noted his concern that he had not even had a chance to be interviewed for these roles.

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29 His previous application was by way of an email as opposed to a letter.
30 A human resources practitioner in another team within NZ Steel.
31 Twelve days after Mr Haddad had expressed an interest in the roles.

[107] The next day, on 24 October 2019, Ms Toeke and Mr Johnson met with Mr Haddad, confirming that the Process Computing department restructure was proceeding and that his position would be disestablished.

[108] Mr Haddad immediately wrote a cover letter (attaching his CV) to them both, applying for all three Information Services positions.

[109] On 25 October 2019, he provided an updated version of the position description of Process Computing Manager to illustrate his skills and capabilities.

[110] It was either in this meeting or in a meeting that took place the previous day that Mr Haddad says Mr Johnson said to him that "you are not quite a match for any of those roles".

[111] Mr Johnson denies making that statement. He says that his comment was that Mr Haddad would not necessarily be a match for all of the roles. In other words he should think carefully about which role or roles his skills were most aligned with and apply for that one. He says Mr Haddad misconstrued his comment.

[112] Ms Toeke and Mr Haddad met with Mr Johnson on 25 October 2019 to discuss the process of redeployment and what suitable opportunities he wished to express an interest in. From that discussion it was confirmed that he would be interviewed for the three management positions in the following week.

[113] The arrangements in relation to the interviews were confirmed in an email from Ms Toeke to Mr Haddad on 30 October 2019.

[114] Mr Haddad responded to Ms Toeke advising that he was still deciding whether to attend the interview or not. He confirmed that he was interested in taking other positions but took issue with having to apply for them. His view was that the company had an obligation to redeploy him without going through an interview. He considered that Messrs Johnson and Dale could decide which position was suitable by judging him on his achievements over the last seven years.

[115] Ms Toeke confirmed that the positions were contestable, that there were other internal applicants and that if he wished to be considered for one of the positions, he needed to be interviewed.

[116] On 31 October 2019, Mr Haddad advised the company that he considered the roles were almost identical to his current role, were clearly within his capabilities, and that the company was obliged to offer the role to him without the need for him to attend an interview. He also noted that he was the only individual directly impacted by the restructure. He went on to say that he saw no point in attending that afternoon's interview as the company had declined to offer the role to him and had already indicated that it did not consider that he was the right fit for it. He said he was referring to Mr Johnson's statement to him that "you are not quite a match for any of these roles". He advised that he had found the process extremely stressful and humiliating and that he did not wish to put himself through further stress by attending an interview when it was evident that the outcome had already been determined and his application would be unsuccessful.

[117] Ms Toeke denied this and suggested that they meet with Mr Haddad. She said it did not need to be a formal interview but that a meeting would allow both parties to establish suitability and talk about next steps.

[118] Over the period 1 November to 5 December 2019, various correspondence was exchanged via email between Mr Haddad and the company including between his lawyer and the company about the need for him to be interviewed for the new IS management roles.

[119] Mr Haddad maintained that he had been with the company for seven years and his competency and qualifications were well known to NZ Steel,[32] that he had the skills and competencies for all three positions, that they were similar to his current role, that he was happy to enter into a professional development plan and that he was willing to take on whichever of the roles Messrs Johnson and Dale thought him the most suitable for.

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[32] He also provided a CV and updated version of his current position description.

[120] Further, Mr Haddad said he should not be required to and did not want to put himself through the stress and humiliation of an interview, when it was apparent to him that the outcome was obvious from the outset – he would not be appointed.

[121] His view was that the company had an obligation to redeploy him into one of the roles, especially as he was the only employee who was displaced as a result of the restructuring.

[122] The company, through Ms Toeke, maintained the position that it was not obliged to offer Mr Haddad one of the roles because they were different from his current position, it was a contestable process, there were other applicants that the company was obliged to treat fairly as well, and it needed to interview him so as to ascertain his suitability for any of the roles. It denied it was predetermined.

[123] During this period, NZ Steel offered Mr Haddad the role of Process Computer Engineer. On 22 November 2019, he met with Ms Toeke to discuss the role. However, as it paid significantly less than his current role, he decided not to take up the offer. He was concerned that they had reduced the pay to make it unattractive to him.

[124] Mr Haddad sought and was provided with further information in relation to the restructure.[33]

[125] After considering the material, on 5 December 2019, Mr Haddad's lawyer advised that Mr Haddad would not attend an interview because NZ Steel was required to offer him a role, had no legitimate reason for not offering one, was being disingenuous and breaching good faith in inviting him to apply, and was putting him through the stress of an interview when it would not genuinely consider him.

[126] On 9 December 2019, NZ Steel wrote to Mr Haddad noting that following restructuring, the company had attempted to identify any suitable positions that he could be redeployed into, that one possibility was that he might fill one of the three vacant managerial roles, and that he was given an opportunity to apply and be interviewed for those positions but had declined to do so. NZ Steel advised that it

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[33] He says he was not provided with all of the documentation sought.

considered that it had now exhausted the possible options for redeployment and as a result Mr Haddad's employment was terminated due to redundancy.

[127] It elected to pay him in lieu of notice;[34] therefore his final date of employment was 9 December 2019. A sheet was attached to the letter setting out his redundancy compensation and various leave entitlements. Mr Haddad received $114,556 by way of redundancy compensation and $36,739 by way of various leave entitlements.

Analysis

[128] It is apparent from the above course of events that Mr Haddad began actively seeking redeployment as early as 3 October 2019, the day after the proposal was put to him.[35] On 11 October 2019, he specifically asked about the project management vacancies. Despite this, NZ Steel did not take any steps in this regard.

[129] NZ Steel agrees that Mr Haddad is capable of performing project management roles.[36] The position he is currently reinstated into is that of Project Manager – Engineering Services.

[130] NZ Steel's actions, or inaction, leading up to 24 October 2019 are problematic. Mr Haddad specifically asked to be considered for the project management roles. However, he was denied the opportunity to be considered for them because NZ Steel failed to respond to his queries. Further, despite the offer to one of the applicants not proceeding, NZ Steel gave no consideration to Mr Haddad for the role, even though he was still employed at the time.

[131] Given what I have found above in relation to the inevitability of the disestablishment of Mr Haddad's position as Process Engineering Manager, it was unfair of NZ Steel to fail or refuse to begin considering redeployment until 24 October 2019, after the decision to proceed with the restructure had been notified. Even if it had not been predetermined, NZ Steel had an obligation to be responsive and

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34 Four weeks.
35 See [93]–[95] above.
36 Depending on the nature of the project.

communicative.[37] It was not. I consider that this failure prejudiced Mr Haddad, in particular in relation to the project management roles.

[132] In relation to the IS management roles, Mr Haddad's applications were not treated with the seriousness or respect due to an existing employee to whom good faith obligations are owed.

[133] Mr Johnson's email to Mr Dale of 4 October 2019 made substantive observations (both positive and negative) in relation to all of the applicants but dismissively referred to Mr Haddad as "Saving his bacon".[38]

[134] At the time, Mr Haddad (not unreasonably) thought the position of Legacy Platform Manager to be the most suitable, as three of his staff had been moved to report to it and there was some cross-over with his skillset and capabilities. Despite that, it is apparent that Mr Johnson intended to appoint Mr Wyatt to the Legacy Platform Manager position from the outset.[39] While Mr Johnson denies that is the case, his email correspondence indicates otherwise. When corresponding with Mr Dale, Mr Johnson referred to Mr Wyatt as only applying for the Legacy Platform Support Manager role. This is despite Mr Wyatt on more than one occasion specifically stating his preference for the Platform Integration Manager role on the basis that he considered his skillset more suited to it. The "Saving his bacon" email also expressly says that Mr Johnson would be happy to appoint Mr Wyatt to the role.[40]

[135] While I accept that Mr Johnson was not the sole decision maker, and that Mr Dale was also involved in the interviews, we do not know his views as he did not give evidence. The view of Mr Johnson (who was running the process), however, was clear.

[136] Accordingly, Mr Haddad's application, in regard to that position at least, was not being dealt with in good faith. Nor was he treated fairly and reasonably.

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37 Employment Relations Act 2000, s 4(1A)(b).
38 See [96] above.
39 Mr Wyatt was appointed to that role. The other positions were not filled.
40 See [96] above.

[137] Mr Johnson denies making the statement that Mr Haddad was not quite a match for any of the roles; he says that his comment was that Mr Haddad would not necessarily be a match for all the roles, which is why an interview was necessary. I accept Mr Johnson's evidence that Mr Haddad misconstrued his statement. This is consistent with Mr Johnson's comment to Ms Toeke in an internal email, that those were not the words he had used.

[138] However, I consider that Mr Johnson's generally dismissive view of Mr Haddad was likely to have been apparent to him and would account for his interpretation of what was said in that meeting.

[139] In relation to Mr Haddad's ultimate refusal to attend an interview in relation to the IS management positions, on the basis of his treatment to that point, including what he says Mr Johnson said in the meeting on 24 October 2019, his position is understandable but unwise. Mr Haddad should have put NZ Steel to the test.

[140] I accept that Mr Haddad was offered the less senior role of Process Computing Engineer.[41] However, even this was not straightforward. Mr Haddad's evidence, which was not disputed,[42] was that the vacancy had previously been advertised at a higher remuneration level because the company had had difficulty filling it. However, when it was offered to Mr Haddad, the remuneration band was back to what it was normally and significantly less than the salary he was receiving at the time.

[141] I do not consider that it was unreasonable of NZ Steel to return the role to its normal salary banding. However, it is understandable that Mr Haddad would have perceived it as yet another example of NZ Steel taking steps to make staying in the organisation unattractive.

[142] Accordingly, taking into account all the circumstances set out above, I do not consider that NZ Steel treated Mr Haddad fairly and reasonably in relation to redeployment. In particular, I do not consider that it was active and constructive in maintaining the employment relationship. The failure to engage with him in relation

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41 In this regard, it met the requirements of *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55.

42 Although Ms Toeke says this was a mistake.

to the project management roles was not responsive and communicative. Mr Haddad was prejudiced by these failures.

[143] Mr Johnson's predetermination to appoint Mr Wyatt to the role of Legacy Platform Manager was also unfair to Mr Haddad. He was not treated fairly and reasonably in the selection process for that role. That there were two other roles to apply for does not detract from that breach.

[144] NZ Steel did not meet its obligations to Mr Haddad, either contractually or as a matter of good faith in relation to redeployment. His dismissal was unjustified.

[145] In the circumstances, I do not consider it necessary to make findings in relation to the extent to which the new IS managerial roles were different from the role of Process Computing Manager and/or whether Mr Haddad had the skills and experience for those roles. Nor do I consider it necessary to make a finding in relation to Mr Haddad's attendance or not at the interview. The breaches arose before any interview would have taken place. I note, however, that it is a high risk strategy to refuse to attend an interview and that, as an alternative, an employee could consider recording their concerns and then attending on a without prejudice basis. In that way, as the former Chief Judge aptly put it, the employer can be put to the test.[43]

Conclusion

[146] The decision to disestablish Mr Haddad's position did not follow a fair and reasonable process and was unjustified.[44]

[147] Further, NZ Steel did not treat Mr Haddad fairly and reasonably when considering redeployment.[45] This was in breach of both the terms of his employment agreement and also NZ Steel's obligation of good faith. In particular, it failed to be active and constructive in maintaining the employment relationship, or responsive and communicative. Overall, the redundancy process was carried out unfairly, and this unfairness was exacerbated by NZ Steel's breaches of its redeployment obligations.

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43 *Rolls v Wellington Gas Co Ltd* [1998] 3 ERNZ 116 (EmpC) at 125.
44 See [32]–[43] above.
45 See [128]–[144] above.

[148] As a result of these breaches, Mr Haddad was unjustifiably dismissed.

[149] Having reached this conclusion, I turn to consider the issue of remedies.

Remedies

Reinstatement

[150] Reinstatement is the primary remedy in proceedings for unjustified dismissal.[46] The remedy of reinstatement is to the employee's former position or one no less advantageous.[47] It must be awarded wherever practicable or reasonable to do so.[48]

[151] Mr Haddad is currently reinstated to the role of Project Manager in the Engineering Services department which is a role similar to those I have found should have been considered at the time of the restructuring but were not.[49] Counsel for NZ Steel has accepted that in the event of a finding of unjustified dismissal, in particular where that finding relates to the conduct of the company in relation to redeployment, there is not a strong argument to say that reinstatement is not practicable or reasonable.

[152] I consider that reinstatement is appropriate in these circumstances. Mr Haddad worked for NZ Steel for seven years before his dismissal. While there were moments of friction, there was no evidence of anything in his formal employment record that would preclude reinstatement. NZ Steel is a large well-established company. It has been able to accommodate Mr Haddad's reinstatement to date. It can continue to do so.

[153] I consider that the current position that Mr Haddad has been reinstated to is appropriate given the findings I have made in relation to the breaches against him. His previous position does not exist. The terms of the project management role are no less advantageous,[50] and reinstatement of Mr Haddad to a project management position, as he currently holds, is a just and equitable outcome.

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46 Employment Relations Act 2000, s 125.
47 Section 123(1)(a).
48 Section 125(2).
49 The roles advertised were Area Project Managers.
50 Mr Haddad is on the same salary as previously and while he is not managing staff, he has to manage key relationships (both internal and external) and has a high level of responsibility.

Reimbursement of lost earnings

[154] Mr Haddad is seeking reimbursement of lost remuneration during the period from the date of his dismissal on 9 December 2019 until 13 April 2021 when he was reinstated to the payroll of NZ Steel. He also seeks holiday pay on any lost earnings awarded.

[155] NZ Steel submits that the order made by the Authority, which allowed three months' lost remuneration, plus an additional sum for holiday pay, is sufficient. The Authority awarded Mr Haddad a sum of $41,623.20 and this sum has already been paid.

[156] Section 123 of the Act states that the Court may, in settling a grievance, provide for "the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance".[51] Section 128(2) clarifies that reimbursement will normally be limited to "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration." However, s 128(3) allows that the Court "in its discretion" may award a greater sum where appropriate.

[157] I accept that this is an appropriate case for the discretion under s 128(3) to be exercised in light of the fact that Mr Haddad has been reinstated and also taking into account his efforts to regain employment over what was a difficult period during 2020.

[158] In considering the extent to which Mr Haddad's losses should be remunerated, I observe that it was by no means certain that he would have been dismissed irrespective of NZ Steel's procedural defects. If Mr Haddad had been consulted from the very beginning of the process and been engaged with in good faith throughout, the whole outcome of the restructure and redeployment process might have looked very different. In light of the severity of the breaches that began at the very beginning of the process, it is not possible to make any conclusions about whether Mr Haddad may or may not have been dismissed in any event.

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51 Section 123(1)(b).

[159] Therefore, subject to any reductions which will be discussed below,[52] it is appropriate to apply s 128(3) to order reimbursement of the whole of the wages Mr Haddad has lost since his dismissal.

[160] In calculating the sum payable to Mr Haddad, it will be necessary to reduce it by the sum of $41,623.20 which has already been paid as a result of the Authority's determination.

[161] Additionally, it is appropriate that the sum of wages does not include the payments Mr Haddad received from ACC. If he were to receive full salary payments for this period, this would amount to a double payment which would be an inequitable windfall for him.

[162] Mr Lapthorne submitted that the Court should not take ACC payments into consideration when calculating lost remuneration. He relies on *Judea Tavern Ltd v Jesson*.[53] While I agree that is normally the position in relation to payments from agencies like ACC or the Ministry of Social Development where repayments may need to be made, the present case can be distinguished because Mr Haddad has been told that he is not required to pay the amounts back.

[163] Mr Pearce submitted – and I agree – that reimbursement for lost earnings is for exactly that – a loss. Where that loss has been mitigated or reduced by other earnings, it is not open to the Court to award more than the actual loss. That would be contrary to the intention of s 123(1)(b) of the Act. Therefore, I consider the case at hand can be distinguished from *Judea Tavern* due to the advice from ACC.[54]

[164] Therefore, the award can be calculated in the following manner. Mr Haddad is to be compensated for the entire period from 9 December 2019 until 13 April 2021, taking into account any ACC payments. He must be restored to the financial position that he would have been in if he had not been dismissed. This includes holiday

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52 The redundancy payments made to Mr Haddad are discussed separately.

53 *Judea Tavern Ltd v Jesson* [2017] NZEmpC 82 at [40].

54 ACC's position may relate to NZ Steel being an accredited employer, and so it may have contributed to the payments received by Mr Haddad. The evidence on this was unclear. What was clear was that Mr Haddad was not required to pay it back.

pay/leave entitlements which would have accrued during that period[55] and all other financial job-related benefits that he would have been entitled to. Once the total sum is calculated, the sum of $41,623.20, which has already been paid, can be subtracted. The parties ought to be able to make these calculations themselves but may seek further guidance from the Court should they be unable to do so together.

Redundancy compensation

[165] When Mr Haddad's employment was terminated, he received a contractual redundancy payment of $114,556 (gross) and outstanding leave of $36,738.73 (gross).

[166] Mr Haddad submits that the redundancy compensation should not be offset against his claim for loss of earnings for unjustified dismissal. He relies on *Muru v Coal Corp of NZ Ltd* where the Court held:[56]

> ... if redundancy compensation is paid for a job loss then that does not rule out compensation for humiliation, loss of dignity and injury to feelings; neither does it rule out reimbursement of any proved remuneration loss, if one or both is justly payable on its own grounds in the particular facts of any case.

[167] However, NZ Steel correctly observes that in *Muru* the employee was not reinstated. In the same judgment, the Court held:[57]

> ... dismissal for redundancy and payment of redundancy compensation ... are inseparably linked. The job has gone, in its place, inadequate though it may be, is a sum of money. If the redundancy is never reversed, why should one ever contemplate repayment of the money? The compensation, one might think, should stay where the loss is, i.e. with the employee. It is compensation for that loss. It seems to me a long leap of logic to propose that if the redundancy dismissal occurred by mistake then the compensation paid for that was a windfall. While the redundancy remains then surely a contractual agreement to compensation must remain good.

[168] In particular, I observe the statement: "If the redundancy is never reversed, why should one ever contemplate the repayment of the money?". As the redundancy has been reversed in the present case, it is necessary that the funds be repaid unless the

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55 Outstanding leave accrued prior to the termination of Mr Haddad's employment is discussed in the context of redundancy below.

56 *Muru v Coal Corp of NZ Ltd* EmpC Auckland AEC 19/97, 12 March 1997 at 9.

57 At 8.

parties come to a different arrangement by agreement. This means that the sum of $114,556 (gross) will need to be repaid by Mr Haddad.

[169] The other sum of $36,738.73, which related to outstanding leave entitlements, is more complicated. Mr Haddad's redundancy notice states that the payment was constituted by the following:

> You will be paid your outstanding annual and long service leave, plus the previous 3 years unused sick leave.
>
All outstanding Annual leave liability	$12,026.10	16.92 days
All outstanding Long Service leave liability	$0.00	0 days
All outstanding Alternative days liability	$0.00	0 days
Unused Sick days over last 3 years	$11,562.00	19.5 days
Accrued Long Service leave	$13,150.63	18.5 days
	$36,738.73	

[170] If Mr Haddad were to repay the sum of $12,026.10 which related to his outstanding annual leave, NZ Steel would need to restore his previously accrued leave entitlements. The parties ought to be able to agree which option to take.

[171] The parties appear to have already dealt with Mr Haddad's sick leave entitlement, the balance of which (nine days) has been reinstated.

[172] The sum of $13,150.63 which relates to accrued long service leave is more difficult. The parties should come to an agreement about whether that payment should be repaid or other arrangements made. Care should be taken to ensure that Mr Haddad is placed in the same or better position than he would have been in had he not been dismissed.

Compensation

[173] Mr Haddad seeks compensation of $40,000 whereas NZ Steel submits that the sum of $15,000 awarded by the Authority is sufficient.

[174] In *Richora Group Ltd v Cheng,* Chief Judge Inglis established that there are three bands for compensation:[58]

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[58] *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].

(a) Band 1: Up to $10,000

(b) Band 2: $10,000–$40,000

(c) Band 3: $40,000 and above

[175] When considering what band is appropriate, it is necessary to consider the harm and the extent of the loss suffered.

[176] As has already been set out above, NZ Steel's breach of good faith was serious. Mr Haddad states, and I accept, that the company's actions had a devastating effect on him and his family. Its actions caused him considerable anxiety and placed considerable stress on him in respect of his finances. Mr Haddad states that this caused him to lose confidence and self-esteem. The severity of the harm suffered was worsened by the dismissive attitude towards him shown by some within NZ Steel at the time of his dismissal – an attitude illustrated by the remark "Saving his bacon", which was made about him.

[177] Both parties agree that Band 2 is the appropriate band but disagree about what end of the band is appropriate. Overall, I consider that a sum of $25,000 is appropriate compensation. Mr Haddad has already been paid $15,000 compensation previously ordered. Accordingly, he is now entitled to a further $10,000.

Interest

[178] Mr Haddad also claims interest calculated at the rate of five per cent pursuant to the Judicature (Prescribed Rate of Interest) Order 2011. However, in all the circumstances, it would not be appropriate to order interest in light of the fact that Mr Haddad has had the financial benefit of substantial sums from NZ Steel over the relevant period, some of which will need to be repaid.

Contribution

[179] NZ Steel submits that any remedies should be reduced for contribution. Given my findings above, there is no basis for a reduction in the remedies due to Mr Haddad.

He was active and constructive in relation to his pursuit of redeployment from early in the restructuring process. It was NZ Steel that did not meet its obligations in this regard.

Outcome

[180] The challenge is unsuccessful. The Authority's determination is set aside, and this decision stands in its place.

[181] Mr Haddad's dismissal from NZ Steel was unjustified.

[182] The following orders are made:

(a) NZ Steel is ordered to reinstate Mr Haddad in accordance with the conditions set out above at [153].

(b) The parties are to agree what sums must be paid by each party and what entitlements must be restored in accordance with the guidance set out above at [164] and [168]–[172] with the proviso that further guidance may be sought from the Court where agreement is not possible.

(c) NZ Steel is ordered to make a payment to Mr Haddad of $10,000 as compensation pursuant to s 123(1)(c)(i) of the Act, being the difference between this Court's finding of $25,000 and $15,000 previously ordered and paid.

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

Kathryn Beck
Judge

Judgment signed at 4 pm on 5 April 2023