

Redundancy – Justifying a decision to dismiss

In the recent decision of *Grace Team Accounting v Brake*, the Court of Appeal has ruled on the correct approach to assessing whether dismissal in a redundancy situation is justified.

The decision signals that it will no longer be enough for an employer simply to assert a decision to dismiss for redundancy is justified on the basis it is a genuine commercial decision, without any ulterior motive.

When reviewing the decision to dismiss an employee, the Employment Court will not only consider whether the decision was genuine (and not a pretext for dismissing a disliked employee) but also whether the employer's decision is based on substance and in compliance with its consultation obligations imposed under section 4 of the Employment Relations Act 2000 (**the Act**).

**Stuart Dalzell (Partner) and James Wollerman (Senior Associate) discuss the case and key points of the judgment below*

Facts:

Ms Brake entered into an individual employment contract with Grace Team Accounting (**GTA**) in August 2009. She commenced work in

October 2009, assured her position with GTA would be long-term. Between March and April 2010 GTA undertook a review of client files and the financial performance of the company. The review found that GTA's annual turnover was significantly down from previous years.

In light of the review, GTA decided to make two employees redundant on a '*last on first off*' basis. It was determined that Ms Brake's position would be made redundant as she was *last on*.

Unaware of the redundancy discussions, Ms Brake advised her manager she required leave to visit her doctor because she had leukaemia. Ms Brake's condition was stable and her health did not affect her work.

Almost immediately after this discussion, Ms Brake was advised was advised of GTA's proposed restructure and was informed that her position would likely be surplus to requirements. At a further meeting Ms Brake was advised that her position was to be disestablished.

Following an exchange of correspondence between Ms Brake's lawyer and GTA, Ms Brake

met with GTA and it was confirmed that her position was disestablished for economic reasons. Several weeks later it was discovered that the review of GTA's financial performance was incorrect. Rather than suffering a loss of \$61,000, GTA had made a profit of just under \$60,000.

The Employment Court found as a matter of fact that if the mistake in the financial review had not been made by GTA, there would have been no immediate need for the redundancy of Ms Brake. It held that Ms Brake's dismissal was not justified under section 103A of the Act.

Did the Employment Court apply the correct test of justification?

It is a fundamental requirement of New Zealand employment law that every dismissal must be justified by the employer.*

At the time of Ms Brake's dismissal, the test for determining whether a dismissal was an unjustified dismissal was as follows:

*The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer **would**¹ have done in all the circumstances at the*

¹ The section 103A test has now been amended to '...what a fair and reasonable employer **could** have done...'

* The only exception being a dismissal under a trial period under s 67A of the Employment Relations Act 2000, provided the trial period was properly entered into.

time the dismissal or action occurred.

GTA argued that the Employment Court had erred by second-guessing the business decision of a company acting in good faith. Essentially, GTA argued that it is not for the Court to substitute its judgement for that of a company that decides *‘for genuine commercial reasons...a worker is surplus to its needs’*.

The decision of the Court of Appeal

The Court of Appeal upheld the decision of the Employment Court. An assertion by the employer that a decision to dismiss an employee was a *genuine business decision* does not preclude the Employment Court from assessing whether the decision was one a fair and reasonable employer would (now ‘could’ - see note below) have made in the circumstances.

The test under section 103A of the Act, required the Employment Court to *‘determine on an objective basis whether the employer’s actions and how it acted were what a reasonable employer would have done’* in all the circumstances.

Considering section 103A in light of the purposes of the Act (section 3) and the overarching duty of good faith (section 4), the words *‘fair and reasonable employer’* could not be read down to mean ‘genuine employer’. Reference to case law predating the enactment of 103A did not assist the Court of Appeal’s interpretation of the text and purpose of section 103A.

The Employment Court was required to consider whether what was done was what a fair and reasonable employer would have

done in all the circumstances at the time – essentially a recital of section 103A.

Applying the test to the facts the Court of Appeal found that GTA acted precipitously by failing to exercise proper care in its evaluation of its financial information, providing Ms Brake with incorrect information and dismissing her on a false premise.

Damages

The Court of Appeal upheld the damages awarded by the Employment Court, \$65,000 for lost remuneration and \$20,000 compensation for humiliation and loss of dignity.

The award for damages is notable as:

- The compensation awarded to Ms Brake for lost remuneration equated to one year’s lost salary. While the default award under section 128 of the Act provides payment of a sum equal to three month’s lost remuneration, the Court of Appeal upheld the award noting the Employment Court had applied the correct principles outlined in Sam’s Fukuyama Food Services Ltd v Zhang. An award greater than the default amount was justified due to Ms Brake’s working record and the fact she was held in high regard.
- A range or ceiling for which compensation would be awarded for humiliation or loss of dignity had not been set by previous case law. The consequences of the redundancy on Ms Brake were significant and she suffered considerable distress, in particular due to her reasonably held belief she had

been dismissed following disclosure of her illness.

Concluding remarks

This decision practically makes it harder to justify dismissals for redundancy.

As noted above, the decision signals the need for employers to not only justify redundancy decisions on the basis of a genuine commercial decision, but to also ensure they comply with the overarching duties to act in good faith and consult with and disclose relevant information to employees. Practically, employers need to ensure they have a proper and sustainable basis to dismiss an employee which is based on accurate information.