IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 28
ARC 87/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANGELIQUE STEVENS Plaintiff
AND	HAPAG-LLOYD (NZ) LIMITED Defendant

ARC 7/14

IN THE MATTER	a challenge to a determination of the Employment Relations Authority
BETWEEN	HAPAG-LLOYD (NZ) LIMITED Plaintiff
AND	ANGELIQUE STEVENS Defendant

Hearing:	21 July 2014 (evidence of Carmen Pietersen, taken before Judge Inglis); 6-8 August 2014; 24 and 28 August 2014; 4 and 11 December 2014 (further submissions filed)
Appearances:	E Hartdegen, counsel for plaintiff P Kiely and S Worthy, counsel for defendant
Judgment:	12 March 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] Two challenges are before the Court. The first is Mrs Stevens' challenge to a determination of the Employment Relations Authority (the Authority) dismissing her claim that she was unjustifiably dismissed and disadvantaged.[1] The second is a challenge by Hapag-Lloyd (NZ) Ltd (HL Ltd) to the Authority's subsequent costs

[1] *Stevens v Hapag-Lloyd (NZ) Ltd* [2013] NZERA Auckland 461.

determination, finding that although Mrs Stevens had unreasonably declined a Calderbank offer, costs of $2000 were appropriate given her financial circumstances.[2] It seeks costs in the Authority of $20,000.

[2] Both challenges were heard on a de novo basis.

Background

[3] HL Ltd is a subsidiary of the Hapag-Lloyd group, a global shipping enterprise which transports goods around the world to and from various destinations. Mrs Stevens was employed by HL Ltd for around seven years, in the role of Manager, Customer Service Imports. She was no stranger to the shipping industry having previously worked as imports coordinator for another company involved in the business. It is clear that she was a highly regarded and valued employee of HL Ltd and the Imports Team, which she managed.

[4] During 2012 consideration was being given to the possibility that increased efficiencies might be made by off-shoring some imports functions to the Hapag-Lloyd Global Service Centre in Chennai. The proposal emanated from Hapag-Lloyd's headquarters in Hamburg. Mr Carter, the Managing Director of HL Ltd, was not involved in these early discussions. He was advised of a proposed pilot project involving Australia and New Zealand towards the end of November 2012. While a pilot project was proposed, together with a timeframe for its completion, I accept Mr Carter's evidence that it remained open to HL Ltd to explore whether, and if so what, change was feasible and advisable. I also accept his evidence that if changes to the imports function within HL Ltd had not been feasible he would have reported that and the pilot project would not have proceeded in respect of New Zealand. Mr Carter's evidence in this regard was supported by that of the Director Business Administration, Mr Smith.

[5] On 6 December 2012 Mr Carter met with a number of managers, including Mrs Stevens and her manager, Ms O'Brien (Customer Services Director). The purpose of the meeting was to discuss undertaking a review of HL Ltd's import

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2 *Stevens v Hapag-Lloyd (NZ) Ltd* [2014] NZERA Auckland 1 [Authority costs determination].

functions and processes to assess the viability of off-shoring some of this work. It was clear that the proposal, if implemented, would likely have resource implications. Mr Carter made it plain that the review would be undertaken in a consultative and inclusive manner and that feedback was welcome. He emphasised that the intention was to retain staff within HL Ltd, as reflected in the minutes of the meeting. The timeframe for the review was discussed, with proposed completion by the end of March 2013. Mrs Stevens was involved in the review and was also involved in a number of meetings relating to an assessment of the feasibility of the pilot project, assisting in developing HL Ltd's feedback.

[6] As it transpired, in February 2013 HL Ltd concluded that its business may indeed be able to operate more efficiently. In particular, it was considered that the key releasing function (controlling the release of containers at terminals once payment and documentation has been received) could be off-shored. It is this conclusion which underpinned the proposal to restructure the Imports Department.

[7] Mr Carter announced the proposed restructure to Mrs Stevens at a meeting on 28 February 2013. Ms O'Brien was also present. Mrs Stevens was advised that the proposal was that two import coordinator roles, currently reporting to her as Imports Manager, would be transferred to the Documentation Department and that her role would be disestablished. At the meeting Mrs Stevens received a letter confirming the proposed restructure and the purpose of it. The letter advised that the proposal was to reduce the number of import positions from four to two to "create greater efficiencies and productivity levels across the Imports Department" and that "[s]hould the proposed restructure proceed other options of alternative employment within [HL Ltd] will be made available." The proposal was that there would be two available positions in the Sales Support Team, namely a Sales Support Coordinator and a Sales Support Manager position.

[8] Feedback from Mrs Stevens was sought, and a form enclosed for that purpose. She was advised that the feedback would be reviewed and that changes or adjustments to the proposal would then be made. She was also advised that a further meeting would be scheduled with her to discuss the process and to provide an

opportunity to ask any questions she might have regarding her personal situation. A copy of an announcement to staff was enclosed for Mrs Stevens' information.

[9] A document setting out an indicative timeline was also provided to Mrs Stevens, which identified dates for meeting with affected staff to outline the proposal, the timeframe for feedback on the proposal, consideration of the feedback provided and communication of a decision about the final structure and selection criteria, one-on-one meetings with affected employees giving advice of preliminary opportunities for redeployment and final advice about redeployment.

[10] Mrs Stevens raised a number of concerns about the way in which the meeting on 28 February unfolded and the information she was provided with. I did not find her evidence in relation to the meeting straightforward. She suggested that the company deliberately provided ambiguous information to her, prompted by ulterior motives. She said that she understood from the meeting that her role was going to be made redundant and that the decision had already been made. However she later criticised Mr Carter for not telling her that her position would be disestablished.

[11] No formal minutes of the meeting were before the Court. There was, however, a PowerPoint presentation which Mr Carter said formed the basis for discussion. While there is some uncertainty as to the detail of what was discussed with Mrs Stevens at the meeting of 28 February I am satisfied that it was made clear to her that there was a proposal to disestablish her role and that her feedback on that proposal was being sought. The indicative timeline document made it abundantly clear that the proposal was just that – a proposal, and that final decisions had yet to be made. The PowerPoint presentation, which was shown to Mrs Stevens on a large screen, clearly highlighted the reasons underlying the restructuring proposal (to achieve better efficiencies and productivity in the current difficult shipping environment), the details of the proposal and advice as to what it might mean for affected staff, including Mrs Stevens. The current and proposed structure of the Imports Team was presented in a simple, readily digestible, diagrammatic form. The position that Mrs Stevens held was notably, and obviously, absent from the proposed structure. The consultation process was also outlined, together with the proposed timeframes for various aspects of the process. It was proposed that the new structure

would be in place by 1 April 2013. An opportunity was given for questions at the end of the presentation.

[12] A meeting with other members of the Imports Department was also conducted on 28 February. Mrs Stevens attended this meeting too. The PowerPoint presentation was shown again and the details of the proposed restructure and the process that would be followed were outlined. Immediately following the meeting a query was sent on behalf of the Imports Team, to which a response was provided. One of the identified issues related to redundancy:

> Q. Is redundancy an option if a person does not wish to apply for either of the positions?
>
> A. The intention is to redeploy affected employees in similar roles to those held today.
>
> Q. What happens if all 3 coordinators want the doc's position, or the Sales Support position? There are only 2 positions in docs and 1 in SS, does the 2nd/3rd person get made redundant, if so how is that person chosen?
>
> A. The usual selection criteria applies to the Sales Support postings with the most suitable candidate closest to the required skills.
>
> By posting the role internally there may be other opportunities that will present themselves.

[13] Mrs Stevens sent two emails in relatively quick succession to Mr Carter on 4 March 2013. The first was sent at 8.54 am, advising that she had understood following the 28 February meeting that her role would be disestablished on 31 March and that her position would therefore be "subject to redundancy". She went on to say:

> *I seek confirmation that I am entitled to a severance payment* … as per the terms and conditions of my employment contract, clause 7-A.
>
> As this has a significant impact on my employment I require a response by close of business today.
>
> (emphasis added)

[14] The next email was sent at 8.56 am, seeking confirmation that the Import Manager role and one Import Coordinator role would be redundant, advising that this was consistent with verbal advice she had received during the course of the meeting

on 28 February. She also referred to advice she had received that there would be one Sales Support Manager position and one Sales Support Coordinator position, both of which would be posted internally to all staff. She queried whether this was correct, in light of the documentation that had been provided. Mrs Stevens went on sick leave on 5 March.

[15] Mr Carter responded to Mrs Stevens' email on 6 March, advising that under the proposed structure two coordinators would report to the Documentation Manager, Davina Kemp, and that the proposal was to post these roles internally. Mr Carter also sent a consolidated response to a number of queries, including those raised by members of the Imports Team, on 7 March. This response noted, in relation to a concern about whether the consultation was genuine, that Mrs Stevens had been involved in the earlier review and that the extent of off-shoring of some functions had only recently been fully understood, and reiterated that: "[w]e have been clear from the outset we do not wish for redundancy to result, rather continuity of employment for all involved in this process." As to the selection criteria that would be applied, it was said that industry experience, previous experience in a similar role, and individual competencies around the key tasks of the roles would be relevant.

[16] It is apparent that Mrs Stevens did not consider that Mr Carter's response adequately dealt with the issues she had raised. She sent a further email to him on 7 March in the following terms:

> Please could you reply to my below question [of 4 March] as your response to the Q & A regarding my redundancy does not answer my specific question below.
>
> *There is no need for this to be drawn out, I just need a simple yes or no answer.*
>
> *Under the Employment Law my understanding is that I am able to take my redundancy. Please confirm so that I can make my decisions with accurate information.*
>
> (emphasis added)

[17] Mr Carter replied the same day, advising that:

> We have been clear from the outset on redundancy if the proposal is to proceed. We will redeploy in similar roles to those held today. Our objective is to avoid redundancy.
>
> Is that clear enough?
>
> …

[18] Mrs Stevens responded:

> Yes you have been very clear that you want to redeploy however my role will be disestablished in 3 weeks time and you have not offered me any clear indication of the role I will be offered.
>
> *Should I not wish to accept any role within HL my understanding is that I would be entitled to my redundancy payment and this is what I am seeking confirmation on.*
>
> (emphasis added)

[19] Mr Carter replied:

> *Just to close this as I am clear on what you are wanting to hear.* Bearing in mind we are still in the feedback phase of the proposed [re]structure and have made no decisions.
>
> *We are obliged as an employer to seek all opportunities to avoid redundancy which does include retraining and redeployment.*
>
> Should this proposal go ahead the options would look like this – and we would still like feedback from your team on this.
>
> 1. Offer yourself and one Co-ordinator (based on skills and competencies) a role in Sales Support without posting these roles internally. Offer the continuation of roles to other two Import Co-ordinators.
>
> 2. Post both these roles which thereby may create opportunities in other departments other than Sales for both a Co-ordinator and Manager roles. Offer the continuation of roles to the other two Import Co-ordinators.
>
> *In either scenario we do expect that as there are similar roles available at the same grades and terms and conditions, no redundancy will apply.*
>
> (emphasis added)

[20] It must, by this time, have been very clear to Mrs Stevens that Mr Carter was keen to redeploy staff and believed, at that relatively early stage of the process, that an alternative role on the same terms and conditions would be available for her. Mrs Stevens did not reply directly to Mr Carter's email of 7 March. It seems that she saw little point in doing so.

[21] I have dealt with these events in some detail. That is because it is apparent that this period constituted something of a watershed in terms of Mrs Stevens' position on the proposal and the implications that she believed it had for her. It was also during this period that she instructed a lawyer. I think that it is fair to say that Mrs Stevens became entrenched in the view that she was entitled to a payment by way of redundancy compensation from around this time if she chose not to take up another role and that this influenced the way in which events subsequently unfolded. Her mother's evidence reinforces the point. She confirmed in cross-examination that Mrs Stevens had advised her in late February 2013 that she was entitled to a substantial sum by way of redundancy and that she was very stressed about not being paid what she believed she was due.[3]

[22] In a subsequent letter dated 25 March Mrs Stevens' lawyer confirmed to HL Ltd that advice had been provided to Mrs Stevens that her role was redundant and expressed the view that the company's position was simply motivated by a desire to avoid having to pay redundancy compensation. I pause to note that this theory relating to the company's underlying motivations was one that Mrs Stevens returned to during the course of evidence.

[23] To return to the chronology, Ms O'Brien went to visit Mrs Stevens at home on 8 March. The purpose of the visit was essentially two fold – pastoral (to see how Mrs Stevens was) and to reassure her that if she took on the Sales Support Manager role she would be adequately supported. Ms O'Brien's recall of the meeting was clear and I accept her evidence as to what was, and was not, discussed. In particular I accept that no discussion took place in relation to the Documentation Manager role.

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[3] It was this alleged failure by the company which was said to underlie the medical issues that Mrs Stevens faced and the distress she was suffering from at the relevant time.

Ms O'Brien's evidence in this regard tends to be supported by the contemporaneous documentation.

[24] Mrs Stevens emailed Ms O'Brien later that day asking what package would come with the Sales Support Manager role and what training would be given. She also referred to feedback she had received that the Sales Support Department was not a good working environment and "can be dysfunctional". Ms O'Brien responded to her questions, outlining the level of support that would be available to her and setting out her view that Mrs Stevens would be more than capable of performing the role. She reiterated that if Mrs Stevens needed anything further she should contact her.

[25] On 12 March Mrs Stevens' lawyer advised Mr Carter that while Mrs Stevens would attend group feedback sessions, she (the lawyer) would need to be present at any individual meetings as her representative.

[26] On 19 March staff were advised that the restructuring of the Imports Department would proceed, with a reduction of positions from four to two and advising that the intention was to progress redeployment options. The following day Mr Carter wrote to Mrs Stevens offering her the Sales Support Manager position, advising that her terms and conditions would remain the same. He confirmed that an individualised training plan would be provided to her and advised that he would prefer to have her decision on the role before opening up the Sales Support Coordinator position to others. Mr Carter further noted that:

> We would also like to confirm that we consider this offer to service our contractual obligations under clause 7b of your IEA. *Accordingly, should you choose not to accept it, you will not be eligible for Redundancy Compensation as detailed under clause 7.*
>
> (emphasis added)

[27] The letter concluded with a space for Mrs Stevens to countersign, under the following disclaimer:

> I accept ongoing employment with [HL Ltd] in the position of Sales Support Manager (Level 5b) and I acknowledge that my taking up this position does not give rise to any entitlements or any claim to compensation, damages or any other payments from [HL Ltd].

[28] Mrs Stevens did not sign and return a copy of the letter. Rather her lawyer wrote a lengthy letter to Mr Carter on 25 March notifying a personal grievance.

[29] The parties attended mediation in early April. That did not resolve matters. A further offer on the same basis as set out in the 20 March correspondence was made on 12 April. Mr Carter noted that a tailor-made training plan was being created to assist with the transition in the event that Mrs Stevens took on the role and outlined some of the similarities between the two positions, expressing the view that any differences were very subtle. Mrs Stevens replied on 17 April advising that:

> *Once my role is disestablished at the end of April, I consider that I am redundant and am entitled to be paid my redundancy compensation.*
>
> I believe that [the Document Manager, Ms Kemp's] role will be substantially different also as my staff will be reporting to her.
>
> She has no skills or knowledge of imports, and will need to be trained to supervise and do the hands-on work needed.
>
> I believe that [Ms Kemp's] current role will also be redundant in consequence, and that the new role she will be doing should have been made contestable to both [Ms Kemp] and me. Whoever is in that new role will have to be trained in the other's work and area.
>
> I was told my staff would report to [Ms Kemp] as a fait accompli, no-one consulted with me prior to the company making that decision. This is another aspect of the company not following a fair consultation process.
>
> I have no experience or skills in sales, and I have no interest in being the Sales Support Manager. Nor do I believe that you can decide that I must accept the Sales Support Manager's role, and that you can force me to undertake training for it, just because the company does not want to reduce its head count, and it would suit the company to have me in that role.
>
> The Sales Support Manager's role has been vacant for about the last six months and it clearly is convenient to shove me into the role, so that the company can avoid paying me my redundancy compensation.
>
> I too have rights.
>
> I do not intend to sign the letter, and I am shocked that you have tried to get me to sign away my rights to pursue a personal grievance in the fine print at the bottom of the letter.
>
> (emphasis added)

[30] Mr Carter responded to the points raised in Mrs Steven's letter the next day. In particular he emphasised the consultation process that had been undertaken, made

the point that Ms Kemp's role was not being disestablished, reiterated what the role of Sales Support Manager would entail and what the proposed training would be directed at, enclosed a fresh letter of offer and made it clear that her acceptance would not amount to a waiver of her rights to pursue a personal grievance. He also reiterated that the offer was perceived by HL Ltd to fulfil its obligations under cl 7 of the IEA and that if she declined the offer cl 7(b) would be engaged. The timeline for acceptance of the offer was again extended, to 5pm the next day.

[31] Mrs Stevens did not accept the offer. Mr Carter subsequently met with her to provide her with a letter terminating her employment. The letter thanked her for her "very good work" for the company and confirmed that a positive reference would be provided. It went on to state that:

> We are giving one month's notice as we are required to do, but *happy to discuss with you when you would look to work out your notice period.* We have an open mind and open to your feedback and suggestions.
>
> Attached is a draft communication to staff in respect of your termination of employment. For internal and external purposes we are more than agreeable to describe it as a resignation rather than a termination, but you are welcome to give feedback on that point as soon as possible.
>
> (emphasis added)

[32] Mrs Stevens wrote to Mr Carter on 23 April taking issue with the way in which the meeting the previous day had been conducted, again asserting that the company was in breach of its contractual obligations by failing to pay her redundancy compensation, raising a further personal grievance and advising that her preference was to be paid her notice in lieu and not have to return to work. She also took issue with the draft communication to staff which Mr Carter had provided for comment.

[33] Mr Carter provided a substantive response on 26 April, and confirmed that there was work for her at HL Ltd for the one-month notice period. He went on to state that:

> Ange, I emphasise that both myself and the team hold you in the highest regard. We are disappointed that you have left the workplace. We urge you to reconsider and come back to work. We have every confidence that you can do the new role where the differences are subtle.

> … Whether you take legal advice and from whom is over to you but we ask you to seriously consider the actions you have taken to date.

[34] I pause to note that it was suggested that the above quoted extracts from Mr Carter's correspondence constituted undue pressure on Mrs Stevens, threatening her if she did not come back to work and threatening her if she did not withdraw her personal grievance. I do not consider that they can sensibly be read in this way, either in isolation or in the context of the entire email.

[35] Mrs Stevens did not take up the resuscitated offer contained in Mr Carter's email, and in the event was not required to work out the notice period. She remained on sick leave during this time.

The claim

[36] Mrs Stevens raises a number of concerns in relation to the termination of her employment however her primary point is that she was entitled to be paid redundancy compensation under her employment agreement. Additional arguments were also mounted, including that the consultation process was procedurally unfair; that HL Ltd tried to force her to accept a substantially different role, constituting a breach of its obligations of good faith under s 4 of the Employment Relations Act 2000 (the Act); and that she suffered unjustifiable disadvantage in her employment. As I understood the plaintiff's claim, the alleged unjustified disadvantages related to threatening behaviour (seeking to exclude a personal grievance claim from being pursued if the offer of alternative employment was accepted, offering her the option of not working out her notice period but later reneging on such an offer, and putting pressure on her to conduct training in India); not providing an opportunity to apply for the Documentation Manager position; and not giving her the opportunity to have her lawyer present during the meeting of 22 April at which she was advised that her employment was terminated.

[37] HL Ltd says that because Mrs Stevens was offered an alternative position on substantially the same terms and conditions, no entitlement to compensation arises. It says that the process that led to the termination of Mrs Stevens' employment was fair and that it met all of its obligations to her.

[38] Clause 7 of Mrs Stevens' employment agreement provided that:

> The employer operates in a competitive market and if business is not maintained at a sufficient level your position may become redundant. Redundancy may also arise in any other circumstance where the position filled by you is, or will become, surplus to the needs of the Employer.
>
> Subject to clause (b) below, in the event that your position is made redundant, your redundancy entitlements will be determined in accordance with the following redundancy provisions.
>
> (a) You shall be entitled to four weeks' notice or alternatively the Employer may choose to pay your salary in lieu of notice.
>
> Subject clause (b) below, you shall also be entitled to compensation…
>
> (b) Notwithstanding the foregoing, *you shall not be entitled to redundancy compensation in the event that you are offered reasonable and alternative employment, on substantially the same terms and conditions*, either by the employer, or by any other company or other entity to whom the business or assets or part thereof, is sold or otherwise transferred.
>
> (emphasis added)

Clause 7(b) – harsh and oppressive and in breach of international obligations?

[39] The central plank of the plaintiff's submissions rested on a contention that cl 7(b) was harsh and oppressive and could not be relied on by the company. The argument was said to be bolstered by a number of international instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Forced Labour Convention. It was submitted that HL Ltd was obliged to comply with these instruments, via its Code of Ethics, and that it had failed to do so.

[40] It is convenient to begin with first principle. The ability to reposition staff has long been recognised as important in reorganisations of the workforce. It is equally well recognised that the redeployment of staff to a position that is similar to their original one does not in itself constitute termination or redundancy.[4] The relevant provisions of the employment agreement are pivotal in determining the

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[4] *Group Rentals NZ Ltd v Canterbury Clerical Workers IUOW* [1987] NZILR 255 (AC) at 258-259; *Nelson Timber Industry IUOW v Nelson Pine Forest Ltd* [1989] 1 NZILR 451 at 454 (LC).

extent to which HL Ltd was entitled to require Mrs Stevens to take up the alternative role offered to her, avoiding its redundancy obligations.[5]

[41] While international conventions may be adopted into domestic law they do not otherwise bind private individuals, including entities such as HL Ltd. It is true, as Mrs Hartdegen submitted, that HL Ltd is part of a global organisation with a Code of Ethics that makes it clear that it aims to be a good global citizen and acknowledging that it is "subject to laws, regulations, and comparable rules" of each legal environment it operates in internationally, but the Code cannot be read as incorporating the instruments relied on by reference and does not mean that various provisions of them are directly enforceable against HL Ltd.

[42] Mrs Hartdegen sought to rely on *Kelly v Tranz Rail Ltd.*[6] There the former Chief Judge observed that in enacting the Employment Contracts Act 1991 Parliament was likely to have been cognisant of its international obligations, including the right to strike and this, it was said, was relevant to the way in which s 28(1) of the previous Act was to be interpreted.[7] I pause to note that on appeal the Court emphasised that there was no need to resort to international instruments in the interpretative exercise.[8] In any event the case has limited relevance in the context of the plaintiff's argument in this case, which is squarely focussed on contractual, rather than statutory, interpretation.

[43] Nor do I agree with the submission that cl 7(b), as drafted, is contrary to the "ethos and principles of redundancy law" or is otherwise objectionable. Mrs Stevens contended that HL Ltd should not be entitled to "force" her to take on a role she did not want. I do not consider that legal arguments relating to the Forced Labour Convention assist. There is no suggestion that HL Ltd was entitled to require her to accept the offer that it made. Mrs Stevens remained able to decline it and did. That choice had implications for her as her role as Imports Manager had been disestablished. Clause 7(b) simply deals with the not uncommon position that arises where an employee has been offered a position that is substantially similar to their

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5 *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 (CA) at [36].
6 *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC).
7 At 501-502.
8 *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ (CA) at [40].

(disestablished) position and chooses not to accept that role. It is well accepted that, in such circumstances, redundancy compensation does not arise.[9]

[44] I note for completeness that while it was submitted that cl 7(b) was "harsh and oppressive", no evidence was called as to the negotiations underlying the provision and it is notable that while the phrase featured in s 57 of the Employment Contracts Act 1991, it is not replicated under the current Act. Section 68(4) of the present Act does however provide that "Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable." None of the grounds in s 68(2) are made out.

Personal preferences

[45] Mrs Hartdegen also submitted that, properly interpreted, cl 7(b) required HL Ltd to have regard to Mrs Stevens' personal preferences in determining whether or not an entitlement to redundancy compensation arose. I understood this argument to be based on Mrs Stevens' desire to continue working in imports rather than sales.

[46] Clause 7(b) refers conjunctively to an offer of "reasonable" and "alternative" employment. It could be argued that the reference to reasonable suggests that an employee's personal preferences may be relevant. However, when read in context it is clear that the provision is focused on the nature of the alternative employment offered, and whether it is on substantially the same terms and conditions (to be objectively assessed), rather than a subjective inquiry as to Mrs Stevens' personal preferences.

[47] Plainly cl 7(b) did not empower HL Ltd to offer Mrs Stevens *any* alternative position, thereby discharging its contractual obligations to her. Rather it is apparent that the use of the term "reasonable" acts as a qualifier in terms of appropriateness or suitability. Accordingly, it is useful to consider the way in which the Court has interpreted similar clauses providing for alternative employment in the context of redundancy claims. In *Pilgrim v Director-General of Health* the Court observed, in

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9 *New Zealand Engineering IUOW v Dunlop New Zealand Ltd* [1986] ACJ 848 (AC) at 853.

relation to a contractual provision which provided for reassignment to a "suitable position", that:[10]

> Suitability, as defined in the employment contract in question, must therefore be determined objectively. It is a question of fact and degree. *That does not mean that the employees affected and the employing department are not entitled to have opinions on the subject but their opinions cannot be allowed to prevail if, upon an objective view of the matter, such as would be taken by a reasonable and disinterested but not uninformed person, a different result would be produced*. Suitability is within reasonable limits a flexible concept and involves a contrast with the narrow approach authorised for reconfirmation in position.
>
> Counsel are agreed that the test of suitability of the position is an objective one but they were not agreed about what this means and entails. First and foremost *an objective test means that suitability is not to be determined by the subjective opinion of either employer or employee. Employers have to recognise some restriction on the absolute power to dispose of their employees as they see fit. On the other hand, employees must overcome that resistance to change which is a natural attribute of the human condition. In particular, they have to accept that they may be redeployed to a position with a different department or agency in a position which is neither the same nor necessarily similar but for which they are suitable by reason of skills which they already possess or which they can reasonably be expected to acquire as a result of a modicum of training falling short of retraining*. In practice it should not be difficult to tell whether this test has been met.
>
> (emphasis added)

[48] It is clear, as Mr Kiely (counsel for the defendant) submitted, that the parties intended by the use of the words "substantially" and "alternative" that the employment offered would differ in some respects. This is hardly surprising. As the Court observed in *Sewell v New Zealand Trade and Enterprise*, while noting that it was not necessary to minutely scrutinise the two roles, any change in jobs as a result of a restructure will produce some degree of change.[11]

Substantially the same terms and conditions

[49] I did not understand the plaintiff to be strongly pursuing an argument at hearing that the roles of Imports Manager and Sales Support Manager were not

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10 *Pilgrim v Director-General of Health* [1992] 3 ERNZ 190 (EmpC) at 204. It is notable that in *Sanson v Auckland Regional Council* [1999] 1 ERNZ 708 (EmpC), at 721 the redeployment clause in question provided for transfer to an "another *appropriate* position." The Court concluded that "appropriate" was synonymous with "suitable" and that the above considerations applied in assessing whether a position had been made redundant.

11 *Sewell v New Zealand Trade and Enterprise* AC5/05, 22 February 2005 (EmpC) at [21].

substantially the same. However, for completeness, I deal with this issue. In my view, the facts point squarely to the positions being on substantially the same terms and conditions and that the reasonable observer would not think that there was sufficient difference to break the essential continuity of the employment.[12]

[50] It is clear that the positions involved the same pay and benefits. The work was to be performed in the same location and for the same hours. The roles were equivalent 5(b) roles within the organisational structure, with no difference in status; were managerial in nature, requiring similar managerial credentials and experience; and involved liaising with sea freight customers, internal departments and overseas offices. Both roles also involved organising coordinators to perform technical and clerical tasks.

[51] The parties were at odds over the split between managerial and hands-on tasks performed by Mrs Stevens in her current role and the tasks that would have been required in the Sales Support position. Mrs Stevens asserted in cross-examination that approximately 20 per cent of her work was management-related, with 50 per cent of her tasks being described as 'hands-on', the residual 30 per cent being related to 'superuser' activities. Evidence was called on behalf of the plaintiff in relation to the hands-on nature of the work. It was of limited assistance. While Ms Pietersen had worked for HL Ltd as a 5(b) manager, she left the company in December 2013, had limited interaction with the Imports Department and had nothing to do with Customer Services, as she accepted in cross-examination. Other witnesses for the plaintiff who had previously worked at HL Ltd were either not employed at the relevant time or were otherwise less well placed to comment on the two roles. It is notable that other staff, with no previous sales support experience, were able to successfully transition into the Sales Support Team.

[52] As Mrs Hartdegen submitted, the defendant did not call another 5(b) manager to give evidence. However, Ms O'Brien was well placed to comment on the two roles, including in her capacity as manager, having worked in close physical proximity to the Imports Team and having taken over Mrs Stevens' role while she

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[12] *McKenna v AFFCO New Zealand Ltd* [2001] ERNZ 75 (CA) at [17], citing *Auckland Regional Council v Sanson* (CA), above n 5, at [19].

was on parental leave. I am satisfied that she had a good understanding of the requirements of each position and I accept her evidence in this regard.

[53] While I accept that some hands-on activity was required in Mrs Stevens' role, and would have been required in the alternative role, I am satisfied that this would have been minimal and could readily have been addressed by additional training. I do not accept that an in-depth knowledge of the technical aspects of all tasks performed by members of the team was required, given the focus on managerial responsibilities, and I am satisfied that the hands-on tasks were predominantly performed by staff, rather than managers. A comparative analysis of the two roles undertaken by Mr Smith reinforces the point.

[54] As I have said, Mrs Stevens contended that up to 30 per cent of her time was taken up by her role as a "super user". However it is revealing that this allegedly significant component of her role was not identified in the very lengthy list of functions ascribed to her role in counsel's letter notifying the original grievance. I preferred Ms O'Brien's evidence that, in reality, such functions would have only taken up approximately five per cent of Mrs Stevens' time.

[55] Mrs Stevens gave evidence that she was given a position description for the Sales Support Manager role that had been altered to make it look very similar to the role she currently held. This allegation was not made out. The position description relied on by Mrs Stevens at hearing was a generic one, sourced from Hapag-Lloyd's global intranet site, and not used at the relevant time in New Zealand.

[56] Mrs Stevens reiterated during the course of evidence that training would be required to enable her to undertake the Sales Support Manager role. I accept, as did the defendant's witnesses, that this was so. I do not consider that the need for some training, of itself, makes positions dissimilar. The reality is that the defendant's business operates in a dynamic and competitive environment and new technology and systems upgrades are regularly required to ensure its efficient operations. This was something that was part of Mrs Stevens' role and something that she would have been well used to dealing with. I do not accept that the amount of training that would have been required to equip Mrs Stevens for the alternative role would have

been substantial and she would plainly have been more than capable of absorbing, and utilising, it. I accept Ms O'Brien's evidence that Mrs Stevens would only have required minimal additional training.

[57] I am satisfied that the role of Sales Support Manager and Imports Manager were on substantially the same terms and conditions.

Dysfunctional work environment

[58] Mrs Stevens raised a concern about the Sales Department being dysfunctional and it seems that she did not particularly take to the manager (Mr Humphries). It is clear that the Sales Department had been understaffed for some time and that this had given rise to some difficulties but it was equally clear that steps were being taken to remedy the situation. Further, it is clear that a significant amount of support was being offered to Mrs Stevens to ease any transition. It is telling that alleged issues relating to Mr Humphries did not feature with any real prominence at the relevant time, although the fact that he allegedly did not personally greet her was noted in counsel's letter of grievance; reference to unspecified feedback that the Team could be dysfunctional was made in Mrs Stevens' email of 8 March; and Mrs Stevens gave evidence that she told Mr Carter that Mr Humphries did not personally greet her and referred to the state of the Team at the 28 February meeting. It is however fair to say that the issue assumed greater prominence at hearing, where it appeared to be something of a makeweight.

[59] While I leave open the possibility that there may be some circumstances in which a dysfunctional work environment may be relevant to an assessment of whether an offer is of reasonable and alternative employment on substantially the same terms and conditions, the evidence falls well short in the present circumstances.

Procedural fairness

[60] The emphasis is on substantial fairness and reasonableness, as opposed to pedantic scrutiny by the Court of a process followed by an employer.[13] The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and to actively consult with affected employees prior to making a final decision.[14]

[61] A careful analysis of the process that was undertaken by HL Ltd reveals that many of the strongly expressed criticisms advanced on the plaintiff's behalf do not withstand scrutiny.

Sufficient information and opportunity for input?

[62] It is clear that the proposal that Mrs Stevens' role be disestablished was drawn to her attention at an early stage, and in the context of a private meeting. Mrs Stevens gave somewhat confused evidence that, despite the presentation shown to her (twice) on 28 February clearly identifying that her role was absent from the proposed new structure, she was unaware of the proposal following the meeting. I cannot accept this.

[63] Information was provided on the proposal and the basis for it. A consultative process followed, with the company making it clear that it was seeking feedback. Responses were provided to questions that were raised, including as to the Sales Support Manager role and the basis on which an appointment would be made.

[64] Mrs Stevens was given sufficient time to provide feedback on the proposals and the deadline for feedback was extended on occasion. In the event, she chose to give limited feedback (including her indication at the meeting of 28 February that her preference that the roles not be advertised, as she acknowledged at hearing).

[65] Once the proposed restructure was confirmed, HL Ltd continued to communicate with Mrs Stevens about the restructure and the potential consequences

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13 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

14 Employment Relations Act 2000, s 4(1A)(c).

of it for her. She was offered the position of Sales Support Manager on 20 March and offered training to support her in such a role. Ms O'Brien had earlier visited Mrs Stevens at her home[15] and discussed the role, together with the training that Mrs Stevens would receive if she took up the position. This is reflected in the contemporaneous correspondence. Following the meeting, Ms O'Brien provided further information about the role in response to a request from Mrs Stevens. Various responses were provided to communications from Mrs Stevens' lawyer and a number of offers of the Sales Support Manager role were made.

[66] While Mrs Stevens said in evidence that she was unaware that her position would be disestablished and her employment terminated I do not accept this. She could not reasonably have been under any illusion about these matters or about the company's position on its liability to pay redundancy compensation under her employment agreement. The company was clear that it was keen to redeploy staff and that it considered that the Sales Support Manager role constituted suitable alternative employment for Mrs Stevens. She made it equally clear that she considered that if she declined an alternative role she would be entitled to redundancy compensation. Her level of substantive engagement was otherwise limited.

[67] Criticisms were made of the company for not providing documentation relating to the pilot project and, in particular, a document known as the Project Initiation Document. This document assumed some importance at the hearing, with the plaintiff suggesting that it reflected predetermination. However, I accept Mr Carter's evidence that he was only aware of, and read, the version of the document relied on by the plaintiff subsequently and well after the restructuring process had occurred. In any event the document is of limited relevance as it relates to initial projections and has broader scope than simply HL Ltd, New Zealand.

[68] I am satisfied, based on the evidence before the Court, that HL Ltd adequately consulted with Mrs Stevens, in good faith, about the particular changes that would occur in the Imports Department and what these might mean for her. Relevant information was provided to enable her to engage effectively in the process

[15] A visit which Mrs Stevens confirmed she had appreciated immediately following it.

and provide feedback on it. She was given a reasonable opportunity to comment on it.

Documentation Manager role

[69] Mrs Stevens alleges that she was disadvantaged because her role was disestablished but Ms Kemp's role as Documentation Manager was not and because she was not provided with the opportunity to apply for that role. I do not accept this. I accept Mr Carter's evidence that the Documentation Manager role remained largely unchanged, although the proposal was that two coordinators from the Imports Team be incorporated beneath it. Ms Kemp held the position and continued in it.

[70] Mrs Stevens said that she advised Ms O'Brien during the meeting at her home on 8 March that the role should have been made contestable but I preferred Ms O'Brien's evidence that, although there was a passing reference to Ms Kemp, no such discussion took place. It is notable that there is an absence of any reference to Ms Kemp's role in the correspondence at the time. Rather the company's alleged failure to advertise the role was first raised on Mrs Stevens' behalf after the consultation process had concluded, the restructuring had been finalised and a personal grievance had been raised. Prior to this time neither Mrs Stevens nor anyone else had expressed any interest in the role or suggested that it should be advertised or offered to others.

Predetermination?

[71] One of the strands of argument running through the case advanced on behalf of Mrs Stevens was that the outcome of the restructuring proposal was predetermined and that it was designed to avoid the need to make a redundancy payment to Mrs Stevens. The evidence does not support this.

[72] It is clear that the restructuring proposal was made on the basis of genuine business reasons and was designed to achieve efficiencies by outsourcing some of the work of the Imports Department to the Global Service Centre in India. Mrs Stevens was involved in a number of the meetings undertaken to scope the viability

of any restructure. In relation to the Imports Department, that scoping exercise identified that, as currently configured, the Department was adequately staffed with three coordinator roles. Given the transfer of work overseas, the number of staff required to perform tasks in New Zealand, including the need for management roles, reduced. It was on this basis that it was proposed, and then determined, that Mrs Stevens' role was to be disestablished. The genuine nature of the process is also reflected in the fact that feedback received from staff members was taken on board by HL Ltd.

[73] It was put to Mr Carter that the termination of Mrs Stevens' employment constituted an act of revenge because she had not accepted the role that she had been offered. This was denied by Mr Carter. I have no difficulty accepting his evidence, which was consistent with the contemporaneous documentation.

[74] The lengths that HL Ltd went to to retain Mrs Stevens' services, the repeated confirmation of her value to it and the extensions of time given to enable her to reconsider her position, undermine any argument that she was targeted in an effort to avoid its obligations to pay redundancy compensation, to punish her or that it was otherwise a sham process.

Threatening behaviour?

[75] A number of submissions were advanced on Mrs Stevens' behalf that HL Ltd engaged in bullying and threatening behaviour, with particular emphasis on the contents of Mr Carter's email of 26 April, set out above. I do not accept the strongly worded criticisms made of this communication. As I have already observed, when read in context it cannot reasonably be given the negative interpretation attributed to it.

[76] Contrary to the submission made on Mrs Stevens' behalf, Mr Carter did not change his position in relation to whether or not Mrs Stevens could choose to work out the notice period. His initial communication made it clear that he was seeking her views on when (not if) she might like to work out her notice period. His subsequent email, confirming that there was work for her in the intervening period,

was hardly threatening and, in the event, Mrs Stevens was not required to undertake work during this time. Rather she remained on sick leave.

[77] Mr Carter's suggestion that she might like to reconsider the position she was adopting arose in the context of his earlier observation that he would like her to come back to work, that he had every confidence that she was adequately equipped to take on the role of Sales Support Manager and that he believed that the differences between that role and her current role were minor. I do not consider that his invitation to reconsider her position in this context can be characterised as threatening.

Disclaimer

[78] The correspondence of 20 March extended an offer of the Sales Support Manager position and incorporated a purported disclaimer. Immediate objection was taken to the inclusion of the disclaimer and it was subsequently withdrawn in the next letter of offer that was presented for Mrs Stevens' consideration. In that letter Mr Carter made it clear that any acceptance of the offer would not amount to a waiver of her rights to pursue a personal grievance. Mrs Stevens did not accept the original, or subsequent, offer and did pursue a personal grievance. The original letter should not have included the disclaimer but I do not accept that it gave rise to an actionable disadvantage in the circumstances.

Request to attend training in India

[79] Mrs Stevens gave evidence that she came under pressure to travel to India to deliver training and that this exacerbated the stress she was under. This was reinforced by the evidence given by Mr Stevens. It was not disputed that Mrs Stevens was asked to undertake such a task. Ms O'Brien's evidence was that Mrs Stevens had been identified as the best person to do so and that she (Ms O'Brien) felt that it might provide some useful professional development opportunities for her. In the event Mrs Stevens, after some prevarication, declined to go and Ms O'Brien did it herself. I accept that Mrs Stevens did not wish to travel to India, for

understandable reasons. I do not accept that any undue pressure was placed on Mrs Stevens or that she was disadvantaged in any way.

Notification of termination

[80] The way in which Mrs Stevens was advised of the termination of employment was criticised. This was primarily based on the fact that Mr Carter advised her of her termination without giving her the opportunity to have her lawyer present at the meeting, contrary to the earlier advice (of 12 March) that Mrs Stevens would need to have her lawyer present at any one-on-one meetings.[16]

[81] While it would have been preferable for Mrs Stevens to have been given advance notice of the purpose of the meeting, and invited to have her representative present, I am not satisfied that anything can be made of this omission in the circumstances. Mrs Stevens was squarely on notice of what would occur if she did not take up the offer that had previously been presented to her on a number of occasions. Mr Carter's correspondence was clearly crafted and could not have given rise to any uncertainty. As Mr Kiely pointed out, Mr Carter could have simply placed the letter of termination in an envelope and sent it to Mrs Stevens. Rather, he chose to meet with her personally and deliver it by hand. The sole purpose of the meeting was to facilitate giving her the letter, not to obtain any feedback or further information or representations on Mrs Stevens' behalf. Ms O'Brien offered Mrs Stevens the remainder of the day off and took some steps to arrange support for her immediately following the meeting.

[82] I do not accept that Mrs Stevens was unjustifiably disadvantaged by the manner in which the meeting was conducted and the fact that her lawyer was not present. Nor do I consider that having representation, or prior notice of the meeting, would have made a material difference having regard to the purpose of it. Even if the absence of a representative did amount to a procedural defect (which I do not accept), it was minor and did not result in Mrs Stevens being treated unfairly.[17]

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16 Referred to at [25] above.

17 Employment Relations Act s 103A(5)(a)-(b).

Conclusion

[83] I am satisfied that the defendant's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the relevant time. The plaintiff's claim of unjustified dismissal and unjustified disadvantage is dismissed.

[84] I turn to consider HL Ltd's challenge to the Authority's costs determination.

The defendant's costs challenge

[85] HL Ltd has challenged on a de novo basis the Authority's determination as to costs. It seeks a costs award in its favour of $20,000 based on what it characterises as the unreasonable rejection of a Calderbank offer made in advance of the Authority's investigation meeting and having regard to the conduct of Mrs Stevens' case in the Authority.

Approach

[86] On a de novo challenge such as this, the Court is required to stand in the shoes of the Authority and to assess the evidence relating to the costs award in order to judge what is an appropriate award of costs in light of all relevant considerations.[18]

[87] HL Ltd's costs challenge is focused on two key issues – the extent to which a Calderbank offer ought to be taken into account as a factor warranting an uplift and the extent to which Mrs Stevens' financial position ought to be taken into account as a factor warranting a decrease in costs.

Calderbank offer

[88] HL Ltd's starting point is that the Court of Appeal has made it clear in previous cases that a "steely approach" to Calderbank offers ought to apply in this

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[18] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [19].

jurisdiction for sound public policy reasons. Particular reliance is placed on the Court of Appeal's judgment in *Health Waikato Ltd v Elmsly*[19] and its subsequent decision in *Bluestar Print Group (NZ) Ltd v Mitchell*.[20] It is apparent that the Authority Member in the present case considered himself bound by this approach.[21] A number of other Authority costs determinations have taken a similar position[22] although, as has been observed, the practice appears to vary.[23]

[89] Commentators have suggested that to the extent that a "steely approach" to Calderbank offers in the Authority has not been adopted it may be at odds with the Court of Appeal authority referred to.[24] I do not read these Court of Appeal judgments as having the broad application contended for by counsel for the defendant. While reference was made to the employment jurisdiction, which plainly includes the Authority, it is clear that both cases were focussed on the approach to costs in the Court.[25] The Court of Appeal has not yet directly considered the application of Calderbank offers in the context of an Authority process and has not, in my view, made any binding findings in that regard.

[90] I consider there to be difficulties with transplanting observations made by the Court of Appeal in relation to the assessment of costs in the Court to the way in which costs in the Authority are to be assessed. As the Court of Appeal made clear in *Bluestar*, the way in which reg 68 of the Employment Court Regulations 2000 (the Regulations) is drafted places the importance of Calderbank offers "front and centre" of the Court's analysis.[26] However, cl 15 of sch 2 to the Act (which relates to costs in the Authority), provides that:

> **15 Power to award costs**
>
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

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19 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].
20 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 (CA) at [20].
21 Authority costs determination, above n 2, at [17]-[18].
22 See for example *Clapham v Alexander & Co Ltd* [2012] NZERA Auckland 396 at [21].
23 Peter Churchman and Simon Mitchell "Costs" (paper presented to New Zealand Law Society 10th Employment Law Conference, Auckland, October 2014) 349 at 354.
24 At 354. See also *Employment Law* (online looseleaf ed, Brookers,) at [ERSch 2.15.15].
25 *PBO (formerly Rush Security Ltd) v Da Cruz*, above n 18, at [35]-[37].
26 *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 20, at [20].

> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[91] No express provision is made, either in the Act or the Employment Relations Authority Regulations, for Calderbank offers to be taken into account. The fact that Calderbank offers are not expressly provided for in relation to costs in the Authority does not mean that they have no application or relevance. However, it tends to support an argument that they are not intended to have the same sort of impact (or "front and centre" focus) as applies in the Court.

[92] The argument that full weight should be accorded to an unreasonably declined Calderbank offer made in Authority proceedings also sits uncomfortably with the principles set out by the full Court in *Da Cruz* relating to costs in that forum. While the full Court confirmed that it was open to the Authority, in the exercise of its broad discretion, to take into account Calderbank offers as a factor warranting an uplift, the next immediately expressed guiding principle it enunciated was that costs in the Authority should be modest. In this regard it was said that:[27]

> … the Authority is not bound by the *Binnie* principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest".

[93] I struggle to see how an award of costs of the magnitude sought by the defendant (of $20,000 for a two day investigation meeting), can realistically be regarded as "modest" in the circumstances.

[94] Nor should the original legislative intent be lost sight of. Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.[28] It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at $3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is

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[27] *PBO (formerly Rush Security Ltd) v Da Cruz*, above n 18, at [45].
[28] Employment Relations Act 2000, s 157(1).

each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. As the full Court observed in *Da Cruz*:[29]

> … The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.

[95] In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority. The practical reality is that compensatory awards in the Authority tend to hover around $5,000 to $7,000.[30] Giving full force to Calderbank offers in that forum would likely have a chilling effect on employees pursuing grievances at first instance, with the spectre of a significant costs liability out of all proportion to the likely outcome.

[96] Mrs Stevens does not appear to take issue with the timing of HL Ltd's offer. I am satisfied that she unreasonably declined to accept the offer and was in a worse position than she would have been had she accepted it. I accept that an uplift is warranted in the circumstances.

[97] This is not the sort of case in which indemnity costs would be appropriate. Nor did the defendant suggest that such costs would be. It is well established that indemnity costs, following an unreasonable refusal of a Calderbank offer, are rare and are generally reserved for cases where a party's conduct has been especially egregious.[31]

[98] I prefer to approach costs in this case by uplifting the daily rate which I would otherwise have applied in the circumstances of this case, in assessing an appropriate contribution to the defendant's costs having regard to the Calderbank offer. Such an approach has the advantage of going some way to addressing two key policy considerations – first, that conduct unnecessarily increasing costs ought to be

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29 *PBO (formerly Rush Security Ltd) v Da Cruz*, above n 18, at [41].

30 Ministry of Business, Innovation & Employment "Compensation Awards 2014" http://www.dol.govt.nz/er/services/law/case/costaward/comp14-1.asp.

31 *Diver v Geo Boyes and Co Ltd* HC Hamilton CP58/93, 20 May 1998 at 23-24.

discouraged and second that costs in the Authority should generally be modest (and bear a degree of proportionality, including to the notional daily rate).

[99] The defendant seeks an uplift to $20,000 for a two-day investigation meeting. That equates to an increase in the daily rate of 286 per cent. I do not consider that such an increase is justified. Rather, I consider that an uplift to $4,500 per day, or a total of $9,000 is appropriate, having regard to the unreasonable rejection of the Calderbank offer together with the other aggravating factors referred to below.

Conduct of case

[100] HL Ltd further submits that an uplift in costs is warranted because of the way in which the plaintiff pursued her claim in the Authority, including on the basis that she changed representation a number of times and pursued hopeless lines of argument. The plaintiff took issue with the defendant's assertion that Mrs Stevens changed representatives five times during the course of the process. What is evident is that there was some change of representation. However, I am not persuaded on the basis of the material relied on by the defendant that this led to a discernible increase in its costs.

[101] The investigation meeting was adjourned, on the plaintiff's application, at a late stage. I accept that this would have increased HL Ltd's costs because of wasted preparation time, and that a modest uplift is appropriate in the circumstances.

[102] It is said that Mrs Stevens pursued hopeless points. I accept that the defendant would have been put to the cost of responding to each of the matters raised by Mrs Stevens and that this would have increased its costs to some degree. I do not, however, accept that it substantially increased costs on the basis of the material before me. And the reality is that if a point is demonstrably hopeless, it will generally not involve a significant application of resources to respond to it. Arguments about the obligations owed by private entities under public international law is one such example. It is telling that, in written submissions in the Court, the plaintiff's submission that cl 7(b) was harsh and oppressive is summarily dismissed by the defendant in two brief paragraphs and the international law submission

receives no attention whatsoever. These points received similarly scant treatment in written submissions filed in the Authority.

Financial hardship

[103] It is well established that the Authority may have regard to a party's financial circumstances in determining costs, including whether they ought to be ordered at all.

[104] HL Ltd submits that no discount ought to be made for the plaintiff's financial position. Particular reference is made to *Gates v Air New Zealand Ltd*, where it was said that:[32]

> A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that *a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship*. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. *It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate*.
>
> (emphasis added)

[105] HL Ltd submits that the fact that Mrs Stevens may be caused hardship by the imposition of a costs award is not of itself sufficient to deprive it of a costs award to which it would otherwise be entitled. Rather, it must be shown that the hardship would be disproportionate to HL Ltd's entitlement to be justly compensated for the costs it has incurred.

[106] *Gates* related to costs in the Court, not the Authority. However, I agree that the successful party's interest in being compensated for its costs is an important consideration to be weighed in the Authority's broad discretion. That is consistent with the primary principle that costs follow the event unless particular considerations

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[32] *Gates v Air New Zealand Ltd* [2010] NZEmpC 26 at [21].

dictate otherwise. In my view the fact that an order for costs will impose financial hardship is to be considered when making an order for costs in the Authority but is not decisive and must be weighed among other factors relevant to the costs exercise.[33] It is incumbent on a party seeking a reduction in costs on this basis to satisfy the Authority of the factual basis for such a submission.

[107] A considerable amount of evidence in relation to the plaintiff's financial position was before the Court on the company's de novo costs challenge. In particular, Mr Stevens gave extensive evidence as to the very slim margins the Stevens family was currently operating on having regard to the household's incomings and outgoings. This, he said, left very little excess a week. The financial situation is exacerbated by ongoing costs in relation to the litigation on the challenges, with a loan having been extended by family members. It is also clear that Mrs and Mr Stevens have substantial debts.

[108] Mrs Stevens is currently on a salary of $80,000 per annum although this is short term employment and she has given evidence that there is no certainty of ongoing employment. Mr Stevens is currently employed and earns approximately $85,000 per annum. Evidence was also given in relation to the value of the family home, which (according to updated material submitted on behalf of HL Ltd) leaves substantial equity in the property of at least $350,000.

[109] Ultimately a balancing exercise is required. HL Ltd ought to be entitled to a contribution to its costs. The costs it incurred were increased by the way in which Mrs Stevens pursued her claim in the Authority. The position is exacerbated by her unreasonable refusal of a Calderbank offer. Meeting a costs award would present challenges to Mrs Stevens, having regard to her financial circumstances, but I am satisfied that she would be in a position to meet the award imposed against her without undue financial hardship.

[110] Having regard to all of the circumstances, I consider that an appropriate award of costs is $9,000.

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[33] For similar reasons to those set out in *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].

Conclusion

[111] The plaintiff's challenge to the Authority's substantive determination is dismissed.

[112] The defendant's challenge to the Authority's costs determination is granted. The plaintiff is ordered to pay the defendant $9,000 by way of contribution to its legal costs.

[113] The parties are urged to seek to agree on costs. If that does not prove possible memoranda may be filed, with the defendant filing and serving any memoranda and documentation in support within 30 days of the date of this judgment, the plaintiff filing and serving any memoranda within a further 20 days and any memoranda by the defendant strictly in reply no later than a further 10 days.

Christina Inglis
Judge

Judgment signed at 11.15 am on 12 March 2015