IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 81
ARC 108/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JUDITH BRAKE Plaintiff
AND	GRACE TEAM ACCOUNTING LIMITED Defendant

Hearing: 10, 11 and 24 July 2012
(Heard at Auckland)

Counsel: Warwick Reid and Rachael Rolston, advocates for plaintiff
Garry Pollak, counsel for defendant

Judgment: 13 May 2013

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff, Ms Brake, has challenged a determination of the Employment Relations Authority (the Authority) which found that her dismissal for redundancy was justified and that the actions of her then employer, the defendant, Grace Team Accounting Ltd (GTA), were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.[1] The test for justification of a dismissal, provided by s 103A of the Employment Relations Act 2000 (the Act), which was in force at the time of the dismissal, used the word "would" instead of the word "could", which was substituted on 1 April 2011 by s 15 of the Employment Relations Amendment Act 2010 (Amendment Act).

[1] ERA Auckland AA409/10, 13 September 2010.

Non-publication orders

[2] At the commencement of the hearing by consent an order was made suppressing from publication or inspection by any person other than the parties to the case, of medical certificates, confidential communications relating to the report carried out by the expert engaged by GTA and financial accounts of GTA. This judgment will, when necessary, contain only oblique references to those documents and other financial accounts and analyses for which suppression was not sought and will not disclose their contents. That may provide a degree of necessary obscurity but the parties will be aware of the contents of those documents.

Factual findings

[3] The plaintiff has worked in the accounting field for approximately 24 years. At the beginning of 2009 she was working for KPMG in Tauranga and had been there for some eight and a half years. In July 2009 she saw an advertisement in the "Bay of Plenty Times" for the position of a senior accountant with GTA. She made an email enquiry asking for particulars of the salary. She received a reply which did not clarify the salary issue and she did not pursue the matter. I accept her evidence that she was not looking for another position and was happy in her job at KPMG and, had it not been for the subsequent events, would still have been working there.

[4] In the week ending 31 July 2009 the plaintiff received a phone call from Mr Michael Grace one of the two principals and directors of GTA. Mr Michael Grace told her they were still looking for someone and suggested that she come in for an interview. Following that phone call she sent Mr Michael Grace her curriculum vitae and, after an email exchange, a meeting was arranged at GTA's offices. Present at that meeting was Mr Michael Grace and Mr Lindsay Grace, the company's founder, and the other director of GTA. Also present was Ms Kristen Retter who was a manager employed by GTA.

[5] Mr Lindsay Grace explained that the plaintiff would be replacing Ms Janine Edgar, a senior accountant who was about to go on parental leave. The plaintiff was concerned that should Ms Edgar come back from parental leave, during which her position would have been protected, the plaintiff might then have been made redundant. The plaintiff was assured that her role was not conditional on Ms Edgar's return and that her role was permanent. The defendant acknowledged, in a letter dated 26 April 2010, to which I will again refer, that at the time the plaintiff was employed, GTA envisaged that her position "would be long term".

[6] Mr Lindsay Grace accepted in cross-examination that the plaintiff was correct to have assumed at the time GTA recruited her that they had adequate work for her to provide her permanent long-term employment. The GTA directors were aware that the plaintiff was at that time in permanent long-term employment with KPMG.

[7] It is common ground that at no stage during the interview on 10 August 2009, or at any time subsequently before the plaintiff was offered employment by GTA was it ever suggested that GTA might, at some stage in the near future, look at restructuring.

[8] On 19 August 2009 the plaintiff accepted an offer of employment with GTA and commenced work on 5 October that year. The parties signed an individual employment agreement which embodies the terms of the employment.

[9] The plaintiff worked a 40 hour week throughout the period from 5 October 2009 until 14 April 2010. The staff remained unchanged throughout that period, apart for Ms Edgar leaving for parental leave in December 2009. The plaintiff took over much of Ms Edgar's work during the period October 2009 through to March 2010.

[10] GTA management held staff meetings on the first Wednesday of each month. At the meeting on 7 April 2010 it was announced that the plaintiff would take over the remainder of Ms Edgar's workload. That meeting was attended by Messrs Lindsay and Michael Grace. Mr Lindsay Grace addressed the issue of the fixed fee arrangements for certain clients which apparently prevented the full fee recovery by

GTA for all the work performed. The minutes of the meeting record that Mr Lindsay Grace was holding off reviewing those fixed fees because major changes in the workflow of the managers were expected.

[11] At the time of that meeting Ms Retter had worked with the directors during the previous month on the allocation of the workload of the staff and had prepared a work schedule which I find had allocated the plaintiff a substantial volume of work for the year ahead.

[12] When discussing workloads at the staff meeting on 7 April the minutes record the following:

> 14. Workflows have not changed all that much. Most of Janine's jobs have gone to Judy [Ms Brake]. If you're not busy this month, look over your workflow and familiarise yourself with your jobs. In some months the hours have gone over but this will be due to those larger jobs that could take more than a month to complete. It's just a matter of juggling. If you are stressed, put your hand up!
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> 15. At the beginning of each month there will be a meeting about how the last months work went. If it went good/bad, over/under budget and how we can resolve issues. Put in your diaries a half hour block to look over your timesheets for the previous month so you can fill out your workflow with your actual hours so an accurate comparison can be made.

[13] It is common ground that nothing was said at that meeting to suggest that GTA had surplus capacity for the performance of its accounting work.

[14] It was Mr Lindsay Grace's evidence that he had prepared an analysis over the Christmas 2009/2010 period which showed concerns with cost overruns with fixed fees that could not be on-charged. He had discussed these with Mr Michael Grace. He considered there was little they could do to change the contracts and that they had to hold the matter over until a more complete review of the client's files could be done in mid-late March 2010. He claimed that the report from Mr Michael Grace and Ms Retter of the review of the work schedule for 2010/2011 demonstrated that if assignments were performed to budget, GTA had significant overcapacity with their current staffing levels.

[15] Mr Lindsay Grace said he prepared a report showing that the annual turnover was significantly down on forecast. On Friday 9 April 2010 he drafted an initial report which he completed as an action plan. On Saturday 10 April he identified in that report that they had made an apparent loss, that they had time efficiency issues and their cash reserves were down by $100,000 from the same position in previous years. His action plan proposed reviewing pricing for all GTA's work, varying the terms of the fixed term contracts, instituting monthly monitoring of fees, viewing discretionary costs, improving the efficiency of administration work and arranging a meeting with the bank manager to outline the problems and to seek support by way of additional facilities. He decided that he needed to get legal and human resources advice should redundancies be needed as he had not ever made any staff redundant in the past. He sent an email to Wendy Macphail of Employment Law Services on the morning of Saturday 10 April 2010 in which he stated:

> I have been reviewing our performance for the last year & budgets for the coming year. I need to review with you making one staff member redundant & also looking at a possible restructure so making another position redundant.
>
> When can we catch up?

[16] Ms Macphail responded at 6.20 am on Monday 12 April offering to meet later that day. She met that day with Messrs Lindsay and Michael Grace, Mrs Glenys Grace (Mr Lindsay Grace's wife and an employee of GTA), Ms Retter and Joy Luker (a long term employee of GTA who specialised in business development and trouble shooting for clients). They reviewed the issues Mr Lindsay Grace had identified. His evidence was that the outcome of the meeting was to implement the action plan immediately and, because of the overcapacity which he claimed had been previously identified, to implement the redundancy process for Joanne Stirling, a manager whose position they considered surplus to requirements and Kirsty Redmayne, a training accountant.

[17] Ms Macphail gave certain advice, including reference to the principle in redundancies of last on/first off. The evidence led on behalf of the defendant was unsatisfactory as to when precisely during the course of Monday 12 April it was decided that the redundancies would not be limited to Ms Stirling and Ms Redmayne. It is common ground, that these were the two staff to be affected by the

possible restructuring referred to in Mr Lindsay Grace's 10 April email. Why it was also decided to include the plaintiff, apparently based on the principle of last on/first off, was not made clear. Ms Macphail was not called as a witness. It appears that the defendant acted largely on Ms Macphail's advice and, as will be seen, Ms Macphail actually dismissed the plaintiff.

[18] Messrs Grace attended at their bank and received assurances that the bank would support them with whatever necessary facilities were required. The practice did not avail itself of their bank's offer of support.

[19] At around 12.30 pm on Wednesday 14 April 2010, the plaintiff spoke to her manager, Ms Retter, and told her that she needed to take leave on Friday 16 April to make a routine visit to her doctor at Auckland Hospital, as she had leukaemia. The plaintiff explained that this had not affected her work, her condition was stable and under control and her treatment involved blood count monitoring at Auckland Hospital. The plaintiff said she was fit and well. This had not been previously discussed with anyone at GTA.

[20] Ms Retter gave evidence that she was quite taken aback by the plaintiff's advice. A short time later Ms Retter had lunch with Mr Lindsay Grace and told him about the plaintiff's leukaemia and passed on what the plaintiff had told her. Although they were joined at lunch by Mr Michael Grace and a client, Ms Retter's evidence, confirmed by that of Mr Michael Grace, was that she did not tell Mr Michael Grace either that day or subsequently about the plaintiff's leukaemia. I accept her evidence.

[21] In spite of receiving the advice about the plaintiff's medical condition, Mr Lindsay Grace and Ms Retter proceeded, as they had previously agreed with Mr Michael Grace and Ms Macphail in attendance, to hold a meeting with the plaintiff that same afternoon at around 3pm. It appears they had previously held meetings that morning separately with Ms Stirling and Ms Redmayne, who were apparently told something similar to what the plaintiff was told, for the first time, at the 3 pm meeting. I accept Mr Lindsay Grace's evidence that he was distressed at the role he had to play at that meeting as he had never been previously involved in making any

staff redundant. It is therefore likely that his voice was strained and not normal and the way that he read out the material to the plaintiff added to her own distress, coming only two and one half hours after she had first told GTA of her chronic illness.

[22] At the 3 pm meeting Mr Lindsay Grace read out prepared notes apologising in advance that he might need to keep looking down at them. The following is a summary of what he stated. The recession was impacting on their business. Last weekend he was working on his books and was surprised to see how much their costs had gone up despite their workload decreasing and for this reason the company was forced to look at the way they were doing things for financial reasons. As a consequence they were considering a restructuring proposal. Nothing had been decided at that point in time regarding the structure of the business, but the plaintiff needed to know that if the restructuring presently under consideration was adopted her position may be surplus to their requirements.

[23] They wanted to hold a formal consultative hearing to discuss the matter with her further and she was entitled to bring a representative with her to that meeting if she would like to. At that meeting he would explain to her the detail of the restructuring proposal that they were considering and she would be provided at that meeting with the opportunity to put forward any comments and suggestions that she might have. GTA wanted to hear her views about the situation before deciding what to do. That meeting would also discuss her entitlements regarding redundancy and any assistance that might be offered should it become necessary to make her position redundant. The meeting would be held the following Monday afternoon.

[24] For commercial reasons she was required to keep the matter confidential, apart from her representative, if she chose to use one, and her partner and would need to tell them that they must also keep the information confidential. She was also required to keep the matter confidential from other employees within the company and that this was very important. She was asked if she had a problem with that directive or any problems about what had just been told to her about confidentiality.

[25] The plaintiff was then thanked for her time and given a letter summarising what had just been told to her. She was told she need not go back to work but could go straight home if she would like to, and could also have the next Thursday and Friday off work on pay so that she could arrange a representative for the meeting. She was asked to ring Mr Lindsay Grace in the morning if she wanted to have one or two of those days off on pay.

[26] The plaintiff described herself in evidence as being shell shocked and totally surprised. She stated that her first reaction was to link the letter to her disclosure to Ms Retter. She asked Mr Lindsay Grace if the meeting was related to her leukaemia. She said that Mr Lindsay Grace stammered and that Mr Michael Grace expressed surprise and claimed that he did not know about it. Mr Lindsay Grace said that he first thought about the need to restructure the company on Friday 9 April and had continued to think about it over the weekend. She was then handed the letter.

[27] I have no doubt the plaintiff was shocked and distressed by the announcement. She had been given no financial or other information as to why she was likely to be dismissed, just six months after she had been employed and had left a secure job to start at GTA. She did not think there was any response she could usefully make and initially decided not to go to the Monday meeting.

[28] The plaintiff was not required to attend work the following day and on the Friday she went to Auckland hospital as planned. During the weekend she met her ex-husband, her advocate Mr Warwick Reid, and he explained to her an employer's obligations in relation to redundancies.

[29] On Mr Reid's advice the plaintiff attended the meeting on Monday 19 April. Mr Michael Grace was present. She was introduced to Ms Wendy Macphail, who she now knows to be an employment advocate. She again raised the issue of her leukaemia and Mr Michael Grace responded by saying that the redundancy was unrelated. Ms Macphail, to back up Mr Michael Grace's assertion, told the plaintiff that she had been consulted about the process two weeks before. The plaintiff said she found this strange because when Mr Lindsay Grace spoke to her at the previous Wednesday meeting, he had claimed that he first thought about the redundancies

over the prior weekend. Mr Michael Grace corrected Ms Macphail who agreed that she had been phoned by Mr Lindsay Grace on Saturday 10 April, only nine days before.

[30] The plaintiff stated that she could not put forward comments and suggestions about the restructuring proposal as, other than the fact that she was about to be dismissed, as she had virtually no information about the proposal. She claims that when the meeting ended she was not clear as to her work situation.

[31] At the meeting the plaintiff was advised that a senior accountant's role was to be disestablished, should the restructuring proposal be adopted. It was explained to her that the criteria that they were considering applying was "last on/first off". They stated that, before they could make any decision, they would like to consider any ideas she might have, that they had not thought of. The plaintiff was then given the following two days off to work on alternatives to the restructuring proposal. She was asked to present her written submissions by 5pm on Wednesday 21 April so that they could consider them before the next meeting scheduled for Thursday 22 April, at a time to be agreed.

[32] The following day, 20 April, Mr Michael Grace sent the plaintiff a letter confirming the discussion. It stated that the company was suffering a downturn in business and its costs had increased in the last year and it was considering the restructuring proposal which could make her position surplus to requirements. It stated that, at the meeting scheduled for 22 April, GTA would provide the plaintiff with feedback about her written submissions and would inform her whether or not the company accepted the redundancy proposal in its existing format. It also advised her that on that day she might receive notice that her position would be disestablished, depending upon the written feedback she provided.

[33] The plaintiff responded the following day, Wednesday 21 April, stating at the outset that as she had been given little or no information about the reasons for the redundancy or the proposed reallocation of her workload, she was not in a position to comment constructively on the proposals. She therefore confined her submission to expressions of concerns about her own treatment as an employee. These included:

a) that she had only been employed for six months and had queried at the time whether it was a long term position and it was confirmed that it was;

b) that as a consequence she had resigned from a long term senior role at KPMG;

c) that there was no indication in October 2009 that there were any concerns about the economic impact of the recessionary environment;

d) that within hours of conveying her medical condition to Ms Edgar she was called to the meeting and advised of the redundancy process. The coincidence in timing led her to believe the issues were related. She suggested that the redundancy process had the appearance of a sham and that she may well have grievance rights as an employee and for discrimination under the Human Rights Act 1993;

e) she sought information demonstrating how the workload of the firm had deteriorated since her employment six months previously;

f) she sought information about the working hours of others and alternatively ways of retaining her employment, possibly by the reduction of her work in a restructured role, rather than her redundancy;

g) she expressed her enjoyment of her work over the previous six months and wanted to be able to continue to work diligently for GTA;

h) she concluded by stating that the stress that they had caused her to suffer was extreme and that she did not feel up to attending the proposed meeting that week.

[34] The plaintiff received in response the letter dated 26 April 2010. This repeated that the restructuring proposals had been for financial reasons as it was GTA's view that it might be overstaffed for the work they had, and this could result in the possible disestablishment of a number of roles, based on the last on/first off criteria. It confirmed what she had been told, namely that GTA did not bring in the

revenue it had expected and that costs had also gone up and it attached a statement of the turnover and wages bill for the years ending 2009 and 2010. Without setting out the full figures it showed the turnover was down by $99,799 in 2010 from 2009 and the wages were up by $19,084.

[35] The letter stated that others in the team would take over her work if her position was disestablished. It stated that when she was employed six months earlier, GTA envisaged her position would be long term because at that time they did not foresee that they would be in the financial position they were today and that their revenue would have been so low for the last year.

[36] The letter acknowledged that she had resigned from her position at KPMG to take up the position with GTA but at the time they did not foresee that the recession would impact to the extent that it had. They accepted that her chronic illness had never impacted upon her work and contended that they did not even know of her condition until recently, stating that her medical condition did not influence the decision to consider her role for disestablishment. The letter also advised that GTA had commenced consultation with two other staff members with regard to the restructuring proposal and, during the process, both potentially affected employees had chosen to resign as they had other opportunities available to them. One position was a senior accountant/manager role, the other position was a part-time intermediate role. These were later found by the plaintiff to be the positions held by Ms Stirling and Ms Redmayne respectively.

[37] The letter confirmed that consideration had been given to part-time work for the plaintiff and others but claimed that this did not work operationally or financially and that GTA was able to offer better service by having full-time staff rather than part-time employees. Although it acknowledged it was true that they had some part-time staff presently, it stated that they did not want any more and the bigger jobs, which the plaintiff had the experience to do, were being undertaken more efficiently on a full-time basis. The letter claimed that this provided the extra information she had requested and gave her until 28 April to provide any further thoughts she had about the matter, with a new meeting scheduled for 29 April to which she was invited to bring a representative.

[38] The plaintiff returned to work on Wednesday 28 April with a medical certificate clearing her for full-time work. She received on that day another letter from GTA. It expressed the view that the company could complete all foreseeable work in the future with fewer employees, thus reducing expenditure. It reiterated that GTA would not have employed her if they had foreseen a reduction in work ahead. It annexed a schedule showing the way the company's turnover had increased for the last five years and noted that this had shown an increasing turnover by about $100,000 per annum. It states that they had had no reason to believe that this would not be the same for 2010 but instead of there being a $100,000 increase in turnover for 2010 there was in fact a $100,000 decrease in turnover. (As was common ground these figures, in fact, turned out to be incorrect).

[39] The letter concluded that the turnover was $200,000 short of what was expected and while two employees had resigned, resulting in a saving of approximately $93,600, the firm was still "around" $100,000 short of what had been projected. The letter concluded by stating that GTA believed that they had provided the plaintiff with sufficient information to meet her enquiries about the company's turnover and the workload.

[40] The final meeting took place on 30 April. It was attended by Messrs Lindsay and Michael Grace and Ms Macphail on behalf of the company. The plaintiff was represented by Mr Reid. The plaintiff claims that during the course of the meeting Ms Macphail, in response to the contention that GTA should have foreseen the downturn in work at the time of her engagement, asserted that the company had no idea about this and that the workload had dropped significantly during the last six months. After being pressed on the point by Mr Reid, Mr Lindsay Grace finally admitted that while there was some drop in the workload it was not significant and he stated that GTA did not keep records for the measurement of actual performance against budgeted performance.

[41] At the conclusion of the meeting Ms Macphail announced that the plaintiff's position was disestablished for economic reasons, that she would have one month's notice and that GTA had elected to pay out the notice period. She stated there was no point in the plaintiff coming back to work as her position had already been

disestablished and there was no work for her. The plaintiff was provided with offers of career counselling sessions and positive references.

[42] Mr Lindsay Grace gave evidence that in about the middle of May 2010 Ms Luker was preparing year end statistics reports for the company. She queried Mr Lindsay Grace's calculation of the turnover as her figures were showing an amount of some $120,000 more. On double checking he said that they found that he had shown incorrect figures in his workings for the restructuring process which had created the error. Notwithstanding that he still claimed that the annual turnover for the 2009/10 year was still lower than that of the previous year but instead of his projected loss of $61,000 the final result declared was a profit of $59,568. He contended that this result was still not acceptable and he believed that the action that they had taken to make the three staff redundant was valid.

[43] The difficulty with that view is that, as the plaintiff said in her evidence, it produces quite a different picture to that presented to her at the time of the meetings and, in particular, to the figures in the letter of 28 April. There was not a $100,000 decrease in turnover for the year ending 2010 and in fact the turnover figure should have been increased by $120,000. Further the result of the two other employees resigning meant a saving of another $93,600. The figures therefore used to justify the redundancy of the plaintiff had turned out to be inaccurate. This is a matter to which I will return when applying the law to this case.

[44] I did not find that the defendant's position was greatly assisted by the evidence of their expert, Marsden Robinson, whose evidence I accept. Mr Robinson was instructed, apparently in 2012, to review and report on the financial performance of GTA in the fiscal years up to 31 March 2010 and the two subsequent fiscal years. Whilst there was a strong suggestion from the plaintiff that some of the material provided to Mr Robinson by GTA for his analysis may have been incorrect, particularly in relation to the staff ratios, this did not, materially undermine his substantive findings. Despite increases in the gross fees earned, the net income of GTA effectively remained static for the four years to 31 March 2009, declined in the year ending 31 March 2010 and improved in the year to 31 March 2011.

[45] Mr Robinson found that the financial performance of GTA for the five years ending 31 March 2010, was highly unsatisfactory and that if GTA had sought his advice at that time, he would have recommended substantial staff reductions. It was unfortunate that Mr Robinson was called by the defendant before I heard the evidence from the two principals of GTA and their explanation as to how they analysed matters to come to the conclusion that they had to make three staff redundant in April 2010.

[46] Mr Robinson confirmed that he did not obtain any financial information which enabled him to discern that in the period from October 2009 until the end of March 2010, a period of approximately six months, there were any changes financially to the practice which would have given rise to concerns for the principals of GTA. He confirmed that he had not been provided with any such material and could comment only on the annual figures. He was able to say that the profitability for the practice for the year ending March 2010 and the four years prior to that had been, in his view, unsatisfactory. He was not aware of any particular differences about the year ending 2010, in comparison to the years ending 2009/2008 and earlier.

[47] I asked Mr Robinson whether it would have been sage in his view for the directors to have employed an additional senior accounting staff member half way through the 2010 financial year, that is to say in 2009. He confirmed that was not a sage thing to do, and if they had approached him in any of those years from 2006 until 2010 with those figures, he would have told them that they had too many staff. He confirmed that his general conclusions, based on his analysis of other accounting practices, would not have been any different if he had been asked to report for any of the years from the years from 2006 until 2010. He noted that 2011 did produce a better report, but that there was still considerable room for improvement. I asked him whether at the time the plaintiff was offered employment, somewhere around August of 2009, the financial position of the practice at that stage was unsatisfactory from Mr Robinson's point of view. He stated that it was and he would have thought that this should have been apparent to GTA. His evidence was that there was nothing that would materially have changed the position adversely from August 2009 until 31 March 2010.

[48] I conclude that had Mr Robinson's expert opinion been sought at the time of the negotiation with the plaintiff he would have advised GTA not to have employed the plaintiff in August 2009 and there was nothing that he was aware of, that changed the position between that point in time and 31 March 2010. Shortly after that date Mr Lindsay Grace, based on his miscalculated figures, concluded that the practice was in something of a crisis which required the immediate redundancy of three of the staff.

[49] I find as a fact that had Mr Lindsay Grace's calculations for the redundancy proposal not been based on an error of $120,000 there would have been no immediate need for the redundancy of the plaintiff. Mr Lindsay Grace's action plan included a number of practical proposals which would have revealed to GTA its correct financial position, have improved its profitability and may have avoided the plaintiff's redundancy at that time.

The law

[50] Mr Pollak, for the defendant, advised that his client relied on, as it had at the Authority, the decision of Chief Judge Colgan in *Simpsons Farms Ltd v Aberhart*[2] and in particular the following statement:[3]

> … So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.

[51] That decision has recently been explained by the judgment of the Chief Judge in *Rittson-Thomas t/a Totora Hills Farm v Davidson*:[4]

> [48] In *Simpsons Farms* I said that I did not understand Parliament to have intended the principles stated by the Court of Appeal in *GN Hale & Sons Ltd v Wellington Caretakers IUOW*[5]to be affected when it enacted the Employment Relations Act and, in 2004, s 103A in particular. That statement may be interpreted to say that an employer only has to persuade the Authority or the Court that the decision to declare a position redundant (and, thereby, to dismiss the holder of that position) was a genuine business decision in the sense that it was not a charade dismissal for other motives.

[2] [2006] ERNZ 825.
[3] At [67].
[4] [2013] NZEmpC 39.
[5] [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).

> That, in turn, has resulted in employers presenting evidence to this effect and then submitting that the Authority or the Court is not entitled to inquire further into the decision if it is satisfied that business reasons were the true ones for the dismissal. If that has been taken from what I wrote in *Simpsons Farms*, it was not what was intended. Readers of my judgment in that case will note that after making those remarks about *GN Hale*, I did then apply a s103A analysis to the employers decision to dismiss the grievant in that case and did not simply accept the assertion that it was a genuine business decision.

[52] After referring again to the Court of Appeal's decision in *GN Hale & Sons Ltd v Wellington Caretakers IUOW,*[6] Chief Judge Colgan[7] made it clear that it was not for the Court or an Authority Member to substitute its decision for that of the employer's business judgment at the time. He stated:

> [50] … So, in practical terms, a Judge (or an Authority Member) cannot say "On the information now before me I would not have made the decision the employer did and so the employer should be found to have done so unjustifiably".

[53] The Chief Judge stated[8] that the Court cannot ignore the statutory requirements contained in s 103A:

> [53] Section 103A does require the Court to inquire into a decision to declare an employee's position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified. The statutory mandate does not, however, go as far as the Labour Court did in *GN Hale*, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done, and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.
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> [54] It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.
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> [55] It may be seen that the enactment of the Employment Relations Act and, in particular, s 103A in 2004 and as amended in 2010, did affect the

[6] [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).
[7] *Rittson-Thomas* at [50].
[8] *Rittson-Thomas* at[53]-[55].

> previous law about justifications for dismissal on grounds of redundancy but not to the fundamental extent of setting aside everything that the Court of Appeal propounded in *GN Hale*.

[54] I have quoted extensively from *Rittson-Thomas* and record my complete agreement with the way the Chief Judge has explained the requirements of s 103A in a redundancy setting. It is entirely in accord with the views expressed about s 103A by the full Courts in *Air New Zealand v V*,[9] and *Angus v Ports of Auckland Ltd*[10] both misconduct cases.

[55] I am satisfied that the law requires me to determine whether the decision GTA made to dismiss the plaintiff and how it was reached were what a fair and reasonable employer would have done in all the relevant circumstances.

Justification

[56] I find that the plaintiff had reasonable grounds for believing that her advice on her medical condition at 12.30 pm on Wednesday 14 April 2010 led to her being called into the meeting at 3 pm that afternoon and being warned that she may face the disestablishment of her position and the loss of her employment. The timing was most unfortunate. The defendant was following a predetermined pattern in relation to the three persons who had been identified for possible redundancies on the afternoon of Monday 12 April. When the plaintiff was being told of her impending redundancy and required to keep it confidential she was totally ignorant that two others could be affected at that stage. All of this reasonably led her to believe that her health was why she was being selected for dismissal.

[57] Other communications she received right up to and including the Authority's investigation supported her in that conclusion. Initially she was not given any financial information which independently supported the decision to make her redundant. It was never satisfactorily explained to her, or the Court, how she came to be listed as the third person to be considered for redundancy when Mr Lindsay Grace had only considered one definite and one possible position for restructuring on the weekend. Both of those positions were quite different to that of the senior

[9] [2009] ERNZ 185.
[10] [2011] NZEmpC 160 at [25].

accounting position held by the plaintiff. It was understandable that she would draw the conclusion that the last on/first off principle had been used at the last moment, before the consultation process started, in order to include her, because of her health situation. That reasonable belief of the plaintiff caused her considerable distress and was the underlying reason for the tension that developed in the 30 April meeting.

[58] I am, however, satisfied from the evidence given by both Messrs Lindsay and Michael Grace that the plaintiff's chronic illness was not a factor which led to her inclusion for redundancy purposes. That apparently was as a result of the application of the last on/first off principle in order, presumably, to be able to justify the redundancy of the other two employees, which might have been more difficult if the most recent employee had not been included for redundancy purposes. That view was apparently reached on the Monday on the advice received from Ms Macphail. It has, I find, bedevilled the proper consideration of the plaintiff's redundancy by the defendant, which proceeded on the wrong financial information.

[59] The onus of establishing the justification rests on the defendant. As I have indicated in my factual findings there are three major areas of difficulty for GTA. The first is the employment of the plaintiff in August 2009 when, on Mr Robinson's evidence, the practice should not have engaged a permanent full-time senior accountant because of its financial position, at that time unknown to GTA. Second, the claim that the defendant's financial position deteriorated substantially over the subsequent six months, when there is no evidence that it did so. Third, the lack of evidence as to why it included the defendant with the two staff whose positions were being considered for disestablishment.

[60] There was no convincing evidence that GTA's financial situation substantially deteriorated, either as a result of the recession or as a consequence of the loss of clientele, in the six months following the plaintiff's employment. Only one client's loss was mentioned and that was as a result of taxation advice, not the recession. Those fees lost were not, I find material when considering the defendant's total turnover. The turnover figures were miscalculated by more than $120,000.

[61] The 7 April meeting clearly demonstrated that there was more than adequate ongoing work for the plaintiff and other members of the staff who were asked to indicate if they felt themselves under stress. I was not satisfied that the work allocation showed a staff overcapacity. The action plan Mr Lindsay Grace proposed would have provided for the first time for a careful monitoring of the true situation and this would have allowed any future decisions to be based not on miscalculations, but on accurate assessments.

[62] The defendant ran a substantial accounting practice with major clients and was used to providing accurate financial analysis of its clients' financial affairs. It did not, from the evidence I heard, adequately apply such analysis either to its decision to employ the plaintiff or the decision to make her redundant. It did not give adequate information to the plaintiff at the time which would have enabled her to have seen the financial error on which Mr Lindsay Grace's calculations were based and would have allowed her to come up with more concrete proposals that could have avoided her redundancy.

[63] The defendant did not adequately explain how the plaintiff came to be included in the redundancy proposal especially after the other two employees accepted the situation and agreed to leave. This would have provided GTA with sufficient saving to have rendered the plaintiff's immediate redundancy unnecessary.

[64] Had the defendant analysed its own practice on the basis of correct information, and in the manner in which Mr Robinson conducted his review, it would not have offered the plaintiff employment and motivated her to leave her permanent employment with KPMG.

[65] Taking into account the characteristics of the defendant, its actions and how it acted, I find they were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. For all these reasons I find that the defendant has failed to discharge the burden of showing that the plaintiff's dismissal for redundancy was justified.

[66] As alternatives to the submission that the defendant failed to satisfy the test of justification set out in S103A of the Act, Mr Reid argued that the defendant was estopped from relying on the provisions of the redundancy clause in the employment contract and that the dismissal was unjustified because it was not genuine, in the way the defendant applied the last on/first off criteria and, because the procedure was so flawed and lacking in good faith, it amounted to substantive unfairness.

[67] In support of the estoppel argument Mr Reid first cited *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd.*[11] The Court of Appeal observed that estoppel by convention is a species of estoppel by conduct or in pais, as it was called in some of the older authorities. For the purposes of a transaction the parties may agree that certain facts should be admitted to be the facts as a basis upon which they would contract and they cannot resile from that. As the Court of Appeal stated, put at its simplest, parties may, for the purposes of a particular transaction, agree either expressly or implicitly, that black shall mean white and vice versa. The Court of Appeal then stated:

> The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):
>
> (1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
>
> (2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
>
> (3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
>
> (4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true and binding.
>
> (5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.
>
> (6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption.

[11] [1996] 1 NZLR 548 (CA).

[68] Based on these tests, Mr Reid submitted that in the present case there was a mutual underlying assumption upon which both parties to this employment agreement acted in forming the employment relationship in August 2009 and through to 12 April 2010. That mutual underlying assumption, he contended, was that the defendant's present workload, as evidenced by the defendant's turnover, was of such a nature to support the plaintiff's employment on a permanent basis and that turnover did not change in the years 2009 to 2011 in any material respect. Mr Reid pointed to the evidence of Ms Retter, who explained why the plaintiff's permanent employment was important to the defendant because they were investing time and money in the plaintiff. He noted that the plaintiff explained why it was so vital to her, because she was in a long term employment relationship which she would never have given up other than on the basis of permanent employment with the defendant. He submitted that both parties, expressly or by implication, accepted this assumption as being true, as the offer otherwise would not have been made, nor would it have been accepted for the purposes of the transaction. This, he submitted, met the first two tests.

[69] As to the third test, he submitted the acceptance of employment was intended to affect legal relationships in the sense that it was intended to govern the legal position between them, particularly in respect of the redundancy clause in the agreement. To suggest to the contrary, he submitted, involved acceptance of the proposition that the defendant was redundant from the moment her employment commenced, or at least potentially redundant and that was a position the defendant cannot be permitted to argue.

[70] Mr Reid contended that the plaintiff had met the fourth test and the plaintiff was entitled to act and had acted as the defendant knew or intended, upon the assumption being true and binding and this she did by resigning from her long term secure position at KPMG and taking up employment with the defendant.

[71] As to the fifth test he submitted that the plaintiff would suffer detriment if the defendant was allowed to resile or depart from this assumption and justifiably dismiss her. He submitted that she had suffered detriment because she resigned from KPMG and was dismissed by the defendant six months after she started work for GTA.

[72] On the sixth point he submitted that it would be unconscionable to allow the defendant to depart from or resile from the underlying assumption of permanent, not six monthly, employment.

[73] Mr Reid also cited a number of cases showing the development of the estoppel doctrine, including *Harris and anor v Harris and anor*[12] a decision of Fraser J in which the Judge cited a number of English cases,[13] the first being *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*[14] a judgment of Lord Denning MR in which Lord Denning stated:[15]

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[74] Fraser J also cited two judgments of the Court of Appeal of New Zealand *Burbery Mortgage Finance & Savings Ltd (in rec) v Hindsbank Holdings Ltd* [16]and *Gillies v Keogh.*[17]

[75] Mr Reid also submitted there was no need for any actual representation and that the parties were bound by the conventional basis upon which they had conducted their affairs, even though there was no unequivocal promise by the conventional basis upon which they had conducted their affairs. It did not matter

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[12] (1990) 1 NZ ConvC 190,406; (1989) 6 FRNZ 1 HC Christchurch, CP208/89, 15 December 1989.
[13] At 33.
[14] [1981] 3 All ER 577 at 584.
[15] At 584.
[16] [1989] 1 NZLR 356; (1989) ANZ ConvR 371.
[17] [1989] 2 NZLR 327; (1989) 5 NZFLR 549; (1989) 5 FRNZ 490 (CA).

whether the underlying assumption of either fact or law was due to misrepresentation or mistake.[18]

[76] In the present case I am satisfied that the defendant was acting under the mistaken belief that it had a profitable practice, had adequate ongoing work and needed to engage the plaintiff on a permanent full time basis. Had the defendant obtained the benefit of Mr Robinson's analysis in mid-2009, when the other employee gave her notice of intention to go on parental leave, it is highly unlikely another permanent senior accountant would have been sought to replace her.

[77] It does not follow that if the estoppel applies the plaintiff was to be immune from being made redundant for all time during her employment with the defendant. It is possible to resile from an underlying assumption, providing reasonable notice is given.[19] It is not enough to say that the original assumption was based on a mistaken view of the defendant as to its profitability and therefore it was free to resile. This was because the parties had contracted on the basis that the underlying assumption of profitable ongoing work was correct. If the defendant could show a genuine change in circumstances, that would also allow for the assumption to be changed. That did not occur here.

[78] Mr Reid also addressed the doctrine of estoppel by convention, in the context of the interpretation of contractual arrangements by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[20] which was applied by Judge Ford in *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Amcor Packaging (NZ) Ltd*,[21] in the following terms:

> [27] The doctrine of estoppel by convention was explained in detail in *Vector*: indeed it formed the basis of the judgments of Justices Tipping, McGrath and Wilson. Justice McGrath stated:
>
> > [68] The essence of estoppel by convention and its distinguishing characteristic is that there is mutual assent or a common assumption as to the relevant fact:

[18] See *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, cited in *Gillies* at 5.
[19] See *Burbery* at 359, 361 and 364.
[20] [2010] NZSC 5, [2010] 2 NZLR 444.
[21] [2011] NZEmpC 135.

> …both parties are thinking the same; they both know that the other is thinking the same and each expressly or implicitly agrees that the basis of their thinking shall be the basis of the contract.
>
> [69] The effect of the estoppel is to prevent a party from going back on the mutual assumption if it would be unjust to allow him to do so.

> [28] Justice Wilson in *Vector* dealt with estoppel by convention in the context of it being one of the three exceptions to the general principle that the words of a commercial contract should be given their ordinary meaning in the context in which they appear:
>
> [124] The third exception is that a party asserting that the words of the contract should carry their ordinary meaning may be estopped by convention from doing so, if that would be a departure from the parties' common understanding (the "convention") that the words were not to carry their ordinary meaning. …
>
> [125] As Professor David McLauchlan said in a note on *Air New Zealand:*
>
> … there can be no objection in principle to the parties to a written contract being able to choose their own private code or convention as to the meaning of the terms of the contract.

[79] Mr Reid submitted that in the present case the Court would not be concerned directly with the interpretation of an agreement but whether the fundamental underlying assumption can be relied on to estop the defendant from asserting its strict legal rights.

[80] For completeness, Mr Reid referred to the reference to the doctrine of estoppel in *Armstrong v Attorney-General (on behalf of Chief Executive Department of Justice)*[22] where equitable estoppel was raised as a fourth cause of action. Mr Reid observed that there is still debate as to whether or not estoppel can found a cause of action but observed that in the present case it was purely being relied upon as a defence, a shield and not a sword. In the *Armstrong* case, Chief Judge Goddard noted that it is necessary for the creation of an estoppel to show a) the creation or encouragement of the belief or expectation; b) reliance by the party and c) detriment as a result of that reliance.[23]

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[22] [1995] 1 ERNZ 43.
[23] At 70.

[81] A more startling proposition advanced by Mr Reid was that even if the Court was to find that a dismissal was justified under s 103A, the successful employer could still be estopped from dismissing the grievant if the elements of the doctrine were present. I observed that it may be difficult for an employer to justify that it had acted fairly and reasonably if the employee could demonstrate, for the purpose of the estoppel doctrine, that the employer had acted unconscionably and that it would be unjust to allow the employer to resile from the underlying assumption where the employee had suffered detriment. Mr Reid submitted that the estoppel doctrine could constrain an employer from exercising, as part of the right to manage, the right to dismiss an employee on the justifiable grounds of redundancy. He cited *Duggan v Wellington City Council*,[24] where Chief Judge Goddard, in a somewhat different context, stated:[25]

> The time for exercising the right to manage is when deciding whether to enter into a particular contract and what its terms will be. Once the contract has been made and its terms accepted, the right to manage has been exercised and if this results in a voluntary consensual curtailment of some of the employees freedom of association then that is the result of its exercise of free will in entering into the contract. It has exercised its freedom of contract and must now bow to its consequence that employment contracts create enforceable rights and obligations, the shorthand term for which is the sanctity of contract. No employer should wish to deny these oppositions. No public employer may do so.

[82] I consider this is a matter which should be left for decision for another day. I note the presence of the statutory bar in s 113(1) of the Act which states:

> **113 Personal grievance provisions only way to challenge dismissal**
>
> (1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.
> …

[83] I conclude that the estoppel claim which I find made out, supports the conclusion that a fair and reasonable employer would not have dismissed the plaintiff in these circumstances.

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[24] [1994] 1 ERNZ 241.
[25] At 256.

[84] Mr Reid submitted that, in considering justification, one of the circumstances in the present case was the purported application of the last on/first off principle. He submitted that because of the matters he had raised the defendant was estopped from raising that argument because of the underlying assumption upon which the plaintiff was employed.

[85] I can see the force of that argument. It would not apply to someone who was unemployed at the time and offered a position, or where there had been no underlying assumptions as to the permanency of the employment. In such cases a fair and reasonable employer might be objectively justified in applying the last on/first off principle in a redundancy situation. It was not appropriate here and this supports the conclusion that the dismissal was unjustified.

[86] As to the claim that the dismissal was not genuine, in the present case there is no suggestion that the redundancy was a mask for some other ulterior motive in dismissing the plaintiff. The defendant thought highly of the plaintiff, her dismissal was the last thing the directors wanted to do and they wrongly considered they were compelled to do so by the financial situation or the first on/last off principle. This was a genuine, but mistaken, dismissal.

[87] There is evidence that the directors acted precipitously. If they had put into process the forward plan they had considered on 7 April of closely analysing the monthly fees in terms of budgets, and making accurate comparisons, something they had never apparently previously used as a management tool, this would soon have shown, based upon the correct turnover figures and the savings made by the resignation of the two other staff, that the plaintiff's redundancy would not have been required.

[88] Finally Mr Reid submitted that the consultative process was only formulaic and was not genuine because it did not provide, in terms of s 4 of the Act, adequate access to information relevant to the continuation of the plaintiff's employment and about the decision or an opportunity to comment on the information before the decision was made.[26] Because of the inaccuracy of the information being relied

[26] Section 4(1)(a)(c)(ii).

upon, Mr Reid submitted that putting all of these matters together shows that the redundancy process was fundamentally flawed and the statement from Ms Macphail that there was a substantial downturn in work was not true.

[89] These are matters I have already taken into account in concluding the dismissal was unjustified.

Remedies

[90] The plaintiff sought reimbursement to her of lost earnings from 30 April 2010 until 31 March 2012 giving credit for $5,000, being the one month's notice and total part-time earnings and benefits of $21,106. This, Mr Reid stated, made a total of $104,38.94 before tax. Her evidence was that she applied to see if she could get her old job back at KPMG but she was unsuccessful. She also provided copies of a considerable number of job applications for which she was also unsuccessful. Mr Pollak took no issue with any failure of duty to mitigate and I am satisfied that no such break in the chain of causation can be established.

[91] Before projecting the loss of earnings as far ahead as Mr Reid is seeking on behalf of the plaintiff it is necessary to consider the decision of the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang.*[27] This deals with the discretion that may be exercised by the Authority or the Court under s 128(3) of the Act to order an employer to pay, by way of compensation for remuneration lost by the employee as a result of the personal grievance, a sum greater than that to which s 128(2) relates. That subsection provides that the employer must pay to the employee the lesser of a sum equal to the lost remuneration or three months ordinary time remuneration.

[92] The Court of Appeal decision requires the Authority and the Employment Court to consider any factual matters which might indicate that the employment, but for the dismissal, would not have carried on for the period for which reimbursement is being sought. Thus, if the employment was already unsatisfactory and there were major employment relationship problems, it may have been unlikely that the employment would have continued beyond the three months period.

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[27] [2011] NZCA 608.

[93] In the present case there were no factors relating to either the plaintiff's work performance or personality which in any way would have rendered her likely for dismissal. To the contrary, her past working record demonstrates many years of stable and satisfactory work. She was held in high regard by the defendant.

[94] If, in the period under consideration, it could be demonstrated that the financial situation of the practice had deteriorated to such an extent that redundancy would have been a likely consequence for the plaintiff on a last on/first off basis, then that would have been the point at which the lost remuneration would cease.

[95] The financial material provided by the defendant's however, showed that that point was not reached in the ensuing years after her dismissal even if it had to continue to meet her salary. I therefore cannot find any clear factual basis upon which to reduce the amounts sought. Taking into account, however, the need for the Court to exercise a degree of restraint and to be fair to both sides when settling the grievance,[28] I consider that 12 months salary, without any allowance for anything earned during that particular period, would be an appropriate award, recognising both the interests of the plaintiff and the defendant. I therefore award the plaintiff for lost remuneration, the total of $65,000, before taxation.

[96] Turning to the claim for compensation under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings, I note that at the last moment in the hearing, Mr Reid formulated the compensation figure on behalf of the plaintiff at $40,000. The effect of this dismissal on the plaintiff was readily apparent when she gave her evidence. She broke down in distress on a number of occasions and had difficulty reading her brief. As Mr Reid put it, a defendant must take the plaintiff as it finds the plaintiff, taking into account the characteristics of that person. The plaintiff had recently informed the defendant of her leukaemia, she was single and dependant upon her income and the timing of the announcement of the redundancy proposal less than three hours after she had sought leave to attend Auckland Hospital was most unfortunate and added greatly to her distress. The consequences of the redundancy, her concerns that it may have been because of her medical condition, and her regrets over the loss of her previous stable employment, clearly remained

[28] Section 123(1).

with the plaintiff up until the hearing. Mr Reid advised that he had considered obtaining medical evidence to put before the Court and although this was not done, I am satisfied that there were serious consequences for the plaintiff in being made redundant. I award her $20,000 under this head.

[97] The plaintiff is entitled to costs. If these cannot be agreed they should be the subject of an exchange of memoranda, the plaintiff's memorandum being filed and served by 24 May 2013 and the defendant's response by 31 May 2013.

B S Travis
Judge

Judgment signed at 11am on 13 May 2013