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Employment law legal analysis - Must employers redeploy redundant employees?

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This article looks at an employer's obligation to redeploy an employee to a different position in circumstances where they would otherwise be made redundant. The writer's focus is not on the existence or extent of any such obligation, but on how the Employment Court has distinguished a key decision of the Court of Appeal to find that such an obligation, in law, exists.

As all lawyers know, the Court of Appeal's decisions are binding on the Employment Court. The doctrine is called *stare decisis et non quieta movere* - to adhere to precedents and not to unsettle things that are established.

Equally well known is that such decisions are not binding if they can be distinguished by some factual, procedural or legal difference from the case before the lower court thereby rendering the higher decision inapplicable.

The writer explores how the Employment Court distinguished the Court of Appeal's Judgment in *New Zealand Fasteners Stainless Ltd v Thwaites*[1], with the effect of reversing the law enunciated in the higher court.

New Zealand Fasteners

In 2000, the "full court" of the Court of Appeal in *New Zealand Fasteners,* presided over by Richardson P, Gault, Thomas, Keith, Tipping JJ, stated[2]:

> *The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination.*

And[3]:

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

By reason of *New Zealand Fasteners,* an employer is obliged to consider whether a redundancy might be avoided by redeployment or otherwise, but is not obligated to offer the affected employee a different position.

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[1] [2000] 1 ERNZ 739
[2] At page 747, para 22
[3] At page 747, para 25

The Court of Appeal's rationale was that the relationship between employer and employee applies in respect of the position and work the employee is contracted to provide and that this may be varied consensually in the course of the relationship, but not otherwise, not even by the courts.

Jinkinson

In 2010, Judge Couch in the Employment Court in *Jinkinson v Oceana Gold (NZ) Ltd*[4] distinguished *New Zealand Fasteners* stating that the law had substantially altered since that Judgment.

Jinkinson turns the effect of *New Zealand Fasteners* around. Now an employer is not merely required to consider whether the redundancy might be avoided by redeployment or otherwise, an obligation acknowledged in *New Zealand Fasteners*, but they are also obligated to offer the employee a different position if the courts consider one to be suitable.

The decision in *Jinkinson* has since been followed in *Wang v Hamilton Multicultural Services Trust*[5] without further analysis of the underlying principles of law. As things stand, *Jinkinson* represents the law on this key "redundancy" issue rather than *New Zealand Fasteners.*

His Honour gave 3 reasons for his stance, namely, that:

1. *New Zealand Fasteners* was decided in the context of the Employment Contracts Act 1991. The enactment of the Employment Relations Act 2000 (**ER Act**) and, in particular, the amendments made to it in 2004 had substantially altered the law in the area[6].
2. S103A ER Act required the courts to objectively review all the actions of an employer up to and including the decision to dismiss. In the case before him, a critical step in deciding to dismiss Ms Jinkinson was the decision that she would not be appointed to one of the [available alternative] positions[7].
3. The introduction of the duty of good faith in section 4 ER Act and, in particular, the relationship between ss4(1A)(c) and 103A meant that that the employer's decision not to appoint Ms Jinkinson to one of the [available alternative] positions must be justifiable[8].

Each of His Honour's reasons are considered below to assess whether the legal 'about face' in *Jinkinson* is itself justifiable.

Would v Could

The first point His Honour makes is that *New Zealand Fasteners* was decided in the context of the now repealed Employment Contracts Act 1991. Certainly, the test for justification was different when *New Zealand Fasteners* was decided as compared with when *Jinkinson* was decided.

In *New Zealand Fasteners*, the courts assessed an employer's conduct by what they justifiably could do in relation to the employee. This may be discerned from the Court of Appeal's use of the words "could have reached" in its Judgment (see within the above Judgment extract).

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[4] [2010] NZEMPC 102
[5] [2010] NZEmp142
[6] At para [37]
[7] At para [38]
[8] At para.s [40], [41] and [43](c)

In consequence, the Court of Appeal imposed a subjective test, that is, what the employer could do, rather than the objective test of what they should have done. A subjective test allows an employer a wider range of possible lawful alternatives, than the objective test which requires the courts to determine what the employer ought to have done.

In October 2000, the Employment Relations Act 2000 came into force leaving the subjective test applied in *New Zealand Fasteners* unaffected.

Because the justification test involves balancing the rights of employers on one hand with the rights of employees on the other, it engages political and philosophical considerations. Consequently, the test has been reversed and reversed again according to the philosophy of the Government of the day.

In 2004, the Government enacted section 103A ERA turning the test from "could" to "would". Brookers on Employment Law explained[9]:

> *Section 103A (as inserted in 2004) required that substantive justification for a dismissal or other disciplinary action be determined objectively. The section appears to have been introduced, at least in part, in response to the Court of Appeal's decision in W & H Newspapers Ltd v Oram [2001] 3 NZLR 29, [2000] 2 ERNZ 448 (CA). There the Court held at [31]:*
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> > *"The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of 'could' rather than 'would', used in the formulation expressed in the second BP Oil case …"*
>
> *In the BP Oil case (Northern Distribution Union v BP Oil New Zealand Ltd [1992] 3 ERNZ 483 (CA)) the Court of Appeal had held at 487: "In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer* would have taken *in the particular circumstances."*
>
> *The intention of introducing s 103A appears to have been to overturn Oram and return to the test espoused by the Court of Appeal in BP Oil.*

Cognisant of the change, Judge Couch stated[10]:

> *The most significant change has been the enactment of s103A set out above. As the full Court made clear in Air New Zealand v V: "In cases of dismissal, it requires the Authority or the Court to <u>objectively</u> review all the actions of an employer up to and including the decision to dismiss".* (Author's emphasis)

His Honour applied an objective test in *Jinkinson*[11].

Since the decision in *Jinkinson* legislators have changed the test from "would" back to "could", so that from April 2011, section 103A now states:

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*

[9] Commentary note ER103A.01
[10] At para 38
[11] At para [65].

Having gone full circle and had all other things been equal, *New Zealand Fasteners* ought, again, to represent the law on the correct approach to assessing the justifiability of an employer's conduct. This particular aspect of the reasoning in *Jinkinson* for departing from *New Zealand Fasteners* is*,* arguably, not sustainable.

Test of justification

As may be noted from the above extract, Judge Couch also cited *Air New Zealand v V* in support of the view that section 103A ERA requires the courts to objectively review *all* the actions of an employer up to and including the decision to dismiss. His Honour determined that one such "decision" was the decision not to appoint Ms Jinkinson to one of the available alternative positions.

The difficulty with this argument as a reason to depart from *Thwaites* is that the Court of Appeal specifically rejected the idea that the courts had the power to "vary" the contractual position as between employer and employee saying:

> *The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee.*

That the courts must objectively review *all* the actions of an employer does not address this issue.

The Court of Appeal knew Mr Thwaites' employer had decided not to appoint him to an alternative role, nevertheless as a matter of principle and consistently with the law of contract, it concluded it was unable to hold that such a decision could be unjustified.

It cannot be maintained that the Court of Appeal failed to review all of the employer's actions and decisions leading up to and including Mr Thwaites' dismissal. No credible distinction seems available on this ground.

Good faith

In regard to section 103A ER Act, Judge Couch considered that the test for justification was interrelated to the obligation of good faith, in particular and with respect to *Jinkinson*, section 4(1A)(c). For convenience, section 4(1) and (1A) are set out below.

> *(1) The parties to an employment relationship specified in subsection (2)—*
>
> *(a) must deal with each other in good faith; and*
>
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
>
> *(i) to mislead or deceive each other; or*
>
> *(ii) that is likely to mislead or deceive each other.*
>
> *(1A) The duty of good faith in subsection (1)—*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment*

> *relationship in which the parties are, among other things, responsive and communicative; and*
>
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
>
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

Having determined that the employer's decision to disestablish Ms Jinkinson's position and the decision to not to appoint her to one of the alternative positions were both essential aspects of the employer's actions leading to the dismissal, His Honour held that the combination of sections 103A and 4(1A)(c) meant that the Court was empowered to decide whether the non-appointment was justified, and hence, whether the dismissal was justified.

It is difficult however to discern how section 4(1A)(c) alters the position from that which subsisted in *New Zealand Fasteners*. The subsection obliges employers who are proposing to make an adverse decision regarding an employee's employment to provide access to information (4(1A)(c)(i)) and an opportunity to comment on that information (4(1A)(c)(ii)). These obligations have no obvious relevance to the question of whether or not Ms Jinkinson ought to have been appointed to another role.

Section 4(1A)(c) does not address the Court of Appeal's point that the obligations between employer and employee arise out of their contractual relationship for the post for which they were employed, not another.

At the crux of the Court of Appeal's stance is that an employer may choose who it wishes to employ for a particular role. It is not for the courts to make that choice for them. It is difficult to see how section 4(1A)(c) changes this.

Good faith more generally

Perhaps His Honour's point is that the obligations of good faith brought in with the enactment of section 4 ER Act as enhanced by the addition of section 4A, together change the legal position enunciated in *New Zealand Fasteners*.

In 2002, the majority of Court of Appeal in *Coutts Cars Ltd v Baguley,* which endorsed *New Zealand Fasteners*, also sought to limit the meaning of "good faith".

The Government responded in the December 2004 by enacting Section 4(1A). The commentary to the Employment Relations Law Reform Bill 92-2 states:

> *Good faith in this bill is a broader concept than simply the common law obligations of mutual trust and confidence (the bill overturns the effect of the decision of the Court of Appeal in Baguley to the extent that it sought to limit good faith to the pre-existing common law obligations of mutual trust and confidence)*.

Clearly and expressly, section 4(1A) widened the scope "good faith" beyond the common law implied mutual obligations of trust and confidence (to counter the Court's dicta in *Baguely*) and obliges parties to an "employment relationship" to be active and constructive in establishing and maintaining a productive employment relationship and communicative responsive. What it does not do, however, is redefine the "employment relationship" to be one which applies outside the position contracted for.

The Court of Appeal in *Baguley* stated[12]:

> *… the relationship between an employer and an employee still rests on an agreement (contract). It is in negotiating for and operating under that contract that the obligations of good faith apply. The obligation to deal with each other in good faith is not so much a stand-alone obligation as a qualifier of the manner in which those dealings are to be conducted, and specifically (though not exhaustively) those dealings identified in s 4(4). We do not find in the new provisions a warrant to introduce into what is still a contractual relationship terms and conditions the parties have not agreed to but which the Authority or a Court might think it fair to impose. That would be to detract from the process of bargaining the Act so clearly promotes and protects.*

With *Jinkinson* in mind, the question arises; What is there within section 4(1A)(a) to (c) which negates what the Court of Appeal stated about "the relationship" between employer and employee applying in respect of the position and work the employee is contracted to provide, that is, as opposed to any other position a Court might subsequently determine would be suitable? The answer appears to be "nothing".

Concluding comment

Some may consider the Employment Court's ruling in *Jinkinson* accords with common-sense or notions of justice and fairness towards Ms Jinkinson. After all; why dismiss an employee for redundancy when with a little patience and re-training, that person can do some other available work for the employer?

This article is not concerned with the moral merits of the Employment Court's decision. It is concerned with legal principles and, in particular, the doctrine of s*tare decisis* whereby a higher court's decision that cannot be distinguished must be followed.

In the writer's view and notwithstanding the legislative broadening of the scope of good faith, the manner in which the Employment Court distinguished the Court of Appeals decision in *New Zealand Fasteners* is unsound.

It will be interesting to see what the Court of Appeal does when an appeal relying on *Jinkinson* comes before it.

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[12] At para 39