NOTE: ORDER OF EMPLOYMENT COURT PROHIBITING PUBLICATION OF MEDICAL CERTIFICATES, CONFIDENTIAL COMMUNICATIONS RELATING TO THE REPORT CARRIED OUT BY THE EXPERT ENGAGED BY THE APPELLANT AND FINANCIAL ACCOUNTS OF THE APPELLANT REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA368/2013
[2014] NZCA 541

BETWEEN	GRACE TEAM ACCOUNTING LIMITED Appellant
AND	JUDITH BRAKE Respondent

Hearing:	3 July 2014
Court:	O'Regan P, Wild and White JJ
Counsel:	P M Muir and R M Rendle for Appellant Respondent in person (W Reid as McKenzie Friend) P M Cranney, Counsel Assisting the Court
Judgment:	11 November 2014 at 3 pm

JUDGMENT OF THE COURT

A We answer the questions on which leave was given as follows:

(i) Question: Did the Employment Court apply the correct test under s 103A of the Employment Relations Act 2000 for justification of dismissal on the grounds of redundancy?

Answer: Yes.

(ii) Question: Did the Employment Court apply the correct principles when exercising its discretion to award remedies to the respondent?

Answer: Yes.

B **The appeal is dismissed.**

C **The appellant must pay the usual disbursements of the respondent and the reasonable travel and accommodation costs of the McKenzie Friend in relation to the appeal.**

D **We make no award of costs in relation to the application for leave to appeal.**

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] This is an appeal against a decision of the Employment Court in which it found that the respondent, Ms Brake, had been unjustifiably dismissed by the appellant, Grace Team Accounting Ltd (GTA).[1] The Employment Court Judge, Judge Travis, ordered GTA to pay compensation of $85,000 to Ms Brake.[2] In a later judgment he ordered GTA to pay $16,000 to Ms Brake as a contribution towards her actual and reasonable costs.[3]

Questions of law

[2] Leave to appeal to this Court was granted on 4 December 2013 on the following questions of law:[4]

(a) Did the Employment Court apply the correct test under s 103A of the Employment Relations Act 2000 (the Act) for justification of dismissal on the grounds of redundancy?

(b) Did the Employment Court apply the correct principles when exercising its discretion to award remedies to the respondent?

Counsel assisting the Court

[3] In the leave judgment, this Court noted that Ms Brake was self-represented and directed the Registrar to appoint counsel to assist the Court on the questions of law for which leave was granted. Mr Cranney appeared as counsel assisting and we thank him for his thorough and thoughtful submissions.

Section 103A

[4] Section 103A of the Act is the provision at the heart of the present appeal. It was inserted into the Act in 2004 (the 2004 amendment).[5] Section 103A was then

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1 *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81 [Decision under appeal].
2 At [9] below we discuss the breakdown of this award.
3 *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 98.
4 *Grace Team Accounting Ltd v Brake* [2013] NZCA 613.
5 Employment Relations Amendment Act (No 2) 2004, s 38.

amended in 2010 (the 2010 amendment).[6] The 2010 amendment took effect on 1 April 2011, after Ms Brake was dismissed. The applicable law is therefore s 103A as it stood before the 2010 amendment. At that time, s 103A provided:

> **103A Test of justification**
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> 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 would have done in all the circumstances at the time the dismissal or action occurred.

Other matters raised by GTA

[5] In relation to the first question of law, counsel for GTA, Ms Muir, argued that s 103A of the Act as enacted in 2004 and amended in 2010 did not change the law relating to dismissal for reasons of redundancy as outlined in the decisions of this Court pre-dating the 2004 amendment. She relied on a statement of the Chief Judge of the Employment Court in *Simpsons Farms Ltd v Aberhart*, where the Judge stated the 2004 amendment was not intended to revisit long-standing principles about substantive justification for redundancy.[7] However, the Judge subsequently clarified his position on this in a later case, *Rittson-Thomas t/a Totara Hills Farm v Davidson*, where he indicated that he had not intended to say the pre-existing law should be applied.[8]

[6] Ms Muir said this change of approach by the Employment Court gave rise to two issues. These were:

(a) whether the Employment Court had changed the law, and if so, whether it was entitled to do so; and

(b) whether there was a breach of natural justice in the present case. The decision in *Totara Hills Farm* was delivered after the hearing in the Employment Court in the present case but before its delivery of

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6 Employment Relations Amendment Act 2010, s 15 [the 2010 amendment].
7 *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [67].
8 *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55 at [48]–[49].

judgment. Counsel were not given the opportunity to make submissions on the effect of the *Totara Hills Farm* decision.

[7] We do not propose to engage with those issues because we see them as distracting from the essential issue, which is the question of the correct interpretation of s 103A of the Act. We are not bound by the Employment Court decisions in *Simpsons Farms* and *Totara Hills Farm*, and our task is to determine the correct interpretation of s 103A in light of the argument we have had presented to us. While we accept that it may have been advisable for the Employment Court in the present case to seek further submissions on the interpretation of s 103A after the decision in *Totara Hills Farm* was released, we see the very full argument on that issue presented to us as answering any concerns about natural justice. Even if we were to accept that a breach of natural justice occurred and remitted the matter to the Employment Court for reconsideration, the Employment Court would be bound to follow the interpretation of the law set out in this judgment.

[8] Ms Muir raised as a separate issue what she termed the failure of the Employment Court to treat redundancy as a "special situation". We will address that issue as part of the evaluation of the correct interpretation of s 103A of the Act.

[9] In relation to the relief granted to Ms Brake, Ms Muir argued that the award of $65,000 (roughly equivalent to 12 months' salary) for lost remuneration was wrong in principle, being four times the starting point of three months' lost earnings as set out in s 128(2) of the Act. She also argued that the award of $20,000 compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings was wrong in law.

[10] We add for completeness that Ms Brake sought to renew in this Court the argument she had made in the Employment Court that GTA was estopped from dismissing her. The argument was that GTA induced her to leave her secure position at KPMG, her previous employer, by promising a secure, long-term position. There was no downturn in workload after she commenced work at GTA and no hardship to GTA. Judge Travis said this claim was made out and that it supported the conclusion

he had reached under s 103A.[9] But he did not find it necessary to make a finding on whether an employer who did comply with s 103A could nevertheless be estopped from dismissing a redundant employee.[10] We do not see this issue as arising in terms of the leave given. On our approach to the present appeal, it is not necessary to engage with it. We therefore say no more about it.

[11] We address the test under s 103A first, before turning to the issues relating to the remedies awarded to Ms Brake. Before we do, we set out the factual background as reflected in the factual findings of the Employment Court. As the present appeal is an appeal on points of law only, we are bound by the factual findings made by the Employment Court.[11]

Facts

[12] Ms Brake entered into an individual employment agreement with GTA in August 2009, and commenced work as an accountant on 5 October 2009. The agreement provided for redundancy, which it defined as "a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business". It provided for a process of consultation but said no redundancy compensation was payable to a redundant employee.

[13] The background to Ms Brake's employment was that she had been employed by KPMG for a number of years and had approximately 24 years' experience in the accounting field. A few months before she received the job offer from GTA, she had seen an advertisement in the local paper for the position of senior accountant with GTA. She expressed initial interest but the matter went no further until she was contacted by one of the principals of GTA, Michael Grace, asking her to come for an interview. She was engaged to replace a senior accountant who was about to go on parental leave, but was assured that her role would not end when the parental leave ended, and that the position would be a long-term one.

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9 Decision under appeal, above n 1, at [83].
10 At [81]–[82].
11 Employment Relations Act 2000, s 214.

[14] The other employee went on parental leave in December 2009 and Ms Brake took over most of her work.

[15] GTA undertook a review of client files in March 2010. This followed an earlier analysis of the firm's financial situation in the Christmas period 2009/2010. That analysis revealed concerns with cost overruns on fixed fee arrangements for larger clients. On 9 and 10 April 2010, another principal of GTA, Lindsay Grace, prepared a report showing that annual turnover for the 2009/2010 financial year was significantly down on forecast. He prepared an action plan, which he described in his evidence as follows:

> The problems I identified were:
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> (i) we had made an apparent loss; and
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> (ii) fee write-offs were in excess of $100,000; and
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> (iii) we had time efficiency issues; and
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> (iv) our reserves (cash on deposit) were $30,000; down from $130,000 at the same time the previous year.

[16] The action plan proposed a number of measures to improve efficiency.

[17] Also on 10 April 2010 (a Saturday), Lindsay Grace sent an email to Wendy Macphail, an employment law consultant, to get legal and human resources advice should redundancies be needed. The email he sent to Ms Macphail said:

> I have been reviewing our performance for the past 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.

[18] On Monday 12 April 2010, GTA decided, after taking advice from Ms Macphail, to implement the redundancy process for Ms Stirling and Ms Redmayne, a manager and a trainee accountant respectively. However, Ms Macphail apparently advised GTA that the principle of last on/first off should be applied. Ms Brake was "last on". This was an unsatisfactory aspect of the case because Ms Macphail was not called to give evidence. Judge Travis commented on this as follows:

> [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 those 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.

[19] Two days later on Wednesday 14 April, Ms Brake (unaware of the restructuring and redundancy discussions) spoke to her manager, Ms Kristen Retter, and told her that she would need to take leave on the following Friday to make a routine visit to her doctor at Auckland Hospital, because she had leukaemia. She assured Ms Retter that the illness had not affected her work and her condition was stable and under control. Her treatment involved blood count monitoring at Auckland Hospital. She was otherwise fit and well. She had not previously told anyone at GTA about this. Shortly afterwards Ms Retter told Lindsay Grace about this. However, she did not tell Michael Grace either on 14 April or the following day.

[20] Notwithstanding this new information about Ms Brake's health status, Lindsay Grace and Ms Retter proceeded to hold a meeting with Ms Brake, with Michael Grace and Ms Macphail in attendance, at 3 pm on 14 April. They had earlier met with Ms Stirling and Ms Redmayne, and both of those employees accepted the position and agreed to terminate their employment with GTA. At the 3 pm meeting Mr Lindsay Grace read out prepared notes in a strained and upset manner, outlining the restructuring proposal and informing Ms Brake that her position may be surplus to requirements.

[21] Predictably, Ms Brake made a connection between the fact she had informed GTA of her illness and the redundancy discussion. This caused her great distress. However, Judge Travis found as a fact that the illness was not a reason for making Ms Brake redundant, and that the timing was simply an unfortunate coincidence.[12]

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[12] Decision under appeal, above n 1, at [58].

Nevertheless the decision to go ahead with the redundancy discussions immediately after Ms Brake had disclosed her medical condition was considered by the Judge to be a factor adding to the distress caused by the whole episode.[13]

[22] There was a further meeting on Monday 19 April at which Ms Macphail was present, along with Michael Grace. Ms Brake was told that her position was to be disestablished, and it was explained that GTA was applying a last on/first off policy. She was given two days off to work out alternatives and told to present submissions by Wednesday 21 April so they could be considered on Thursday 22 April. A letter confirming this discussion was sent to her on Tuesday 20 April. On Wednesday 21 April Ms Brake wrote to say that she had received legal advice and outlined her concerns about the fact that she had been employed on a full time long-term basis only six months before, and that the meeting to inform her of the restructuring occurred on the same day as she disclosed her medical condition.

[23] Ms Brake received a letter in response to this on Monday 26 April. The letter repeated that the restructuring proposals were for financial reasons and gave some information about these, including a statement that turnover was down by almost $100,000 in the 2009/2010 financial year from its level in the previous financial year and that wages were up by around $19,000. It said that the financial concerns leading to the restructuring had not been foreseen when Ms Brake was employed. It stated that GTA had provided sufficient information for her to comment and gave her until Wednesday 28 April to do so, with a meeting scheduled for Thursday 29 April.

[24] Ms Brake returned to work on Wednesday 28 April with a medical certificate clearing her for full time work. She was thereupon given another letter from GTA. This repeated that GTA believed it could undertake its foreseeable future work with fewer employees and this had not been foreseen when she was hired. In a schedule annexed to the letter, there were figures showing the way the turnover of GTA had increased for the last five years, noting that this had shown an increase in turnover of about $100,000 per annum. It was against that background that she was employed. GTA had not had any reason to believe that this would not be the same for the 2009/2010 financial year, but instead of there being a $100,000 increase in turnover

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[13] At [57].

for 2009/2010, there had been a $100,000 decrease in turnover. As it turned out, however, these figures were incorrect.

[25] The letter concluded that as turnover was $200,000 short of what was expected, the resignation of two employees (resulting in a saving of $93,600 in wages) still left GTA around $100,000 short of what was projected. This provided the financial basis for her redundancy.

[26] A final meeting took place on Friday 30 April, attended by Lindsay and Michael Grace and Ms Macphail on behalf of GTA, and by Ms Brake and her ex-husband, Warwick Reid. Mr Reid also acted as Ms Brake's advocate in the Employment Court and was her McKenzie Friend in this Court. At the meeting, Lindsay Grace acknowledged that the drop in workload was not significant, and said that GTA had not kept records measuring actual performance against budgeted performance. At the end of the meeting Ms Macphail announced that Ms Brake's position was disestablished for economic reasons and that she would be paid one month's salary in lieu of notice.

[27] The mistake in the financial information on which the redundancy decision was made (which was also the financial information that was disclosed to Ms Brake during the consultation) was discovered some weeks later. This arose when an employee of GTA, Joy Luker, was preparing year end statistics for GTA for the 2009/2010 financial year. She calculated the turnover for the 2009/2010 financial year at a level $120,000 higher than that reached by Lindsay Grace in his calculations. On double checking, it was shown that Lindsay Grace had used an incorrect turnover figure for July 2009, which had led to this error. This meant that instead of there being a loss of $61,000 for the financial year, the final result was a profit of just under $60,000. Lindsay Grace's evidence was that this profit figure was still unacceptable, and the action to make three staff redundant remained valid.

[28] Judge Travis made the following important finding of fact:

> [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.

[29] Ms Brake applied to have the Employment Relations Authority (the ERA) investigate her dismissal. The ERA found that the decision to make Ms Brake's position redundant was substantively justifiable under s 103A of the Act.[14]

Employment Court decision

[30] Ms Brake challenged the ERA's determination de novo before the Employment Court.

[31] The Judge identified three major areas of difficulty for GTA in establishing the dismissal was justified:[15]

(a) The fact that Ms Brake was employed in August 2009 when GTA should not have engaged a permanent full-time senior accountant because of its financial position, at the time unknown to GTA.

(b) The claim that GTA's financial position deteriorated substantially over the subsequent six months, when there is no evidence that it did so.

(c) The lack of evidence as to why it included Ms Brake with the two other staff whose positions were being considered for disestablishment.

[32] Key issues raised in the proceedings included Ms Brake's health, and GTA's calculation errors. The Judge described the timing of the 14 April meeting, just hours after Ms Brake disclosed she had leukaemia as "most unfortunate".[16] However, as noted above,[17] the Judge was satisfied that Ms Brake's illness was not a factor which led to her inclusion in the proposed redundancies.[18]

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14 *Brake v Grace Team Accounting Ltd* NZERA Auckland AA 409/10, 13 September 2010.
15 Decision under appeal, above n 1, at [59].
16 At [56].
17 At [21].
18 At [58].

[33] As also noted above,[19] the Judge found that had Lindsay Grace's calculations not been based on an error there would have been no immediate need for Ms Brake's redundancy.[20]

[34] Discussing the relevant law, Judge Travis quoted *Totara Hills Farm* and noted he was in complete agreement with the way Chief Judge Colgan in that case explained the requirements of s 103A of the Act in a redundancy setting.[21]

[35] The Judge found GTA failed to discharge the burden of showing the dismissal was justified. Had GTA analysed its own practice on the basis of correct information it would not have offered Ms Brake employment and motivated her to leave her previous employment with KPMG. It also could not adequately explain how Ms Brake came to be in the redundancy proposal after two other employees had already accepted the situation and agreed to leave, thereby providing GTA with sufficient savings to render Ms Brake's redundancy unnecessary.[22] The Judge found the actions of GTA were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.[23]

[36] The Judge did, however, find that the dismissal was genuine. He said there was no suggestion that the redundancy was "a mask for some ulterior motive" in dismissing Ms Brake.[24] He described the situation as "a genuine, but mistaken dismissal".[25]

Did the Employment Court apply the correct test under s 103A?

[37] The first question for this Court is whether the Employment Court applied the correct test under s 103A of the Act for justification of dismissals on the grounds of redundancy.

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19 At [28].
20 At [49].
21 At [54].
22 At [63]–[64].
23 At [65].
24 At [86].
25 At [86]. The Judge's compensation orders and his finding on estoppel are summarised at [9] and [10] above.

[38] Ms Muir argued that the correct test under s 103A in a redundancy case is that a redundancy dismissal will be justified if the Employment Court, looking objectively at the matter, concludes that the employer genuinely considers that the position is superfluous to its needs. As just noted, Judge Travis found the dismissal was genuine, in that it was not "a mask for some other ulterior motive". Ms Muir said he should have therefore upheld the ERA's decision that the dismissal was justified.

[39] The case for GTA is, in Ms Muir's words, that:

> The Employment Court erred in changing the law on justification for dismissals for redundancy (which was well recognised by the Courts) and has assumed jurisdiction to second-guess business decisions for a company acting in good faith.

[40] As noted earlier, the focus of this contention is on the observations of Chief Judge Colgan in *Totara Hills Farm* rather than the decision under appeal in the present case. But, because Judge Travis in the present case followed *Totara Hills Farm*, the argument is that he applied the wrong legal test.

[41] In order to analyse this argument it is necessary for us to consider the cases relied on by Ms Muir and the extent to which they apply in the present statutory context.

Hale

[42] Ms Muir said the key principles to be applied in redundancy situations were set out in *G N Hale & Son Ltd v Wellington Caretakers IUW*, a unanimous decision of a Full Court of this Court.[26] In *Hale* Cooke P stated:[27]

> … an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him. The personal grievance provisions of the Labour Relations Act, and in particular the existence of remedies for unjustifiable dismissal, should not be

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[26] *G N Hale & Son Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151 (CA).

[27] At 155 and 156: citing *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580 (CA) at 582.

> treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or expediency of the employer's decision. When a dismissal is based on redundancy, it is the good faith of that business and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal.
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> … the question is essentially what it is open to a reasonable and fair employer to do in the particular circumstances. A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented.

[43] Richardson J described the term "unjustifiably dismissed" as an "elusive concept".[28] He said the Labour Court was entitled to scrutinise with care claims that dismissals were for redundancy reasons and to expect "an adequate commercial explanation from the employer for the course adopted".[29] But he added:[30]

> If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the Courts or the unions or workers to substitute their business judgment for the employer's.

[44] Somers J said if a dismissal is made because the employer genuinely considers the employee is superfluous to the needs of the business it will to that extent be justified.[31] He said he did not think an honest assessment of commercial needs by an employer could be subjected to objective tests of fairness, reasonableness or necessity by the Court.[32] He contrasted the law in New Zealand with that of the United Kingdom, where legislation provided that whether the dismissal was fair or unfair depended on whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason.[33] That question, he said, was to be determined in the United Kingdom in accordance with equity and the substantial merits of the case.

[45] Casey J observed that in determining whether dismissal for redundancy is substantially justified the only question to be asked is whether the employer made

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28 At 157.
29 At 157.
30 At 157–158.
31 At 158.
32 At 158.
33 At 158–159: citing the Employment Protection (Consolidation) Act 1978 (UK), s 57(3).

that decision for genuine commercial reasons. He said the employer is the best judge of what is in the commercial interests of the business enterprise.[34]

[46] Bisson J said dismissal for redundancy was in a class of its own. He saw the approach that had been taken by the Labour Court as eroding the right of an employer to manage the business in which the employee is employed.[35]

[47] The principal focus of *Hale* was on what constituted redundancy. The Labour Court had found that a dismissal for redundancy was justifiable only if the employer proved it had been commercially necessary in the interests of the viability of the employer. Viability was used as a synonym for capacity to survive. This Court was clear that the Labour Court's restrictive interpretation was wrong: what was required was that the employee was superfluous to the needs of the business. This could arise where the employer sought to make the business more efficient. No one has suggested that this Court's determination on that issue in *Hale* be revisited in the present case or that the law on that issue has been affected by legislative changes. We consider that aspect of *Hale* remains good law.

[48] *Hale* was a case decided under s 210 of the Labour Relations Act 1987, which dealt with personal grievances. Section 210(1)(a) included within the concept of personal grievance "that a worker has been unjustifiably dismissed". There was no definition in the statute of "unjustifiably dismissed", which led to Richardson J's "elusive concept" observation. Importantly, there was no legislative equivalent in the Labour Relations Act to s 103A of the Act. The comments of Somers J about the United Kingdom legislation indicate that his observations in *Hale* may have been different if there had been such a provision.

Aoraki

[49] In *Aoraki Corporation Ltd v McGavin*, this Court reconsidered *Brighouse Ltd v Bilderbeck* in which this Court had by a majority found an employee was unjustifiably dismissed because the employer had not paid adequate compensation (there was no contractual obligation to do so) and had not communicated, consulted

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[34] At 159.
[35] At 159.

or negotiated with the employee in respect of alternatives to redundancy.[36] *Brighouse* was overruled. The judgment of the plurality (six of the seven Judges) expressed one of its reasons for reconsidering *Brighouse* as follows:[37]

> … redundancy is an important area of the law affecting large numbers of New Zealanders every year. It is imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are. Redundancy should lend itself to a short statement of governing principles drawn from the straightforward application of the [Employment Contracts Act 1991].

[50] The judgment of the plurality went on to state:[38]

> Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

[51] In *Aoraki* the governing legislation was the Employment Contracts Act 1991, which was discussed in some detail in the judgment of the plurality.[39] The plurality noted that the purpose of the Employment Contracts Act emphasised that employment issues were a matter of contract where the type of contract and the content was essentially for the parties freely to negotiate.[40] The relevant provision relating to personal grievances[41] was based on the concept of unjustifiability, which was the yardstick by which personal grievances applied to claims of unjustifiable dismissal and unjustifiable action.[42] The personal grievance provisions were part of the overall balance reflecting the special characteristics of employment contracts and under which employees and employers had mutual obligations of confidence, trust and fair dealing.[43]

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36 *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA); *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 (CA).
37 At 292–293.
38 At 293–294.
39 Beginning at 293.
40 At 284.
41 Section 26.
42 At 285.
43 At 287.

Coutts Cars

[52] *Coutts Cars Ltd v Baguley* was the first reported case under the Act, in which the respondent argued he had been unjustifiably dismissed.[44] It pre-dated the enactment of s 103A, however. The personal grievance provision at issue was similar in form to those in both the Labour Relations Act (*Hale*) and the Employment Contracts Act (*Aoraki*). However, the Act contained statutory requirements relating to good faith dealing that had not appeared in the Employment Contracts Act.

[53] Richardson P, Gault and Blanchard JJ found as follows:

> [42] We do not see that the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that the Courts have placed upon parties to employment contracts over recent years. Undoubtedly the duty to deal in good faith will have impact in additional areas such as negotiations and collective environments, but in the area with which we are presently concerned we consider the law already required the observance of good faith. There is no reason why the decisions in *Aoraki* and *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 [(CA)] should not continue to provide guidance on the applicable principles. We add, however, that the present case concerns more the process of selection among employees for redundancy than the genuineness of the redundancies. The former is not a matter that arose in *Aoraki*.
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> [43] Plainly the obligations to act in good faith and to avoid misleading and deceiving, together with the importance accorded the provision of information, will make consultation desirable, if not essential, in most cases. But as said in *Aoraki*, to impose an absolute requirement would lead to impracticalities in some situations.

[54] Tipping J agreed that the general tenor of *Aoraki* must apply in the new legislative environment.[45] However, McGrath J disagreed with the majority that the obligation of employers to consult over potential redundancy remained as limited as that outlined in *Aoraki*.[46] He found that it was a necessary implication that in providing for a duty of good faith, the Act went beyond what the courts had previously recognised at common law or under the Employment Contracts Act, imposing a higher standard of conduct.[47]

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44 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA).
45 At [66].
46 At [72].
47 At [83].

2004 amendment

[55] As mentioned above at [4], s 103A was inserted into the Act by the 2004 amendment. The impetus for the new s 103A was a decision of this Court in a personal grievance case involving unjustified dismissal, *W & H Newspapers Ltd v Oram*.[48] *Oram* was not a redundancy case, but a case involving dismissal for cause. This Court said the test to be applied was whether the decision to dismiss was one which a reasonable and fair employer could have taken.[49] This adopted the test set out in *Northern Distribution Union v BP Oil New Zealand Ltd*, but modified it by replacing "would" in the *BP Oil* test with "could".[50]

[56] Section 103A gave statutory force to the *BP Oil* test, preferring its use of "would" to the *Oram* use of "could".[51] There is nothing in the parliamentary materials indicating that the insertion of s 103A was motivated by a perceived need to change the law relating to redundancy.

[57] The 2004 amendment also amended ss 3 and 4 of the Act to strengthen provisions relating to the duty of good faith owed by parties in an employment relationship with each other. This Court's conclusion in *Coutts Cars* that the change in approach in the Act when compared to the Employment Contracts Act did not affect the law as stated in *Aoraki* was an impetus to these amendments.

[58] We agree with Mr Cranney that the following provisions of the Act also effected significant change to the statutory scheme in relation to redundancy:

(a) section 3(a), which provides that an object of the Act is to build "productive employment relationships" through the promotion of good faith "in all aspects of the employment environment and of the employment relationship";

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48 *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA).
49 At [31].
50 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487.
51 The 2010 amendment, above n 6, has now replaced "would" with "could", apparently reverting to the *Oram* formulation.

(b) section 3(a)(i), which provides that "employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on the legislative requirement of good faith behaviour";

(c) section 3(a)(ii), which refers to "acknowledging and addressing" the inherent inequality of power in employment relationships;

(d) section 4(1)(a), which requires parties to an employment relationship to deal with each other in good faith;

(e) section 4(1)(b), which prohibits parties from doing anything to mislead or deceive each other or anything that is likely to mislead or deceive each other;

(f) section 4(1A)(a), which provides that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence;

(g) section 4(1A)(b), which requires parties to be active and constructive in establishing and maintaining a productive employment relationship in which parties are responsive and communicative;

(h) section 4(1A)(c), which requires that an employer who is proposing to make a decision that is likely to have an adverse affect on the continuation of employment of an employee must provide the affected employee with:

(i) access to information relevant to the continuation of the employee's employment; and

(ii) an opportunity to comment on the information to the employer before the decision is made (subject to certain limitations relating to confidential information set out in ss 4(1B) and 4(1C));

(i) section 4(4)(e), which provides that the duty of good faith applies to "making employees redundant"; and

(j) section 4A, which provides for penalties for failure to comply with the duty of good faith.

[59] We agree that these provisions were intended to, and did, alter the pre-existing law and must be brought into account when determining whether the legislative framework for decisions about redundancy has changed since the decisions of this Court in *Hale* and *Aoraki*.

[60] In *Aoraki*, this Court dealt with the need to consult employees who may be made redundant as follows:[52]

> It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organise and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However, in some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy, or its timing.

[61] In contrast to that approach, s 4(1A) provides that the duty of parties to deal with each other in good faith is wider in scope than the implied common law mutual obligations of trust and confidence.[53] In *Simpsons Farms*, the Employment Court noted:

> [35] More particularly, under s 4(1A)(c), the law 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 an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision and an opportunity to comment on the information to the employer before the decision is made.

[62] We see the new provisions relating to notice and consultation in the 2004 amendment as a clear departure from the law as stated in *Aoraki* and *Coutts Cars*.

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52 *Aoraki*, above n 36, at 294.
53 Above at [58](f).

Simpsons Farms

[63] *Simpsons Farms* was the first redundancy case to be decided in the Employment Court after the enactment of s 103A of the Act. Chief Judge Colgan noted that redundancy situations are different in the sense that the employee is usually without fault but may nevertheless suffer the same consequences of disadvantage from the dismissal as if he or she had been in serious breach of the employment agreement; but nevertheless Parliament had made no distinction in the enactment of s 103A between different sorts of personal grievance.[54]

[64] Chief Judge Colgan cited the *Hale* and *Aoraki* decisions,[55] along with other leading decisions on redundancy.[56] In light of those cases, Judge Colgan raised and addressed the following question:

> [56] Assessed by reference to these cases just summarised, did Parliament intend to change the Judge-made law of justification for redundancy disadvantages or dismissals in 2004? An examination of the relevant law-making documents (the explanatory note to the Bill, the report of the Select Committee and transcripts of the three readings of the Bill in the House) reveal no particular references to the tests of justification for disadvantage or dismissal for redundancy. Although, in one other respect, one judgment of the Court of Appeal (*Coutts Cars*) was referred to expressly as being intended to be affected by legislative changes (as to s 4), in all of the material relating to s 103A the only reference to a judgment was to that of the Court of Appeal in *W & H Newspapers Ltd v Oram* … a case of dismissal for cause.
>
> [57] However, the words used by Parliament in s 103A are so broad and clear that they must be taken to encompass not only dismissals or disadvantages for cause but also for other reasons including redundancy. It is notable that in her first reading speech on the introduction of the Employment Relations Law Reform Bill, the Minister summarised s 103A as follows:
>
> > Overall, the test is to be an objective one. This is not a radical revamp of the dismissal law. It draws from existing case law and fits well within good human resources practice.
>
> [58] Although not, or at least not only, in s 103A, Parliament contemporaneously legislated expressly for minimum requirements of procedural fairness in employment relationships including, in particular, the circumstances of or leading to redundancies. Section 4(1A) enacted in 2004, and particularly in response to the Court of Appeal's judgment in *Coutts Cars*, emphasises that:

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54 At [37]–[38].
55 Beginning at [40].
56 *Coutts Cars*, above n 44; *Brighouse*, above n 36.

- The duty of good faith is wider in scope than the implied mutual obligations of trust and confidence at common law in employment contracts.

- The parties to employment relationships are required to be "active and constructive" in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

- Without limiting the foregoing, the duty of good faith 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 his or her employees, to provide them with access to information, relevant to the continuation of their employment, about the decision, and to provide the affected employees an opportunity to comment on that information to the employer before the decision is made.

…

[64] In the Employment Relations Amendment Act (No 2) 2004 Parliament intended to alter and prescribe the tests for justification for disadvantage in, or dismissal from, employment in general and to change the Judge-made law exemplified by the judgments of the majority of the Court of Appeal in *Coutts Cars*. It addressed these latter changes by adding specific information sharing provisions in s 4. These set out a fair and reasonable employer's minimum obligations where redundancy may ensue and are thus an element of the new s 103A tests of justification.

[65] Following the new s 103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s 4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.

…

[67] I do not consider that the recent statutory changes were intended to revisit long-standing principles about substantive justification for redundancy exemplified by judgments such as *Hale*. The words and phrases of s 103A echo the statements of Cooke P and Richardson J in *Hale* as set out in paras 40 and 41.[57] Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s 103A, to return to the position espoused by the Courts in cases such as and following *Hale*. So long as an employer acts genuinely and not out of ulterior motives, a business decision

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57 The statements referred to here, set out at [40] and [41] of *Simpsons Farms*, above n 7, refer to 155 and 157 of *Hale*, above n 26. These are broadly the same excerpts as those set out in this judgment at [42]–[43].

> to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A.

[65] Not surprisingly, Ms Muir highlighted the last sentence of [67] as a statement of the approach required under s 103A of the Act. We accept that it supports her argument. But the contrast with [65], in which the statutory test is correctly stated, is obvious.

Air New Zealand v V

[66] *Air New Zealand v V* concerned a dismissal for serious misconduct following the employee's testing positive for cannabis in a random drug test.[58] The ERA found that this amounted to serious misconduct, but Air New Zealand's refusal to provide him with a rehabilitation programme rendered his summary dismissal unjustifiable. Before the Employment Court, Air New Zealand expressly asked the Employment Court to differ from the views expressed in *Simpsons Farms*, among other previous decisions of that Court.[59]

[67] The Employment Court held that s 103A imposes on the Employment Court[60] an obligation to judge the employer's actions against the objective standard of a fair and reasonable employer. It is not the standards that the Employment Court judge might apply had he or she been in the employer's position, but rather what the judge concludes a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.[61]

[68] The Employment Court considered s 103A, in cases of dismissal or disadvantage grievances, requires the Employment Court to review objectively all the actions of an employer up to and including the decision to dismiss.[62] Having done this, it concluded that the decision to dismiss the employee was a decision that a fair and reasonable employer would have taken in all the circumstances.[63] The

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58 *Air New Zealand v V* (2009) 6 NZELR 582 (EmpC).
59 *Air New Zealand v V*, above n 58, at [2].
60 The obligation also falls on the ERA in cases dealt with in that jurisdiction. We will refer to the Employment Court only but those references should be construed as if the ERA was also referred to.
61 At [33]–[34].
62 At [37].
63 At [109].

Employment Court did not appear to explicitly address the issue raised by Air New Zealand of revisiting *Simpsons Farms*.

Totara Hills Farm

[69] In *Totara Hills Farm*, Chief Judge Colgan returned to his statements in *Simpsons Farms*. The Judge considered it "an opportune moment to explain what may have been intended, although expressed somewhat cryptically by me as the author of that judgment".[64] The Judge explained his earlier judgment as follows:[65]

> [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 IUW* 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. 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 s 103A analysis to the employer's decision to dismiss the grievant in that case and did not simply accept the assertion that it was a genuine business decision.

[70] Chief Judge Colgan referred to the principle in *Hale* (that it was not for the Employment Court to substitute its decision for that of the employer) and stated it was this principle that the Judge was satisfied, in *Simpsons Farms*, that Parliament did not intend to change by enacting s 103A.[66] The Judge stated the position is still that it is not for the Employment Court to substitute or impose its business judgment for that of the employer taken at the time.[67]

[71] The Chief Judge then applied s 103A as it stood before 1 April 2011. Articulating the test, the Judge stated:

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64 *Totara Hills Farm*, above n 8, at [47].
65 Footnote omitted.
66 At [50]–[51].
67 At [51].

> [52] … the Court cannot ignore the statutory refinements to the law of justification in personal grievances effected, first, with s 103A in 2004 and, subsequently, with the amendments to that section made in 2010. For the purposes of this statement of principle, both versions of s 103A are materially indistinguishable. In other words, it does not matter whether a "would" or "could" test is applied.
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> [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.
>
> [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.
>
> [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 previous law about justifications for dismissal on grounds of redundancy but not to the fundamental extent of setting aside everything that the Court propounded in *GN Hale*.

[72] The Judge analysed the employer's financial justifications for the dismissal, concluding that these appeared to be flawed to such an extent as to throw into doubt the genuineness and justification of making the employee's position redundant.[68]

Commentary

[73] The Brookers commentary on s 103A notes:[69]

> Even taking into account parliamentary intent, however, it could be argued that the plain language of s 103A empowers an objective approach to the employer's decision-making restructuring process, including a pre-*Hale*, or anti-*Hale*, substitution of the views of the Authority or Court for those of the employer … One could argue therefore that the Authority or Court should look carefully at the employer's decision to restructure and – on an objective

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68 At [67].

69 *Employment Law* (online looseleaf ed, Brookers) at [ER103A.04].

> basis – determine whether the fair and reasonable employer "would" (or, from 2011, "could") make such structural changes in the workplace, especially where redundancies were avoidable if no change were to be made or if some other change were made. In other words, the passage of s 103A may have called into question the continued relevance of the self-limiting aspects of *Hale*.

2010 amendment

[74] When s 103A was replaced in 2010, a new subs (3) was added. This sets out a list of matters that the Employment Court must consider when applying the "fair and reasonable employer" test. This list uses language that is appropriate for cases of dismissal for misconduct, but not appropriate for a redundancy situation.[70]

[75] Ms Muir said this demonstrated that the new s 103A inserted by the 2010 amendment was aimed at dismissals for cause and not intended to change longstanding principles in relation to redundancies. She cited in support of that contention an observation by a Full Court of the Employment Court that the s 103A(3) factors:[71]

> … applied literally, … may not be appropriate to a determination of justification for dismissals … on grounds such as redundancy, medical incapacity and for other reasons than … "misconduct" in employment.

But it is notable that the Full Court went on to say, "we can really only conclude that the … Court should try to give a sensible interpretation to subs (3)".[72]

[76] The Full Court certainly did not suggest that s 103A did not apply to redundancies or that it should be given a different meaning in redundancy situations than in misconduct situations.

[77] We do not think the 2010 changes can be brought to bear in determining the meaning of the version of s 103A enacted in 2004.[73] In any event, we do not think

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70 For example, the factors in the list refer to "allegations against the employee" and "concerns the employer has with the employee".

71 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [46].

72 At [52] citing *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA).

73 *Commissioner of Inland Revenue v Databank Systems Ltd* [1990] 3 NZLR 385 (PC) at 394; *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [110]–[111]; and J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 250 and 644.

s 103A(3) limits the scope of the fair and reasonable employer test. We agree with the Full Court that it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.

Our analysis of the s 103A test

[78] We indicated to Ms Muir at the hearing that the submission s 103A should be interpreted by working forward from *Hale* and asking if the 2004 amendment had changed the law was an unorthodox methodology for statutory interpretation. We accept that the test in s 103A (as it was before the 2010 amendment) is similar to that in *BP Oil*. But we are being asked to interpret the reference to a fair and reasonable employer in s 103A in redundancy cases as meaning "an employer who is genuine" (that is, is not using redundancy as a pretext for dismissing a disliked employee), but as meaning "fair and reasonable employer" in cases of dismissal for misconduct. We can see no good reason to give the same words completely different interpretations depending on the type of case to which they are applied.

[79] We also consider it is a mistake to treat observations in *Hale* and the cases that followed it as if they were legislation. The multiple judgments in *Hale* have subtle differences, as highlighted above. This Court recognised the need for procedural fairness and its deference to the commercial judgment of the employer was limited to the question of whether the employee had become superfluous, contrasting with the Labour Court's insistence that a business had to be on its last legs before a redundancy situation could arise.

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a "fair and reasonable employer" can properly be read down to mean "a genuine employer", in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki.*

[82] We accept that the comment at [67] of *Simpsons Farms* did indicate that a self-limiting approach should be taken. That comment was:[74]

> 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 s 103A.

[83] However, the comment at [67] of *Simpsons Farms* jarred with the statements in the paragraphs preceding [67] and with the approach taken by the Chief Judge in that case. So it may not have been surprising that Chief Judge Colgan felt the need to return to this "genuineness" issue in *Totara Hills Farm.* As noted above at [69]–[72] the Judge made it clear in *Totara Hills Farm* that this was not intended to mean the Employment Court was not entitled to inquire further into the decision if it was found to be a genuine business decision.[75]

[84] We agree, therefore, with Chief Judge Colgan's formulation in *Totara Hills Farm* at [53] that s 103A (pre-2011) required the Employment Court to assess whether what was done by the employer, and how it was done, were what a fair and reasonable employer would have done in all the circumstances at the time. That formulation is essentially a recital of the plain words of s 103A. It is hard to see how a statement of the law that recites the relevant statutory provision can be an error of law. We do not think it is helpful to focus on pre-s 103A case law when interpreting and applying s 103A. To the extent that the Chief Judge did so in *Totara Hills Farm*, we would respectfully disagree.

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74 *Simpsons Farms*, above n 7.
75 At [48].

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.

[86] Ms Muir also argued that the Employment Court had failed to treat redundancy as a "special situation" and she referred to the judgment of the plurality in *Aoraki* which referred to redundancy as a special situation.[76] Similarly, Bisson J had referred to redundancy as being "in a class of its own" in *Hale*.[77]

[87] We do not think the reference to "special situation" in *Aoraki* was intended to create a rule of law. It was simply a statement of the obvious, a dismissal for redundancy is different in character from a dismissal for cause, because, as this Court pointed out in *Aoraki*, the redundant employee has done no wrong.[78] The dismissal arises because of the circumstances of the business, not because of any misconduct. Now that the Act prescribes the s 103A test for all dismissals, whether for cause or for redundancy, and requires compliance with the duties set out in s 4 in relation to redundancy situations, we do not think that any particular legal significance can be attached to the term "special situation".

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[76] *Aoraki*, above n 36, at 293.
[77] *Hale*, above n 26, at 159.
[78] *Aoraki*, above n 36, at 293. See above at [50] for the full quote. The same point was made by Chief Judge Colgan in *Simpsons Farms*, above n 7, at [37].

[88] Ms Muir also argued that the recognition by courts in other areas of law of the "managerial prerogative" of businesses extends to cases under s 103A. She defined "managerial prerogative" as "the Court not substituting its view for that of the business". She cited the decision of this Court in *Latimer Holdings Ltd v SEA Holdings Ltd*[79] and the decision of the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd*.[80] We accept that those decisions are authority for the proposition that the courts will not, in a company law context, second guess business decisions made by directors acting within the scope of their authority and in good faith.

[89] But the statutory context of the present appeal is different from the company law provisions at issue in the *Latimer* case. And it is notable that the Privy Council in *Howard Smith*, having found that the power to issue shares was one for management and not one on which the Court would substitute its view, went on to uphold a finding that viewed objectively the power had been exercised for an improper purpose. We do not see these cases as assisting us in the present context under s 103A of the Act. That section requires the Employment Court to decide objectively whether the actions of the employer meet the "fair and reasonable employer" standard. The Employment Court cannot discharge that responsibility by saying if the employer considers it was reasonable, then it must be so.

Application of the law to this case

[90] Judge Travis found that GTA had failed to discharge the burden of showing that its actions, and the manner in which it acted, were what a fair and reasonable employer would have done in all the circumstances at the time of Ms Brake's dismissal. A number of important factual findings were brought to bear in that conclusion. As findings of fact are not subject to appeal, our analysis of the correctness of the Judge's decision proceeds on the basis of those findings.

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[79] *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [69] and [71]. See also *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) at 253 and *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC) at 79.

[80] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) at 832.

[91] The key findings were:

(a) The financial information which led Lindsay Grace to initiate the process culminating in the redundancy of Ms Brake contained a basic arithmetic error, which meant that Lindsay Grace thought the business was in a position of making a $60,000 loss when, in fact, its position was that it was making a $60,000 profit. The Judge found that if the calculations used for the redundancy proposal had not been based on this $120,000 error, there would have been no immediate need for the redundancy of Ms Brake.[81]

(b) There was no convincing evidence that GTA's financial situation had substantially deteriorated in the six months following the commencement of Ms Brake's employment.[82]

(c) The staff meeting held on 7 April demonstrated there was more than adequate ongoing work for Ms Brake and other members of the staff. The action plan that Lindsay Grace proposed at that meeting would have allowed for careful monitoring of the true work situation and would have allowed for any future decisions to be based on accurate assessments, not on miscalculations.[83]

(d) GTA ran a substantial accounting practice with major clients and was used to providing accurate financial analysis of its clients' financial affairs. But it did not adequately apply such an analysis to its decision to employ Ms Brake or its decision to make her redundant.[84]

(e) GTA did not give adequate information to Ms Brake at the time which would have enabled her to have seen the financial error on which Lindsay Grace's calculations were based and would have allowed her

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81 Decision under appeal, above n 1, at [49].
82 At [60].
83 At [61].
84 At [62].

to come up with more concrete proposals that could have avoided her redundancy.[85]

(f) GTA did not adequately explain how Ms Brake came to be included in the redundancy proposal, especially after Ms Stirling and Ms Redmayne accepted the situation and agreed to leave, which the Judge found would have provided GTA with sufficient savings to have rendered Ms Brake's immediate redundancy unnecessary.[86] This finding took into account the failure to explain how the situation developed from the potential for one redundancy in the email Lindsay Grace sent to Ms Macphail on 10 April 2010 to two redundancies (Ms Stirling and Ms Redmayne) to three redundancies including Ms Brake. This was not explained and Ms Macphail was not called to give evidence as to what prompted the change in approach.[87]

(g) If GTA had analysed its practice on the basis of correct information it would not have offered Ms Brake employment and motivated her to leave KPMG.[88] However, the Judge said he was satisfied that GTA was acting under a mistaken belief that it had a profitable practice and adequate ongoing work and that it needed to engage Ms Brake on a permanent full time basis.[89]

(h) GTA thought highly of Ms Brake and there was no suggestion that the redundancy was a mask for some ulterior motive in dismissing Ms Brake.[90]

(i) The directors of GTA had acted precipitously.[91]

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85 At [62].
86 At [63].
87 At [17].
88 At [64].
89 At [76].
90 At [86].
91 At [87].

(j) The decision to go ahead with the redundancy meeting with Ms Brake only hours after she had disclosed that she had leukaemia caused Ms Brake great distress, although the illness was not a reason for making her redundant, and the timing was simply an unfortunate coincidence. The circumstances reasonably led Ms Brake to believe that her health was why she was being selected for dismissal, and other communications she received from GTA right up to and including the ERA's investigation supported her in that conclusion.[92] This reasonable belief caused Ms Brake considerable distress and was the underlying reason for the tension that developed in the meeting between GTA, herself and Mr Reid in the 30 April meeting.[93]

[92] Mr Cranney argued that the following were specific breaches of the obligation to act as a "fair and reasonable employer" would act:

(a) failure to provide adequate or sufficient information before dismissal;

(b) provision of wrong information prior to dismissal;

(c) dismissal on the basis of wrong information in circumstances in which the correct information was readily and reasonably available and the wrong information would have been corrected had the appellant not committed the failure identified in (a) above;

(d) disregarding the mutual assumption of ongoing employment in circumstances in which it was unjust to do so, including as to selection for dismissal;

(e) unfair/incomprehensible selection rationale; and

(f) proceeding with the dismissal process immediately after Ms Brake's health disclosure, contributing to Ms Brake's reasonable belief that that was the reason for dismissal.

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92 At [56]–[57].
93 At [57].

[93] He said that the Employment Court's finding based on those factors did not involve the Employment Court substituting its business judgment for that of GTA. The essential findings of the Employment Court were that GTA did not treat Ms Brake as a fair and reasonable employer would have done. The Employment Court did not suggest that GTA could not make an employee redundant unless its business was about to fail (the concern addressed by this Court in *Hale*).

[94] Ms Muir said that the Employment Court had erred because it had not found the redundancy dismissal justified on the basis that GTA genuinely considered that Ms Brake's position was superfluous to its needs. We do not agree. GTA acted precipitously and did not exercise proper care in its evaluation of its business situation and it made its decision about Ms Brake's redundancy on a false premise. So it never turned its mind to what its proper business needs were but rather proceeded to evaluate its options based on incorrect information. We can see no error in the finding by the Employment Court that a fair and reasonable employer would not do this.

[95] Ms Muir also said that the Employment Court had substituted its own decision for that of the appellant, but we do not think that is the case. What the Employment Court said is that it considered it likely that GTA would not have thought it needed to make Ms Brake redundant if it had considered correct information. That is an assessment of what GTA would have done, not a substitution by the Employment Court of GTA's judgment.

[96] Ms Muir said that the Employment Court erred in holding that GTA needed to demonstrate that its situation had changed since it had hired Ms Brake in 2009. We accept that the focus of decisions about the justifiability of a dismissal are required, under s 103A, to be focused on the time of the dismissal. But we do not think that the Employment Court erred in taking into account the fact that Ms Brake had been encouraged to leave a secure job at KPMG on assurances of a permanent position at GTA, when considering whether GTA's actions were what a reasonable employer would have done in the circumstances. This was a relevant, although not decisive, factor.

[97] Ms Muir said that the Employment Court was wrong to take into account information not known to GTA at the time of the dismissal, namely the fact that Lindsay Grace had made an error in his calculations. As just mentioned, we accept that the evaluation of an employer's conduct in relation to a dismissal must be focused on the time of the dismissal. But we do not think the Employment Court made any error in taking into account that the conduct of GTA included evaluating the dismissal on wrong (and carelessly miscalculated) information and that this then led to wrong information being given to Ms Brake in the course of the consultation process. The careless miscalculation of the financial information, the reliance on that wrong information, the provision of that wrong information to Ms Brake and the decision to make Ms Brake redundant on the basis of that wrong information were all matters that affected GTA's conduct at the time of the dismissal.

[98] We conclude on this issue that the Employment Court did not apply the wrong test. So we answer the first question: "Yes". GTA's appeal against the Employment Court's finding that it breached s 103A and that the dismissal was therefore unjustified fails.

Did the Employment Court apply the correct principles in relation to remedies?

[99] We now turn to the second question on which leave was given, namely: Did the Employment Court apply the correct principles when exercising its discretion to award remedies to the respondent?

[100] Ms Muir submitted that the Employment Court erred in the present case in exercising its discretion in the level of awards for compensation for distress and lost earnings and argued that these remedies should be substantially reduced.

[101] At the outset we remind ourselves that we are dealing with an appeal limited to questions of law, and an appeal question which recognises that limitation by referring to "the correct principles". This is not an appeal against the exercise of a discretion, but rather one which deals with the correctness of the principles brought to bear in the exercise of the discretion.

Compensation for lost remuneration

[102] We start with the award of $65,000 as compensation for lost remuneration. In the present case, reimbursement was sought for lost earnings from 30 April 2010 until 31 March 2012, with credit being given for the payment in lieu of notice and some part time earnings that Ms Brake had received during that period. The amount claimed was just over $104,000. The relevant section is s 128 of the Act, which provides:

> **128 Reimbursement**
>
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.
>
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[103] Judge Travis cited the decision of this Court in *Sam's Fukuyama Food Services Ltd v Zhang* as to the approach to be followed in cases under s 128.[94] It is clear that he considered that an award greater than the default amount specified by s 128(2) was appropriate. He considered whether there were any factual matters which might indicate that the employment of Ms Brake, but for the dismissal, would not have carried on for the period for which reimbursement was sought. The Judge concluded that there were no such factors because Ms Brake's past working record demonstrated stable and satisfactory work, and she was held in high regard by GTA.[95]

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[94] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

[95] Decision under appeal, above n 1, at [93].

[104] The Judge also considered that the financial material provided by GTA showed that redundancy would not have been a likely consequence during the period under consideration.[96] However, the Judge was conscious of the need to exercise restraint and to be fair to both sides, and therefore reduced the amount claimed from just over $104,000 to $65,000, which broadly equated to 12 months' salary without any allowance for anything earned during that period.[97]

[105] Ms Muir argued that the Judge had found as a matter of fact that the decision to dismiss Ms Brake was a genuine business decision and therefore an award of 12 months' salary was wrong. She cited this Court's decision in *Aoraki* for that proposition.[98] We do not accept this submission. The Judge found that the decision to dismiss was in breach of s 103A and therefore unjustified. The fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore, "genuine") did not alter the fact that s 103A was breached.

[106] The citation relied on by Ms Muir from *Aoraki* is the following statement:[99]

> Where the grievance concerns the manner in which a substantively justifiable dismissal was carried out, that is the wrong to which remedies may be directed, and there is no power under the statute to make an award for the loss of the job.

[107] Even if that statement had survived the change in the statutory framework since this Court's decision in *Aoraki*, it would not be applicable in the present case because Ms Brake's dismissal was not found to be "substantively justifiable".

[108] We are satisfied that Judge Travis applied the correct principles based on this Court's decision in *Sam's Fukuyama Food Services*. No error of principle is demonstrated. This ground of appeal therefore fails.

Compensation for humiliation

[109] As noted above at [9], the Judge also awarded $20,000 under s 121(1)(c)(i) of the Act. That provision empowers the Employment Court to order as a remedy for a

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96 At [94].
97 At [95].
98 *Aoraki*, above n 36.
99 At 295.

personal grievance compensation for "humiliation, loss of dignity, and injury to feelings of the employee".

[110] Ms Muir argued that this award was excessive. But to succeed in the appeal she needed to establish that it was awarded in the application of an incorrect principle.

[111] Ms Muir relied on this Court's decision in *NCR (NZ) Corporation Ltd v Blowes*, in which an award for non-economic loss in a redundancy case was reduced from $15,000 to $7,000.[100] She also referred us to statistics published by the Ministry of Business, Innovation and Employment of awards made by the Employment Court and the ERA under s 123(1)(c)(i). She pointed to the fact that only 42 of the 1,022 awards were $15,000 or more (4.1 per cent) and the median was between $4,000 and $6,000.

[112] We do not find the statistics particularly helpful, for reasons articulated by Mr Cranney. The statistical tables do not identify what cases are referred to, what reductions were made for contributory conduct, and whether the award was for unjustified dismissal, unjustified conduct or other types of grievance listed in s 103 of the Act.

[113] We consider that the approach taken in *Blowes* has to be read in light of the later decision of this Court in *Commissioner of Police v Hawkins*.[101] In *Commissioner of Police v Hawkins*, this Court endorsed comments made by Chief Judge Colgan in *Simpsons Farms* to the effect that *Blowes* did not establish a range within which awards must fall or set a ceiling.[102]

[114] In the present case the Judge referred to the distress caused to Ms Brake by the circumstances of the redundancy, particularly her (reasonable) belief that it was triggered by the disclosure of her illness. He described the consequences of the redundancy decision on Ms Brake as being serious, and we see no reason to differ from that conclusion.

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100 *NCR (NZ) Corporation Ltd v Blowes* [2005] ERNZ 932 (CA).
101 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 ERNZ 381.
102 At [71], endorsing *Simpsons Farms*, above n 7, at [76]–[79].

[115] We can see no error of principle in the manner in which Judge Travis approached this issue.

Conclusion

[116] We conclude that there was no error in principle and that the second question should therefore be answered "yes".

Result

[117] We answer both the questions on which leave was given in the affirmative. We dismiss the appeal.

Costs

[118] As Ms Brake was self-represented, she is not entitled to costs. However, we award her usual disbursements for herself and the travel expenses of her McKenzie Friend.

[119] Costs in relation to the granting of leave were reserved. The leave application was dealt with on the papers. It was opposed by Ms Brake but leave was given. So, to that extent, GTA was successful at the leave stage. However, we do not consider it is appropriate to make an award of costs given that there was no need for a leave hearing and in light of the ultimate outcome of the case. In our view, justice would be done by providing that costs lie where they fall in relation to the leave application.

Solicitors:
Simpson Grierson, Auckland for Appellant