

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 506
3084932

BETWEEN BRETT ARTHUR
Applicant

AND OSS LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
Tim Oldfield, counsel for Respondent

Investigation Meeting: 8 and 9 September 2020

Submissions received: 9 September 2020

Determination: 7 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Arthur was employed by OSS Limited (OSS) from 26 April 2019 to 20 November 2019 in a senior role of head of sales and marketing. Five months after he commenced working at OSS his employment ended following a restructuring process which disestablished his position. OSS provides technical and consulting services to the IT industry.

[2] This employment relationship problem has two key elements. The first concerns an alleged breach of the employment agreement as to the calculation and payment of the variable component of Mr Arthur's salary and if so, what, if any entitlement is due to Mr Arthur. The second, is whether Mr Arthur's dismissal for redundancy was unjustified.

[3] Mr Arthur seeks remedies in respect of both elements including payment of the variable component of his salary, interest on that sum, reimbursement of lost wages consequent to his dismissal, compensation for hurt and humiliation consequent to his dismissal, the award of a penalty against OSS for breach of the employment agreement in failing to pay the variable component part of which is to be awarded to him and a contribution to legal fees.

[4] OSS denies the remedies sought or that it has breached any term of Mr Arthur's employment. It says Mr Arthur's dismissal for redundancy was justified, that the terms of the variable component of his salary were not agreed and/or that Mr Arthur's performance did not entitle him to a bonus.

Non-publication order

[5] During the investigation meeting OSS sought non-publication orders under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) for documents identified in an email dated 8 September 2020 from Mr Oldfield on the grounds of commercial sensitivity. Mr Arthur did not oppose the order which was made on an interim basis.

[6] It is accepted the information in the identified documents is commercially sensitive and that there is no public interest in the material being published. It is clear to the Authority that this is an appropriate matter in which to issue a non-publication order.

[7] The Authority orders the documents identified in Mr Oldfield's email of 8 September 2020 are subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

The Authority's investigation

[8] The Authority heard evidence from Mr Arthur, his partner Deana Bernard, Ian Soffe, the founder and managing director of OSS, Rae Froggatt, OSS human resource manager and Grant Olliff, OSS general manager of sales.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[10] The issues identified for investigation and determination are:

- a. Did OSS breach Mr Arthur's employment agreement by failing to calculate and pay the variable component of his salary?
- b. If so:
 - i. What monies, if any, are owed to Mr Arthur under the employment agreement?
 - ii. Should interest be awarded on any sums found payable by OSS to Mr Arthur?
 - iii. Should the Authority order OSS to pay a penalty?
- c. Was Mr Arthur unjustifiably dismissed?
- d. If Mr Arthur was unjustifiably dismissed, what remedies should be awarded considering:
 - i. Lost wages;
 - ii. Compensation under s 123(1)(c)(i) of the Act?
- e. If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Arthur that contributed to the situation giving rise to his personal grievance?
- f. Should either party contribute to the costs of representation of the other party?

Background

[11] At the commencement of 2019 two related companies were joined to form OSS and a number of new staff employed to deal with an expected consequent increase in business. Mr Arthur was one of the new employees hired. His was in a senior role – head of sales and marketing. He reported directly to Mr Soffe.

[12] After what appears to have been an informal recruitment process on 8 April 2019 Mr Soffe emailed Mr Arthur an offer of employment. A proposed employment agreement was not attached to the email but the key terms and conditions were outlined including a base salary and “OTE \$300K via targets and incentive scheme to be agreed, and reviewed 6 monthly”. “OTE” is an acronym for on target earnings and refers to total compensation including base salary and a variable component such as commission.

The parties’ employment agreement

[13] On 9 April Mr Arthur emailed Mr Soffe accepting the offer in principle, attaching a signed non-disclosure agreement for an upcoming strategy workshop he had been invited to attend with OSS and proposing a process to agree the “proposed on target remuneration”.

[14] The next communication between Mr Arthur and Mr Soffe was on 15 April when Mr Soffe emailed Mr Arthur a “draft contract to review”. The document was signed by Mr Soffe.

[15] This was the intended employment agreement.¹ It was presented as a draft for Mr Arthur to review and on which his comment was sought. It should have come as no surprise to OSS that Mr Arthur seriously engaged in this draft review process.

[16] The parties’ next communication was Friday 26 April when Mr Arthur emailed Mr Soffe that he had had a chance to review the “draft IEA and schedule A”, he would send him a marked up document with his proposed changes and signalled clearly that

¹ Section 63A of the Employment Relations Act 2000 sets out what an employer must at least do when bargaining for an individual employment agreement which includes providing to the employee a copy of the intended agreement under discussion: section 63A(2)(a) Employment Relations Act 2000.

he wanted to discuss the schedule A in more detail with “Main points that I’d like to cover on Monday are the KPIs and rem structure (as pertains to me and the sales team)”.

[17] On 30 April Mr Arthur started work with OSS. It does not appear Mr Soffe and Mr Arthur discussed what would happen if the terms of the employment agreement were not finalised when Mr Arthur started employment.

[18] The next stage in the bargaining for the employment agreement was on 22 May when Mr Arthur emailed Mr Soffe the intended employment agreement marked up with tracked changes (Mr Arthur’s proposed IEA). This formatting meant Mr Arthur and Mr Soffe could see on one document the original intended employment agreement and Mr Arthur’s proposals. For the purposes of this determination the main proposed changes were to replace the OTE with the following commission/bonus structure:

- 2 x commission payments based on (i) company target gross margin and (ii) company net margin; and
- 2 x bonus payment based on (i) 120% company net profit before tax target and (ii) 133% company net profit before tax target.

[19] In the covering email Mr Arthur explained the proposed commission and bonus payment schemes did not contain specific figures because the budget and targets for the 2020 financial year had not yet been set. The email continued:

What we do need to do in short order is to at least agree the base/at risk split so that we can get me on to this month’s payroll. I’ve proposed this as a 75/25 split so that it is in line with (most) of the sales team. Next step after that would be agreeing the budget with Bronwen so I can sort out the sales team targets and associated incentives.

[20] Mr Arthur’s email makes it clear that to finalise the figures for his proposed bonus/commission scheme information from the previous financial year was required on which a budget could then be agreed and the process for target setting for the sales team could begin against which his own targets would be set.

[21] On 27 May Mr Arthur and Mr Soffe met to discuss Mr Arthur’s proposed IEA. Mr Arthur says Mr Soffe agreed to his proposed IEA. Mr Soffe says he did not agree to the proposed IEA. Later that day Mr Soffe emailed payroll advising Mr Arthur’s “start date, 26 April 2019 with base remuneration \$210K p.a.” Mr Arthur was copied

into the email. The email reflects OSS accepted at least two of the changes in the proposed IEA.

[22] There is insufficient evidence to establish OSS accepted Mr Arthur's proposed IEA in its totality. The signatures on the documents are not evidence of OSS's agreement because the document contains Mr Soffe's signature from the 15 April intended agreement which predates Mr Arthur's proposed IEA. Mr Soffe's email to payroll is evidence sufficient to establish the specifically mentioned terms were agreed. For these same reasons there is insufficient evidence OSS agreed to Mr Soffe's proposal to increase his annual leave entitlement.

[23] If I was satisfied OSS had accepted Mr Arthur's proposed IEA entirely the terms of the commission lacked sufficient certainty or completeness to be enforceable. This is because, once the year ending 2019 financial information had been provided the parties, under Mr Arthur's proposal, would have entered a further process to negotiate and agree budgets and targets.² As matters transpired this did not occur before Mr Arthur's employment ended.

Why were the sales targets and budgets not set?

[24] The minutes of the weekly senior leadership team meeting between 6 June and 5 September regularly record Mr Arthur raising that he was waiting on financial information to progress and finalise the commission and budget figures for the sales team. The minutes also regularly record Mr Soffe as working on getting the year-end financial information so that the operating budget and targets could be set for the sales team.

[25] Mr Soffe said the delay in getting the information was caused by complexity consequent to the recent joining of two companies and internal issues within the finance team that had only recently come to light. The Authority accepts these are the reasons for the delay. While it is clear Mr Arthur's continued raising of the issue resulted in some defensiveness from Mr Soffe I am satisfied it was clear to Mr Soffe why Mr Arthur was raising the issue and that he (Mr Soffe) was on board with providing the information. This finding is made because the first quarter commission payment to the

² Refer extract of email from Mr Arthur to Mr Soffe 22 May 2019 at [19] above.

sales team on 11 July was made with the caveat it was a good faith payment pending the “new sales team incentive scheme for FY2020”, on 12 August Mr Arthur and Mr Soffe met to discuss the issue further and the senior leadership team meeting minutes record Mr Soffe regularly providing updates with progress for example, the 14 August minutes record Mr Soffe saying “budgets, territories and targets, etc next cab off the rank”.

Consequences for the parties’ employment agreement

[26] Mr Arthur seeks to rely on a decision of the Authority to support his claim of, at least, a pro rata commission payment based on the agreed commission structure in the employment agreement.³ In *Jamieson* the Authority ordered a pro rata payment of at risk earning component of salary despite the parties not agreeing targets as required under their employment agreement. The Authority did not accept the bonus payment was discretionary and was satisfied Mr Jamieson had met performance measures and the overall financial performance of the business indicated a bonus was payable.

[27] Mr Arthur’s situation is somewhat different to that described in *Jamieson*. There is insufficient evidence to calculate the at risk portion of Mr Arthur’s salary because the parties had not agreed how it was to be calculated.

[28] I have considered whether the bonus paid to the sales team in July should apply to Mr Arthur and whether his decline of that bonus could be considered a conditional acceptance on finalisation of sales team incentive scheme. However, there is insufficient evidence this was the parties’ intention. Mr Arthur’s evidence was he declined the bonus because he expected the detail of the sales’ team and, in due course, his bonus to soon be finalised.

[29] Further, I have considered the bonus’ OSS paid to other staff during this period and whether they gave rise to a reasonable expectation on Mr Arthur’s behalf that he also would receive a bonus. Mr Soffe’s evidence was these bonuses were paid for specific results based on specific conditions of employment. It is accepted the circumstances in which these bonuses were paid is sufficiently different to that of Mr Arthur that no claim of reasonable expectation out be successfully made.

³ *Jamieson v Fortlock Security Systems (2008) Limited* [2019] NZERA 408.

[30] For completeness, in the absence of agreement to the intended employment agreement's commission clauses those clauses do not bind the parties.⁴ Mr Arthur did not accept OSS' commission proposal as set out in the intended agreement and made a counter proposal which, for the reasons set out above, OSS did not accept or, do not have sufficient certainty to enforce. Unfortunately for Mr Arthur the terms of his bonus were not finalised before events overtook the parties and the restructuring process commenced. He is unable to enforce the terms of the bonus because the terms are too uncertain or incomplete to enforce. The Authority cannot set those terms.⁵ Whether any failure on OSS' part to finalise the terms of the bonus before the restructuring process commenced amounted to an unjustified action which disadvantaged Mr Arthur in his employment was not a question before the Authority.⁶

[31] Mr Arthur's claim for breach of the employment agreement for failure to pay the variable component of his salary is declined. There will be no consideration of a penalty for breach.

Restructuring and Redundancy

[32] On 9 September Mr Soffe wrote to Mr Arthur setting out a proposal to disestablish his role as head of sales and marketing. The letter stated OSS was considering a restructure to "contain costs and maximise the profitability of the company". Mr Arthur was invited to a meeting at midday 11 September and told he could bring a support person. Attached was a document setting out the restructuring proposal titled "2019 Proposal for Restructure". This document makes clear Mr Arthur's role was one of five positions within OSS potentially impacted by the restructuring – Mr Arthur's position of head of sales and marketing, the Wellington based service delivery manager, two northern service delivery manager roles and the head of commercial and IT. The proposal document included the principles underlying how the restructure would be conducted, the business drivers for the proposal which were listed as market change and company profitability, a before and after organisational chart and functional impact including "Marketing leadership would transfer to the existing role of Head of Customer Experience and Digital Marketing, in

⁴ Section 64(6) Employment Relations Act 2000.

⁵ Section 161(2) Employment Relations Act 2000.

⁶ Section 160(1)(3) Employment Relations Act 2000.

collaboration with the line of business heads”. A timeline for the restructuring process was included.

[33] Mr Arthur attended the 11 September meeting with Mr Soffe and Ms Froggatt. He was supported by Ms Bernard. During the meeting Mr Arthur sought to understand why the review was necessary, how specific parts of his role would be met under the proposed structure, who in the business knew about the restructuring proposal and what would happen with the temporary and contract roles. While high level, answers were provided to the questions. In particular, the rationale for the restructuring was given that the expected uplift in business from combining the two companies had not occurred as expected and OSS knew this from ongoing monitoring including information from the weekly sales and resourcing meetings.

[34] By letter dated 15 September Mr Arthur wrote to Mr Soffe with feedback and concerns about the restructuring proposal including:

- OSS had failed to keep the process private to those affected by talking about it to other staff and publishing the fact in an open calendar invite;
- the process was not in good faith because the true reason was performance concerns about one of the affected employees and Mr Arthur’s challenging of financial governance and repeated requests for information;
- Mr Arthur could not provide comment on the financial basis of the decision because he had not received the financial information he had been requesting; and
- no austerity measures had been put in place.

[35] At this time when Mr Arthur was considering his feedback to the proposed restructuring another employee in a potentially affected position (head of commercial and IT) told him he intended to pursue another option with Mr Soffe. This employee did secure a newly created role consequent to the restructuring. Whether this new role was a redeployment option OSS should have considered for Mr Arthur or if the process by which this new role was created impacted on the fairness of the redundancy process is discussed below.

[36] Also at this time Mr Arthur accepts he made a reference to his employment ending during a sales team meeting. He says it was a throw away comment and that most of the people in the room were well aware his role was to be disestablished.

[37] The parties next met on 20 September. At the outset of the meeting Mr Soffe said he was surprised by Mr Arthur's feedback. Mr Soffe then proceeded to advise a modified version of the restructuring proposal was to be implemented, his role (Mr Arthur's) was disestablished and his employment terminated, this was not a reflection of his performance and the decision was made because substantial cost savings needed to be made. Mr Soffe had a prepared letter which he read through while responding to comments and questions from Mr Arthur. The letter addresses Mr Arthur's feedback in some detail including OSS did not accept the restructuring was not legitimate or that Mr Arthur or others had been targeted or that calendar appointments were not marked private. The letter includes:

- the restructure was required "to make substantial cost in light of lower than expected occupancy and revenues; the latter situation being one that you, as well as I, have had increasing visibility of over recent months";
- lists cost-saving and revenue improvement measures taken to date;
- Mr Soffe had consulted widely about roles and their value to business but had not shared the restructuring proposal document beyond those immediately effected and his advisors;
- the consultation meetings were marked as private in the email system and requests more information about the alleged confidentiality breach;
- refers to the "headline numbers" and "targeted future sales performance" Mr Arthur was told about at the start of his employment;
- Mr Soffe did not agree the detailed breakdown sought by Mr Arthur of OSS's past performance was necessary for him to perform his role;
- The rationale for the recent purchase of a marketing business;

[38] Mr Arthur was given two months redundancy notice in accordance with his employment agreement, his last day of employment was to be 20 November 2019 and he was given the option not to work out his notice and take "garden leave", which he elected. The letter ended acknowledging the difficult circumstances leading up to the

decision, thanking Mr Arthur for his contribution and offering assistance with the search for alternative employment.

[39] The meeting was not easy. Mr Arthur was, by his own admission, angry and expressed his opposition to and frustration with the restructuring forcefully. His disappointment is understandable given the relative newness of his appointment.

Discussion

[40] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The legal principals to apply to such a consideration are set out in the following statements of the Court of Appeal in *Grace Team Accounting Limited*:

[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*.

...

[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.⁷

[41] In assessing the justifiability of a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.

Genuine business need for restructuring?

[42] Mr Arthur is critical of the OSS decision to make his position redundant. Firstly, he says given his skill and experience OSS should have sought out his view before starting the restructuring process. Secondly, he says it was impossible to provide any meaningful assessment of the proposed restructure because he never had access to the type of financial information he needed to do his job.

[43] OSS says the challenges facing the business were regularly discussed in the senior leadership team, of which Mr Arthur was a member, during the consultation process Mr Arthur never asked for specific financial information but that at all times he had access to considerable sales information through the client management system.

[44] The client management tool Mr Arthur had access to provided considerable information that would have assisted understanding of the situation the business was facing. In addition the documents before the Authority show Mr Soffe expressed expectations around sales levels and that they had not been met. Mr Olliff, who also held a position of seniority in the business and had access to similar information to Mr Arthur, was unequivocal in his evidence that sales were not at a level expected, the costs and complexity of combining the businesses to form OSS were significant and that cost savings through restructuring was an option to respond to the situation. I am satisfied Mr Arthur had access to information and was party to discussions in which he had input about the challenges facing the business. Further, I am satisfied Mr Arthur, as a senior employee was aware of the context of the restructuring.⁸

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

⁸ *Kiteley v Carbine Aginvest Corporation Ltd* [2020] NZEmpC 106 at [26].

[45] It is correct Mr Arthur did not request specific financial information regarding the restructuring. His comments centred on the financial information he understood he needed to complete the bonus negotiations and which were never provided. A failure on the part of an employee to make a specific information request does not discharge an employer's obligation to act fairly and reasonably in providing information considered in a redundancy setting. If the bonus information or other financial information had been relevant to the restructuring then it should have been provided to Mr Arthur. However, I am not satisfied that there was information that OSS considered in the restructuring process that was not presented to Mr Arthur in a way that allowed him to comment with the only caveat being the information considered in the consideration and formulation of the new position which is considered and discussed below.

Ulterior motive?

[46] Mr Arthur says the restructuring process unfairly targeted him. He says his repeated requests to Mr Soffe for specific financial information got him off side with his employer. He also relies on comments attributed to Mr Soffe about another effected employee's performance which, Mr Arthur says, is evidence of an ulterior motive.

[47] There is insufficient evidence the restructuring was implemented to target Mr Arthur or any other effected employee. Mr Arthur's was one of a number of positions effected by the restructuring. OSS has justified the reasons for the restructuring.

Failing to keep confidential?

[48] Mr Arthur says OSS failed to keep the process confidential. To support this contention he refers to public outlook invitations and knowledge of the restructuring about the business. He raised his concerns with OSS during the consultation process and a response was provided. I am not satisfied there was any conduct of OSS which would amount to a failure to maintain the confidentiality of the process which unfairly disadvantaged Mr Arthur in his employment or tainted the restructuring process.

Redeployment?

[49] OSS had an obligation to consider alternatives to making Mr Arthur redundant.⁹ The restructuring process resulted in a modification to the proposed outcome which resulted in a new position for one of the effected employees. A fair process would have updated all effected staff on the modified proposal, given them a chance to comment and where, appropriate, an opportunity to apply for that new position. This is because the restructuring proposal purported to reorganise a part of the business in a proposed way and part way through the process that proposal changed. This is matter on which OSS was obliged to consult with Mr Arthur.

[50] The evidence for OSS was the possibility of the new role as a redeployment option for Mr Arthur was ruled out early on because of assumptions OSS made about his salary and seniority expectations and Mr Arthur's reaction to the restructuring. The assumptions OSS made were unreasonable and do not amount to consultation. A fair observer would have expected OSS to be able to put Mr Arthur's reaction to the restructuring in context and not allow it to cloud the process being undertaken. This is particularly so given the skill and experience of the OSS team overseeing the restructuring.

[51] On 1 October a member of the sales team resigned. This was ten days after Mr Arthur had been given notice of dismissal for redundancy with his last day of employment with OSS being 20 November. Was this vacant role a redeployment opportunity OSS should have offered Mr Arthur? OSS says no and has referred the Authority to the judgment of the Employment Court in *Kiteley v Carbine Aginvest Corporation Ltd*.¹⁰ The difference between Mr Arthur's situation and that before the Court in *Kiteley* is the redundant employee's employment had ended (Mr Kiteley's final day was 30 November 2017) before the new appointee was offered the role (17 December 2017). OSS had an obligation to offer the vacant role to Mr Arthur given the role was within Mr Arthur's capability (it fell within his then team) and became available during his notice period.

⁹ *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142, [40] – [43].

¹⁰ *Kiteley v Carbine Aginvest Corporation Ltd* [2020] NZEmpC 106.

[52] These flaws in the redundancy were not minor and render Mr Arthur's dismissal unjustified.¹¹

Remedies

Lost wages

[53] Mr Arthur sought an award of lost wages for the period of nine months and 19 days from when he finished with OSS on 20 November 2019 to the date of the Authority investigation meeting less the amount of \$7029.60 he received from the COVID-19 subsidy paid to him as a shareholder employee of a small business.

[54] Having established a personal grievance for unjustified dismissal, and having lost remuneration as a result, Mr Arthur is entitled to an order reimbursing him for the lesser of a sum equal to or to three months' ordinary time remuneration.¹² The Authority also has a discretion to order payment of more than that lesser sum.¹³

[55] The evidence supports that Mr Arthur attempted to mitigate the loss of wages from OSS by applying for a number of roles. I decline to exercise my discretion and award lost wages beyond the three month period because I am not satisfied Mr Arthur has applied for a range of roles which may have provided a better opportunity to secure employment.

[56] Mr Arthur is entitled to lost wages in the sum of \$52,500.00 (calculated at \$210,000.00 per annum ÷ 12 x 3) in respect of pursuant to s 128(3) of the Act.

[57] Mr Arthur is entitled to holiday pay in respect of the lost remuneration. OSS is ordered to pay Mr Arthur the sum of \$4,200.00 as holiday pay (calculated at 8% of \$52,500.00) pursuant to s 23 of the Holidays Act 2003.

Compensation for humiliation, loss of dignity and injury to feelings

¹¹ *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102, [35] – [38]; *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [40] – [42].

¹² Employment Relations Act 2000 s 123(1)(b) and s 128(2).

¹³ Employment Relations Act 2000 s 128(3).

[58] Mr Arthur and Ms Barnard gave evidence of the impact of the dismissal on Mr Arthur. Mr Arthur said he experienced shock, humiliation and embarrassment at being made redundant. He said he felt angry and when he reflected on his interactions with OSS over the course of his employment and in light of the redundancy this caused him to doubt his own judgement and decision making. He said he was fearful about securing another comparative position in his industry given the time of year he was made redundant, his short tenure with OSS and his age. Mr Arthur said the financial impact of losing his position has been significant including having a negative impact on the financial support he can provide his three dependent children. Ms Barnard's evidence included her observation that Mr Arthur's confidence has declined as a consequence of his dismissal.

[59] Having regard to the particular circumstances of this case, I consider that an award of \$20,000 under section 123(1)(c)(i) is appropriate.¹⁴

Contribution

[60] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[61] This was a no fault dismissal. Mr Oldfield submits that there is blameworthy conduct during the consultation process which he submits made it difficult to engage with Mr Arthur and cast doubt on any willingness to continue in employment, including accusing OSS of using the redundancy as a mask to get rid of him. I do not find the comments, though expressed forcefully and with anger, contributed to the circumstances giving rise to the grievance. I accept the comments may have made Mr Soffe and Ms Froggatt uncomfortable and that they may have found them challenging but I do not find discomfort or challenging behaviour, in the context, contributed in a blameworthy manner to the clear failings in the redundancy OSS' undertook.

¹⁴ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

[62] There are no deductions from the monetary remedies for reasons of contribution.

Summary of orders

[63] OSS Limited must pay Brett Arthur the following amounts within 28 days of the date of determination:

- (i) \$20,000 under s 123(1)(c)(i);
- (ii) \$52,500 gross as reimbursement of lost wages under s 123(1)(b); and
- (iii) \$4,200.00 in holiday pay.

Costs

[64] Mr Arthur seeks reimbursement of legal fees. As he was self-represented the basis of his claim is unclear. It may be he seeks reimbursement of the filing fee and disbursements or a contribution to legal fees incurred in instructing a representative to raise his personal grievance. The parties are encouraged to resolve this issue between them. If this is not possible, Mr Arthur is to file and serve any costs memorandum within ten working days of the date of determination and OSS Limited may file and serve any reply memorandum within a further five working days. Given the proximity to the end of the year this costs timetable may be varied on application.

Marija Urlich
Member of the Employment Relations Authority