IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 199
5394920

	BETWEEN	MEGAN COWIE Applicant
	A N D	HOAMZ LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Mary-Jane Thomas and Riki Donnelly, Counsel for the Applicant Don Rhodes, Advocate for the Respondent
Investigation meeting:	17 June 2013 at Queenstown
Submissions Received	At the investigation meeting and 4 and 12 July 2013 Further information received 23 September 2013
Date of Determination:	24 September 2013

DETERMINATION OF THE AUTHORITY

A. Megan Cowie was unjustifiably dismissed by HOAMZ Limited.

B. HOAMZ Limited must pay Megan Cowie $9,963.99 in lost remuneration.

C. HOAMZ Limited must pay Megan Cowie $7,000 compensation.

Employment relationship problem

[1] Megan Cowie was employed on 26 November 2009 as the Rentals Division Manager. Her role was to manage the respondent's long-term rental business. She reported to Fred Bramwell, the respondent's managing director. Two other staff, a full-time property manager and a part-time business development manager, worked in the general rental management business.

[2] Another arm of rental business called Relaxaway Holiday Homes offered short term rentals. It was managed from Christchurch by another director of the respondent, Neil Martin.

[3] Ms Cowie was paid a salary of $61,000 and received new business incentive payments.

[4] On 21 August 2012 Mr Bramwell e-mailed Ms Cowie. He wrote that she would have been aware that he had been considering the rentals business model and that he wanted to meet with her individually the following day *to talk through the proposal to take this business forward*.

[5] On 22 August 2012 Ms Cowie and Mr Bramwell met and he presented a proposal that the Relaxaway business and the long-term rental business be amalgamated and that Mr Martin would no longer be employed. The proposal also contemplated the Rentals Division Manager role being disestablished and a new property manager role being established to be paid $40,000. There was no mention of new business incentive payments.

[6] The proposal said that approximately $55,000 in salary would be saved by the two roles being disestablished. The other two positions in the property rentals business were to be unaffected except that they would report directly to Mr Bramwell instead of the Rentals Division Manager.

[7] Ms Cowie was upset by the proposal. It was agreed that she had an outburst during which she swore and told Mr Bramwell that he was the worst manager that she had ever had.

[8] Mr Bramwell also told Ms Cowie that he expected to meet with her on 24 August 2012 to discuss the proposal. He said she should bring a representative and that he would have a representative there. The proposal stated that all roles were to continue until the proposed meeting on 24 August 2012.

[9] Ms Cowie left the meeting. She remained upset and e-mailed Mr Bramwell asking if she was required to remain at work until the 24 August meeting. Mr Bramwell replied by e-mail that under the circumstances HOAMZ would pay her to be at home for the rest of the week until the meeting.

[10] Ms Cowie intended to work from home. However, her work phone no longer allowed her access to her work e-mails. She initially assumed it was a technical problem but Mr Bramwell had diverted her e-mails to the other rentals staff in the office.

[11] A second meeting took place on Monday 27 August 2012 rather than as initially proposed on 24 August. Ms Cowie was accompanied by Ms Thomas. No mutually satisfactory resolution was reached. It is common ground that the redundancy proposal was confirmed by the end of the meeting. Ms Cowie was given four weeks' pay in lieu of notice, in line with her individual employment agreement.

[12] A person contacted Mr Bramwell within days after the meeting and was offered the new property manager's role on 31 August 2012. She signed an employment agreement on 3 September 2012. She is paid $45,000 and has the use of a *company car after hours for commuting purposes*. She does not receive new business incentive payments.

The claims

[13] Ms Cowie claims that she was unjustifiably dismissed. She says the decision to make her redundant was pre-determined, and that she should have been offered redeployment in the proposed property manager position.

[14] By way of remedy she claims lost remuneration of $28,524.62 including holiday pay up to the date of the investigation meeting on 17 June 2013 and compensation of $20,000 for humiliation, loss of dignity and injury to her feelings, and legal costs.

[15] HOAMZ resists all the claims. It says that the redundancy was justified on the basis of poor financial performance of the rentals business. Mr Bramwell considered that Ms Cowie was unlikely to want to be employed in the proposed new position due to it paying $20,000 less than her then role. He says if Ms Cowie had asked to be employed in that role and had *shown a sincere desire to work in that lower position* she would have been offered the position. However, once Ms Cowie criticised the respondent and Mr Bramwell on 22 August 2012 the respondent decided that it was unlikely Ms Cowie wanted the proposed new role and declined to offer it to her.

Issues

[16] The Authority needs to determine whether Ms Cowie was unjustifiably dismissed by HOAMZ by way of redundancy, specifically:

- Did HOAMZ have genuine reasons for the redundancy?
- Did HOAMZ follow a fair and proper process?
- Whether Ms Cowie is entitled to any remedies.

Determination

[17] It is established law that an employer is entitled to make its business more efficient by the introduction of cost saving steps, including reducing the numbers of employees by way of redundancy. The Authority is not able to substitute its own judgment for the employer's judgment on whether it would have made the employee redundant or not, but must consider the issue objectively[1].

[18] However, if the justification for the redundancy is challenged by an employee the employer must be able to prove to the Authority that the decision made and how it was reached were what a fair and reasonable employer could have done in the circumstances that existed at the time[2]. In applying the tests under s.103A of the Employment Relations Act 2000 (the Act), Chief Judge Colgan of the Employment Court has recently explained that:

> *[54] It will be insufficient under section 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 enquire 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.* [3]

[19] Mr Donnelly submits that the redundancy was pre-determined and was a charade. He submits that the respondent's motive was not to streamline the business but was to terminate Ms Cowie's position either due to performance issues that had

[1] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA)
[2] Section 103A Employment Relations Act 2000.
[3] *Michael Rittson-Thomas trading as Totara Hills Farm v Davidson* [2013] NZEmpC 39

not been raised with her, or because of a personal conflict between her and Mr Bramwell, or because he simply considered that she was paid too much.

[20] Mr Bramwell disputes that there was a poor relationship between him and Ms Cowie. I can only presume he is referring to the time before the 22 August meeting because after that Mr Bramwell formed a very clear view about Ms Cowie's future at HOAMZ.

[21] Clause 13 of Ms Cowie's individual employment agreement deals with redundancy:

> *13.1 The Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and whether there are any alternatives. The Employer shall provide to the Employee sufficient information to enable meaningful consultation and shall consider the views of the Employee before making a decision to make the Employee redundant.*
>
> *13.2 Where a decision is made to terminate the Employee's employment on the basis of redundancy the Employer shall consult with the Employee as to whether there are:*
>
> *a. Any opportunities for redeployment within the employer's organisation; or*
>
> *b. Possibilities of career advisory services or other counselling being made available, time off for job search purposes and whether payment in lieu of notice may be provided.*
>
> *13.3 In the event that the Employee's employment is terminated on the basis of redundancy, four weeks' notice shall be provided of such termination. No redundancy or severance payment shall be payable.*

[22] Clause 13.1 imposed a duty on HOAMZ to consult with Ms Cowie about any proposed redundancy. I do not consider there were any exceptional circumstances that would have negated that duty. HOAMZ also had a duty under clause 13.1 to provide Ms Cowie with sufficient information about the proposal to make any consultation meaningful and to consider her views on the proposal before reaching a final decision about her redundancy[4].

[23] Ms Cowie says that at the 22 August 2012 meeting she was told that her position was going to be made redundant and that at the proposed Friday meeting the

[4] That duty is also an integral part of HOAMZ's duty of good faith considered below.

redundancy would be confirmed. She denies being told that Mr Bramwell wanted to seek her views about the proposal.

[24] Mr Bramwell says that at the 22 August 2012 meeting he made it clear that the redundancy was only a proposal and they would meet again in two days' time to discuss it further. However, he agrees that he did not tell Ms Cowie he was seeking her feedback on the proposal and any ideas she might have about potential cost savings or anything else that might offer an alternative to her position becoming redundant.

[25] Mr Bramwell says that at all times until the decision was taken at the meeting on 27 August Ms Cowie's potential redundancy was referred to as a "proposal" so it should have been clear that no decision had been made. As the Chief Judge held in *Simpsons Farms Ltd v Aberhart*[5]:

> *Consultation required more than simply a prior notification, and sufficient time was to be allowed. It was never to be treated as a mere formality. Sufficiently precise information was to be given to allow employees to state a view, together with a reasonable time and opportunity to do so. That might include an opportunity to state views in writing or orally. Genuine efforts had to be made to accommodate the views of the employees, and there was a tendency to at least seek consensus. A proposal was not to be decided or acted upon until after the consultation was completed*[6].

[26] I find that HOAMZ did not undertake meaningful consultation about Ms Cowie's proposed redundancy. That was in breach of clause 13.1 of her employment agreement. Ms Cowie was not aware that she was actually being consulted about the proposed redundancy. In reaching my decision I have also taken into account that the period of time between the first meeting in which the proposal was outlined to Ms Cowie and the proposed second meeting was only two days. It was not clear to Ms Cowie that the purpose of the second meeting was to hear her feedback on the proposal. That short period of time contributed to her suspicion that the decision had already been made.

[27] Mr Bramwell says that removal of Ms Cowie's access to her work e-mails on 22 August was to allow HOAMZ to deal directly with clients while she was at home and:

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[5] [2006] ERNZ 825
[6] Ibid, at paragraph 62.

> *In addition I add I was concerned after her 'outburst' when she was presented with the restructuring proposal, and determined that previous practice would continue …emails come back to the office but access to the telephone remained.*

[28] Ms Cowie says that in the past when she had been at home on sick leave she retained access to her work e-mails and continued to respond to them from home. I prefer Ms Cowie's evidence to Mr Bramwell's on this point. It was not *previous practice*, at least not invariable previous practice, to remove Ms Cowie's access to work e-mails when she was at home.

[29] Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Both parties have a duty to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

[30] Before unilaterally removing Ms Cowie's access to her email Mr Bramwell had a duty to discuss that intention and the reasons for it with Ms Cowie in good faith. However, he failed to do so and did not tell her why he had restricted her access or seek her agreement to that. Further, Mr Bramwell failed to reinstate Ms Cowie's access to her work e-mail when asked to do so by Ms Thomas.

[31] Mr Bramwell's failure to adequately consult Ms Cowie about her proposed redundancy combined with his unilateral removal of her access to work emails contributed to Ms Cowie's view that the redundancy decision had been made by 22 August 2012 and that Mr Bramwell no longer wanted her to work for HOAMZ.

[32] In addition to a general mutual duty of good faith set out in s.4 of the Act s.4(1A)(c) imposes a special duty of good faith on an employer. It 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 the employee affected:

> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before a decision is made.*

[33] The new property manager is paid $45,000 rather than the $40,000 the proposal outlined. In addition she has the use of a business branded car for

commuting purposes[7]. The car cost the Relaxaway part of the rentals business $12,500 and was purchased after Ms Cowie's redundancy. Mr Bramwell submitted information after the investigation meeting saying that the car would have been purchased regardless of who took up the new property manager's position. However, there was nothing in the proposal presented to Ms Cowie about the proposed purchase of a new car for the newly merged rentals division or that commuting use of that car might be available to the person in the new property manager's role.

[34] At the investigation meeting Mr Bramwell said that the pay for the new role was put up to $45,000 because he needed to pay that much to secure his preferred applicant in the role. That demonstrates that there was room for negotiation on the proposed salary for the new property manager's role however Ms Cowie was never told that.

[35] Mr Bramwell says that Ms Cowie must have known that the rentals part of the HOAMZ business was not profitable[8]. Ms Cowie says she was not familiar with the profit and loss or the budgets for the business. She says it was her role to make monthly reports on her part of the rentals business only to Mr Bramwell and make sure the other two staff performed their jobs properly. I accept her evidence.

[36] Ms Cowie was not shown the figures on which the projected salary saving of $55,000 was calculated, she was not told that a new car would be purchased for the merged rentals business which the new property manager could use for commuting purposes and she was not told that there was any room for negotiation upwards on the proposed $40,000 salary. Therefore I consider HOAMZ did not give Ms Cowie access to information which was relevant to the decision about whether or not her job would continue. HOAMZ breached its s.4(1A)(c) duty of good faith to Ms Cowie.

[37] A fair and reasonable employer could not have made the decision to make Ms Cowie redundant without genuine consultation undertaken in good faith and without giving Ms Cowie access to information which was relevant to the decision about whether or not her job would continue.

[38] The proposal estimated that of the approximately $55,000 it projected as savings $21,000 would come from the difference in salary between Ms Cowie's role

[7] HOAMZ pays for the car's costs including petrol, WOF, registration and insurance.
[8] The proposal said that the combined rentals business earnings before income tax were $9,000.

($61,000) and the new property manager's role ($40,000). However, savings of about only $16,000 were actually made given the $45,000 salary actually paid. True savings for the first year from Ms Cowie's redundancy are no doubt much lower, if they have been achieved at all, when the value of the car purchase and its use as a part of the property manager's salary package are taken into account.

[39] In two recent Employment Court cases[9] Judge Travis decided that when redundancy decisions were made on the basis of essentially misleading financial information - incorrect financial analysis in *Brake* and undue pessimism as to the possible financial results for the current year in *Tan* – the redundancies could not be justified.

[40] In *Tan* the head teacher was made redundant on the basis of the employer's calculation that it could not afford to retain her services. However, shortly after Ms Tan's departure the employer advertised for a full-time qualified teacher and within two months of her redundancy the employer had purchased the building in which it operated.

[41] HOAMZ's calculation of its salary savings has not been borne out. It has not proved that the decision it made to make Ms Cowie redundant as at 27 August 2012 was made on reliable figures. A fair and reasonable employer could not have made the decision it did to make the Rental Divisions Manager role redundant in all the circumstances when the amount of money it projected to save was not actually going to be realised.

[42] Ms Cowie says that she should have been redeployed to the new property manager role, which she would have accepted in preference to being made redundant. She also says she would have accepted a part-time job at that time, if necessary.

[43] Clause 13.2 of Ms Cowie's employment agreement says that if a decision is made to terminate her employment on the basis of redundancy HOAMZ shall consult with her about possibilities for redeployment within the business. Clearly the newly created property manager's role was an opportunity for Ms Cowie to be redeployed within the business.

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[9] *Brake v Grace Team Accounting Limited* [2013] NZEmpC 81 and *Tan v Morningstar Institute of Education Limited t/a Morningstar Preschool* [2013] NZEmpC 82

[44] At the meeting on 22 August 2012 Ms Cowie asked if she would be able to apply for the newly created role and was told that she could do so when it was advertised. Mr Bramwell remembers this although Ms Cowie does not. I accept his evidence. It is clear that Ms Cowie was very distressed during and after the meeting and has only retained the memory of the distinct impression that she was going to lose her job.

[45] Ms Cowie also says that potential redeployment for her was not mentioned at all by Mr Bramwell either before or after her outburst. Mr Bramwell agrees that apart from saying Ms Cowie could apply for the job when it was advertised he did not mention redeployment. The role was never advertised outside of the HOAMZ website because it was filled within the week of Ms Cowie's redundancy.

[46] Clause 13.2 of the employment agreement contemplates more than Ms Cowie being able to apply for the new role once it was advertised. It says that HOAMZ will consult with Ms Cowie about potential redeployment. However, HOAMZ did not initiate any consultation with Ms Cowie about redeployment to the new role.

[47] Mr Bramwell gives two reasons for not offering Ms Cowie the newly created role of property manager instead of making her redundant:

- The first reason occurred to him before he presented the proposal for her redundancy to Ms Cowie – he was concerned about the desirability of employing someone *just relieved of most of their responsibilities as well as taking a $20,000 cut in salary, as there could be the possibility of resentment and lack of enthusiasm which would not make for a happy office*. He described these as his initial reservations for offering Ms Cowie the new role.

- The second reason was Ms Cowie's outburst after the redundancy proposal was presented to her. Mr Bramwell says *because Megan had so vehemently expressed her feelings towards me and the Company, then our reservations remained. If anything my reservation had hardened for the reason I have previously stated.*

[48] On 24 August 2012 Ms Thomas requested a copy of the redundancy proposal and asked Mr Bramwell to confirm:

> *that if our clients position is made redundant (obviously after consultation) you agree that she will be offered the new position (we envisage that she would obviously given* (sic) *a months notice this change* (sic) *as per her current IEA) and then take on the new role at the lesser pay rate.*

[49] Mr Bramwell e-mailed a copy of the proposal to Ms Thomas and wrote:

> *We are not prepared to offer Megan the new role because the difference in salary from $61,000 to $40,000pa, plus the significant reduction of responsibility would create major dissatisfaction for her.*
>
> *This feeling is furthered by Megan's clear unhappiness at working for the company, as evidenced by her own words when the proposal was initially floated. Her thoughts on working for the company were made clear at this meeting. Words, including expletives, to the effect of our company being 'one of the worst working environments I have ever worked in', plus a direct attack on management credibility lead us to have serious reservations about employing Megan in the new role.*

[50] According to Mr Bramwell Ms Thomas continued to insist that HOAMZ should offer to redeploy Ms Cowie in the newly created role but that at no time did Ms Cowie indicate *she wanted the position, only that we should offer it*.

[51] Mr Bramwell says that he had been advised and was aware that:

> *had Megan actually asked for the position then I must allow her the opportunity to take it up. I remain firmly of the view she has never actually asked for the position, rather she kept asking was I going to offer it… I was and remain of the view that asking if I would offer the position and stating Megan wanted the position, is under the circumstances as I have detailed above, quite different.*

[52] In the Employment Court case of *Wang v Hamilton Multicultural Services Trust*[10] Judge Perkins adopted reasoning used by Judge Couch in *Jinkinson v Oceana Gold (NZ) Ltd* [11] in relation to redeployment. The Trust considered that Mr Wang was capable of performing the newly established role but did not offer to deploy him in that role. Instead, it hoped that he would apply for the role when it was advertised. Judge Perkins decided that the Trust failed in its duty to properly consider Mr Wang's redeployment, and that there was a *failure of the Trust to redeploy Mr Wang*[12]. Therefore Judge Perkins decided that Mr Wang's dismissal on the grounds of redundancy was not able to be justified under the s.103A test.

[53] In the *Rittson-Thomas* case the newly created role of shepherd paid only $6,000 less than Mr Davidson's redundant role of unit manager. He was not offered the new role but was told that he could apply for the shepherd's role. For his own reasons he decided not to do so. Chief Judge Colgan decided that in failing to offer Mr Davidson the alternative role created as a result of his redundancy the employer

[10] [2010] NZEmpC 142
[11] [2010] NZEmpC 102
[12] Ibid, paragraph [48]

did not act as a fair and reasonable employer would have[13] and Mr Davidson's dismissal for redundancy was not justifiable.

[54] Ms Cowie engaged Ms Thomas to act on her behalf and Ms Thomas set out in writing Ms Cowie's expectation that she would be appointed to the new role and *would take it on at a lesser pay rate.* However, Mr Bramwell made it very clear HOAMZ was not prepared to offer Ms Cowie the role.

[55] Mr Rhodes submits that in all the circumstances of the case HOAMZ's failure to offer Ms Cowie the newly created position was what a fair and reasonable employer could have done. He submits that Ms Cowie's situation was different from Mr Davidson's situation in *Rittson-Thomas* because of her outburst on 22 August 2012. He submits that Ms Cowie had a chance to respond to the respondent's concerns about offering her the new position but failed to do so and therefore cannot now say that it was unfair or unreasonable not to offer her the role.

[56] A fair and reasonable employer would have realised that at the 22 August meeting Ms Cowie was upset and shocked about her proposed redundancy and have taken her outburst in its stride, or at least given her an opportunity to cool down. Instead, Mr Bramwell considered that Ms Cowie's negative outburst entirely precluded her from remaining an employee and retained that view even when he had an opportunity to reflect on Ms Thomas' request to redeploy Ms Cowie to the new position. However, he did not tell Ms Cowie at the time of his meeting with her that her outburst had hardened his resolve not to engage her in the new role. He did not resile from that position despite Ms Thomas making it clear to him that Ms Cowie expected to take on the new role at the lower pay rate.

[57] Mr Bramwell continues to maintain a distinction that I do not consider a fair and reasonable employer could seek to maintain. That is, he says that Ms Cowie's counsel's continued insistence that HOAMZ should offer Ms Cowie the new position is different from Ms Cowie asking to be employed in the new position. He says Ms Cowie's request to remain employed is what he would have required along with some understanding between them that Ms Cowie could work with him under the changed circumstances – given her outburst on 22 August.

[13] Ibid, at paragraph [59]

[58] I do not consider that is a reasonable distinction to maintain in all the circumstances. Ms Cowie's representative asked HOAMZ to offer to engage Ms Cowie so that she could *take on the new role at the lesser pay rate.* That was sufficient to put HOAMZ on notice that Ms Cowie preferred being redeployed to being made redundant.

[59] Ms Cowie's employment agreement makes it clear that HOAMZ had a duty to consult her about redeployment. Mr Bramwell did not do that.

[60] In addition, the *Wang* and *Rittson-Thomas* cases make it clear that it was HOAMZ duty to redeploy Ms Cowie within the business if that was possible. That was certainly possible. Mr Bramwell says that Ms Cowie's:

> *…relationship with clients was at all times everything that I expected.*

[61] Also the duties in the new position were very similar to those Ms Cowie had been undertaking since 2009 with the main change being that her management responsibility for the other rental property staff was taken over by Mr Bramwell.

[62] A fair and reasonable employer when presenting Ms Cowie with the proposal to disestablish the rental division manager's role would have offered to redeploy her to the proposed new role. Ms Cowie would have been entitled, for her own reasons, to let HOAMZ know if she did not wish to accept that redeployment.

[63] While the redundancy proposal appears to have had its genesis in genuine business reasons Mr Bramwell had mixed motives for making Ms Cowie redundant particularly once she expressed her dissatisfaction with HOAMZ and with him in the meeting on 22 August 2012.

[64] I have considered whether HOAMZ was such a small employer that it affected its ability to act as a fair and reasonable employer in all the circumstances. However, that is not the case. HOAMZ took advice on the redundancy process. It could have taken more time over the consultation phase and made it clear to Ms Cowie that her views were sought and would be taken into account. I consider HOAMZ's failures to adequately inform and consult Ms Cowie were more than minor and affected her unfairly. Its failure to offer to redeploy Ms Cowie was also more than minor and affected her unfairly.

[65] Overall HOAMZ's decision to make Ms Cowie's position redundant and failure to offer to redeploy her to the new property manager's position were not decisions a fair and reasonable employer, judged objectively, could have made in all the circumstances at the time. Therefore, Ms Cowie has a personal grievance of unjustified dismissal and is entitled to remedies.

Remedies

Lost remuneration

[66] Ms Cowie has claimed $28,524.62 as lost income from the date of her dismissal to the date of the investigation meeting on 17 June 2013. That figure includes holiday pay on what Ms Cowie would have earned if she had remained employed by HOAMZ.

[67] Section 123(1)(b) of the Act allows me to provide for the reimbursement by HOAMZ of the whole or any part of wages Ms Cowie lost as a result of her grievance. Section 128(2) of the Act provides that I must order HOAMZ to pay Ms Cowie the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration (equivalent to thirteen weeks).

[68] Generally speaking a dismissal occurs on the day that the employment ceases[14]. There was a mutual agreement that Ms Cowie would not be required to work out her four weeks' notice. Ms Cowie's four weeks' notice meant that she was paid for four weeks after 29 August 2012. Therefore, the dismissal by way of redundancy occurred on 25 September 2012.

[69] Ms Cowie says that she started to look for work immediately after her employment was terminated. Initially she was only able to obtain work doing odd jobs for friends, such as landscaping work. She also did some contract property management work in Alexandra, which is one hour away from her home. I am satisfied that Ms Cowie acted reasonably to mitigate her loss of earnings.

[70] Ms Cowie earned $4,682 gross doing contract work from 26 September 2012 to 25 December 2012, which is a period of three months after her dismissal. Since she obtained some work in the three months after her dismissal I need to award her

[14] *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413, at 418

actual lost remuneration for the three months after her dismissal. That is the lesser of the sum of her lost remuneration or three month's ordinary time remuneration.

[71] At HOAMZ Ms Cowie was paid $1,173.08 gross salary per week in the rental property manager's role; which would have been $15,250.04 over a thirteen week period.

[72] However, although the redundancy process and the decision to make Ms Cowie redundant was unjustifiable I consider that if HOAMZ had offered to redeploy Ms Cowie to the new property manager's role it is highly likely she would have accepted the offer, perhaps after some negotiation about the pay level and any other benefits. HOAMZ did not continue to pay someone $61,000 from 26 September 2012 to 25 December 2012, but paid $45,000[15] per annum over that period for the new role. Gross salary for thirteen weeks at $45,000 per annum is $11,250. I consider this to be the appropriate amount of lost remuneration, minus actual earnings of $4,682.00, leaving a total of $6,568.00 that must be paid to Ms Cowie.

[73] Ms Cowie's claim for lost remuneration includes a claim for holiday pay on her lost remuneration. I consider that Ms Cowie is also entitled to be paid 8% holiday pay on the $6,568 lost remuneration amounting to $525.44.

[74] In addition, s.128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2); that is, for more than three months.

[75] Ms Cowie claims that she should be remunerated for her losses up to the date of the investigation meeting on 17 June 2013. Ms Cowie obtained work as a property manager on 1 February 2013. She is paid a lower hourly rate than she was on with HOAMZ and is an independent contractor so does not receive annual leave or sick leave.

[76] I consider HOAMZ should pay Ms Cowie reimbursement of wages at the rate of $45,000 per annum up to 31 January 2013 only when she gained new employment and not until the date of the investigation meeting. That is because I consider that even had Ms Cowie been redeployed to the property manager's role she would have

[15] With the added advantage of free commuting.

looked for other work and been likely to obtain and accept it, even without the perceived advantages of being an employee.

[77] Between 26 December 2012 and 31 January 2013 Ms Cowie earned $1,802.50 gross doing contract work. If she had been employed as the property manager at HOAMZ she would have earned $4,673.05 over that further five weeks and two days ($865.38 per week x 5 + $346.15 (2 days)). The balance that should be paid by HOAMZ is $2870.55 in lost remuneration. However, I do not consider that holiday pay should be paid in addition to this as over that period Ms Cowie would have inevitably taken holidays, although it is not possible to say how many days.

Compensation

[78] Ms Cowie claims compensation of $20,000 for humiliation, loss of dignity and injury to her feelings under s.123(1)(c)(i) of the Act. Ms Cowie says that she was very upset at what she saw as personal targeting of her position, and as a result her self-worth suffered. She says she was very stressed and anxious for some weeks. She believed her reputation as a property manager suffered *around town* and people wondered why she had been made redundant but someone else had been employed.

[79] Ms Cowie consulted her GP in September 2012 following her redundancy. On 2 May 2013 her GP, Dr Kathryn Smith wrote of that consultation that Ms Cowie:

> *…was noticeably distressed and reported difficulty with sleep. She was suffering from anxiety and panic attacks as a consequence of losing her job so unexpectedly. The shock of losing her job when she had been lead to believe she was performing very well was difficult to reconcile and she was struggling to make sense of her situation.*
>
> *We discussed medication options at that time, however Megan declined this and chose to deal with it on her own.*

[80] I consider that $7,000 is reasonable compensation for Ms Cowie's humiliation, loss of dignity and injury to her feelings in all the circumstances.

Contribution

[81] Having determined Ms Cowie has a personal grievance under s.124 of the Act I must now consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly.

[82] Mr Rhodes submits that Ms Cowie's outburst effectively precluded her from being redeployed in the newly created role. I do not agree. However, even if I am wrong and that could have precluded her redeployment there were other reasons that the redundancy was unjustified particularly a lack of good faith provision of relevant information and inadequate consultation. Ms Cowie did not contribute to the situation leading to her unjustified dismissal and therefore her remedies should not be reduced.

Costs

[83] Ms Cowie as the successful party is entitled to a reasonable contribution towards her actual legal costs. The parties are encouraged to resolve costs themselves. In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The notional tariff for half a day is $1,750. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

[84] However, if it is not possible for the parties to agree on costs, then Ms Cowie has 28 days within which to file a costs memorandum and HOAMZ has 14 days within which to respond.

Christine Hickey
Member of the Employment Relations Authority