IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 155
5637704

	BETWEEN	MARK DAVIES Applicant
	AND	ONEAIR LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Mark Lawlor and Catherine Coup, Counsel for the Applicant Michael Witt, Counsel for the Respondent
Investigation Meeting:	2 and 3 March 2017
Determination:	25 May 2017

DETERMINATION OF THE AUTHORITY

A. OneAir Limited acted unjustifiably in its dismissal of Mark Davies on the grounds of redundancy.

B. In settlement of his personal grievance OneAir Limited must pay Mr Davies the following sums within 28 days of the date of this determination:

(i) $12,745 as lost wages, with interest at the rate of five per cent on that amount from 28 January 2017 until the date payment of this amount is made in full; and

(ii) $8000 as compensation for humiliation, loss of dignity and injury to feelings.

C. OneAir Limited must also pay the following penalties within 28 days of the date of this determination:

(i) $1000 to the Authority, for transfer to the Crown Bank Account, for failing to provide Mr Davies with a written employment agreement; and

(ii) $2000, to be paid directly to Mr Davies, for breaches of good faith in its dealings with him.

D. Costs are reserved with a timetable set for memoranda if a determination on costs is necessary.

Employment Relationship Problem

[1] OneAir Limited (OneAir) dismissed Mark Davies from his position of office manager on 9 August 2016. The dismissal was on the grounds of redundancy. His application to the Authority sought findings that, among other concerns, his dismissal was unjustified because OneAir failed to genuinely consult him about its restructuring plans or to properly consider redeploying him to a newly created position. Mr Davies also sought findings he was unjustifiably disadvantaged due to earlier failures by OneAir to provide him with an employment agreement, to clarify his job description, and to adequately support him in carrying out his role. He sought remedies of lost wages, compensation, and penalties.

[2] OneAir operates a heat pump installation and servicing business under the trading name of Airforce One. It purchased the business in October 2015. At that time OneAir's sole director Ramon Schagen had recently returned to New Zealand after a 23-year career in oil and gas marketing in Singapore.

[3] OneAir's statement in reply to Mr Davies' claim said the restructuring was necessary for genuine commercial reasons and he was fairly consulted about the changes and his dismissal. Three positions were disestablished – the office manager, the commercial manager and the service manager. One new position was created. In OneAir's initial proposal the new position was called an operations manager. After feedback from Mr Davies, OneAir changed the title of this role to a customer services manager (CSM). OneAir said it was obliged to offer the CSM role to the employee who held the previous service manager position as those two roles were so similar. As a result, OneAir said, it had not needed to consider Mr Davies for the CSM role and could not have redeployed him to it anyway. OneAir also said it had earlier made genuine efforts to clarify Mr Davies's job description, which needed to be resolved

before a new employment agreement could be finalised, and had agreed to requests he made for additional staffing to provide support to him.

The Authority's investigation

[4] Five witnesses provided information for the Authority investigation:

- Mr Davies;
- his wife, Min Jeong Kim;
- Mr Schagen;
- OneAir's customer services manager Nick Flannagan, who previously held the role of service manager also disestablished in the restructuring;
- Dennis Hodgetts, an accountant engaged by OneAir in March 2016 and who was involved in discussions with Mr Schagen about restructuring the business; and
- Mike McKeown, a business consultant who provided advice to Mr Schagen from January 2016.

[5] Mr McKeown was a friend of Mr Schagen from their high school and university days. He had worked on restructuring exercises in his management career, including in a state-owned enterprise. He also arranged for him and Mr Schagen to take advice on the restructuring exercise from the Employers and Manufacturers Association (EMA).

[6] Each witness, under oath or affirmation, confirmed their written witness statement was correct and answered questions from me and the parties' representatives. The representatives also gave oral closing submissions, speaking to a detailed written synopsis.

[7] The written and oral evidence, along with extensive background documents, has been closely considered. This determination has not set out an extensive chronology and details of what happened from the time of Mr Schagen's purchase of the business through to Mr Davies' dismissal. Rather, as permitted by 174E of the Employment Relations Act 2000 (the Act), it has stated findings of fact and law necessary for the conclusions expressed on the issues raised by Mr Davies' claim and has specified orders made, without recording all evidence and submissions received.

Issues for determination

[8] The following issues required determination:

(i) Was OneAir's decision to dismiss Mr Davies for redundancy what a fair and reasonable employer could have decided in all the circumstances at the time, including considering whether:
   (a) the business rationale for the decision was sound; and
   (b) disestablishment of the office manager position was predominantly made for genuine commercial reasons, not an ulterior purpose; and
   (c) he was adequately and properly consulted on it; and
   (d) whether the prospect of redeploying him to the operations manager or CSM position was fairly considered (which includes the question of whether the role was so similar to the one Mr Flannagan held, OneAir was obliged to offer it to him)?

(ii) Was Mr Davies unjustifiably disadvantaged by:
   (a) A failure to actively and constructively clarify his role and support him in it; and/or
   (b) Inadequate attention to workload-related queries and appropriate steps to provide a safe and healthy work environment; and/or
   (c) Not being provided an opportunity to apply for the operations manager or CSM role?

(iii) Did OneAir breach its obligations under s 64 of the Employment Relations Act 2000 (the Act) by not providing Mr Davies with a written employment agreement after the transfer of his employment from the previous owner of the business, and if so, should a penalty be imposed for the breach?

(iv) Did OneAir breach its good faith obligations under s 4(1A) of the Act in its dealings with Mr Davies about the restructuring and, if so, should OneAir pay a penalty for the breach?

(v) If OneAir is found to have acted unjustifiably, what remedies should be awarded, considering:
   (a) Lost wages; and
   (b) Compensation under s123(1)(c)(i) of the Act?

(vi) If any remedies are awarded, was there any blameworthy conduct by Mr Davies that contributed to the situation giving rise to his grievance and requires a reduction of remedies under s 124 of the Act?

(vii) Should interest be included on any remedies awarded?

(viii) Should either party contribute to the costs of representation of the other party?

The test of justification

[9] The Authority must assess a dismissal for redundancy, and how the decision was reached, on the objective test of justification set by s 103A of the Act. The test is whether what was done and how it was done was what a fair and reasonable employer could have done in all the circumstances at the time. As explained by the Court of Appeal in *Grace Team Accounting Limited v Brake*:[1]

> 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.

[10] Section 4 of the Act requires an employer to provide affected employees with both access to relevant information and then an opportunity to comment on that information before making a decision that will have, or is likely to have, an adverse effect on the continuation of the employment. Restructuring proposals which include the prospect of an employee's position being disestablished are one instance where those consultation obligations apply.

[11] The s 103A test of justification places the onus on the employer to establish it has met those requirements in making a genuine business decision. It will have more difficulty doing so where the employee establishes, on the balance of probabilities, that the decision was unfairly tainted by an unjustified pretext or ulterior motive.[2]

[12] When an employer has been called upon to justify a decision to dismiss, made because the position held by an employee was said to be redundant and no suitable alternative role was available, the Authority's inquiry considers whether the nature and quality of the employer's evidence has sufficiently and reliably established that the employer acted reasonably in doing what it did and how it did it. A dismissal for

[1] [2014] NZCA 541 at [85].
[2] *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40 (EC) at 49.

redundancy will be unjustified where defects in the process followed by the employer were more than minor and resulted in the employee being treated unfairly.[3]

An unjustified dismissal

[13] For reasons set out in the remainder of this determination, I concluded OneAir acted unjustifiably in dismissing Mr Davies. OneAir failed to provide him with a real and adequate opportunity to address information and views that were relevant to its decision to make his position redundant. It also unreasonably refused to at least consider redeploying him to the one available role. As a consequence OneAir had not acted as a fair and reasonable employer could have done in all the circumstances at the time.

Was the business rationale for the restructuring unjustified?

[14] Mr Davies submitted OneAir's decision to disestablish his position was not predominantly made for a genuine business reason. He submitted that the evidence showed Mr Schagen saw Mr Davies as not working effectively or to Mr Schagen's liking. Rather than address Mr Schagen's concerns through a likely longer process of performance management, Mr Davies submitted OneAir had instead used restructuring as a means to end his employment.

[15] Those submissions echoed the trenchant criticism of OneAir's restructuring proposal Mr Davies had made in his initial feedback about its rationale, sent with a letter from his lawyer on 21 July 2016. He said there was another "agenda at play" in the proposal. He called for Mr Schagen to make an investment in the business to allow it to grow and to address any performance issues Mr Schagen had with him in "better ways". He described the proposal as "a panicked overreaction" that risked undoing work done to make the business stable. He criticised Mr Schagen for drawing a wage from the business but not funding it adequately.

[16] When Mr Davies asked what savings the restructuring could achieve, OneAir identified overall cost reductions totalling $102,584 a year. The proposed operations manager role, on a higher salary than the existing service manager role, and higher wages for an office administrator and a senior technician would increase some

[3] Employment Relations Act 2000, s 103A(5).

spending. This was to be offset by a reduction of $165,360 spent on salaries for Mr Davies' role and the two other disestablished positions.

[17] Mr Schagen considered earlier decisions to increase staffing, made at Mr Davies' request, had resulted in an unsustainable ratio of staff costs. The five technicians, who were seen as generating revenue, were supported by eight office-based managers and administrative staff. This included four telemarketing staff who took service requests and booked technicians' visits to customers.

[18] While Mr Davies considered Mr Schagen should have taken a longer term view and increased the level of funds invested in the business, the approach taken by Mr Schagen and his advisors was not unreasonable. Objectively, a shorter term view requiring a higher ratio of revenue earned to wages spent was within the range of responses that a fair and reasonable employer could have taken to the business risk. There was a genuine business concern OneAir could legitimately seek to address by reducing its staff costs, including by reducing the number of positions.

Was removing Mr Davies the predominant ulterior motive?

[19] However there was also ample evidence the changes proposed and implemented were made in a context of Mr Schagen and Mr McKeown holding very critical views of Mr Davies, how he carried out his role and his capabilities. Those views, and the effect they might have on decisions about OneAir's business plan and Mr Davies' place in the business, were not put to him before decisions on the restructuring process were made. As a result he did not get any real opportunity to address and, if possible, correct them so they did not unfairly affect the outcome.

[20] Mr McKeown had drafted OneAir's "transformation plan", titled Project Phoenix, with input from Mr Schagen. Their critical views of Mr Davies were apparent from the introductory section of the plan. Mr Schagen could not recall if he wrote this section himself or it was based on conversation with him. Referring to himself in the third person, it set out Mr Schagen's view of the business since its purchase by OneAir (emphasis added):

> The Officer Manager expressed a few months later that he was finding the workload too high. To address this, the owner has attempted to reduce the Office Manager's workload via the following measures;
> 1. Promoted another staff member to supervise the Customer Services staff, thereby reducing the HR function workload;

2. Hiring a candidate suggested by the Office Manager as a full time Commercial Manager to manage new installs as well as the commercial customers;
3. At the request of both the Office Manager and Commercial Manager, subsequently approving the recruitment of a Service Manager to supervise the Customer Services Team and the Service Technicians;
4. Assigning another staff member to assist the Office Manager two hours each day with daily banking reconciliations.

…

With the possible exception of the Commercial Manager (TBC), no signed IEAs are currently in place with any of the managers. Job Descriptions (JDs) have been discussed with each of the managers, but have not been finalised. This is due to the Office Manager's belief that the JD presented to him did not match the role he was performing, or could perform (repeated requests for his own version have been made in good faith, but the only response to date has been a 'Tasks performed before, during and after takeover' document that is far too brief and simplistic to form any basis for a meaningful JD). Secondly, the Office Manager's continued insistence that his workload remained too high and another Manager was needed to reduce his burden, meant that a JD could only ever be finalised once the new Manager was appointed and settled in before the job scopes for each Management role could become apparent. This lack of agreed JDs has resulted in **Managers a) not performing all of the functions they were hired to perform and b) not meeting the minimum KPIs necessary to be effective in their roles.** This **needs to be addressed ASAP**.

The situation has been exacerbated by the Director's inability to work full time himself in the business over the last nine months due to unexpected health problems. Now recovered, he is now looking to take a more active role within the business, and his new roles and reporting requirements will impact the job duties of each of the managers.

[21] Notes probably prepared by Mr McKeown in late July included the following description of Mr Davies, drawn from Mr McKeown's conversations with Mr Schagen:

> Mark's own communication has been unconstructive (aggressive) at times, perhaps reflecting his stress levels at the time. Ramon has tried to accommodate this, and hasn't formerly [sic] reprimanded Mark for his repeated loss of temper in the interests of Mark's wellbeing and perhaps to the [sic] Ramon's detriment.

[22] Later during the restructuring exercise Mr McKeown reviewed, at his own initiative, the decision not to allow Mr Davies to apply for the CSM role. He discussed his analysis with Mr Schagen. In notes Mr McKeown made of his review he described Mr Davies as "arguably [having a] good business background but doesn't demonstrate business nous", lacking supervision and having an emphasis that was academic rather than practical.

[23] While those views had obvious implications for decisions about whether Mr Davies would end up with an on-going role in the business, this evidence did not go so far as establishing removal of Mr Davies was the predominant purpose of the restructuring exercise. But holding those views, not telling him about them and not giving him any real opportunity to address them amounted to a significant defect in the process followed. For reasons described in the remainder of this determination, this defect had the effect of Mr Davies being treated unfairly.

Was Mr Davies adequately and fairly consulted?

[24] Mr Davies was not shown the 11-page Project Phoenix document that set out the rationale for OneAir's restructuring proposal. It was clearly drafted with the intention it would be shown to OneAir staff. It was set out in a Power Point slide format and ended with two slides with the heading "Next steps: what is asked of staff". The text of those two slides referred to employees by the pronoun "you". Those slides set out how employees could provide feedback on the proposal and what would happen if their role was disestablished and if they were offered a revised role.

[25] Mr Schagen and Mr McKeown said they did not show Mr Davies, or any other employees, the Project Phoenix presentation on the advice of their EMA counsel at the time. Instead they wrote to Mr Davies on 14 July 2016, setting out the restructuring proposal. OneAir later answered questions asked about the proposal in correspondence from Mr Davies' lawyer by letter on 2 August 2016.

[26] Although Mr Schagen and Mr McKeown also provided some further information in discussion with Mr Davies and his lawyer, the failure to provide Mr Davies with the Project Phoenix document meant he was not really fully in the picture about OneAir's plans or the reasons for it.

[27] He was not fairly informed of Mr Schagen's view that the problems that "need[ed] to be addressed ASAP" through restructuring included Mr Davies failing to perform functions for which he was hired to perform and failing to meet "minimum KPIs" necessary to be effective in his role.

[28] He was not provided with the financial analysis, set out over five slides, which underpinned the proposal's central premise that staffing changes were needed to decrease the ratio of support staff to staff directly earning revenue.

[29] In a consultation meeting on 14 July he was provided with documents showing the proposed structure and job descriptions for the roles of operations manager and a part-time office administrator. However, without seeing the Project Phoenix document, he did not get the full details of how OneAir proposed duties would be reallocated from three existing managers' roles to the office administrator, the managing director, the proposed new operations manager role or outsourced to an accountant. The heading on each of the five slides on those proposed reallocations included the words "for consultation". The tasks identified in those lists, the extent of each existing manager actually did those tasks, and their experience from having done so, became matters of considerable importance in the debate over whether Mr Davies could be at least considered for redeployment to what later became the CSM role.

[30] OneAir's 2 August letter, responding to Mr Davies feedback about its proposal, did include its analysis of how duties would be reallocated from his role once disestablished. It agreed with his argument that the operations manager role was "sufficiently different" from the service manager's role, with the implication that it could not automatically be given to that employee.

[31] However, OneAir responded to that difficulty by then renaming the new role as a CSM. It said the role was "primarily designed to be a supervisory role" in contrast with his primarily clerical role as office manager. It said some of the supervisory roles he had carried out had since been reallocated to the commercial manager and the service manager.

[32] On that basis OneAir insisted it was still obliged to directly appoint the current service manager, Mr Flannagan, to the CSM role. It declined to give Mr Davies the opportunity to apply for the role. Again Mr Davies did not have the benefit of the job task analysis on which OneAir relied for its conclusions.

[33] The result was that OneAir failed to establish, from the evidence of Mr Schagen and Mr McKeown, it had met its positive obligation to provide Mr Davies with relevant information and the opportunity to fairly comment on it before making

the decisions that had an adverse effect on the continuation of his employment. The defects in its process were more than minor. In light of the s 4(1A) obligations they were substantial defects. OneAir had set out the information and analysis on which it relied in the Project Phoenix document. It was well within its resources to fully disclose it to Mr Davies. Its failure to do so, which was a deliberate decision, resulted in Mr Davies being treated unfairly.

Was redeployment fairly considered?

[34] An employer planning to disestablish an employee's role must then carefully consider whether that employee could be redeployed to another role, if available and suitable, or risk a finding that a dismissal for redundancy was unjustified.[4]

[35] Two related factors meant OneAir was not able to establish it had fairly and reasonably met its obligation to consider the prospect Mr Davies' dismissal could be avoided by redeployment to a new role.

[36] Firstly, at the time OneAir developed its restructuring plan, there was an unresolved dispute about Mr Davies' job description. It had no reliable or agreed basis on which to compare the roles and what work was actually done.

[37] Secondly, OneAir's view that Mr Flannagan could be considered for the role was flawed. It described the operations manager role as comprising "in excess of 80 per cent" of what Mr Flannagan did in his service manager role. Following Mr Davies' feedback OneAir accepted the proposed new role was "sufficiently different" and renamed it as the CSM role. It then said this role was then "at least 75%" the same as the tasks and duties of the service manager. It said this was "sufficiently similar" to the service manager's role, so that the new role was still not contestable. It based that conclusion, in part, on the notion that Mr Davies could not be appointed to the CSM role because his existing position as office manager was not sufficiently similar to that proposed role.

[38] The shortfall in OneAir's evidence, to establish it acted reasonably, was to be able to show what Mr Davies' tasks actually were and to show its analysis of the similarities between the service manager and CSM roles, and sufficient difference

[4] *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 at [42] and *Jinkinson v Oceana Gold (NZ) Limited* [2010] NZEmpC 102 at [40]-[42].

from the office manager's role, reflected the reality of what was done rather than merely being an assertion. Mr McKeown had attempted some comparison of lists of tasks or duties carried out by the incumbents in each role but this did not substantiate what was actually done and what was intended. For example, the CSM role was said to include "HR" or personnel matters and "HSE" safety assessment and reporting duties. These were duties that, in part at least, Mr Davies had carried out in his office manager role.

[39] OneAir appeared to have relied on a supposed 'rule of thumb' that an incumbent of a role, whose duties were 75 per cent or more similar to a new role, must be offered the new role. However the actual test for substantial similarity, which is a question of fact and degree, has been summarised in this way: Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee, consider there was sufficient difference to break the essential continuity of the employment?[5]

[40] The difficulty for OneAir, in establishing the reasonableness of its decision to deny contestability of the CSM role, was its assertion of a degree of similarity above 75 per cent. Whether a job is the same with a change of focus and emphasis, or is a different position, is a question of fact and degree to be determined on an evidential foundation, not mere assertion.[6] OneAir's evidence failed to establish any such compelling factual foundation. Mr McKeown conceded, in his oral evidence, the assessment of similarity was, at best, "an educated guess".

[41] Another point also made OneAir's refusal to consider redeploying Mr Davies unreasonable, in all the circumstances at the time.

[42] OneAir said it risked facing a personal grievance application from Mr Flannaghan if he was not offered the new role. In part any such risk was created by the approach OneAir took from the outset of its consultation with Mr Flannaghan about the restructuring proposal. Its first letter to him advised the proposed operations manager role was a renaming and resizing of his service manager role. It said his position would be "broadened in scope and responsibility". When OneAir adjusted its proposal to rename that role as the CSM, its letter to Mr Flannaghan said OneAir

[5] *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 (CA) at [19] citing *Wallis v Carter Holt Harvey Limited* [1998] 3 ERNZ 984 (EC) at 995.
[6] *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378 (EC) at 392.

"would be obliged to directly appoint" him to that position. It had not really kept open the prospect that the outcome, based on further feedback and factual analysis, might need to be different.

[43] Acting reasonably, OneAir could have considered the CSM role was contestable due to its overlap with some duties Mr Davies had in his role and his earlier experience with some of the CSM's anticipated tasks. If OneAir had done so, applying fair selection criteria clearly disclosed to Mr Flannagan and Mr Davies, there was at least some real prospect Mr Flannaghan would have accepted the outcome of that contest, even if it were unfavourable to him. If such a process had been followed, the alternative, of an outcome unfavourable to Mr Davies, would have left him with either no or at least fewer grounds for a personal grievance.

[44] Mr Davies was, at the time, unjustifiably disadvantaged by OneAir's failure to fairly consider whether he might be suitably redeployed to the CSM role rather than dismissed. This disadvantage in turn contributed to the overall unfairness and unreasonableness of OneAir's decision to dismiss him for redundancy in the way that it did. It was part of the course of conduct that established his personal grievance for unjustified dismissal.

Other earlier unjustified disadvantages?

[45] As identified in the list of issues set out earlier in this determination, Mr Davies's statement of problem specified other personal grievances he raised about disadvantages he said occurred during the course of his employment. They were first raised on his behalf by his lawyer by letter on 4 August, before Mr Davies got notice of his dismissal for redundancy on 9 August. He raised a personal grievance for unjustified dismissal on 15 August before his notice period expired on 23 August.

[46] A conclusion on one of those disadvantage grievances, concerning the opportunity to apply for the CSM role, has already been expressed in this determination.

[47] The other two – about clarification of his role and providing support in carrying out his duties – concerned matters that were part of the context and background in which his personal grievance for unjustified dismissal arose.

[48] The concern about clarifying his role, particularly the appropriate job description, was the subject of much evidence from Mr Davies and Mr Schagen. They each described their own efforts glowingly and disparaged the responses of the other man as inadequate. In the ordinary sense of the word Mr Davies was at a disadvantage from the outset of OneAir's purchase of the business. This resulted from the description Mr Schagen was given of Mr Davies' role and work before the sale occurred. The broker handling the sale, conveying information said to come from the sellers, told Mr Schagen that Mr Davies was "the accountant" and "responsible for the full running of the business end of the operation". The sellers also described Mr Davies as being employed with the intention of training him to take over the General Manager role to operate the business from day to day. They said he was "just about at that level to take that role over".

[49] Mr Davies was not aware until March 2016 that his work and role was described to Mr Schagen in that way. By then OneAir had owned the business for around five months. Mr Schagen lived in Cambridge and dealt with many matters remotely by telephone or Skype call, in part a result of health matters.

[50] Mr Davies saw his role as intended to be more limited. He considered he had an unmanageable level of additional tasks to do due to staff resignations and changes. This contributed to tension between him and Mr Schagen, including over the task of developing and finalising the job description for Mr Davies' role. In late March 2016 Mr Schagen committed to providing Mr Davies with "a finalised contract" within ten working days of him providing Mr Schagen with a "time diary" and an "ideal job scope". In the following week Mr Davies took sick leave due to workload issues. Nothing further happened to resolve the matter of a job description until 21 June when Mr Davies wrote to Mr Schagen to complain about lack of progress. He had not done the time record he was asked to provide as he said he considered there was "little point … without having the entire picture". Meanwhile Mr Schagen had engaged Mr McKeown and arranged for Mr Davies and the other managers to meet with him to discuss business plans and options. Those events led, soon after, to OneAir's restructuring proposal.

[51] Mr Davies described the exchanges over a job description as having reached an impasse. Mr Schagen said it had become "a chicken and an egg" situation,

meaning it was not clear which came first, clarifying Mr Davies' role or finalising a job description that defined the role.

[52] The point, for the purposes of this determination, was that the lack of clarity worked to Mr Davies' disadvantage during OneAir's restructuring exercise. Mr Schagen and Mr McKeown made assessments based on views of what was expected of him in his role that were not finalised, agreed or even clear. The Authority makes determinations according to the substantial merits of a case and it has a discretion to find a grievance is of a type other than alleged.[7] On that basis, the situation regarding lack of clarity over Mr Davies' job description, was part of the context in which OneAir's decision to refuse to consider whether he might be redeployed amounted to a personal grievance for unjustified dismissal. It was artificial and unnecessary to conclude the earlier exchanges over the job description amounted, in and of themselves, to a separate, unjustified disadvantage.

[53] The other alleged disadvantage grievance was not established. Mr Schagen had been active and responsive to Mr Davies' request for additional staffing. An earlier passage in this determination identified the resulting increase in the number of employees. This included creating the position of commercial manager, from February 2016, and appointing Mr Flannagan as service manager in May. Both new managers carried out aspects of duties Mr Davies had earlier had to shoulder himself once the two previous owners, who had worked in the office each day prior to the sale, left after the completion of a transitional arrangement.

Did failure to provide a written employment agreement warrant a penalty?

[54] OneAir's purchase of the business was an asset sale. The company that previously operated the business told the staff their employment was at an end and when their accrued holiday pay would be paid. They were also told all employees would be retained on the same terms and conditions under a new employment agreement with OneAir. Mr Davies' evidence was that he arranged for the employees to be provided with written employment agreements recording those new arrangements. He did not prepare such an agreement with OneAir for himself as he considered it was inappropriate to do so. Mr Schagen was aware of that situation from by December 2016 at the latest. The result was OneAir was in breach of its statutory

[7] Employment Relations Act 2000, s 157 and s 122.

duties to provide a written employment agreement to Mr Davies and had failed to provide him with a copy of any intended agreement. Both breaches rendered OneAir liable for a penalty.

[55] The extended and inconclusive exchanges over the content of a job description, that might be attached to such an agreement, was not a legitimate excuse not to have complied with the obligation from the outset of the employment on 5 October 2016. OneAir submitted Mr Davies knew his terms and conditions as they were set out in his written employment agreement with the previous owner. It was a reason that made compliance easy, not a sufficient excuse for breach of an absolute statutory duty on all employers in place for many years. Deterring other employers from acting in the same way was, on its own, sufficient reason to impose a penalty. As a single instance, resulting from careless oversight, the appropriate level of penalty was $1000, to be paid to the Authority for transfer to the Crown Account, within 28 days of the date of this determination.

Does failure to adequately consult and provide information warrant a penalty?

[56] Mr Davies sought a penalty of $10,000 against OneAir for multiple breaches of its statutory duty of good faith. This claim relied in part to the events about which he raised his unjustified disadvantage claims. For the reasons given in considering those disadvantage claims earlier in this determination, the evidence did not establish there were deliberate, serious and sustained failures to comply with the duty of good faith to the level necessary to impose a penalty under s 4A in relation to those events. However, in relation to the circumstances that made his dismissal unjustified, a penalty for such failures was warranted. OneAir misled Mr Davies about the basis on which his future with the company was being assessed. It withheld information from him, including by not showing him critical comments made about him in the Project Phoenix document. Mr Schagen and Mr McKeown were not frank with him about the dim view held of his work and how he did it.

[57] Taking what they did, or omitted to do, during the course of the restructuring exercise as a single instance, it was however deliberate conduct. It harmed Mr Davies. While some of that harm may be addressed in remedies awarded under s 123 for his personal grievance for unjustified dismissal, a penalty was appropriate to

punish OneAir's conduct as a means of deterring other employers acting in the same way.

[58] A penalty of $2000, that is one tenth of the maximum amount that could be imposed for one breach, was a proportionate amount for that purpose. As Mr Davies was the person who directly suffered the harm resulting from OneAir' breach, the amount is to be paid directly to him within 28 days of the date of this determination.[8]

Remedies

Lost wages

[59] In remedy of his grievance for unjustified dismissal Mr Davies sought an order of lost wages for the period from 23 August 2016, when the termination of his employment became effective, until he started a new job on 27 January 2017. During those five months he was able to get some part time work from which he earned $1389. After deducting those earnings, his lost wages claim totalled $25,490.

[60] OneAir submitted the termination of Mr Davies' employment on the grounds of redundancy was inevitable, so even if its actions were procedurally unfair, it did not cause his loss of wages and no award for them could be made. It said, if given the opportunity to take part in a contest for the role, Mr Davies would have been unsuccessful anyway. It relied on the evidence of Mr McKeown and Mr Schagen about their assessment of Mr Davies's suitability for the CSM role, compared to Mr Flannagan. OneAir's argument on this point was wrong from two reasons.

[61] Firstly, the standard of assessment is that of the objective employer, acting fairly and reasonably, not the subjective standard of what OneAir's representatives said they would have done in the counter-factual situation of allowing Mr Davies to apply for the role. Such an objective employer could not have taken account of the supposed performance issues not fairly addressed earlier or have discounted Mr Davies' experience in carrying out some of the tasks included in the CSM role. Under such an objective assessment, the outcome might have been the same but was not as certain or inevitable as OneAir asserted.

[8] Employment Relations Act 2000, s 136.

[62] Secondly, it is correct that a lost wages award will not be available where dismissal would have been the most likely outcome even if a fair and proper procedure was followed. In *Waitakere City Council v Ioane (No 2)* the Court of Appeal said "procedural infelicities" would not warrant such an award "if a fair procedure would **inevitably** have resulted in a justified dismissal".[9] The bold emphasis is mine.

[63] In Mr Davies' case the result of a proper or fair procedure was not so certain. As a matter of likelihood, he must have stood some chance that in a contest with fair selection criteria, and with irrelevant factors ignored by a reasonable employer, he could have been chosen over Mr Flannagan. It was a contingency in the circumstances of his dismissal of which account had to be taken. His loss of some real but not certain chance of continued employment had to be assessed on a loss of a chance basis.

[64] The upper ceiling for the assessment required under s 123(1)(b) and s 128 of the Act was the full five months of wages lost. During that time Mr Davies made reasonable endeavours to mitigate the loss with some earnings from part-time work and by applying for jobs in the range of his experience. These included accounting, clerical, call centre and teaching jobs. He was successful in gaining appointment to a teaching role in his specialist subject from 27 January 2017.

[65] However this was not the end of the necessary analysis. A counter-factual analysis also had to be made, allowing for all realistic contingencies that might, but for the unjustifiable dismissal, have resulted in the employment relationship ending anyway.[10] There were two such relevant contingencies in Mr Davies' case.

[66] Firstly, he might have resigned sometime during that period, due to general dissatisfaction with the job and his situation at OneAir. He had made inquiries about a teaching job in September. It was for a position in his specialist subject that rarely came up. There was no other evidence he had made inquiries or moves that might have resulted in him leaving anyway during that period. It was not enough to say he was likely to have left anyway sometime during the period of loss claimed.

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[9] [2005] ERNZ 1043 (CA) at [28]. See also *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [81].
[10] *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [37].

[67] Secondly, the chance he could have tried and failed in a contest for the CSM role had to be considered as a contingency that would have justifiably ended his employment. His chances of being selected for the position, in a fair process, were at best one in two. Equally, he stood the same chance of being unsuccessful, so his dismissal for redundancy would have continued in any event.[11] Applying that contingency and those prospects to the full period of loss, the appropriate award for lost wages was half the total amount lost. The resulting award under s 123(1)(b) and s 128(2) was $12,745.

Interest on the award of lost wages?

[68] Interest may be awarded on the amount ordered as a remedy for lost wages.[12] Mr Davies' was denied the use of money this determination has found he lost due to unjustified actions by OneAir. An order of interest on that amount was appropriate, to be calculated from 28 January 2017 to the date of payment in full of the amount of lost wages award. The rate of interest is five per cent a year.[13]

Compensation for humiliation, loss of dignity and injury to feelings

[69] Mr Davies sought an order of $20,000 as a global award of distress compensation for his grievances. In the light of the findings in this determination and his evidence about the effect of OneAir's unjustified actions on him, an award at that level was not warranted.

[70] Mr Davies expressed the effects of his dismissal on him in a relatively reserved manner. His wife's evidence confirmed he appeared stoic about their circumstances after his dismissal and its impact on him. His evidence about the financial and other anxiety caused by his dismissal and his sense of hurt over how Mr Schagen ended his employment supported an award of $8000 as compensation under s 123(1)(c)(i) of the Act.

Any reduction required for contributory conduct by Mr Davies?

[71] The Authority must consider the extent to which any actions by Mr Davies contributed to the situation giving rise to his grievance and, if those actions so require,

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[11] See *Anderson v Christchurch Press*, ERA Christchurch CEA 205/04, 25 August 2005 at [142].
[12] Employment Relations Act 2000, Schedule 2, clause 11 and *Wills v Goodman Fielder NZ Limited* [2014] NZEmpC 233 at [147] and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34 at [144].
[13] Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

reduce the remedies that would otherwise have been awarded accordingly.[14] His conduct during the restructuring exercise, in which his personal grievance for unjustified dismissal arose, was not blameworthy. He had provided feedback as requested. He was said to have been argumentative in earlier dealings with Mr Schagen. On one occasion, in March 2016, he apologised for his manner in expressing his frustration to Mr Schagen about delays in resolving his employment agreement. In the context of the interactions between them on that issue over many months, his conduct was not blameworthy. No reduction of remedies was required.

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[73] If they are not able to do so and an Authority determination on costs is needed Mr Davies may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum OneAir would then have 14 days to lodge any reply memorandum. The Authority will not consider costs outside this timetable unless prior leave to vary these directions has been sought and granted.

[74] The parties could expect the Authority to determine costs, if asked to do so, by applying its usual notional daily rates for an investigation meeting spanning two full days (which would total $8000), unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15]

Robin Arthur
Member of the Employment Relations Authority

[14] Employment Relations Act 2000, s 124.
[15] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].