

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 514  
3128215

BETWEEN JENESSA DUDDY  
Applicant

AND NEVADA SPORT LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McInnes, advocate for the Applicant  
Gareth Abdinor and Zachary Pentecost, counsel for the  
Respondent

Investigation Meeting: 29 September 2021 at Christchurch

Submissions Received: 8 and 29 October 2021 from the Applicant  
22 October 2021 from the Respondent

Date of Determination: 16 November 2021

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**DETERMINATION OF THE AUTHORITY**

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**Prohibition from Publication**

[1] I prohibit from publication under clause 10 (1) of the second schedule to the Employment Relations Act 2000 (the Act) the contract between Nevada Sport Limited and Enterprise Recruitment Christchurch Limited on the basis of its commercial sensitivity.

**Employment Relationship Problem**

[2] Jenessa Duddy was employed by Nevada Sport Limited (Nevada) from in or about February 2018 as a Warehouse and Administration Assistant.

[3] Nevada is a retail business that imports outdoor, travel and leisure products from overseas and sells them in retail stores. The Managing Director of Nevada is David Steans.

[4] Ms Duddy was party to an individual employment agreement (the employment agreement) with Nevada which was signed by both parties in early February 2018.

[5] On 12 May 2020 Ms Duddy received an email with an attached letter from Mr Steans requesting she attend a meeting on 15 May 2020 to discuss a possible change to the structure of the business. Ms Duddy was advised to bring a support person to the meeting.

[6] Ms Duddy attended the meeting on 15 May 2020 with her husband Stephen as her support person. Mr Steans attended the meeting with a human resource consultant.

[7] This meeting and some other meetings/telephone conversations over this time were covertly recorded by Ms Duddy. Ms Duddy said in her evidence that she recorded the conversations because English is not her first language and she could replay them to gain understanding. The Authority has been provided with the recordings and transcripts about conversations that took place.

[8] After the meeting on 15 May 2020 Ms Duddy received a copy of the proposed restructure document. This referred amongst other matters to proposed structural changes in the Head Office which included the warehouse and retail stores. An opportunity for feedback was to be provided by 25 May 2020.

[9] A meeting held with all employees on 20 May 2020 to discuss the restructuring proposal and Mr Steans addressed those employees present.

[10] Ms Duddy responded to the proposal and provided written feedback by 25 May 2020. Initially it was sent to an incorrect email address. Mr Steans could not recall receiving the feedback at that time but accepted he was provided with it at a meeting on 27 May 2020 at which there was to be discussion and feedback to the proposal and a decision made. The feedback was focussed on Ms Duddy remaining a permanent employee with flexible working hours above a guaranteed minimum number of hours.

[11] It was confirmed at the meeting on 27 May 2020 and in a subsequent letter that Ms Duddy's position was redundant. Ms Duddy was given four weeks' notice. She worked

out her notice with the final day being on 26 June 2020. She was offered by way of redeployment a casual employment agreement which she accepted during her notice period.

[12] While Ms Duddy was working out her notice period a temporary worker worked 40 hours a week in the warehouse. After the notice period ended Ms Duddy says that she was only given very limited casual work and only offered one day's work after 21 July 2020. In September 2020 the temporary worker was taken on as a permanent employee by Nevada in the warehouse.

[13] Ms Duddy says that her dismissal was unjustified. Although she also claimed that she was unjustifiably disadvantaged in her employment because of an incident on 21 July 2020 that claim was not pursued in submissions. Mr McInnes had indicated that it may not be at the Authority investigation meeting as it was a secondary matter. There is also an alleged breach of good faith although no penalty is sought.

[14] Ms Duddy seeks reimbursement of lost wages and compensation together with costs.

[15] Nevada accepts that it dismissed Ms Duddy for reason of redundancy but says that it did not unjustifiably dismiss Ms Duddy or otherwise act in a manner that was unjustified and caused disadvantage. It does not accept that it failed to act in good faith. It says that the temporary worker did not replace Ms Duddy when she was offered a permanent employment agreement and that the role was different.

### **The Issues**

[16] The Authority needs to determine the following issues:

- (a) What are the material clauses in the employment agreement?
- (b) Was there a genuine redundancy?
- (c) Did Nevada follow a fair process in good faith in making Ms Duddy redundant including adequate consultation, consideration of feedback and provision of information?
- (d) If the Authority finds that Ms Duddy was unjustifiably dismissed then what remedies is she entitled to and are there issues of contribution and mitigation.

## **The material clauses in the employment agreement**

[17] Clause 4 provides for obligations of the relationship. Both the employer and employee have obligations to deal with each other in good faith in all aspects of the employment relationship.

[18] Clause 12 mainly provides for restructuring and redundancy when all or part of the work by the employee will be affected by the employer entering into an arrangement with a new employer.

[19] Clause 12.4 provides that if the employee's employment is terminated on the basis of redundancy then the employee is entitled to notice of termination but is not entitled to any additional payment by way of compensation or otherwise.

## **Was the redundancy genuine?**

### *Legal framework*

[20] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake* considered and confirmed the approach to be taken in considering justification of a dismissal on the basis of redundancy.<sup>1</sup> The justification test in s 103A of the Employment Relations Act 2000 (the Act) is to be applied. The test requires the Authority to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[21] It was confirmed in *Brake* that it is not helpful to focus on case law before s 103A when interpreting and applying the test of justification. The importance of addressing the genuineness of a redundancy was emphasised by the Court of Appeal and it stated following on from statements about pre-section 103A case law:

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 at section 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the section 103A test. In the end the focus of

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<sup>1</sup> *Grace Team Accounting Limited v Judith Brake* [2014] ERNZ 129 (CA).

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.<sup>2</sup>

[22] The Authority is entitled in applying the justification test to inquire into the merits of the decision that was made and whether that was what a fair and reasonable employer could have done.<sup>3</sup>

[23] A fair and reasonable employer could be expected to comply with statutory and contractual obligations. As set out earlier the employment agreement had limited reference to redundancy but does refer to good faith obligations.

[24] There are statutory obligations in s 4 of the Act which require the parties to an employment relationship to deal with each other in good faith. In a redundancy setting this includes consultation. Section 4(1A)(c) of the Act requires that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment provide to the employees affected access to information relevant to the continuation of their employment and information about the decision. The employee should be given an opportunity for comment on that information. There is also an obligation to parties to an employment agreement not to mislead or deceive each other or do anything likely to mislead or deceive each other.

[25] Redundancy is not defined in the employment agreement. The commonly accepted definition of redundancy often referred to in redundancy cases is set out in *GN Hale & Son Ltd v Wellington Caretakers IUOW* by the Court of Appeal that redundancy is:

...a termination of employment attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer.<sup>4</sup>

[26] Of more recent times the Court of Appeal in *Brake* confirmed as it did in *GN Hale* what was required for a justifiable redundancy noting this could arise when the employer sought to make the business more efficient.<sup>5</sup>

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<sup>2</sup> Above n 2 at 85.

<sup>3</sup> *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [54].

<sup>4</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1NZLR 151 (CA)

<sup>5</sup> Above n 1 at [47].

*Justification for the redundancy*

[27] It falls to Nevada to establish that the dismissal of Ms Duddy was for reason of genuine redundancy and what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

*Basis for the restructuring*

[28] Mr Abdinor submits that Nevada needed to gain flexibility in the warehouse as another lockdown would have put strain on the business. He submitted that because of the unexpected period before another Covid lockdown there was no need to “flex down” the labour requirement in the warehouse for a prolonged period. He submits on behalf of Nevada that the financial performance of the company was not the main reason for restructuring as it impacted Ms Duddy’s position. Mr Abdinor acknowledged that a temporary worker is more expensive however submits it is cheaper if they are no longer required.

[29] The basis for the restructuring of the warehouse presented at the first meeting with Ms Duddy and in the proposal lacked clarity as to whether it was to achieve flexibility or it was for financial reasons or a combination of both. There was reference to the impact of Covid 19 and financial difficulties at the time of the restructuring.

[30] Mr Steans in his evidence explained that some months of the year were busier than others for the warehouse. Whilst I accept his evidence about that there was no assessment provided at the time of the restructure about the level of flexibility required and when flexibility was required. There was no assessment provided whether it was anticipated the warehouse work was likely at times to drop away completely or simply be reduced. At the first meeting on 15 May 2020 Ms Duddy was advised that they were not “talking about disestablishing her [position] altogether.”

[31] A lack of clarity continued whilst Ms Duddy was still working out her notice about what work would be available in a casual role that she had been offered with Nevada. Ms Duddy had a meeting with Mr Steans and a human resource employee at Nevada on 3 June 2020. There was discussion about the warehouse being busy. Mr Steans responded to the busy period along the lines that the company was “fore-charging for July” and it was “not actually busy, it’s not real...” During the meeting Mr Steans stated that there was not going to be “any cash for the end of that month or July.” Ms Duddy wanted some reassurances that if she

became a casual employee with Nevada she would be called to undertake work before a temporary worker. That reassurance was not forthcoming from an assessment of the recorded meeting on 3 June 2020.

[32] Ms Duddy raised the possibility of a full time position in the future at the same meeting. Mr Steans said that he was “definitely not putting anyone full-time for the future.” He referred to a need to get the wage bill down. Ms Duddy raised during the meeting that if there was a full time role she thought she should have more priority than anybody else. That was not answered specifically by Mr Steans although at a later point in the meeting he confirmed that “There’s no way we can afford another full-time.”

*Would Ms Duddy have simply agreed to work more flexible hours if required?*

[33] There was no attempt to ascertain whether Ms Duddy would have been prepared to agree some change of hours and flexibility without the need to restructure the position.

[34] Clause 6 of Ms Duddy’s employment agreement provided for hours of work as follows:

The Employee’s hours of work shall be approximately 40 hours per week. It is agreed that this will fluctuate according to the demands of the work to be done but is based on an expectation that these hours will fulfil this role. Should this not be the case either party may bring the matter to the table and mutual agreement will be reached.

[35] Mr Abdinor submitted that this clause did not provide the level of flexibility or certainty Nevada required and there was a likelihood that the employee could refuse a reduction of hours.

[36] Ms Duddy in her feedback to the restructuring proposal was not opposed to any change to her full time hours of work. As an alternative to a casual position she proposed a reduction of her hours. Mr Abdinor correctly observed Ms Duddy still wanted a guaranteed minimum of hours. Mr Steans recalled Ms Duddy wanted guaranteed hours for three days with any additional work being offered to her first before to any temporary agency workers. I accept that although her written feedback is not specific as to the level of guaranteed hours. Ms Duddy wanted the situation to be reviewed on a 3 monthly basis with a view to returning to a full time role if conditions improve. That feedback was discussed on the same day Ms Duddy was given notice of her termination and was not accepted on the basis that there could not be a guarantee of any hours.

[37] The failure to talk to Ms Duddy about whether she was prepared to be flexible with her hours under the employment agreement if the need arose before commencing a restructure supports a level of pre-determination. The speed of the process undertaken at a time when the warehouse was busy and in need of more and not less hours of work to be undertaken casts doubt on the genuine nature of the redundancy.

*Warehouse busy at time of restructure*

[38] The evidence was that the warehouse was busy at the time Ms Duddy was advised that her position was to be disestablished and when she was working out her notice. During a recorded telephone discussion between Ms Duddy and Jeremy, the logistics and warehouse supervisor on 2 June 2020, there was discussion about having a third person in the warehouse [a temporary worker] at that time as extra staff were required. Jeremy referred to it being busy for a month initially in the conversation and later during the discussion to the possibility of uncertainty but after two or three months.

[39] Ms Duddy worked 40 hours per week for her four week notice period from 27 May 2020 until her last day of 26 June 2020 which was an increase to the hours she had been working under level 3 lockdown of 80% of her normal hours. Nevada said that additional hours were given to Ms Duddy as a sign of good will during her notice period.

*Temporary worker*

[40] A temporary worker was engaged from 8 June 2020 in the warehouse and the engagement overlapped with part of Ms Duddy's notice period. I shall refer to her as S.

[41] Mr McInnes asked for some relevant information about the hours S had undertaken. The information stated that the hours worked by the temporary worker were high initially because of training and because Ms Duddy turned down work. It was stated that after the training period the hours of the temporary worker fluctuated and varied based on business needs.

[42] The actual hours of work of the temporary worker in the warehouse were then provided. The temporary worker worked 39 hours for her first week and 40 hours for each of the next seven weeks in the warehouse. The only variation in hours of work aside from three weeks where 39 or 39.5 hours were worked was one week in August 2020 when the temporary worker

worked 32 hours. After that the temporary worker worked 40 hours a week for five weeks and 39.5 hours for one week before being offered a full time permanent position on 18 September 2020.

[43] An analysis of those hours does not support that the temporary worker's hours fluctuated and varied after the initial period of work for training. Rather it confirms the hours remained reasonably consistent at 40 hours per week until she was offered a full time permanent position in the warehouse.

*Hours offered to Ms Duddy under her casual agreement*

[44] There was limited casual work offered to Ms Duddy after the end of her notice period.

[45] The week after the end of her notice period Ms Duddy was offered and worked 19.15 hours of casual work and the temporary worker worked 40 hours. The next week which commenced on 6 July 2020 Ms Duddy worked 11.45 hours and the temporary worker worked 40 hours. The evidence supported Ms Duddy was only available to work for a half a day on 7 July 2020 because of a physiotherapy appointment but no other work was offered that week.

[46] On or about 10 July 2020 Ms Duddy applied for mediation because she had concerns that she had been essentially replaced. The transcribed recording of a discussion/meeting Ms Duddy had with an employee from human resources at Nevada on 10 July 2020 confirmed her raising concerns that she only got offered limited work and the temporary worker worked every day. Ms Duddy asked the employee to tell her how it worked when the temporary worker got more hours. The transcript records that the employee responded she did not know and suggested that Ms Duddy talk to Mr Steans.

[47] The next week commencing 13 July 2020 Ms Duddy worked 24 hours and the temporary worker worked 40 hours.

[48] The next week commencing 20 July 2020 Ms Duddy worked for 16 hours and the temporary worker worked 40 hours.

*Exchange on 21 July 2020*

[49] On 21 July there was an exchange between Ms Duddy and Mr Steans in the car park. There is a dispute about aspects of the discussion. It is not disputed that there was some

discussion about the reasons for mediation and Ms Duddy expressed concern about the use of the temporary worker and in all likelihood her change to a casual employment agreement. Mr Steans did not accept that he said that Ms Duddy was “making a mistake going to mediation.” Ms Duddy did not accept that she said she would “take the company to the cleaners.” She said in evidence that she did not know what that meant and when that was referred to in the statement in reply she had to ask her husband what it meant. Nevada did not attend mediation at that time. There was no more casual work offered to Ms Duddy after 21 July 2020 until on or about 18 August 2020.

*Advertisement for position at the warehouse*

[50] On 24 July Ms Duddy saw an advertisement for a warehouse person with Nevada. She recognised it as her position. Mr Steans said that the advertisement was placed by Enterprise Recruitment and the worker engaged at that time was not guaranteed hours of work and was a temporary worker.

*Grievance raised*

[51] On 31 July Mr McInnes raised a personal grievance for unjustified dismissal and the alleged conduct on 21 July 2021 on Ms Duddy’s behalf.

*Further work offered*

[52] The evidence was that there was some further work offered to Ms Duddy on or about 17 August but she had to turn it down because it required heavy lifting and she had a sore shoulder and was having physiotherapy due to an earlier incident at Nevada. After the Authority investigation meeting the Authority was provided with the recording and transcript of a conversation between Ms Duddy and Jeremy on 18 August 2020. The transcript shows that Ms Duddy asked if there was any work the next week. Jeremy asked Ms Duddy how she was feeling and she explained that she had a sore shoulder but that she could do light duties. Jeremy said the only work available was heavy lifting so there was no work the following week.

[53] I do not accept that the hours worked by the temporary worker were on any sensible analysis due to Ms Duddy turning work down.

*Full time role offered to temporary worker*

[54] Objectively assessed the disestablishment of Ms Duddy's position did not result in financial savings or significant flexibility.

[55] S worked equivalent hours to those Ms Duddy had as a permanent employee from the time she was engaged and the cost of her work was more expensive. Ms Duddy was offered and worked some limited additional hours as a casual. It is likely from the advertisement placed by Enterprise Recruitment after S had commenced working on 24 July 2020 that at least one other temporary worker was engaged to undertake some work in the warehouse over that period.

[56] Within three months of Ms Duddy's last day at Nevada on 26 June 2020 the temporary employee was offered a permanent full time position at Nevada in the warehouse. In the intervening period there was no evidence of any decrease in the warehouse work.

[57] At the Authority investigation meeting Mr Steans said in his evidence that S's permanent position in the warehouse was not the same as Ms Duddy's and there had been a change in systems. There was focus on the devanning aspect of the role Ms Duddy had undertaken and that she had been accredited to undertake that work.

[58] I asked for a copy of S's employment agreement and this was provided after the Authority investigation meeting. The position that S was offered and accepted on 18 September 2020 was that of warehouse and administration assistant which the same title as the position that Ms Duddy had held.

[59] I have compared the tasks in the two position descriptions. Ms Duddy in her position description had ten specific tasks. Seven of these are the same in each position description. S in line with Ms Duddy's position description was required to assist with stock layout, stock taking, dispatch and packing orders, receipting of returned stock and removing labels, assisting in warranty assessments and processing, keeping the warehouse tidy and assisting in sorting and recycling. The dispatch requirement in each position description does appear to use a different system. Ms Duddy had three additional duties of sales orders using the end of day procedure, assisting with devanning and recording and manipulation of bin numbers.

[60] I was provided with and only reviewed the employment agreement for S after the Authority investigation meeting. Both parties had an opportunity to make any further submissions about the additional information. The annual salary for S in her employment agreement was \$44,720 per annum and \$21.50 per hour to be reviewed according to the letter of offer after six months. Mr McInnes in his submissions set out Ms Duddy's salary as \$40,400.00. I have taken that to be for her permanent role. To the extent therefore that it may have been suggested I could not conclude the devanning aspect of Ms Duddy's role attracted a higher level of salary.

[61] I find that the full time permanent role S was appointed to at Nevada in September 2020 was essentially the same as the warehouse and administration assistant role that Ms Duddy undertook. I do not conclude that Ms Duddy's role was superfluous to the needs of Nevada at the time she was made redundant.

[62] I do not find for the reasons set out above that Nevada has established that Ms Duddy was dismissed for reasons of genuine redundancy. For completeness there were different roles elsewhere in Nevada impacted by the restructuring. This finding is confined to Ms Duddy's redundancy.

[63] Alongside the inability of Nevada to justify the dismissal on the basis of genuine redundancy there was overlapping and interrelated procedural unfairness.

[64] There was an absence of sufficiently precise information about the basis for the restructuring and whether it was flexibility or financial or both. There was an absence of information about what workplace flexibility in the warehouse would look like at a time when it was known that there was plenty of work in the warehouse requiring more not less workers. These matters impacted the ability to properly consult. Insufficient information and answers were provided about how moving to an outsourced employee warehouse model would work alongside the offer to Ms Duddy of a casual employment agreement. When Ms Duddy asked for clarification about the use of temporary workers and work allocation as it impacted on her this was not directly addressed and answered.

[65] I find Ms Duddy's dismissal was substantively and procedurally unjustified because it was not what a fair and reasonable employee could have done in all the circumstances at the time.

[66] For completeness breaches of good faith have been referred to by both parties although no penalty has been sought by either party. Breaches of the overarching statutory obligations of good faith are part of the findings the Authority has made above about the redundancy and process.

[67] Mr Abdinor raised breaches of good faith on the part of Ms Duddy in covertly recording meetings and discussions. I accept it would have been preferable for Ms Duddy to have advised that she was recording the discussions that took place. I weigh that English is the second language for Ms Duddy and she wanted to understand properly what was happening. Mr Abdinor submits that the undisclosed recordings and comments made supported that Ms Duddy was attempting to create a claim against Nevada. Ms Duddy denies that. I cannot be satisfied that was her intention and in any event she had established a grievance of unjustified dismissal. The Authority has only needed to have limited regard to the recorded and transcribed discussions. Most of the information necessary to consider justification arose from other than the recordings.

[68] Ms Duddy has established her grievance of unjustified dismissal. The claim for unjustified disadvantage was not pursued. Ms Duddy is entitled to consideration of remedies for her unjustified dismissal.

## **Remedies**

### *Lost wages*

[69] Ms Duddy claims 41 weeks of unpaid wages between 26 June 2020 and 12 April 2021 when she obtained a part time retail role. She has produced numerous applications for roles with the earliest written application for a role on 2 November 2020. Ms Duddy said in her evidence that she applied for work from September but those applications are no longer available. Ms Duddy says that she made at least 100 applications for work.

[70] Section 128 of the Act is concerned with reimbursement. It applies where the employee has a personal grievance and has lost remuneration as a result of the personal grievance.

[71] Section 128(2) provides:

If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser

of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[72] Section 128 (3) provides that:

Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[73] Mr Abdinor in his submissions states that Ms Duddy has not provided any reasonable justification for an exercise of the discretion in s 128(3) for an award in excess of three months ordinary time remuneration and that she has not provided evidence that she mitigated her loss.

[74] He submits that it was only at the Authority investigation meeting that the job applications from November 2020 were provided. Prior to that only job applications from March 2021 had been provided. Mr Abdinor submits that Ms Duddy appears to have applied for unsuitable roles although does not elaborate on that further. He also submits it was unclear when Ms Duddy became fully fit for work after she turned down casual work offered in August because of her shoulder injury.

[75] Ms Duddy's permanent employment with Nevada ended on 26 June 2020 however she had entered into a casual employment agreement with Nevada. She was entitled with her knowledge of the availability of work in the warehouse to expect that she would be offered a reasonable amount of work. When she was not she appropriately raised that with human resources. She asked for clarification but it was not forthcoming. She asked for mediation in July 2020. No further work was offered after an exchange in the car park with Mr Steans on 21 July 2020 until some heavy lifting work was offered in August 2020. I do not conclude it was unreasonable of Ms Duddy to wait until September 2020 to begin a job search in earnest. Until that time there was work that she could have been offered as a casual employee and mediation if it had proceeded could have resolved work allocation. The delay in applying for other work before September does not break the chain of causation.

[76] Ms Duddy was undergoing physiotherapy for a shoulder injury sustained much earlier at Nevada and declined work in August. I am not satisfied that shoulder injury had any significant impact on her ability to mitigate loss.

[77] Ms Duddy says that it was from September 2020 that she began to search for other roles. Although there is an absence of applications in writing I accept her evidence that she

commenced a search for other employment at that time and the absence of written applications is not for such a period as to break the chain of causation. There are copies of a sizable number of written applications from November until April 2021. Although some of the job applications from November 2020 were not provided until the day of the investigation meeting there was no suggestion that they were not authentic.

[78] I am satisfied that there were adequate steps taken to mitigate loss. I have weighed the adequacy of mitigation with the evidence that Ms Duddy became anxious, depressed, angry and resentful with her treatment by Nevada. She needed three months of weekly counselling to deal with her emotional reaction to her dismissal.

[79] The Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang* considered the exercise of the discretion in s 128(3) of the Act.<sup>6</sup> I have considered on a counterfactual analysis as the Court of Appeal requires whether but for the unjustified dismissal Ms Duddy's employment may not have carried on for the period for which she seeks reimbursement. There was no evidence to support that Ms Duddy was not a satisfactory and hard-working employee. A permanent full time employee was employed in what I have found to be essentially the role Ms Duddy was performing from September 2020. The evidence did not support any reduction of work in the warehouse between 26 June and September 2020.

[80] I consider for these reasons this is a case where the Authority should exercise the discretion in s 128(3) and order Nevada pay to Ms Duddy by way of compensation for lost remuneration a sum greater than 3 months ordinary time remuneration.

[81] There is no automatic entitlement to full compensation as stated by the Court of Appeal in *Telecom New Zealand Ltd v Nutter* and moderation is appropriate in setting awards for lost compensation.<sup>7</sup>

[82] Equally the individual circumstances of each case need to be considered. An award of 41 weeks lost remuneration is not inconsistent with the award made by the Employment Court in *Brake* of 12 months' salary which award was upheld on appeal. *Brake* involved a mistaken redundancy but was not considered to be one that masked an ulterior motive.

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<sup>6</sup> *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608.

<sup>7</sup> *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [78].

[83] I consider reimbursement of lost wages for 41 weeks is appropriate in this case. Ms Duddy received a weekly sum of \$776.92 based on a salary of \$40,400 gross. \$776.92 multiplied by 41 weeks is the sum of \$31,853.72 gross.

[84] From that needs to be taken the income received from the casual work. Mr McInnes has assessed that on the basis of 31 hours worked. I have assessed that on the basis of 70.6 hours worked as a casual employee for Nevada. Mr McInnes set out the hourly rate for that work at \$18.90. The employment agreement provides for an hourly rate of \$19.42. Either party may return to the Authority if necessary within five days about those two issues. \$19.42 multiplied by 70.6 hours is \$1371.05 and I deduct that sum from \$31,853.72.

[85] Subject to any issue about contribution Ms Duddy is entitled to be reimbursed lost wages in the sum of \$30,482.67 gross.

#### *Compensation*

[86] Ms Duddy provided compelling evidence of humiliation, loss of dignity and injury to her feelings when she was dismissed without genuine reason. She described feeling resentful, angry and powerless. Ms Duddy lost weight as a result of the stress and suffered from anxiety and depression. She experienced sleeping issues and was referred by her doctor to a counsellor and underwent a lengthy period of counselling once a week over three months to deal with the impact of the process and dismissal.

[87] Ms Duddy said in her evidence that she went to talk to those at Nevada about what was happening to try and resolve the situation but she was not listened to. Ms Duddy's husband confirmed that Ms Duddy had difficulties with sleeping and weight loss after her dismissal. He described her as a very proud person who did not want handouts and confirmed that she became angry and resentful and needed counselling.

[88] The impact on Ms Duddy of the dismissal was serious. An award of \$20,000 for compensation subject to any issues of contribution is appropriate.

#### *Contribution*

[89] I do not find that Ms Duddy contributed to her dismissal and no deduction is made to the above awards.

**Orders made**

[90] I order that Nevada Sport Limited pay to Jenessa Duddy the sum of \$30,482.67 gross being reimbursement for lost wages under s 123(1)(b) of the Act.

[91] I order that Nevada Sport Limited pay to Jenessa Duddy the sum of \$20,000 without deduction being compensation under s 123 (1)(c) (i) of the Act.

**Costs**

[92] I reserve the issue of costs. Failing agreement Mr McInnes has until 29 November 2021 to lodge and serve submission as to costs and Mr Abdinor has until 13 December 2021 to lodge and serve submissions in reply.

**Helen Doyle**  
**Member of the Employment Relations Authority**