

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 106  
3106372

BETWEEN

RA'ED HADDAD  
Applicant

AND

NEW ZEALAND STEEL  
LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: S Laphorne and M Chen, counsel for the Applicant,  
C Pearce for the Respondent

Investigation Meeting: 8 and 9 December 2020

Submissions and further information received: 11, 18 and 21 December 2020, from the Applicant  
15 and 16 December 2020, from the Respondent

Determination: 16 March 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Haddad was employed by New Zealand Steel Limited (NZS) from July 2012 until 9 December 2019 when his position was made redundant and he was dismissed. At the date of dismissal Mr Haddad held the position of manager of the process computing department (PCD).

[2] Mr Haddad says his redundancy was a sham and was predetermined. He also says NZ Steel failed to follow a fair procedure, failed to comply with the redeployment obligations as provided in the parties' employment agreement and breached the duty of

good faith. He seeks remedies including reinstatement and an award of penalties for breach of the employment agreement and duty of good faith.

[3] NZ Steel denies the claims. It says the redundancy was genuine and the process fair and reasonable.

### **The Authority's investigation**

[4] In the course of the investigation the Authority heard evidence from Mr Haddad and two witnesses for NZ Steel, Michael Johnson and Dana Toeke. Written submissions and further information were filed subsequent to the investigation meeting.

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

### **Issues**

[6] The issues requiring investigation and determination are:

- a. Was Mr Haddad unjustifiably dismissed?
- b. If so, what remedies should be awarded considering:
  - i. Reinstatement;
  - ii. Lost wages and holiday pay;
  - iii. Compensation under s123(1)(c)(i) of the Act.
- c. If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Haddad that contributed to the situation giving rise to his grievance?
- d. Did NZ Steel breach cl 12 of the parties' employment agreement? If so, should the Authority order a penalty?
- e. Did NZ Steel breach its duty of good faith? If so, should the Authority order it to pay a penalty?

- f. Should either party contribute to the costs of representation of the other party (including a consideration of costs incurred prior to and subsequent to the filing of the statement of problem)?

### **The parties' employment agreement**

[7] Clause 12 of the parties' employment agreement provides:

#### **12. Managing Redundancy**

A redundancy situation occurs where your employment is terminated because your position or the duties and responsibilities of your work role are significantly altered or are surplus to requirements, due to a change in the Company's size, structure, responsibilities, or operational or market requirements.

The first option is to consider redeployment should your position become surplus. You will be treated fairly and reasonably in any selection process, taking into account such things as skills, experience and employment record.

In the event of redundancy, you will receive as much notice as possible and not less than 4 weeks' notice of termination of employment or payment in lieu of notice. During your notice period the Company may provide you with outplacement assistance as appropriate.

Redundancy compensation shall be based on average weekly earnings over the last 12 months and calculated as follows:

...

### **The relevant law**

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

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

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require

the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.<sup>1</sup>

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

[10] In *Wang v Hamilton Multicultural Service Trust* the Employment Court held the employer's actions were deficient in failing to offer Mr Wang a redeployment role when, given some training, he could have performed it:

Where I consider the Trust has failed in its obligations under the redundancy process with Mr Wang relates to the issue of redeployment. The obligation was on the Trust to consider other alternatives to making Mr Wang redundant. In this case, surprisingly, both Ms Fraser and Ms de Lisle concede that Mr Wang was well able to perform the duties of the new position of finance manager and indeed encouraged him to apply for the position when it was advertised. With the attitude of suspicion Mr Wang held he somewhat misguidedly refused to apply for the position. In the circumstances which led to that point, I nevertheless regard his attitude in that respect understandable even though most unfortunate. In view of what Ms Fraser and Ms de Lisle have said, he should have been offered the position by way of redeployment rather than having his previous position terminated and requiring him to apply for the new position when it was advertised.<sup>2</sup>

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<sup>1</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

<sup>2</sup> *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142 at [40], [42]-[43].

## **Background**

[11] New Zealand Steel employs a large number of engineers and IT specialists. The team of engineers Mr Haddad managed in PCD sat within the information system (IS) structure. Part of the PCD team responsibilities was maintenance and updating of bespoke computing systems (legacy applications) located within different business units in NZS.

### *Issues late 2018 to August 2019*

[12] In late 2018 Mr Haddad and Mr Johnson had an exchange about communication style. It is not necessary to set out the detail of this discussion other than to say the discussion was frank. Both Mr Haddad and Mr Johnson wrote to the head of IS, Jason Dale, expressing concerns about the exchange. Mr Johnson's email to Mr Dale included his view Mr Haddad had a "poor attitude" and did not "have the qualities that we would expect from someone in a senior position". These views were not directly put to Mr Haddad to comment on and he was unaware Mr Johnson had put these views before Mr Dale.

[13] Subsequent events raised further concerns for Mr Haddad about Mr Johnson's attitude towards him, which he escalated to Mr Dale and human resources. In late June 2019 the usual process of including him as the team manager in feedback from a team meeting was changed. Mr Haddad was unclear or did not accept the rationale and felt excluded. In July 2019 Mr Johnson gave Mr Haddad an unfavourable performance rating, which was the lowest he had received in his seven years employment at NZS. He asked Mr Johnson to reconsider the rating which Mr Johnson declined.

[14] Also in mid-2019 Mr Johnson was formulating a restructuring proposal for IS and PCD which included the disestablishment of Mr Haddad's position.

### *August 2019 – Information Systems restructuring announced*

[15] In August 2019 NZS announced restructuring of the IS team. The restructuring followed a process signed off by NZS's senior leadership team. The IS restructure resulted in three new managerial positions being created and no job losses within those teams. Those positions were advertised internally on 24 September with a closing date of 30 September.

[16] On 23 September Mr Haddad returned to work after a period of leave. He became aware of the IS restructuring and understood it would not impact on PCD. Mr Haddad's evidence was he had this understanding because Mr Johnson told him PCD was "out of scope" and he had very recently received confirmation of the PCD team objectives for the coming year.

*October 2019 – PCD restructure*

[17] On 2 October Mr Johnson and Ms Toeke met with the PCD team to outline a restructuring proposal for PCD.<sup>3</sup> They requested feedback be provided by 11 October 2019. A document outlining the proposal was provided to the PCD team. The proposal was to move the PCD team out of the IS structure, embed PCD engineers with the business teams their work supported and shift the legacy application team to report to the newly created legacy application manager.

[18] This was in effect a two-stage restructuring process of the IS department. Such a process has created complexity. One of the new IS manager roles had functions of Mr Haddad's role in PCD but the consultation occurred while Mr Haddad was away and before the proposed impact on PCD was announced. The effect of this was the only person directly impacted by the restructure, Mr Haddad, was not consulted during the first tranche of consultation.

[19] The following day Mr Haddad emailed Mr Johnson and Ms Toeke indicating he would apply for the legacy platform support manager role as "the logical choice". His email is broadly neutral on the proposed restructure and is clear Mr Haddad wished to continue his employment with NZS.

[20] On 4 October Mr Haddad emailed Ms Toeke that if the restructuring proceeded he expected a position in the new IS structure to be offered to him and he was open to discuss any potential position, equivalent to at least his current position, within NZS. He advised he would bring a representative to the outcome meeting if he was to be made redundant. Ms Toeke replied that day outlining the process was to receive and consider feedback, that she could meet with him to discuss how his position might be impacted and his options and was happy to discuss other vacancies within the business. She offered to set up a meeting on a day that suited him and his representative the following week. A meeting was duly set up.

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<sup>3</sup> Mr Haddad had been advised of the PCD restructure privately that morning.

[21] On 9 October Mr Haddad sent his feedback on the proposal identifying flaws he saw, that the benefits to IS were unclear and the risks to plant line support if PCD was decentralised. He queried the wisdom of disestablishing a professional team to have them report to non-specialists. He referred to the Port Kembla plant in New South Wales, a plant owned by the same group which owns NZS, which he described as having a successful model where process computing aligned with IS and the engineering team.

[22] On 11 October Mr Haddad emailed Ms Toeke his curriculum vitae and covering letter applying for a project manager position advertised within NZS. On 14 October Ms Toeke acknowledged receipt of his curriculum vitae, the feedback and reiterated the next steps in the restructuring process including discussing current vacancies if the restructuring proceeded.

[23] On 14 October the PCD team submitted its collective feedback. The feedback opposed the proposal on grounds that it would be detrimental to the systems the team supported and the business. The receipt of the feedback was acknowledged.

[24] On 18 October Mr Haddad emailed Ms Toeke asking why the project manager role was no longer listed as a NZS vacancy. He asked how this would impact him given the outcome of the restructure had not been announced. A telephone conversation followed and on 23 October Ms Toeke emailed Mr Haddad that the two project manager roles were at appointment and offer stage respectively. Mr Haddad by reply email raised some questions about the role appointment process and requested an update on the legacy platform manager role.

[25] On 24 October Ms Toeke and Mr Johnson met with Mr Haddad and confirmed NZS was proceeding with the proposed structure and his role as the PCD manager was disestablished.

### *Redeployment*

[26] NZS's evidence as to its approach to redeployment was as follows:

- an employee displaced due to restructuring will be offered an alternative position if it is clearly within the employee's capability;
  - if there are no such roles, NZS will endeavour to advise the effected employee of other vacant roles they may be interested in applying for;
- and

- if the effected employee applies for such a role they are applying for a contestable position and must be interviewed along with every other candidate.<sup>4</sup>

[27] Consistent with this approach at the 24 October meeting Ms Toeke discussed with Mr Haddad the three roles (the management roles) in the restructured IS team – legacy platform support manager (the role Mr Haddad had already expressed an interest in), platform integration manager and business engagement manager – and that he would have to apply and be interviewed for the roles in a contestable process. Mr Haddad said he should be offered one of the roles and NZS could choose which one to offer him. There is a dispute as to how the 24 October conversation then proceeded but the Authority is satisfied it was reasonable for Mr Haddad to apprehend NZS was not going to offer him any of the roles because it did not view any of them as clearly within his capability.

[28] Notwithstanding, following the meeting Mr Haddad emailed Ms Toeke and Mr Johnson applications for the three roles. He also expressed interest in any other suitable positions within NZS and applied for a vacant process computing engineer role. An interview for all three roles was set up for Thursday 31 October. The interview was to be conducted by Mr Dale.

[29] On 25 October Mr Haddad emailed Ms Toeke and Mr Johnson raising a personal grievance on the grounds his position had been disestablished for no justified reason, he felt he had been targeted and the restructure would not achieve the identified benefits and should be reviewed. Ms Toeke replied on 30 October attaching a letter from Mr Johnson confirming the outcome and that he would be interviewed the following week for the three management roles in which he had expressed an interest. Mr Haddad later received the document confirming the restructuring outcome. Mr Johnson's outcome confirmation letter, with respect to redeployment, includes:

We invited you to indicate interest in a suitable position for us to consider which you have done.

If no other suitable role is evident, you will receive notice of termination on the basis of redundancy.

If the redeployment process results in you being offered a substantially similar position, or results in you accepting any other position on any terms whatsoever, then you will not be entitled to redundancy compensation.

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<sup>4</sup> Witness statement Dana Toeke 11 August 2020 [26] – [27].

[30] Mr Haddad wrote to Ms Toeke he had indicated his attendance at the interview was “tentative” and would confirm the following day, he had applied for other positions within NZS because it had been made clear he needed to but his view was he should be offered one of the IT manager roles and was happy for NZS to select which one.

[31] On 31 October Mr Haddad emailed Ms Toeke he would not attend the interview because:

- the IS manager roles are almost identical to his current role and “are clearly within my capabilities”;
- NZS was obliged to offer him a suitable alternative role without an interview;
- he was the only person directly impacted by the restructure of PCD and held the view the purpose was to “exit [him] from the business”;
- he saw no point attending an interview because NZS had declined to offer him one of the roles and have indicated he’s not the right fit (this is a reference to the 24 October meeting); and
- he had found the whole process extremely stressful and humiliating and he did not believe NZS had acted in good faith.

[32] Ms Toeke replied the following day that NZS understood how difficult the process was for Mr Haddad, was conscious to provide support and referenced access to EAP services and its contact details. The email recorded NZS did not agree with the allegations Mr Haddad had made and that “in the interest of ensuring you get the opportunity to be considered for the IS positions” offered to meet, other than in a formal interview, for both parties “to establish suitability and talk about next steps”. She suggested a meeting time and that Mr Haddad was welcome to bring a support person.

[33] Mr Haddad acknowledged the support provided and that he would provide an answer as soon as possible.

[34] On 4 November Mr Haddad wrote to Ms Toeke, Mr Johnson and Mr Dale reiterating his view NZS should offer him the roles, that Mr Johnson was aware of his capabilities given they had worked together for six years and he was happy to meet with them that afternoon to discuss their expectation of the offered role, that he assumed the terms and conditions of employment would be the same, that his service would be recognised and he would attend the meeting with his lawyer. The email continued that in the alternative, if an offer was not to be made they could meet to discuss resolution

of his concerns. The meeting was confirmed for 3pm that afternoon. NZS confirmed the meeting would not be to offer a role but to discuss next steps for considering Mr Haddad for one of the IT positions and the process for his impacted position, which the Authority understands means his notice period.

[35] It is fair to say, by this point, the parties' positions were clear and were known to each other. These positions were restated at the meeting which ended with Mr Haddad advising he would consider further if he would attend an interview.

[36] On 6 November, after Mr Haddad sought more time to consider his interview attendance, NZS reiterated its desire to progress matters and meet with Mr Haddad, the offer of support was repeated and a further redeployment opportunity was raised for discussion. This was a vacancy for a process computing engineer. Later that day Mr Haddad, through his lawyer, wrote to Ms Toeke that he would not attend an interview, restated his view he should be offered one of the IS manager positions and that it was clear NZS wanted to appoint new people. The letter included an information request.

[37] On 13 November Ms Toeke replied including:

Clause 12 of Ra'ed's employment agreement provides that if his role is disestablished, NZ Steel has an obligation to consider redeployment. Ra'ed will be treated fairly and reasonably in any selection process, taking into account such things as his skills, experience and employment record.

Ra'ed does not have a right to insist on being offered a role that other candidates have also applied for. That would be neither fair nor reasonable.

There are important differences between the new roles and Ra'ed's previous role of Process Computing Manager. Although they are at a similar managerial level, they are in different parts of the business and the work being done by the employees he would be managing is very different. Part of the philosophy behind creating these roles is that it is important for NZ Steel to have managers in place who are familiar and experienced with the work their employees are doing.

Because of this, it is not a foregone conclusion that Ra'ed would be the right person to fill any of the three roles. But nor is it a foregone conclusion that he would not be the right person. That is why, if Ra'ed wants one of the three roles, he needs to confirm which role(s) he wishes to be considered for and NZ Steel need to be able to interview him to determine whether he is suitable for that role. It would not make sense to simply offer Ra'ed a role in which he is untested, without going through a proper interview and recruitment process. Nor would it be fair to other employees who have applied for the role(s).

[38] On 18 November Mr Haddad, through his lawyer replied, including:

We understand that Ra'ed is the only employee whose role has been disestablished. Therefore, there is no unfairness to any of the other applicants

if a position is offered to Ra'ed as they already have an existing role and can still apply for the two remaining vacancies.

Ra'ed does not accept that the new positions are very different and that they are in a different part of the business. The 3 vacancies are still within the IS team, they report to the same manager and have the same objectives. In addition, 3 of the 8 members of the new legacy support team are from Ra'ed's team which he has managed for the last 5 years with proven success.

[39] The parties met to discuss the process computing engineer role. On 25 November Mr Haddad, again through his lawyer, wrote to Ms Toeke to advise he was not interested in that role because it would mean a 40% reduction in salary. The letter also records Mr Haddad had understood from earlier recruiting rounds the salary band for the upper range of that role was closer to his current salary and to see it now reduced reinforced his view the process was designed to exit him from the business. He restated he was entitled to be offered one of the roles and remade the information request which had not yet been met.

[40] Mr Haddad's last day of employment with NZS was 9 December 2019.

## **Discussion**

### *Restructuring a sham and/or selection for redundancy pre-determined?*

[41] Mr Haddad accepted in evidence that the restructure of the IS team was not a sham. He says the PCD restructure and the disestablishment of his role were not undertaken for genuine reasons. He says Mr Johnson had long held negative views about him and his managerial ability and these inevitably influenced the decision to disestablish his position.

[42] NZS says the restructuring of IS was genuine which was detailed in planning documents and signed off by senior management. It says decentralising the process computing team out of IS was a decision a reasonable employer could have made in the circumstances.

[43] While it is accepted Mr Johnson had expressed negative views about Mr Haddad to Mr Dale and his concerns arising from those circumstances were raised with Mr Haddad in his performance review in July the Authority is not satisfied NZS undertook a restructure of IS and PCD with the purpose of exiting Mr Haddad from the business. It is accepted the restructuring was undertaken for genuine business reasons.

[44] That said, running a two-stage restructuring introduced complexity to the process and had the effect of marginalising the only employee directly impacted by the restructuring, Mr Haddad.

### *Redeployment?*

[45] NZS had an obligation to consider alternatives to making Mr Haddad redundant.<sup>5</sup> The restructuring process resulted in the creation of three managerial roles. On the evidence before the Authority:

- Mr Haddad had the skills, qualifications and experience to successfully fulfil at least one of those roles;
- NZS never considered whether Mr Haddad had the skills, qualifications and experience to fulfil the roles; or
- failed to put that consideration to him in a fair and reasonable manner.

[46] NZS's reasoning for failing to undertake this consideration was flawed.<sup>6</sup> NZS could have assessed Mr Haddad's suitability for the roles without requiring him to participate in a contestable process and NZS did not owe an obligation to the other staff who had applied for the roles equivalent to that owed to Mr Haddad because Mr Haddad was the only employee facing redundancy. The obligation on NZS in this situation was a positive obligation. NZS's insistence that Mr Haddad establish his suitability for the role was an inversion of that obligation and, the Authority accepts, the failure was inconsistent with the obligation to act in good faith and positively explore redeployment with Mr Haddad.

[47] Mr Johnson suggested in his evidence he had made an assessment of Mr Haddad's experience based on his curriculum vitae, was concerned about a lack of IT and software experience and this meant Mr Haddad had to interview for the roles. This reason does not clearly feature in any of the contemporaneous statements of the reasons why Mr Haddad had to participate in a contestable process. If Mr Haddad had been fairly told at the time he would have had an opportunity to consider NZS's concerns and provide comment. This did not occur and such an opportunity could reasonably be

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<sup>5</sup>Clause 12 of the parties' employment agreement and *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142, [40] – [43].

<sup>6</sup> Refer [37] above email 13 November.

expected in a fair and reasonable process given the circumstances including and significantly, that Mr Haddad was the only effected employee.

[48] NZS submits the requirement for Mr Haddad to participate in a contestable process was within the range of decisions that could be made by a fair and reasonable employer. This is not accepted because (i) the requirement does not recognise Mr Haddad's unique position as the only applicant effected by redundancy and (ii) NZS could have assessed Mr Haddad's skills, experience and qualifications for the role and put any identified deficiencies to him on which he could comment without requiring him to participate in a contestable process.

[49] NZS submits Mr Haddad's refusal to attend an interview was unreasonable because there was no reasonable basis for him not to believe he would be fairly treated. This argument turns in part on a dispute in the evidence – Mr Haddad said Mr Johnson told him in the 24 October meeting he was not a match for any of the roles, Mr Johnson says he said it was unlikely anyone would be a match for all the roles. Ms Toeke corroborates Mr Johnson's recollection. On either account this begs the question what would a contestable interview process add to an assessment of Mr Haddad's skills, experience and qualifications to perform the role and that question has not been answered satisfactorily answered. Further, on Mr Johnson's evidence he undertook an initial assessment of Mr Haddad's suitability for the IS manager roles and found Mr Haddad's skills deficient. This is to be expected given the clear evidence of the NZS process as outlined in Ms Toeke's 13 November email. It is understandable then that Mr Haddad left the meeting on 24 October with the apprehension he had been assessed as not a clear fit for any of the roles. The Authority is satisfied this is what was communicated to Mr Haddad.

[50] There was little dispute in the evidence that with some training Mr Haddad could have performed at least the legacy platform manager role. During the restructuring process NZS did not consider this aspect of redeployment or, if it did, this was not put to Mr Haddad to provide an opportunity for him to comment. This was a flaw in the process. There was no evidence to suggest Mr Haddad could not have successfully undertaken any necessary training.

[51] The failure to offer Mr Haddad a redeployment option in the circumstance outlined above was a flaw in this redundancy process which was not minor and rendered Mr Haddad's dismissal unjustified.<sup>7</sup>

## **Remedies**

[52] Mr Haddad has established a personal grievance. He is entitled to a consideration of the remedies sought.

### *Reinstatement*

[53] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>8</sup> It must be awarded unless it is not practicable or it is unreasonable to do so.<sup>9</sup>

[54] Mr Haddad submits reinstatement is reasonable and practicable in the circumstances given there is no breakdown of trust and confidence between the parties, he has not been subject to any disciplinary or performance management process which would make his return to the workplace unsuitable and NZS is a large, profitable business with vacancies and ongoing recruitment. Mr Haddad also says his age and family circumstances emphasise the importance of reinstatement to him, he has a medical clearance to return to work, that he was a long standing, loyal employee and if he had been appointed to one of the IS manager roles he would have remained employed by NZS.

[55] NZS submits reinstatement would be impracticable. Mr Haddad's role was disestablished and, following a hiring freeze in March 2020, the duties of two of the three new managerial roles have been subsumed into existing managerial roles and several redundancies have occurred. NZS says there is no role for Mr Haddad to be reinstated to and his is not a category of employee where vacancies frequently arise.

[56] The availability of a vacancy is not a requirement of reinstatement.<sup>10</sup> The considerations are practicability and reasonableness. NZS is a substantial business which employs a number of staff in Mr Haddad's professional category. It has been on notice since the outset of Mr Haddad's claim of his desire to return to its employment

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<sup>7</sup> *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102, [35] – [38]; *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [40] – [42].

<sup>8</sup> S 123(1) Employment Relations Act 2000.

<sup>9</sup> S 125(2) Employment Relations Act 2000.

<sup>10</sup> *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

and he has not delayed pursuing his claim. The Authority is satisfied the employment relationship can be successfully re-established. While it is accepted the position Mr Haddad held at dismissal no longer exists there are roles within the plant in which Mr Haddad was a long standing employee which he has the skills, experience and qualifications to fulfil.

[57] Mr Haddad is to be reinstated into a position no less advantageous to that he held at date of dismissal.<sup>11</sup> Two conditions apply:

- (i) Reinstatement is to take place within 28 days of the date of determination to allow New Zealand Steel to carry out any necessary reorganisation to make a position available for Mr Haddad; and
- (ii) Mr Haddad must cooperate fully in any retraining required by New Zealand Steel to meet changed working conditions.

#### *Reimbursement*

[58] Mr Haddad seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim is one year running from the date of dismissal, 9 December 2019, until date of hearing. A calculation of holiday pay on lost earnings is also sought.

[59] It is accepted redundancy compensation does not offset lost wages.<sup>12 13</sup> It is also accepted payments received under the ACC scheme are not relevant to calculating lost remuneration.<sup>14</sup>

[60] After reviewing the evidence of loss and Mr Haddad's attempts to secure another job the Authority is satisfied Mr Haddad is entitled to an award of three months lost remuneration to be calculated at his rate of pay at date of dismissal. It is not appropriate to award more than three months lost remuneration. Due to a sporting injury in late 2019 Mr Haddad has been unable to work and has received earnings related compensation from ACC from then until November 2020. The seriousness of this injury and its significant impact on his ability to work is very likely to have impeded Mr

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<sup>11</sup> S 126 Employment Relations Act 2000.

<sup>12</sup> Mr Haddad received redundancy compensation of \$114,556 (gross) in accordance with the terms of the parties' employment agreement.

<sup>13</sup> *Muru v Coal Corp of NZ Ltd* (1997) 5 NZELC AEC 19/97.

<sup>14</sup> *Scissor Platforms (1997) Ltd v Brien* [1999] 2 ERNZ 672 at 673; *Judea Tavern Ltd v Jesson* [22017] NZEmpC 82 at [40].

Haddad's ability to secure alternative employment. This is likely to be the dominant reason Mr Haddad has not been able to secure new employment. For these reasons the discretion to award more than three months lost earnings will not be exercised in Mr Haddad's favour.

### *Compensation*

[61] In evidence Mr Haddad said the restructuring process and his dismissal were incredibly stressful and disappointing. He said as the process went on he felt shocked and blindsided and when he returned to the workplace to return his property he was escorted which was humiliating and made him feel like a criminal. He said losing his job has resulted in significant financial and emotional stress, unsettled his plans for what he expected to be a secure future and this uncertainty has placed a great deal of stress on his family.

[62] It is accepted the impact of the restructuring process and the consequent dismissal has had a profound and negative impact on Mr Haddad. The Authority is satisfied he experienced harm under each of the heads in section 123(1)(c)(i). He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$15,000.00.

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Haddad that contributed to the situation giving rise to his grievance?*

[63] The only aspect of Mr Haddad's conduct which could amount to a possible consideration under s 124 is his refusal to attend the interview. Though Mr Haddad's refusal could be considered unfortunate, in circumstances similar to those before the Court in *Wang*, given it occurred after NZS confirmed its decision to disestablish his position and there was no more than a chance attending the interview could have stopped his employment ending, the submission is accepted the decision not to attend did not contribute to the situation giving rise to his personal grievance.

*Did NZS breach clause 12 of the IEA? If so, should the Authority order it to pay a penalty?*

[64] The evidence is clear NZS did not fulfil its obligation to Mr Haddad to fairly and reasonably consider him for a redeployment option. This was a breach of clause 12 of the parties' employment agreement.

[65] In doing so NZS is liable to a penalty if I am satisfied that the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.<sup>15</sup> I am not satisfied that was the case. NZS has sought, in error, to apply a blanket process to a situation which had unique features and in order to meet its obligations to Mr Haddad, required that process to be amended. The Authority will not exercise its discretion and award a penalty.

*Did NZS breach the duty of good faith? If so, should the Authority order it to pay a penalty?*

[66] It is not clear to the Authority how the claim for breach of good faith is distinct from the personal grievance claim for unjustified dismissal or the breach of employment agreement which is addressed above. This claim mirrors the found breach of the employment agreement and has been dealt with above.<sup>16</sup>

### **Summary of orders**

[67] New Zealand Steel Limited unjustifiably dismissed Mr Haddad. The following orders are made:

- a) New Zealand Steel Limited is ordered to reinstate Mr Haddad in accordance with conditions set out in paragraph [53] above;
- b) Within 28 days of the date of determination New Zealand Steel Limited is to make the following payments to Mr Haddad:
  - i) \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
  - ii) three months lost remuneration pursuant to section 123(1)(b) and s 128 of the Employment Relations Act 2000;
  - iii) holiday pay for the period of the three months lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

### **Costs**

[68] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Mr Haddad is to file and serve any costs memorandum

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<sup>15</sup> S 133A Employment Relations Act 2000.

<sup>16</sup> *Kazemi v RightWay Limited* [2019] NZEmpC 73 at [109].

within 28 days of the date of determination and New Zealand Steel may file and serve any reply memorandum within a further fourteen days.<sup>17</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>17</sup> This timetable seeks to accommodate proximity to the Easter break.