

Attention is drawn to the order
prohibiting publication of certain
information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 806
3289279

BETWEEN

KMW
Applicant

AND

ZIB DIGITAL LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Rachel Irwin and Penny Swarbrick, counsel for the Applicant
Daniel Erikson, counsel for the Respondent

Investigation Meeting: 3 September 2025
Submissions: 12 September 2025

Date: 12 December 2025

DETERMINATION OF THE AUTHORITY

Nonpublication application

[1] The applicant asks for nonpublication of their identity based on their commercial and career reputation. They explain they have an online social media account presence as an ‘influencer’ which associates with an online business. The applicant also says there will be adverse effects on their future career prospects if it is publicised that they brought this claim.

[2] The application is opposed by the respondent. It says the grounds are not made out and matters of anonymising third parties can be done without the resort to non-publication orders.

I accept that anonymising the names of third parties can simply be done in a manner of writing this matter.

[3] When considering nonpublication, the starting point is the principle of ‘open justice’ and that this should not be displaced lightly. I am not satisfied that the grounds presented for the applicant set the applicant’s situation apart from other employees who bring claims challenging the end of their employment particularly where the termination is one of redundancy which is a no fault dismissal. Equally I am not satisfied that the adverse effects claimed in relation to the applicant’s social media presence and associated business interests is sufficiently detailed enough and is any different to a person in business who is marketing products or their skills and then challenging a matter in this forum.

[4] Accordingly, I decline the application for permanent nonpublication of the applicant’s identification.

[5] However, I make an interim order prohibiting from publication the identity of the applicant and their sole witness whose identity by relationship could lead to the identity of the applicant. This order is for an interim period of 28 days from the date of this determination to allow for any challenge. At the end of 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication. I will now refer to the applicant as KMW and their witness as PLQ for the purpose of this determination. Those letters are randomly selected.

[6] As noted above, any third parties that I may need to refer to are appropriately anonymised in the manner of writing.

Employment relationship problem

[7] On 27 June 2022 KMW commenced employment with ZIB working in a full time permanent role as a ‘Marketing Manager – Australia New Zealand’, the title description in an individual employment agreement (IEA) signed in May 2022 by the parties before the employment commenced.

[8] On 7 February 2024 ZIB disestablished the ‘Marketing Manager – Australia New Zealand’ role and terminated KMW’s employment on four weeks’ contractual paid notice with

no requirement to work in the notice period. By the time KMW had been terminated they had been employed in the role for chronologically 20 months albeit they took agreed periods of leave including 39 days as unpaid leave most of which was a trip away for nearly ten weeks in mid-2023, returning in August 2023.

[9] KMW challenges through personal grievances both the procedure relating to the decision to disestablish their role as well as the genuineness of the substantive decision to do so. KMW claims they were disadvantaged due to alleged procedural deficiencies in the redundancy process, adverse comments about her engagement of legal assistance and that ZIB breached its duty of good faith under s 4(1A) by not providing them with sufficient rationale to consider feedback on the proposal to disestablish their role. KMW says they were unjustifiably dismissed due to ZIB's predetermination, insufficient detail provided to feedback on and no opportunity given for redeployment into an alternative role when there were options available.

[10] KMW also claims that in May 2022 they were induced by Mr McFedries, a co-director of ZIB to leave their long term secure employment to accept the above referred role with ZIB. KMW says the inducement was through pre employment representations made by Mr McFedries in discussions and emails. KMW says these representations were promises of significant opportunities to earn commission making the role a '\$200,000.00 role' which did not happen. KMW has raised a disadvantage grievance about this claiming the loss of benefit¹ as a grievance remedy (the difference to what was 'promised' versus what they earned as a result of the grievance). KMW also asks the Authority to consider the matter under its discretion to make orders under the law relating to contracts under s 162(a) and (b) of the Act² as they apply to misrepresentation.

[11] KMW claimed that ZIB discriminated against them through family status because of their stated intention to start a family and this was part of seeking to end their employment. This claim was withdrawn in the submissions for KMW provided after the Investigation Meeting³.

¹ Employment Relations Act 2000, s123(b), 123(1)(c)(ii).

² Both apply to misrepresentation: Section 35(1) Contract and Commercial Law Act 2017; ss 9 and 12 of the Fair Trading Act 1986.

³ Submissions for the Applicant, dated 12 September 2025.

[12] KMW claims grievance remedies of compensation for the grievances, lost wages due to the alleged unjustified dismissal, and costs as well as remedies for the misrepresentation. There is an application for a 'penalty' for breach of good faith to be payable to KMW.

[13] ZIB denies all claims and says it made a justified business decision and consulted sufficiently about the redundancy proposal with KMW. It says any deficiency in its initial communications to disestablish KMW's role was either a minor fault or was corrected by ZIB then providing sufficient information. ZIB stands by its position that because KMW did not give feedback to the information provided, within the extended time allowed, it decided to disestablish the role and terminate the employment. To the claim of no redeployment, ZIB says it did not understand KMW was interested in other roles that were available, was not skilled to do those roles, or that the digital sales specialist role was something always advertised.

[14] ZIB says the role was not misrepresented and rejects the remedies sought. ZIB says that comments about the role were future facing and the "\$200,000.00 role" comment pre employment was in relation to what the role could become with KMW's effort. It says there was a base salary as recorded in the IEA of \$120,000.00 and a bonus structure relating to bringing in leads. The bonus was earned for the individual employee bringing in the lead if it resulted in a contract confirmed. The quantum of the bonus was linked to the value of the contract that resulted. The bonus structure it says was contained in a letter of offer and was explained in the interview discussions for the role. It says KMW was not employed in a sales role that attracted commission payments. It says that KMW during their employment brought in one successful lead and was paid the contracted bonus amount for this. ZIB says the issue of misrepresentation was not raised by KMW until after a proposal to disestablish their role was communicated. ZIB says there was no misrepresentation, and that the Authority has no jurisdiction to set terms and conditions of employment. Overall ZIB says that KMW took an unnecessarily aggressive and litigious approach even before ZIB had made any decision to disestablish KMW's role.

Authority's investigation

[15] I held an investigation meeting after receiving timetabled written witness evidence and relevant documentation. On oath and affirmation, I asked questions of all witnesses. The witnesses were KMW and PLQ; for ZIB, Chris Knights, founder and chief executive officer of

ZIB; Katie McAleese, a co-director of ZIB; Amanda Hawke, an employed digital manager, at the time, at ZIB; and Adrian McFedries, a co-director of ZIB. Representatives were given the opportunity to ask questions of witnesses.

[16] I timetabled for written submissions after the investigation meeting and heard from counsel on these after which I reserved my determination.

[17] As permitted by s 174E of the Act, this determination has stated findings and expressed conclusions as necessary to dispose of the matter. It has not recorded all evidence and submissions received.

The issues

[18] The issues for me to determine are:

- a. Did ZIB misrepresent the role that KMW was offered and if so what financial remedy should be awarded for any loss incurred from this?
 - i. Contract and Commercial Law Act 2017 (FTA and misrepresentation)
 - ii. Disadvantage
- b. Was the decision to disestablish KMW's role as surplus to its business requirements that of a fair and reasonable employer in all the circumstances?
- c. Did ZIB discuss alternatives to dismissal with KMW before deciding there were no alternatives to dismissal?
- d. Depending on the above, was the dismissal justified in that it was what a fair and reasonable employer could have done in all the circumstances?
- e. If the dismissal was unjustified what if any remedies are to be awarded for:
 - i. Compensation
 - ii. Lost wages as a result of the dismissal?
- f. Was there a breach of good faith under s 4(1a) of the Act relating to alleged insufficient information provided with the proposal to disestablish the role and end the employment?
- g. If so is a penalty for breach of good faith to be awarded taking into account the factors under s 133A of the Act?
- h. If a penalty is awarded should the Authority exercise its discretion to order that any or all of the penalty be paid to KMW?

- i. What if any costs are to be awarded?

[19] Before considering the issues I will set out some further chronological background below.

Further background

[20] KMW was approached by Mr McFedries on an online platform on 1 May 2022 at a time when KMW was employed by a large marketing media business on a full time basis on base salary plus commission for sales as well as running her own 'social media account' as 'an influencer' that focused on her 'passion for fashion'.⁴ Her online presence attracted Mr McFedries to reach out about her working for ZIB. Mr McFedries' reach out email included the following:

I write to you as your name has come up a few times in the past couple of weeks as we've researched the marketing talent that stands out in NZ. ... I am Chairman of Zib Digital ANZ and we are in serious growth mode and I enjoy being involved in the selection of our people. I've spent the last 20 years investing and building successful international businesses. I've done this by being involved in bringing together exceptionally talented people and enjoying a journey where we disrupt tired markets/industries with a fresh, relevant and enjoyable new approach.

ZIB digital is a very very successful digital specialist, but we've kept the nimbleness and culture of a smaller business despite our size. We are down to earth people doing great things for over 800 great clients.

We respect you have an existing role, but we were keen to explore with you where your passion and superpower is in relation to marketing.

We currently have four new NZ roles (our NZ HQ is Christchurch) for Digital Specialist Leader, Digital Specialist and Marketing Manager for Australia and NZ for ZIB Digital.

⁴ As explained by KMW in their response to Mr McFedries on 2 May 2022. Affidavit of [KMW] dated 5 June 2025, annexure 'B'.

If you think any of this holds an interest I'd be more than happy to have a chat with myself and our NZ CEO.

If not, respect that too.

[21] Mr McFedries alerted KMW to the three New Zealand based roles advertised with ZIB at the time. KMW's response included that she was 'really happy in [their] current role, [they had] a great client list of local and national businesses, a lovely team, competitive salary + *commission structure*⁵ and a great working environment with flexibility.' KMW did however say they would be open to 'the right opportunity and salary package' and 'having looked into ZIB a little this morning online I would be interested to know more about the Marketing Manager position if you have further details or a JD.' There are further congenial communications, and a meeting online is set up for what was agreed would be a 'private' confidential chat. Ultimately a number of meetings occurred.

[22] The first informal discussion between Mr McFedries and KMW and then with Mr Knights and Ms McAleese on 19 May 2022, another interview on 23 May 2022 and a further meeting on 25 May 2022. Mr McFedries in these proceedings has produced a 'File Memo' dated 'May/June 2022' which he says was a memo compiled after the interview process and part of his way of summarising his work matters each week. This is consistent with KMW's evidence that they did not recall Mr McFedries taking any extensive notes during the interviews. KMW gave evidence they had never seen these notes until these proceedings. Mr McFedries says they were his own record which I accept in the context of a recruitment process. However KMW does not agree with all that the interview notes record and I will return to the relevance of this in relation to the claim of misrepresentations claimed pre-employment.

[23] Employment was offered and documentation accepting signed. The letter of offer contained a table that was not referenced in the individual employment agreement (IEA), the meaning of which is in dispute as to whether it was an individually negotiated 'commission' structure or was the ZIB all employee bonus scheme whereby any employee bringing in a lead

⁵ My italics emphasis added.

that resulted in a successful contract received a one off bonus for this. I will return to the details of this below, again in relation to the misrepresentation claims.

[24] It is not disputed that soon after commencing in the role it became apparent that there was work needed to be done on updating digital marketing material. Mr Knights says that KMW was the best person to do this and refers to this as a 'pivot' in what KMW was focusing on. KMW says this came at a time when they had been to Australia and participate in sales meetings after which they say they were told by Mr Knights not to participate, that this was not part of their role. Mr Knights says sales team people raised a concern that KMW at times 'talked over' people in their sales meetings. He said that KMW's attendance in those meetings did stop as but this was not by way of 'exclusion' as KMW claims. Either way, KMW's performance review documentation about a year after commencement shows they had continued to work on projects and were wanting to have new 'KPIs' to clarify their role and support their ability to earn commission. Their oral evidence about this continuing in a role they now claim was misrepresented to them was that they wanted to do their best to continue on and that they were a 'people pleaser'.

[25] It is in dispute the extent to which KMW raised issues during their employment about not being provided with opportunities to earn commission as they say now they were promised. KMW says they raised this as a 'misrepresentation' issue many times. ZIB says they did not raise any issue about 'misrepresentation'.

[26] Documentation shows that KMW had communications with Mr McFedries prior to leaving on their extended holiday in mid-2023 in which Mr McFedries acknowledges that upon their return in August 2023, work on KPIs for KMW's role would be looked at. It is not in dispute that this did not happen when KMW returned to work in August 2023. Mr McFedries says the overall concerns about the need to restructure ZIB overtook matters.

[27] In mid-January 2024 ZIB commenced a process of proposing to disestablish KMW's role. That process ended with notice of termination provided on 7 February 2024 as already referred to above. By the time of termination KMW had raised disadvantage grievances challenging that ZIB had not provided any sufficient information for KMW to provide feedback

on and raised issues about the role having been misrepresented. KMW raised a grievance of unjustified dismissal after termination for reasons generally summarised above.

Did ZIB misrepresent the role that KMW was offered and if so what is the loss, if any, to be compensated in loss of benefit or any other remedy?

[28] Parties to an employment relationship must not do anything to directly or indirectly mislead or deceive each other or do anything directly or indirectly that is likely to mislead or deceive each other. The term ‘employment relationship’ is specified under s 4(2) as the relationship between ‘an employer and an employee employed by the employer’. The pre employment misrepresentations that KMW claims do not fall within this alleged breach of duty because they fell outside of the acceptance KMW signed by signing the individual employment agreement she signed. I have nothing to show me that acceptance occurred prior to this signing. In other words, the misrepresentations I am asked to consider fall into the category of those allegedly made before the employment relationship commenced.

[29] Under s 162 of the Act⁶ subject to some constraints⁷ the Authority may make orders in relation to ‘any enactment or rule of law relating to contracts, including (b) ‘the Fair Trading Act 1986’.

[30] The relevant sections of the Fair Trading Act 1986 are:

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

12 Misleading conduct in relation to employment

No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely

⁶ Employment Relations Act 2000.

⁷ Above at ss163, and 164.

to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

[31] By submissions KMW includes that the claim related to the general misrepresentation section of the Contract and Commercial Law Act 2017, a section which includes the need to show the applicant has been induced by the misrepresentation. The part of this provision is set out below as relevant:

35 Damages for misrepresentation

- (1) If a party to a contract (A) has been induced to enter the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B),-
- (2) (a) A is entitled to damages from B in the same manner and to the same extent as if the misrepresentation were a term of the contract that has been breached; ...

[32] To determine KMW's claim I have to consider whether they have shown there was likely a misrepresentation and then if so, whether they were induced to enter the contract of employment with ZIB to such an extent that they should now receive compensation being the difference they earned up to the \$200,000.00 salary they say was promised by Mr McFedries in pre employment representations along with promises to provide opportunities to earn commission on top of the base salary.

Was there a pre employment misrepresentation?

[33] The pre employment misrepresentations claimed by KMW are stated as follows⁸:

- a. That KMW was 'advised verbally on multiple occasions, including by Mr McFedries during the call of 4 May 2022, that the Role was in marketing and sales in Australia and New Zealand.'
- b. That Mr McFedries 'advised' in an email dated 28 May 2022 'that the Role would provide the Applicant with regular opportunities to earn commission and significant international opportunities for career growth.'

⁸ Supplementary Statement of Problem dated 15 May 2024 at paragraph [9].

- c. That Mr McFedries advised verbally in the ‘Interview Meetings’ that the Role would involve inclusion in high value global tender and working regularly on client pitches for current and prospective clients.’ That this is ‘supported by comments in the 27 and 28 May 2022 email correspondence’ between Mr McFedries and KMW.
- d. That ZIB ‘promised’ KMW ‘a significantly higher paying role that her role at [her existing long term employer] (including higher commission earning potential), and greater career growth opportunities.’ KMW says these representations were in the pre employment 28 May 2022 email from Mr McFedries to KMW which KMW specifically states in her claim to be:
 - (i) “...the scale we will achieve across the globe this becomes a \$200k role”;
 - (ii) The “bonus structure that would apply for the first 12 months ... is uncapped”
 - (iii) “We have created the bonus structure component as reality as you are currently selling in your role, so it lets you play to a super power.”

[34] KMW says further that the remuneration package they were promised was set out in the letter of offer dated 30 May 2022, and the IEA and that it included:

- a. A base salary of \$120,000; and
- b. Contracted sales bonus based on ‘uncapped’ commission of:
 - (1) Sales amount of up to \$40,000 – bonus of \$500;
 - (2) Sales Amount of up to \$80,000 – bonus of \$1000;
 - (3) Sales Amount of up to \$80,001+ – bonus of \$2000.’

That KMW was ‘advised verbally on multiple occasions, including by Mr McFedries during the call of 4 May 2022, that the Role was in marketing and sales⁹ in Australia and New Zealand.’

[35] For me to be satisfied a misrepresentation occurred that in effect would result in a remedy as if the representation was a term of the employment leading to breach of contract damages being awarded, I need to be more than vague about finding what was likely said about

⁹ Italics emphasis added.

the role including sales duties in the verbal pre employment discussions. This is particularly given the claim relates to ‘multiple’ occasions. I note that KMW in her reply evidence says she did not say that her role was called a ‘sales and marketing manager’ but that she considered the role was represented to her as involving ‘sales and marketing duties.’ I will consider the matter on that basis although find the distinction minimal.

[36] Mr McFedries has provided in his evidence a general file note headed ‘May/June 2022’. He gave oral evidence that this note was made as per his standard practice of summarising earlier discussions or meetings within a time close to the event or events. I accept that KMW had not seen this note until these proceedings. The note is nearly two pages of bullet points under headings that broadly accord with the position ZIB has taken in relation in these proceedings. The note includes that the role was explained to KMW pre employment as not being a sales role but one where it involved generating leads for the ANZ sales team; that under the heading ‘Core Role Described to Candidate’ that the ‘focus’ was on ‘lead generation’ ‘developing and delivering strategies for marketing effectiveness’; that under the heading ‘Remuneration’ the ‘Package confirmed as \$110k to \$120k base/Negotiated \$120,000 base; Team Bonus structure was shared – based on introduction of leads/contacts/Explained only had to introduce up to each individual/some team in business introduce zero/some team in business introduced \$20-\$30 worth.’

[37] I am not satisfied that the above file note records a contemporaneous account of what was said specifically in any individual discussion or interview pre-employment. The date of May/June 2022 leads me to conclude this was made as part of the type of round up Mr McFedries explained was his practice.

[38] However, the above file note is consistent with the plausible evidence of Ms McAleese that she recalled the Team Bonus Structure’ being explained at the second interview she was present at. I find it was likely that the ‘Team Bonus Structure’ was discussed pre employment with KMW and this did not equate to commission for a role that included sales’ duties. Ms McAleese gave a plausible description of the team bonus structure as something that was paid to an employee for being the person to bring in the lead that eventually resulted in a sale confirmed by a member of the sales team. The bonus related to the value of the contract in the

confirmed sale. Mr McFedries' file note also reflects this was for anyone to bring in a lead, that some did and some did not. Ms McAleese was adamant that the structure was explained at all interviews. I find it likely then that the team bonus structure was a finder fee bonus, and it was up to employees to try to earn it, but it was not required. It does not show me that it related to commission earned for a sales role nor to a 'KPI' as KMW has said they expected to have attached to earning commission for sales. If KMW considered she had been told this I find this inconsistent with them not asking more questions about it when negotiating for the remuneration package in their 27 May 2022 email to Mr McFedries. The negotiation from her end centred solely on seeking more in the base salary and nothing about 'commission' or Bonuses'. It is also not consistent with them earning such a bonus for introducing a client during their employment.

[39] KMW in their oral evidence to me says they had concluded that they would be paid a 'sales commission' in a similar way to what they had received in their prior role. As I understand it this was more direct selling involvement than what they did for ZIB. Based on the above and hearing from KMW that they likely formed their own understanding I do not find that even if 'sales' was mentioned in conversations pre employment, I have insufficient evidence to show a misrepresentation that the role involved sales duties.

That Mr McFedries 'advised' in an email dated 28 May 2022 'that the Role would provide the Applicant with regular opportunities to earn commission and significant international opportunities for career growth.'

[40] The email sent to KMW by Mr McFedries on 28 May 2022 at 4.56pm does not include the above highlighted representation in its text. That email includes Mr McFedries' response to KMW who by then had responded to his email dated 27 May 2022 'offering' her a role and wanted to negotiate a higher base salary to which Mr McFedries said there would be no movement. That base salary I note was higher than the one from her previous role. The closest to such a representation as claimed above may be contained in the 27 May 2022 email which I consider below. For here I do not accept there was a misrepresentation made about regular opportunities to earn commission and significant international opportunities for career growth.

That Mr McFedries advised verbally in the 'Interview Meetings' that the Role would involve inclusion in high value global tender and working regularly on client pitches for current and prospective clients.' That this is 'supported by comments in the 27 and 28 May 2022 email correspondence' between Mr McFedries and KMW.

[41] Other than the above referred Mr McFedries' above referred May/June 2022 file note which does not include the above being discussed in an interview meeting, I have considered the two emails he sent to KMW on 27 and 28 May 2022 that are before me.

[42] In the 27 May 2022 email Mr McFedries includes information about the 'bonus structure' which adds more to the explanation than what Ms McAleese gave to me in the investigation meeting and more than what was in the letter of offer dated 30 May 2022. It says, 'the bonus structure' was for the 'first twelve months' and that he had increased it from '\$1500 to \$2000 on the top end – it is uncapped'. ZIB's evidence is that this relates to the team structure. KMW says it relates to commission on sales, and as in these proceedings she says she was prevented from being involved in opportunities to earn commission within the sale process sales or upselling. The figures used in Mr McFedries' file note are consistent with the third line of the table in the 30 May 2022 letter of offer. I do not accept there was a representation that this bonus structure related to commission on sales.

[43] The 27 May 2022 letter includes comment about potential to earn more in the role:

I am very clear you will learn an enormous amount, enjoy this journey and have an opportunity to vastly exceed what you are earning now as you build into this role. It's about having the passion for becoming one of the top digital marketing people in Australia and helping drive ZIB Digital as the most respected digital specialist around. I respect there will always be nerves around change, but that gap of discomfort is the exiting part of any journey.

[44] Mr McFedries says that the representation about higher earning is potential earnings based on KMW's efforts. I accept that it is referenced alongside 'as you build into this role' and 'becoming one of the top digital people ...'. I do not find this language shows anything more

that expressions about the potential of the role rather than representations that are specifically presented to the extent that I am asked to consider they were due to not being fulfilled as terms of the contract to award damages as if they were.

That ZIB 'promised' KMW 'a significantly higher paying role that her role at [her existing long term employer] (including higher commission earning potential), and greater career growth opportunities.'

[45] I note that this part of the misrepresentation equates directly with me being asked to award the difference between a \$200,000.00 salary and what was earned. KMW says these representations were in the pre employment 28 May 2022 email from Mr McFedries to KMW which KMW specifically states in her claim to be:

- (iv) "...the scale we will achieve across the globe this becomes a \$200k role";
- (v) The "bonus structure that would apply for the first 12 months ... is uncapped"
- (vi) "We have created the bonus structure component as reality as you are currently selling in your role, so it lets you play to a super power."

"...the scale we will achieve across the globe this becomes a \$200k role"

[46] I do not accept the above was a misrepresentation to the effect that it meant a \$200,000.00 per annum salary was guaranteed as is effectively claimed by KMW. The context of this email was Mr McFedries' response to KMW wanting to negotiate a higher base salary which he declined. I refer to this above. The whole sentence is advisable to state: 'The reality is you make this work in the ZIB environment and the scale we will achieve across the globe this becomes a \$200k role.' I agree with ZIB's position that this cannot be construed as guaranteeing a \$200,000.00 salary. It is not referenced in the IEA. The wording is prefaced with 'you make this work'. I find it is a projected statement and not one guaranteeing a \$200,000.00 salary.

“bonus structure that would apply for the first 12 months ... is uncapped”

[47] This appears to be included in the 27 and not the 28 May 2022 email and is in the context of Mr McFedries explaining the increase of the bonus scheme to \$2,000.00 which is consistent with the highest level value bonus figure in the chart provided in the letter of offer dated 30 May 2022. That level is expressed as ‘\$80,001 +’ for the value of the contract and that a \$2,000.00 bonus applies. To the extent this relates to the team bonus structure that I find above was likely explained to KMW pre employment I do not accept this shows me it was a misrepresentation. Again, I note that it is not in dispute that KMW earned a bonus for bringing a client into ZIB under the bonus structure during their employment.

“We have created the bonus structure component as reality as you are currently selling in your role, so it lets you play to a super power.”

[48] Mr McFedries’ evidence is that the Marketing Manager role that KMW was employed in was created to ‘focus on activities that would generate leads/empower the sales team with content/ liaise with the digital experts at ZIB and basically own the functions of marketing.’

[49] Mr McFedries refers me to the advertisement for this new Christchurch based role which included:

‘located ... in Christchurch ... reporting to the ZIB NZ CEO’

‘What we are looking for: Simple, someone who understands/ Marketing is ultimately about driving leads/Engagement with relevant clients is what counts/Everything speaks – details, standards matter/The value of traffic communication/Digital is the foundation of marketing’

‘your daily tasks will include but are not limited to:

- Focus on lead generation and how we constantly reach our type of client
- Conduct the orchestra approach with any digital execution via our internal teams
- Ensure the sales material is updated each month with new results/ case studies

- Measure, report and change any marketing effectiveness and the strategies
- Develop and enhance any tools used for events, sales pitches, expos
- Identify sectors that the sales team, may seek to focus on.’

‘What skills do you need?’

- 3 years + experience in marketing roles
- Experience in marketing strategy and implementation
- Highly driven, have the ability to multitask with an attention to detail
- Experience in a role you influenced the actual sales results
- Digital marketing knowledge is definitely preferred but not essential
- Exceptional; communicating and influencing skills
- Emotional intelligence’

[50] I have paused here to consider Mr McFedries communication that the bonus structure was ‘created’ rather than being the generic one that applied to all employees as was my understanding This is consistent with KMW saying they negotiated the earnings structure over the base salary.¹⁰ However I do not find the bonus structure represented a commission based on sales more than I have already found above. That the levels above \$500.00 cap for all employees may have been negotiated here for KMW seems likely but the principle of the bonus being for bringing in a client only I do not consider was misrepresented as a broader sales commission.

KMW says further that the remuneration package they were promised was set out in the letter of offer dated 30 May 2022, and the IEA and that it included:

- c. A base salary of \$120,000; and*
- d. Contracted sales bonus based on ‘uncapped’ commission of:*
 - (1) Sales amount of up to \$40,000 – bonus of \$500;*
 - (2) Sales Amount of up to \$80,000 – bonus of \$1000;*
 - (3) Sales Amount of up to \$80,001+ – bonus of \$2000.’*

¹⁰ Referenced in MKW’s reflections in the June 2023 performance review.

[51] For the same reasons as above, I do not find a misrepresentation. Most particularly KMW signed an IEA that had not inclusion of a bonus scheme that related to what she considered was a commission on sales. The table in the letter of offer as I have found above was likely known to KMW pre employment, they received such a bonus during their employment, and they have likely formed their own understanding based on their previous employment structure as to what they may have expected to receive in pay.

[52] Based on the above findings KMW's claims that they should be awarded the difference to a salary equivalent to \$200,000.00 gross and what they earned due to a misrepresentation are unsuccessful.

Was the decision to disestablish KMW's role as surplus to its business requirements that of a fair and reasonable employer in all the circumstances?

[53] The Court of Appeal¹¹ has confirmed that an employer needs to show that the decision to make an employee redundant is genuine and based on business requirements. If the answer is yes to both and the role made redundant is surplus to the employer's needs, it is not then for the Authority to replace the employer's business judgment for that of the Authority. In addition, the Act requires the parties to deal with each other in good faith when restructuring. This includes providing affected employees with access to information (subject to specified confidentiality provisions) relevant to any proposal adverse to continuation of their employment and an opportunity to comment on that information before the decision is made. Section 4(1A) of the Act reflects this obligation on the employer:

- (b) ...when proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more [of its employees] to provide to the employees affected -
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

¹¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 (CA).

[54] The Employment Court¹² has summarised the extent to which in a redundancy information provided by the employer needs to have sufficient details for consultation to be a reality:

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

Predetermination

[55] I accept the submission for KMW that at the first meeting on 16 January 2024 when KMW was first told about ZIB's 'proposal' to disestablish their role, and in the associated proposal letter partially read out but then emailed to KMW after the meeting, the language used shows that a decision had been made at the very least to not redeploy KMW to another role. The language that I find indicated a decision had likely been made about this was: '*Alternative arrangements, unfortunately ... we've assessed it and we've not identified any roles that align to your current skills, experience and our business needs.*' This wording was also in the follow letter sent to KMW after the meeting. The former manager was reading from that letter (In part) during the meeting.

[56] I accept also there was an indication through other language that the leadership team had already decided it had the task of offering support and '*to assist you transitioning to your next career venture*' with '*recommendations, references, introductions.*'

[57] Two further sections of the transcript show me that the language could reasonably be construed as meaning that the decision it was KMW's role to be disestablished was already

¹² *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54].

made. The first from the former manager whose words I include from the recording transcript in full:

Look again, I'm really sorry. This is really hard for all of us. We all really value the contribution and effort and support that you've given us for the last 18 months. Me over the last 12 months. You know it was a really tough decision for us to make, but operationally as a business, you know, we had to look at the role and it's just not a role that we can continue to have operating out of the New Zealand market, and we just have to think about how we're going to achieve business goals throughout the next year. And this is one of the unfortunate decisions we had to make. So, what will happen from here? I suggest you go home. You're welcome to go home, take time to process. If you have any questions, anything, you're welcome to reach out to any of us. I'm going to put that meeting in for Thursday. You're welcome to pull that forward. So, if you think about an alternative role or an idea that you want to put forward tomorrow or anytime between now and then you're welcome to do that. Um, alternatively, if you say, look, I accept that this is the situation and I'm happy to just be done with this and accept the redundancy, we're also happy to do that at any time between now and then.

[58] The second comments I find add to predetermination came at the end of the short meeting from Mr Knights who in evidence acknowledged he was the one making the decisions about this process and outcome. The oral evidence included that Mr McFedries was not available because of medical issues. Mr Knights' concluding words to KMW were:

These are like one of the, the really shit things about, you know, businesses and things like that. Especially when we meet great people like yourself and and [sic], the impact that you've had on this business. But at the moment, as [sic] [the former manager] said, it's just some things a business just doesn't doesn't work for us. And yeah, we just we need to make that hard decision and unfortunately , you're, you're within that role.

[59] I find it likely from the above that while KMW was being invited to contribute their thoughts and ideas to ZIB's decision making about whether to disestablish their role and while

the words of ‘proposal’ were used, the language and explanations at this stage through the former manager, through Mr Knights and replicated in the ‘proposal’ letter itself supports that a decision had been made to choose the role KMW had to disestablish and even that offers to help transition to new employment are difficult not to have taken as predetermination that KMW’s employment was to end.

Fast process

[60] KMW also submits the process was unreasonably fast. Based on the chronology I agree. Even beyond this first stage ZIB moved to terminate the employment even when a personal grievance had been raised due to insufficient information to feedback on. I will return to this below. There appeared to be no reasonable rationale for the unseemly haste. Mr Knights gave oral evidence when I asked him about this ‘rush’. He explained that in his experience people did not want things prolonged in these situations because it was stressful. Mr Knights confirmed in his oral evidence to me that he only had experience in Australian workplaces with such a process. Mr Knights did not impress as someone overly familiar with the requirement to consult and give time for this to be a meaningful exercise, something he acknowledged then led to engaging a New Zealand representative after KMW challenged the process for lack of information to feedback on after the 16 January 2024 meeting and ‘proposal letter’. I find that the rapid timeframe set alongside the predetermined language supports that a decision had already been made at this stage to select only KMW’s role to disestablish after a stated careful teams review of all roles.

Lack of information to feedback on

[61] KMW challenged the lack of sufficient information about the ‘proposal’ after this first 16 January 2023 meeting. KMW engaged legal counsel, and with counsel they attended a further online meeting on 24 January 2024 which was followed by a letter on behalf of KMW to ZIB challenging amongst other things the insufficiency of material to give meaningful feedback to and alleging the above predetermined language and rapid unreasonable process.

Was the information in the 16 January 2024 meeting and 'proposal letter' sufficient for KMW to consult on?

[62] As well as finding above that the first stage was rushed and predetermined KMW's role for disestablishment, I agree that there was little information to feedback on. The 'Redundancy Proposal' letter included:

After careful consideration of our current business needs, market dynamics, and operational efficiency, we have made the strategic decision to restructure our teams. As part of this reorganisation, we propose the redundancy of the marketing role, which you currently hold. However, we want to assure you that this is not a reflection of your performance, deduction or skills. In an effort to enhance cross-functional collaboration and streamline our operations, the responsibilities of the marketing role will be absorbed into the Australian production team. This integration is aimed at leveraging synergies between marketing and production functions, promoting efficiency, and ensuring a unified approach to our business objectives.

[63] What stands out here is that the role that KMW was employed to do was called 'Marketing Manager Australian-New Zealand'. There is reference to 'cross-functional collaboration' and 'streamlining of operations' as the reasons for proposing to disestablish that role, but nothing to say what these things were aimed at correcting. Nothing was explained about the inefficiencies across the Tasman (If that is what is being described) in relation to KMW's role and how ZIB considered that role and not other roles that could be restructured or disestablished to address this. I accept this would be relevant and important detail for KMW to have had to enable then to give any meaningful feedback.

[64] KMW was asked to consider other options or ideas within less than two days from receiving this information (or to have the option of accepting the redundancy) . This was unreasonable and lacked any form of genuine consultation as required. I accept there was little if anything for KMW to have meaningfully fed back on at this first stage.

Did further information provided give KMW sufficient to respond to?

[65] ZIB says that the information further provided corrected things by providing more detailed information.

Friday 25 January 2024 letter from the former manager

[66] ZIB responded through its by then engaged counsel to KMW's challenge and denied that the process had been unfair to that point. It denied any predetermination but in response to the request for further information ZIB's counsel attached a 'ZIB digital' letterhead letter addressed to KMW with no date and no signatory as to the writer. That said it could be reasonable to take it that the letter was from the former manager. At the end the letter it sought a renewed date of 2 February 2024 (a Sunday) for KMW to give feedback or that meeting in person could be arranged and that KMW's lawyer was welcome to attend. At the end it includes 'If you have any further questions, please don't hesitate to contact [the former manager's email].'

[67] The attached letter from what I take to be the former manager included reference to meeting on 24 January 2024 in a meeting that ZIB intended was for KMW to provide feedback 'However your lawyer explained that you felt the proposal had not been outlined to you in enough detail to allow you a meaningful opportunity to respond.' The letter continued that it was important that KMW had 'input into this process' and then set out 'Additional Information' including that 'at this stage, no final decision has been made in relation to the proposal.'

[68] Under 'Additional Information' ZIB stated:

Prior to presenting you with this proposal, we have given careful consideration to whether the current structure best meets the needs of our business. We consider that additional benefits could be derived from absorbing the duties currently falling under your role into the Australian production team. This will alleviate current management confusion with future decisions being made and

executed within Australia. Challenges with communication will be reduced because everyone will be working from the same office. Time zone efficiencies will be removed, NZ is 2 hours in front of AUS and the new structure will ensure all people are working in the same time zone. We felt these changes will improve overall productivity and remove any unnecessary double handling.

If we disestablish your role, the duties you currently perform would be absorbed in the Australian production team The letter then includes a table a column headed 'Duty/ Responsibility' and the second column aligning to the Australian position that would absorb that duty.

[69] I note that the table in the above letter lists 12 specific task duties such as 'Social media content. 8 posts per month/ Video Testimonials – 4 per year/ Event support & planning 1-2 per year.' No job description has been produced in these proceedings. I am satisfied it was never attached to the job offer and do not accept as plausible Mr McFedries explanation that the job advertisement for the role was the job description. Even if it could give some idea to the role, that advert shows a role beyond just twelve tasks. Even then this explanation goes to an end result of what to do rather than why. It is the 'why' that KMW has asked for more information about.

[70] I accept that this letter did not in reality provide further sufficient information for KMW to respond to, particularly about ZIB's stated 'careful consideration as to whether the current structure best meets the needs of our business.' Any review of what appears to be described as an operational review was never provided in any detail. I accept the submission that evidence at the Investigation meeting did not produce more clarity to this either. There was reference to a wider restructure for financial purposes that resulted in shutting down an operation in India, but I accept that the evidence was unclear as to the timing. KMW's evidence is that this happened while they were still employed. It is also difficult to see how this connected to the reasons given in the former manager's second letter (the purpose of which was specifically to address KMW being able to have input) which refers to the cross Tasman efficiencies to be gained due to communication issues and time zone challenges.

[71] I accept that the letter contained no explanation of what the 'challenges with communication' were that would be reduced by having tasks of KMW's role performed across

a number of Australian employed and based production staff in the business. I accept the letter contained no explanation as to what the issues were causing the ‘inefficiencies with time zone’ that would be reduced by removing KMW’s role to Australia. In turn I accept there was nothing explained about why the former manager included that ‘these changes will improve overall productivity and remove any unnecessary double handling’.

[72] KMW responded with a personal grievance based on their earlier challenges and included that the further information did not address the concerns about insufficient information and therefore was preventing KMW from giving feedback. For KMW it is submitted that ZIB’s position was to ‘box on’ with its process to an end result of termination despite the challenges raised. ZIB submits that it provided sufficient information and when KMW did not provide feedback it terminated the position based on its proposal.

[73] When KMW raised issues after this, placing specific questions about the insufficient information, ZIB’s instructed response was to refute it had not provided more information or to repeat what it had already explained. I accept this is what happened here.

[74] Standing back from the above I find ZIB did not provide sufficient information to support its stated reasons for not only proposing the disestablishment of KMW’s role but also how it based its decision that it was just KMW’s role proposed. This coupled with the predetermined language and the rapid process being applied which continued to ‘box on’ despite a personal grievance raised and the notice it was on that there was an obligations of good faith to provide more sufficient information to consult on leads me to find that the propose was not genuinely one of consultation but more of a ‘charade’ with an outcome to achieve.

[75] I do not find that ZIB’s procedural faults were mainly minor or rectified during the process. There was a significant deficiency in core information about how ZIB got to the end result of deciding the role was to be disestablished as was communicated in January to KMW. It has also not been cured by ZIB’s evidence in this investigation which I accept later changed to being a decision made for financial reasons rather than its January 2024 stated explanation that there were operational issues between the two countries including time zone differences, none of which have yet to be explained.

Redeployment

[76] To the above then comes the issue of redeployment. Even if ZIB were to say that in any event there were reasons financial that would otherwise have supported what it did by saving on the \$120,000.00 salaried position of KMW (something I do not consider was consistent in its evidence as noted above), its failure to redeploy meant that its termination of the employment of KMW was unjustified.

[77] There was at least one position that involved a digital sales role which was being advertised at the time of the proposal to disestablish KMW's role. The position was in Christchurch. There were other positions. Mr McFedries' oral evidence included he considered KMW would not have been suitable for any of these roles. He was not at the time involved in the proposal to restructure.

[78] In answer to questions about how ZIB formed a view that KMW was not suited to any other roles, Mr McFedries' evidence included that he understood KMW was not interested in a sales position because that was not a position they indicated interest in when he first approached them with the Marketing Manager role and two other roles - one of which was a sales position and again in a conversation he had with her in June 2023. His evidence also criticises KMW's skills and performance during her employment which is wholly inconsistent with ZIB's clear communications in January 2024 that the proposal had nothing to do with KMW's performance and the way they did their job and they were thanked for their efforts and work. If that was correct it remains far from what a fair and reasonable employer could have done to not have consulted with KMW at that time of proposing disestablishment of their role to have allowed input into what roles there were and how they could be redeployed. This is different to having to compete for any available role they ought to have had the opportunity to be redeployed even if this meant some level of training or development. I accept the submission that with KMW's past employment in sales they reasonably missed out on the opportunity to retain their employment based on ZIB forming its own views about their skills and experience without any consultation at all. Even if the decision to dis-establish the role was justified, this lack of opportunity to be redeployed into what I accept from KMW would have at least been continuance of a job, means I find the termination of the employment an unjustified dismissal.

Remedies

[79] KMW is entitled to be compensated for their grievances with compensation for the human effect on them resulting from the unjustified dismissal and the disadvantages grievance. I find it appropriate to consider global compensation.

[80] I accept the evidence of both KMW and their partner that the suddenness of the proposal to make KMW's role redundant delivered in pre-determined language on 16 January 2024 likely started at that point a degree of shock and stress and humiliation. I further accept that the manner in which ZIB did not seem to appreciate what a fair process was in relation to fundamental material to have provided about the rationale for the proposal to have exacerbated the human effect on KMW. I find it likely they continued with their multiple online activities and associated events as an 'influencer' and while ZIB questions how they could continue with this if so hurt and humiliated, I accept in some part KMW's explanation that they felt real embarrassment about people finding out they had been terminated from their employment so soon after starting.

[81] Further I accept in this context that KMW having to return to their previous employer so soon after leaving to ask for a job (of which there were none) resulted in considerable embarrassment. I accept KMW's partner's evidence about the adverse effect the termination had on KMW including her previous confidence and what he described as an observed increased level of anxiety and not sleeping exacerbated by worry about what those at ZIB were saying about her. I do not accept I have sufficient medical evidence to show me that an event in November 2024 was caused by the termination of the employment by ZIB and that causation would also be questioned in that KMW launched her business in that month. I find likely that considerable effort and energy went into this and did not just start in November 2024. The incorporation of the entity KMW set up to run this business predated the end of the employment.

[82] Standing back from the above I find that the combined effect of the process and the termination of the employment attracts a compensatory payment of \$20,000.00.

Loss of earnings

[83] I have considered the evidence toward lost earnings as a result of the grievance of unjustified dismissal only. The other lost earnings related to the misrepresentation claims which have been unsuccessful. I find it appropriate to award lost earnings to three months post the end of the employment at the level of the base salary of \$120,000.00 gross. I accept the evidence that KMW tried to mitigate their loss by seeking other employment. I am not satisfied I should however award beyond three months. I find it likely based on what is before me that KMW would have put considerable time and effort into developing their online beauty business which was launched in November 2024. I accept the submission for ZIB that this was something that was being planned and worked on before January 2024. The corporate entity that KMW is director of was incorporated well before they were terminated from their employment. While KMW appeared vague about their understanding of that entity I found this surprising given the level of apparent confidence and business acumen that is reflected in the communications I have before me in this matter.

[84] I find it appropriate to award lost earnings for three months based on the base salary of \$120,000.00 gross being \$27,962.30 gross.

Breach of good faith and penalty

[85] I accept that a breach of s4(1A)(c) of the Act occurred here in that insufficient information was provided with the proposal to disestablish the role after which the continuance of the employment was not achieved with some likelihood that it could have been particularly in relation to the failure to consult and consider redeployment. Such a breach can attract a penalty which is a sanction that is considered against factors under s 133A of the Act which are based on matters where there is a level of need overall for deterrence wider than the individual employment relationship.

[86] I accept the submissions for the applicant that ZIB did not meet the object of the Act to act with good faith in relation to the above. I accept there is some level here of a likely deliberateness in ending KMW's employment for a reason likely due to performance rather

than what was stated to be a wider team restructuring, information and evidence of which ZIB has struggled to be consistent about in its evidence as to the reason for this and more particularly was unable to provide any details about during the proposal when repeatedly asked. That ZIB continued on gave a level of deliberateness and sustained breach that supports a level of sanction for deterrence. However, this matter affected only one employee to whom compensation has been awarded for its effect. I also note that deterrence and lessons learned may well come from this determination in circumstances where ZIB appears not to have had previous penalties for employment matters. While KMW opines that this is because others have been too afraid to claim against the company for its treatment of them I have no evidence other than KMW saying this. Weighing the above I do not consider this matter appropriate for a penalty award.

Under s 124 of the Act are any remedies to be reduced for employee contribution to the grievance?

[87] I do not consider in the circumstances of the breach of good faith and the grievances made out that KMW contributed to the grievances to justify a reduction in remedies awarded.

Costs

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

[89] If the parties are unable to resolve costs, and an Authority determination on costs is needed, KMW may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum ZIB will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted especially given the current end of year timing of this Determination.

[90] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

Summary outcome of determination

[91] The following orders are made:

- a. Within 28 days from the date of this determination ZIB Digital Limited is ordered to pay KMW:
 - a. \$20,000.00 compensation under s123(1)(c) of the Employment Relations Act 2000;
 - b. \$27,692.30 gross in lost wages under s 128 of the Employment Relations Act 2000.
- b. All claims brought by KMW for loss of wages associated with misrepresentation of terms of their employment are unsuccessful;
- c. The application to award a penalty for the found breach of good faith under s4(1A)(c) of the Employment Relations Act 2000 is declined.

Antoinette Baker
Member of the Employment Relations Authority

¹³ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1