

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 337
3189339

BETWEEN

LEIGHTON MOSESE
Applicant

AND

AUCKLAND ONE RAIL
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Ben Thompson, counsel for the Applicant
Eloise Callister-Baker, counsel for the Respondent

Investigation Meeting: 16 February 2023

Submissions received: 1, 16 and 22 March 2023

Determination: 27 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Leighton Mosese and the respondent Auckland One Rail Ltd (AOR) have an employment relationship.

[2] Since 2014, Mr Mosese has been a Locomotive Engineer (LE), driving for the Auckland Metro Rail business now operated by AOR on behalf of Auckland Transport.

[3] The problem he has brought to the Authority for resolution, arose when a colleague, also an LE, was appointed to a more senior position of Driver Manager

(DM) without the position being advertised. AOR has a policy in employment of advertising vacancies except in certain defined situations. Without knowing of the vacancy, Mr Mosese could not express any interest in the position or participate in the recruitment process provided for by AOR under its policy.

[4] The problem has been advanced as a personal grievance. It was formally raised by Mr Mosese with a claim that AOR had taken unjustified action affecting his employment, or a condition of employment, to his disadvantage.

[5] The parties tried to resolve the grievance on their own terms. When that could not be done, they took part in an investigation meeting of the Authority. Several witnesses including Mr Mosese gave evidence and were questioned by his counsel Mr Thompson, counsel for AOR, Ms Callister-Baker, and by the Authority. Comprehensive submissions, focussed on the issues, were also presented and these have been very helpful.

[6] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or the submissions received.

The DM appointment

[7] In early March 2022, Mr Mosese learned that in February an appointment had been made to a Driver Manager position within AOR. Several times before, between 2017 and 2019, he had applied for a similar position when a vacancy had been advertised. He was unaware AOR had recruited again to fill the position, only finding that out just after the appointment was made and the appointee commenced in the position.

[8] Mr Mosese's union, the Rail and Maritime Transport Union (RMTU), took the matter up with AOR on 9 March 2022. Rudd Hughes, a union organiser, sent an email referring to the appointment of Guy Havill-Austin to a DM position. He said this appeared to the union to have occurred without any job advertisement or notification by AOR of recruitment for the position. Mr Hughes said that the employer had breached its current policy of advertising vacancies, and he questioned the 'integrity' of the appointment process. He acknowledged that AOR's policy did

have certain exceptions but claimed Mr Havill-Austin's appointment fell outside any of those. Mr Hughes said that members of the RMTU had been disadvantaged by the 'clear breach' of policy and that consequently AOR had exposed itself to multiple personal grievance claims.

[9] In his email of 9 March, Mr Hughes requested that Mr Havill-Austin's appointment be rescinded, so that the position could be advertised to allow 'all those interested the opportunity to apply'.

[10] Nine days later, on 18 March 2022, Mr Hughes received an email in reply from AOR's Head of People and Culture, Marianne Murray-Brown. Although she highlighted some 'mitigating' circumstances including urgency, Covid, and changes in leadership and personnel after a recent purchase by AOR of the business, she conceded that a particular exception to the policy had not applied in the circumstances. This was the exception stated at page 5 of the Recruitment and Internal Moves (RIM) policy document, that appointments could be made without advertising when there had been recruitment in the last three months to a similar role in the same location and a suitable shortlisted candidate, unsuccessful from that earlier occasion, could be offered the latest job.

[11] Ms Murray-Brown acknowledged the union was correct in claiming that the appointment of Mr Havill-Austin had occurred after the three month period stipulated in the policy, had elapsed.

[12] In her email she made no reference to any of the four other exceptions in the RIM policy document.

[13] Ms Murray-Brown did not support Mr Hughes suggestion that the appointment be rescinded. This seems unsurprising, as rescinding the appointment may have caused more problems than it fixed, particularly for Mr Havill-Austin who, as was observed by Ms Murray-Brown, had done nothing wrong. She nevertheless accepted without reservation that in the circumstances, 'employees missed the opportunity to apply for positions'.

[14] The correspondence between RMTU and AOR did not resolve matters and a grievance was formally raised by the union in May 2022. A statement of problem

was lodged by Mr Mosese in September 2022 and a statement in reply by AOR in early October, after unsuccessful mediation in August.

[15] The statement in reply takes a different approach to the matter than Ms Murray-Brown took in her March email to the union. During the investigation meeting and in submissions, AOR sought to distance itself from the views she had given to Mr Hughes. AOR has suggested that when she wrote to him, she had not been sufficiently informed of the matter to be able to give those views. She was not available as a witness to speak for herself, but in the absence of oral evidence from her, the next best evidence is her words in the email she sent to Mr Hughes on 18 March.

[16] In its statement in reply AOR said that its recruitment of Mr Havill-Austin to the DM position had been fair and reasonable in the circumstances, and that consequently Mr Mosese did not have valid grounds for raising a personal grievance. Even if its actions were unjustified AOR contended, Mr Mosese was not disadvantaged by them in his employment. His claim for remedies was rejected.

[17] The statement in reply put forward a second exception taken from the RIM policy to explain the absence of advertising. It allowed for a direct appointment to occur when an employee had been identified as suitable through a thorough succession planning process.

[18] In her 22 March email to Mr Hughes, Ms Murray-Brown had made no mention of this exception being applied in the circumstances.

Mr Havill-Austin

[19] The claim before the Authority has not been directed at Mr Havill-Austin personally in any way. His merit for appointment to the DM position has not been questioned by Mr Mosese or the RMTU.

[20] What is in issue is the procedure followed by AOR to secure the appointment. The issue is whether Mr Mosese had an expectation from his employment relationship that, subject to some exceptions, in response to an advertisement he could if he wished put himself forward for consideration to be appointed.

A policy may be part of employment, or conditions of employment

[21] A particular aspect of an arrangement between an employer and employee may be a 'condition' of employment while not being a term of the contract, as was explained by the Employment Court in *Downer New Zealand Ltd v Jones*¹ and earlier cases. The Court observed, '... not everything an employer provides, or an employee expects to receive, during employment is either a term or a condition of the agreement between them'².

[22] It follows that if to the disadvantage of the employee, an employer without justification fails to comply with such an arrangement or aspect of it, the employee may have a personal grievance of the disadvantage type under s 103(1)(b) of the ER Act.

[23] The employment relationships AOR entered into with Mr Mosese and the RMTU, tied the employer to observe and perform employment policies it had promulgated, such as the RIM policy. Mr Mosese and his union could reasonably expect its terms to be complied with by AOR.

[24] The RIM policy is expressed to operate in conjunction with applicable awards and agreements covering AOR employees. It is not to be found among any of the express or implied terms or conditions of Mr Mosese's collective employment agreement (CEC), but AOR does not dispute that generally speaking a policy may constitute part of employment or provide a condition of employment.

[25] Separately from its contractual obligations the employer had a statutory duty of good faith, which required AOR to comply with policies it had introduced and had represented to employees it would observe.

Recruitment and Internal Moves policy

[26] A key provision of the RIM policy is that all positions into which employees may be recruited will generally be advertised (clause 2.3). Also, when recruitment is underway, candidates are to be kept informed and up to date throughout the process (clause 1.3).

¹ [2018] NZEmpC 77, at [104]

² At [104]

[27] Although the RIM policy and procedures are expressed to be subject to variation or discontinuance in the absolute discretion of the employer, AOR does not argue that this wide discretion was invoked by it in this case. AOR contends that it did comply with the RIM policy, as there were circumstances allowing it to invoke one or both of two exceptions expressed in it.

Exceptions available in rare cases

[28] Only in rare cases can exceptions be made by AOR to the requirement to advertise. The two exceptions relied upon by AOR are among five which are to be found at the end of the RIM policy document, under the heading Exception Process. The provision containing all five is reproduced below, with the two relied on highlighted in bold.

Exception process

In rare circumstances, an exception may be made to the policy requiring all vacancies to be advertised. Appointments can be made without advertising in the following circumstances:

- **A vacancy where a similar role in the same location and at the same level was recruited in the last three months and a suitable shortlisted Candidate from the previous role is to be offered.**
- Where the recruitment of a role is confidential, with the approval from the GM P&C/P&C Manager and the recruitment Business Partner may engage directly with a potential Candidate or an external agency if required.
- **A direct internal appointment may occur when an internal employee has been identified as suitable through a thorough succession planning process.**
- In circumstances where there is a restructure and as a result several roles may be “spilled” - the initial scope of filling these vacancies should be inwardly focussed. On completion of this ‘current team selection process’ the roles will be advertised.

- Where a new permanent position is created that is currently filled with a contractor or temporary and:
 - a) The contractor has been in the role for 6 months or more; or
 - b) Where a role requires direct placement of a casual or fixed term to a permanent position under an enterprise or collective agreement.

[29] The introductory sentences to the five exceptions indicate that they are a code, rather than examples of the sort of circumstances that may permit a departure from the policy, particularly the general requirement to advertise vacant positions.

[30] For convenience, the two relevant exceptions highlighted above will be referred to as ‘the three month’ exception and ‘the succession planning’ exception.

Three month exception

[31] The Authority agrees with submissions for Mr Mosese that this exception could not have applied to the appointment of Mr Havill-Austin. This is simply because more than three months went by between the earlier recruitment when Mr Havill-Austin had been shortlisted as a suitable candidate, and his appointment as a DM.

[32] The earlier appointment process was concluded on 21 October 2021. Mr Havill-Austin’s appointment following the next process was made on 21 February 2022, a period of four months later.

Block of line

[33] AOR contended that while the total elapsed time since the earlier recruitment was more than three months, a reduction to that period should be made for the block of line which had suspended or limited rail operations between 26 December 2021 and 15 January 2022.

[34] Block of line is a planned period when trains do not run for certain hours each day over two or three weeks each year, so as to enable maintenance and development

work on the line to proceed safely and efficiently. It was an event anticipated and planned for in 2021/2022. Block of line had previously occurred almost annually.

[35] It ran from 26 December 2021 until 15 January 2022. Even taking those 21 days into account does not bring a reduction of the recruitment period to three months or less.

[36] The Authority agrees with Mr Mosese that while block of line brings with it an operational restriction to rail services for a period, it does not suspend the CEC or the employment of LE's, or the application to them of the RIM policy. He said, and the Authority accepts, there is no exemption from the employment agreement that comes into effect for block of line. During that period he remained a full-time permanent employee on pay, with rights and obligations.

[37] It is reasonable to attach some weight to the fact that Ms Murray-Brown, AOR's Head of People and Culture at the time, dismissed the three month RIM policy exception from having any application. She did so she said, after reviewing the issue. It is clear that in the nine days after receiving Mr Hughes email and before she replied, she made enquiries. She said she spoke to the individuals involved in making the decisions. She agreed the recruitment of Mr Havill-Austin 'was done after the three months outlined in the policy'.

[38] Three months is not necessarily to be taken as a purely arbitrary period, which might equally have been fixed at two months or four months or some other period, so that a 'near enough is good enough' approach could be justified. Its likely significance is recency or proximity to the previous recruitment, in terms of memory and knowledge that members of the recruitment panel might have retained from considering previous candidates.

[39] This is not a case where the three month period was exceeded by just a few hours, or by only a day or two, so that a *de minimis*³ approach could be considered reasonable.

³ The law does not concern itself with trifles.

[40] The Authority rejects the submission for AOR that three months is not to be strictly interpreted. That approach would raise the question; if not 3 months, then how long can the period be? Compliance would become arbitrary.

[41] The policy provides that exceptions to it are to be 'rare', which suggests the three month period is not to be observed arbitrarily or casually. The requirement that the recruitment process is to be 'robust, fair and equitable', suggests the same. 'About three months' is not a robust time period.

[42] Under the RIM policy AOR (as the successor of Transdev) was committed to providing 'a fair and transparent recruitment process'. Whenever any of the five exceptions are invoked, transparency will necessarily be removed or reduced, even if only temporarily. Mr Havill-Austin's recruitment was not advertised and Mr Mosese had no knowledge of it before the appointment was made. If transparency and AOR's commitment to transparency is to be suspended, the terms on which the exceptions are drawn up should be strictly interpreted and observed. Having a wide discretion and taking a liberal approach to the length of three months, defeats transparency and its promotion.

[43] For the above reasons the Authority finds the three month exception did not apply in the circumstances to permit an appointment to the DM position without advertising. By the time of Mr Havill-Austin's appointment, the three month period had elapsed by several weeks.

Succession planning exception

[44] The Authority also agrees with the submissions made for Mosese, that this exception did not apply to the appointment of Mr Havill-Austin.

[45] Ms Murray-Brown, who said she had spoken to the individuals involved in making the decisions, made no mention of this exception being part of the thinking or decision-making surrounding Mr Havill-Austin's appointment. If the exception had been considered and relied on, it could be expected that Ms Murray-Brown would have found that out and offered it to the union as an explanation for what happened. It was in AOR's interests to give an explanation to the union.

[46] Those more directly involved in the appointment gave evidence that Ms Murray-Brown did not speak to them about how they had approached the appointment of Mr Havill-Austin.

[47] In AOR's statement in reply, the succession planning exception is referred to in connection with the recruitment carried out in September and October 2021;

2.7 As a result of the extensive assessment process strong candidates were identified and the final selection for the one position was difficult as there were two closely ranked candidates.

2.8 It was decided that the second placed candidate as well as the up and coming talent would be part of a formal succession plan for future Driver Managers.

This involved working closely with them to support their career aspirations through utilising selected Driver Managers as mentors. Four of the candidates were selected for the programme including the Appointee [*Mr Mosese*].

2.9

2.10

2.11 A consideration in the decision to offer the Appointee the role was that he was a highly regarded close second in the merit based selection process and that he had participated in the succession programme that encouraged and fostered the career aspirations of the four selected candidates.

2.12 The impact of the severe COVID restrictions on the operational circumstances were also considered when the decision was made.

(underlining added)

[48] However there is no mention of the succession planning exception in emails between AOR's Train Crew Manager, Sally Husband, and AOR's People and Culture

team adviser, Jon Baxter, sent on 16 February 2022 when the appointment was about to be made. Mr Havill-Austin is referred to as having been the second choice in the previous round, following vigorous testing and a comprehensive interview by an interview. It could be expected that if he had been within the scope of the exception in the RIM policy, that circumstance would have counted more as a reason for shortening the appointment process than his placing second in the previous round.

[49] The Authority is satisfied that AOR in February 2022, had not developed a ‘thorough succession planning process’, within the contemplation of the policy exception as written in the RIM document. Even if it had, Mr Havill-Austin as a person considered for appointment did not, in the circumstances, undergo such a process. It is intended to be a *through* such a process that a direct recruit will be identified as suitable for appointment.

[50] The evidence given for AOR indicates to the Authority that those directly involved in the recruitment of Mr Havill-Austin, were not familiar with the succession planning exception as provided in the policy document. When addressing in evidence the circumstances of the recruitment, they appeared to have misunderstood its meaning.

[51] Ms Sally Husband is a Train Crew Manager for AOR. She told the Authority that because of the urgency to fill a DM role, which had unexpectedly become vacant in February 2022, she considered it appropriate to offer the role to Mr Havill-Austin rather than readvertise it. She said this was for two reasons; first, he had been a close second in the September-October 2021 recruitment round; and second, he had been identified for succession planning for the DM role after the previous round.

[52] On 16 February 2022 she contacted Mr Jon Baxter who was then assisting AOR’s People and Culture team while Ms Murray-Brown was on leave. She mentioned the urgency of the situation and asked if Mr Havill-Austin could be appointed off the back of the September-October 2021 recruitment round, because he had been runner-up to the successful applicant then.

[53] Mr Baxter replied within the hour, simply saying that if the other panel members supported the appointment then he would support it too.

[54] In this email exchange there is nothing said about the RIM policy or any of the exceptions to it. The three month period or succession planning are not mentioned at all.

[55] Mr Baxter explained this to the Authority in his evidence, saying he had not been aware of the policy on 16 February when he replied to Ms Husband.

[56] Ms Husband said much the same. She had not been aware of the policy, or at least the words of it.

[57] Ms Husband described her understanding of a 'bespoke process', meaning one tailored to the individual employee or LE. She referred to it as a development and mentoring plan. Although Mr Havill-Austin was identified for succession planning, she said in fact he had not undertaken any succession planning process because of Covid-19 restrictions on having face to face meetings.

[58] Ms Erica Meredith is a People and Culture team Advisor of AOR. She described succession planning. She said there is no formal process and no applicable policy. Succession planning looks different for each employee, she said, and employees would not be told they had been identified for it, even while work was done to develop and mentor them. She explained succession planning as being, 'it is what we want it to be'.

[59] When Ms Murray-Brown made enquiries before she answered Mr Hughes complaint in March 2022, she spoke to Ms Meredith briefly. Ms Meredith said she had emphasised the three month exception as creating the strongest case for directly recruiting Mr Havill-Austin.

[60] The Authority considers there are no features of a *thorough - succession - planning - process* discernible in the arrangements understood and described by Mr Baxter, Ms Husband, or Ms Meredith. Features indicating a 'thorough process' are likely to include a degree of formality, probably in writing to give certainty and transparency, a programme, details of planning, progression, measurement, monitoring and review. The process is likely to provide for an assessment of suitability for future promotion to be made at some point.

[61] The process needs to be *thorough* to bring transparency and discourage appointment based on favouritism or bias.

[62] What is meant by a process is usually something of general application, not 'bespoke', and not something made up on the go, or ad hoc, and it is unlikely an employee will be left unaware that they are engaging in a process. Mr Mosese described it as a 'formally communicated' process which an employee could apply for approval to engage in.

[63] The Authority is satisfied from the evidence that the succession planning exception as described in the RIM policy, was not the same arrangement that members of the appointment panel may have had in mind when appointing Mr Havill-Austin. Uppermost in their mind was the urgency of the situation. Possibly in their minds was the three week block of line, although, from Ms Meredith's evidence, AOR had not previously taken block of line into account to reduce the three month period. To the extent they had the three month period in mind, the panel viewed it generously and extended the period well beyond three months to meet the need for a quick appointment.

[64] What was not in their minds was a process to facilitate the *identification* of an internal employee as being someone suitable for appointment. They have described a process for a different purpose, being to facilitate the *development* of individual employees so that they might later be viewed as suitable for appointment.

[65] Mr Baxter said he was not aware of the policy on 16 February. It seems he drafted AOR's statement in reply in June 2022, in which a 'formal succession plan' is referred to (at para 2.8). Ms Husband said there was no formal process. Mr Baxter had possibly by June 2022 read the succession planning exception in the policy and understood that it was intended to be a formal process, which accords with Mr Mosese's view of it and also the view of the Authority.

[66] Because of Covid the succession planning process described for Mr Havill-Austin, could not be applied, so it is hard to see how his suitability for appointment could be identified from a process which had not been able to be followed. That is not to discount the weight that could be given to his having been the runner-up in the

previous recruitment round, but the exception is not framed around his placing in an earlier round.

[67] Because Ms Murray-Brown's evidence was unavailable, the Authority does not rely on the single email she wrote to Mr Hughes and the silence in that email about the succession planning exception. The email is consistent with what Ms Meredith said about urgency being the real driver of the truncated recruitment process.

[68] The Authority concludes that the succession planning exception in the policy was not applied by AOR in the circumstances. It cannot be invoked after the event by the employer to justify its actions.

Extenuating circumstances

[69] The urgency of the situation is a matter of mitigation, not excuse. There is no defence of necessity available, particularly as the circumstances seem to have arisen out of AOR's deployment of resources and planning. The circumstances did not arise from natural disaster or similar supervening event totally outside the control of the employer. Covid was present and causing disruption, but by 2022 AOR could not have been in much different a situation as many other employers, particularly in the business of public transport at that time. If a penalty had been claimed for breach of an employment agreement, mitigation could have operated to reduce the amount.

[70] The February 2022 recruitment took place because a DM position became vacant. Mr Baxter in his evidence for AOR said this was unexpected and had resulted from the 'demotion' of a DM. Mr Mosese in his evidence said the DM had 'left' that role because of allegations of misconduct. Either way, the circumstances do not suggest that AOR had no control over the way matters progressed and was unable to take measures to delay the departure from the role of the outgoing DM.

[71] The circumstances suggest to the Authority that planning for occurrences such as sudden illness (especially by 2022 in times of Covid), resignation, disciplinary demotion, or other not uncommon occurrences, was lacking in a business where maintaining competency assessments of LE's was so vital. The February direct recruit could have become ill immediately after being appointed, and without an

adequate back-up or risk management plan, AOR would have again been faced with the same conditions of urgency.

[72] The Authority considers that AOR contributed to the situation it described as an urgent one. It must bear responsibility for that without claiming it was justified in departing from the condition of Mr Mosese's employment that required, subject to defined exceptions, all vacancies to be advertised.

[73] The Authority agrees with submissions made for Mr Mosese, that a fair and reasonable employer could have utilised other resources to meet the urgency of the situation requiring competency assessments to be done. There were alternatives to directly recruiting a DM on 21 February 2022.

[74] The Authority accepts that there were alternatives, some which could have shortened the time needed for a recruitment round. The union was not consulted to see if some agreement could be reached to cover the situation, although it seems from the CEC that seeking a variation to the agreement would have required too much time to seek the consent of a majority of union members. Subject to meeting licencing requirements, it may have been possible to recruit on a casual or fixed term or contractor basis to, gain some time.

[75] It seems that the use of Driver Trainers to cover the immediate need, was available as an option, but was not taken up by AOR.

[76] It was shown to the Authority that the use of Driver Trainers to administer the Competency Management System (CMS), was within the position description of Driver Trainer. The Authority also accepts that there is no reason why, particularly with the co-operation of the union, the normal recruitment period itself could not have been shortened to relieve some of the urgency arising from the CMS work.

[77] The AOR ruled out the use of its simulator as a means of addressing urgency. It said that the simulator was prone to malfunction, which seems an unsatisfactory situation to have been allowed to continue.

[78] Mr Mosese's rights should not have been regarded as expendable, when planning or administrative deficiencies within AOR were largely the cause of the situation.

Disadvantage

[79] AOR in submissions referred to the Employment Court decision in *Kang & Saena Company Ltd*⁴ as an example of a breach (of s 65 of the ER Act) not causing disadvantage. On the facts of the case, that was because the employee had been able to be informed by alternative means of the contents of standard provisions of an employment agreement, which document she had not been given as required by the ER Act.

[80] In the present case, Mr Mosese lost an opportunity which for all practical purposes was not, and is not, able to be retrieved and offered to him. He has been permanently disadvantaged.

Unjustified action

[81] For the above reasons the Authority finds that the failure to advertise the vacancy to which Mr Havill-Austin was appointed was not justified. The test of s 103A of the ER Act has not been satisfied by AOR. Objectively, the employer's departure from the clear RIM policy it had promulgated, was not what a fair and reasonable employer could have done in all the circumstances at the time that action was taken.

[82] The Authority finds that Mr Mosese was disadvantaged in his employment or conditions of employment. He felt disappointed in his employer when he was entitled to expect better treatment. He was not given a chance to apply for the vacancy and be considered for appointment on his merits, as he had demonstrated them to be during his service.

[83] Whether that chance, if he had been given it, would have led to appointment cannot be determined with any certainty. He may not have applied, as had happened some earlier vacancies. He may have applied but been unsuccessful. Or he may have been successful but withdrawn from appointment. These are matters that may be relevant to the assessment of quantum of compensation but not liability for unjustified disadvantage action. Mr Mosese was denied a tangible and valuable opportunity that was for him to take or leave. He suffered disadvantage as a result.

⁴ [2022] NZEmpC 151

Mr Mosese has a personal grievance

[84] There is no argument that Mr Havill-Austin who was appointed to the position of DM, was the best appointee on merit. But the end does not justify the means in this case, which saw the rights of Mr Mosese and possibly of other potential candidates, overridden. His trust and confidence in his employer was damaged or diminished as a result. It was a disadvantage in his employment to experience his employer's unjustified failure to comply with its obligation to advertise a position. The Authority finds that Mr Mosese has a personal grievance.

Settlement of the grievance

[85] Mr Mosese's claim to have the appointment of Mr Havill-Austin set aside was withdrawn following discussion at the investigation meeting. The Authority's view was that ordering such a result would cause injustice, be contrary to the objects of the ER Act and not be in compliance with the role of the Authority under the Act.

[86] The remaining remedy sought is compensation for both loss of dignity and injury to feelings suffered by Mr Mosese, and for loss of a benefit which he might reasonably have been expected to obtain if his grievance had not arisen.

[87] An award of up to \$15,000 in total is sought under both limbs of s 123(1)(c) of the ER Act.

[88] Looking at the harm caused to Mr Mosese, reasons why employees might apply for a position on one occasion but not the next time the same vacancy comes up, are endless and arise from a diverse range of personal circumstances, and alteration to those from time to time.

[89] The Authority places no weight on predictions, even his own, of whether Mr Mosese would have applied for the February vacancy if it had been advertised. His past conduct in that regard is not a reliable indicator of his enthusiasm and career ambition either. The vacancy was not filled in a way where these things could be revealed.

[90] It is relevant that AOR is a large organisation in which recruitment to DM positions has been reasonably frequent. It is probable there will be further

opportunities, and sooner rather than later. Mr Mosese has a reasonably good chance of eventually being appointed to a DM position, as his experience is growing while he continues to serve AOR. There is a basis for more than a token level of compensation for loss and injury.

[91] The damage extends beyond a breach of the Policy and into the CEC itself. Under the heading 'Employment Philosophy' at clause 7 of the CEC, AOR has committed itself to providing 'fair and equitable opportunities to all'. Skilled staff are expressly acknowledged to be the main resource of the relationships between AOR, its employees and their union. Employees are promised by AOR 'a chance' to develop career paths and access higher earning and developmental opportunities. AOR also committed itself to promoting confidence among employees that their employment relationship would be based on trust, goodwill, and mutual respect. The actions of AOR at the heart of this grievance claim have steered away from that goal, as Mr Mosese felt.

[92] 'Fair and equitable' are powerful and meaningful words in any serious context, not the least employment relationships. These are not to be read as mere words of comfort or embroidery. They are the promise of the employer and they should be fully complied with unless any of the defined exceptions apply to the circumstances.

[93] In February 2022, Mr Mosese was not provided with a fair and equitable opportunity to apply and be considered for appointment to the DM position.

[94] In assessing compensation under the two limbs of s 123(1)(c) of the ER Act, the Authority also takes it into account that AOR's actions were not aimed at Mr Mosese personally, to try and obstruct him from seeking promotion. The employer's default seems to have arisen because of internal planning problems with regard to having certain personnel available in the early part of the year. Also, AOR is likely to have still been adjusting to its acquisition of the Transdev business. Covid inevitably contributed to the problems.

[95] If Mr Mosese had been given the chance to apply it is possible he may not have, just as he did not apply on earlier occasions. It is likely he would not have been successful, assuming Mr Havill-Austen also applied. It was not an absolute right to

appointment he lost. Availability of the right to apply and be considered was contingent on whether any of the five exceptions to the RIM policy could apply in the circumstances, so that recruitment could be direct and without advertisement. If so, there would not have been an opportunity to apply. When properly applied, the exceptions are wide-ranging and could potentially have limited the requirement to advertise on a number of other situations. Any assessment of probability must consider these contingencies, against which Mr Mosese's loss of expected benefit is to be measured.

[96] Certainly, he could expect that if none of the policy exceptions applied then he would have an opportunity to apply and be considered for the DM position.

[97] As Mr Mosese had been RMTU Branch Secretary for four years, he clearly would have developed from that a strong sense of justice in the workplace, and also seen as important the need for his employer to respect conditions of employment for himself and others, including union members. He has suffered disappointment and lowering of regard or respect for his employer because of its actions, which may demoralise him. Mr Hughes and Natasha Petrucco, Mr Mosese's partner, gave compelling evidence about the personal effects the grievance has had on him, including lost motivation and disillusionment. He has been harmed.

[98] Against that Mr Mosese from his service would have acknowledged that the matters of mitigation Ms Murray-Brown set out in her email to Mr Hughes were real limitations which can arise even with good planning. Covid is a good example. These did not excuse AOR's actions, but they did provide some explanation and show that as with most workplaces, AOR's was not perfect.

Compensation

[99] The Authority considers the total compensation that should be awarded to Mr Mosese is \$9,000, without deduction, as nothing he did contributed to the situation that gave rise to his grievance.

[100] The amount awarded is apportioned as \$5,000 under s 123(1)(c)(i) and \$4,000 under s 123(1)(c)(ii) of the ER Act.

[101] AOR is ordered to pay the compensation to Mr Mosese within 21 days of the date of this determination.

Costs

[102] Mr Mosese is entitled to a contribution to his legal costs of representation. If the parties cannot agree on the amount, the Authority will determine it based on the usual daily rate awarded in cases such as this one.

[103] If an application for costs becomes necessary, it is to be made within 21 days of the date of this determination, and any reply is to be made within a further 14 days of any application made.

Alastair Dumbleton
Member of the Employment Relations Authority