IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 389
5624085

	BETWEEN	DALE NORMAN Applicant
	AND	CANAM MANAGEMENT SERVICES LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Nick Carter, Counsel for the Applicant Loukas Petrou, Advocate for the Respondent
Investigation Meeting:	7 and 8 November 2016
Determination:	28 November 2016

DETERMINATION OF THE AUTHORITY

A. The real nature of the employment relationship at the time Canam Management Services Limited (CMSL) gave Dale Norman notice of the termination of his employment was ongoing and not casual.

B. CMSL actions in dismissing Mr Norman, and how it carried out his dismissal, were unjustified.

C. In settlement of Mr Norman's personal grievance for unjustified dismissal, CMSL must pay him the following sums within 28 days of the date of this determination:

(i) $12,026 as reimbursement of lost remuneration; and

(ii) $8,000 as compensation for humiliation, loss of dignity and injury to his feelings.

E. Costs are reserved, with a timetable set for memoranda to be

lodged if an Authority determination on costs is necessary.

Employment Relationship Problem

[1] Canam Management Services Limited (CMSL) employed Dale Norman in an IT support role in June 2010. His job title was initially IT Administrator but later changed to IT Manager. CMSL employed staff who worked for Canam Construction Limited (Canam), part of a commercial group that provides construction services.

[2] Mr Norman's employment agreement with CMSL, dated 3 July 2010, required him to be available for a minimum of 20 hours a week. He sometimes worked longer hours when business demands required. In addition to his work commitments to CMSL Mr Norman operated two small businesses of his own – one was a small web hosting service and the other, which he began in 2014, was a photography business using drones for aerial photography. In 2015 Mr Norman decided to resign from his job with CMSL to pursue prospects developing his aerial photography business. Mr Norman discussed his plans with Canam's managing director Loukas Petrou and then, on 22 July 2015, submitted his notice in writing. His employment agreement provided for one month's notice, making his last day of work 21 August 2015, but Mr Norman offered to work beyond that date if CMSL needed longer to find a suitable replacement.

[3] Around three weeks after handing in his notice Mr Norman learnt his aerial photography business would not get a contract he had relied on getting. As a result the business would not generate enough revenue to sustain him in self-employment. Faced with the prospect of considerably less income than he hoped for, Mr Norman approached Mr Petrou about the prospect of returning to work for CMSL.

[4] Mr Petrou agreed Mr Norman could continue to work for CMSL beyond 21 August 2015. The nature of the arrangement under which Mr Norman kept working for CMSL was the main issue of dispute in the matter before the Authority. Mr Norman said he had "withdrawn" his resignation and, with Mr Petrou's agreement to him doing so, he returned to work on an ongoing part-time basis under the same terms of employment as he previously had. Mr Petrou insisted there was no such agreement. He said Mr Norman's work for CMSL from August 2015 was on a casual basis until "a suitable replacement" was found, either by employing a new person or

by arranging for its IT server provider, a business called OneNet, to do the work Mr Norman carried out in his role.

[5] On 7 March 2016 Mr Petrou advised Mr Norman that CMSL had employed a "dedicated IT person", who was starting work that day. Mr Petrou gave Mr Norman notice that his employment was to end in four weeks' time, on 1 April 2016.

[6] Mr Norman raised a personal grievance for unjustified dismissal. In his application to the Authority he sought orders for payment of lost wages and distress compensation along with a penalty for breach of good faith. CMSL replied that Mr Norman's employment, from August 2015, "was simply an alternative casual arrangement until we found someone else" and that it had provided notice in March 2016 so he could "spend one month with the new person for a proper and complete transition".

The Authority's investigation

[7] For the purposes of investigating Mr Norman's claim the Authority was provided with written witness statements from Mr Norman, his wife Lamanda Brown, Mr Petrou, Canam director and general manager Andrew Clark, OneNet sales manager Steve Victor, CMSL human resources and payroll manager Ashika Larking and CMSL's current IT manager Yumiko Grayston.

[8] Ms Larking had begun working for CMSL as an office administrator in September 2015. Her duties were expanded include to some IT administration and she was later appointed as CMSL's human resources and payroll manager.

[9] Ms Grayston was employed to replace Mr Norman as IT manager for the business from 7 March 2016. It was a role Ms Graystons had previously held between 2006 and 2008.

[10] Under arrangements made at an Authority case management conference six weeks earlier, Ms Grayston was expected to attend the investigation meeting. However she was not there on either day. She was said to be on annual leave in the South Island. Her statement could not be tested and was set aside.

[11] The other witnesses did attend and each, under oath or affirmation, answered questions asked by me and the parties' representatives. The representatives also had an opportunity to provide oral closing submissions on the factual and legal issues for resolution.

[12] At the end of the investigation meeting an oral indication of preliminary findings was given, now confirmed by this written determination.[1] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[13] From the investigation the following issues required determination:

(i) What was the nature and status of the employment relationship between Mr Norman and his employer by the date of his dismissal on 7 March 2016 – was it permanent and ongoing or had it become, from August 2015 onwards, "an alternative casual arrangement" pending recruitment of a replacement for his position?

(ii) If the employment relationship was casual, was the decision and manner of terminating the employment on 7 March 2016 justified (under s 103A of the Employment Relations Act 2000 (the Act))?

(iii) If the employment relationship was ongoing, was the decision and manner of terminating the employment on 7 March 2016 justified (under s 103A of the Act), including whether consultation with Mr Norman about the change was required?

(iv) If the CMSL's actions were unjustified, what remedies should be awarded, considering:

(a) Lost wages (subject to evidence of reasonable endeavours by Mr Norman to mitigate his loss); and

(b) Compensation under s123(1)(c)(i) of the Act?

(v) If any remedies are awarded, was there any blameworthy conduct by Mr Norman that contributed to the situation giving rise to his

[1] Employment Relations Act 2000, s 174 and s 174B.

grievance and required a reduction of those remedies, under s 124 of the Act?

(vi) Did the employer's actions amount to a breach of its duties of good faith to Mr Norman and, if so, should a penalty be imposed, and if so, of what amount?

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

The nature and status of the employment relationship by 7 March 2016?

[14] Two particular aspects needed to be considered in determining the nature and status of the employment relationship as it continued from August 2015 until 7 March 2016.

[15] Firstly, findings were required about what was agreed when Mr Petrou and Mr Norman spoke in August 2015 about whether Mr Norman could keep working for CMSL. There was a 'he said, he said' contest in the evidence of the two men about their discussion. It was not, on all the available evidence, a contest that could simply be decided on grounds that one of the two men was more reliable and credible in their account of what was said. It had to be resolved, in terms of findings that the Authority could make on the balance of probabilities, on the basis of what could be discerned from their subsequent conduct and what would be apparent from that conduct to an objective observer familiar with the background and circumstances.

[16] Secondly, there was a question over whether the employment relationship from August 2015, even if it had continued on some changed and casual basis, had reverted to its previous permanent and ongoing basis by the time Mr Petrou gave Mr Norman notice on 7 March 2016 that his employment was to end on 1 April.

[17] The following explanation by the Employment Court of how "casual employment can mutate to employment of continuous and indefinite duration" was relevant (with bold emphasis added):[2]

> The Court recognises that the nature of employment or working relationships may change over time, requiring the Authority or the Court to assess the nature of that relationship at the time appropriate to the proceedings. Where the claim is one of unjustified dismissal, **the relevant time is when the**

[2] *Rush Security Services t/a Darien Rush Security v Samoa* [2011] NZEmpC 75 at [19], [23] and [24].

> **relationship terminated and this may be different from what it was when it was first established**.
>
> I respectfully agree with the judgment in *Jinkinson* that whilst such change may sometimes result in this being evidenced in explicit agreement between the parties, more **often such changes are gradual and subtle and occur in day to day conduct**. These, when viewed overall, may lead to a conclusion that the parties have agreed implicitly to vary their original agreement for casual employment.

[18] In the earlier *Jinkinson* decision the Court said the Authority must consider the "real nature of the relationship" of the parties. If the reality was found to be at odds with the label one or both parties gave to the relationship, "substance should prevail over form". If the parties' mutual employment related obligations only existed during periods of work, the employment would be regarded as 'casual'. However the employment relationship would be regarded as 'ongoing' if there were found to be mutual obligations continuing between periods of work. Where the parties' conduct gave rise to legitimate expectations of further work being provided and accepted, there was a corresponding mutual obligation on the parties to satisfy those expectations. Whether mutual obligations existed to provide and to perform work were largely questions of fact.[3]

[19] Indicators that an employment relationship was, in reality, ongoing rather than casual included:[4]

> (a) The number of hours worked each week.
> (b) Whether work is allocated in advance by a roster.
> (c) Whether there is a regular pattern of work.
> (d) Whether there is a mutual expectation of continuity of employment.
> (e) Whether the employer requires notice before an employee is absent or on leave.
> (f) Whether the employee works to consistent starting and finishing times.

What was agreed in August 2015?

[20] Although neither man was entirely sure of the date that Mr Norman talked to Mr Petrou about the prospect of staying on at CMSL, it was probably on 18 or 19 August, shortly before the notice Mr Norman had given on 22 July was due to expire. No written note or other record was made at the time of their discussion or soon after. However the resignation letter Mr Norman had given Mr Petrou on 22 July became

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[3] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37], [39], [41] and [52].
[4] At [47].

relevant to Mr Petrou's evidence about what he said became the arrangement after 18 or 19 August. Mr Norman's resignation letter read:

> As a follow up to the conversation we had on Monday I wish to hand in my resignation as I've been given a number of opportunities that will allow myself to become a full-time self-employed photographer/videographer in the years to come.
>
> As this work requires me to drop everything at a drop of a hat I won't be able to commit myself to IT support role that Canam requires.
>
> I understand that to find a suitable replacement for myself w[ill] exceed my term of my notice period of 1 month and thus I am willing to extend working beyond this when possible to aid in the transition.

[21] When he got that notice on 22 July Mr Petrou wrote the following note on the letter: "Last day 21 August but could work longer as required". Notes from an executive management group monthly meeting held on 17 August, and attended by Mr Petrou and Mr Clark, included a reference to the same effect: "Dale Norman has resigned to pursue his own business but happy to do work for us (at the same rate) until we find replacement".

[22] Mr Petrou's evidence was that what he then agreed to, in the 18 or 19 August discussion about Mr Norman's change of plans, was for Mr Norman to keep working for CMCL until a replacement was found and to 'aid in the transition' for a new employee. In answering questions during the Authority investigation about that discussion Mr Petrou twice referred to the arrangement as something he thought, at the time, would last only some weeks, not months. He used the phrases "a few weeks" and "maybe two or three weeks".

[23] However Mr Norman was adamant he had said he needed to "withdraw" his resignation. From the discussion with Mr Petrou that had followed that request, Mr Norman said understood he remained working at CMSL indefinitely on the same terms and conditions. He insisted there was no discussion of working only until a replacement was found. He said Mr Petrou told him that Ms Larking was due to start work as an administrative assistant. Mr Norman said he suggested Ms Larking could also assist with some of his IT administration work. Mr Norman knew Ms Larking from a previous period that she had worked on an overseas project for Canam.

[24] Several factors objectively favoured Mr Norman's account of the basis on which he kept working for CMSL over CMSL's assertion that "it was simply an alternative casual arrangement until we found someone else" and "there was no expectation in terms of performance and attendance".

[25] Firstly, Mr Norman continued to do largely the same work for the same pay and used the same title, as IT manager, in his dealings with staff and people outside the business. He did hand over some administrative tasks to Ms Larking but his role was largely technical, and it was him and not her who was able to do those technical tasks. The reduction of time he spent on some administrative tasks did not reduce his hours of work for CMSL below the weekly minimum of 20 he was required to do under the terms of the employment agreement he had signed in July 2010.

[26] Secondly, Mr Norman was expected to be available five days a week. Ms Larking, in her oral evidence, described Mr Norman as "quite punctual" and "always in the office by 7am" before her. She said he often left the office between 10.30am and 12 noon each day and could not be contacted after then. However Mr Norman said he sometimes went on site visits at those times, after telling office staff that he was leaving. Pay records for the period from late August 2015 to late February suggested Mr Norman regularly worked more than the weekly minimum of 20 hours his employment agreement required.

[27] Thirdly, Mr Norman sought and took paid annual leave, including days over the 2015/6 summer holiday period, and was paid for two days sick leave between September 2015 and March 2016. His annual leave entitlements also continued to accrue in the period from late August to early March.

[28] Fourthly, there was nothing to suggest any weekly check was made of his availability for work or the availability of work at CMCL during that period. Rather there was a mutual expectation that he would keep working and there was work for him to do.

[29] Measured against the *Jinkinson* criteria, the regular pattern of work, hours worked, working times, leave arrangements and the apparent continuity in what was expected and done, indicated an ongoing rather than casual employment relationship.

[30] Three further factors supported such a conclusion.

[31] Firstly, as an instance of subsequent conduct, Mr Petrou made no real effort in the ensuing months to find a replacement for Mr Norman. In his oral evidence Mr Petrou accepted there was "no active search" by him during that time. The steps that led to Ms Grayston's employment began at her initiative, not his. In early February 2016 Ms Grayston had unexpectedly contacted Mr Petrou by email to ask whether Canam might have any administrative work she could do. Mr Petrou then thought she was someone who, given her previous experience, could take over the IT manager role. He arranged to meet her and offered her the job.

[32] OneNet, the provider of Canam's 'cloud' services, had proposed during the last quarter of 2015 that it could provide onsite IT services, which was the work that Mr Norman did. However, after talking about it with Mr Norman, Mr Petrou did not pursue that proposal. Consistent with their other evidence, neither man agreed entirely with the other man's account of that discussion. Mr Norman's account was that he said it did not make sense to pay OneNet staff to provide those onsite services at a considerably higher hourly rate than what he was paid. Mr Petrou agreed Mr Norman had referred to the higher rate but said Mr Norman mentioned "someone" being paid that rate rather than himself. Mr Petrou suggested that choice of words was consistent with an understanding that Mr Norman was not the person who would continue to be employed in the role. Relevant for present purposes was the fact that Mr Norman continued to be employed by CMSL to do the work rather than being replaced by an external provider.

[33] During the second day of the Authority investigation, and for the first time, Mr Petrou suggested Mr Norman had been asked, at some unspecified time, to help draft an advertisement for his job. Mr Petrou made the suggestion during his questioning of Mr Norman. Mr Norman said he had no memory of any such request. Mr Petrou then sought to produce an email from an administrative assistant that he said supported his suggestions. He was denied leave to do so at that stage of the proceedings. It was not evidence CMSL had provided or referred to in its statement in reply or witness statements. No such document was lodged in accordance with the Authority's directions for providing relevant documents before the investigation meeting. No account was taken of it, or any reference to it, in reaching the findings made in this determination.

[34] The second further factor supporting the conclusion of ongoing employment was CMSL's failure to make any written record of the alleged change to the basis of Mr Norman's continued employment after 21 August 2015. At the time of the August discussion Mr Norman was still working under the terms of his written employment agreement signed in 2010. Because his July notice never took effect, the employment continued. If a change to the nature of his employment had been agreed at that time, the variation should have been recorded in writing.[5] As the party with the duty to provide and keep a copy of any intended agreement (including a variation), CMSL carried the burden of any doubt created by a failure to do so. It could have documented a supposedly 'casual' arrangement or, if there were truly an agreed term that Mr Norman would continue to work only until a replacement was found, have made a fixed term agreement identifying the occurrence of that 'specified event' as the reason that the employment would end.[6]

[35] A third further factor relates to another instance of Mr Petrou's subsequent conduct. Mr Norman, in closing submissions, submitted that the wording of an email Mr Petrou sent Mr Norman on 7 March had, significantly, not referred to any supposed agreement that his employment since late August was only on a casual basis.

[36] The email was Mr Petrou's written follow-up to his verbal advice to Mr Norman earlier in the morning of 7 March that his employment was to end. It explained that Ms Larking had moved to payroll and human resources duties so no longer had time for IT administration duties. It said Ms Grayston had been employed to do those duties but as she was "competent in IT and well aware of the requirements of our business … it [made] sense for her to be our dedicated IT person working exclusively for Canam". It referred to a "need to rationalise our business and streamline what we do". It described Mr Norman as "our IT person on a part time basis that also runs his own business" and included the following description of why his employment was to end:

> Recently you resigned to pursue your own business and when the contract you had did not quite work out you asked to stay longer. Now is time for you to move on with your private business and for us to focus with a dedicated person to look after IT exclusively for Canam.

[5] Employment Relations Act 2000, s 63A(1)(e) and s 65.
[6] Employment Relations Act 2000, s 66(1)(b).

[37] While Mr Petrou's email then also included an offer to "use" Mr Norman "as a consultant/independent contractor as and when required" for "some high level IT services" after 1 April, he did not refer to Mr Norman's employment ending on the basis of any agreement that it had continued on a 'casual' basis only from late August.

Had the basis changed from casual to ongoing after seven months?

[38] Those factors supported the conclusion that the real nature of Mr Norman's employment from late August on was ongoing rather than casual. However, if there had been either an express or implied 'casual arrangement' from late August, the day to day conduct of Mr Norman and CMSL over the ensuing six months suggested his employment had become of continuous and indefinite duration. If the *Jinkinson* indicators discussed above were not immediately established from the point at which Mr Norman carried on in the job from late August 2015, they were (for the reasons noted earlier in this determination) nevertheless firmly established by what both Mr Norman and CMSL were doing by early March 2016. Assessed at the time that the relationship was terminated, by notice on 7 March to take effect from 1 April, any objective observer was more likely than not to have regarded the employment to be ongoing rather than casual.

Did CMSL act fairly and reasonably in ending the employment?

[39] In CMSL's closing submissions Mr Petrou submitted he "had the right to ask [Mr Norman] to leave immediately" on 7 March but had acted fairly by, instead, giving him four weeks' notice.

[40] It was a submission that could not survive the findings made in this determination that Mr Norman's employment was not on the asserted casual basis. Instead, the statutory test of justification of CMSL's actions on 7 March had to be made in light of the finding that Mr Norman's employment, by then if not even earlier, was on an ongoing basis.

[41] In a memorandum sent to Canam staff on 14 March Mr Petrou described Ms Grayston as "taking over the part-time IT role" from Mr Norman. It was, according to his evidence at the Authority investigation, an accurate description. Ms Grayston was employed with the same job title, as IT manager, for the same 20 hour minimum a week. The only real difference was that she was employed at an hourly rate some $12

less than that paid to Mr Norman. Mr Petrou said the lower pay was the appropriate market rate for the IT role, which was less specialised than Mr Norman thought.

[42] In determining Mr Norman's claim that he was unjustifiably dismissed, the Authority had to consider whether what CMSL did (and how it did it) was what a fair and reasonable employer could have done in all the circumstances at the time. Such an employer could not have failed to meet its statutory obligation to give Mr Norman information about the proposal to end his employment in that way and to give him an opportunity to comment on the proposal before the decision was made.[7]

[43] Mr Petrou did not tell Mr Norman of his plan to employ Ms Grayston, or discuss with Mr Norman any likely effect of that plan on him, before Ms Grayston arrived at Canam's offices to start work on 7 March. Mr Petrou had forgotten he had arranged for her to start that day. He then went and found Mr Norman. He told him that Ms Grayston was to replace him. Mr Petrou followed up that information with the 7 March email referred to earlier in this determination. The email confirmed a four week notice period ending on 1 April.

[44] CMSL's decision to dismiss Mr Norman, and the manner in which it was carried out, clearly failed to satisfy both its good faith obligations and the statutory test of justification.

[45] Ms Grayston was employed in the same role, so the decision to dismiss Mr Norman from the role could not be justified as a redundancy.

[46] In defending its decision in the Authority proceedings, CMSL made some criticisms of how Mr Norman had performed his role. However those concerns were not properly addressed with him before his dismissal, so the decision could not be justified as a dismissal for poor performance. The notion that he had not done the job well enough was also inconsistent with Mr Petrou's offer, in his 7 March email, to engage Mr Norman as an independent contractor to provide "some high level IT services" after 1 April.

[7] Employment Relations Act 2000, s 4(1A)(c).

[47] As a matter of fair process, surprising Mr Norman with notice on 7 March, once his replacement had already arrived at the workplace, was plainly not what a reasonable employer could have done in all the circumstances.

Remedies for unjustified dismissal

[48] As Mr Norman had established CMSL acted unjustifiably in both why and how it dismissed him, he was entitled to an assessment of remedies. For the following reasons he was entitled to an award of lost wages, but not for as long a period as he claimed, and to an award of compensation for the humiliation, injury to feelings and loss of dignity CMSL's actions caused him.

Lost wages

[49] Mr Norman's assessment that his monthly earnings were $5342 was unchallenged. He calculated the figure from his pay records for the last three months of his employment. His calculation, thereby, excluded higher average hours he had worked in 2015, so was more than fair.

[50] He claimed lost remuneration should be awarded for a six month period, effectively from April to September inclusive. However CMSL submitted his evidence showed Mr Norman unreasonably failed to mitigate the extent of the loss he claimed.

[51] As explained by the Employment Court in its decision in the *Xtreme Dining* case, the worker must meet the "evidential burden" to provide relevant information about the steps she or he took to mitigate the asserted loss of wages.[8] The worker must do so because that is information in her or his knowledge. The Authority "cannot be too stringent in its expectations" of a dismissed worker in assessing that information because the worker has been "the victim of a wrong".[9] However, if the employer does put mitigation in issue, the employer must then persuade the Authority that the worker acted unreasonably in failing to mitigate her or his loss.[10]

[8] *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [101].
[9] At [103].
[10] At [104].

[52] On two accounts CMSL was persuasive in showing Mr Norman had acted unreasonably in not doing more to mitigate the extent of his loss over the full six month period for which he claimed wages.

[53] Firstly, although Mr Norman said he looked for jobs in his area of IT expertise, Mr Norman did not apply for any such jobs in the whole six month period. He said that was because he did not want a full-time job, as that would interfere with developing his aerial photography business, and the part-time jobs that were available were "below my pay grade". He gave the example of not wanting to travel from his West Auckland home to jobs in South Auckland or on the North Shore that paid $25 an hour or less.

[54] Secondly, Mr Norman spent his time during those six months developing his aerial photography business, and doing some small jobs for his web hosting business. Together that work, after deducting expenses, generated a net profit of $8,164. As well as doing the work that generated that income, Mr Norman said he put time into marketing and promoting his aerial photography business. Those months were during the quieter autumn and winter seasons when the weather was not so good for drone-based photography. According to Mr Norman's evidence, that promotion work had begun to bear fruit in the summer months, which was after the period for which he claimed lost wages, and the business now had "enough work lined up to see me through". He said that "if push came to shove" he would have taken a lower paid IT job during that time but "I wanted to give my business a go and that's started to pay off now".

[55] The difficulty with what he said, in relation to his mitigation efforts, was that if CMSL had not dismissed him, he would still have been able to work promoting his own aerial photography business during the part of the working week, and the weekends, that he was not working for CMSL. Reasonably, that work (and the modest income it generated in the six month period for which lost wages claimed) cannot all be taken as efforts to mitigate the loss resulting from CMSL's actions.

[56] Applying the Court's direction not to be 'too stringent' in the expectations of of a dismissed worker when considering his or her evidence about mitigation efforts, the period of loss could be assessed as three months but not the longer period claimed. A corresponding reduction, reasonably, then had also to be made from the portion of

his earnings made from his business activity over the six month period. The whole amount could not fairly be deducted from the lost wages awarded for only three months. Under the broad assessment allowed, the appropriate amount to offset was around half, that was $4000 of those earnings.

[57] The necessary calculation was as follows. Three months' lost wages totalled $16,026, from which $4000 had to be deducted as the amount Mr Norman earned in mitigation of his loss. The result of $12,026 was the sum CMSL had to pay Mr Norman in reimbursement of lost remuneration under s 123(1)(b) and s 128 of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[58] CMSL submitted two aspects of how Mr Norman behaved over the termination of his employment did not support his claim for compensation for the distress he said was caused by his unexpected dismissal.

[59] Firstly, Mr Petrou said Mr Norman had not protested or complained when told that he was to be replaced by Ms Grayston. Mr Petrou said that if Mr Norman was "so shocked" he would surely have asked why he was being dismissed.

[60] Secondly, Mr Petrou said Mr Norman used a "joyful manner" in an email that he sent all Canam staff on 11 March about his last working day. Mr Petrou said this contradicted Mr Norman's evidence of humiliation or upset at his dismissal. In the email Mr Norman wrote that his last day working for Canam was to be 1 April "and before you ask, it's not an early April Fool's joke either". The email also mentioned that "in the meantime [Ms Grayston] has already started and will be taking over my role so please include her in any future IT requests and communications".

[61] Neither submission negated Mr Norman's evidence in support of his claim for compensation. Mr Norman's failure to protest at the unexpected notice given to him on 7 March was consistent with a sense of shock. It was also apparent from his evidence that Mr Norman was a relatively reserved person. He had immediately seen Mr Petrou's decision to replace him with Ms Graystone was a fait accompli and there was nothing to be gained by reacting sharply.

[62] Mr Petrou also appeared to misunderstand the tone of Mr Norman's 11 March email, if he thought the reference to an April Fool's joke was "joyful". Rather it let other staff know that Mr Norman had been replaced and, properly, referred future IT queries to Ms Grayston, with a somewhat pointed reference to her having already started.

[63] Mr Norman's evidence was that he found the experience humiliating. This was compounded by Mr Petrou's 14 March memorandum sent to staff saying Ms Grayston was "taking over" Mr Norman's role so Mr Norman could "focus on and grow his career in aerial photography". It was not an accurate description of how or why Mr Norman's employment by Canam was ending. Mr Petrou did not talk to Mr Norman about how he might like his departure to be described to staff throughout the Canam business, many of whom Mr Norman had worked with over the previous five years.

[64] Mr Norman was, again, relatively reserved in his evidence about the effect of the dismissal on him. He said he was "not happy" and was upset to have to leave Canam's employment in the way that he did. Ms Brown's evidence confirmed her husband's account of the effect of his dismissal on him. She described him as being uncharacteristically unhappy and withdrawn as a result.

[65] While Mr Norman was shocked by the sudden news he was to be dismissed and upset by it because, as he said, he had "never been sacked before in my life", there was no evidence of significant ongoing effects on his confidence or capacity. He had, as Ms Brown put it, "gone into problem solving mode" with the result that, after some months of effort, his own business was developing as he wished.

[66] On that evidence, and while mindful of the need not to keep compensatory payments artificially low, $8000 was an appropriately modest sum to award Mr Norman under s 123(1)(c)(i) of the Act to compensate him for the loss of dignity and injury to his feelings that resulted from his dismissal and how CMSL carried it out.[11]

Any reduction for conduct contributing to the grievance for unjustified dismissal?

[67] CMSL submitted any remedies awarded should be reduced because there aspects of how Mr Norman had performed his duties for which he could have been

[11] *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

dismissed or issued written warnings. Mr Petrou said he accepted Mr Norman was technically competent but criticised the timeliness of his service. While allegations about performance were canvassed at some length in questioning by the parties, the evidence as a whole did not establish problems identified were entirely, or even at all, due to shortcomings by Mr Norman in how he carried out his work. There was no sufficient evidential basis of blameworthy conduct that would warrant any reduction of remedies under s 124 of the Act.

Penalty claimed for breach of good faith

[68] Mr Norman claimed a penalty for CMSL's breach of good faith in failing to consult with him over its plan to end his employment. He wanted any penalty awarded to be paid to him.

[69] While CMSL clearly breached its statutory good faith duty, the remedies awarded for Mr Norman's unjustified dismissal, under s 123 of the Act, were sufficient punishment for the particular breach and a sufficient deterrent to CMSL and other employers from committing such breaches. No further penalty was warranted in the circumstances.

Costs

[70] Costs are reserved.

[71] The parties are encouraged to resolve any issue of costs between themselves.

[72] If they are not able to do so, and an Authority determination on costs is needed, Mr Norman may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum CMSL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[73] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate of $3500 (applicable for matters lodged before 1 August 2016), unless particular circumstances or factors required an upward or downward

adjustment of that tariff.[12] Although the second day of the investigation meeting ended mid-afternoon, the daily tariff would apply to two full days because the first day of investigation ran a little later than usual and the second day started, by agreement, a little earlier than scheduled.

Robin Arthur
Member of the Employment Relations Authority

[12] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].