IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 34
5465403

	BETWEEN	LLOYD ROWE Applicant
	A N D	PICTON BUILDING CENTRE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Graham Hill, Counsel for the Applicant Charles Murdoch, Counsel for the Respondent
Investigation Meeting:	3 February 2015 at Blenheim
Submissions Received:	9 February and 19 February 2015 from the Applicant 16 February 2015 from the Respondent
Date of Determination:	16 March 2015

DETERMINATION OF THE AUTHORITY

A. The Applicant's dismissal was substantively justified but the procedure adopted was unjustified, which caused Mr Rowe an unjustified disadvantage in his employment.

B. The Applicant is awarded remedies under s123(1)(c)(i) of the Employment Relations Act 2000 in relation to that disadvantage.

C. Costs are reserved.

Employment relationship problem

[1] Lloyd Rowe claims that he was unjustifiably dismissed from his position as manager of the Picton Building Centre on or around 25 March 2011 and that he was unjustifiably disadvantaged by the process that was followed leading to his dismissal.

Mr Rowe alleges that there was a failure to properly consult with him and to provide him with sufficient information to enable him to understand and comment on the proposal presented to him. He states that he was not given the opportunity to have a support person at the meetings and that his position was not disestablished but that he was replaced.

[2] The respondent denies that Mr Rowe was unjustifiably disadvantaged by the process or that he was unjustifiably dismissed. It says that the dismissal was due to an urgent need to restructure in the face of significant financial losses, that there was sufficient consultation and that all the information relied upon by the respondent was either given to Mr Rowe or was readily available to him from the general ledger which Mr Rowe had set up and operated. The respondent accepts that Mr Rowe's position was not disestablished, but that there was a restructuring that resulted in the owner of the respondent taking over some of his duties without drawing any pay.

Brief account of events leading to the dismissal

[3] Mr Rowe's employment commenced in June 2006 and his position evolved into that of manager. He was not given a written individual employment agreement. Mr Rowe's evidence is that he introduced a banking system into the respondent which reconciled the till to the computer stock system and, in 2010, added creditors to the computer system and implemented a running ledger system. He also resolved problems with the stock system which allowed a more accurate system to track movement of stock and sales and income.

[4] Mr Rowe acknowledges that, from about mid-2010, the respondent was facing some financial difficulties and it is common ground that, in August 2010, Mr Rowe and his assistant met with the owner of the company, Gary Knofflock, and the company accountant, Mathew Kerr, to discuss the need for more accurate recording of stock and reducing the amount of accumulated employee leave.

[5] It would appear that there were discussions between Mr Rowe and Mr Knofflock in 2010 about possible restructuring of the company, and although there is disagreement between them as to how far these discussions went, it is common ground that the first time that Mr Rowe knew that there was a proposal to terminate his employment was on 4 March 2011, when Mr Rowe was called into a meeting with Mr Knofflock and Mr Kerr.

[6] Although Mr Rowe says that he was not aware of what subject matter was going to be discussed at this meeting, he did record it, which indicates that he is likely to have had some inkling that it was more than just a run-of-the-mill management meeting. A transcript of that meeting that was presented to the Authority indicates that there was discussion both about Mr Knofflock getting a better return on his investment and about the company facing an impending overall loss, at that point, of $104,000.

[7] It is also clear from the transcript of the recording of this meeting that Mr Knofflock was proposing that he go into the business and take over some or all of Mr Rowe's duties, although he was not sure which duties he would take over. There was discussion about how that would produce a saving if Mr Knofflock was going to draw funds from the company by way of wages or drawings and Mr Knofflock said at that meeting that he would only draw $100-150 per week. His evidence to the Authority was that, after Mr Rowe's employment was terminated, he worked in the company on a part time basis only, carrying out only some of Mr Rowe's duties and redistributing the remaining duties amongst existing staff, and that he did not draw anything from the company by way of income. He also said that the actual loss sustained by the company by financial year end was more than twice that projected.

[8] A further meeting took place between Mr Rowe, Mr Knofflock and Mr Kerr on 8 March 2011. Mr Rowe recorded this meeting as well and provided a transcript of the meeting to the Authority. During this meeting, it would appear that Mr Knofflock was only able to identify wage costs as the cause of the impending loss of $104,000. The transcript also suggests that Mr Rowe was asked whether he could identify any way of improving the financial situation but that, when Mr Rowe asked for information to enable him to assess the position, Mr Knofflock stated that the information was *in the general ledger* and that Mr Rowe had full access to that and that he should print off a copy.

[9] It appears that, during this meeting, Mr Rowe indicated that he wished to have a support person with him for the following consultation meetings but that his identifiable person would not be available for around a further two weeks. It would appear that Mr Knofflock adjourned the meeting at that point so that he could take advice about how long it was reasonable for the company to wait until Mr Rowe's preferred support person was available.

[10] Mr Knofflock's evidence is that he took advice from the HR manager of the Auckland-based headquarters and was advised that he had to give a reasonable amount of time to allow Mr Rowe to find a support person but that two weeks was too long. It also appears that, at some point between 8 and 16 March, it was agreed that financial information would be given to Mr Rowe to enable him to understand better what was being proposed, together with copies of notes made by Mr Knofflock of the previous meetings.

[11] On 16 March 2011, Mr Rowe was handed copies of Mr Knofflock's notes, and Mr Knofflock read them out to assist Mr Rowe to decipher the handwriting. Mr Rowe was also given a report printed off from the general ledger, dated 9 March 2011, which compared budgeted income and expenditure against actuals up to that date. This statement of financial performance was 2½ pages long and broke down sales and expenses into a reasonable amount of detail. It enabled the reader to identify which aspects of the business were above or below budget. The document showed a loss at that point of $104,998. Mr Rowe was also handed print outs from the Statistics New Zealand website which contained information about the number of building consents issued for residential and non-residential buildings in January 2011.

[12] Whilst it is not clear when the next meeting took place, during the investigation meeting the parties believed that it was either on 18 or 21 March 2011. This is perhaps understandable given that these events took place nearly four years ago. After the investigation meeting the parties contacted the Authority to say that they both believed that the final consultation meeting took place on 21 March 2011.

[13] As to when the decision to dismiss Mr Rowe was communicated to him, which was also uncertain, there is ample evidence to show that it was 25 March. First, an email from Mr Knofflock to Mr Rowe dated 22 March 2011 asked Mr Rowe to identify the names of two staff who Mr Rowe had said had approached him asking for references, indicating that they were intending to leave. This strongly suggests that the decision to dismiss Mr Rowe was made after that email had been sent on 22 March 2011 and that, therefore, the decision was communicated to Mr Rowe on 25 March 2011. With respect to that question asked in Mr Knofflock's email, it is the evidence of both parties that Mr Rowe declined to make known the information as he believed it had been given to him by the two staff in confidence.

[14] Second, the letter from Mr Knofflock to Mr Rowe which confirms the decision bears the date of 25 March 2011. Finally, there is a transcript which records Mr Knofflock advising Mr Rowe that his employment was to be terminated with effect from that day. Whilst the transcript is dated 18 March, this is clearly an error because the transcript refers to Mr Rowe being entitled to two weeks' notice, which would take him through to 8 April. Working back from that date results in 25 March.

[15] A personal grievance was raised on behalf of Mr Rowe by way of a letter from his lawyer of the time, dated 20 June 2011. Mr Rowe's statement of problem was lodged with the Authority on 13 June 2014. It is not clear why it took so long for the proceedings to be launched, but they were lodged within the three years period allowed under s114(6) of the Employment Relations Act 2000 (the Act).

The issues

[16] The Authority must consider the following issues in determining whether Mr Rowe was unjustifiably dismissed and unjustifiably disadvantaged by the process followed:

a. Whether the dismissal was genuinely by reason of redundancy or restructuring;

b. Whether sufficient information was given to Mr Rowe in order for him to understand the rationale behind the proposal;

c. Whether there was sufficient consultation with Mr Rowe prior to a decision being made;

d. Whether the decision to dismiss Mr Rowe was predetermined; and

e. Whether Mr Rowe was unjustifiably disadvantaged by not having a support person present during the consultation process.

The law

[17] Section 4(1A) of the Act provides as follows:

> *(1A) The duty of good faith in subsection (1) –*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confident; and*

> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
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> *(c) within limiting paragraph (b), requires an employer who is 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 his or her 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.*

[18] The dismissal of Mr Rowe took place before 1 April 2011, and so the pre-amendment test of justification at s103A of the Act applies. This provided as follows:

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

Was Mr Rowe's dismissal genuinely by reason of redundancy or restructuring?

[19] There is no longer a statutory definition of redundancy in New Zealand employment legislation, although the widely accepted position is that it involves a post becoming superfluous to the requirements of the employer, resulting in the dismissal of the post holder. It is accepted by the respondent that Mr Rowe's position had not become superfluous to requirements.

[20] However, simply because Mr Rowe's position was not superfluous to requirements, so that his dismissal was not by reason of redundancy as traditionally defined, does not in itself render the dismissal unjustified. It is also not the case that the fact that the respondent called the proposed dismissal a redundancy during the consultation process in itself renders the dismissal unjustified, provided that all of the relevant facts leading to the proposal of dismissal were made known to Mr Rowe, and a fair and reasonable procedure of consultation followed.

[21] In other words, this is not a case where the success or failure of the applicant's claim hinges on whether his dismissal was by reason of a redundancy as opposed to some other lawful reason. What is of importance is whether the dismissal was justifiable in accordance with the statutory test that was in force at the time.

[22] However, notwithstanding that Mr Rowe's dismissal was not a classic redundancy situation, it is still relevant to apply the principle expounded by His Honour Chief Judge Colgan in the judgement of the Employment Court in *Rittson-Thomas t/a Totara Hills Farms v. Davidson*[1]. This made clear that the leading decision on redundancies since the enactment of s.103A of the Act, *Simpsons Farms Ltd v. Aberhart*[2], is not to be interpreted to endorse a proposition that an employer can simply say that there was a genuine business reason for a redundancy dismissal and that the Authority cannot examine the merits of that assertion.

[23] The same principle can, and should be applied to the present case, where a dismissal has been attributable to the financial exigencies of the respondent at the time. In making its inquiry into the merits of the assertion, the Authority can expect evidence to be adduced by the respondent to prove the fairness and reasonableness of the decision that was taken.

[24] The respondent has certainly adduced evidence to show that, by March 2011, the company was facing a substantial financial loss. Mr Knofflock explained in evidence that this loss was due to a slowing down in building work in the Picton area, which was in turn due to the on-going global financial crisis and the September 2010 and February 2011 Canterbury earthquakes (because many bach owners in the Marlborough Sounds lived in Canterbury and had to divert building efforts to repairing their main residences).

[25] I accept this evidence of Mr Knofflock. I also accept his evidence and that of Mr Kerr that the situation had to be addressed reasonably urgently because the company could otherwise have failed. I also accept that Mr Knofflock and Mr Kerr had examined the operation of the company carefully and had identified that a significant overhead was the company's wage bill. Whilst I note that Mr Rowe said in his evidence that he doubted the accuracy of the figures being produced by the general ledger, the fact that the company went on to make a much bigger loss than

[1] [2013] NZEmpC 39
[2] [2006] ERNZ 825

was being projected at that time calls into question Mr Rowe's assertion that the company should have waited a further six months before any action was taken because of those claimed inaccuracies.

[26] It is certainly the case that other elements of the company's expenses had increased which would have contributed to the impending loss, but I am satisfied that these were also being taken into account by Messrs Knofflock and Kerr when they determined that reducing the wage bill was an essential element in addressing the loss.

[27] What complicates this matter, and which raises the prospect of an unjustified dismissal, is the fact that Mr Knofflock was proposing to step into Mr Rowe's position and carry out elements of the role. This action can only be justifiable if the rationale for doing so was to address the financial shortfalls faced by the company which is relied upon by the respondent, and that was a fair and reasonable step to take in all the circumstances.

[28] Having considered the evidence, I believe that Mr Knofflock's decision to step into Mr Rowe's role was a decision that a fair and reasonable employer would have made in all the circumstances that prevailed at the time. It is clear that Mr Rowe's remuneration package was costing the company in the region of $60,000 a year and that the company's operations needed to be managed. Contrary to Mr Hill's submission, I accept that Mr Knofflock was capable of carrying out the key parts of Mr Rowe's post and was also able to do so, as the owner, without drawing any earnings. Whilst the saving of this salary would not have addressed the impending loss in its entirety, it would have assisted in a material way. I believe that Mr Knofflock's proposal was a pragmatic solution which was open to him to carry out, as the owner of the business, in the circumstances.

[29] I do not find that the respondent advertising for a senior supervisor in October 2011 was to fill Mr Rowe's post. I accept Mr Knofflock's evidence that this advertisement was for another staff member who had to resign after heart bypass surgery.

[30] It was the evidence of Mr Rowe that two staff members had left the company shortly before Christmas, and that this had caused some problems for the existing staff covering their work. Mr Rowe surmised that the company could have disestablished the roles of one or more junior staff but he was not clear which ones could have been

spared at that time. I accept the evidence of Mr Knofflock that disestablishing junior staff positions was considered but that the most effective action was to step into the role of Mr Rowe, as it was a role he could undertake and it would result in a substantial saving in terms of salary.

[31] The notes of the meetings suggest that Mr Knofflock was considering at one point taking over part of Mr Rowe's post only, on a duel role basis, but was not sure what parts of the role he was proposing to take over. This, in itself, would not have been sufficient consultation, if he had gone on to take over part of Mr Rowe's role with Mr Rowe remaining in employment. However, Mr Knofflock dropped this proposal and I am satisfied that he did make clear to Mr Rowe that he was considering Mr Rowe's dismissal prior to him putting that proposal into effect.

[32] The matter is also complicated by the statements made by Mr Kerr during the consultation period that Mr Knofflock was seeking to increase his return on his investment. If Mr Knofflock had replaced Mr Rowe solely or principally for this purpose, in circumstances where there was no urgent need to address a significant loss, I would not find that that was an action that a fair and reasonable employer would make in all the circumstances. However, I am satisfied that the action was prompted by a need to address the impending loss and that was the primary motivation of Mr Knofflock behind his proposal. The concept of return on investment was one which Mr Kerr, as an accountant, was rightly interested in, but it was not the main focus of Mr Knofflock's action I find.

[33] In summary, I find that there were genuine urgent financial reasons for Mr Knofflock stepping into Mr Rowe's position on a part time basis, so as to save around $60,000 per annum. This dismissal was an action that a fair and reasonable employer would have taken in all the circumstances. Therefore, the dismissal was substantially justified.

Was sufficient information given to Mr Rowe in order for him to understand the rationale behind the proposal?

[34] I do not accept Mr Hill's submission that financial information was not provided to Mr Rowe until 21 March. This is for two reasons. First, Mr Knofflock gave evidence that he recalled giving Mr Rowe the financial information along with the notes of the previous meetings (and documentary evidence shows that these notes

were discussed and handed over to Mr Rowe on 16 March). Second, Mr Rowe said in his oral evidence he had been given the weekend to *ponder* the financial information. This means that he could not have been given it on 21 March 2011, which was a Monday.

[35] Mr Knofflock's rationale for not providing financial information to Mr Rowe until the third consultation meeting was that Mr Rowe already had the financial information readily available to him from the general ledger. However, it is clear that it was possible to run different reports in the general ledger, and it does not seem to be the case that Mr Knofflock told Mr Rowe which report he and Mr Kerr were working from to have enabled him to have printed a copy for himself.

[36] It is plain to me that a fair and reasonable employer would not have held two meetings with Mr Rowe, which were purportedly consultation meetings, prior to, or during which no financial information was given to Mr Rowe. Even if Mr Rowe could easily have recreated the financial information from the general ledger, he was entitled to know exactly what information was being relied upon by Messrs Knofflock and Kerr. One of the objects of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by acknowledging and addressing the inherent inequality of power in employment relationships.[3] There was a material inequality of power as between Mr Knofflock and Mr Rowe when Mr Knofflock was telling Mr Rowe that he was thinking about taking over his role, due to financial concerns. This inequality could have been narrowed if Mr Rowe had been able to see exactly the same information that Mr Knofflock had seen when reaching the conclusion that a way to reduce the loss was to take over Mr Rowe's role.

[37] It follows from this finding that Mr Rowe suffered from a disadvantage in his employment by not having been given copies of the relevant information in advance of the meetings of 4 and 8 March. However, I am unable to find that this disadvantage was unjustified, as Mr Rowe did not raise a personal grievance in respect of it within 90 days of the date of the last failure, on 8 March 2011, as is required by s 114(1) of the Act. The 90 day period expired on 5 June 2011, and the personal grievance was raised by letter on 20 June 2011.

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[3] Section 3(a)(ii).

[38] For the avoidance of doubt, I do not find that this failing to make available the information before 16 March 2011 was a breach of s.4(1A) of the Act. This is because the duty requires the employer to provide access to relevant information, and an opportunity to comment on it, before the decision to dismiss is made. I find that the decision to dismiss Mr Rowe was made after 22 March, in which case the relevant information had been provided beforehand.

[39] Mr Rowe also said in evidence that he was not able to interpret the report that was given to him on 16 March. I find this more difficult to believe, given that it was clearly showing in some detail where expenditure was exceeding budget, and by how much. He also said in evidence that he had pondered the report but implied that he did not pay it a great deal of attention after he had received it because, by then, he was convinced that he would be dismissed in any event. Mr Rowe did not explain why that was the case, however. I examine this allegation of predetermination below.

Was there was sufficient consultation with Mr Rowe prior to a decision being made?

[40] There were at least four meetings prior to any decision being taken to dismiss Mr Rowe. It is hard to determine exactly how effective the meetings were, as the topics discussed during them were wide ranging, albeit all relevant to the general topic of the company's financial performance.

[41] For example, as referred to above, it appears that Mr Knofflock suggested at one point that Mr Rowe and Mr Knofflock could undertake a duel role. However, this would not have addressed the financial concerns at the heart of the consultation, and it appears that this proposal was dropped by Mr Knofflock. This fact suggests to me that the consultation was genuine in that Mr Knofflock was exploring different options.

[42] However, whilst I accept that the meetings were undertaken as genuine consultation meetings, I have concerns that the consultation was not sufficient in the sense that Mr Knofflock's proposals were initially somewhat nebulous, which created confusion for Mr Rowe. This in turn created a disadvantage in Mr Rowe's reemployment as it was essential that Mr Rowe clearly understood the proposal and I am not satisfied that he did at the start of the process. Furthermore, I believe that the unstructured approach adopted by Mr Knofflock was not an action that was a fair and

reasonable employer would have taken in all the circumstances. Hence, I believe that Mr Rowe suffered an unjustified disadvantage in his employment in respect of this aspect of the process followed.

[43] However, I do believe that Mr Knofflock gave consideration to what Mr Rowe said during the meetings. This is demonstrated by the level of discussions that the transcript records they were having.

Was the decision to dismiss Mr Rowe predetermined?

[44] I do not believe that this was the case, both because of the level of discussions that occurred between Mr Knofflock and Mr Rowe, and because of the email that Mr Knofflock sent to Mr Rowe on 22 March 2011 asking to know which two employees were thinking of resigning. If Mr Knofflock had had a closed mind about the outcome of the consultation process he is not likely to have sent this.

Was Mr Rowe unjustifiably disadvantaged by not having a support person present during the consultation process?

[45] Mr Knofflock's notes record that Mr Rowe was asked whether he wanted to have a support person present at the first meeting on 4 March 2011, and he replied that he did not. The meeting of 8 March was curtailed when Mr Rowe stated that he did want a support person present. It appears that Mr Knofflock wanted to go ahead with the meetings after 8 March when he was advised by his HR adviser that having to wait two weeks for Mr Rowe to find a new support person was too long. Mr Rowe said in his evidence that he was not forced to proceed without his support person of choice.

[46] I find that Mr Rowe could have engaged another support person when he found out that his preferred choice was not available for two weeks, and that it was not unreasonable in the circumstances for Mr Knofflock to have wanted to proceed in a shorter timeframe. I find that Mr Rowe did not suffer an unjustified disadvantage in respect of this matter. In any event, the letter of personal grievance did not refer to the issue of a support person and so I am not convinced that the Authority has the jurisdiction to consider this matter in any event.

Conclusion

[47] It is my conclusion that Mr Rowe was unjustifiably disadvantaged by the process that was followed by Mr Knofflock, which was unstructured and confusing for Mr Rowe, at least at the start. However, I have also found that there was a substantial and genuine reason for Mr Rowe's dismissal. Even if an entirely fair process had been followed, I find that Mr Knofflock's decision to step into Mr Rowe's role would still have occurred because he was facing an urgent need to address a significant financial loss and that proposal was a fair and reasonable one to put into effect to assist in addressing it. I am not satisfied on a balance of probabilities that there was anything that Mr Rowe could have proposed which would have addressed that financial loss in any substantial way, while saving his job. As the dismissal was substantially justified it was not rendered unjustified by the procedural flaw I have identified.

Remedies

[48] Sections 123 and 128 of the Act provide as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*
>
> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[49] I have found that Mr Rowe's dismissal was justified, but the process adopted caused him an unjustified disadvantage in his employment. I must therefore first assess whether Mr Rowe lost any wages or other money as a result of that unjustified disadvantage grievance (s123(1)(b)).

[50] In Aoraki Corp Ltd v McGavin[4] at 294, 619 the Court of Appeal stated:

> *In terms of s 40(1)(a) and (c) and s 41(1) the relevant remedies are "reimbursement" of wages or other money "lost by the employee as a result of the grievance" (s 40(1)(a», "compensation ... including compensation for ... loss of any benefit ... which the worker might reasonably have been expected to obtain if the personal grievance had not arisen" (s 40(1)(c)(ii», and compensation for "lost remuneration" where the employee has "lost remuneration as a result of the personal grievance" (s 41). Where the grievance concerns the manner in which a substantively justifiable dismissal was carried out, that is the wrong to which remedies may be directed, and there is no power under the statute to make an award for the loss of the job.*

[51] Whilst the statutory references in the above passage are to the Unfair Contract terms Act 1991, the material terms are the same as the equivalent sections in the Act. The thrust of the passage is that Mr Rowe is not entitled to remedies arising out of the dismissal itself, as I have found that that was justified. Any remedies that may be due arise out of specific unjustified disadvantage that I have identified.

[52] I do not find that Mr Rowe suffered any identifiable monetary loss as a result of that disadvantage. It could arise if the consultation process would have been prolonged by an unflawed process being followed, so that Mr Rowe would have earned salary for longer, but the unstructured start to the consultation process which caused confusion was effectively clarified, so that Mr Rowe understood the relevant proposal, before the overall consultation had ended. Therefore, I do not believe that Mr Rowe would have earned salary for longer had that flaw not occurred.

[53] I do, however, accept that the confusion would, in turn, have caused Mr Rowe humiliation, loss of dignity and injury to his feelings. His evidence of the effect on

[4] [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

him was largely about the effect of being dismissed. However, I infer that his confusion would have caused a moderate effect in terms of s123(1)(c)(i), and I fix compensation at $3,000.

[54] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[55] I cannot find that there was any blameworthy conduct by Mr Rowe that contributed to the flaws that caused him unjustified disadvantage in his employment. Therefore, I do not reduce the remedies that I have awarded to Mr Rowe.

[56] In his submissions Mr Hill seeks the imposition of penalties against the respondent for non-provision of an employment agreement and under s4 of the Act. However, penalties were not sought in the statement of problem and no application was made to amend the statement of problem to add the pursuit of penalties. It would not be just to contemplate the award of penalties when the first notice of them being sought was made at the stage of submissions. I therefore decline to entertain this late application.

[57] In Mr Murdoch's submissions there is a statement that Mr Rowe owes the respondent $1,254.32. Although Mr Hill rightly points out that this has not been pleaded, nor any evidence led about such an alleged debt, I do not understand Mr Murdoch to be making a counterclaim in his submissions. In any event, I cannot take it into account.

Order

[58] I order that the respondent pay to Mr Rowe the sum of $3,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[59] Costs are reserved. The parties are to seek to agree how costs are to be dealt with, but if they are unable to reach agreement within 28 days of the date of this determination, any party seeking a contribution to their costs may serve and lodge a memorandum within a further 14 days of that date, and a memorandum of counsel in reply must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority