IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 626
3156461

	BETWEEN	SUSHIL SEHJI Applicant
	AND	SWIRE SHIPPING PTE. LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Stephen Langton, counsel for the Respondent
Investigation meeting:	12 and 13 April 2022, and 13 and 14 June 2023
Submissions received:	27 April 2022, and 27 June, 14 and 21 July 2023
Determination:	25 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In February 2002 after 20 years at sea as an officer and Captain, Sushil Sehji took employment ashore as Operations Manager of Tasman Orient Line Ltd. Seven years later in August 2009, he signed an individual employment agreement (IEA) with Swire Shipping Pte. Ltd. (Swire), as a Cargo Planner at Auckland.

[2] Swire is a global shipping company. It has a head office in Singapore and offices in several countries including New Zealand, Australia, Indonesia, China, and in North America. Cargo Planners are or have been employed in many of those offices.

[3] The new IEA in 2009 followed a change in shareholding of the business Mr Sehji had been employed in since 2002. His employment was treated as transferred to

Swire. His 2002 start date was deemed to continue and all leave accruals except annual leave were transferred with him.

Notice of termination

[4] On 25 March 2021, Mr Sehji received one month's notice that his position was to be disestablished to enable a restructuring of the business. Mr Sehji was advised of the entitlements he had under his IEA, which included redundancy compensation of 26 weeks' pay and an option to be paid in lieu of working out notice.

[5] In an email he sent to Swire on 25 March 2021, the day he received notice, Mr Sushil complained that his redundancy was unfair and motivated by bias against him rather than valid business reasons. After referring to his 19 years of service, his level of experience, qualifications, technical and professional skills, and his high level of performance, he said he should have been retained ahead of two colleagues performing the same work.

[6] Mr Sehji complained that scores he was given in selecting him for redundancy were manipulated, because Swire's NZ Planning and Operations Manager, Geoff Diggle, had been against him for personal reasons. He described his termination as a false redundancy and an unjustified dismissal.

[7] Later, in a statement of problem Mr Sehji lodged in November 2021, he described the way he was selected as non-transparent and supported by untruthful statements.

[8] He engaged in mediation with Swire in July 2021 but the employment relationship problem remained unresolved.

[9] In his statement of problem Mr Sehji sought interim reinstatement. That application was not pursued. He amended his statement of problem in February 2022 and Swire lodged a statement in reply shortly after.

Change in Authority

[10] An investigation meeting was held in April 2022 but because a determination was unable to be completed by the presiding Authority member, a change of member was made in April 2023. The situation is provided for by clause 16 of Schedule 2 of the Employment Relations Act 2000 (the ER Act).

[11] The change led to evidence being taken again at a further investigation meeting held in June 2023. Clause 16 provides that an investigation is to continue as if there has been no change, rather than as a rehearing *de novo*.

[12] The Chief of the Authority has granted an extension of time beyond the normal three-month period for giving this determination.

[13] The determination is given in accordance with s 174E of the ER Act and does not record all the evidence or information considered by the Authority, or submissions received.

Review of claims

[14] A second round of submissions made after the change of member, offered Mr Sehji an opportunity to review and refine the several claims comprising his employment relationship problem.

[15] It is clear he has done this in his latest comprehensive submissions, for he no longer seeks a determination of some of his original claims.

[16] The claims now before the Authority are listed at para [68] of his second closing submissions, as follows;

(i) Unjustified dismissal

(ii) Unjustified disadvantage

(iii) Discrimination – Direct and Indirect

(iv) IEA Breaches

(v) Wages Claims and Loss of Wages/Benefit due to unjustified dismissal

[17] As remedies for these claims Mr Sehji seeks orders;

- reinstating him to his former position with Swire, or similar one
- compensating him $180,000 for loss of expected benefits of his employment
- compensating him at Band 3 (above $50,000) for humiliation, loss of dignity and injury to feelings
- reimbursing lost wages of $90,000 to him
- compensating or reimbursing holiday pay of $7,200
- compensating him $15,780 for loss of bonus as an expected benefit of employment
- compensating him $11,800 for actual and prospective long service entitlements
- reimbursing $1,180 for leave outstanding
- compensating him for excessive hours worked - and claims for Pay Equity and in-lieu days
- compensating him for loss of expected employer KiwiSaver contributions at 3%
- interest on lost wages from November 2021
- penalty up to $20,000 for breaches of s 4 of the ER Act - good faith obligations

Non-publication order

[18] Mr Sehji also seeks an order prohibiting publication of the parties' names and identifying details, to protect Swire's reputation from any harm that may be caused if its employees' actions, which are alleged to be unlawful by Mr Sehji, were to receive publicity.

Restructuring

[19] The responsibility of a Cargo Planner is the safe, efficient and effective movement by sea of cargo and the vessel carrying it. Mr Sehji and his two colleagues based at Auckland were responsible for cargo planning, ship management and

supervising the operations at all local and international ports through which designated vessels sailed.

[20] In February 2021 a proposal to restructure New Zealand operations was made by Swire. It followed significant changes made in 2020 to the business in Singapore and Australia. Improvements in communication and efficiency were considered achievable by having more planning work done in Jakarta within a single international time zone, and by centralising some operations to support the Singapore located Head Office of Swire.

[21] An initial proposal was to remove all planning from New Zealand. This was not finally acted upon but the planners who were based in Australia were all made redundant.

[22] Head Office sought a reduction of the three Cargo Planner positions in New Zealand by one. Mr Sehji and his two colleagues were given a proposal for this reduction on 17 February and asked for their feedback.

[23] In a detailed four-page report dated 25 February 2021 to Swire management, Mr Sehji concluded that three Cargo Planners were necessary to maintain operations at a high level, and that a reduction to two was unrealistic and unworkable under existing workloads. He claimed it would bring an increased risk of error and delay. His two colleagues also disagreed with the proposal.

[24] In his feedback Mr Sehji described the workload of the three Cargo Planners as unsustainable, causing fatigue and resulting in the need to take sick leave. He raised as a risk the total breakdown of an employee from 'long hours worked every day including weekends' and with very little down-time occurring over six months. He described the proposed reduction as unjustifiable.

[25] With regard to his workload, Mr Sehji referred to provisions of his IEA requiring his hours of work to be 37.5 per week between Monday and Friday. The IEA also provided that due to the nature of the business, Mr Sehji could be required to work outside of normal hours, including weekends.

[26] With that proviso in mind it seems, Mr Sehji asked a question in his report;

> ….. what is the reasonable hours we are expected to work beyond 37.5 hours/day (sic)?.

[27] In his report Mr Sehji made suggestions as to how pressure could be relieved in the interests of keeping cargo planners in good health.

[28] On 9 March 2021, Swire confirmed to the Cargo Planners that one of their positions in New Zealand was going to be disestablished.

[29] Management then proposed selection criteria and circulated them to Mr Sehji and his colleagues, who were given two days to provide any views about them.

[30] The proposed selection criteria were;

1. Performance
2. Planning Experience
3. Flexibility to plan other vessels as required
4. Teamwork – ability to work with Ops and other teams

[31] Mr Sehji seemed content with the criteria and gave no feedback.

[32] The next stage of the selection process was an interview, in preparation for which the Cargo Planners were asked to rate themselves 1 to 5 against the criteria and then attend the interview to discuss their self-assessments. Mr Sehji was interviewed by Geoff Diggle, and Dennis Aquino, HR Business Partner, on 12 March 2021.

[33] A written summary was made of that interview and of a subsequent selection discussion between Mr Diggle, Mr Aquino, Ashwin Balachandar, Head of Vessel and Planning Singapore, and Brodie Stevens, New Zealand Manager for Swire. They reviewed the scores and the comments about performance given by them previously for each of the three Cargo Planners.

[34] Mr Sehji was not given and did not request a copy of the summary or any other relevant written information produced from the selection process.

[35] When Mr Sehji was notified of his selection for redundancy on 25 March, he immediately complained to Swire that the decision was unfair and influenced by a bias Mr Diggle had against him.

Unjustified dismissal grievance

[36] Mr Sehji's employment ended with dismissal, which he claims was unjustified. Swire contends it was a justified dismissal.

[37] The issue is one the Authority must determine under s 103A of the ER Act, which provides the test of justification for dismissal or other action by an employer.

[38] The determination, which is to be made by the Authority on an objective basis, is whether Swire's actions and how Swire acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[39] Actions of Swire central to the issue of justification are, 1) the reduction of the Cargo Planner positions in New Zealand by one, and 2) the selection of Mr Sehji as the redundant Cargo Planner.

1) Reduction in number of positions

[40] From the information and evidence provided to the Authority by Mr Sehji and Swire, the Authority is satisfied that the restructuring from three to two of the Cargo Planner positions in Auckland, was proposed and carried out for genuine business reasons. Alternative methods of operating were implemented by Swire to achieve efficiencies for its business in cost and time.

[41] The Authority finds this reduction was not devised and aimed personally at Mr Sehji, to remove him from employment. It was focussed on positions rather than on any one individual who for the time being held a position.

[42] Witnesses for Swire placed some emphasis on the decision to downsize as having been led from Singapore by Head Office, as if that was an outside agency rather than Swire itself, but the decision is to be viewed as the decision of the employer, wherever it emanated from.

[43] The reduction proposal was stated to be based on 'expected port calls in New Zealand in 2021'. Mr Sehji argued that Swire's forecast was merely a mathematical equation which did not reflect the reality of the work expected of and carried out by Cargo Planners.

[44] Without being able to see exactly the future, a fair and reasonable employer could make a decision based on a reasonable prediction of work likely to be coming in.

[45] Some work that had been done by the planners, the ESEA service, was transferred from New Zealand to Jakarta, to lessen the impact of change on the workload of the two remaining planners.

[46] The scale and degree of change, the planning for its implementation and the consultation by Swire about the proposal, make it unlikely that the removal of Mr Sehji from employment was the real reason for downsizing.

[47] The Authority concludes that Swire acted with justification in deciding on a reduction of Cargo Planner positions at Auckland from three to two. A fair and reasonable employer could have acted in that way in the circumstances prevailing in March 2021.

2) Selection of Mr Sehji

[48] To implement the restructuring proposal Swire had to decide which of three Cargo Planners would be made redundant. Provided it acted as a fair and reasonable employer could act, how it made that decision was a matter for Swire.

[49] The selection process of assessing Cargo Planners against core competencies was similar to one widely used in employment and, provided the assessments were made fairly and without bias, applying that process was what a fair and reasonable employer could have done in all the circumstances.

[50] Mr Sehji was asked for his views about the proposed criteria but had nothing he wished to offer.

[51] The criteria chosen by Swire were directly relevant and expressly referrable to the job description Swire provided to the Cargo Planners, when they were consulted about the Restructure Proposal.

[52] Although a degree of subjectivity may sometimes be part of an assessment, the Employment Court has recognised that in itself is not unfair or unreasonable;

> *Any assessment of an employee, whether it is of their skills, performance, or attitudes will be subjective up to a point (however, it will still need to comply with an employer's good faith obligations).* [1]

[53] The assessment of each Cargo Planner was carried out by three managers independently, after an interview with each employee. The managers and a fourth manager, Mr Aquino, then had a group selection discussion. This spread of decision making and oversight gave some protection against the possibility of one assessor's bias having an influence on the process.

[54] The three cargo planners were considered on a very similar if not identical footing in terms of their workloads and the general conditions affecting performance of their work. They were assessed for the same job they each performed under the same conditions.

[55] In his 25 February response to the proposal, Mr Sehji noted that all three planners were 'already stretched to the limit' finding it 'extremely difficult to cover' when any planner is on leave. Mr Sehji appeared to be speaking for his two colleagues as well as himself in raising those concerns. The strain he experienced from his long hours of work, appears to have been common to the three planners.

[56] Although Mr Sehji strongly disagrees with Swire's assessment of him, it is not evident to the Authority that the selection of Mr Sehji was influenced by bias on the

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[1] *Dunn v Methanex NZ Ltd* [1996] ERNZ 222

part of any of the managers participating in the process. Two of the three assessors, Mr Diggle and Mr Stevens, had had long working associations with Mr Sehji in Swire's business, as managers with the ability and opportunity to disadvantage Mr Sehji much earlier than 2021, if they had a personal motive for wanting to. The third assessor had not been employed by Swire for long.

[57] The Authority accepts that in carrying out their role the assessors were conscious of the potential consequences their decision was going to have on the life of one of their long serving and well performing employees. That is often an unavoidable part of selection for redundancy.

[58] The Authority finds that where Mr Sehji was given lower scores than his colleagues for Flexibility and Teamwork, the three assessors were reasonably consistent in their views of him. Mr Diggle's scores do not stand out as markedly different from those of the other two assessors, and he scored Mr Sehji higher for flexibility than one assessor.

[59] In the notes supporting the Flexibility scores, reference was made to Mr Sehji having an issue with weekend work and being reluctant to carry out planning for Pacifica vessels. Where he was scored 2 for Flexibility (by one assessor) and 3 (by two assessors), one of the other planners was given 4 (by two assessors) and 5 (by one assessor), and the other planner was given 4 (by one assessor) and 5 (by two assessors).

[60] For Teamwork Mr Sehji was scored 3 by each of the assessors. The other planners were scored 4, apart from one score of 5 given to one planner by one assessor.

[61] The notes supporting the Teamwork scores indicate dissatisfaction with Mr Sehji for his communication style. Mr Diggle referred to communication issues raised by him previously with Mr Sehji in annual performance reviews.

[62] Regarding Performance and Planning Experience, there is a high degree of consistency in the scoring of the three assessors given to the three cargo planners.

[63] Mr Sehji attached considerable importance to his length of service as a relevant factor in the selection process. The minutes he produced from his interview on 12

March highlight his seniority and experience of '19 + years of Planning experience in this company'. Measured by length of service, he was the most senior planner. Mr Sehji has remained upset with his dismissal, partly because his seniority was not given greater weight.

[64] 'First on – last off' can be a basis for selection but was not in this case. To paraphrase Mr Sehji, length of service of itself is merely a number. In terms of learning and achievement, the greater the number does not necessarily equate to the greater the knowledge and experience aquired. Swire was entitled to focus on what had been demonstrated by each planner during his service with the company, however long or short that may have been.

[65] Mr Sehji's length of service and his experience as a senior mariner and cargo planner were indirectly taken into account in the assessment of performance, flexibility and teamwork, criteria Swire chose to use.

[66] It is clear in the Planning Experience notes produced from the managers' group discussion that Mr Sehji's length of service and sea experience were mentioned, although the latter was not viewed as a 'must have in the role'.

Duty of good faith – s 4(1A) of ER Act - opportunity to comment before redundancy decision is made

[67] To implement restructuring of cargo planning within its business, Swire proposed to make a decision that would result in the loss of employment of one Cargo Planner.

[68] In that situation Section 4(1A)(c) of the ER Act imposes on the employer party to an employment relationship, a duty of good faith to provide an employee who will lose employment, or is likely to lose employment;

> (i) access to information, relevant to the continuation of the employee's employment, about the decision, and
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> (ii) an opportunity to comment on the information to their employer before the decision is made.

[69] Mr Sehji addressed the requirements of s 4(1A) in his first closing submissions of 27 April 2022. He submitted;

> (14) During the discussion on restructure proposal, it is evident now that the employer failed to "fairly and properly provide all relevant information" at the time of consultation. The fundamental reason for restructuring was missing.
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> (15) The scores of the Applicant and the other two planners were not disclosed to the Applicant after the individual interviews on 12 March 2021. The employee was denied the access to information, relevant to the continuation of his employment and was not given an opportunity to comment before the dismissal decision. He was just handed the letter of dismissal on 25 March 2021.
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> (16) The employer did not provide any objective evidence for Flexibility and Teamwork scores.

[70] It is not disputed that in the circumstances Swire failed to comply with s 4(1A) imposing a statutory duty. Relevant information compiled in writing during the consultation and selection process, was not given to Mr Sehji. Section 4 (1A) applies to any relevant information, whether committed to writing or not.

[71] Section 4(1A) is a strong and central legislative requirement, as can be seen from the high importance the object of the ER Act places on good faith in all employment relationships. The Employment Court has approved a description of it as a 'natural justice provision', the core right of which is the opportunity to comment[2].

[72] The relevant information was collected or compiled in March during Mr Sehji's interview and shortly after that when the Swire managers met as a group to consider the scores they had each given him and his two colleagues.

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[2] *Vice Chancellor of Massey University v Martin Wrigley and another* [2011] NZEmpC 37, at [54]

[73] Swire provided the written information to Mr Sehji's lawyer on or about 1 July 2021, a few weeks before mediation took place. More information was provided in December 2021.

[74] The Authority does not accept that the failure by Swire was simply that it did not make available to Mr Sehji information that he was already well aware of, from earlier performance reviews, general communication and directives or occasional chidings from management, or from his oral assessment interview. Utterances and body language were no substitute for seeing starkly, in black ink on the page, the information that would seal his fate.

[75] Until the written assessments were disclosed to him Mr Sehji did not know how his colleagues had been assessed relative to him. The selection process was an exercise in making comparisons between Mr Sehji and his two colleagues, and to fully understand how he had been assessed he needed to know how the other employees had been measured alongside him. This information could easily have been supplied with the names of the individuals redacted. Mr Sehji has now objected to some of the assessments made of his colleagues. He was not given the opportunity to do that before the decision was made to disestablish his position.

[76] In submissions for Swire, counsel Mr Langton contended that Swire's failure to comply with s 4(1A), did not necessarily lead to an absence of justification for Mr Sehji's dismissal.

[77] The Authority does not agree. Mr Sehji was not afforded a fundamental statutory right to have an opportunity to comment on information of critical importance to the continuation of his employment. An employer who or which fails to comply with s 4(1A) does not act as a fair and reasonable employer could have done.

[78] For such employer, there is no opting-in or opting-out of compliance. As the Employment Court has observed, 'a fair and reasonable employer will comply with the law'[3].

[3] *Simpsons Farms Ltd v Aberhart* [2006] NZEmpC 92, at [65]

[79] The test of justification at s 103A must be considered against the factors set out at s 103A(3), or such of them applying to the circumstances. For a redundancy dismissal, factor (a) the adequacy of the employer's resources and factor (b) provision of a reasonable opportunity to respond, seem to be applicable.

[80] There is no suggestion that Swire did not have the resources to inform itself of its legal obligations or to fully conduct a fair redundancy process. It did not give Mr Sehji an opportunity to be heard on the scoring Swire had given him before the redundancy decision was made.

[81] Where an employer is determined by the Authority not to have acted as a fair and reasonable employer could have in all the circumstances, s 103A(5) does provide some mitigation to the application of the justification test. A dismissal is not to be found unjustified solely because of minor defects of process which did not result in the employee being treated unfairly.

[82] The requirement to provide relevant information and the opportunity to comment on it, is not merely a minor detail of procedure. The Authority finds that s 103A(5) has no application in circumstances where a fundamental substantive provision of employment law was not complied with by Swire. A breach of legislation addressing the inherent inequality of power in employment relationships was unfair to Mr Sehji, by having him left in the dark about the way he had been scored before the decision to dismiss was made, and for a long time after that.

[83] The breach denied him knowledge, and it denied him the chance to communicate with his employer about the views it had formed of him in carrying out the assessment and interview exercise.

[84] As a party to an employment relationship, one of Swire's good faith obligations under s 4(1A)(b) was the requirement to be communicative. The opportunity to comment was Mr Sehji's to exercise, not Swire's. It was unfair and unreasonable for Swire to decide what information Mr Sehji should or should not see.

[85] Mr Stevens said in evidence that Mr Sehji was not shown the written material because he thought it would have upset Mr Sehji. His immediate reaction on 25 March

to being told of his redundancy, is some indication of how wound-up he had become by the selection process while awaiting the outcome of it.

[86] If Swire was confident in its assessments and believed them to be fair and reasonable, there was no good reason to avoid engaging with him and explaining and confirming the assessments.

[87] Mr Sehji was not given the opportunity to comment on the written assessments. The Authority considers it quite likely Mr Sehji would have vigorously rejected those assessments of him and pointed to his experience over several months before they were made, of working for prolonged periods well beyond normal hours. He would also have pointed to the concerns he had raised about his health, and to the attempts he made to have Swire clarify what could reasonably be expected of him under the terms of his IEA.

[88] This has relevance when the Authority is giving consideration to whether it would have made any difference to the decision to select Mr Sehji for redundancy, if he had been shown the written material and given an opportunity to comment on it. Some degree of speculation is required to answer that question, but the Authority's view is that it probably would not.

[89] Mr Sehji should at least have had the opportunity to debate the assessments made of him. Those assessment determined he would lose his Cargo Planner position. It seems likely they also ruled him out of any consideration for redeployment, given the remarks about his inflexibility and less critical comments made about his teamwork.

Redeployment

[90] The Authority finds that the dismissal was unjustified for the further reason that there was no attempt to consult Mr Sehji about the present or future availability of redeployment or his suitability for that. The Authority does not accept that there were no positions he could have been considered for either in New Zealand or in Singapore. Mr Sehji said he was prepared to relocate. His evidence was that there were positions regularly arising or likely to arise in the near future. He was not consulted and only found out later there had been vacancies.

[91] A proactive approach by the employer to redeployment is required by the duty of good faith[4]. A fair and reasonable employer will consult and explore reasonable opportunities for redeployment of an employee selected for redundancy.

[92] The scoring and assessment given of Mr Sehji in the selection exercise, made it less likely that Swire would recommend him for any redeployment. Nevertheless, Mr Sehji was entitled to be offered that conversation, no matter how disappointing and disagreeable he may have found it.

[93] As the Employment Court held in *Gafiatullinav v Propellorhead Ltd* [5]*;*

> An employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation.

[94] Mr Sehji concluded the 'Unjustified dismissal claim' section of his comprehensive closing submissions with the following;

> The test of s 4(1A)(c) and s 103A of the ER Act are not met so the dismissal should be determined unjustified.

[95] For the reasons given above, the Authority completely agrees with that submission and determines that the dismissal of Mr Sehji was unjustifiable. He has a personal grievance.

Remedies for unjustified dismissal

[96] The remedies sought by Mr Sehji are reinstatement, reimbursement of lost wages, compensation for humiliation, loss of dignity and injury to feelings, and compensation for loss of benefits reasonably expected from the employment relationship. All those are available under s 123 of the ER Act.

[97] In considering remedies, the Authority finds there is no question of any contributory conduct by Mr Sehji for which he could be blamed. No reduction of any remedies is required for fault on his part.

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[4] *Gafiatullinay v Propellorhead Ltd* [2021] NZEmpC 146, at para [111]
[5] Above 4, at [111]

[98] The judgment in *Gafiatullinay v Propellorhead Ltd* [6], is an example from the Court of the way consideration is to be given by the Authority when determining remedies, in circumstances such as those of this case. The Court held;

> Where a dismissal is regarded as unjustified purely on procedural grounds, allowance must be made for the likelihood that if a proper process had taken place, the employee would still have been dismissed. In such a situation, the unfair process would not be causative of the employee's loss. [7]

[99] The Court found the employer had taken the performance of an employee into account when assessing whether the employee's position was needed or could be disestablished. The dismissal was held to be unjustified because the employer had failed to consult the employee about her performance and its views of that, and about her suitability for redeployment.

[100] The Court considered the employer's procedural failures had significantly impacted the employee and given her the impression the process was about her and not her position, while being unlikely to alter the outcome[8].

[101] The Authority must make allowance for its finding that Swire was justified in deciding to reduce by one the number of Cargo Planners employed at Auckland. The Authority finds that had Swire properly and fully discharged its obligation to consult Mr Sehji, it is unlikely he would have remained employed by Swire.

[102] Although Mr Sehji has obtained employment which he started in February 2022, he continues to seek reinstatement. The Authority finds that reinstatement, although it is the primary remedy, is neither practicable nor reasonable in the circumstances of a justified downsizing by Swire. It is not reasonable to potentially put at risk the job of one of the two remaining cargo planners, so that a position can be made for Mr Sehji.

[103] Although Mr Sehji will disagree, because he has a much different perception of his performance than Swire in relevant respects, the Authority is satisfied that the

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[6] Above 4
[7] At [152]
[8] At [94]

managers' scoring was not influenced by personal dislike, prejudice, or bias, or that any other unfounded or irrelevant consideration was taken into account by Swire in its selection.

[104] The remedies are to address the harm caused by the breach of s 4(1A)(c), the failure to consult about redeployment or alternatives to redundancy, and any loss of remuneration and expected benefits.

[105] It is obvious and understandable that Mr Sehji has suffered and continues to suffer significant personal distress from the decision made to terminate his employment. The cause of his distress is mostly the loss of his employment after a nearly 20-year career when approaching retirement age.

[106] At paragraph (55) of his second closing submissions Mr Sehji referred to a display of the depth of his distress and the loss of his employment as the major cause of that. He said he felt he had been thrown out and abandoned by his company, and he was worried about the future without a job, especially at his age.

[107] The breach of s 4(1A)(c) for which compensation can be awarded, is a much lesser cause of hurt feelings, the Authority is satisfied.

[108] The lack of consultation about redeployment or alternatives to redundancy have caused Mr Sehji distress.

[109] As compensation for his unjustified dismissal, Swire is ordered to pay Mr Sehji $12,000 under s 123(1)(c)(i) of the ER Act.

[110] Following his dismissal Mr Sehji lost wages for about nine months before starting his present employment in a lower paid job. Only a small part of that loss can be attributed to his grievance. Section 128 of the ER Act provides for reimbursement of the lesser of lost remuneration resulting from the grievance, or three months reimbursement. The Authority considers that if Swire had undertaken full consultation with Mr Sehji, his notice of termination would have been deferred for no more than two weeks and his dismissal would have taken effect two weeks later after 23 April 2021.

[111] Swire is pay two weeks basic salary to Mr Sehji under s 123(1)(b) of the ER Act. His basic salary was $100,944.00 at termination.

[112] There is no suggestion that the redundancy compensation Mr Sehji received should be set off against lost wages. That compensation was for a different purpose.

[113] Swire's KiwiSaver contributions are to be made or compensated for on the lost remuneration awarded and annual holiday pay is to be reimbursed also.

[114] Interest is to be paid on the lost remuneration from the date of lodging the statement of problem, 6 November 2021, until paid in full.

Claim for excessive hours worked – disadvantage personal grievance

[115] In his statement of problem lodged on 26 November 2021, Mr Sehji sought compensation for 'excessive hours worked'.

[116] This was not stated to be a remedy for a personal grievance claim but that may be inferred from the availability of compensation as a grievance remedy.

[117] The monetary amount of the claim was left unquantified.

[118] Mr Sehji's amended statement of problem lodged on 10 February 2022, referred to a disadvantage personal grievance claim, arising from 'unreasonable long work hours' being demanded by Swire.

[119] Mr Sehji alleged he had been misled about the workload when he became employed, which under the IEA was over 10 years before his employment ended. He alleged his wellbeing was neglected through Swire's actions of giving him an extra workload and not approving sick leave when requested. He sought resolution of his claims, although he did not specify a remedy of compensation or recovery of wages.

[120] In support of this claim Mr Sehji presented information showing daily work hours over several months immediately before his employment ended. The records for July 2020 show 26.5 days worked consecutively, and average weekly hours of 85.92 ('gross') worked. A summary of weekly hours worked from August to December

2020 shows 69, 62, 62, 64 and 72 respectively, in those five months. For December 2020, Mr Sehji's records show 30 days were worked consecutively, Christmas day being the one day off.

[121] Under the express terms of his IEA, Mr Sehji had agreed with Swire that his normal hours of work were 37.5, to be worked Monday to Friday, but there was an express qualification to that, as follows;

> **6. HOURS OF WORK**
>
> - In addition to these hours, the employee may be required to perform such overtime (including work on weekends) as may be reasonably required by the employer in order for the employee to properly perform their duties. The employees salary fully compensates them for all hours worked.

[122] The IEA explained this qualification in the First Schedule under Hours of Work

> ……. due to the nature of the business you must be prepared to work outside of normal office hours which include weekends.

[123] The Authority finds that Swire did not act unjustifiably by requiring Mr Sehji to work overtime, because the parties had expressly contemplated in their IEA at clause 6 that such a requirement could be made. What the parties did not expressly provide for, were any limits on Swire's exercise of that requirement. Mr Sehji questioned those limits when he responded by letter of 25 February 2021 to the redundancy proposal. He had questioned the limits earlier as well. The limits had not been agreed or decided by the parties when the employment terminated.

[124] On one view of the IEA and this particular claim of Mr Sehji, a question arises as to the interpretation, application or operation of the IEA. That question might be, what are the circumstances in which Mr Sehji could reasonably be required to perform overtime beyond a particular limit, of say 60 hours a week, in order to properly perform his duties? To what extent is that limit to be set by reference to health and safety requirements and considerations, or reference to a point at which there is a risk of an

employee becoming physically or mentally unable to continue properly performing his duties?

[125] Put another way the question is, what did the parties contemplate as the bounds of reasonableness, beyond which Swire could not require greater overtime to be worked by Mr Sehji? Along with the expressed intention of the parties, the answer would have to take into account their joint responsibilities to take all reasonable precautions for their health and safety. Mr Sehji could only work overtime voluntarily up to the point at which the extent of it became unsafe or unhealthy. The question is, where was that point in this particular employment relationship with the type of work performed by Mr Sehji?

[126] The Authority is not a regulator of overtime, and it cannot fix terms of employment by varying the parties' IEA provision such as clause 6, to require payment on top of salary to be made for overtime worked.

[127] A minimum wage recovery claim seems to be unavailable as a potential remedy for this claim, because at Mr Sehji's salary level of $100,944.00 (basic) his hours did not reach the point at which his pay fell below the minimum wage.

[128] From 1 April 2020 the minimum wage was $18.90 per hour. For a one-week period, over 100 hours of work would be required before Mr Sehji's pay rate dropped below the minimum wage.

[129] The remedies for a disadvantage personal grievance including compensation, are available if a grievance has been raised within 90 days, or the employer has consented to an extension of that period, or the Authority has given leave on the grounds of exceptional circumstances to raise the grievance outside 90 days.

[130] Swire contends that viewed as a personal grievance this claim was raised out of time, because the amended statement of problem was not lodged until 10 February 2022, nine months after the employment ended.

A dispute

[131] There is another limitation on grievance claims which is imposed by s 103(3) of the ER Act. An action of the employer alleged to be unjustified, must not arise from the interpretation, application or operation of the employment agreement. The remedy in that situation is to obtain, via the disputes process, a declaration as to the rights and obligations of the parties under the employment agreement, in this case clause 6 of the IEA.

[132] The existence of a dispute is pointed to by Mr Sehji's email response to Mr Diggle of 16 July 2020. When advised of a requirement for him as a planner to cover Pacifica shipping work, his response was that he had not agreed to do this as part of his job. He said;

> …… hours are not suitable to me are outside my contractual terms.

[133] In his consultation response letter of 25 February 2021, Mr Sehji asked;

> Can you please elaborate what is the reasonable hour are we expected to work beyond 37.5 hours/day (sic)?

[134] In a letter of 20 August 2021 to Mr Aquino, he said

> I asked the question so many times what the reasonable hours of work, but got no reply.

[135] The Authority finds that Mr Sehji's excessive hours claim arises from a dispute and not from a personal grievance. That dispute remains undecided.

[136] Now that the employment has ended and Mr Sehji can no longer be required to work, giving a declaration to resolve that dispute may be of no practical benefit.

[137] The Authority cannot determine a dispute from the information provided by Mr Sehji to the Authority when his claim first came before the Authority. No directions were given by the member first assigned this case to have this claim investigated and

determined as a dispute. It is clear from the first submissions made by the parties that they did not address the matter as a dispute.

[138] The excessive hours worked claim as presented is not upheld.

Claim of discrimination

[139] In the statement of problem Mr Sehji lodged on 26 November 2021, he included among his personal grievance claims;

> (v) Direct and Indirect discrimination, misuse of position of authority and giving an unjustified warning.

[140] He referred in the document to 'systemic discrimination' against him, and to being 'side-lined for any promotion'.

[141] In his closing submissions of 27 April 2022, Mr Sehji said he felt that he had been overlooked during his employment because of his 'Ethnicity, Colour, Race and Religious beliefs'.

[142] In his closing submissions of 27 June 2023, Mr Sehji described himself as;

> (94) …… of Asian origin (for the purpose of colour, race and ethnicity) and … of Hindu religion.

[143] Mr Sehji claimed his manager had 'preferred and selected White over Asian and Christian over Hindu'. He referred to several appointments Swire had made of people he categorised as 'White and Christian'. He alleged in the context of his discrimination claim that he had been paid less than one of his cargo planner colleagues.

[144] Mr Sehji inferred that he had been selected as the redundant cargo planner because of discrimination, the two retained planners being, in his observation, 'white and Christian'. He pointed to nine management employees of Swire in New Zealand who he said were 'white', which to him indicated systemic discrimination.

[145] Mr Sehji referred to an email sent to staff in November 2020 by Swire's Managing Director based in Singapore. He suggested the email can be read as an acknowledgment by Swire to staff that the company was having problems with fully embracing diversity and inclusion into its culture.

[146] The discrimination claims have been raised as a personal grievance under ss 104 and 105 of the ER Act. They are subject to s 114 which requires them to be raised within a period of 90 days. The claims were raised six months or more after Mr Sehji's employment terminated.

[147] The Authority finds that Mr Sehji's claim has not been raised in compliance with s 114. Swire has not consented to the claims being raised out of time and leave has not been sought to do so on the grounds of exceptional circumstances. They cannot therefore be investigated further and determined as a personal grievance claim.

[148] Had they been raised within the time period prescribed, the Authority is unlikely to have found that Mr Sehji had a personal grievance of discrimination. In directions it gave on 3 February 2022, the Authority required Mr Sehji to lodge an amended statement of problem providing details of the claims of unjustifiable disadvantage and discrimination. The information he has provided in response does not support a claim of discrimination.

[149] Mr Sehji's claims ask for broad inferences to be drawn from general circumstances as to Swire's motivation or reasons for certain actions or inactions on its part. He rests his claims on differences or distinctions between individuals because of race, ethnic origin, religion or gender. More than that is required. Unlawful discrimination does not occur unless any of those differences have been the determinative factor in, for example, selection for redundancy, or in appointing or not appointing employees to other positions of employment (as in promotion or redeployment), or in providing or not providing particular terms of employment to individual employees.

[150] It is Mr Sehji's strong intuition that he was discriminated against, but this has not been supported with the information or evidence necessary to establish the claims in terms of s 104 of the ER Act and the prohibited grounds of discrimination at s 105.

Claim for pay equity

[151] This claim arises from Mr Sehji's belief that one of his colleague cargo planners was paid more although his period of service with Swire was less. Mr Sehji attributes this disparity to discrimination against him on the grounds of his colour or ethnicity.

[152] The Authority accepts the submissions of Mr Langton that Mr Sehji has a misconception about the nature of pay equity claims. Also, he has not provided any evidence of discrimination on any unlawful ground.

[153] Pay equity is equal pay for work of equal or comparable value. In considering a claim, comparison is often made between work normally carried out by women with different work normally carried out by men. Mr Sehji's Cargo Planner colleagues were also male.

[154] Lawfully, an employer may decide to pay two people unequal remuneration, although they are doing the same or very similar work.

[155] The Authority finds against Mr Sehji on this claim.

Claim for alternative holiday for work on public holidays

[156] This claim is for 2 days alternative holidays as provided by s 48(2)(b) of the Holidays Act 2003, where an employee works on a public holiday that would otherwise have been a working day.

[157] Mr Sehji's evidence, supported by detailed schedules of days and hours worked, is that he worked on Boxing Day 2020 and New Year's day 2021, which were Saturdays.

[158] The Authority finds that under his IEA, clause 6, and the Hours of Work clause in the First Schedule, Mr Sehji could be required to work on weekends.

[159] The two public holidays were observed on the Monday after them and Mr Sehji worked on both Mondays.

[160] He was entitled to be paid at least time and a half for working on each public holiday, which he acknowledges he did receive.

[161] He was also entitled to an alternative holiday under s 56 of the Holidays Act. The entitlement was not extinguished by notice of termination. A claim may be made to recover pay for the two days under s 60(2) of the Holidays Act.

[162] Mr Sehji's evidence is accepted that Swire recorded those two days as Other Leave due to him.

[163] For Swire it is submitted Mr Sehji has not shown a contractual entitlement to the two days.

[164] The Authority finds that he performed work on the days in question under the express IEA provisions of clause 6 and the First Schedule, Hours of Work clause. He could be required to work Monday to Friday and also on weekends.

[165] In a letter of 13 August 2021, Mr Aquino advised under the heading Other Leave that all leave owing had been paid out to Mr Sehji.

[166] Swire has not produced any wage and time records to show that the 'Other leave' Mr Sehji had seen recorded, was paid to him at any time before or after termination of his employment.

[167] Swire is to produce to the Authority copies of any wages and time records, or holidays and leave records, showing that Mr Sehji either took the alternative holiday or was paid out for it, accruing from work he performed on Boxing day 2020 and New Year's day 2021.

[168] The claim of Mr Sehji for two days' pay ($1,180) will be upheld if the holiday is not shown in any records as taken or paid out. Payment of interest on that amount will also be ordered.

[169] Swire is to produce any records within 14 days of the date of this determination. It is to send a copy of them to Mr Sehji at the same time and the Authority will consider whether a supplementary determination should be given to resolve the claim.

Claim for in-lieu days

[170] Mr Sehji claims there was an arrangement with Swire which allowed for in-lieu days to be taken as time off after working weekends, and for untaken in-lieu days to be paid. He says it was not possible with his high workload to take days in lieu and he was not paid for them when his employment ended.

[171] There was no quantification of the amount of pay claimed by Mr Sehji for in-lieu days.

[172] For Swire it is submitted that the parties had expressly agreed in the IEA that Mr Sehji's salary compensated him for all hours Swire required him to work, including overtime.

[173] The Authority accepts that as the correct position.

[174] The claim for in-lieu days is not upheld.

Claim for Long Service Leave

[175] This is a claim under clause 15 of the IEA for four additional weeks' leave. That entitlement arises after the first 10 years of continuous employment, and again five years after that, and again after another five years, or 20 years' service in total.

[176] Mr Sehji's employment terminated on 23 April 2021. For the purposes of computing service entitlements, he was deemed to have commenced with Swire on 1 February 2002. He would have served 20 years on 1 February 2022 if his employment had not ended earlier. The Authority may assume he received his entitlements of four weeks due at 10 and 15 years' service, so it is more correct to say he had served 4.25 years of the second qualifying 5 year period, not 19.25 years.

[177] The amount of the entitlement that would have fallen due on 1 February 2022 is not in issue. Swire rejects the claim on the basis that the required length of time, five years, was not served and there was no obligation for Swire to pro-rate the entitlement.

[178] The Authority agrees with that submission. Although the years of service needed to qualify is an arbitrary number, it is a number the parties agreed to in their IEA. There is no express or implied term to the contrary, and the Authority cannot vary the parties IEA.

Claim for compensation for lost performance bonus

[179] A remedy of compensation for loss of a contractual entitlement to any bonus payment is potentially available under s 123(c)(ii) of the ER Act. Mr Sehji claims $15,780.00 as a bonus entitlement he expected for the year ending 2021.

[180] The First Schedule to the IEA provides for a performance bonus to be paid, at the end of the financial year, in accordance with Swire's policy scale. It is expressly payable at the employer's 'sole discretion'.

[181] The 26 November 2021 statement of problem did not claim a bonus payment as part of any remedy. The amended statement of problem of 10 February 2022 alleged that Swire had failed to apply its policy regarding performance bonus, but otherwise made no claim for any monetary amount.

[182] In Mr Sehji's first closing submissions dated 27 April 2022, at para (41) the remedy sought is $15,780, 'as per company bonus policy and bonus for the year ending December 2021'. Swire did not address that claim, possibly because it appears from the date of Swire's submissions they were also filed on 27 April before there was an opportunity to see Mr Sehji's submissions filed at the same time.

[183] In Mr Sehji's second closing submissions dated 27 June 2023, at para (132) the same remedy in the same amount was claimed.

[184] Swire's second closing submissions of 13 July 2023 did not address the claim.

[185] In principle a claim such as this could be made if an employer habitually or customarily has paid a bonus, despite it being described in the IEA as discretionary.

The Authority has no information or evidence about the application of Swire's bonus policy in the 2021 financial year or any other year, and it has no information from Mr Sehji as to computation of the amount he has claimed.

[186] The Authority notes the correspondence about a bonus entitlement between Mr Sehji and Mr Aquino on 4, 13 and 20 August 2021. That correspondence under the heading 'Bonus criteria' and 'Bonus Payments', is in attachments 9, 10 and 11 of the statement in reply lodged on 17 February 2021. The correspondence provides little assistance in establishing the nature of any entitlement Mr Sehji had to a performance bonus or the amount of any entitlement he had, in the 2021 financial year.

[187] The claim for lost performance bonus is not upheld.

Claims for penalties for breach of ER Act and IEA

[188] In his first statement of problem lodged on 26 November 2021, Ms Sehji did not claim penalties for any breaches, whether of statute or employment agreement.

[189] In his final closing submissions Mr Sehji referred to a failure by Swire to comply with s 132 of the ER Act. That is not a penalty creating provision, and the Authority is not satisfied that Swire failed to produce records while under any legal obligation to do so.

[190] Mr Sehji also referred to breaches of the ER Act; s 60A (requirement of good faith bargaining for an IEA), s 67C (agreed hours of work to be specified in IEA) and s 67 F (no adverse treatment for refusing to perform certain work). Reference to those provisions had not been made before closing submission were lodged in June 2023, over two years after the employment of Mr Sehji was terminated. As claims for penalties they are out of time, because penalties have to be claimed within 12 months of the breach. In any event penalties are not able to be claimed for a breach of any of those particular sections.

[191] In his amended statement of problem lodged on 10 February 2022, at paragraph 1a (iii) he expressed his problem as including, 'breaches of the duty of good faith in restructure process and selection process'.

[192] In paragraph 3j the remedies sought for his problem included, 'penalties imposed if statutory or contractual breaches are found.

[193] Actions of Swire going back one year to 10 February 2021 could be the subject of a claim for penalty made in the amended statement of problem. Swire's breaches of s 4(1A) occurred inside the one-year period, in March 2021.

[194] The Authority finds that no claim of breach of the IEA was made by Mr Sehji. There is no reference by clause number to a particular provision, or to the subject matter or content of any provision, sufficient to identify any breach.

[195] A claim of breach of s 4 of the ER Act was made in the amended statement of problem. While there is no reference to the section number, the claim is sufficiently particularised with the words, "Swire breached statutory obligations of the duty of good faith'. Those words are a clear enough reference to s 4 including s 4(1A) 'the duty of good faith', and also to s 4A which provides a penalty for certain breaches.

[196] Mr Langton's submission for Swire is that the contended breach is a personal grievance rather than a penalty claim. The Authority finds that a penalty has been sought for a breach of good faith and the claim has been directed at 'statutory obligations' in that regard. They include the obligations under s 4(1A)(c), which the Authority has found on the facts were not complied with by Swire.

[197] A single action can give rise to a claim for more than one legal remedy. The breach of s 4(1A) is the basis of both a personal grievance and a penalty claim.

[198] The claim for a penalty has been properly brought before the Authority, and it was brought within the time permitted.

[199] A penalty can be considered and imposed where a breach of the duty of good faith in s 4(1) of the ER Act is deliberate, serious and sustained.

[200] The failure of Swire was deliberate; Brodie Stevens in evidence confirmed it was consciously decided not to show the written selection information to Mr Sehji. The failure was serious; s 4(1A) imposes an important obligation on parties and has been

likened to a natural justice provision. The failure was sustained; what amounts to a sustained breach is a question of degree and is relative to the circumstances. The central events in this case occurred over a few days leading up to a decision being made to determine whether Mr Sehji's employment would end or continue. The breach was not a momentary lapse during an employment the parties were expecting to continue. The breach was not corrected or mitigated during the remainder of Mr Sehji's employment. Swire did not reveal the information to Mr Sehji until June and December 2021, after it had terminated his employment.

[201] Swires's breach of s 4(1A) was a major contributor to Mr Sehji's employment relationship problem, his unjustified dismissal, and is a breach which should be met with a penalty.

Assessment of penalty

[202] Matters the Authority is to have regard to in determining an appropriate penalty for any breach, are set out at s 133A of the ER Act. The list is not an exhaustive one and the Authority may consider anything else of relevance.

[203] The first matter, at s 133A(a), is the object of the legislation as stated in s 3.

[204] That object includes building productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship, and acknowledging and addressing the inherent inequality of power in employment relationships.

[205] A further matter for consideration is the nature and extent of any breach. Swire failed to give Mr Sehji access to relevant information about his selection for redundancy. Without that he was unable to comment on the information before the final decision was made to terminate his employment, whether or not that would have made any difference. The breach was a single one affecting one employee rather than several.

[206] The breach was deliberate and occurred as much from a wish by Swire to spare Mr Sehji's feelings as from a desire to avoid having to engage with Mr Sehji about the decision and how it was arrived at.

[207] As to the matter of the nature and extent of any loss or gain from the breaches, there was no financial advantage to Swire from its failure. Mr Sehji lost an important opportunity to question his selection for redundancy, or at least gain a better understanding of how and why the decision had been made.

[208] A fifth matter is whether Swire has made amends for its failure. There is no indication of any attempt to mitigate in any way the harm caused to Mr Sehji.

[209] The circumstances of the breaches as an additional matter have been covered earlier in this determination.

[210] The final matter is previous conduct. Nothing is known to the Authority about anything relevant in this regard.

Additional considerations

[211] The Court has identified additional considerations to those expressed in s 133A of the ER Act[9] . They include deterrence and the degree of culpability.

[212] Swire seems unlikely to fail in its disclosure obligation again. There is some need for general deterrence, insofar as other employers may intentionally or inadvertently breach s 4(1A) of the ER Act.

[213] Ability to pay any penalties is also a consideration. The Authority has no information to suggest that Swire will have difficulty paying a penalty.

[214] Finally, the Authority must look at consistency with penalty awards in other cases and, in the outcome of the investigation, seek to achieve a balance between the breaches and any consequences of them.

[215] In *Unite Union v Hospitality Services Ltd*[10], a penalty of $12,000 was imposed for breach of s 4(1A) in circumstances where information gathered from the

[9] *Labour Inspector v Preet PVT Ltd* [2016] ERNZ 514 at [68] and [80].

[10] [2022] NZERA 535

employment of 13 hotel workers was not disclosed to them before a decision based on that information was made to make them redundant. The penalty was partly for a breach of the ER Act and also of the collective agreement covering the employment. The employer was large and well resourced, and the workers did not become aware of the breach until an Authority investigation had commenced.

[216] The maximum penalty for the breach of s 4(1) is $20,000.

[217] Swire's breach involved a single employee, Mr Sehji, and although it was intentional it was not accompanied by malice. A relatively light penalty is appropriate which, taking all considerations into account, shall be $3,000.

Payment of part of penalty to Mr Sehji

[218] The Authority has a discretion under s 136(2) of the ER Act to award the whole or any part of a penalty to any person. No circumstances are laid down as to when the Authority may or may not make award under s 136(2).

[219] In *Unite Union v Hospitality Services Ltd* [11] workers were each awarded $1,000 of the total penalty.

[220] The Authority does not consider that payment to Mr Sehji of some of the $3,000 penalty will be doubling up on compensation he has been awarded under s 123(1)(c)(i). A penalty is punishment for a breach, which in this case was a wrong directly affecting Mr Sehji as well as the public who have an interest in seeing that laws are complied with.

[221] It is fair that Mr Sehji should become invested in the enforcement of s 4(1) of the ER Act, and in a tangible or monetarised way. By receiving part of the penalty, he may share in the enforcement process and receive reparation as well.

[222] Mr Sehji is to receive $1,000 of the penalty. The balance of $2,000 is to be paid to the Employment Relations Authority for payment into a Crown Bank Account.

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[11] Above 7, at para [28]

Non-publication Order

[223] Although the Authority has been given a broad discretion by clause 10 of Schedule 2 of the ER Act to make orders prohibiting publication, that discretion is to be exercised in accordance with principle. The openness of justice is a fundamental principle[12].

[224] Before imposing any limitations on the availability of knowledge from an investigation carried out by it, the Authority must be satisfied, to a high standard, that there are specific adverse consequences of publication which are sufficient to justify an exception to the fundamental principle[13].

[225] The Authority is not satisfied that there are such consequences likely to flow from publication of any of the details of this investigation.

[226] The order is declined.

Conclusion

[227] In summary, orders are made against Swire;

- For payment to Mr Sehji of compensation under s 123(1)(c)(i) of the ER Act of $12,000

- For payment to Mr Sehji of lost remuneration under s 123(1)(b) of two weeks at basic salary ($100,944 per annum), including holiday pay and KiwiSaver contributions for that period

- For payment of interest on the lost remuneration, from 26 November 2021 until paid in full. The amount to be paid can be calculated at www.justice.govt.nz/fines/civil-debt-interest-calculator

[12] *Erceg v Erceg* [2016] NZSC 135
[13] Above 5, at paras [12] and [13]

- For payment of a penalty for breach of s 4(1) of $3,000, of which $1,000 is to be paid to Mr Sehji and the balance to the Authority for payment to the Crown.

- Within 14 days, Swire is to provide any wage or time record information it has showing the two alternate holidays for Boxing Day 2020 and New Years day 2021 were taken by Mr Sehji or were paid out to him.

- Payment of the compensation, reimbursed wages and penalty as ordered above, is to be made by Swire within 21 days of the date of this determination.

Costs

[228] Costs are reserved. As Mr Sehji was not represented during the investigation meeting, he is unable to claim legal costs.

[229] Swire has had mixed success in the result of the investigation. Any application it may wish to make should be filed within 21 days of the date of this determination.

[230] If an application is made by Swire for costs, Mr Sehji shall have 21 days in which to reply.

[231] If costs are applied for, any order made may be determined on the basis of the Authority's current daily rate applied to two days of investigation meeting. Neither party was responsible for the requirement to repeat the investigation meeting in June 2023.

Alastair Dumbleton
Member of the Employment Relations Authority