

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 646  
3200019

BETWEEN CHRISTOPHE THEVENOT  
Applicant  
AND NELSPRAY LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: Robert Brinkworth, counsel for the Applicant  
Stephen Sansom, counsel for the Respondent  
Investigation Meeting: 30 and 31 July 2024 in Nelson  
Submissions Received: 31 July 2024 from the Applicant  
31 July 2024 from the Respondent  
Determination: 31 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Christophe Thevenot graduated from the University of Nancy in France with a master's degree in mechanical engineering. He undertook his master thesis at the University of Canterbury. Mr Thevenot worked from 2010 in France and in Auckland as a mechanical engineer.

[2] On 12 March 2018 Mr Thevenot was employed by Nelspray in Nelson as a mechanical engineer. Initially he anticipated his role was to spend about fifty percent of his time designing (CAD), thirty percent on assembly and twenty percent travelling for installations and engineering meetings. The employment ended on 17 July 2020 for reason of redundancy. Mr Thevenot says that he was unjustifiably dismissed from his employment because the redundancy was not genuine but for an ulterior motive. Alternatively, he says that he was unjustifiably disadvantaged by the process undertaken in reaching the final decision to dismiss

him. Mr Thevenot seeks reimbursement of three months' lost wages and compensation in the sum of \$30,000.

[3] Nelspray carries on the business of the design, manufacture and installation of industrial spraying units and systems specifically for the panel board industry. Tony Coleman is the sole director of Nelspray and its founder. Nelspray does not accept that Mr Thevenot was unjustifiably dismissed or disadvantaged. It says that its process was conducted reasonably, and that the redundancy was for justified genuine reasons.

### **The investigation process**

[4] The events under consideration arose about four years ago. The statement of problem was lodged with the Authority in November 2022.

[5] There were issues to resolve about whether personal grievances were raised outside of the statutory time period. By agreement the resolution of these issues was on the papers. In a preliminary determination dated 4 March 2024, the Authority found the personal grievances for unjustifiably disadvantage relating to the redundancy process and dismissal were raised within the statutory timeframe.<sup>1</sup>

[6] There was an additional claim about compensation for the loss of the opportunity for international travel. The Authority concluded it would need to hear oral evidence at the substantive investigation meeting about whether a disadvantage grievance had been raised about the loss of the international travel opportunity.

[7] Mr Brinkworth in a memorandum dated 3 July 2024 advised that the claim for missed travel opportunities was abandoned and the remaining substantive issues for the investigation meeting were those set out earlier about the redundancy.

[8] The Authority held an investigation meeting at the Nelson District Court. The Authority heard evidence from Mr Thevenot and his wife, Amanda Burggraff, by the virtual meeting room conferencing system (VMR) from their overseas location. The Authority heard evidence from Mr Coleman and John Kerridge, who is a business consultant and provided advice to Mr Coleman to assist with the restructure of Nelspray. The Authority also heard from Dylan

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<sup>1</sup> *Christophe Thevenot v Nelspray Limited* [2024] NZERA 127.

Filbee who undertook contracting work as a mechanical design engineer before and after Mr Thevenot's redundancy.

### **The issues**

[9] The Authority needs to resolve the following issues in this matter:

- (a) What are the material provisions in the employment agreement between Mr Thevenot and Nelspray?
- (b) What is the legal framework for assessing justification for a redundancy dismissal?
- (c) Was the redundancy genuine?
- (d) Was the process used to implement the redundancy fair with consultation carried out in good faith?
- (e) If a grievance is established what remedies should be awarded and are there issues of contribution and mitigation?
- (f) Should costs be reserved?

### **The material provisions in the employment agreement**

[10] The original employment agreement (the employment agreement) that Mr Thevenot entered into with Nelspray is dated 15 February 2018. He was presented with a subsequent employment agreement dated 15 August 2019. The subsequent employment agreement changed aspects of the job description in Schedule 3 and remuneration but was not signed by Mr Thevenot. The redundancy clause remained unchanged. The notice period in schedule 1 for redundancy is four weeks.

[11] Clause 30 in the employment agreement is headed redundancy. It provides as follows:

- 30.1 In this clause 'redundancy' means a situation where the Employee's employment may be terminated, wholly or mainly, owing to the fact that the Employee's position is, or will become, superfluous to the needs of the employer.
- 30.2 Where the Employer considers that the Employee's position could be affected by redundancy, the Employer shall consult where reasonably practicable with the Employee regarding the possibility of redundancy and consider whether there are alternatives to dismissal. After considering the views of the Employee, the Employer may make a decision to proceed with the possible redundancy.

- 30.3 If an Employee's employment is terminated because their position has become redundant, the Employee will not be entitled to redundancy compensation, but will be given notice in writing for the period specified in the Statement of Personal Terms in Schedule 1 of this agreement or payment in lieu of such notice.

### **What is the legal framework for assessing justification for a redundancy dismissal?**

[12] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake* considered and confirmed the approach to be taken in considering justification of a dismissal based on redundancy. The justification test in s 103A of the Employment Relations Act 2000 (the Act) is to be applied. The test requires the Authority to determine on an objective basis whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances.<sup>2</sup>

[13] The importance of assessing the genuineness of the redundancy was emphasised by the Court of Appeal.<sup>3</sup> The explicit requirements for disclosure of information and consultation in redundancy situations were referred to. There was reference to the fact that the Authority or Court will have before it the information provided by the employer to the employee justifying the redundancy.<sup>4</sup>

[14] A fair and reasonable employer could be expected to comply with the statutory and contractual obligations. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. This includes consultation when making employees redundant. Parties to an employment agreement must not mislead or deceive each other or do anything likely to mislead or deceive each other. Section 4(1A)(c) of the Act requires that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, provide to the affected employee access to information relevant to the continuation of the employee's employment and give an opportunity for comment on that information.

[15] There should not be pedantic scrutiny of the process but an emphasis on substantial fairness and reasonableness. The key element of procedural fairness in the context of a

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<sup>2</sup> *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541 at [84].

<sup>3</sup> Above n1 at [85].

<sup>4</sup> Above n1 at [81].

proposed redundancy is to provide relevant information and actively consult before making a final decision.<sup>5</sup>

[16] The Authority is required to objectively assess under s 103A of the Act whether the dismissal of Mr Thevenot was what a fair and reasonable employer could have done in all the circumstances at the time he was dismissed. Alternatively, were there actions on the part of the Nelspray that were unjustified and disadvantaged Mr Thevenot during the restructuring process.

### **Was the redundancy genuine?**

#### *Organisation structure of Nelspray before the restructure*

[17] Mr Coleman's design and mechanical engineering skills came from his previous positions and a problem-solving mindset that he had since he was young. In 2011 he decided to build a spray system for one of his clients and worked with an electrical engineer. With the incorporation of Nelspray in 2013 Mr Coleman has developed the business into a world leading supplier of specialised spray systems.

[18] It was anticipated in or about the time that Mr Thevenot was employed in February 2018 that Nelspray may capitalise on commercial opportunities which may result in the expansion for the business. Nelspray had signed a new agreement with one of its major clients Siempelkamp which would result in the design, development, and supply of several spray systems. Before Mr Thevenot was employed the design work had been outsourced for about six months to a contractor Mr Filbee. Mr Thevenot was employed specifically to bring the design capabilities of Nelspray within the company and this would free Mr Coleman up to travel for marketing and sales.

[19] When Mr Thevenot commenced his employment with Nelspray in 2018 the only others working for the company were Mr Coleman and an electrical engineer.

[20] In 2019 due to work growth and expansion a fabrication engineer Blair was employed. It was also decided to employ a Siemens PLC specialist with management experience who shall be referred to as P. P was employed as the manufacturing manager and had responsibilities for

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<sup>5</sup> *Stevens v Hapag-Lloyd (NZ) Limited* [2015] ERNZ 224 at [60].

the oversight of the workshop and all manufacturing processes including electrical design and co-ordination through to assembly and packaging. P became Mr Thevenot's manager. There was also an office manager L.

#### *Performance concerns*

[21] Mr Thevenot had become increasingly unhappy in his employment at Nelspray. He was frustrated that international travel opportunities were not available for him as he was told they would be and raised his concerns with Mr Coleman and P about this. Other employees were undertaking installations overseas. Mr Thevenot said that for much of his employment at Nelspray he was the subject of criticism about his performance. He did not believe there was a clear rationale for the criticism. He was told performance issues were the reason he was told he could not go on installation trips overseas.

[22] Nelspray was concerned about Mr Thevenot's performance and what it saw as the lack of development in design capabilities and repeating mistakes. Matters came to a head during meetings between Mr Thevenot and Nelspray about performance in January 2020. Nelspray said that Mr Thevenot did not engage with its attempts to structure a new position for Mr Thevenot both in August/September 2019 and in January 2020 and/or a suggestion that there be oversight of him by a senior design engineer.

#### *Decision making around the restructure.*

[23] In or about February and March 2020 the impact of COVID-19 was being felt. Mr Coleman said that he had many discussions with Siempelkamp at this time. Siempelkamp accounted for 70-80% revenue for machine sales. There was a concern that Siempelkamp's potential clients with existing quotations for new lines incorporating the spray systems would pause the ordering of the product. Nelspray expected a reduction in orders through 2020 and into 2021. Mr Coleman provided an email dated 9 July 2024 from the head of global sales at Siempelkamp that confirmed an earlier phone conversation with him related to the negative impact on sales for Siempelkamp globally after the outbreak of the COVID 19 pandemic. The email set out that the order intake dramatically reduced during the pandemic times and that the recommendation to Nelspray to consider reduced order volumes from Siempelkamp to Nelspray was correct.

[24] Mr Coleman talked with Mr Kerridge about the staffing structure of Nelspray from about February 2020 with reduced sales projections and increased operational costs. There was a discussion that Mr Thevenot's position could be undertaken by a contractor, Mr Filbee. Mr Filbee already had experience with Nelspray's design services and client requirements and did not need upskilling. He could also be available on an "as needs" basis rather than full time which would save costs.

*Discussions with Mr Thevenot on 29 April 2020 about the restructuring*

[25] Mr Thevenot had been working at home over the COVID 19 lockdown. He returned to work towards the end of April 2020. Mr Thevenot and Mr Coleman had a discussion on or about 29 April 2020. Mr Coleman said in his oral evidence that it was not a planned meeting.

[26] Given the passage of time it is not surprising that there are different recollections about what was discussed. The possibility of Mr Thevenot's position being made redundant was discussed. Mr Thevenot said that Mr Coleman told him that "it seems we will need to make you redundant." Mr Coleman in his evidence used the word "may" in relation to redundancy. There was a discussion about the project Mr Thevenot was working on. Mr Coleman said he discussed the communication from Siempelkamp. Mr Thevenot did not have a clear memory about that. Mr Coleman said that he told Mr Thevenot about the proposal to use Mr Filbee to undertake the design work. Mr Thevenot said that he was not confident that there was discussion about Mr Filbee undertaking the work as a contractor. His evidence was he found out that Mr Filbee was undertaking the design work only after his employment ended and was surprised.

[27] Mr Thevenot said that from what was said he concluded Mr Coleman's mind was made up that his position was redundant. Mr Coleman did not accept that.

*1 May 2020*

[28] On 1 May 2020 Mr Coleman sent a letter to Mr Thevenot attached to an email. The email referred to the discussion on Wednesday [29 April] and asked Mr Thevenot to put all "your thoughts you were mentioning down on paper so we can discuss further."

[29] The letter provided as follows:

Dear Chris Thevenot

As discussed.

- With the current worldwide COVID situation, Nelspray needs to look at our operational costs with the downturn in expected sales. This unfortunately appears to involve moving to contractors for some areas of our business.
- We are currently working on the Turkey project that I expect you will complete the design for, very shortly.
- Beyond that, the expected sales to year end will be down on previous projections.
- If new contracts do arise, and where there is no guarantee of this future work, or the extent of it, it makes commercial sense for us to use Contractors for new project designs -at least until the market returns which may be 6 months to a year or even longer.

Please give us some feedback on these concerns, and the proposal we are exploring that your position may become redundant.

We would be grateful for this feedback by Wednesday 7<sup>th</sup> May 2020.

Yours sincerely

Tony Coleman

[30] Mr Thevenot responded on 5 May 2020 to Mr Coleman by email which is set out below:

Hi Tony,

I am sorry I said I would carry on with the project on my own time. I am sure you understand it is not possible as I will need to find a new way to survive financially in Nelson, so I won't have spare time...It is another big disappointment, I really wanted to see this whole design process through. So I am not sure what is left to talk about? As the "when" is at the end of the Turkey project.

The only thing I would like to ask is if it would be ok, for me to use images of my work here, as I would like to build a portfolio. I don't know if there are any legal aspect around that? I understand that I will not use the logo or company name under any circumstances. I am also going to register on the engineering French board, so I will need to write a certification of work, but I will write it down and just ask you to sign it please.

I can't really think straight at the moment, and never been through that, so let me know if there is anything I should do before I leave?

[31] On 8 May 2020 Mr Coleman responded by email focusing on the finalising of the Turkey project and the time required for that. The email ended with "The "when" is still open".

[32] Mr Coleman in his evidence said by 5 May 2020 the decision about Mr Thevenot's position becoming redundant was finalised by Mr Thevenot when he accepted the proposal.

Mr Coleman saw his commitment from that point being to support Mr Thevenot to complete the Turkey project.

[33] After 8 May 2020 there was no evidence of further discussion about the redundancy proposal. Mr Thevenot had started to consider his work options including the possibility of becoming a contractor.

[34] On 8 June 2020 Mr Thevenot sent an email to Mr Coleman noting amongst other matters that it had been more than a month since the conversation and he did not know where he was “sitting with redundancy.” He wrote that the situation is “unbearable” and there was reference to the stress and fear it brings. He also wrote that he had been depressed for months and wanted to go forward and “leave this behind.” Mr Thevenot advised in his email that he intended to become a contractor.

[35] On 12 June 2020 Mr Thevenot went to see his medical practitioner and the consultation notes record he spoke of the stress about work and job security with respect to the redundancy. The medical certificate that was provided to Nelspray stated that Mr Thevenot was medically unfit from 12 June 2020 and should be fit to resume work on 20 June 2020.

[36] Mr Coleman forwarded the 8 June email to Mr Kerridge who telephoned Mr Thevenot on 12 June 2020 to set up a meeting. Mr Coleman in his written evidence stated that Mr Thevenot was unable to identify how long it would take him to complete the project so on 16 June it was determined his last day would be 19 July 2020.

[37] Mr Kerridge sent an email dated 16 June 2020 to Mr Thevenot in which he advised that he had met with Mr Coleman and P on 10 June 2020 to discuss a number of matters including the proposed disestablishment of Mr Thevenot’s position. He wrote that following further discussions it had been decided to proceed as originally planned. He stated in the email that the reasons previously stated by Mr Coleman remain valid and have been strengthened by:

- Covid 19 has made the market uncertain.
- The Turkey job is near completion, and we have only one other confirmed order.
- Covid 19 means that Tony Coleman is unlikely to travel outside the country this year. This impacts the marketing of Nelspray products, and also means Tony is available to perform some duties as a Mechanical Engineer.

[38] On 17 June 2020 Mr Kerridge went to see Mr Thevenot at his home as arranged for a meeting. Mr Thevenot thought the meeting was about five minutes in duration and Mr Kerridge said not it was not more than half an hour. The evidence did not support issues of justification for the redundancy were explored in any depth. Mr Thevenot said in his evidence that he signed some papers at the meeting however Mr Kerridge was not clear what they may have been.

[39] Given the passage of time I have placed reliance on the contents of an email Mr Kerridge sent to Mr Thevenot dated 18 June 2020 following the meeting. He noted in that email that there were no questions or points added to those already communicated during the meeting on 17 June 2020. The email contained advice that Mr Thevenot's position would become redundant on 17 July 2020 and it was not proposed he work out his one month notice period rather it would be paid in lieu. The email ended with a statement that it was not an easy decision to make as Nelspray really appreciated Mr Thevenot's service.

[40] Mr Thevenot responded to the email and made some requests for documents and asked for some assistance with financing some training. He thanked Mr Kerridge for his effort and clarity however said in relation to the comment in Mr Kerridge's letter about appreciating his service to Nelspray.

There is no point rubbing salt in the wound, they are jeopardizing my career and have been treating me unfairly for 2 years, so let's not pretend they appreciate my work for them.

[41] Nelspray did not employ another person in the mechanical engineer position and Mr Filbee has continued as a contractor to provide mechanical design services to Nelspray. Mr Filbee's evidence was that with his experience and specialisation with the SolidWorks program he could meet all of Mr Thevenot's design responsibilities and complete them more efficiently and within shorter time frames. Mr Thevenot in his oral evidence did not accept that Mr Filbee was faster than he was.

### **Conclusions about genuineness of the redundancy?**

[42] Dissatisfaction with Mr Thevenot's work had flavoured the employment relationship from an early stage. Performance issues came to a head during meetings in January 2020. Two meetings were recorded. There had been a suggestion in January 2020 that a position be created for Mr Thevenot that would maximise his skills and/or that he has oversight from a senior person. A performance management plan was not progressed. It is clear from the evidence that

Nelspray considered Mr Thevenot, despite its attempts to upskill him, had not developed to the extent required, was not engaging with its suggestions, and was making mistakes.

[43] There was an email from P to Mr Thevenot in April 2020 that was particularly critical about his performance. Mr Thevenot said that he had emailed P back to show him that he had in fact completed the work and that it was not his fault that the viewer P was using was not displaying the parts. There was no apology or other response.

[44] Mr Coleman agreed when questioned that he did consider Mr Thevenot's performance when making decisions about outsourcing the design work to Mr Filbee. He did not agree that the decision to disestablish the position was based on other than business needs. Mr Kerridge recalled in his oral evidence discussions at the time of the restructuring that whilst Mr Filbee was more expensive than Mr Thevenot, he was able to work more efficiently than Mr Thevenot. The Authority is satisfied that Mr Thevenot's performance was a motivation for the decision to disestablish Mr Thevenot's position and contract out the design aspect of Mr Thevenot's role. The issue is whether concerns about Mr Thevenot's performance was the predominant reason for disestablishing his position.

[45] The evidence supported mixed motives for the decision to disestablish Mr Thevenot's role. There were impacts to the business caused by COVID 19 including the potential of reduced orders from Nelspray's major client Siempelkamp and the corresponding need to consider a reduction in costs. Mr Coleman was not able to travel at that time and he could undertake some of the work that Mr Thevenot had been undertaking. Mr Filbee would operate on an "as needed" basis that could be cost effective. The design work has continued to be undertaken by him as a contractor.

[46] A mere suspicion that the predominant motive to disestablish the role was the concerns about Mr Thevenot's performance and not business need is not enough. The evidence does show however that concerns about performance came to a head shortly before there were restructuring discussions and that Mr Thevenot's performance was considered during those discussions and contrasted in all likelihood with that of Mr Filbee.

[47] Transcripts from the meetings held on 20 and 22 January 2020 disclose evident strain and difficulty in the employment relationship. At the 22 January 2020 meeting Nelspray wanted Mr Thevenot to come back to them with a plan about a role that he could perform with

his skill set and/or it was suggested bringing in a senior design engineer to provide oversight. Mr Coleman's evidence was that Mr Thevenot did not engage about those suggestions. Mr Thevenot did not accept that. Some confusion about who was to do what could not be discounted. Mr Coleman and Mr Kerridge then commenced discussing the need for cost savings from in or about February 2020 onwards. There was then lockdown and the evidence supported plenty of work was still available. The restructuring proposal was discussed with Mr Thevenot in late April and reduced to writing on 1 May 2020.

[48] The process for the redundancy decision was limited with little information provided. Mr Thevenot's email of 5 May 2020 was relied on as confirming that he agreed with the proposal in a manner that may support an element of pre-determination. There was no timeline when each stage of the process would take place aside from a date for a response by Mr Thevenot to the proposal. Mr Kerridge's evidence was that orders did continue to come through and there was a bit more work and then a lull. There was no precise information about that. Mr Thevenot's position was the only one considered not "key" to the business at that time with most of his role able to be outsourced. His position was the only one at that time disestablished. Alternatives to dismissal were not explored with Mr Thevenot. Although it was known on 8 June 2020 that Mr Thevenot was also likely to become a contractor which would have satisfied the business rationale Nelspray did not consider he perform the design work in that capacity. Mr Filbee was clearly seen as more efficient to Mr Thevenot and considered to be operating at a higher level.

[49] There was a business rationale for the decision to disestablish Mr Thevenot's position. It is more likely than not considering the evidence as a whole that the predominant motivation for disestablishment of Mr Thevenot's position was about Mr Thevenot and concerns about his performance.

[50] For the reasons set out above Nelspray has not established that the redundancy was for genuine business reasons. The decision to disestablish his position was motivated predominantly by concerns about Mr Thevenot and his performance.

### **Was the process fair with consultation carried out in good faith?**

[51] There was related procedural unfairness with the inability of Nelspray to justify the dismissal on the grounds of a genuine redundancy.

[52] There was an absence of precise information about the basis for the restructuring that impacted the ability to properly consult. The written information provided on 1 May 2020 referred broadly to a downturn in expected sales and these being down on previous projections. There was no information provided as to what the expected downturn in sales would be from previous projections. The proposal stated that it makes sense to use contractors for new designs if there is future work. Mr Filbee's availability, that he had worked previously with Nelspray's design services and client requirements and did not require upskilling was clearly part of the restructuring proposal. That was not provided on 1 May 2020 as part of the rationale for the restructuring. Not all of Mr Thevenot's role was intended to be outsourced but there was nothing put in the initial proposal about how the remaining aspects of the work would be undertaken. Mr Kerridge did at a later point advise Mr Coleman could do some of the design work. Mr Coleman's evidence was that the quality control work could be absorbed by others but there was nothing in the proposal to that effect. There was a brief meeting on 17 June 2020 with Mr Thevenot and Mr Kerridge but initial difficulties with consultation were not overcome. The dates about when the position would be disestablished were confusing and did not support a real opportunity for further consultation was available.

[53] The good faith obligations in s 4(1A)(c) of the Act requiring access to information relevant to the continuation of Mr Thevenot's employment were not satisfied by what was provided and a real opportunity to comment was not available.

[54] A fair and reasonable employer could have been expected to have explored with Mr Thevenot whether he was accepting the proposal rather than just presuming that he had accepted the proposal on 5 May 2020. This is particularly so in circumstances where Mr Thevenot asked Mr Coleman to let him know if there is "anything he should do before he leaves" and advised that he had not been through a similar process. Mr Thevenot said in evidence that he did not understand the process and did not know that he could comment on the restructuring proposal. English was not his first language and this was his first redundancy process. The duty of good faith requires parties in an employment relationship to be active and constructive in establishing and maintaining an employment relationship. Parties are required to be responsive and communicative. Nelspray fell short of its good faith obligations in this respect.

[55] Clause 30.2 of the employment agreement required Nelspray consider alternatives to redundancy. There was no consideration of alternatives. Nelspray refers to a lack of engagement by Mr Thevenot during processes in August and September 2019 and in January 2020 although that is not accepted by Mr Thevenot. Mr Sansom submitted that consultation is a two-way street and in light of Mr Thevenot's earlier failure to engage it was a fruitless exercise to consult further with him after 5 May 2020 including about alternatives. An employer acting fairly and in accordance with its obligations would have considered whether there were any alternatives to redundancy including any prospect of redeployment to other positions.

[56] Nelspray did take some steps to limit the impact of the redundancy with payment of notice in lieu enabling Mr Thevenot to focus on searching for other roles and payment of \$1000 towards the cost of training.

[57] Mr Thevenot's dismissal was substantively and procedurally unjustified because it was not what a fair and reasonable employer could have done in all the circumstances at the time.

[58] Mr Thevenot has established his grievance of unjustified dismissal. The alternative claim of unjustified disadvantage is effectively absorbed in this finding. Mr Thevenot is entitled to consideration of remedies for his unjustified dismissal.

## **Remedies**

### *Lost wages*

[59] Mr Thevenot seeks three month's lost wages. He explained that his confidence was low after being made redundant and there were limited opportunities in Nelson. Two job applications were provided to the Authority as part of the common bundle. Mr Thevenot decided to begin contracting and upskilled himself by taking a course in FEA simulation. He had to fund the purchase of software at a cost of about \$15,000. Nelspray as set out earlier contributed \$1000 towards upskilling costs. After 17 July 2020 Mr Thevenot received the Covid relief payment of \$500 per week for three months and he used that to pay for upskilling, create his website and meet potential clients.

[60] He then worked for free for a company to gain exposure for his work and rebuild his confidence for two months. It was only after that that he was able to find alternative work and

needed to sell his apartment in France to support himself and his partner over this time and pay for the training and software. Mr Thevenot has attempted to mitigate his lost wages adequately.

[61] Section 128 (2) of the Act provides:

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.

[62] The actual loss suffered by Mr Thevenot was greater than 3 months ordinary time remuneration. The appropriate award therefore is three months ordinary time remuneration. At the material time Mr Thevenot's annual salary was \$68,640.00. He worked overtime but the calculation of three months lost wages should be undertaken on his ordinary time remuneration for 40 hours per week.

[63] Subject to issues of contribution Mr Thevenot is entitled to be reimbursed lost wages in the sum of \$17,160 gross being \$68,640 divided by 52 weeks and multiplied by 13 weeks.

#### *Compensation*

[64] The claim under this head is \$30,000. The evidence from Mr Thevenot supported that he suffered emotional distress and financial hardship as a result of the redundancy process and dismissal. He remained unclear about why his position had been identified as being the position to be made redundant. His communications during the redundancy process support the stress and anxiety that he felt at that time. A medical certificate provided on 12 June 2020 shows he was at that time low in mood with racing thoughts and decreased appetite. He was prescribed sleeping pills.

[65] The Authority was provided with some notes from two counselling sessions on 5 and 17 August 2020 that Mr Thevenot attended after he was made redundant. The notes record that Mr Thevenot was struggling to sleep and felt angry at his manager at work. The notes record he was ruminating and had thoughts about the injustice of the situation. Some strategies were provided to deal with these matters. By 17 August Mr Thevenot reported feeling less angry.

[66] Ms Burggraaf gave evidence that Mr Thevenot was very hurt by the redundancy and that it took him a long time to rebuild his confidence.

[67] The Authority must consider the compensation award in respect of the personal grievance established of unjustified dismissal. The evidence supported some of the impacts on Mr Thevenot's mental health arose from the loss of travel opportunities and what he saw as constant and unreasonable criticism of his performance. This had continued over an extended period. Mr Thevenot was experiencing depression before the redundancy process in January 2020. The Authority cannot order Nelspray compensate Mr Thevenot for those matters for which a grievance has not been established.

[68] The Authority is satisfied that Mr Thevenot has experienced harm under each of the heads in s 123 (1)(c)(i) of the Act in respect of the unjustified dismissal grievance. Considering awards in similar cases an appropriate compensatory award subject to contribution is the sum of \$20,000.<sup>6</sup>

#### *Contribution*

[69] The Authority is required to consider whether any remedy awarded should be reduced for blameworthy conduct on the part of Mr Thevenot that contributed to the situation that gave rise to the personal grievance. The dismissal was for reasons for redundancy. It was not because of any fault on the part of Mr Thevenot. He did not contribute in a blameworthy way to the situation that gave rise to the personal grievance. The above awards are not reduced.

#### **Summary of Orders**

[70] Mr Thevenot was unjustifiably dismissed from his employment with Nelspray Limited.

[71] Nelspray Limited is ordered to pay to Mr Thevenot the following amounts.

- (a) The sum of \$17,160 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (b) The sum of \$20,000 without deduction being compensation under s 123 (1)(c)(i) of the Act.

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<sup>6</sup> *Waikato District Health Board v Archibald* [2017] ERNZ 791 and *Richora Group Limited v Cheng* [2018] ERNZ 337.

## **Costs**

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

[73] If the parties are unable to resolve costs, and an Authority determination on costs is needed Mr Brinkworth may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Sansom will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[74] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>7</sup>

Helen Doyle  
Member of the Employment Relations Authority

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<sup>7</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)