

**Attention is drawn to an order
prohibiting publication of parties'
identification**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROHE**

[2021] NZERA 190
3111872

BETWEEN CC
Applicant

AND RQ LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Amy De-La Cruz, advocate for the Applicant
Kenneth Morrison, advocate for the Respondent

Investigation Meeting: 24 March 2021 in Auckland

Submissions Received: 16 September 2020 from the Applicant
16 September 2020 from the Respondent

Date of Determination: 7 May 2021

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] Pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act) the Authority has resolved to not publish the parties' names on the basis that the applicant is seeking alternative employment and the proceedings did not involve contested disciplinary or performance issues.

[2] I use the following random identifiers :

- CC - the applicant.

- RQ Limited - is the respondent company.
- SG - is the director/owner of VS Limited
- NH – Group Account Director
- GN – is an Account Manager at VS Limited.
- KJ – is the Office Manager at UH Limited.

The employment relationship problem

[3] CC was employed by RQ Ltd as a Senior Account Manager from 12 June 2017 until the position was disestablished during a restructuring process. CC's employment ended on 3 May 2020. RQ Ltd is a well-established marketing and related activities business that at the time of the restructuring employed around twelve people.

[4] CC claims that RQ Ltd unjustifiably dismissed her by effecting a restructuring process that was not conducted in accordance with her employment agreement and was not for genuine business reasons. CC alleges that the redundancy was enacted for an ulterior motive which was to remove her from her position because she contested proposed changes to her employment terms during a restructuring prompted by the March 2020 Covid-19 lockdown and its attendant impact.

[5] CC further contends that actions RQ Ltd undertook during the redundancy process disadvantaged her and that RQ Ltd has not acted in a manner consistent with good faith obligations.

[6] As remedies CC claimed compensation for distress, lost wages and a penalties for breach of good faith and breach of the employment agreement.

[7] By contrast, RQ Ltd contend that the restructuring process was initiated for genuine reasons absent of any ulterior motive and that it was based upon CC's position being superfluous to the company's needs, exacerbated by a drop off in business both prior to and during the Covid-19 lockdown.

The Authority's Investigation

[8] The investigation took one day and I heard evidence from CC, her partner and mother and for the company: SG, owner and managing director of RQ Ltd; NH, Group Account Director; GN, Account Manager; and KJ, Office Manager.

[9] I received helpful submissions from both parties' representatives following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicant's claims.

Issues

[10] The issues I have to resolve are:

- i. Was CC unjustifiably dismissed and/or disadvantaged or was the employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner, including questions of:
- ii. Whether there were genuine business reasons for the restructure?
- iii. Did RQ Ltd comply with the relevant provisions of CC's employment agreement?
- iv. Did RQ Ltd breach any good faith obligations?
- v. Is there any evidence that the restructuring was contrived or enacted for an ulterior motive?
- vi. If an unjustified dismissal claim is established what remedies should be awarded?
- vii. If any breach of good faith or breach of CC's employment agreement is established is it appropriate to award a penalty against RQ Ltd for such?
- viii. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[11] RQ Ltd initially engaged CC in June 2017 as a full-time Senior Account Manager to work on client marketing issues pursuant to an individual employment agreement and job description. Responsibilities were well described including that CC be “involved in a wide number of projects across multiple clients” with a focus on “Engage projects” in the client services team. This involved working on in-store promotional events and trade shows.

[12] In late 2019, RQ Ltd reduced staffing to address an underperformance of the business but despite CC’s position being under scrutiny it was retained. An RQ Ltd independent director witness, noted that the reduction in staff restored a level of profitability to the business up to March 2020.

[13] As a result of her partner being offered a job opportunity overseas, CC signalled her resignation on 2 March 2020 with a planned leaving date of 15 May 2020. However, due to the emerging Covid 19 crisis, the job offer was delayed and CC on 17 March, requested by email that she be able to withdraw her resignation.

[14] SG, RQ Ltd’s managing director/owner responded cautiously by email of 18 March. SG noted the company had just applied for the government wage subsidy to assist firms during emerging Covid -19 restrictions (with CC being included in the application) and that he could not rescind the resignation until “we have crunched the numbers and decided as a team the best way through this”. SG further indicated: “So, I just wanted to let you know your request is noted and we’ll get back to you asap”. To place matters in context, on 19 March 2020 the government had announced a ban on gatherings of more than 100 people and a border closure to all but returning citizens. SG indicated he fully briefed all employees of the difficulties the coming lockdown would create and the costs of maintaining the business.

[15] In a 20 March email to all staff including CC, SG provided an update and outlined that even without the wage subsidy, the overheads of the business entailed a “guarantee we’ll all be paid in full for the next 3 fortnights i.e. next week and April”.

[16] The email candidly warned that:

Worst case scenario is I will have to pay people for work by the day/hour on income generating jobs or ask you to take leave without pay or issue redundancies if we are buggered totally. This would be a last resort to say the least but best be honest, the world is truly on its knees but as soon as the disease flat curves, should bounce back pretty quickly in most areas.

[17] The email ended with a suggestion that a group chat be set up and SG was “happy to speak to you guys privately too if I don’t all you first” (sic). By this point in time everyone was working from home and the parties recalled a Skype chat occurred to discuss how the team would respond.

[18] On 30 March, SG phoned CC indicating that he would rescind her resignation and then forwarded an email to CC (and all other employees) subject line “Re Update on RQ situation and your Options”. After setting out the financial pressures RQ Ltd faced, SG opened the email by stating:

I am sorry but [RQ] simply doesn’t have the cashflow or resources to cover your continued Employment Agreement in its current format.

Therefore, unfortunately, the only option I can currently see are either voluntary redundancy or leave without pay. I have not yet made the final decision on these options and I am open to any suggestions you may have regarding your position and personal circumstances.

[19] SG then presented two ‘options’ that can be summarised as:

- 1) **Voluntary redundancy** – which involved CC being paid full salary to the end of April and holiday pay on the final day and somewhat confusingly SG stated: “You may also be paid the balance of the wage subsidy of \$585/week for 12 weeks we have received”. In explanation of the latter, SG said he was not sure if the subsidy could be paid in a lump sum or used for this purpose but if it could be, it would be paid “in addition to your final pay”. Further, SG suggested if any work came in after CC’s redundancy she could be re-hired as a contractor on an hourly basis.
- 2) **Leave without pay** – in this option SG offered to pay CC: “100% of your normal pay to the end of April” and then place CC on leave from 1 May in which timeframe CC would be paid the government subsidy of \$585/week (gross) for six weeks. The further restriction on this option was it being envisaged CC would remain an employee on leave without pay but “you will not be paid your holiday pay owing unless your employment is terminated through resignation or redundancy” during the leave period no further holidays would accumulate. Finally, SG stated

should this option be taken “you need to agree and be aware that should we need to make you redundant while you are “on leave” there will be no need for notice or any further payment except holiday pay owed” i.e. the full April pay had to be regarded as CC’s “final redundancy pay - out”.

[20] SG concluded the email indicating CC could “seek advice” and get back to him as soon as possible “with your suggestion for any alternative options and questions requiring clarification or discussion before making any choice”.

Employment agreement provision

[21] CC’s employment agreement at clause 23 under the heading “Redundancy Provisions”, first defines what is a potential redundancy situation with emphasis on the “Employee’s position” no longer meeting the needs of the business and states:

In the event of a redundancy situation the Employer will:

- Meet with the Employee, providing information about the proposed arrangement
- Give the Employee an opportunity to comment on the proposal
- Consider and respond to the Employee’s comments.

[22] The agreement then indicated at clause 25, that “compensation for redundancy” was either the agreement’s notice period (one month) or: “The Employer reserves the right to offer, at its absolute discretion, enhanced redundancy compensation”.

Comment

[23] Whilst RQ Ltd could, with some legitimacy, claim that the agreement provision had broadly been adhered to in the context of a lockdown situation and prevailing pressure on their business, it is apparent that the step of putting a ‘restructuring’ proposal for consultation before CC has been skipped, in preference to immediately discussing a post-decision outcome that would impact upon CC rather than her position. This was contrary to the definition of redundancy in the employment agreement and long established common law precedent that the position and not the person has to become superfluous to an employer’s needs.¹

[24] I find that RQ Ltd had evidently confused their response to Covid 19 with a redundancy process (by putting before CC the option of voluntary redundancy before

¹ *GN Hale & Sons v Wellington etc, IUOW* (1991) 1 NZLR 151.

completing any information sharing and consultation). I also observe that the options put were overly complicated and open to misconception by both parties. RQ Ltd conceded that no specialist legal advice was obtained in devising the options.

CC's response

[25] In a response sent mid-morning on 1 April, CC indicated she had sought "third-party" advice and noted (in summary):

- Interest in option 2 that CC felt was "part paid leave" that she accepted would be the \$585 per week subsidy with no additional top up that she claimed should be paid for 12 weeks.
- Once the 12 weeks expired, if she was then made redundant the agreement notice provision should apply and any enhanced redundancy should be negotiated together with any holiday pay due at the end of the notice period (rather than being "offset" against the subsidy payments).
- That option 2 was "a front ended redundancy process where you are proposing [RQ Ltd] is released from its redundancy obligations" and her understanding that companies receiving the subsidy had to endeavour to maintain employment for the 12 weeks of the subsidy.

[26] Notwithstanding the above expressed concerns, CC's email concluded that she had elected option 2, provided that she:

- be paid the subsidy only for 6 weeks as "part paid leave";
- not accumulate holiday pay in that period;
- did not agree to a "no notice" redundancy provision and would not forego an opportunity to negotiate a redundancy payment.

RQ Ltd's response

[27] SG responded the same day in the mid-afternoon, in a manner that partially misconstrued CC's proposal, in that he indicated he had been prepared to pay everyone full wages in April but he could not afford to "pay another month's full wages on top of this then to make people redundant if necessary". Then, despite earlier indicating that he was open minded to other options, SG stated:

I therefore reject your proposal and as you don't like either of the options presented to you in return for rescinding your resignation, I guess we return

to the situation we were previously in with your employment terminating at your request on 15 May.

[28] What emerged during the investigation meeting was that all other employees accepted option 2 and SG believed he could not depart from offering this option lest he favour CC. When pressed however, SG acknowledged that he had failed to properly analyse or get advice on the legality of his offer and that the compromise CC was offering in response, was in monetary terms almost identical. CC was prepared to significantly reduce her salary for six weeks (from \$1,384.62 per week gross to \$585 (gross)).

[29] CC responded on 2 April providing an extract from Work and Income's website detailing subsidy obligations and noted that SG had verbally rescinded her earlier resignation and that RQ Ltd applying for the subsidy on her behalf was evidence of ongoing employment. CC indicated: "I feel my offer to start the subsidy effective immediately after April in line with my previously stated terms is acting in good faith".

Redundancy imposed?

[30] SG responded the same day by email, saying he would not depart from the offer accepted by others, then he contradicted himself by indicating that he was open to "some other reasonable alternative". SG then concluded that he could "see no option other than making you redundant with 1 months' [sic] notice in accordance with your employment contract from the day the final decision is made". SG then said he was happy with refunding the government wage subsidy and reiterated:

If you have any other suggestions that might save your job I am keen to hear them, but they cannot be things that significantly benefit you over other staff. Please come back to me as soon as possible.

Comment

[31] It became clear at this point that SG was targeting CC rather than having already conducted a proper analysis of the need for her 'position' and sharing this with CC – otherwise, he would not have logically offered potentially ongoing employment if she had accepted option 2. No other positions were identified as potentially surplus. SG also acknowledged in questioning and on reflection, that CC was not seeking a significantly better deal than those employees who accepted option 2.

[32] RQ Ltd sought during the investigation meeting to advocate that the position CC held was surplus to their needs but even if I was to affirm this view, it clearly was not put to CC at the time and CC was instead, asked to respond with ideas to save her position in a vacuum of information.

Next step by RQ Ltd – termination of employment

[33] CC responded to SG on 3 April, reiterating her proposal and she placed RQ on notice that she considered she had grounds for a constructive dismissal and unjustified disadvantage grievance but said I “would like to remedy this by reaching an agreement that works for both of us and am giving you one final opportunity to do so”.

[34] SG on the same day and again without obtaining specialist legal advice, responded by suggesting CC’s stance left him with a choice he felt was, in contrast to other employees “morally wrong for me to give you a better deal than I am giving them”. He then stated he felt no credible option had been provided and:

.... you leave me no option than to make your position redundant. Your last day as an employee of [RQ Ltd] will therefore be 3 May 2020. The balance of your wage subsidy received after this date will be refunded to the government.

I sincerely regret that things have come to this. The reason I rescinded your original resignation wasn’t just sympathy, you were good at your job and I was more than happy to retain you as a key member of the team, at least until the Australian career opportunity for [CC’s partner] hopefully resolved itself and was back on track. Unfortunately that is not now the case.

[35] On 5 April SG, after stating “I am sorry I could not accommodate your demands”, offered CC a verbal or written character reference. Following this an email exchange occurred with SG placing CC on leave with pay for the remainder of the notice period (a discretion permissible in the employment agreement).

The legal framework

The employment agreement

[36] CC's employment agreement [cited above para 20] requires that in the event that a redundancy situation impacted upon her "position" RQ Ltd was, in summary, obliged to:

- meet with CC and provide information (to allow consultation);
- allow CC an opportunity to comment "on the proposal" (actual consultation); and
- consider and respond (feedback before a decision is reached);

[37] The agreement provision, whilst incomplete in detailing the process once a decision was reached, is consistent with well-established case law that indicates it is the position and not the person that is under scrutiny. Where the provision is deficient, is on detailing that an employer has a good faith obligation to (amongst other requirements) put in place a fair selection process where other employees are potentially involved (as was here) and positively explore redeployment options in a redundancy situation once such is established.²

[38] In assessing whether the above clause and basic good faith obligations were observed, I find that at the point where it was posited that CC's position was redundant (if indeed it was surplus), RQ Ltd did not continue the process of consultation. SG merely communicated his view that CC's position was redundant because CC had refused to agree to an option others had accepted. He gave CC no practical opportunity to comment on why her position was the only one to be disestablished and he did not provide CC with an opportunity to counter his assessment prior to the decision being made.

[39] RQ Ltd conducted a significant restructuring process just prior to this situation and would be aware of the pitfalls of such (given that a disaffected employee pursued a personal grievance). To his credit, in giving evidence SG openly acknowledged that he should have directly communicated with CC before he made his decision to effectively terminate her employment but he indicated he felt betrayed after he had exercised discretion in rescinding her earlier resignation and then she did not accept the same option as others had agreed to. SG claimed that consultation with CC was still fair but that it took a different form and went

² *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102 and *Wang v Hamilton Multicultural Services Trust* (2011) 8 NZELR 588 (EmpC).

faster. SG went as far as to say that he thought CC would be the last person to respond negatively to his proposal (option 2) and he acknowledged that he did not properly analysis CC's response to his proposal and said it was possible he did not fully understand what she was proposing. I observe that SG placed himself in this position by devising an overcomplicated proposal that he sought no legal advice on. He should have first checked the legality of his own proffered two options - including consistency with the employment agreement, government subsidy scheme rules and the Holidays Act.

Finding on potential breach of contract

[40] I find SG became fixated on CC not agreeing to the option that others had accepted and that this motivated SG to halt negotiations and switch to a decision to make CC redundant. I think this was an impetuous decision of SG that was influenced by the pressure RQ Ltd was under as the full implications of Covid 19 became apparent. As such, whilst I must also consider whether RQ Ltd had an ulterior motive, I discern that there was insufficient malice displayed to make this a deliberate and sustained breach of the employment agreement when all the surrounding circumstances are considered.

[41] I note that CC's advocate advanced an argument that the breach of the employment agreement was that RQ Ltd did not exercise its discretion to offer CC additional redundancy compensation. I however, find that the clause in question (see para 21 above) provides the employer with absolute discretion and such has not been breached.

Justification

[42] In order to justify termination of employment or an employer's actions RQ Ltd must meet statutory requirements set out in s 103A of the Act. In *Stormont v Peddle Thorp Aitken Ltd* in the context of a redundancy case Chief Judge Inglis indicated:

In order for a redundancy to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The Court must consider whether the employer met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.³

³ *Stormont v Peddle Aitken Ltd* [2017] ERNZ 352 at [52].

Good faith

[43] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s 4 of the Act - these include a positive disclosure obligation enabling employee access to all relevant information supporting the reason for the redundancy and detail of how it will be implemented. Further and crucially, a fully informed employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised and once the decision has been made, redeployment options should be explored.

[44] The Court of Appeal in *Grace Team Accounting v Brake*⁴ has ruled that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons and when looking at applying s 103A, O'Regan J said:

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.⁵

[45] In essence, the above requires the Authority to determine first if the redundancy was genuine (an assessment that has to first exclude any ulterior motive) and then whether it was enacted in a procedurally fair manner.

⁴ *Grace Team Accounting Ltd v Brake* [2015] 2NZLR 494 (CA) at [85].

⁵ At [85].

Ulterior motive?

[46] I first have to deal with the central claim advanced that the restructuring process was enacted for an ulterior motive which I have already briefly touched upon in considering whether a breach of contract was deliberate.

[47] Factors I weighed up that suggest the redundancy was enacted for genuine reasons are:

- RQ Ltd had just recently restructured due to concerns over poor profitability and was now facing a very uncertain operating climate due to Covid restrictions. Of significance was the promotional work that they undertook was reliant in part on in-store demonstrations that immediately dried up due to gathering restrictions.
- Whilst the financial reasons advanced were not supported with documentation and they did not go beyond generally an aspiration for greater profitability/efficiency, there was some logic to the reorganisation of responsibilities and reporting lines.
- RQ Ltd had no performance issues with CC as evidenced by their willingness to allow her to retract her resignation during an uncertain trading period.

[48] Set against the above, I considered whether an ulterior motive was present as at 'first blush' the correspondence and evidence appears to strongly suggest so. I have considered:

- That RQ Ltd did not set out to CC, the logic of disestablishing her position when all other positions were retained.
- That no shared analysis was conducted/disclosed to ascertain what responsibilities CC was actually undertaking prior to the restructuring and to contrast her skills with others in her team.

- It was not clear whether SG had properly turned his mind to the common law obligation to ‘redeploy’⁶ in a circumstance where CC was the only person subject to being made redundant.
- The haste by which the process was conducted, once CC’s position was identified to go and the mixing together of a process that started with consultation on how to respond to Covid and utilise the government wage subsidy and then morphed into a redundancy.
- The documentary evidence: specifically the email of 1 April 2020, (above para [25]) that drew an explicit link between CC turning down ‘option 2’ and RQ Ltd rescinding her resignation when no such exchange was evident and SG’s objectively unreasonable refusal to negotiate down from a position that was not legally sustainable.

Assessment

[49] In determining whether the process (with identified deficiencies) specifically applied to CC, ‘masked’ an ulterior motive I am conscious that this is close to an allegation that this was ‘sham’ process being akin to an allegation of fraud and that it “should not be lightly made” as “those engaging in a sham are in reality seeking to deceive others as to the true nature of what they have agreed and are intending to achieve”.⁷ The advocate for CC did not develop this argument in submissions other than to generally assert that RQ Ltd’s issuing CC with notice of her redundancy appeared to be a vindictive “punishment” for her failing to go along with the option all other employees’ agreed with and that the option offered was unlawful.

Finding

[50] In carefully assessing the factors above, I am inclined to view the restructuring process and particularly its timing as not being well made out and therefore not enacted for genuine

⁶ *Wang v Hamilton Multicultural Service Trust* [2011] 8 NZELR 588.

⁷ Wylie J applying Richardson P’s statement of the law concerning shams in *NZI Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at [57].

reasons. RQ Ltd also owed CC a good faith duty not to directly or indirectly mislead or deceive⁸ and I find such a duty was transgressed.

Finding

[51] On balance and having assessed in context both explicit and inferential factors, I find that a pre-determined and thus predominantly ulterior motive existed in the decision to disestablish CC's position.

Procedural fairness and good faith factors

[52] Given the finding that an ulterior motive drove the decision to make CC redundant I do not need to go through the impact of procedural fairness issues in great detail beyond what I have already traversed, suffice to say that the process was rushed and lacked a semblance of procedural fairness.

Finding

I find that in all of the circumstances, CC was unjustifiably dismissed.

Claimed penalty for breach of good faith

[53] I am not persuaded that penalties for the good faith breaches identified are warranted or have reached the threshold found in s 4A of the Act for imposing such, given the circumstances prevailing. In my view the transgressions CC's advocate has identified, though not minor, are adequately remedied by my finding that CC has successfully established a personal grievance and the remedies detailed below. I rely on s 160(3) of the act in making this assessment.

[54] Despite finding an ulterior motive drove SG's decision-making, I think his approach fell short of a breach threshold of it being "deliberate, serious and sustained"⁹ as although SG did not seek appropriate specialist legal advice on the options he tried to impose, SG struck me as genuinely believing that he was advancing the proposal in an effort to retain employees

⁸ Section 4 (1) Employment Relations Act 2000.

⁹ Section 4A Employment Relations Act 2000.

in extraordinarily difficult circumstances. I was convinced by RQ Ltd's witnesses, who remained in the company, that SG was generally a benevolent and otherwise fair employer.

[55] Whilst not condoning RQ Ltd's approach, I see no deterrent purpose in awarded a penalty for breach of good faith and I am not of the view, as suggested, that RQ Ltd took advantage of the chaos of the Covid 19 pandemic to end CC's employment.

What remedies should CC be awarded?

Lost wages

[56] CC described the impact of her employment ending to be distressing and she had to make significant efforts to unsuccessfully fully mitigate her loss, including working freelance, and has provided ample evidence of job searching. Unfortunately for CC the termination of employment coincided with the Covid 19 lockdown and opportunities for work of the nature undertaken were sparse. CC moved to Queenstown in September 2020 and with the help of Work and Income she has established an on-line marketing business but her bank and IRD statements disclosed modest income in the period 1 April 2020 to 31 March 2021 (\$11,332.19 of which \$3,120 was earned up to September 2020).

[57] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by CC on a finding that she has established a personal grievance, and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[58] Here I find CC's lost remuneration was attributed to her personal grievance which was that she established that RQ Ltd acted with an ulterior motive and did not meet key contractual and statutory procedural requirements when they disestablished her position.

[59] CC's advocate claimed twenty weeks lost wages, being the period covered by the wage subsidy and its extension or three months lost wages. Nothing was provided to justify the reasoning on either period cited.

[60] I have considered a number of relevant authorities including *Grace Team Accounting v Brake* where the Court of Appeal upheld the Employment Court's award of 12 months' lost

earnings on the basis that, but for the flawed redundancy, Ms Brake's employment was likely to be ongoing. The decision outlined a discussion of the principals involved in setting lost remuneration and the contingencies that need to be considered in exercising discretion under s 128(3) of the Act.¹⁰

[61] I also was guided by an Employment Court decision of Judge Smith, *Roach v Nazareth Care Charitable Trust Board*, which extensively traversed applicable case law in applying ss 123 and 128 of the Act.¹¹

[62] I am obliged to balance matters up, such as the potential that CC's position may not have been sustainable in the long term as RQ Ltd provided evidence of financial constraints in the period under scrutiny (although they did manage to retain all other employees and is now in a position to look at engaging additional employees). I also have to consider that CC has made the choice to re-locate and start her own business albeit potentially due to limited opportunities available in her home city.

[63] I consider it would be equitable in all of the circumstances to award CC three months' lost remuneration calculated on CC's final salary of \$72,000 p.a. minus \$3,120 (the amount CC had earned prior to relocating to Queenstown) that is a total of \$14,880 (gross).

Compensation for humiliation, loss of dignity and injury to feelings

[64] I heard from CC, her mother and her partner about how debilitating the impact of the decision was on her. This included anxiety, lack of sleep, loss of appetite, de-motivation and lack of interest in previous activities. Whilst CC candidly disclosed she had struggled in the past with anxiety issues, she felt she could control such and the stress of losing her job and the circumstances of such exacerbated her anxiety.

[65] Her partner gave evidence describing the ongoing impact on their relationship including financial stress and worry for CC's ongoing health.

¹⁰ At [101] – [108] that affirmed Judge Travis in the Employment Court decision had properly applied the principles set out in *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

¹¹ *Roach v Nazareth Care Charitable Trust Board* [2108] ERNZ at [68] – [80].

[66] CC described the humiliating impact of having to seek Work and Income support and having to borrow money off her parents to pay essential bills and loan commitments

[67] I found CC to be a credible applicant who has taken some significant steps to manage her distress and try and move on with her life and build resilience.

[68] Having carefully considered CC's evidence I am convinced that the impact of the dismissal was not transitory and CC suffered significant ongoing humiliation and loss of dignity and injury to feelings.

[69] In considering analogous cases of both the Authority and the Courts that discuss compensatory issues to be assessed, including *Stormont* and *Zhang v Telco Asset Management Limited*, that deal with redundancies found to be either 'disingenuous' (*Stormont*)¹² or not effected in accord with good faith requirements¹³ I consider that CC's level of distress at the impact of the dismissal warrants a reasonably significant amount of compensation. I fix that amount at \$18,000 pursuant to section 123(1)(c)(i) of the Act.

Contribution

[70] Section 124 of the Act indicates that I must consider the extent to which, if at all, CC's actions contributed to the situation that gave rise to her personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no cogent reason to reduce the remedies awarded above as CC made significant efforts to meet her employer's concerns about their ongoing overheads including willingly agreeing to a salary reduction. CC's stance in asserting her legal rights was not aggressive and it was pragmatic. It was not appreciated.

[71] I find CC was not engaged in any wrongful action and she did not act in a blameworthy or culpable manner that gave rise to her grievance occurring so no reduction in any of the remedies awarded is warranted.

¹² At [71].

¹³ *Zhang v Telco Asset Management Ltd* [2019] ERNZ 438 at [154] at [107].

Outcome

[72] **Overall I have found that:**

- a. CC was unjustifiably dismissed from her employment with RQ Limited.**
- b. RQ Limited must pay CC the sums below within 28 days of this determination being issued:**
 - i. \$14,880 gross lost wages;**
 - ii. \$18,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;**

Costs

[73] Costs are at the discretion of the Authority and here CC was successful in her claims and has obtained significant compensatory remedies in a one day investigation meeting.

[74] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[75] If no agreement is achieved, CC has fourteen days following the date of this determination to make a written submission on costs and RQ Limited has a further fourteen days to provide a response. I will then on receipt of submissions, determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority

