

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 387
3082612

BETWEEN BRUCE CAMPBELL
Applicant

AND VALUE TYRES LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Sarah Townsend, counsel for the Applicant
Anna Oberndorfer, counsel for the Respondent

Investigation Meeting: 15 & 16 September 2020 in Christchurch

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

Date of Determination: 7 October 2020

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Bruce Campbell was employed by Value Tyres Limited (VTL) as a marketing manager in Christchurch from 27 June 2016 until his position was disestablished during a restructuring process and his employment ended on 30 August 2019. VTL is a nationwide wholesale tyre business that at the time of the restructuring employed around eighty people.

[2] Mr Campbell claims that VTL unjustifiably dismissed him by effecting a restructuring process that was not for genuine business reasons but was enacted for an ulterior motive to

remove him from his position for undisclosed performance concerns and to replace him with an external appointee.

[3] Mr Campbell further contends that actions VTL undertook during the redundancy process disadvantaged him and that VTL has not acted in a manner consistent with good faith obligations in not redeploying him to a vacant combined sales and marketing manager position created by the restructuring.

[4] Overall, Mr Campbell claims that the ending of his employment relationship with VTL was not enacted in accordance with section 103A Employment Relations Act 2000 (“the Act”) and the good faith requirements set out in s 4 of the Act.

[5] As remedies Mr Campbell initially claimed compensation under s 123(1)(c)(i) of the Act, lost wages, a penalty for breach of good faith and interest on his claimed compensatory amounts and costs.

[6] By contrast VTL contend that Mr Campbell’s employment was justifiably terminated as a result of a restructuring process following a period of genuine and robust consultation and that Mr Campbell was not redeployed due to him not possessing all of the skills and experience required for a newly created sales and marketing manager position.

The Authority’s Investigation

[7] The investigation took one and a half days and I heard evidence from Bruce Campbell, his wife Rae Campbell, Richard Northover a former VTL colleague who also lost his job as a result of the restructuring and Bruce Donaldson, managing director of VTL. 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

[8] The issues I have to resolve are:

- i. Overall, was Mr Campbell 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 VTL comply with the relevant provisions of Mr Campbell's employment agreement;
- iv. did VTL breach good faith obligations in not redeploying Mr Campbell? and:
- v. Is there any evidence that the restructuring was enacted for an ulterior motive or contrived to appoint an available external applicant?
- vi. If an unjustified dismissal claim is established what remedies should be awarded?
- vii. If any breach of good faith is established is it appropriate to award a penalty against VTL for such?
- viii. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[9] VTL initially engaged Mr Campbell in November 2015 as a part-time consultant to work on marketing issues reporting directly to Mr Donaldson. Mr Campbell at the time was working as a business consultant on his own account. Mr Campbell's impressive CV showed that he had both sales and marketing experience at a senior level in the dairy industry and manufacturing. He has a BCom (Hons) majoring in marketing management from Otago University.

[10] In June 2016, Mr Donaldson engaged Mr Campbell as an employee in a newly created full-time marketing manager role pursuant to a well prepared individual employment agreement and detailed job description.

[11] In mid-2017 Mr Northover was promoted from a sales representative to National Sales Manager working alongside Mr Campbell in the senior management team. In late 2017 Mr Donaldson directed Mr Campbell to mentor Mr Northover. Shortly afterwards in a documented performance review discussion, Ms Donaldson asked Mr Campbell to take on more of a sales responsibility to further assist Mr Northover. This involved Mr Campbell taking responsibility for sales territories in the South Island and lower North Island to allow Mr Northover to concentrate on sales in the Auckland region.

[12] In early 2019 Mr Campbell completed a sales strategy and annual plan for the board. In his March 2019 performance review Mr Campbell claims Mr Donaldson offered him a pay rise and he agreed to update his job description to reflect his evolving role – neither event occurred.

[13] Mr Donaldson denied offering a pay rise but conceded Mr Campbell's annual salary had progressively increased from \$150,000 to \$170,000 over the course of his employment and that appraisals of him were generally positive with no performance issues being identified save some counselling on task focussing. Mr Donaldson acknowledged that he did suggest the job description update but he said he did not get around to it.

[14] Overall, Mr Donaldson described Mr Campbell as “diligent and hard-working” and only alluded to having to give advice around difficult team dynamics that Mr Campbell had encountered and dealt with utilising HR support and team building exercises.

[15] Mr Campbell recalls being surprised in February 2019, when Mr Donaldson cancelled ‘out of the blue’ an overseas sales trip that he had been undertaking preparation work on. Mr Campbell says he soon after asked Mr Donaldson if he was planning on making him redundant as the sales trip formed a significant portion of his marketing work – Mr Donaldson

reassured him he had no plans to do so but related a negative comment from a board member on his view of how much time was spent on marketing activities.

Mr X's involvement

[16] In mid-June 2019, Mr Donaldson was approached by a person returning to New Zealand with significant overseas tyre industry experience ("Mr X"). Mr X had attended university with Mr Donaldson and although he did not describe him as a close friend, Mr Donaldson conceded that he had known him for years and had kept in touch; being in the same industry gave them something to occasionally discuss.

[17] Mr Donaldson claimed that his contact with Mr X was initially because Mr Donaldson was exploring an alternative business option that may have involved him relinquishing his operational role at VTL. In his written evidence he said he was keen to talk to Mr X "[W]ith the idea that there might be an expanded commercial development in future".

[18] Mr Campbell's counsel asserted that subsequently disclosed email exchanges explicitly indicate an agenda to make way for a position for Mr X by removing Mr Campbell. Mr Donaldson denied this, claiming that he had explored Mr X as a 'backstop option' general manager should he step outside the business to pursue another venture that did not eventuate.

[19] Mr Donaldson, on being directed to do so after the investigation meeting, produced a confidentiality agreement that he and Mr X signed on 17 June 2019. Under the heading "Purpose" it indicated: "the possible offer by Value Tyres and the possible acceptance by X of a position as an employee of Value Tyres". The intent of the agreement appears to have been to allow Mr X access to information on the state of VTL's business.

[20] Informal email exchanges between the parties in the period 29 June - 3 July indicate that some informal discussion with a VTL director had already taken place and that Mr X wished to be employed by VTL. Although no specific position is mentioned in the exchanges, it is clear from the tenor of the emails that it was at the senior management level. Mr X was

apprised of concerns Mr Donaldson had with his senior management team and Mr X made some general observations in response, including “[I] am a great believer in have the correct personnel and creating the team environment, the team will then bring the results” [sic].

[21] Mr Donaldson went as far as saying in a 1 July email that “[S]hould everything go to plan we will need an awesome team...” and “I’m collecting salary and package information and will respond in due course”. Although no formal written offer was made at this point in time, a Mr Donaldson email to Mr X of 3 July indicated:

I have enjoyed our discussions to date and can certainly see future possibilities.

However, as discussed we are reviewing our structure and we have a process to work through at this end before we can further our discussion in a more meaningful way.

My suggestion is that we reengage when this is complete, on or around 26 July 2019.

The restructuring proposal

[22] On 26 July 2019, Mr Campbell met with Mr Donaldson and VTL’s chair Grant Stewart. An invitation on the previous day had not indicated the purpose of the meeting or alerted Mr Campbell to the need to have a support person present. At the meeting, Mr Campbell recalled Mr Stewart prefacing the need to carry out a restructuring by alluding to the requirement to save costs because sales were not meeting expectations in a difficult financial environment. Mr Donaldson then proceeded to read out a document headed “Review of the Senior Leadership Team”. The brief introduction indicated:

The purpose of this document is to propose a change to the Senior Leadership Team (SLT) and our reporting structure.

Last November Value Tyres Ltd (VTL) completed a restructure of the sales team to enhance the position of the company and grow sales. There has been some success in that change however the structure of the Senior Leadership Team (SLT) now needs to be reviewed to improve VTL operations at a senior level.

[23] The proposal, a copy of which was provided to Mr Campbell, went on to suggest that the existing roles of sales manager and marketing manager (then occupied by Mr Northover

and Mr Campbell) be disestablished and replaced by two new positions of general manager sales and marketing and a business development manager. An attached appendix detailed the key responsibilities of the two proposed roles.

[24] No financial information was disclosed to support the restructuring throughout the process. Mr Donaldson says he drafted the proposal document with the assistance on process issues from Juanita Wilson, VTL's HR Consultant (who worked part-time). EAP support was offered and a suggestion that 'one on one' meetings could occur if requested and it stated "team members are entitled to be represented or have a support person with them".

[25] The proposal also set out:

STEPS AFTER THE DECISION

There will be consultation with all team members directly affected. Redeployment would be the first option to be considered. If there is a role available that is suited to those affected by the proposal, then a discussion would take place regarding redeployment to it.

[26] In addition an appendix 4 headed: "Question and Answer Sheet" contained the following guidance:

Question 2: If you think you would be suitable for one of the roles within the new structure, but it is different to the one you currently have, will I be considered?

Yes, it is VTL's preference to redeploy, where practicable. You may have to apply for the role if it is not similar to your current role and not one where other affected team member accepts redeployment to.

[27] Input was sought on the proposal by 6 August with a final decision being proposed for 9 August. At this point in time, no selection criterion was disclosed for consultation.

[28] Mr Campbell engaged in providing feedback and in evidence said he thought the changes were sensible to clarify lines of communication and responsibility in the management team. Given that he was already undertaking a significant proportion of Mr Northover's sales role and undertaking marketing duties, it is understandable he sought clarity in reporting lines and commented that perhaps an excessive number of reports had been identified.

[29] Mr Campbell says he considered that he would be re-assigned to the Sales and Marketing role and that he was supportive of combining the two responsibilities. He limited his feedback to commenting on the practicality of the reports specified and suggested that a sales manager role be based in Auckland.

[30] Mr Donaldson acknowledged feedback on his proposal in an email of 9 August to the senior management team and issued an amended proposal for feedback by 14 August (the sales and marketing manager role however, remained unchanged apart from removing 'general' from the job title).

[31] Counsel for Mr Campbell drew attention to an email at this point in the process from Ms Wilson, the HR Consultant, to Mr Donaldson which suggested decisions on people leaving had already been made as Ms Wilson said she was seeking costings on career transition programmes and asked Mr Donaldson if he would be deviating from the redundancy provision in their standard employment agreement (it provided two weeks compensation regardless of length of service).

[32] Ms Wilson and VTL had parted company by the time of the investigation meeting and she did not give evidence – in questioning, Mr Donaldson said Ms Wilson took only a very peripheral role in the restructuring and he also sourced external legal advice on process matters. Mr Donaldson said he devised the restructuring proposal and was the sole-decision maker.

[33] Mr Campbell did not take up the offer to discuss any concerns and did not communicate to Mr Donaldson his belief that he should simply be re-assigned to the sales and marketing manager role or his belief that this is what he was already doing at the time of the restructuring. Mr Donaldson says he raised concerns informally with Ms Wilson who, although supportive on a personal level, made it clear that she was not driving the process.

[34] Ms Wilson in an email of Thursday morning 15 August to Mr Donaldson, provided a "Decision document draft" that said:

I hope you have already made appointments with Bruce and Richard for tomorrow and provided them the opportunity to bring a support person along to the meeting as previously discussed with you.

[35] Ms Wilson's email also provided an extract from Mr Campbell's employment agreement, clause 11, covering "Redundancy". At cl 11.2.2, after detailing the consultation process, the agreement states:

If as a result of the restructure your employment is likely to be terminated for reasons of redundancy then we shall:

- continue the process of consultation with you and shall explore alternatives to redundancy;
- after we have consulted with you, give you the notice of termination in accordance with the period specified in the letter offering you employment if we consider at our discretion there are no alternative positions or arrangements that are suitable;
- provide you with reasonable assistance in finding other employment (i.e. time off to attend interviews);

[36] Ms Wilson's email guided Mr Donaldson on the above by suggesting that he meet with those affected and their support person and that he should:

Ask if they are interested in any of the roles (i.e. do they have the necessary skills) and to register their interest by the end of business Tuesday, 21 August by emailing Bruce Donaldson

The restructuring decision

[37] Mr Donaldson met Mr Campbell on the morning of Friday 16 August and he says he was not alerted to the need to have a support person present. At this brief meeting, Mr Donaldson read from a document dated 19 August that had an attached general memo headed "SLT structure change" to VTL Team Members, authored by Mr Donaldson, that said in part:

The review was initiated because of my on-going responsibility to ensure our operating costs are carefully managed to do the best for our customers/operation and achieve the required growth that is necessary for VTL.

The review is now completed, with the outcome being changes to both the sales and marketing areas. The roles of National Sales Manager and Marketing Manager have been disestablished and the new structure combines both work areas. It will have a Sales and Marketing Manager, along with a Sales Manager position will be based in Auckland. The new structure, effective from Monday, 26 August 2019 is on the following page.

[38] A 'Decision Document' attached to the aforementioned memorandum listed the key principles for change in the senior leadership team as:

- Doing the best for our customers/operation
- Imbalance of tasks and productivity across the team
- Achieve expected growth
- Efficiency in leadership structure

[39] Under "NEXT STEPS" the document went on to say:

Affected team members will be considered for redeployment to positions created by the restructure

Where VTL considers that the team members who have registered an interest in being considered for a position in the new structure do not have the necessary skills and experience for any of the new positions they will be advised on Monday, 26 August. Roles will then be advertised externally.

Selection process:

The following criteria is proposed as the basis for selection into new positions:

- Skills (technical and behavioural), experience, and qualifications as indicated- Position Descriptions Annex 2
- Past Performance
- Understanding the commitment to the new focus and direction of the sales and business unit

Affected team members who are not placed

If an affected team member is not successful in their application for a new position, their employment would come to an end by reason of redundancy and notice would be provided in line with the terms of their individual employment agreement.

[40] Mr Donaldson asked for expressions of interest in the new positions and at the meeting Mr Campbell said he did want to be considered – Mr Campbell said at the investigation meeting that at this point, he still believed he was the logical fit for the sales and marketing manager role.

[41] Following 16 August meeting, Mr Campbell scrutinised the documentation provided and noticed that the "Person Specification – Skills and Attributes" for the sales and marketing manager role included "10 years plus experience in the tyre industry and working at a senior

leadership level”. He immediately confronted Mr Donaldson asking if the ten year industry experience was ‘negotiable’ and Mr Donaldson said he would need to get back to him on that – Mr Campbell, not happy with the response, commented that this was the sort of requirement businesses use to exclude applicants. Mr Donaldson did not comment and did not get back to Mr Campbell.

[42] In evidence, Mr Donaldson claimed Ms Wilson inserted the 10 year industry requirement but could not explain why he did not remove it and he did not seek legal advice at this point. When pressed, Mr Donaldson conceded that Mr X had 10 years plus industry experience and subsequently placed some emphasis on a reason for Mr Campbell’s subsequent non-appointment as his lack of tyre industry experience and product knowledge.

[43] Believing that the process was pre-determined, Mr Campbell says he sought legal advice and was told to just see what his employer would do next.

[44] Mr Donaldson said he then left for a business trip to China on 16 August. On 19 August Mr Campbell confirmed his interest in the sales and marketing manager role in a brief email to Mr Donaldson – he did not set out any reasons why he felt he should be appointed or provide any further feedback on the selection criteria. When questioned, Mr Campbell said he did not notice that the final decision document described the selection criteria as ‘proposed’ – his main concern was the ten year plus tyre experience requirement.

[45] Ms Wilson then emailed Mr Donaldson on Thursday 22 August checking if anyone had registered interest in the new SLT roles and that if they had they would need to be considered:

1. If they are suitable and have the technical, and behavioural competencies etc. then they are appointed to the role
2. If they do not meet the criteria then you would need to advise giving the genuine reasons.

[46] Further, Ms Wilson’s email indicated that a meeting request needed to go out giving individuals sufficient time to arrange a ‘support person’ (not 24 hours) and that someone

needed to attend with Mr Donaldson but Ms Wilson was not available that following Monday. Ms Wilson then went into some detail on how to handle a dispute, what redundancy payment may have to be offered if a grievance was raised, the need to look at outplacement services and the impact on the team when it was all over – all as counsel for Mr Campbell highlighted, being suggestive of Ms Wilson being aware that the decision to dispense with Mr Campbell had already been made.

[47] Mr Donaldson, in a response email indicated that he would be returning to Christchurch the next morning (Friday) and asked Ms Wilson to set up a meetings with Mr Campbell and Mr Northover the following Monday afternoon

[48] Mr Campbell recalls receiving the meeting invite to meet with Mr Donaldson from Ms Wilson on Friday 23 August for Monday 26 August at “2pm start 2:30pm end” and it saying “[Y]ou are welcome to bring along a support person to the meeting and I recommend that you do so”.

[49] The purpose of the meeting was described as Mr Donaldson “would like to meet with you regarding the decision on the new SLT structure”.

Communicating the non-appointment decision to Mr Campbell

[50] On Monday 26 August, Mr Campbell arrived for the meeting unaccompanied and says he first observed Mr Campbell writing on the new role’s job description in his office then being ushered by Mr Donaldson to the boardroom. He recalled being immediately told that he was unsuccessful for the role and that he would be made redundant. He says Mr Donaldson then discussed arrangements for his departure date and whether he wished to work out his notice period. Mr Campbell says he then asked for the reasons for his non appointment and Mr Donaldson briefly highlighting his:

- Lack of insight into the market and grasp of the product.
- Lack of collaborative management practices.
- Failing to focus on existing sales channels and growth opportunities.

- Level of engagement.
- Limited appreciation of the dynamics of the industry.
- Poor negotiating skills.

[51] Mr Donaldson confirmed the meeting was short and tense, that he went through the position description and expressed his rationale for his decision and that Mr Campbell did not contest any of the points he made about his performance. Mr Donaldson said he was surprised Mr Campbell did not 'fight' for his job during the meeting and just took notes and when asked if there was anything he wanted to say he responded - no.

[52] The only difference in recall of the meeting sequencing was Mr Donaldson recalled discussing Mr Campbell not working out his notice at the end of the meeting. Mr Donaldson took no notes of the meeting but did disclose at the investigation meeting his selective brief handwritten comments made on the person specification document that he had prepared before the meeting.

[53] It would appear from Mr Campbell's own disclosed notes that the notice period was discussed after Mr Donaldson went through his reasons for non-appointment.

[54] Of note, is that Mr Donaldson's hand written notes on the person specifications do show he placed "3 years only" next to the requirement for 10 years plus service and "product is an issue" and that during the meeting he did not disclose he took these factors into account. In cross examination, Mr Donaldson tried to play this factor down claiming the ten year plus experience requirement was only kept in the criteria as an 'ideal' recruitment specification – a premise capable of twin meaning.

[55] Mr Donaldson conceded none of the exclusively critical observations made had been put to Mr Campbell in the past.

[56] Mr Campbell recalls being shocked by criticism of his performance and he did not respond, believing Mr Donaldson to have made his mind up. He said he just took notes and

then stated his preference was not to work out his notice period. It was agreed he return on Wednesday 28 August to do a short 'handover'.

[57] Mr Campbell was provided with a "letter of disestablishment" when he returned on 28 August to work his last day – it said in part with no further elaboration:

You were considered for re-deployment into the newly created position of Sales and Marketing Manager and I shared with you the reasons why you were not successful in being appointed to this role.

[58] Mr Campbell was paid two weeks in lieu of notice, two weeks redundancy pay, offered career counselling, financial advice and provided a certificate of service.

Mr X's appointment

[59] The vacant sales and marketing position was not advertised as indicated. Mr Donaldson, after obtaining board permission contacted Mr X on 28 August and by 3 September had secured an agreement that Mr X commence working for VTL as a Sales and Marketing Manager commencing on 16 September 2019. A short memo to staff was circulated announcing the appointment and it highlighted Mr X's length of experience in the tyre industry.

Mr Campbell's PG

[60] By counsel's letter of 27 September 2019, Mr Campbell raised a personal grievance claiming that he had been unjustifiably dismissed, VTL had not acted in good faith and that the redundancy decision was not genuine.

[61] VTL's advocate responded by letter of 24 October 2019 vigorously denying Mr Campbell's claims, suggesting in part:

Genuine consideration was given to his interest in the role. Unfortunately, while he possessed some of the skills and experience required, he did not possess all. While your client verbally asserted to Mr Donaldson that the '10 years' requirement may have been included to prevent him from successfully being appointed, this was not the case. and;

In reality the appointment did not turn on the 10 years' experience.

[62] The parties then attended mediation but the matter remained unresolved.

Unjustified dismissal and/or disadvantage or was it a genuine redundancy?

[63] Mr Campbell claimed that his employment was brought to an end by reason of a flawed redundancy process. He essentially claims that he was personally targeted and that the decision to disestablish his position was pre-determined.

[64] By contrast VTL claim they endeavoured to act in a good faith manner in enacting the decision including entering into patient consultation with Mr Campbell who had in their view, effectively attempted at an early stage to not engage in the process.

The legal framework

The employment agreement

[65] Mr Campbell's employment agreement at cl 11.22 as [cited above para 30] requires that in a restructuring situation his employer at the point where his employment is "likely to be terminated for reasons of redundancy" is obliged to:

- continue the process of consultation with you and shall explore alternatives to redundancy;
- after we have consulted you, give you the notice of termination in accordance with the period specified in the letter offering you employment if we consider at our discretion there are no alternative positions or arrangements that are suitable;
- provide you with reasonable assistance in finding other employment (i.e. time off to attend interviews);

[66] The above agreement clause is consistent with well-established case law that an employer has a good faith obligation to positively explore redeployment in a redundancy situation.¹

[67] In assessing whether the above clause was complied with, I find that at the point where it was likely Mr Campbell's position was redundant, VTL did not 'continue' the process of consultation. Mr Donaldson merely communicated his subjective opinion that Mr Campbell was not suitable to be appointed – he gave Mr Campbell no practical opportunity to comment on his proposed selection criteria (that was objectively biased against Mr Campbell) and he did not provide Mr Campbell with an opportunity to counter his subjective assessment prior to the decision being made.

[68] VTL even failed to carry out its own initial expressed intention by not convening a meeting with Mr Campbell to discuss redeployment opportunities. To his credit, in giving evidence Mr Donaldson openly acknowledged that he should have met with Mr Donaldson before he made his decision to effectively terminate his employment.

[69] It then follows, that the second point in the contractual provision commencing: "after we have consulted with you", you will be given notice of termination, could not be complied with as no initial consultation had occurred.

[70] The advocate for VTL in submissions suggested cl 11.2.2 of the employment agreement had been complied with by Mr Donaldson carefully considering the possibility of appointing Mr Campbell to the new role – I find how that fulfilled the notion of "consult" to be a risible concept.

[71] In the context of a redundancy situation in the Employment Court decision *Stormont v Peddle Thorp Aitken Ltd*, Chief Judge Inglis outlined key consultation principles as:

Consultation involves the statement of a proposal not yet finally decided on,
listening to what others have to say, considering their responses, and then deciding

¹ *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102 and *Wang v Hamilton Multicultural Services Trust* (2011) 8 NZELR 588 (EmpC).

what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.²

[72] The third point in cl 11.2.2 is not contentious or particularly relevant but I do acknowledge that VTL did offer Mr Campbell ongoing assistance and that if I find that this was a fairly conducted restructuring I will give them due credit for this.

[73] I do not find the contractual clause to be ambiguous and as Chief Judge Inglis also commented in *Stormont* in a parallel situation:

The wording of the relevant clause in this case is unequivocal — it required Peddle Thorp to consult with Ms Stormont over possible redeployment before reaching a final decision and to continue to consult with her during any notice period. While the defendant would prefer not to be bound by the express words of the agreement it entered into, there is no scope for reading in a qualifier that such consultation was unnecessary where the company unilaterally considered no other suitable positions existed. As emphasised in *Money v Westpac Trust Banking Corporation*:

“ ... The contractual obligation must be taken to have been entered into deliberately by the respondent with the intention of honouring it if the occasion arose.”³

[74] Taking the above into account, I find VTL breached Mr Campbell’s employment agreement by not specifically consulting him over redeployment options both prior to making a decision that he was not suitable for the vacant role and thereafter and that this breach was of a clear contractual obligation.

[75] The breach, as the Court also noted in *Stormont* involving “an employer’s failure to consider redeployment”, led Chief Judge Inglis to comment that the Court of Appeal had previously observed such an oversight “may support a finding that a redundancy is not genuine”.⁴

² *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].

³ At [78] referring to *Money v Westpac Banking Corporation* [2003] 2 ERNZ 122 at [39].

⁴ At [79] – [81] referring to *Aoraki Corporation Ltd v McGavin* [1998] 1ERNZ 601 (CA).

Justification

[76] However, the above finding is not the ‘complete picture’. In order to justify termination of employment and an employer’s actions including in a redundancy situation, VTL must meet statutory requirements set out in s 103A of the Act commonly referred to as the ‘justification test’. In *Stormont* in the context of a redundancy case Chief Judge Inglis summarised neatly that:

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.⁵

Good faith

[77] 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.

[78] Contrary to what VTL’s advocate asserted, in the context of assessing whether an employee has been denied redeployment due to the application of a selection process, s 4 (1A)(c) of the Act is relevant as it emphasises the duty of full and open communication. As Couch J in *Jinkinson* noted:

Subsection (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process. Addressing this provision, Ms Brook invited me to draw a distinction between cases in which employees are being selected for *redundancy*

⁵ At [52].

in a downsizing process and cases in which employees were being selected for redeployment to alternative positions. She submitted that the provisions of s 4(1A)(c) apply to *selection* for *redundancy* but that they do not apply to “the assessment of staff for possible redeployment in lieu of *redundancy*.”

I do not accept that submission. As noted earlier, the decision to disestablish Ms Jinkinson’s existing position as a grade controller and the decision not to appoint her to one of the mine technician positions were both essential aspects of the employer’s actions leading to her dismissal. Had either decision been made differently, she would not have been dismissed. In carrying out the **selection** process, therefore, Oceania Gold was undoubtedly proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. Those who were selected would have their employment continued. The employment of those not selected would be terminated. Section s 4(1A)(c) therefore applied to that **selection** process.⁶

[79] The Court of Appeal in *Grace Team Accounting v Brake*⁷, 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.⁸

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

Ulterior motive?

[81] I first have to deal with the claim advanced that the restructuring process was enacted for an ulterior motive or as Mr Campbell’s counsel alleged:

⁶ At [40] – [41] emphasis added.

⁷ *Grace Team Accounting Ltd v Brake* [2015] 2NZLR 494 (CA) at [85].

⁸ At [85].

The redundancy was not for genuine business reasons. It was used as a mechanism to dismiss the applicant for performance reasons and replace him with an external candidate already known to the respondent.

[82] Factors I need to take into account that suggest the restructuring was enacted for genuine reasons are:

- The restructuring was part of a wider process that included the finance team and other members of the senior management team.
- Whilst the financial reasons advanced were vaguely expressed and no documentation was disclosed, they did not go beyond generally an aspiration for greater profitability/efficiency, there was some logic to the reorganisation of managerial responsibilities and reporting lines and Mr Campbell supported the premise of such.
- VTL engaged in consultation on the proposal over a reasonable timeframe and sought feedback from employees on the initial structural change and they altered such after feedback and offered counselling services to affected employees.
- Information was openly shared on how the new positions would operate including for Mr Campbell, provision of a copy of a job description and person specifications for the Sales and Marketing Manager's proposed role.
- VTL shared with Mr Campbell the methodology they ostensibly used to select for the new sales and marketing role and they openly outlined the factors to him why he was not deemed suitable for such a role.
- The prior consultation with Mr X may have been coincidental or it may have involved a 'mixed motive' of Mr X being potentially considered for a more senior role had Mr Donaldson decided to step out of his operational role.

- Whether Mr Campbell was genuinely considered for redeployment (which includes a failure to interview him and his lack of opportunity to comment on the decision not to appoint him before it was made).
- Whether Mr Campbell had a reciprocal ‘good faith’ obligation to engage in the process by, for example, raising his concern more explicitly when he was not re-assigned and passively accepting Mr Donaldson’s selection methodology proposal, and not advancing any factors he believed should be taken into account on why he considered he met the ideal person specification.

[83] Set against the above, I have to consider whether an ulterior motive was present as at ‘first blush’ the process had the appearance of being a genuine restructure enacted for sensible organisational reasons. I have considered:

- That VTL engaged in extensive discussion with Mr X prior to the restructuring commencing that on the documentary evidence presented, heavily implied that he was to be offered a sales and marketing role once the restructuring was completed and that is what eventuated without VTL advertising externally.
- That no independent analysis was conducted to ascertain what role Mr Campbell was actually undertaking prior to the restructuring and that Mr Donaldson’s assurance that he would update his job description to reflect the additional duties that Mr Campbell had undertaken, was not completed.
- Thus, Mr Donaldson did not produce a detailed documentary analysis of factors he considered made the new position substantially dissimilar to the one Mr Campbell occupied. When asked if he compared what Mr Campbell did with what was required in the new role Mr Donaldson said no, that he only used the proposed job description to assess suitability.
- Whilst consultation was open in many respects, VTL failed to put the selection criteria they intended to use up for comment prior to completing the consultation phase.

- The selection criteria devised was explicitly biased against Mr Campbell by the inclusion of ‘10 years plus experience in the tyre industry’ – he objected to this but it was left in, without further explanation. Mr Donaldson’s notes and oral evidence indicate that it was a factor taken into account in not appointing Mr Campbell to the new role.
- The selection process involving no interview or call for detailed application information beyond an ‘expression of interest’.
- It was not clear that Mr Donaldson had consulted Mr Campbell’s CV as part of the selection process – I suspect not as in questioning Mr Donaldson conceded when he initially recruited him it was the marketing aspect of his work he concentrated on and that his CV “was somewhere on file”.
- The selection process as such, was entirely subjective and conducted solely by Mr Donaldson.
- During the period 16 August – 24 August inclusive Mr Donaldson was absent overseas although he claimed that he had completed the assessment of Mr Campbell prior to him leaving (which suggests that he did so before presenting the final decision document on structure which was the first point that the selection criteria had been disclosed – this dispels the notion advanced in submissions that VTL allowed adequate time to consult on the criteria before it was applied).
- Undisclosed performance factors were used to assess Mr Campbell’s suitability for the new role including the result of an earlier psychometric personality test.
- It was not clear whether Mr Donaldson had properly turned his mind to the common law obligation to ‘redeploy’⁹ in a circumstance where Mr Campbell was the only applicant and what considerations that entails as contrasted with a ‘competitive’ selection process.

⁹ *Wang v Hamilton Multicultural Service Trust* [2011] 8 NZLR 588.

- The very fact that in not appointing Mr Campbell, Mr Donaldson knew that he had Mr X as an alternative known candidate and that he was appointed without a formal interview.
- The haste by which Mr X was subsequently appointed.

Assessment

[84] In determining on the evidence, whether the process as it specifically applied to Mr Campbell ‘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”.¹⁰ Counsel for Mr Campbell did not develop this argument in submissions other than to generally assert that documentation disclosed implied that Mr X was impliedly offered employment before the restructure commenced even though no evidence of a concluded written offer and acceptance of such emerged until after the restructuring was completed.

Finding

[85] In carefully assessing the factors above I am inclined to view the restructuring process as being enacted for genuine reasons and that it was not a sham process. It would likely have occurred without Mr X’s interest being expressed. I however, before considering and applying statutory obligations owed to Mr Campbell below, come to a view that the contextual factors strongly suggest that the decision to not redeploy Mr Campbell was more likely than not, driven by an ulterior motive and that Mr Donaldson compared Mr Campbell with Mr X as if he was conducting a normal selection process for a vacant position where he could openly select.

[86] One of the explicit factors strongly pointing to an ulterior motive was the unexplained inclusion and application of the ‘10 years plus industry experience’ specification that was

¹⁰ 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].

reinforced by Mr Donaldson's comment in evidence that he considered Mr Campbell was not a "tyre man" and that he did not "bleed black".

[87] I do accept at 'face value' that Mr Donaldson's initial interest in Mr X may have been in a more senior role or as an investor given the content of the confidentiality agreement obligations he imposed but I had no evidence before me on Mr X's capabilities and experience at a more senior level (or in marketing) to support this. Notwithstanding, Mr X clearly indicated that he wanted to be employed by VTL and made no explicit mention in emails of such a role being other than managing the sales team. Mr Donaldson suggested an appointment was soon available by disclosing that he had to get a restructuring completed first then quickly seized upon Mr X's continued availability once he had terminated Mr Campbell's employment. I find this factor particularly telling because the 'restructure' reference can only have been an allusion to the situation at VTR.

[88] VTL also owed Mr Campbell a good faith duty not to directly or indirectly mislead or deceive ¹¹ and I find such a duty was transgressed.

[89] On balance and having assessed in context both explicit and inferential factors, I find that a pre-determined and thus predominant ulterior motive existed in the decision not to appoint Mr Campbell to the vacant sales and marketing manager role. That motive was established in evidence that Mr Donaldson for VTR, made explicit overtures to Mr X offering employment before the restructuring commenced and whilst ostensibly considering Mr Campbell for redeployment, he considered Mr X to be a more suitable appointee in a context where he had no legal right to make that comparison.

Genuineness of the redundancy

[90] I find that even if the redundancy was subjectively genuine on organisational grounds which I have found appears to be the case, I have to examine the manner by which Mr

¹¹ Section 4 (1) Employment Relations Act 2000.

Campbell was treated during the process and once the decision was made and a redeployment obligation became apparent. This involves the application of s 103A and good faith factors.

Procedural fairness and good faith factors

[91] In analysing whether VTL effected the restructuring in a good faith manner, I take into account that VTL engaged internal and external professional advice to assist Mr Donaldson to manage and guide the process. The extent to which VTL followed this advice and the quality of such was questionable and exposed at the investigation meeting.

[92] The first issue was that Mr Donaldson and Ms Wilson, in formulating the proposal of disestablishing the notional marketing manager position, had no accurate updated job description describing the tasks Mr Campbell was actually undertaking in both the sales and marketing areas.

[93] Then, no financial information was provided to employees to justify the need for the proposal and given that Mr Campbell and Mr Northover were being judged overall on their past sales performance, this was information that should have been disclosed. I reject VTL's advocate's assertion that such disclosure was not material to the decision. I find in this regard VTL was in breach of a statutory obligation. Section 4(1A)(c) of the Act unequivocally states it:

... requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his employees to provide to the employees affected -

- i. access to information, relevant to the continuation of the employees' employment, about the decision; and
- ii. an opportunity to comment on the information to their employer before the decision is made.

The selection criteria and its application

[94] Mr Campbell, despite being belatedly aware of its existence, had little real opportunity to comment on the selection criteria and his comment was not explicitly sought. The duty to disclose selection criteria in a redundancy situation and meaningfully consult on such is a well-established legal principle that pre-dates the enactment of statutory good faith duties.¹² VTL's specific duty was to first disclose the use of a comprehensive selection criterion that Mr Donaldson had prepared, outline how it would apply, and then seek feedback on its content and application.

[95] I also find that the criteria including cross-reference to the position description, contained a factor that was clearly biased (the ten year industry experience requirement) and some other elements of the criteria were unclear including how such would be applied – an example being a reference to “technical and behavioural” skills with no explanation of how such would be assessed.

[96] Setting aside the lack of consultation and transparency of its application, I also have to consider whether devising a patently ‘high hurdle’ selection criteria and applying it in a wholly subjective manner was consistent with both the contractual and common law good faith obligation to fairly consider redeployment or in this case effectively re-assignment as Mr Campbell was ostensibly the only applicant being considered.

[97] This somewhat thorny question has been addressed by the Employment Court in *Jinkinson, Wang, Stormont* and affirmed in *Rittson-Thomas (t/a Totara Hills Farm) v Davidson*. I conclude from these cases that the approach is: if the employee possesses the requisite skills and experience for the position then the obligation is on the employer to offer the alternative position and merely providing an opportunity to express an interest in a

¹²*Coutts Cars Ltd v Baguley* [2001] 1 ERNZ (CA).

position that an employer is contemplating allowing competition for (as I find here), is not the same as an offer of the position.¹³

[98] I do consider that Mr Donaldson applied his own criteria in a considered although subjective fashion but the ‘premise’ he started from was incorrect – it was not an assessment against an ‘ideal’ list of attributes. VTL’s advocate subsequent to the investigation meeting, provided evidence that appeared to show the extent of Mr Campbell’s sales travel activity but this was an incomplete picture of his role and an attempt to retrospectively conduct an assessment of the two roles that was not undertaken at the time of the decision.

[99] I also consider that this was not a straight comparison of whether Mr Campbell as suggested by VTR’s advocate, was not fulfilling the full range of a sales manager’s duties – that was not the point, he clearly was partly undertaking a sales and marketing role. VTL should have conducted a simple assessment of whether Mr Campbell had the skills and experience to undertake the position and that could even have included consideration of ongoing training and support measures – that would fulfil the common law redeployment obligation.

[100] I find on the evidence of Mr Campbell’s CV, his qualifications and described experience in both sales and marketing at a management level, his past positive appraisals, demonstrated flexibility and absence of any formal performance issues and Mr Donaldson’s assessment of his hard working and diligent character, that he was easily qualified and ‘suitable’ to be re-assigned into the expanded sales and marketing role.

[101] I am guided by an authoritative article reviewing the law, including the above decisions and Authority precedents that concluded that a failure to redeploy remains an important component of the assessment of the application of s 103A of the Act and good faith and that:

The approach in these decisions is consistent with the requirements of the Employment Relations Act 2000. A cornerstone of that Act is the obligation on

¹³ *Rittson-Thomas (t/a Totara Hill Farm) v Davidson* [2013] NZEmpC 39 at [11].

both parties to the employment relationship to be “active and constructive in establishing *and maintaining* a productive employment relationship”.¹⁴ Paying lip service to redeployment by, for example, too readily discounting an existing employee’s ability to meet the requirements of a “new” role, or by seeking to exaggerate the differences between the existing and new roles, is inconsistent with this obligation.¹⁵

[102] I find that the ‘selection’ criteria and how it was implemented by VTR was not in accord with contractual, good faith and established common law obligations and was in any case, not honestly and fairly applied.

[103] For completeness, I find this was a flawed redundancy selection process with initial ‘surface’ consultation but no full sharing of relevant information and Mr Campbell was provided with no prior opportunity to comment on the decision to dismiss him. These procedural defects were not minor in a sense of bringing s 103(5) into play (Mr Campbell was treated unfairly) and the respondent has thus failed to meet the considerations set out in s 103A and s 4 of the Act.

[104] The finding that it was more likely than not that there was an ulterior motive behind the way this redundancy was effected is reinforced by the significant procedural defects and breaches of good faith that I have identified. This ended Mr Campbell’s employment relationship in a manner that did not fall within the parameters of what a notional, fair and reasonable employer could have done in all the circumstances at the time.

Finding

[105] I find that Mr Campbell in all of the circumstances was unjustifiably dismissed.

Claimed penalty for breach of good faith

[106] I am not persuaded that penalties for the good faith breaches identified are warranted as in my view the transgressions Mr Campbell’s counsel has identified though not minor, are

¹⁴ Section 4 (1A)(b) Employment Relations Act 2000.

¹⁵ *Geoff Davenport and Frances Law, “Redundancy challenges – Wang eight years on”* [2018] Employment Law Bulletin (NZ) 94, Lexis Nexis.

adequately remedied by my finding that he has successfully established a personal grievance that he was unjustifiably dismissed and the remedies detailed below. I rely on s 160(3) of the act in making this assessment.

[107] I also, despite finding an ulterior motive that impliedly involved Mr Donaldson engaging in calculating behaviour, think his approach fell just short of the threshold of it being “deliberate, serious and sustained”¹⁶ as he sought legal advice and although making identified mistakes in the process he genuinely believed that he fairly considered Mr Campbell for the vacant role albeit wrongly in comparison with Mr X. Whilst not condoning VTR’s approach I see no deterrent purpose in awarded a penalty for breach of good faith.

What remedies should Mr Campbell be awarded?

Lost wages

[108] Mr Campbell described the impact of his employment ending in the above circumstances to be distressing but he did make significant efforts to mitigate his loss in a timely fashion and he provided ample evidence of such.

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

[110] Here I find Mr Campbell’s lost remuneration was attributed to his personal grievance which was that he established that VTL acted with an ulterior motive and did not meet key contractual and statutory procedural requirements when they failed to redeploy him in a vacant position.

[111] Mr Campbell’s counsel claimed lost wages in a sum reflecting the actual loss in the intervening period (just over twelve months) on the basis that had a fair selection process been

¹⁶ Section 4A Employment Relations Act 2000.

undertaken, Mr Campbell's employment would have been ongoing. Counsel cited 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 and 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.¹⁷

[112] I also was guided by an Employment Court decision of Judge Smith, *Roach v Nazareth Care Charitable Trust Board* that extensively traversed applicable case law in applying s 123 and s 128 of the Act.¹⁸

[113] I am obliged to balance matters up such as the potential that had Mr Campbell been appointed to the expanded new role he may have struggled to meet VTL's expectations in the sales area and that from evidence given, albeit subjective he had undisclosed issues of confidence harboured by Mr Donaldson but not at a level to suggest his performance was sub-standard as borne out by previous performance appraisals. Against this, I have to consider that Mr Campbell would have been appointed to a sales oversight role and from his CV and impressions I gained hearing his evidence, he operated more at a 'strategic' level rather than 'hands on' and that was what the position required as the job description demonstrated.

[114] I consider it would be equitable in all of the circumstances to award Mr Campbell nine months' lost remuneration (calculated on his final salary of \$170,000 p.a) minus \$9,000 being an amount Mr Campbell had earned in consultancy fees in the interim period.

Compensation for humiliation, loss of dignity and injury to feelings

[115] I heard from Mr Campbell and his partner Rae Campbell how debilitating the impact of the decision was on him. This included anxiety, lack of sleep, de-motivation and lack of interest in previous physical activities, weight gain and reserved communication.

¹⁷ 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.

¹⁸ *Roach v Nazareth Care Charitable Trust Board* [2108] ERNZ at [68] – [80].

[116] Rae Campbell gave unchallenged evidence describing the ongoing impact on their relationship including financial stress and worry she had for Mr Campbell's ongoing mental health and his lack of interest in a range of activities he previously undertook.

[117] Mr Campbell a mature individual, provided no medical evidence but explained his fear of being categorised as having mental health issues and that he rarely consulted his GP. Mr Campbell described the negative impact on his self-esteem and confidence directly linked to his inability to process why he was made redundant.

[118] I found Mr Campbell to be a thoughtful and credible applicant and he diagnosed himself as a 'stoic'.

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

[120] 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*)¹⁹ or not effected in accord with good faith requirements ²⁰ I consider that Mr Campbell's level of distress at the impact of the dismissal warrants a reasonably significant amount of compensation. I fix that amount at \$25,000 pursuant to section 123(1)(c)(i) of the Act.

Interest

[121] Section 123(1)(b) of the Act allows the Authority to consider reimbursing "other money lost" by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid only on lost wages awarded and not the compensatory award (an approach adopted by Chief Judge Inglis in *Nath v*

¹⁹ At [71].

²⁰ *Zhang v Telco Asset Management Ltd* [2019] ERNZ 438 at [154] at [107].

Advance International Cleaning Systems (NZ) Ltd ²¹. However, given some of the delay in scheduling the investigation meeting and the Authority's discretionary approach to this matter and applying guidance from the Court of Appeal in *Gilbert v Attorney-General* ²², I limit the period of interest to six months.

Contribution

[122] Section 124 of the Act indicates that I must consider the extent to which, if at all, Mr Campbell's actions contributed to the situation that gave rise to his 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 although Mr Campbell engaged intermittently in the restructuring process and could be criticised for not earlier asserting his belief that he should have been re-assigned rather than put through a selection process, I have found that he was significantly misled by his employer.

[123] I also reject the rather novel argument advanced by VTL's advocate that Mr Campbell did not act in good faith by not raising his belief that he should have been appointed to the new role and then 'passively' allowing VTL's Mr Donaldson to assess him without challenge and as Mr Donaldson put it: I would have expected him to "fight" for his job. The onus is on the employer to justify a decision to dismiss and to justify their actions and omissions.

[124] Although Mr Campbell had a reciprocal duty to be active and communicative and responsive he did raise the issue of VTL including an objectively biased requirement in the selection criteria in a timely fashion and VTL did not respond. He cannot possibly be expected in the distressing context of having just been told his employment was effectively terminated, to communicate his concerns when the decision had clearly already been made, he was not represented and the set up and purpose of the meeting was to facilitate 'one way' communication and not to seek feedback.

²¹ *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [112] – [114].

²² *Gilbert v Attorney-General* [2010] NZCA 421 at [100].

[125] I find Mr Campbell was not engaged in any wrongful action and he did not act in a blameworthy or culpable manner that gave rise to his grievance occurring so no reduction in any of his remedies is warranted.

Outcome

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

- a. Bruce Campbell was unjustifiably dismissed from his employment with Value Tyres Limited.**
- b. Value Tyres Limited must pay Bruce Campbell the sums below:**
 - i. \$118,500 gross lost wages (plus interest);**
 - ii. \$25,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - iii. Interest is to be paid on the lost wages figure above in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for the period 30 August 2019 until 29 February 2020.**

Costs

[127] Costs are at the discretion of the Authority and here Mr Campbell was wholly successful in his claim challenging the process of his former employer in making him redundant and has obtained significant compensatory remedies in an investigation meeting that took place over one and a half days.

[128] 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.

[129] If no agreement is achieved, Mr Campbell has fourteen days following the date of this determination to make a written submission on costs and Value Tyres 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