

**Note: this determination
includes an order
prohibiting publication
of certain evidence**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 35
5517996

BETWEEN

STEPHEN JARRETT
Applicant

AND

BIO-CELL (NZ) LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Mark Nutsford for the Applicant
Tony Portland and Casey Costello for the Respondent

Investigation Meeting: 27 November 2015

Submissions Received: At the investigation meeting, with further information
received up to, and including, 9 December 2015

Determination: 3 February 2016

DETERMINATION OF THE AUTHORITY

- A. Stephen Jarrett was unjustifiably dismissed by Bio-Cell (NZ) Limited (Bio-Cell).**
- B. In settlement of his personal grievance Bio-Cell must pay Mr Jarrett the following sums within 14 days of the date of this determination:**
- (i) \$350.34 gross as reimbursement for lost wages; and,**
 - (ii) \$8500 as compensation, without deduction, for humiliation, loss of dignity and injury to feelings; and**
 - (iii) \$3500 as a contribution to his costs of representation; and**
 - (iv) \$71.56 as reimbursement of the Authority's filing fee.**

Prohibition from publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the evidence lodged in these proceedings about the financial performance of Bio-Cell (NZ) Limited (Bio-Cell) and Trak Group except for the information contained in this determination.

Employment Relationship Problem

[2] Stephen Jarrett's employment with Bio-Cell ended by reason of redundancy on 13 June 2014. Mr Jarrett claimed he was unjustifiably dismissed because his redundancy was procedurally defective and substantively unjustified. Mr Jarrett claimed his redundancy was not genuine and was, in fact, "false". Bio-Cell denied these claims.

[3] In settlement of his personal grievance with Bio-Cell, Mr Jarrett sought an award of lost wages and compensation for hurt, humiliation and injury to feelings.

The Issues

[4] The issues for investigation and determination were:

- (i) Was Mr Jarrett's dismissal for redundancy, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time, including whether:
 - (a) Mr Jarrett was provided with relevant information and an adequate opportunity to get advice and comment on the information before a decision was made;
 - (b) the decision was made for genuine business reasons and not an ulterior purpose (including the allegation of a "false redundancy"); and
 - (c) alternatives to dismissal were fairly considered?
- (ii) If Bio-Cell's actions were not justified, what remedies should be awarded, considering:
 - (a) lost wages under s 123(1)(b) of the Act; and
 - (b) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Jarrett that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's Investigation

[5] During the investigation meeting, I heard evidence from Mr Jarrett, Bio-Cell managing director Tony Portland, Trak Group general manager Cassandra (Casey) Costello, and Mohammed Khan, a maintenance technician with Trak Limited (another part of the Trak Group).

[6] Trak Group was essentially a management vehicle for Mr Portland's companies. Mr Portland told me that his bank treated the companies that constituted Trak Group, notwithstanding their respective legal identities, as a single financial entity.

[7] A number of documents were provided to me as part of my investigation including Mr Jarrett's individual employment agreement, correspondence to Mr Jarrett from Bio-Cell about the redundancy process and financial records for Bio-Cell and Trak.

[8] During the meeting, I raised concerns about the witness statement provided by Mr Khan. He told me he had not seen the final version of the statement before it was lodged with the Authority. It became apparent that Ms Costello had prepared it based upon brief notes she had taken during a meeting with Mr Khan to discuss Mr Jarrett's evidence and she had not subsequently confirmed its contents with him. Mr Khan and Ms Costello independently confirmed this. Ms Costello subsequently provided the Authority with her notes from this meeting.

[9] I do not criticise Mr Khan for this. He was asked by his employer to give evidence and he cooperated with that request. He had no previous experience giving evidence and was unfamiliar with formal legal processes.

[10] Unfortunately this situation highlights one of the risks of self-representation particularly so where a party is relying on multiple witnesses and one of those witnesses is effectively responsible for the conduct of the matter in the forum.

[11] After setting aside his witness statement on the basis that it was tainted, Mr Khan gave, in the absence of Ms Costello, straightforward and confident answers to questions posed by the Authority and Mr Nutsford. Based on this oral evidence, I found Mr Khan to be a polite, considered and credible witness.

[12] Mr Jarrett gave credible and considered evidence. Ms Costello's evidence, while confidently given, did not sit comfortably with that of Mr Jarrett. Overall I preferred the evidence of Mr Jarrett to that of Ms Costello. Mr Portland was clearly passionate about his businesses and seemed genuinely concerned about the impact of its restructuring on its employees, including Mr Jarrett. I found him to be a credible witness.

[13] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Mr Jarrett's employment relationship problem.

The legal principles for a redundancy dismissal

[14] The primary issue before the Authority is whether Mr Jarrett's dismissal was justified. The test of justification under s 103A of the Act is to be applied on an objective basis by considering whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances.

[15] The Court of Appeal in *Grace Team Accounting Ltd v Brake* emphasised the importance of addressing the genuineness of a redundancy decision by showing that a non-genuine redundancy (i.e. one effected for a purpose other than genuine business needs) is unlikely to satisfy the s 103A test. Conversely, the Court suggested if an employer could demonstrate the redundancy was genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, then that could be expected to go a long way towards satisfying the test.¹

¹*Grace Team Accounting Limited v Brake* [2014] ERNZ 129 (CA) at [85].

[16] A fair and reasonable employer would comply with statutory and contractual obligations. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and not mislead or deceive each other or do anything likely to mislead or deceive the other.

[17] The duty of good faith requires an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of employees to provide the affected employees with access to information which is relevant to the continuation of employment and an opportunity to comment on that information before the decision is made.² The duty of good faith also applies to consultation between an employer and its employees about the effect on employees of changes to the employer's business and making employees redundant.³

[18] The Court has observed that the focus of the inquiry as to whether an employer has met the test in s 103A of the Act is on substantial fairness and reasonableness rather than pedantic scrutiny.⁴ A key element of that inquiry in redundancy situations is whether the employer complied with its obligations under s 4(1A)(c) of the Act.⁵

Mr Jarrett and Bio-Cell

[19] Mr Jarrett commenced employment with Bio-Cell as a Water Treatment Serviceman on a fixed term individual employment agreement in January 2004. From April 2004, he was a full-time permanent employee of Bio-Cell.

[20] In the earlier years of his employment, Mr Jarrett was Bio-Cell's only employee. His work included servicing and maintenance of air-conditioning cooling towers, taking legionella samples and providing water treatments to spa pools. From 2009 onwards, following discussions between Mr Jarrett and Mr Portland, Bio-Cell commenced a process of business enhancement. A new company vehicle was purchased. A part-time employee was engaged to relieve Mr Jarrett of some of his water treatment work so he could spend more time promoting the business and achieving sales.

²Employment Relations Act 2000, s 4 (1A)(d).

³Employment Relations Act 2000, s 4 (1A)(c).

⁴*Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

⁵*Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC28 ar [60].

[21] In 2012, Mr Portland restructured Bio-Cell. The spa treatment business was split off and a sales representative was tasked with helping grow the remaining air-conditioning business. He was also trained in Bio-Cell's treatment procedures. A new management system was also introduced which facilitated a better understanding of work requirements and time allocation.

[22] As part of this restructuring process, a majority of Bio-Cell's overhead costs and expenses, which had, according to Mr Portland, previously been born by his main company, Trak Limited, were shifted to the company's balance sheet. The net result saw Bio-Cell paying a monthly administration payment to Trak Group.

[23] In March 2014, the part-time employee assisting Mr Jarrett resigned. After discussions between Mr Jarrett and Ms Costello, Mr Khan was trained to assist Mr Jarrett and also to provide cover for him during his planned overseas holiday in May 2014. Trak Limited invoiced Bio-Cell monthly for Mr Khan's labour.

[24] The sales/promotional aspect of Mr Jarrett's job appeared to have virtually disappeared by this stage and, according to Mr Portland, there were no further sales opportunities identified for Bio-Cell.

Restructuring process

[25] After meeting regularly with his bank and other advisors in early 2014, Mr Portland resolved to restructure Bio-Cell and several other companies that formed Trak Group, to achieve business growth and enhance profitability

[26] Mr Portland gave Ms Costello responsibility for the restructuring process on behalf of Trak Group. According to Mr Portland, Ms Costello was required to fully consult with him before any final decisions were made. Ms Costello gave evidence that she had experience in managing restructuring in both the public and private sectors. She told me she had also managed previous restructures for Trak Group.

[27] The consultation process adopted by Ms Costello was very swift. For Mr Jarrett it commenced on 23 May 2014 before he left for a planned two week long overseas holiday and continued upon his return to work on 11 June 2014. He was made redundant on 13 June 2014.

[28] Both Mr Portland and Ms Costello knew Mr Jarrett was due to start annual leave on 27 May 2014. It was agreed that Mr Khan would fill in for Mr Jarrett during his absence.

[29] As Mr Jarrett was not scheduled to return to work for approximately two weeks, Ms Costello decided she would inform him about the commencement of the restructuring consultation process before he went on leave, as it would affect him.

[30] At or about 7am on Friday 23 May 2014, Mr Costello asked Mr Jarrett to come into her office. A brief discussion took place and Ms Costello handed Mr Jarrett an envelope. Mr Jarrett was not aware of the contents at this stage. Ms Costello told him he did not have to work for the rest of the day. Mr Jarrett indicated he needed to continue to work, as he had to finalise a number of matters before going on holiday.

[31] Mr Jarrett returned to his office, opened the envelope and read the letter.

[32] The letter was dated 21 May 2014. Under a heading 'Business Background', it provided a brief background of the financial situation facing Trak Group. Under the heading "Consultation", Mr Jarrett's position was identified as being affected by the restructuring and that his input was sought "...into the analysis of the current resources, proposed structure and operational procedures".

[33] The letter went on to state:

The objective of this process is to implement tangible savings and therefore it may be necessary to reduce staff numbers.

It is fully appreciated this is a difficult and stressful time and it is intended to *expedite the process. Meetings have been scheduled to take place this week with all affected staff.* (Emphasis added).

[34] The letter then advised Mr Jarrett:

After receiving feedback from all affected employees and at the conclusion of the consultation the proposed structure will be communicated before any final decisions are made.

It is intended to expedite this process as efficiently as possible to minimise distress without compromising a robust consultation. (Emphasis added).

[35] Mr Jarrett said he was very confused by the letter. This was not surprising. There was no explanation or elaboration of the reference to “proposed structure”, beyond the fact there was going to be one. There was no information beyond generalities about what was happening and why. There was no disclosure of the criteria used for the identification of his position as an affected one or the criteria that would be applied to affected employees to determine who would be made redundant, if it came to that. There was also no reference to redundancy mitigation mechanisms such as redeployment.

[36] Mr Jarrett by now distressed decided he would go home. He returned to Ms Costello’s office to tell her this. According to Ms Costello, Mr Jarrett appeared “confused and taken aback”. She said she tried to reassure him and then asked him to attend another meeting on Monday 26 May 2014.

[37] After returning home and telling his wife what happened, Mr Jarrett decided to seek professional advice about his situation. In response to this advice, he rang and left a message for Ms Costello. She returned his call and he told her that as he was going on annual leave on Tuesday 27 May 2014, he would have insufficient time to prepare for the meeting and that it would have to take place upon his return. Mr Jarrett said that in response Ms Costello insisted that they met on Monday 26 May 2014. He said she also accused him of “purposely trying to slow down the consultation process”. Ms Costello denied she made this comment. It was agreed to meet on 10 June 2014, but a time was not set.

[38] Ms Costello believing that Mr Jarrett misunderstood the process issued him with a further letter dated 26 May 2014. The letter stated, among other things:

It is unfortunate that we will not have an opportunity to meet and obtain your feedback and insight into the company performance, requirements and structure but I respect your preference to take your leave first.

The reason for raising this with you prior to commencing leave was that a number of changes were to be *implemented early this week* and rather than you being impacted by rumour and speculation it was preferable to ensure you were fully informed. (Emphasis added).

[39] The redundancy process hanging over his head, Mr Jarrett and his wife left on their overseas holiday on 27 May 2014.

“Feedback”

[40] According to Ms Costello, by the time Mr Jarrett returned from holiday the process was over for most other affected employees.

[41] This outcome was inconsistent with a letter given to Mr Jarrett on 23 May 2014, which advised him, as outlined above, “the proposed structure will be communicated before any final decisions are made”.

[42] Mr Jarrett arrived back in the country on 9 June 2014. He obtained further professional advice about his situation.

[43] Mr Jarrett said he then rang and left a message for Ms Costello at 4.17pm on 9 June 2014. He claims Ms Costello did not return this call until 12.30pm on 11 June 2014. The statement in reply signed by Mr Portland but drafted by Ms Costello stated that Mr Jarrett did not attend the scheduled meeting on 10 June 2014 and that Ms Costello contacted him on 11 June 2014 to ascertain why not. Her witness statement did not directly address this interaction. Additionally, Ms Costello could not explain why the statement in reply said the meeting, which she said in her witness statement occurred on 11 June 2014, occurred on 12 June 2014.

[44] Ms Costello and Mr Jarrett both agreed that a meeting did take place on 11 June 2014. It was also common ground that Mr Jarrett did not bring a support person. However, there was a dispute as to what time it occurred. Ms Costello said it occurred at 9.10am. Mr Jarrett said it occurred around 1.00pm (or about 30 minutes after Ms Costello returned his phone call of 9 June 2014). This factual dispute does not seem particularly material. Even on Ms Costello’s version, the available time to consult with Mr Jarrett would be extended by, at more, four hours.

[45] Mr Jarrett said during the meeting he was asked by Ms Costello if he could see any opportunities for growth or reducing overheads. Mr Jarrett told Ms Costello he was unsure about opportunities for growth but he was sure overheads could not be reduced further because there was no unnecessary expenditure. Mr Jarrett said the meeting lasted approximately two minutes. Ms Costello disputed this and said the meeting lasted approximately 20 minutes.

[46] In her witness statement, Ms Costello set out the topics covered in the meeting. She said this list was based on notes she took during the meeting. The topics were:

- General business structure and performance;
- [Mr Jarrett's] role and responsibilities including capacity;
- Reluctance of competitor air conditioning companies to use Bio-Cell services;
- Workload changes with the departure of [the part-time employee] and distribution of responsibilities using Mohammed Khan;
- Lack of sales opportunities;
- Issues with the information management system ABM;
- Client satisfaction and service quality;
- Administration and communication being managed through the Call Centre;
- Impacts of using the Trak Limited service technicians to carry out water treatment services.

[47] Mr Jarrett said most of these topics were not discussed. He also said Ms Costello did not take any notes during their discussion. She subsequently provided some notes to the Authority. Even if the meeting went for 20 minutes as suggested by Ms Costello, it would seem unlikely that the list of topics identified above could be adequately covered in that timeframe.

[48] The topics Ms Costello said were discussed disclosed no reference to the selection criteria for identifying affected employees, the criteria to be used for determining which employees would be made redundant or alternative options for those employees such as redeployment, and the timeframe within which this would occur.

[49] At the conclusion of the meeting Ms Costello advised Mr Jarrett she “needed additional time to consult with other managers”. She invited him to “provide any other information regarding the performance of the business and barriers to growth or improved profitability”. A follow up meeting was scheduled for 12 June 2014 at 12.30pm.

[50] At the meeting on 12 June 2014, Mr Jarrett was advised by Ms Costello of an “interim” decision to disestablish his position. Ms Costello said she explained the reasons for this interim decision and Mr Jarrett was invited to provide any additional information before a final decision was made. Ms Costello said Mr Jarrett provided no further information for consideration. The meeting adjourned to give Ms Costello the opportunity to talk to Mr Portland via telephone. Mr Portland and Ms Costello agreed the interim decision to make Mr Jarrett redundant would be made final. Ms Costello claimed that a discussion then took place with Mr Jarrett about there being no suitable alternative positions within Trak Group for him. Mr Jarrett denied this discussion occurred.

[51] Mr Jarrett said this entire meeting took about two minutes. Ms Costello disputed this. She said it took approximately 30 minutes. Even if Ms Costello’s version was correct, 30 minutes to communicate the interim decision to Mr Jarrett, receive his feedback, have a discussion with Mr Portland to finalise the decision, communicate the decision to Mr Jarrett and advise him there were no alternative positions available within Trak Group was a very tight timeframe.

[52] Mr Jarrett was either at that point and/or subsequently via email provided with a letter of termination signed by Ms Costello and dated 12 June 2014. This letter confirmed his redundancy with effect from 13 June 2014 and his final entitlements. The letter also stated:

Other opportunities for your continued employment within the Trak Group were explored but there are no suitable alternate positions or placements within the company and therefore a redundancy process was commenced.

Recognising the stress and uncertainty this process creates we have attempted to conclude this matter in a timely manner and provide clarity for you.
(Emphasis Added).

Redundancy

[53] Mr Jarrett’s employment agreement provided no redundancy compensation. He was paid one week’s notice of termination under his agreement and was given an extra payment equal to two weeks’ pay. He was also paid his holiday pay.

[54] The outcome of the restructuring was that four employees (including Mr Jarrett) were made redundant from their positions. Eight further affected employees remained employed but had various adjustments made to their jobs including changes to reporting lines and workloads.

[55] Mr Portland said that after Mr Jarrett was made redundant, Bio-Cell ceased to have any employees. Mr Khan said he assumed Mr Jarrett's residual work and on occasion other employees of Trak Limited, who were or became trained in Bio-Cell's procedures, performed it. Ms Costello told me that Trak Limited recovered the labour cost for Mr Khan and, as necessary, its other employees from Bio-Cell.

[56] Mr Nutsford submitted that a significant part of Mr Jarrett's job continued to exist and that he should not have been made redundant. Mr Portland and Ms Costello disputed this. When Mr Khan was asked about how much of Mr Jarrett's work he performed on a weekly basis, he said it was approximately two days per week.

[57] Mr Jarrett gave evidence that since his redundancy, he had seen Mr Khan wearing a Bio-Cell uniform and on one of those occasions, Mr Khan told him that he was working five days a week for Bio-Cell. In response this, Mr Khan told me he worked full-time for an initial period undertaking deferred maintenance and this would have been around the time he saw Mr Jarrett. He also said he had two sets of work clothing, one for Bio-Cell and another for Trak Limited and that he was required to change between each based on the work he was undertaking. Mr Khan said that Mr Jarrett had actually given him the Bio-Cell uniform when they worked together. Mr Jarratt did not dispute this.

[58] Mr Nutsford further submitted that the monthly administrative payments made by Bio-Cell to Trak Group constituted "creative accounting" which had damaged the company's balance sheet and this was evidence going to the non-genuineness of Mr Jarrett's redundancy. Mr Portland denied this and said this financial initiative was one of the responses he undertook to help stave off the adverse effects the Global Financial Crisis was continuing to have on the Trak Group. He also said he had sold his house to inject money into the business.

[59] After the investigation meeting, Mr Portland provided the certified financial statements for Bio-Cell and Trak Group. As Mr Jarrett was now an employee of a competitor of Bio-Cell, Mr Nutsford indicated that Mr Jarrett would be content for this information to be only provided to the Authority and for me to draw my own conclusions about it.

[60] Mr Portland and Ms Costello provided oral submissions on behalf Bio-Cell. Unfortunately their submissions were a mixture of case summary and new evidence. As neither were experienced advocates and both were also witnesses this was understandable in the circumstances and I was prepared to grant some latitude.

[61] During these submissions both Mr Portland and Ms Costello attempted to 'retrofit' the restructuring process by identifying the selection criteria applied to Mr Jarrett. Whilst as a matter of strict procedure that additional evidence could be ignored, it did not assist Bio-Cell in any event as this would have been the first time Mr Jarrett became aware of the criteria that was used to select him for redundancy.

Conclusions on Mr Jarrett's dismissal

Genuine Redundancy

[62] After considering the financial statements of Bio-Cell and Trak Group, the evidence of Mr Portland and Ms Costello, insofar as it corroborated that evidence, about the financial performance of Bio-Cell (and the broader Trak Group) and the oral evidence of Mr Khan about how much of Mr Jarrett's work he and other Trak Limited employees were undertaking, I reached the view that Bio-Cell had genuine grounds for dismissing Mr Jarrett for redundancy.

[63] Upon reviewing the financial statements, three things in particular stood out. First, as a result of Mr Jarrett's redundancy, Bio-Cell did not directly employ anyone to perform his work or, for that matter, any work. Second, the amounts paid by Bio-Cell to Trak Limited as labour recovery in the year after Mr Jarrett's redundancy were significantly less than the wages paid to him in the last year of his employment. Third, while Bio-Cell returned a profit, there has been no windfall gain since Mr Jarrett's redundancy.

Procedurally Unfair

[64] While Mr Jarrett's redundancy was genuine, it was not carried out in procedurally fair manner. The defects of process were not minor and Mr Jarrett was treated unfairly. Bio-Cell failed to meet its obligations under s 4 of the Act to Mr Jarrett. It did not do for Mr Jarrett what a fair and reasonable could have done in all the circumstances at the time of his dismissal.

[65] The process used to make Mr Jarrett redundant was rushed, mismanaged and unfair. Bio-Cell did not at any stage during the investigation of Mr Jarrett's employment relationship problem acknowledge or demonstrate its good faith obligations to him.

[66] At the outset of the consultation process, he was denied a proper opportunity to obtain advice and consider the information provided by Ms Costello, such as it was, before the process recommenced immediately upon his return from his holiday. Moreover, by the time he returned to work, the restructuring was effectively over for most other affected employees, which was contrary to the express statement contained in the letter given to Mr Jarrett by Ms Costello on 23 May 2014.

[67] According to Ms Costello's evidence, the three meetings she had with Mr Jarrett during the process lasted cumulatively less than an hour. During these meetings, on her own account, Ms Costello squarely placed the onus on Mr Jarrett to attempt to save his job. However he was given insufficient information about what was happening and why to enable him to properly participate in the consultation process. Fatally for Bio-Cell, in a procedural sense, the first time Mr Jarrett became aware of the criteria used to select him for redundancy was during the investigation meeting.

Remedies

[68] Because Mr Jarrett was unjustifiably dismissed by Bio-Cell, he was entitled to an assessment of remedies to settle his personal grievance.

Reimbursement for lost wages

[69] Mr Jarrett claimed lost wages of \$2555.34 for lost wages. However, Mr Portland submitted that account should be taken of the ex gratia payment of two weeks' pay and one week's notice paid to Mr Jarrett.

[70] Mr Jarrett acknowledged this payment and the claim was recalculated to give an amount of \$350.34.

[71] Although I had found Mr Jarrett's redundancy was genuine, it was appropriate to assess how much longer he would have remained employed by Bio-Cell had it engaged in a proper consultation process and complied with its good faith obligations. Realistically this period would have been two or perhaps three weeks.

[72] Mr Jarrett was entitled to recover the difference between the wages he actually received during this period and the wages he would have expected to receive but for the flawed redundancy process. The appropriate amount was the recalculated amount he claimed.

[73] Bio-Cell must pay Mr Jarrett \$350.34 gross as reimbursement for lost wages under s 123(b) of the Act within 14 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[74] Mr Jarrett sought \$8500 compensation for humiliation, loss of dignity and injury to feelings. It was a modest amount but not artificially low.⁶

[75] While the effect of losing one's employment for unjustified reasons is deeply personal, there is an *inherent* humiliation, loss of dignity and injury to feelings occasioned by such a loss.

[76] In Mr Jarrett's case there was strong and reliable evidence of his hurt and humiliation. Such evidence may be accepted *in toto* without the need for

⁶*Hall v Dionex Pty Limited* [2015] NZEmpC29 at [87]–[90] and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34 at [133]. See, also earlier observation in *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 (CA) at [43] per Thomas J.

corroboration.⁷ In the present matter some of Mr Jarrett's hurt and humiliation evidence were corroborated by Ms Costello's evidence.

[77] Mr Jarrett's length of service and unblemished work record, freely acknowledged by Mr Portland, amplified his distress about what had happened and how it had happened. He also told me how the redundancy process had ruined his overseas holiday for which he and his wife had long saved. He had difficulty sleeping. His distress was compounded by a fear of not being able to secure alternative employment due to being over 60 years old. He worried constantly about his and his family's financial future.

[78] Having particular regard to how Bio-Cell carried out its dismissal of Mr Jarrett for redundancy, and its effect on him, his claim for compensation was made out.

[79] Bio-Cell must pay Mr Jarrett \$8500 compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Contributory behaviour by Mr Jarrett?

[80] Having found that Mr Jarrett was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act, despite this being a redundancy situation, to consider whether he contributed to the situation giving rise to his grievance.

[81] There was no evidence before the Authority of any conduct by Mr Jarrett which contributed to the termination of his employment by Bio-Cell. Mr Portland's evidence was that Mr Jarrett was an exemplary employee. Consequently, no deduction for contribution was needed.

Costs

[82] As Mr Jarrett has succeeded in his personal grievance application, he was entitled to have Bio-Cell contribute to his costs of representation.

[83] The notional daily tariff for such costs, conventionally applied, is \$3500.⁸

⁷*Maharaj v Recon Professional Services Limited* [2015] NZEmpC 61 at [11].

⁸See, *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

[84] At the end of the investigation meeting, I canvassed cost issues with the parties' representatives. On the basis of that discussion I was satisfied there were no factors requiring an adjustment to that tariff. Accordingly, Bio-Cell must pay Mr Jarrett \$3500 as a contribution to the costs of his representation within 14 days of the date of this determination.

[85] Bio-Cell must also reimburse Mr Jarrett \$71.56 for the Authority's filing fee within the same timeframe.

Andrew Dallas
Member of the Employment Relations Authority