IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 418
5368230
5369026

	BETWEEN	PAUL ROBERTSON Applicant (5368230) Respondent (5369026)
	AND	ARCAD LIMITED Respondent (5368230) Applicant (5369026)

Member of Authority:	R A Monaghan
Representatives:	P Robertson in person B Thain advocate for Arcad Limited
Investigation meeting:	18 and 19 September 2012
Determination:	26 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paul Robertson says his former employer, Arcad Limited (Arcad) dismissed him unjustifiably on the ground of redundancy.

[2] Mr Robertson has also raised personal grievances on the ground of unjustified disadvantage in respect of:

- a verbal warning given to him on 22 July 2011; and
- a refusal in or about October 2011 to grant him an increase in his pay.

[3] The investigation in the Authority addressed the question of whether the grievance in respect of the warning was raised within the 90-day period specified in s 114(1) of the Employment Relations Act 2000.

[4] The grievance in respect of the refusal to grant an increase in pay was withdrawn.

[5] Arcad counterclaimed, seeking penalties against Mr Robertson for breaches of:

- good faith; and
- provisions in the parties' employment agreement concerning access to and use of the company's electronic media, and the copying and removal from company premises of the employer's information.

[6] All matters were heard together.

Background

[7] Arcad is a digital media agency. It provides services to clients which include website design and development, the production of audio-visual material and DVDs, and 3D modelling and animation.

[8] Arcad employed Mr Robertson as a graphic designer. He began as a contractor in September 2009 and became an employee in January 2010.

The verbal warning

1. The facts

[9] On 13 July 2011 Arcad's general manager, Steve Allison, called Mr Robertson into a meeting room for a 'friendly chat' during which he indicated there were five areas of concern about Mr Robertson's performance. Mr Allison later described the intention of the meeting as being to inspire a change in Mr Robertson's performance. The areas of concern were broadly stated and no supporting detail was provided. Mr Allison told Mr Roberson that, if the areas were not addressed, he would receive a verbal warning.

[10] On 20 July Mr Allison told Mr Robertson in general terms that his performance since 13 July had been mixed, and that he would receive a verbal warning.

[11] A disciplinary process began at a meeting on 22 July[1] attended by Mr Allison, the managing director Bruce Thain, and the creative director Jeremy Sweetman. Mr Robertson was advised that the purpose of the meeting was to give him a verbal warning. The original five points of concern were: Mr Robertson's negative communication with colleagues; his negative attitude towards work; a drop in the standard of his work; poor time recording; and a failure to complete work on time. Some additional information was provided to explain the nature of the concerns, but there were few details of the particular occasions which had given rise to the concerns. Mr Robertson gave his views of the procedure being followed, and protested that he was unaware of the details supporting the areas of concern and was unaware of what further issues had arisen since the 'friendly chat'.

[12] The meeting ended with Mr Allison agreeing to provide further detailed information about the concerns, but also stating that if there was no improvement in Mr Robertson's performance a written warning and eventual dismissal could follow.

[13] The information was provided in a message dated 12 August 2011. Mr Robertson responded in a message dated 29 August. As well as answering Arcad's concerns, he expressed his own concerns that his hard work and loyalty were not being acknowledged and that the prospect of a pay rise had not been raised with him at all during his employment.

[14] By message dated 6 September 2011 Mr Allison thanked Mr Robertson for his response, and for what Mr Allison described as Mr Robertson's improved performance and attitude. He said Mr Robertson's remuneration would be reviewed when the company's performance and cash flow allowed. Nothing was said about the warning.

[1] Two copies of the notes of that meeting were lodged. It was apparent from the opening contents of one of the copies, which had been deleted from the other copy, that the meeting occurred on 22 July.

[15] A letter dated 29 November 2011 raised Mr Robertson's grievance. It gave a brief history of the matter, including reference to: the advice beforehand that a verbal warning would be given at the meeting on 22 July 2011; the likelihood that the company had made a decision before the 22 July meeting to issue a verbal warning; and Mr Robertson's protests during the meeting at the absence of detail of the issues of concern to the employer. The letter went on to record that, despite Mr Robertson's protests, the verbal warning was maintained and Mr Robertson was informed that if he did not improve in the next two weeks he would face a written warning.

[16] Finally the letter summarised the exchanges in August and September before saying that:

> *19. The verbal warning was procedurally and substantively unjustified. It caused Paul stress and embarrassment.*

2. Was the grievance raised in time

[17] Although he acknowledged that the warning was given on 22 July 2011 Mr Robertson relied first on the exchanges in August, in which he sought and responded to the further information regarding Arcad's concerns about his performance. The outcome of those exchanges - amounting to the failure to withdraw the warning - was the letter of 6 September. Mr Robertson says the 90-day period for raising a grievance commenced on that date.

[18] Section 114(1) of the Act reads:

> *Every employee who wishes to raise a grievance must, … raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee, which ever is the later …*

[19] Mr Robertson's argument concerns the part of s 114(1) which reads '*… beginning with the date on which the action amounting to the grievance occurred or came to the notice of the employee …'* He says the action amounting to the grievance did not come to his notice until 6 September in the circumstances described.

[20] I do not agree that the action amounting to the grievance was the failure to withdraw the warning. The action amounting to the grievance was the issue of the warning. Even the letter raising the grievance discussed the 22 July meeting and said the warning was unjustified because it was predetermined, and Mr Robertson had no adequate information about the employer's concerns nor an opportunity to respond to the concerns before the warning was issued.

[21] In a personal grievance context the existence of justification for the warning is determined as at the time the warning was given. It is assessed with reference to whether, when it decided to issue the warning, the employer had conducted a full and fair investigation into the substantive concerns, as a result of which it had grounds to believe and did believe that the concerns were soundly-based and a warning was warranted.

[22] The elements necessary to establish lack of justification, and the possibility of a grievance on the ground of unjustified disadvantage in respect of the warning, were within Mr Robertson's knowledge when the warning was issued on 22 July and were identified in the letter raising the grievance. No arrangement was made between the parties either then or later to the effect that Mr Robertson would provide an explanation on receipt of further details of the concerns so that the employer would delay making a decision on a warning. Nor was there any suggestion the warning given on 22 July was rescinded pending a more detailed discussion of Arcad's concerns, or that there was any agreement or undertaking from Arcad that the warning would be reconsidered once further discussion had occurred.

[23] Instead, as Mr Robertson put it in his evidence:

> *Mr Allison acknowledged that I did require more details about the five areas of concern, that they would provide me with the information I requested and we would agree upon a time to discuss my side of the story.*
>
> *Given Mr Allison's concession that my points were fair and there would be more discussion once I had the salient facts I genuinely believed that the matter was still open for discussion and that once my side of the story was heard the warning would be dropped.*

[24] On that account, while the discussion amounted to an expression of willingness on the part of the employer to discuss its concerns in more detail, the

discussion did not go any further. Even if there was an acknowledgement that Mr Robertson's 'points' about the lack of detail were 'fair', there was no concession regarding the justification for the warning. In that Mr Robertson hoped or believed the warning would be withdrawn (or dropped), the hope or belief was his own and not the result of any representation to that effect from the employer.

[25] Secondly, in taking the stance he has, Mr Robertson has confused Arcad's action of issuing the warning with the remedies available to him in respect of any lack of justification for it. It is not open to him to say the failure to grant the remedy of withdrawing the warning affects his knowledge of the employer's action in issuing the warning, or of the grounds on which that action was unjustified.

[26] Accordingly I do not accept that s 114(1) applies as Mr Robertson has submitted it does.

[27] In turn I find that the 90-day period commenced on 22 July, and that when the grievance was raised on 29 November it was out of time.

[28] For that reason the grievance cannot proceed.

The dismissal

1. The facts

[29] In August and September 2011 Arcad lost four large projects. As the company had already been suffering losses, Mr Thain considered it necessary to increase margins, reduce operating expenses and increase efforts to bring in more business in order to increase profitability. He formulated a plan to focus on servicing more profitable work with a lower staff overhead, and began to re-position the company in the market accordingly. He described the change in focus as amounting to a move from employing a generalist staff working on low-value work in quantity in order to achieve a profit (an approach which was not proving successful), to employing a smaller group of specialist staff on high-value work. To achieve these goals, a restructuring was necessary.

[30] At a meeting with employees on 11 October 2011, Mr Thain explained that Arcad was facing financial difficulties. He asked for feedback on how the company could change its procedures and be restructured to survive, and although he did not detail his view of how the company's business model should be adjusted he gave an indication of the company's intended direction. He also conducted one-on-one meetings with the staff members later on 11 October. No proposed new structure was put to the staff at that time, rather they were asked for their suggestions for change in the light of the need for the company to improve its financial position.

[31] Feedback was to be provided by 13 October, and Mr Robertson duly provided his feedback by message dated 12 October. Some of his comments concerned the way work processes and employee relations were managed, suggesting that improvements in that regard would assist the company's position. Of more immediate application he commented that the company was too top heavy with managers, and suggested that discussions be held with staff regarding reductions in their hours of work. He indicated he would be willing to enter into such discussion, an indication he had also given on 10 October when raising his wish for an increase in his pay.

[32] Mr Thain and Mr Allison conducted a further series of one-on-one meetings on 13 October, for the purpose of discussing the feedback.

[33] The outcome was a proposal under which the creative team was to be reduced to one senior digital designer's position, with contractors to be engaged as necessary. Mr Robertson's position would be disestablished. Five members of other teams would have their hours of work reduced, and at least one other position was also to be disestablished. The proposal was circulated to the staff late on the afternoon of Friday 14 October, with further meetings to occur on 17 October.

[34] On 17 October the senior graphic designer, Yudisht Rajkoomar, resigned. Mr Thain considered Mr Rajkoomar to be key to the company's strategy of focussing on servicing profitable or high level design work, and that Mr Rajkoomar's skills and experience meant he would also be able to assist the developers. Indeed he had been recruited only three months earlier because of a background which included art direction, development and knowledge of software coding. His background in larger organisations and in running his own business also gave him client management and

creative director's skills. The skill set required for the position of senior digital designer corresponded with Mr Rajkoomar's, with the new position effectively being crafted for him and generally understood to be his.

[35] Thus to Arcad the resignation was a blow to its strategy. However after considering its implications Mr Thain decided to continue with the structure proposed, and to advertise for a person with the necessary skills.

[36] The one-on-one meetings were delayed for a day and the meeting with Mr Robertson went ahead on 18 October. Mr Robertson was advised of the decision to proceed with the disestablishment of his position and to advertise for a senior digital designer. He was encouraged to apply for the senior digital designer's position, although he made no comment on whether he would do so. He said in evidence he said nothing at the time because he was angry and confused about why the position was not being offered to him first, particularly as he perceived that he and Mr Rajkoomar were doing the same job.

[37] At the meeting Mr Robertson was also handed a letter dated 18 October 2011, in which he was advised that his position was being disestablished and that he was being given four weeks' notice of the termination of his employment. His last day of work would be 15 November 2011.

[38] Mr Robertson continued to report for work until, at a meeting on 1 November 2011, Messrs Allison and Robertson reached a consensus that there was little, if any, work for Mr Robertson to do. Mr Allison did not expect this to change before Mr Robertson's last day of work, so advised Mr Robertson he would not be required to attend work for that period although he would remain on call.

[39] An advertisement for a senior digital/web designer was placed on the Seek website that day.

[40] I digress to note that on or about 20 October an advertisement for an 'intermediate/senior digital designer/creative at add:'[2] appeared on a website named nzjobcareer.com. This was not done at Arcad's initiative and the website was short

[2] A trading name of Arcad

lived. The website and its advertisement have been described as bogus, and were the subject of Arcad's claim for penalties against Mr Robertson discussed later in this determination.

[41] I note further that - in the circumstances underlying the second matter raised in Arcad's claim for penalties against Mr Robertson and discussed later in this determination - Mr Robertson saw a text for an advertisement for an 'intermediate/senior digital designer/creative' dated 27 October 2011. I accept the document was, at most, a draft for internal purposes. Mr Robertson has relied on its contents to say the position being advertised was substantially the same as his position.

[42] Returning to the termination of Mr Robertson's employment, by message dated 14 November 2011 Mr Allison reminded Mr Robertson that the company was proposing to recruit a senior digital designer, and asked if the position was of interest. Mr Allison referred to the 1 November discussion to the effect that business was quiet, and to the possibility of the position being offered as a part time or contract role initially. He offered to draft a contract containing an agreed hourly rate, if Mr Robertson was interested.

[43] Mr Robertson replied saying:

> *Regarding the application of Yudi's job or that of a part time role I will in short say no, I don't intend to apply for the position.*
>
> *You may recall in my initial feedback to the re-structuring process that I did offer to cut my hours and pay as a means of keeping my job and saving the company money. At that point I felt confident, despite the recently catalogued issues I have raised with you … that an arrangement could be reached that would satisfy both our goals and allow us to move forward amicably and productively. When you made me redundant without hearing my feedback and overlooked me for Yudi's position (which was essentially the same as my position) my remaining confidence and trust for the senior management disappeared. I am now sadly in a position where I don't feel comfortable being associated with the company.*

[44] For those reasons Mr Robertson did not apply for the position. He says his dismissal was unjustified because he should have been redeployed to the senior digital designer's position, and a fair and reasonable consultation process was not followed.

[45] Since the termination of Mr Robertson's employment the senior digital designer's position as it was originally envisaged has not been filled, although a contractor has been engaged on a part-time basis. Two further redundancies have occurred, and Arcad has reduced its overheads by moving to smaller premises.

2. The law

[46] The applicable test of the justification for the termination of Mr Robertson's employment is contained in s 103A of the Employment Relations Act as amended with effect on 1 April 2011 (the 'new' s 103A).

[47] The test requires a determination, on an objective basis, of whether the employer's actions, and how it acted, were what a fair an reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying the test the Authority must consider whether the employer:

- having regard to the resources available to it, sufficiently investigated the allegations against the employee;
- raised concerns the employer had with the employee before dismissing the employee;
- gave the employee a reasonable opportunity to respond to the concerns before dismissing the employee; and
- generally considered the explanation of any allegations made against the employee.

[48] A full court of the Employment Court observed in *Angus v Ports of Auckland Limited*[3] that, applied literally, these considerations may not be appropriate to a determination of justification for a dismissal on the ground of redundancy.[4] It went on to say that a sensible interpretation should be given to the provisions, and to give an example of their possible application in a case of medical incapacity.[5] To put the matter more generally, an employer must investigate the circumstances in question, and where concerns are held about those circumstances, the concerns must be raised

[3] [2011] NZEmpC 160
[4] At [46]
[5] At [52] and [53]

with the employee before a decision is made, and the employee must be given a reasonable opportunity to respond.

[49] Mr Thain submitted that the new s 103A has the effect of returning the law of redundancy to a position closer to that stated by the Court of Appeal as follows in *New Zealand Fasteners Stainless Limited v Thwaites*:

> *… Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgment for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably* ***could have*** *reached it may be impeached. In any such review it may be relevant that the employer did not consult with the affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate an absence of genuineness in the determination. Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the course of the employer's consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies. Any failure to discharge that obligation that itself is unjustifiable may result in remedies appropriate to the breach.* [6]

[50] The genuineness of the redundancy situation here has not been called into question. Rather the focus has been on how the employer acted, and whether its decision to dismiss Mr Robertson for redundancy was one the employer acting reasonably could have reached. The submissions to which I now turn were particularly concerned with whether Mr Robertson should have been redeployed to the senior digital designer's position, in circumstances where there was no relevant provision in the parties' employment agreement.

[51] In that context the submissions for Arcad first emphasised the use of the word 'could,' both in the above passage and in the new s 103A, saying there has been a return to the subjective test of what an employer 'could' do rather that what an employer 'would' do. I agree to the extent that, as the Court put it in *Angus v Ports of Auckland:*

> *[35] Whereas, under former s 103A, the Court and the Authority were required to determine a single outcome (what a fair and reasonable employer in all the circumstances would have done and how such an employer would have done it), the new test allows for more than one possible justifiable outcome and more than one possible justifiable methodology.*
> *…*

[6] [2000] 1 ERNZ 739 [22]

> *[37] The effect of new s 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.*

[52] The submissions also referred to the good faith provisions in s 4 of the Act, in particular 4(1A). The provision reads:

> *(1A) The duty of good faith in subsection (1) –*
>
> (a) *is wider in scope than the implied mutual obligation s of trust and confidence; and*
>
> (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which parties are, among other things, responsive and communicative; and*
>
> (c) *without limiting paragraph (b) 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 or her employees to provide to the employees affected –*
>
> *(i) access to information relevant to the continuation of the employee's employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[53] The application of s 4(1A) in a redundancy situation was addressed in the Employment Court in decisions such as *Jinkinson v Oceana Gold (NZ) Limited,*[7] which was decided under s 103A as it read before 1 April 2011 (the 'old' s 103A). There, the court considered a submission based on *Thwaites* that, in the absence of a contractual provision to different effect an employee has no entitlement to be redeployed to a position which is not substantially similar to the position previously held,[8] and that it was enough for an employer to genuinely consider an applicant for redeployment. It said two major changes had substantially altered the law since then. The first was the enactment of s 103A (that is, the old s 103A), while the second was the enactment of s 4(1A).

[54] The court found that s 4(1A) applied to cases involving restructuring, and that the provisions applied to selection for redundancy and to the assessment of staff for possible redeployment in lieu of redundancy. It went on to say that the relationship between the old s 103A and s 4(1A) was that a fair and reasonable employer will

[7] [2010] NZEmpC 102
[8] *Thwaites* at [25]

comply with its statutory obligations, and that a dismissal which results from a procedure which does not comply with s 4(1A) will not be justifiable. [9]

[55] The submissions for Arcad relied on the new s 103A, which came into effect after *Jinkinson*, to say the law had returned to the *Thwaites* approach. It was submitted that the obligations under s 4(1A) to be active and constructive in establishing and maintaining a productive employment relationship and to be responsive and communicative did not extend to an obligation to offer Mr Robertson a different position from the one he was engaged to perform. The submissions acknowledged that the employer had an obligation to redeploy Mr Robertson into a substantially similar position if one was available, but said the available position was substantially different and more senior to Mr Robertson's disestablished position.

[56] I have reservations about whether s 4(1A) can be limited in that way. It is conceivable that observing the obligation to be active, constructive, responsive and communicative could lead to the redeployment of an employee to a position which is not substantially similar to the position to be disestablished yet within the employee's skills and experience. That is not to say there is an obligation to offer an employee a different position from the one the employee was engaged to perform, only that the parties have an obligation to engage in a meaningful way about reasonable alternatives to dismissal. Redeployment to another position for which the employee had insufficient if any relevant skills, redeployment which required significant amount of retraining, or redeployment which had the effect of displacing an incumbent, for example, are unlikely to amount to a reasonable alternative.

3. Should Mr Robertson have been offered the senior digital designer's position

[57] Mr Robertson submitted that a process of selection between Mr Rajkoomar and him should have been in place from the outset. He had for some time been concerned at the gap between his salary and Mr Rajkoomar's and is dissatisfied with the lack of explanation at the time of why Mr Rajkoomar's position was to be continued while his was not.

---

[9] *Jinkinson* at [40] – [42]

[58] In support, several witnesses asserted that Mr Rajkoomar and Mr Robertson were doing the same or similar work. Because Mr Rajkoomar had been employed for a relatively short time - in circumstances where the business had not been positioning itself in the high end of the market and, moreover, was struggling - it is not surprising if Mr Rajkoomar and Mr Robertson were perceived to be carrying out the same kind of work. However Mr Rajkoomar was the more senior and experienced of the two, and with a view to making use of his background he had been employed in what was intended to be a separate and senior position from the outset. Moreover the position had been advertised and Mr Robertson had not applied for it. The witnesses' observations were based on the effect of the business' circumstances over a short term, and did not change the inherent differences in the positions.

[59] By the same token, and despite their assertions, some witnesses appeared also to have taken it for granted that Mr Rajkoomar was indeed the more senior and experienced of the two, and that the new position was at most a slightly expanded version of Mr Rajkoomar's existing position as it was intended to be. I find that was the case. Further, even if he had not had an opportunity to display it at Arcad, Mr Rajkoomar had a breadth of skills and experience in areas where Mr Robertson was less skilled and experienced, for which he had been recruited and which Arcad sought to retain. Given its small size, and the need to respond to the commercial and financial pressures on it, Arcad was entitled to make the decision it did.

[60] Mr Robertson submitted, secondly, that he should have been offered the senior digital designer's position on Mr Rajkoomar's resignation. He says the position was substantially similar to his position, in reliance on his analysis of the text for an advertisement for an intermediate/senior digital designer/creative he had found on 27 October. However the difficulty is that the text was a draft, and was not the text of the advertisement which eventually appeared.

[61] The stronger argument for Mr Robertson concerns Mr Thain's plan to use the recruitment - rather than the consultation - process to discuss Mr Robertson's ability to perform at the more senior level, including in particular what additional training might be required. Arcad had reservations about Mr Robertson's qualifications and experience in that, for example, when he was engaged Mr Robertson had just completed a post graduate certificate in digital design, although he had achieved a

Bachelor of Design degree in 2000. One of the areas focussed on particularly strongly in the evidence was a view that Mr Robertson's skills and experience in the use of certain coding software was more limited than the company required.

[62] These were matters which, in the light of the obligations in s 4(1A) of the Act, a fair and reasonable employer should have discussed with Mr Robertson before the decision to advertise the position was made. More generally, as a fair and reasonable employer Arcad should have discussed with Mr Robertson its view of the purpose and requirements of the position, whether Mr Robertson had the skills and experience to meet the requirements, what if any upskilling would be necessary, how that could be achieved, and could it reasonably be achieved without being counterproductive to Arcad's need to address its business difficulties.

[63] For the reasons indicated I would not go as far as to say Mr Robertson should have been offered the senior position. I accept that there was a need for him to upskill, but find that Arcad breached its obligations under s 4(1A) as I have described.

4. Was the dismissal justified

[64] Returning to the application of the test for justification as expanded on in s 103A(3), I conclude that Arcad had 'concerns' about Mr Robertson in respect of a possible shortfall in the skills and experience necessary for the senior digital designer's position. It did not put those to him for an opportunity to respond - and inevitably did not consider the response - before it made the decisions to notify him on 18 October of the termination of his employment, and to 'test the market' for the senior digital designer's position. These were defects in its process.

[65] Section 103A(5) provides that the Authority must not determine a dismissal to be unjustified under the section solely because of defects in the process if the defects were minor and did not result in the employee being treated unfairly. However I find the defects also amounted to a breach of s 4(1A), and were not minor. In addition they did result in Mr Robertson being treated unfairly. He was deprived of an opportunity to discuss his ability to perform the duties of the senior digital designer's position in circumstances where the discussion could have affected the outcome.

[66] Arcad sought to rely in response on Mr Robertson's decision not to apply for the senior digital designer's position, and his rejection of the offer of a part time contract which was made on 14 November 2011. Since notice of the termination of employment had already been given, these matters are relevant to the remedy available in the event the termination was unjustified rather than to the matter of justification itself.

[67] For these reasons I find dismissal was not an outcome a fair and reasonable employer could have decided on in the circumstances. The dismissal was not justified.

5. What remedy should be awarded

[68] Mr Robertson seeks the reimbursement of remuneration lost as a result of his personal grievance, and compensation for injury to his feelings resulting from the grievance.

(a) Reimbursement of lost remuneration

[69] Mr Robertson was paid a salary of $55,000 pa. He obtained full time employment in June 2012 and seeks the difference between the earnings he would have received and the earnings he did receive from the date of termination of employment to that date.

[70] The total earnings he received in that period were $7,177. They were derived from various odd-jobs, and from a new design business of his own which he established with a partner. The loss sought is: 6.5/12 x $55,000 - $7,177 = $22,614.

[71] In some circumstances when employment is terminated unjustifiably in a genuine redundancy situation, but the termination would have occurred even if the employer had acted justifiably, then any loss of remuneration flows from the redundancy situation rather than the employer's unjustified action and cannot be reimbursed. Here it is not possible to say that Mr Robertson would have lost his employment because of the redundancy situation even if Arcad had followed a fair process of consultation, but it is possible to say the parties' relationship would not

have continued on a full time basis. The senior digital designer's position was never filled, rather Arcad's business position continued to deteriorate and a part time contractor was engaged. That means Mr Robertson is entitled to an award of remuneration lost as a result of his personal grievance, but that the loss cannot be calculated on the basis of continued full-time employment at his full time salary.

[72] The information about the work available to the contractor engaged after Mr Robertson's dismissal suggests an assessment of loss on the basis of an ongoing relationship at half of a full time position would be appropriate. I cannot set a notional rate which Mr Robertson would have been offered and accepted, so calculate the loss with reference to the existing rate. Thus, the loss as calculated is:
[½ x 6.5/12 x $55,000] - $7,177 = $7,718.

[73] In addressing the remedies available to Mr Robertson I must also consider whether there should be a reduction in the amount that would otherwise have been awarded, in that Mr Robertson contributed to the circumstances of his personal grievance[10].

[74] I take into account that he had a responsibility of his own under s 4(1A) to be responsive and communicative, so that he should have indicated an interest in the senior digital designer's position if he had a genuine interest in it.

[75] Secondly he had an opportunity to engage with Arcad about a part time contract. His response to Mr Allison's invitation to consider entering into that arrangement was influenced by the fact that he was already angry and disillusioned, but some of his anger was misplaced and does not justify his reaction to the offer. If he was influenced by the unfortunate comments about his salary which were made by the production manager in the emailed message which came to his attention, then they were the unwise comments of a colleague, not of his employer. In taking that approach he failed to take an opportunity to mitigate his loss which was reasonably available to him.

[76] Thirdly, Mr Robertson was offered job search assistance which he did not take, and subsequently turned his attentions to establishing his own business.

---

[10] s 12…

[77] Accordingly I reduce the amount I would otherwise have awarded. Arcad is ordered to reimburse Mr Robertson for remuneration lost as a result of his personal grievance in the sum of $5,000.

(b) Compensation for injury to feelings

[78] There was relatively little evidence of injury to feelings, beyond the anger and disillusion which to a significant extent was pre-existing. Further, I do not accept that the arrangement under which Mr Robertson left on 1 November, rather than at the end of the notice period, amounted to an aggravating feature.

[79] With reference to the existence of the genuine redundancy situation, feelings of Mr Robertson's for which Arcad was not responsible in the present context, and a reduction in respect of contributory conduct, Arcad is ordered to compensate Mr Robertson for injury to his feelings in the sum of $3,000.

The counterclaim for penalties

[80] The counterclaims for penalties centred on two allegations, namely that:

- in or about October 2011 Mr Robertson may have established the bogus website nzjobcareer.com, and on 20 October posted a bogus advertisement for an intermediate/senior digital designer/creative; and
- on 28 October 2011 Mr Robertson accessed the computer and email account of Arcad's production manager.

1. Background

A. Bogus website and advertisement

[81] Arcad considered it possible that Mr Robertson was responsible for the bogus website and advertisement, but there was no evidence that was the case.

[82] The allegation was withdrawn and the associated claim for a penalty is dismissed.

B. Accessing another employee's computer and email account

[83] Mr Robertson admitted that he accessed the computer and email account of Arcad's production manager. He said he did so because by then he was planning to raise a personal grievance and was gathering material in support. Some weeks earlier he had seen a printed copy of an email message between the production manager and Mr Sweetman regarding his pay rise, and wanted a copy of the message for the purposes of his grievance. He did not believe he would be given a copy if he asked for it, so he decided to access the production manager's work computer to obtain it.

[84] As a result on 28 October 2011, in a brief window of time after the production manager and other employees had left the premises for a staff lunch and before access to the production manager's computer without a password had been locked off, he accessed the computer. He identified some email messages he considered relevant and forwarded them to his home email address. These included the draft advertisement of 27 October, which the production manager had apparently sent to the creative director. Mr Robertson then deleted from the 'sent' folder the messages he had forwarded to himself.

2. Should a penalty be ordered

A. Breach of good faith

[85] The Authority's jurisdiction concerning penalties is found in s 133 of the Act. Penalties can be awarded for the breach of an employment agreement, or for breach of a provision in the Act if the provision also provides for penalties.

[86] In that the remaining claim for a penalty was intended as a claim for a penalty for breach of the duty of good faith implied in the parties' employment agreement, I find the underhanded way in which Mr Robertson went about obtaining material amounted to an act of bad faith. There were no reasonable grounds for assuming he would not be provided with copies of the email messages he sought in the event he asked for them - and Mr Thain accepted genuinely and without reservation in the Authority that he would have been obliged to provide copies of relevant messages.

Further, Mr Robertson had no right to access another employee's computer and email messages in the way he did.

[87] Mr Robertson's explanation of his action is unacceptable. He acted wilfully and in breach of the duty of good faith implied in the parties' employment agreement.

[88] A penalty is warranted. Mr Robertson is ordered to pay a penalty in the sum of $500.

B. Breach of provisions concerning access to computer and removal of information

[89] Clause 14 of the parties' employment agreement provided that the employer's electronic media were not to be used for any unauthorised purposes, including: the transmission of certain objectionable communications; searching, perusing or downloading pornographic or offensive material; and transmitting sensitive information where such transmission would be likely to place the company in breach of the Privacy Act 1993.

[90] Clause 16 of the employment agreement prevents an employee from acting without the employer's prior written approval to: copy or remove from the employer's premises information, documents, or other records belonging to the employer; transfer electronically or disclose to any other person any such confidential information or material; or make use for personal gain any such material.

[91] The facts underlying the claims for a penalty for breaches of these provisions are the same as those underlying the claim for penalty for breach of good faith, and it would not be appropriate to penalise Mr Robertson twice for the same actions.

[92] For that reason I make no further order.

C. Order for payment to Arcad

[93] I order under s 136(2) that the penalty be paid to Arcad.

D. Additional comment

[94] Arcad asserted in its statement of its counterclaim it would seek further relief if further breaches were 'established' through 'ongoing investigations'. No further breaches were formally identified or notified prior to the investigation meeting, so that they were not before the Authority at the commencement of the meeting. The assertion was not capable of leaving Arcad free to raise any new alleged breaches, or seek further relief in respect of them, at its initiative at any time and without notice or any grant of leave to do so.

[95] During the investigation meeting Mr Thain identified concerns about the contents of Mr Robertson's current CV and a website which Mr Robertson maintains as part of his new business, and alleged various breaches in respect of these. Even if I accept the breaches had not come to his attention until then, the matter was not properly before the Authority, and was potentially a significant matter which no-one was in a position to address. If it is to be taken any further it will require separate proceedings.

[96] Further, should such proceedings be contemplated, consideration should be given to whether the matter is within the jurisdiction of the Employment Relations Authority or another institution.

Summary of orders

[97] Arcad is ordered to pay to Mr Robertson:

(a) $5,000 as reimbursement of lost remuneration; and
(b) $3,000 as compensation for the injury to his feelings resulting from the personal grievance

[98] Mr Robertson is ordered to pay to Arcad a penalty in the sum of $500.

Costs

[99] Costs are reserved.

[100] The parties are invited to reach agreement on costs. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority