

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 331  
3089492

BETWEEN AHMAD  
FAROUQ SHALALDEH  
Applicant

A N D LAZYWORM APPLICATIONS  
LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person  
Catherine Thomson-Bush, advocate for the Respondent

Investigation Meeting: 5 August 2020

Submissions Received: None from the Applicant  
None from the Respondent

Date of Determination: 24 August 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ahmad Farouq Shalaldeh, a qualified software engineer with a Master of Computer Science Degree (and current PHD candidate), was employed by Lazyworm Applications Limited (“Lazyworm”) a small business software design firm, as a ‘Senior Software Tester’ from 26 October 2015 until his employment terminated on 24 July 2019 as a result of a restructuring process that identified his position as surplus.

[2] Mr Shalaldeh raised a personal grievance by letter dated 9 October 2019 alleging that he had been unjustifiably dismissed. The letter set out alleged procedural deficiencies and substantive reasons to support the claim. Lazyworm provided a response to the grievance by letter of 2 November 2019 denying Mr Shalaldeh's claims describing them as "vexatious and opportunistic" and that all their client's obligations "were discharged in a fair and reasonable manner".

[3] The matter was filed in the Authority on 29 January 2020 and Mr Shalaldeh identified claims that he had been:

- (a) Unjustifiably dismissed.
- (b) Unjustifiably disadvantaged.
- (c) Underpaid by only getting ordinary pay and not provided with days in lieu for working on public holidays.
- (d) Underpaid for consistently working additional hours.
- (e) The subject of good faith breaches.

[4] Lazyworm's advocate did not file a legible statement in reply in a timely fashion and the parties were directed to mediation in May 2020 but the dispute remained unresolved.

[5] After further Authority directions that Mr Shalaldeh complied with, Lazyworm's advocate belatedly filed briefs of evidence on 28 July 2020 and a statement in reply on 31 July 2020.

[6] Pursuant to s 174E Employment Relations Act 2000 ("the Act") I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

## **Issues**

[7] The issues to be decided are:

- a) Was Mr Shalaldeh unjustifiably dismissed or was the employment relationship ended by reason of a genuine redundancy situation absent of any ulterior motive.
- b) Did Lazyworm breach good faith obligations in enacting the decision to make Mr Shalaldeh redundant?
- c) Does Lazyworm owe Mr Shalaldeh unpaid wages for additional hours worked and for working on public holidays?
- d) If an unjustified dismissal is found what remedies should be awarded.
- e) If remedies are appropriate the issue of any contributory conduct is to be assessed.
- f) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[8] Mr Shalaldeh commenced employment with Lazyworm in October 2015 as a ‘Senior Software Tester’. Lazyworm was at this time a newly established and expanding business run by two partners (Atta Elayyan and Michael Choueng).

[9] Mr Shalaldeh was the first software tester to be engaged by Lazyworm. Mr Shalaldeh’s job description describes the position purpose as “[C]reating, maintaining and implementing test processes and leading a team of testers to ensure the quality of all project deliveries”. It then, after listing technical functions, describes tasks to include:

- Training junior testers on project related tasks, testing tools and processes.
- Establishing and managing testing team within the organisation.

[10] However, no testing team existed and none was subsequently established. Mr Choueng who gave evidence for Lazyworm conceded that the job title ‘senior’ was only used to tempt a

tester operating at a senior experienced level to apply and that Mr Shalaldeh was not expected to establish a testing team. When Mr Shalaldeh got too busy testing or with other work, he utilised co-workers engaged as developers or interns to undertake basic testing tasks.

[11] Up until March 2019 Mr Shalaldeh worked directly to Mr Elayyan and developed a trusting and close relationship with him that included socialising with his family outside work. The work included a major ongoing project developing an app for a Jordan based company (the Aramex project) that Mr Shalaldeh translated into Arabic. This involved regular additional hours worked in the evening from 9pm onwards to accommodate the Middle East time zone.

[12] For a period exceeding two years, Mr Shalaldeh estimated that he regularly was working 50 hours per week mainly on the Aramex project and that he received no extra remuneration. Lazyworm did not keep detailed wage and time records believing that Mr Shalaldeh was salaried and that his salary covered all hours worked. Lazyworm also unchallenged, indicated that they adopted very flexible working hours and Mr Shalaldeh often worked from home with no issues being raised about such.

[13] Mr Shalaldeh commenced on a salary of \$55,000 that was increased to \$70,000 within his first two years of employment and he was paid a one off bonus of \$2,000 for his in-house translation work on the app for the Aramex project.

[14] One of Lazyworm's other permanent employees ("Mr X") was engaged for various projects and is described on the company website, his business card and his LinkedIn profile as a software developer although he also assisted with overflow testing.

[15] Unbeknown to Mr Shalaldeh, Lazyworm provided Mr X with an employment agreement dated 1 March 2019 purporting to appoint him to a role of 'Software Tester'. The agreement was signed by Mr Elayyan and Mr X and the job description attached to it was identical to that of Mr Shalaldeh's.

[16] Mr Shalaldeh challenged the validity of Mr X's employment agreement. Mr Choueng, who indicated that his role was 'Chief Technical officer', could only say that it was an unexplainable "oversight" that Mr Shalaldeh had not been informed of Mr X's appointment.

[17] Mr Choueng also conceded that Mr X, who had had an association with Lazyworm since 2016 and had been employed in various capacities, was not then (and now) engaged solely on testing tasks and he did other development work including co-ordinating or facilitating projects. As Mr X did not give evidence I was unable to question him on the extent and mix of his work.

[18] For reasons discussed below I find that I do not have to determine the validity of the employment agreement – the main issue is that I accept that Mr Shalaldeh, as the notional senior tester, was completely unaware of this 'arrangement' to formalise Mr X's role at the time and up to the restructuring he reasonably believed that he was employed as Lazyworm's sole tester. The significance of the arrangement with Mr X became apparent later at the ending of the employment relationship.

[19] Tragically, Mr Elayyan was murdered in the 15 March 2019 Christchurch Mosque incident. Mr Shalaldeh was also at worship in the mosque that day alongside his wife and although they were physically uninjured they both witnessed the unimaginable horror of what took place. Mr Shalaldeh continues to suffer ongoing trauma of such that was exacerbated by him then shortly afterwards, losing his job. He provided a medical report outlining the health difficulties he was facing on an ongoing basis.

[20] The impact upon Lazyworm's business, apart from the grief created by the awful Mosque event, was also significant as Mr Elayyan as their late CEO and co-founder, dealt with sales and marketing of company products and he was a major driving force behind the company and its ability to secure ongoing work. Mr Elayyan's family retain a silent financial interest in Lazyworm.

[21] The upshot was for the period mid - March to June 2019, Lazyworm's income significantly declined and on advice from their accountants to urgently reduce overheads, they decided to restructure with a focus upon reducing staffing. Mr Choueng provided comparative financial information to the Authority that demonstrated the income drop and he says shareholders had to put money into the business to keep it operational. Mr Choueng attributed the income decline solely to the loss of Mr Elayyan's business expertise and range of client contacts. Lazyworm provided further financial information after the hearing that Mr Shalalkeh contested. I do not have to determine this dispute for the reasons below but make the observation that this information should have been shared with Mr Shalalkeh at the time of the restructuring.

[22] Lazyworm then engaged an HR company to assist with the restructuring and guide them through the process. Amy Murphy, an HR advisor from Catch Consulting who gave evidence during the investigation meeting, undertook this task working alongside Mr Choueng who admitted to having very little experience in this area. The extent of Ms Murphy's involvement was significant as she formulated communication material, gave advice on process and attended meetings when the proposed restructure was presented to staff and assisted with the 'aftermath'.

[23] The initial proposal presented in a document to staff at a meeting on 9 July 2019 indicated an overview as:

- LWA Solutions has experienced a downturn in new work and projects, resulting in a significant decrease in revenue. Atta Elayyan was central to our sales and client relationships and since the events of 15 March; we have been unable to reproduce the steady level of incoming work. We are now in a position where to remain in business we need to address this situation.
- To ensure the ongoing viability and sustainability of the business we have evaluated the current structure and identified areas where we are over resourced or have the potential of absorption of a small amount of tasks and functioning whilst maintaining operational functioning of the business.
- Currently, the number of staff we have is in excess to the volume of work coming into our business. In order to ensure the financial viability of the business, we need to reduce

costs. Having identified these market constraints, this business review process proposes to reduce staff numbers, as a way of reducing costs.

[24] The information pack contained a before and after structural chart that proposed a reduction of three employee roles (from nine to six positions). The positions to go were then specifically identified as “Senior Software Tester” and “2 FTE from within the Software Development Team”. To Mr Shalaldeh’s surprise the “Current Structure” diagram indicated that his position had an established “Software Tester” position supposedly reporting to him.

[25] In describing specifically why the senior software tester position had to be disestablished the notice said:

We believe disestablishing this role could be achievable due to the decrease in the volume of testing. Also we propose that the testing that is required is not technical enough to justify a senior role

[26] At the 9 July meeting and subsequently, no financial information was shared with the staff to evidence the need to restructure and Mr Choueng conceded that he regrettably failed to mention that he had of necessity put some of his personal capital into the business.

[27] In post-facto justification explaining the need for only one tester, Mr Choueng alluded to clients no longer requiring extensive pre-testing and that the Aramex project had been completed – none of this was discussed with Mr Shalaldeh at the time.

[28] Feedback was then sought by 17 July about the proposal and a further internal staff meeting took place that Mr Shalaldeh did not attend as he was not in the office between 9 -11 July.

[29] Mr Shalaldeh provided comment on the proposal by email of 16 July to Mr Choueng that after noting his past commitment to Lazyworm, indicated that he believed two new upcoming projects needed his attention and then he stated:

As I am the first and only tester (after Arum left) in this company I believe I should be given an opportunity for Software Tester role as the Senior Software Tester role is going to be disestablishing.

As you mentioned in the proposed structure document that “LWA has experienced a downturn in new work and projects, resulting in significant decrease in revenue”. And to prove my loyalty to Atta and the company in this difficult time.

I have decided to work and do all my tasks and duties for the company with NO SALARY for the pay period between 14<sup>th</sup> and 28<sup>th</sup> July with a total of 80 hours.

Very excited to start writing test scripts for the new projects soon.

[30] Implicit in the above response, was Mr Shalaldeh expressing a willingness to occupy a lower paid position and his belief that only one dedicated testing position existed in the company or was needed.

[31] Mr Shalaldeh in giving evidence stated that he was prepared to significantly compromise on his salary to retain employment as he had recently entered into a mortgage to buy a house and his wife was pregnant.

[32] Mr Choueng said he took advice from Ms Murphy which was “not to engage” with Mr Shalaldeh and to simply proceed to the decision making stage. By email to Mr Shalaldeh of late 17 July (10:50 pm) Mr Choueng said:

Thanks, we appreciate your feedback and will be taking it into consideration as we make our decision this coming week.

Just to clarify, we had until recently, 1 senior software tester (you) and 2 software testers (Anum, who can't be considered in this process due to visa complications, and Jeremy). We are bringing those roles down to 1 software tester in the restructure process. For the devs, the count will be going down from 5 to 3.

Cheers

Mike

[33] Whilst suggesting to the Authority that Mr Shalaldeh's 'position' was simply disestablished and no selection was necessary as he was the highest paid staff member, it emerged from disclosure of documentation just prior to the hearing that Mr Choueng with input from Ms Murphy, had devised and applied a comprehensive assessment criteria to determine which individual employee should be retained. The criteria included: relationships

with co-workers, adaptability, ability to work with minimum supervision and proactively and “ability to spend a proportion of each working day in the LWA office”.

[34] The criteria were not disclosed to Mr Shalaldeh or the fact that there was to be a selection process to assess individuals. Consequently, Mr Shalaldeh had no opportunity to comment on such.

[35] I note there appeared to be no reference to individual’s IT qualifications and past industry experience. I find that it is likely that had Mr Shalaldeh been given a chance to comment that he would have highlighted this omission.

[36] Whether consciously devised this way or not, I also note that the criteria appeared to militate against Mr Shalaldeh’s prospect of ongoing employment as it included an ability to spend a portion of the working day in the office when concerns had been expressed by Lazyworm in response to the grievance about Mr Shalaldeh’s office attendance. This is despite Mr Choueng giving contra evidence that the company was very flexible about such matters provided work was completed.

[37] It also has to be noted that Mr Shalaldeh’s advocate in raising a personal grievance, specifically requested all information surrounding the decision be disclosed and Lazyworm ignored this request until directed by the Authority.

[38] In a 2 November 2019 response to Mr Shalaldeh’s grievance of evident sophistry, Lazyworm in reference to Mr Shalaldeh’s interest in having an opportunity to be considered for the remaining tester role, suggested that:

.... your client advised he should be given the opportunity for the tester role. However, this role was never identified as part of the proposal for change, with the present incumbent being well established within this role.

[39] On 23 July, Mr Shalaldeh attended a meeting with Mr Choueng and Ms Murphy and the decision to disestablish his ‘role’ was communicated. Ms Murphy recalled Mr Shalaldeh was very angry in response to the decision. Subsequently, although Mr Shalaldeh had

indicated that he was willing to work out his notice period, Mr Choueng emailed him on 25 July summarily terminating his employment and paying him a month in lieu of notice. Ms Murphy acknowledged that she gave this advice but did not check Mr Shalaldeh's employment agreement which had no provision for payment in lieu of notice (or any notice provision). No redundancy compensation was paid and a record of service was provided.

### **Issue one: Unjustified dismissal or a genuine redundancy?**

[40] Mr Shalaldeh claimed that his employment was brought to an end by reason of a flawed redundancy process. He essentially claims that he was personally targeted, was misled about the other testing role and that he should have been afforded an opportunity of ongoing employment as he was willing to occupy a lower paid testing role that was well within his capabilities and, that a failure to treat him in a fair and reasonable way brought the employment to an end in an unjustified manner.

[41] By contrast as I understood it, although I had no detailed submission other than they had endeavoured to act in good faith and conceded a significant lack of individual engagement during the process occurred, Lazyworm contended that they identified a 'position' and not a person as surplus to their needs and that was the senior tester and Mr Shalaldeh was the only occupant of that position.

### **The legal framework**

[42] Mr Shalaldeh's employment agreement contains no provision defining a redundancy situation other than the employee protection provision required under s 60J of the Act that although referring to a heading "RESTRUCTURING AND REDUNDANCY" only covers a situation where a new employer undertakes the work undertaken by the employee (i.e. a contracting out situation).

[43] Given that there is no statutory definition of redundancy it has long been established in common law that a redundancy arises where a specific position is superfluous to the needs of

an employer's business, which establishes an abstract construct where it is the position and not the person that is redundant.<sup>1</sup>

### **Justification**

[44] However, the above is only an overarching definition that does not necessarily address the spectrum of how a redundancy arises and in what context.

[45] In order to justify termination of employment including in a redundancy situation, Lazyworm must meet statutory requirements set out in s 103A of the Act commonly referred to as the 'justification test'. This test requires the Authority to undertake an objective assessment of whether the employer's actions and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time of the ending of the employment relationship.

[46] In applying this test the Authority must consider a number of factors including: the resources available to the employer and here in context whether the respondent gave the applicant an opportunity to comment on the proposal to end the employment relationship and whether that comment was genuinely considered by the respondent.

### **Good faith**

[47] 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 of an affected employee being provided with access to information supporting the reason for the redundancy and the detail of how it is proposed it will be implemented.

[48] Further and crucially, an employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised. The Court of Appeal in *Grace*

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<sup>1</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZLR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.

*Team Accounting v Brake* <sup>2</sup> 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 the s 103A tests has 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.

[49] 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.

### **Genuineness of the redundancy**

[50] I find that even if the redundancy was subjectively genuine on economic grounds, which given the limited financial information and contextual factors provided to the Authority appears to be the case, I have to also examine the extent to which the disestablishment of Mr Shalaldehy's role may have been driven by any ulterior motive and balance that up with Lazyworm's need for an ongoing testing function at a reduced cost and complexity.

#### *Ulterior motive?*

[51] I find inferentially on the evidence presented, that the manner by which the redundancy was enacted, although on the surface a rational decision, was so deficient that the explanation of there being an ulterior motive to dispense with Mr Shalaldehy has some significant traction, due to:

- The inexplicable failure to earlier consult on the appointment of Mr X to a testing position ostensibly reporting to Mr Shalaldehy.

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<sup>2</sup> At [85].

- The concealment of the fact that Mr X had been appointed and an employment agreement drawn up with an identical job description to Mr Shalaldeh's when Mr X was an existing employee with other duties to undertake.
- The fact that although Mr Shalaldeh was designated 'senior', this was conceded by Lazyworm as only being a convenient label used to attract a suitably experienced tester.
- The identification of Mr Shalaldeh as the highest paid employee; despite his willingness to engage positively on that fact no exploration of him working for a reduced salary was entertained.
- The effective 'ring-fencing' of Mr X's testing role to protect him from a potential redundancy.
- In his job Mr Shalaldeh exercised no managerial function and was not expected to do so – this leads to my finding that the need of the employer was a testing position that both Mr Shalaldeh and Mr X should have competed for.
- The content of the criteria used to select employees as surplus and the not disclosing of such to Mr Shalaldeh.
- The fact that Mr Shalaldeh was technically better qualified and more experienced than Mr X.

### **Procedural fairness and good faith factors**

[52] In analysing whether the redundancy was effected in a good faith manner, I have to take into account that Lazyworm engaged professional advice to manage and guide the process. The extent of the appropriateness of this advice was questionable and exposed at the investigation meeting.

[53] The first issue was in assisting Mr Choueng in formulating the proposal of disestablishing the senior testing 'role', Ms Murphy conceded she had not viewed Mr X's job description or explored whether Mr X was engaged in other work or why he was being portrayed to co-workers and clients as a 'developer'.

[54] When asked what financial information was provided to employees to justify the restructuring proposal Ms Murphy explained that she had been privy to such but felt that it should not be disclosed unless requested and, she conceded the only information provided was in the pack she put together outlining brief reasons for the restructuring.

[55] I find the non-disclosure was a specific misunderstanding of a well-established legal concept that led to Ms Murphy's client being in breach of a statutory obligation contained in s 4 of the Act and it exposed her client to a potential penalty action.

[56] 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.

(My emphasis).

#### *The selection criteria and engagement on the proposal*

[57] Ms Murphy, despite being aware of its existence as she had suggested Mr Choueng prepare it, did not advise her client to disclose the use of the comprehensive selection criteria he had prepared and how it would apply and that feedback should have been sought on its content and application. I find the 'selection' criteria usage was not transparent.

[58] The duty to disclose selection criteria in a redundancy situation and consult on such is also a well-established legal principle that pre-dates the enactment of statutory good faith duties.<sup>3</sup>

[59] At the stage of gathering individual feedback from Mr Shalaldehy, Ms Murphy gave no assistance with Mr Choeung's response to the request that he be considered for the testing position and openly dissuaded him from engaging individually. Ms Murphy's advice was to proceed to the decision-making stage. This leads to an understandable implication that the whole consultation process was just a "tick box" of going through process steps.

[60] Further, in giving Mr Choueng advice to dismiss Mr Shalaldehy during his notice period with an in lieu of notice payment, Ms Murphy conceded that she did not check whether an enabling provision existed in Mr Shalaldehy's employment agreement – it did not.

[61] The sad thing in this situation is that Mr Choueng did not advance any reason why he needed to keep the financial information confidential and he struck me as an open and honest witness who may have welcomed engaging in a more transparent process. I however, cannot legally absolve Lazyworm for the fact that they relied upon external advice during the process that is something they will have to explore with their consultant.

[62] For completeness, I find this was a significantly flawed redundancy process with initial 'surface' consultation but no sharing of relevant information and Mr Shalaldehy was provided with no real opportunity to comment on the decision to dismiss him with no selection criteria being provided or alternatives considered. These procedural defects were not minor and the respondent thus failed to meet the considerations set out in s 4 of the Act.

### **Finding**

[63] The procedural defects and breaches of good faith that I have identified above and the strong suggestion that there was an ulterior motive behind the way this redundancy was

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<sup>3</sup>*Coutts Cars Ltd v Baguley* [2001] 1 ERNZ (CA).

effected have ended Mr Shalaldeh'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 of the circumstances at the time.

[64] I find that Mr Shalaldeh was unjustifiably dismissed.

[65] I however, decline to make orders for penalties for cited breaches of good faith obligations as I consider that in the circumstances and given the sheer inexperience of Lazyworm's director, the failure to comply was not deliberate, serious and sustained.<sup>4</sup>

### **The underpayment claims**

#### *Overtime*

[66] Lazyworm were unable to provide accurate wage and time records or holidays' records for Mr Shalaldeh as they appear to have relied on him being a salaried employee and they did not record hours/days he actually worked. This was coupled with Mr Choueng describing a relaxed attitude to office attendance and no requirement that any employee work 'traditional 9-5 office hours'.

[67] Lazyworm asserted that Mr Shalaldeh had never raised an issue about working 'excessive' hours and it was their belief that this was balanced up by Lazyworm's flexible approach that allowed him to work from home and at times assist his wife in her small food kiosk business. In addition, in recognition of work on the Aramex project, Lazyworm provided an additional \$2,000 as a 'one off' payment. Lazyworm did not contest that work on the said project took place during the evening at an unsocial time.

[68] Mr Shalaldeh by contrast, provided only a rough estimate of additional hours he claimed he should be paid that amounted to an additional 10 hours per week for a sustained period of two years and he emphasised that the additional hours were unsocial being worked

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<sup>4</sup> The threshold test that has to be met for a penalty to be considered as set out in Section 4A Employment Relations Act 2000.

after 9pm in the evenings on top of tasks he had to complete during the normal working day. Mr Shalaldeh however, offered no evidence of the personal impact upon him of working such hours apart from that it interfered with his leisure and family time.

[69] The starting point for any eligibility is Mr Shalaldeh's individual employment agreement; that at clause 5 stated:

**5.1 Full Time Hours, with an obligation to perform overtime as necessary but without extra payment.**

The Employee's normal hours of work shall be **40** hours per week, between the hours of **9:00 am to 5:00 pm** on **Monday to Friday**. The employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

[70] The above clause covers overtime (i.e. "time worked in addition to one's normal working hours")<sup>5</sup> regardless of when that time is worked. Whilst describing it as an "obligation" to work additional hours the clause then proceeds to temper this with a requirement that it be as "reasonably required".

[71] In interpreting this provision the Authority can have regard to what is a 'reasonable' amount of overtime. Whilst this is an elastic concept, a reasonable approach could be to ensure that an employee conceptually is not required to work regular excessive unsocial hours without some reward or that would make the 'normal' hours provision a misnomer.

[72] In considering the limited evidence around this issue and the timing of the additional hours worked I find that it is more likely than not that Mr Shalaldeh was allowed to adjust his working pattern during the day to compensate for some of the additional hours he worked but the timing and regularity of the extra hours worked does objectively go beyond what could be considered "reasonable".

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<sup>5</sup> Oxford English Dictionary, 2nd ed. Jul 21, 2010.

[73] The quantification of any award is problematic. Lazyworm did acknowledge that a time recording system existed that showed when Mr Shalaldeh worked on particular projects but no computational data on such was produced during the investigation.

[74] Having established that additional unsocial or unreasonable hours were worked and found that this was in part an onerous requirement, the Authority under s 132(2) of the Act where no accurate records are produced, “may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee”.<sup>6</sup> This provides for the exercise of a general discretion where evidence is insufficient from both parties.

[75] Mr Shalaldeh has claimed a sum based upon an additional ten hours per week but admitted that this is only an estimate.

[76] In all of the circumstances, I am prepared to accept that Mr Shalaldeh has a claim for some unpaid hours that went beyond reasonable overtime and I fix this amount at five hours per week at an ordinary hourly rate to be calculated taking Mr Shalaldeh’s annual salary as a divisor for the period of the time he worked on the Aramex project. This calculation period is not to exceed two years.

[77] Once the above calculation is arrived upon I find that Lazyworm is reasonably entitled to deduct \$2,000 off the final sum in recognition of the bonus they paid to Mr Shalaldeh for his contribution to the project in question.

[78] I direct that the parties come to an agreement on the quantification of such extra hours worked using the parameters alluded to above and if they are unable to reach an agreement the parties have the opportunity of returning to the Authority with submissions seeking that I determine the amounts in question.

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<sup>6</sup> Section 132(2) Employment Relations Act 2000.

### *Public holidays*

[79] Similarly, although Mr Shalaldeh could not point to any public holidays he had worked and no holiday records were produced, Lazyworm acknowledged that the provision in Mr Shalaldeh's employment agreement was not in accord with sections 50 and 56 of the Holidays Act 2003 ("HA") in that it did not provided for penal rates and a day in lieu and that Mr Shalaldeh may have been required to work on a public holiday. Lazyworm indicated that they were prepared to address this matter by examining client charging records and matching such with any public holidays Mr Shalaldeh may have worked on.

[80] Section 83(4) of the HA also provides that the Authority may accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay. It is however, noted by the Employment Court in *Hatcher v Burgess Crowley Civil Limited*<sup>7</sup> that it is still open for the Authority not to accept employee statements but something more than a mere concern about imperfections would be required and one example given by the Court was where the employee's statement is simply not credible.<sup>8</sup>

[81] Given Mr Shalaldeh represented himself I am not minded to dismiss his claim entirely and I direct Lazyworm to resolve this issue in the context of coming to an agreement on arrears potentially owed by them checking their records to ascertain what public holidays Mr Shalaldeh worked upon and if due, pay him penal rates and compensation for day/s in lieu not granted as per the HA.

[82] Again, should the parties not be able to come to an agreement on this matter the parties can return to the Authority with submissions on such and I will determine the amount due.

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<sup>7</sup> *Shane Hatcher v Burgess Crowley Civil Limited* [2019] NZEmpC 117.

<sup>8</sup> At [22].

## **Finding**

[83] As above within parameters set, the parties are directed to reach agreement on remuneration for additional hours of work and public holidays insufficiently remunerated with the proviso that if this cannot be achieved the parties can return to the Authority seeking to have the quantum of such determined.

## **Issue 2: Remedies**

### *Lost wages*

[84] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Shalaldehy should I find that he has established a personal grievance and, s 128(2) mandates that this sum be at least the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[85] Here I find Mr Shalaldehy's lost remuneration was attributed to his personal grievance which was that he established that Lazyworm did not meet key statutory procedural requirements when they enacted a decision to reduce their testing roles by one position. However, given I have made the observation that the economic reason for the redundancy was genuine that would still have meant one testing position was removed.

[86] I find that had the restructuring process been properly and fairly enacted Mr Shalaladeh would have only been given an opportunity or 'chance' to compete for the remaining position with Mr X. Whilst it could be contended that it was more likely than not that Mr Shalaldehy would have secured the ongoing testing role given his qualifications and industry experience that is speculation.

[87] An employer has a discretionary right to select employees for appointment provided they do so in a fair manner. Here, Lazyworm may have equally concluded that although Mr X was less qualified he may have demonstrated sufficient competency in testing and had other attributes in his developer role that on a wider basis made his appointment more valuable to

the company aims given the need for flexibility had been flagged as an attribute required by Lazyworm.

[88] In looking at this in its totality, I am obliged to take an approach that Mr Shalaldeh had only a “loss of chance”<sup>9</sup> in securing ongoing employment and I equitably assess that in the circumstances and the evidence provided as no more than 50%.

[89] Mr Shalaldeh gave evidence that he secured alternative employment commencing 19 March 2020 in a similar testing position and provided evidence of a significant number of jobs he applied for in the intervening period and although not put at issue by Lazyworm, I find that he properly made significant efforts to mitigate his loss.

[90] Mr Shalaldeh claimed lost wages in a sum reflecting the actual loss in the intervening period which is thirty weeks salary on the basis that had a fair selection process been undertaken, his employment would have been ongoing.

[91] I find that applying a ‘loss of chance’ approach and taking other factors into account that fifteen weeks salary would be a fair amount to cover Mr Shallaldeh’s potential lost wages.

### ***Section 123(1)(c)(i) Compensation***

[92] Mr Shalaldeh gave compelling evidence of the significant impact of his dismissal and the uncertainty it created at a difficult time to find immediate alternative employment. He explained that this had a major impact upon his mental well-being and relationships with his wife, children and friends. He was particularly upset about a break in relations with the late Mr Elayyan’s family as their children had played together and the family had been providing support to him as he has no other family in New Zealand. He lost sleep became anxious and was depressed and has been getting counselling help (supported by a medical certificate). The

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<sup>9</sup> An approach the Court of Appeal endorsed in a redundancy selection matter in *Rongotai College Board of Trustees v Castle* [1998] 2 ERNZ 430 (CA)

ability to feed his family and pay his mortgage and assist with his wife's small business when she was pregnant must have caused Mr Shalaldeh significant strain and embarrassment.

[93] Mr Shalaldeh also produced a supporting letter from his Work and Income case manager detailing his financial struggles and the fact that Work and Income could only provide limited assistance. The letter observed "It has also been a struggle financially over this entire period and at times he has battled just to pay his mortgage and the rent for his wife's business". A social worker from Christchurch Resettlement Services also attested to Mr Shalaldeh's distress and that they had been providing his family with food parcels while he tried to keep paying his mortgage and also study to complete a PHD whilst actively job searching.

[94] I am easily convinced that Mr Shalaldeh suffered humiliation, loss of dignity and injury to feelings for a lengthy period before he could resolve his employment situation and that as fairly recent immigrant this must have been an extremely alienating experience.

[95] Taking into account the circumstances and awards made by the Authority in similar cases, I consider Mr Shalaldeh's evidence warrants a reasonably significant compensatory amount. I fix that sum at \$25,000 under s123 (1)(c)(i) of the Act.

### **Issue 3: Contribution**

[96] Section 124 of the Act states that I must consider the extent to what, if any, Mr Shalaldeh's actions contributed to the situation that gave rise to the personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no reason to reduce the remedies awarded above as Mr Shalaldeh's reactive response to the restructuring process although robust and somewhat confrontational was understandable in the circumstances of him being significantly misled and side-lined by his employer. In this respect, he was not engaged in a wrongful action and he did not act in a blameworthy or culpable manner that gave rise to his grievance occurring (which was Lazyworm's prior decision to reduce staff and the selection of him to be made redundant).

## **Costs**

[97] In the circumstances, this matter was dealt with in a one day hearing without costs of representation being incurred by Mr Shalalkeh but I think it is appropriate to award him the application filing fee.

## **Outcome**

[98] Overall I have found that:

- a. Ahmad Farouq Shalalkeh was unjustifiably dismissed from his employment with Lazyworm Applications Limited and is owed additional remuneration for overtime worked and for work on public holidays.**
- b. Lazyworm Applications Limited must come to an agreement on remuneration unpaid (minus \$2,000) or the matter will be further determined by the Authority and in addition Lazyworm Applications Limited must pay Mr Shalalkeh the sums below:**
  - i. \$20,192.30 gross lost wages;**
  - ii. \$25,000 pursuant to s 123(1)(c)(i) of the Act;**
  - iii. \$71.56 as a filing fee.**

David G Beck  
Member of the Employment Relations Authority