IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 179
EMPC 212/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DARREN PYNE Plaintiff
AND	INVACARE NEW ZEALAND LIMITED Defendant

Hearing:	10-11 and 19-20 July 2023
Appearances:	P Pa'u, advocate for plaintiff E Butcher and C Joy, counsel for defendant
Judgment:	25 October 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Pyne was employed by Invacare New Zealand Limited (the company) and was subsequently dismissed for redundancy. The Employment Relations Authority found that the dismissal was unjustified, essentially because the decision to disestablish Mr Pyne's role arose primarily because of performance issues, rather than to improve operational efficiency, and that he was unjustifiably disadvantaged.[1] The Authority awarded Mr Pyne $27,500 compensation for lost wages and $10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. The $10,000 award was then reduced by 15 per cent for contribution. While the Authority

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[1] *Pyne v Invacare New Zealand Ltd* [2022] NZERA 240 (Member Arthur).

found that the company had breached its obligations of good faith to Mr Pyne, it declined to impose a penalty for breach. It held that the company's shortcomings had been addressed in the remedies ordered on his personal grievance and no further penalty was necessary.[2]

[2] Mr Pyne filed a challenge in the Court, electing to pursue the challenge by way of non-de novo hearing. Essentially he does not seek to disturb the Authority's finding that he was unjustifiably dismissed and unjustifiably disadvantaged, or that the company breached its obligations of good faith to him; he does seek to disturb the Authority's awards. In this regard he claims that the Authority erred in fact and law in its approach to the calculation of both pecuniary (lost wages) and non-pecuniary (compensation for emotional harm) loss, and submits that both awards ought to be set aside and increased awards made. He also submits that separate awards should be made to acknowledge his unjustified disadvantage grievance. He further claims that the company breached cl 20.1 of his employment agreement, which provided that the company was to "investigate the future [employment] options" for Mr Pyne in a restructuring scenario. It is alleged that the company failed to comply with this obligation, and it ought to be penalised for its contractual failure. The imposition of a penalty is also sought for the breach of good faith.

[3] The company applied for leave to extend time to cross-challenge the Authority's determination and raised a number of objections in relation to the breadth and basis of Mr Pyne's challenge, and the evidence he ought to be permitted to call in support of it. I declined the company's application for leave and dealt with the residual objections in an interlocutory judgment of 7 March 2023.[3] In summary, I held that Mr Pyne was entitled, on his non-de novo challenge, to call relevant evidence directed at the matters at issue, and that the breach of contract claim had broadly been before the Authority and was not objectionable on the basis that it fell foul of s 179(1). The hearing of the challenge proceeded on this basis.

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2 At [89].
3 *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 33.

The facts

[4] Mr Pyne commenced employment with the company in August 2019, initially on a fixed term agreement. His role at that time was rentals business operations manager. Mr Pyne's role included staff management.

[5] At the time he was appointed, Mr Pyne had a conversation with Mr Purtill, the company's vice president and general manager of Asia Pacific. Mr Purtill made it clear to Mr Pyne that the rentals business operations role might continue past the expiration of the fixed term and there may be a project to expand into the Australian market. This pleased Mr Pyne as he had a small business in Queensland, which he continued to operate while working for Invacare (something the company was aware of).

[6] Events occurred at some stage in 2019 which are conveniently referred to at this point in the chronology. It remained unclear what the precise sequence of events was, but what is clear is that they involved comments about Brexit that Mr Pyne was said to have made during a social occasion in a bar and offensive comments he made to a staff member. Those comments, which Mr Pyne did not dispute, led to the staff member making a complaint to Ms Lincoln, Mr Pyne's line manager.

[7] On 9 December 2019 Mr Purtill arranged for an investigator to interview staff and to prepare a workplace culture report. It is apparent that the report was prompted by a range of issues within the company's Auckland office. The report writer spoke to a selected group of staff, including Ms Lincoln, the staff member and Mr Cotter (the human resources manager). Mr Pyne was not spoken to by the report writer.

[8] Ms Lincoln had a meeting with Mr Pyne about the 2019 events and other issues on 6 January 2020. She prepared a file note of her discussion and followed up with an email to Mr Pyne recording the concerns she had raised with him at the meeting about time keeping and "sharing opinions around cultural differences". She took the opportunity to remind Mr Pyne of the company's harassment policy and reiterated the company's expectations around behaviour. At the meeting Mr Pyne apologised to Ms Lincoln in respect of the Brexit comments. Following the meeting he went and

apologised personally to the staff member. He understood the staff member to accept his apology. Mr Pyne also raised the issue with Mr Cotter when he returned from leave on 7 January 2020. Mr Cotter also spoke to the staff member. He understood the staff member to say that Mr Pyne had apologised to them (the staff member) and they considered the matter to be at an end.

[9] As at early January 2020 it appeared (including to Mr Pyne) that issues relating to the events referred to in [6] above had been resolved with no formal disciplinary, or other, action having been taken.

[10] Mr Pyne was subsequently offered, and accepted, a permanent employment agreement, which he signed on 13 February 2020. His job title remained the same.

[11] Two weeks later, on 27 February 2020, Mr Purtill received the workplace culture report.[4] The report was lengthy, and covered a number of concerns across the workplace. Included at page 25 of the report was reference to Mr Pyne. The report writer noted that the staff member had been interviewed and had said that they had raised their concern about Mr Pyne's offensive comments by informing Ms Lincoln and Mr Cotter but that "no action has been taken to date." The date referred to was, I infer, the date on which the staff member had been interviewed and their comments recorded, so some time in December 2019.

[12] While the report writer had not been asked to make recommendations, brief summary conclusions were referred to at the end of each "evidence" section of the report. In respect of the part of the report headed "Evidence – Possible Racial Discrimination" the report writer noted that the material:

> …suggests that all of the above situations had been witnessed by, or brought to the attention of, management. Responding decisively to these kinds of

[4] Note that the plaintiff objected to the admission of the report, which is referred to (and quoted from) in the Authority's determination. It is broadly relevant to the matters at issue on the challenge, including to an informed understanding of the chronology of events and the matters underlying the decision to terminate Mr Pyne's employment. It was admitted on this basis. Objections were also taken to various other documents. The documentation was admitted on a provisional basis. Much of it was broadly relevant to the matters at issue, and I found it of some contextual assistance. Other documentation, such as two witness statements filed in the Authority, have been put to one side. Those witnesses did not give evidence in the Court and there is no surety as to whether the evidence given under oath was consistent with, or differed from, the written statements.

> complaints will build and maintain employee confidence in fair process and will encourage a culture of inclusion, tolerance and respect.

[13] The report also included an observation by Ms Lincoln referencing what she described as "underhand comments" Mr Cotter had made about other employees; and a number of criticisms the staff member was said to have made about Mr Pyne relating to changes he had made since commencing work in August 2019, which the report writer set out under the heading "Unreasonable working conditions". The report and its contents, including the concerns about Mr Pyne, were not drawn to his attention. Nor, as I have already observed, had the report writer engaged with Mr Pyne in the preparation of the report, and prior to making specific references to him which were of a critical nature.

[14] Shortly afterwards (in early March 2020) the company announced a restructuring proposal across the New Zealand and Australian businesses. Four New Zealand roles were initially proposed for disestablishment, though none in the rentals business in which Mr Pyne worked. That soon changed.

[15] On 5 March 2020 Mr Purtill spoke to Ms Lincoln and then sent an email to Mr Cotter. Mr Purtill advised Mr Cotter that Ms Lincoln was:

> … adamant that [Mr Pyne] is not the right person for the role and I would have to agree.

[16] Mr Cotter responded by saying that either Ms Lincoln's or Mr Pyne's roles "should be deleted from the structure" but that if Ms Lincoln left the company a "performance management process should commence with the current operations manager to effect either correction or exit if necessary as end of process." He followed up this message on 8 March 2020 advising Mr Purtill that:

> The next consideration is how to avoid the possible constructive dismissal claim from [Mr Pyne] if his job is removed from structure. He is not on notice as part of the current change proposal so the move you are suggesting cannot be announced to the business without further consultation.

[17] Mr Purtill responded, confirming that he saw Mr Cotter's point in relation to the potential for a constructive dismissal claim from Mr Pyne, and that the company would progress with a change process for the rentals side of the business. Mr Purtill

then sent an email to Ms Steele, customer experience manager, advising her that if the operations management role was retained, and if that role were to report to her, it would involve having to manage Mr Pyne and that would "unfortunately … mean you inherit a people problem that needs to be addressed immediately." Ms Steel replied confirming that she did not wish to manage Mr Pyne; did not think he was the right person; and that she had too much to get done without trying to performance manage him. Mr Purtill responded to Ms Steele on 9 March 2020 advising that he thought he had identified "a path forward".

[18] It is evident from Mr Purtill's reference to "people problem" and the tenor of his communications with Ms Lincoln and Ms Steele (neither of whom gave evidence on the challenge), that concerns in respect of Mr Pyne remained very much afoot as at early March 2020. It is also evident that these concerns were not drawn to Mr Pyne's attention.

[19] On 10 March 2020 Mr Purtill met with Mr Pyne and advised him of a revised proposal. The revised proposal involved the disestablishment of both Mr Pyne's position and Ms Lincoln's position, and expanding Ms Steele's role so that the remaining team members (including the staff member) would report to her.

[20] The purpose of the 10 March 2020 meeting was not, however, confined to alerting Mr Pyne to a revised proposal. The second topic of conversation that Mr Purtill raised with Mr Pyne was in respect of concerns identified in the workplace culture report, specifically relating to the staff member. Mr Purtill said that he would need to address the concerns, which (if established) might amount to serious misconduct. Mr Purtill advised Mr Pyne that while he had felt obliged to draw matters to his attention at this stage, the concerns would not impact on how he (Mr Purtill) viewed the restructuring process and its outcomes. He emphasised that he would, however, need to address them in the future if Mr Pyne remained with the company. Following the meeting Mr Purtill sent Mr Pyne an email which set out the points that had been discussed. The email recorded that Mr Pyne had engaged with Mr Purtill about the issue, and that Mr Pyne told him that he had earlier apologised to the staff member.

[21] The revised restructuring proposals were advised to staff later on 10 March 2020 and they were given time to provide feedback. Following feedback a revised proposal was circulated on 19 March 2020. Mr Pyne provided two sets of written feedback.

[22] The company finalised a variation of the 19 March 2020 iteration of the proposal, which was advised to staff on 27 March 2020. The new structure involved the disestablishment of the general manager role held by Ms Lincoln, the rental operations manager role held by Mr Pyne, a team leader role held by the staff member, and four other roles. The rentals team was to come under Ms Steele, in an expansion of her role as customer experience manager. It also proposed some new roles, including a service manager and a business development manager for new business in the Asia-Pacific region.[5]

[23] Later that day (27 March) Mr Pyne met with Mr Purtill to discuss what roles he would be suitable for. Mr Purtill indicated that Mr Pyne would be qualified for the service manager role but gave no assurances that he would be successful. In the event Mr Pyne asked to be considered for the service manager position. Two other staff members also expressed an interest. While arrangements were made for Mr Purtill and Ms Steele to interview each of the three candidates, that is not what occurred. While Mr Purtill attended two of the interviews he did not attend Mr Pyne's – he says he was in a meeting. In the event, no interview occurred; Mr Pyne and Ms Steele simply engaged in small talk before she closed the meeting. Mr Purtill says that he thought Ms Steele had proceeded to interview Mr Pyne without him, although it remained unclear why he drew this conclusion and why the company would consider it appropriate to progress matters in this way when an employee's future employment was at stake. Mr Purtill also gave evidence that he asked Ms Steele who her preferred candidate was and that she told him it was not Mr Pyne.

[24] Against this backdrop, Mr Pyne was advised that he had been unsuccessful and was given notice of termination of his employment on the grounds of redundancy.

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[5] In the event Ms Lincoln took over the role of customer experience manager from Ms Steele.

The Authority's findings

[25] The above sequence of events sheds light on what unfolded and why. The Authority member formed the view that the weight of evidence clearly established that Mr Purtill's decision to disestablish Mr Pyne's role as rentals operation manager was made for mixed motives – while there was a coherent rationale for consolidation of the rental business under the control of Ms Steele in her customer experience manager role, Mr Purtill could have opted to maintain the operations manager role held by Mr Pyne and had him report to Ms Steele. That option was discounted because of views Mr Purtill and other managers held about Mr Pyne's performance and conduct.

[26] The Authority member concluded that the predominant motive was not consideration of the position and business needs, but about the incumbent and his performance. The Authority held that the decision to disestablish the position held by Mr Pyne and the failure to complete a fair process in considering the prospect of his redeployment to a new position were not what a fair and reasonable employer could have done in all of the circumstances. Mr Pyne had suffered a personal grievance as a result.[6] The Authority found that the company had breached its obligations of good faith to Mr Pyne. The findings of the Authority in respect of unjustified dismissal, unjustified disadvantage and breach of good faith are not in issue on the challenge.

[27] Having found that Mr Pyne had established his personal grievance, the Authority moved to consideration of what remedies ought to be granted in his favour. These findings lie at the heart of the challenge.

Error of fact and/or law – lost remuneration award?

[28] Section 128 deals with reimbursement of remuneration lost as a result of a personal grievance. The Authority must order the employer to pay the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration, subject

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[6] *Pyne*, above n 1, at [70].

to contribution and the discretionary power in s 128(3) to order an employer to pay a greater sum (actual loss being the outer limit).[7]

[29] The Authority noted that Mr Pyne's employment ended on 1 May 2020 and he started in a new role in Brisbane in January 2022 (so around 20 months later). The Authority referred to Mr Pyne's own business and work he had done developing it during the intervening time, and 12 weeks he had spent working for a friend in a plant nursery. The Authority went on to observe:

> [73] [Mr Pyne's] evidence was sufficient to establish that, under s 128(2) of the Act, Invacare should be ordered to pay Mr Pyne three months' ordinary time remuneration in reimbursement of income lost as a result of his personal grievance. … the amount to be ordered for three months' loss was $27,500.
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> [74] Mr Pyne's evidence did not establish that a sum greater than that should be ordered as compensation for lost remuneration under s 128(3) of the Act. As Invacare submitted Mr Pyne had not provided sufficient evidence about his attempts to mitigate that loss or the extent of the time he spent on his own existing business. Some of his job search needed to be conducted in a period of Covid-19 restrictions here and in Australia, but his skill set and experience was in areas of the economy where demand for staff had remained high.

[30] Mr Pyne's representative, Mr Pa'u, was critical of the Authority's expressed assumption that Mr Pyne ought to have been able to find alternative work in the absence of detail as to what the reference to "high demand for someone of his skill set" was based on.

[31] As I have said, evidence in relation to the matters at issue on the challenge (including lost remuneration) was heard afresh. While Mr Pyne was cross-examined on his efforts to find alternative work, and it was essentially put to him that he ought to have been able to find work within a shorter period of time, I accept his evidence that he was significantly impacted by the company's unjustified actions and this affected his ability to explore alternative options, at least in the initial stages;[8] that he tried to find work in New Zealand but, not being able to do so, started looking overseas.

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7 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [74] and [78], noting that an award of more than 18 months' remuneration would sit at "the higher end of the exercise of the discretion".

8 See *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [63]–[65] for a discussion on mitigation and lost wages.

[32] Mr Pyne was plainly surprised that it took him as long as it did to find alternative work – he applied for a significant number of vacancies (the precise number was in dispute but does not need to be pin-pointed with particular accuracy) and attended around 70 interviews. I do not accept, based on the evidence before the Court, that Mr Pyne's failure to find work reflected an absence of genuine effort on his behalf. In the end he felt his only option was to move to Australia, which is what he did and which was disruptive personally for him. These factors are relevant to an assessment of whether the discretion under s 128(3) should be exercised to award Mr Pyne more than three months' lost remuneration.

[33] The company submitted that beyond the prescribed three month remuneration period in s 128(2), the causal link between the dismissal and the lost remuneration was broken, so that the Court should decline to exercise its discretion under s 128(3).[9] I understood the company to say that the causal chain was broken because there was no evidence of aggravating conduct. The absence or otherwise of aggravating conduct is immaterial. What is relevant is a calculation of loss suffered as a result of the breach. The breach was Mr Pyne's unjustified dismissal and disadvantage. Provided the chain of causation is not broken, any consequential losses fall for consideration. Nor is aggravating conduct a requirement before the Court will exercise its discretion under s 128(3). The wording of the provision does not support such an interpretation and nor do well established principles of causation and loss.

[34] I am satisfied that payment of a sum greater than three months' lost remuneration is appropriate in the particular circumstances. As I have said, Mr Pyne's actual loss sets the upper limit that can be awarded in terms of s 128(3). There is no automatic entitlement to be compensated for the full amount. There is no dispute that, in the period between his dismissal and starting his new job in Brisbane, Mr Pyne spent some time working on his own business. Mr Pyne rejected the suggestion, when the point was put to him in cross-examination, that he had been able to spend more time on his business once his employment with the company came to an end. Rather

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9 Citing *Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136 at [41].

he said that the key thing from his perspective was trying to get re-employed. While I accept that Mr Pyne's primary focus was on finding alternative employment, an allowance must be made for time spent on his own business and working in the plant nursery in terms of assessing actual loss.

[35] The Court should not be left to speculate or guess at what losses have been incurred.[10] I agree with the company that the evidence, particularly in relation to what income or otherwise was generated by Mr Pyne's company, was vague and lacked detail. I am satisfied, based on the evidence before the Court, that a fair reflection of the loss which ought to be compensated for is a payment equivalent to six months' lost remuneration. The Authority's award of three months' lost remuneration is accordingly set aside and an award equivalent to six months' lost wages stands in its place.

Error of fact and/or law: compensation for non-pecuniary loss?

[36] In relation to compensation for humiliation, loss of dignity and injury to feelings, the Authority's analysis was as follows:

> *Compensation for humiliation, loss of dignity, and injury to feelings*
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> [75] Mr Pyne gave limited evidence about the effects on him of lnvacare's decision to dismiss him for redundancy and how it had gone about making that decision. He said he found it hard to get over how he had been treated and it had damaged his confidence and affected his sleep and appetite. He did not give evidence of any ongoing effects on him.
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> [76] An appropriate award to compensate for the effects on him, accepting his evidence, was $10,000.

[37] The Court almost invariably adopts the banding approach when considering challenges raising s 123(1)(c)(i) awards.[11] While Mr Pa'u submitted that the Authority member erred in law in failing to apply the banding approach in this case, it is a point

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10 *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371 at [51].

11 See, for example, *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438; *Baillie v Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZEmpC 233, [2022] ERNZ 1201; and *Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146, [2021] ERNZ 654. Contrast *Drivesure Ltd v McQuillan* [2022] NZEmpC 176, [2022] ERNZ 865.

that I do not need to finally decide.[12] That is because I am satisfied, based on the evidence, that the compensatory award must, in any event, be set aside. My reasons for reaching this view follow.

[38] The Authority has latitude, conferred by statute, to refrain from setting out the evidence in detail or the process it has followed in reaching its determination.[13] That reflects the fact that the Authority is designed as a low level investigative institution, focussed on the delivery of timely determinations which are not bogged down in technicality.[14]

[39] Further, the Court is prohibited by statute from advising or directing the Authority in relation to the exercise of its investigative role, powers and jurisdiction or in relation to the procedure that it follows.[15] Parliament has, however, conferred on the Court the jurisdiction to hear non-de novo challenges based on error of law and/or fact, and challenges heard afresh on a de novo basis. Where, as here, it is alleged that the Authority erred in law and fact in arriving at the quantum of compensation, the Court must decide whether it has erred. Where the Authority has given little or no explanation as to how a compensatory sum has been arrived at, the Court may be driven to the conclusion that the Authority has erred.[16] The difficulties for the Court in assessing whether the Authority has erred are compounded by the fact that investigations undertaken by the Authority are not, as a matter of practice (which is entirely open to the Authority to adopt),[17] recorded. This is one of the reasons why, on a non-de novo challenge, it is not uncommon to hear evidence afresh, focused on the matters at issue on the challenge.

[40] It is, with respect, difficult to ascertain from the determination how the $10,000 was arrived at. In the circumstances, it is helpful to cross-check the quantum of

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12 I note that some more recent Authority determinations have applied the banding approach. See especially *Grant v Carrington Resort Jade LP* [2023] NZERA 485 (Member Dumbleton) at [132].

13 Employment Relations Act 2000, s 174E.

14 *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 at [14]; citing *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466. See also Employment Relations Act 2000, ss 157(1), 174(a) and 174A(2)–(3).

15 Employment Relations Act 2000, s 188(4).

16 By way of analogy, see *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12, [2019] ERNZ 1 at [54]–[58], where there was a failure to provide an adequate explanation for the penalty arrived at, leading to a finding that the Authority had erred as to quantum.

17 Employment Relations Act 2000, s 174E(b).

compensation ordered by the Authority applying the analysis usually applied by the Court, namely the banding approach. As will become apparent, that analysis leads to a higher amount, and supports the submission that the Authority erred in the quantum it arrived at.

[41] The stepped approach to assessing non-pecuniary loss under s 123(1)(c)(i) is now well-established in the Court.[18] Mr Pyne clearly experienced harm under each of the heads identified in s 123(1)(c)(i), namely humiliation, loss of dignity and injury to feelings. The company's unjustified actions left him feeling confused, unheard, side-lined, disrespected, stressed and uncertain. He was very concerned about his financial position and what his future might hold, and was obliged to take steps with his bank to protect his position. The company sought to make something of the fact that Mr Pyne's feedback on the proposals did not contain any hint of his upset and that restructures are inevitably stressful. Mr Pyne explained, and I accept, that he was attempting to be professional, including because he was attempting to save his job and was managing staff who were themselves affected by the change process. The point is that an employee is not required to advise their employer that they are experiencing emotional injury as a result of their employer's breach at the time it is occurring. Nor does inherent stress associated with a redundancy process ameliorate any additional stress caused by the company's failings.[19] The Court's assessment is directed at the nature and extent of harm caused to the employee by the employer's breach. Contemporaneous outward manifestations of harm may, of course, support a claim; the absence of such evidence does not lead to a conclusion that no harm was suffered.

[42] Mr Pyne was shocked and upset when he was advised that his role had been disestablished. The way in which the company came to that conclusion, and its failure to engage appropriately with him in good faith in respect of concerns it harboured, exacerbated the emotional harm he suffered. Mr Pyne gave evidence that in the months following his termination he felt betrayed, angry and frustrated, and that this

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18 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337. See too *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]: Band 1 – low level loss/damage; band 2 – mid-level loss/damage; and band 3 – high level loss/damage.

19 See, by way of analogy, the comments in *Pact Group v Robinson* [2023] NZEmpC 173 at [47] regarding a procedurally and substantively unjustified disciplinary process.

impacted his personal relationships. He also had difficulty concentrating and sleeping. In the event, Mr Pyne had to explore alternative work in Australia, with the personal upheaval involved in that.

[43] I pause to note that while an affidavit was filed on behalf of Mr Pyne's partner, which dealt with the impact on him from her perspective, his partner was not available for cross-examination. In the circumstances, I directed that, while the affidavit would be admitted, I would likely give it little or no weight, but reserved leave for the representatives to address me further on the issue if they wished to do so. In the event the point was not strongly pursued, Mr Pa'u accepted the difficulties associated with the evidence. I have not placed weight on the contents of the affidavit in determining remedies.

[44] Counsel for the company, Ms Butcher, submitted that the circumstances of this case fell within band 1, and a compensatory sum of $10,000 was appropriate having regard to the circumstances, including the dismissal being "no fault" and that Mr Pyne was not particularly vulnerable or highly reliant upon the company.[20] Ms Butcher also submitted that the harm Mr Pyne did suffer was a result of his own unrealistic expectations about job security, which could not be blamed on the company. Mr Pa'u submitted that a substantially higher award was required in order to adequately compensate Mr Pyne for his losses.

[45] As I have already said, there must be a link between the grievance and the loss; if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123.[21] That is because remedies are directed at addressing the losses sustained as a result of the breach giving rise to the grievance.[22] I do not accept, however, that there is no connection where the harm comes from the employee's expectation of job security. An employee is entitled to expect that their employment will not be terminated without proper justification – this is what the personal grievance framework is intended to preserve. Nor do I accept that the dismissal in this case can

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20 Distinguishing *Cheng*, above n 18, at [58].
21 *Cheng*, above n 18, at [48].
22 At [51].

accurately be described as "no fault". As the Authority member found, there were mixed motives for the dismissal. The dominant motive for the dismissal was unconnected with the company's business case for the restructuring.

[46] The claim for compensation under s 123(1)(c)(i) is directed at both the unjustified dismissal and unjustified disadvantage. The grievances are, as Ms Butcher points out, inextricably linked. In these circumstances it is appropriate to impose a global award.[23]

[47] I have considered the range of compensatory awards in the Authority and the Employment Court. Recent compensatory awards of the Court falling within the lower portion of band 2 have included consequences similar to those suffered by Mr Pyne.[24] I consider that this case sits within that range. Applying the revised bands referred to in *GF* (band 1 $0-$12,000; band 2 $12,000-$50,000; band 3 over $50,000),[25] I would place this case at $18,000. That is well above the compensatory award in the Authority. I am driven to the conclusion that there was an error and the compensatory award of $10,000 must be set aside.

Error of fact and/or law: contributory conduct?

[48] The Authority found that Mr Pyne had contributed to the matters giving rise to his grievance, leading to a 15 per cent reduction in the compensatory award under s 123(1)(c)(i). The company submitted that this was a fair assessment, but that it was appropriate to apply the reduction across all the remedies awarded. Mr Pa'u submitted that the Authority erred in its approach to contribution, that Mr Pyne had not contributed to the situation giving rise to the grievance and accordingly no reduction could appropriately be made under s 124 of the Act.

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23 *Smith v Life to the Max Horowhenua Trust* [2010] NZEmpC 152, (2010) 8 NZELR 440 at [24]; and *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99, [2014] ERNZ 813 at [50].

24 See, for example, *STL Linehaul Ltd v Waters* [2022] NZEmpC 114 where the Court awarded $17,000 compensation. Mr Waters suffered from stress, pressure and a loss of self-confidence in the context of a redundancy dismissal, and his distress was exacerbated by STL's failure to engage with him on the reasons behind his redundancy.

25 *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162].

[49] The deduction for contribution was said to be based on Mr Pyne's undisputed comments to the staff member. In this regard the Authority said:

> [88] A manager acting responsibly in that situation would have taken more care not to cause offence to an employee reporting to him or, on learning some offence about a personal matter had been caused, have taken steps to address and resolve it with that employee. Mr Pyne's failure in that respect was blameworthy conduct contributing directly to the situation giving rise to his grievance. A 15 per cent reduction in the remedy awarded to Mr Pyne as compensation for humiliation, loss of dignity and injury to his feelings is an appropriate means of marking that contributory conduct. That compensation is to be reduced from $10,000 to $8,500.

[50] The evidence given in the Court appears to have differed from that given in the Authority; in particular the staff member in question did not give evidence and Mr Cotter and Mr Pyne did. On the evidence before the Court, it was established that both Mr Cotter and Mr Pyne spoke to the staff member, understood that the staff member had accepted an apology offered by Mr Pyne, and that they considered the matter at an end. In other words, Mr Pyne had done what the Authority member considered he ought to reasonably have done – immediately apologised and sought to resolve the issue from the complainant's perspective. The basis on which the Authority member reached his conclusion about contribution accordingly falls away.

[51] In any event, the resuscitated complaint did not (at least on Mr Purtill's evidence before the Court) play a role in the events that unfolded, or the selection of Mr Pyne's role for redundancy. Indeed Mr Purtill's email to Mr Pyne of 10 March 2020, which summarised their earlier meeting, expressly stated that Mr Purtill would *not* be factoring concerns about the comments to the staff member into decisions about the restructure. If that is so it is difficult to see how Mr Pyne's comments to the staff member contributed to the situation that gave rise to Mr Pyne's unjustified dismissal and/or disadvantage grievances.

[52] Accordingly I set aside the Authority's finding that Mr Pyne contributed to the situation giving rise to the grievance for the purposes of s 124. No deduction for contribution is appropriate in the circumstances.

Penalty for breach of good faith

[53] As I have said, while the Authority found that the company had breached its obligations of good faith to Mr Pyne, it declined to impose a penalty for breach. It held that the company's shortcomings had been addressed in the remedies ordered on his personal grievance and "no further penalty" was necessary.[26]

[54] Compensatory awards and penalties serve different purposes. The first is to compensate an employee for the harm caused to them by their employer's default. The second is primarily to penalise the defaulting party, although they may have a compensatory element.[27] The fact that a penalty is, by default, paid to the Crown but can, where the Court considers it appropriate, be paid either in whole or in part to the party affected by the breach, underscores the point.[28] Blurring the one into the other risks obfuscation and a dilution of the penalty provisions which Parliament notably strengthened in 2004.[29]

[55] Not every breach of good faith will warrant the imposition of a penalty, as s 4A makes clear. Rather the Act requires a stepped approach: was there a breach of good faith? If so, a penalty should be awarded where that breach was "deliberate, serious and sustained" or if the breach was intended to undermine an employment relationship or if any other matters listed in s 4A(b) apply. The next question is what quantum should be imposed and should the whole or part of the penalty be directed to be paid to the employee.

[56] As I have said, limited detail emerges from the determination as to how the compensatory award had been arrived at under s 123(1)(c)(i). In addition, while implying that the company was liable for a penalty, the Authority did not specify how much an appropriate penalty would be; rather it said that it considered other remedies awarded were adequate to address the point. That may mean, although it is not clear, that the $10,000 by way of emotional harm compensation was intended to be inclusive

[26] *Pyne*, above n 1, at [89].
[27] *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [50].
[28] Employment Relations Act 2000, s 136.
[29] Employment Relations Amendment Act (No 2) 2004.

of an amount that would otherwise have been awarded as a penalty award. If that is so, it may mean, for example, that the Authority considered only $8,000 was appropriate as compensation, and that the $10,000 award included a $2,000 penalty payable exclusively to Mr Pyne rather than the Crown.

[57] I agree with the Authority's conclusion that the company breached its obligations of good faith to Mr Pyne.[30] Accordingly, I now turn to consider whether a penalty should be imposed under s 4A. Ms Butcher drew my attention to the observations in *Waikato District Health Board v The New Zealand Public Service Assoc Inc* that "egregious bad faith" is required for the imposition of a penalty.[31] I note that s 4A does not specify a threshold of egregious bad faith; rather Parliament has conferred a broad discretion on the Court to impose penalties for breaches of good faith in circumstances where the established breach was deliberate, serious and sustained, or where the breach was intended to undermine an employment relationship. In other words, the provision is focussed on instances in which the obligation of good faith has not been met, marking out certain types of breaches of good faith listed in s 4A. Egregious bad faith is not the stated threshold.

[58] *Waikato District Health Board* was a decision of the full Court. While it is true that the Court referred to the threshold in s 4A, it did so by way of obiter comment as follows:[32]

> As was accepted by both counsel, however, the facts of this case would not meet the very high tests of egregious bad faith required under s 4A of the Act before a penalty can be imposed for a breach of good faith.

The judgment is now some 15 years old and the law in respect of penalties, and the way in which good faith obligations are viewed (and compliance with them is to be supported) has developed.

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30 For example, there was a particular breach of the duty to provide access to information and the opportunity to comment on information before a decision was made, analogous to: *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151 at [156]–[157]; leave to appeal this decision was dismissed in *Zhang v Telco Asset Management Ltd* [2020] NZCA 223.

31 *Waikato District Health Board v The New Zealand Public Service Assoc Inc* [2008] ERNZ 80 (EmpC) at [36].

32 At [36].

[59] Ms Butcher also referred me to the approach in *Vince Roberts Electrical Ltd*, where the Court declined to impose a penalty, stating:[33]

> [35] Quite apart from these substantial impediments, it is not appropriate to make a claim for a penalty in this way tagged onto what are effectively the pleadings relating to the personal grievance. Section 4A of the Act requires proof of what amounts to egregious conduct before a penalty would be imposed. It should be separately pleaded if it is to be appropriately raised in a challenge to the Court (which is not the case here) and there should be adequate evidence presented at hearing to justify the claim.
>
> [36] While the actions of the employer in this case would be in breach of s 103A of the Act, no real basis is put forward for imposing an additional penalty for those actions. The matter is not advanced in the closing submissions, and indeed the only reference in those submissions to the claim for penalty is repetition of the claim as it is inadequately set out in the pleadings.

[60] In the present case the point was adequately pleaded. I have already explained why I do not interpret s 4A as requiring an egregious breach and drawn a distinction, which I consider important, between the role of penalties and compensation.

[61] As the statutory language makes clear, the Court must be satisfied the company's breaches meet the bar set by s 4A in order to impose a penalty.[34] Mr Pa'u submitted that the company's breaches of good faith were deliberate, serious and sustained; or that they were intended to undermine the employment relationship. Ms Butcher submitted that there was no evidence of any deliberate or intentional breach. As I have already noted, the redundancy dismissal involved mixed motives, elements of which the company did not disclose or put to Mr Pyne despite those being an operative force in reaching its decision; that was a failure in respect of its duty of good faith. The inescapable inference is that the company's breaches were deliberate, occurred over time, and were designed to undermine the employment relationship it had with Mr Pyne by bringing it to an end. The threshold in s 4A(b)(iii) is accordingly met.[35] A penalty is, in my view, appropriate, including to mark out the Court's condemnation of the conduct as unacceptable.

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33 *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112.

34 *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112, [2016] ERNZ 733 at [120].

35 See, for example, *Gilbert v Transfield Services (New Zealand) Ltd* [2013] NZEmpC 71, [2013] ERNZ 135 at [182]: where former Chief Judge Colgan made obiter remarks regarding an "ulterior motive" for dismissal which may well have undermined the employment relationship.

[62] The maximum penalty, which Mr Pa'u submitted is appropriate, is $20,000.[36] Section 133A sets out a number of (non-exhaustive) factors to which the Court must have regard in determining an appropriate penalty. In this case I consider the following factors of particular relevance. The objects of the Act, including to support good faith behaviour and to address the inherent imbalance of power between employer and employee, the intentional nature of the breach and the negative impact of it on Mr Pyne, and the need to deter future conduct of this sort, not just by the company, but more generally. Having had regard to the range of penalties imposed in other cases, I consider that a penalty of $6,000 is appropriate in this case, payable to the Crown.

Penalty for breach of cl 20

[63] The company was obliged under cl 20.1 of Mr Pyne's employment agreement to, where possible, consider him for alternative positions, having concluded that his role was to be disestablished. It failed to do so. While the company sought to argue that it had investigated future options available in respect of redeployment and genuinely considered Mr Pyne for the role he applied for, this must be seen in light of the extensive evidence I have referred to which indicates this was not the case. In these circumstances it is hardly surprising that no real attempt was made to find alternative work; it would have likely been a charade if such steps had been taken.

[64] The Court may award a penalty for a breach of an employment agreement.[37] However, it is clear that the breach of cl 20.1 of the employment agreement – and the decision not to consider an alternative position for him – was an aspect of the dismissal and relied upon by Mr Pyne for his personal grievance.[38] The Court has previously observed that it would be unusual for a penalty to be awarded in such circumstances, and there would need to be a special facet of the breach that calls for punishment of the employer on top of compensation to the employee.[39] No special facet has been established by Mr Pyne in respect of the failure to explore other options. Accordingly, I decline to order a penalty.

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36 Employment Relations Act 2000, s 135(2)(b).
37 Employment Relations Act 2000, s 134(1).
38 A claim for damages for breach of contract would have been excluded: Employment Relations Act 2000, s 113(1).
39 *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC) at [45]; *Salt v Fell* [2006] ERNZ 449 (EmpC) at [124]; this point was not disturbed on appeal: see *Salt v Fell* [2006] ERNZ 949 (CA) at [3].

Recommendations appropriate?

[65] The Court has the power to make recommendations under s 123(1)(ca). Mr Pa'u invited me to consider exercising that power in this case, to make it clear that where an employer is making a decision that significantly impacts on an employee, they are required to give the employee advance notice of that and indicate that the employee is entitled to a support person. Ms Butcher opposed this aspect of the relief sought, including because no notice had been given and because any recommendations had potentially broad legal impacts.

[66] The power to make recommendations by way of remedy is constrained. First the Court must be satisfied that any workplace conduct or practices were a significant factor in the grievance; second, the recommendation must be directed at the employer, specifying an action the employer should take to prevent similar relationship problems occurring in the future. A recommendation may be particularly helpful in a case such as *GF*, where the employer was found to have incorporated tikanga values into its working relationship with its employees but was uncertain as to how those values might operate in practice. A recommendation was made that the company obtain expert assistance and advice to support its understanding, amongst other recommendations.[40]

[67] In the present case the company will be well aware, from both the Court's judgment and the earlier Authority determination, as to where it fell short and what it should do to avoid a similar situation arising in the future. I do not consider it necessary to make recommendations in the circumstances, and decline to do so.

Summary of orders

[68] The Authority's award equivalent to three months' lost wages is set aside and an award equivalent to six months' lost wages is ordered in Mr Pyne's favour.

[69] The Authority's award of compensation under s 123(1)(c)(i) is set aside and an award of $18,000 stands in its place.

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40 *GF*, above n 25, at [187].

[70] The Authority's reduction in compensation for contributory conduct under s 124 is set aside.

[71] The Authority's finding that no penalty is appropriate for the company's breach of s 4A is set aside, and a penalty of $6,000 is ordered against it, payable to the Crown.

[72] Mr Pyne is entitled to costs, the quantum of which is reserved. The parties are encouraged to agree costs and are reminded of the costs categorisation made on an agreed basis at an early case management conference (namely 2B). If costs cannot be agreed I will receive memoranda, with the plaintiff filing and serving within 28 days of the date of this judgment; the defendant within a further 14 days and anything strictly in reply within a further seven days.

Christina Inglis
Chief Judge

Judgment signed at 12.15 pm on 25 October 2023