

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 579
3038955

BETWEEN VANIA HAMLIN
Applicant

AND THE CHIEF EXECUTIVE OF
NORTHLAND
POLYTECHNIC
Respondent

Member of Authority: Robin Arthur
Representatives: Applicant in person
David Grindle, counsel for the Respondent
Investigation Meeting: 18 March 2019 in Whangārei
Determination: 10 October 2019

DETERMINATION OF THE AUTHORITY

- A. Northland Polytechnic (NorthTec) acted unjustifiably in its dismissal of Vania Hamlin on the grounds of redundancy.**
- B. In settlement of Ms Hamlin's personal grievance for unjustified dismissal NorthTec must pay the following sums to her within 28 days of the date of this determination:**
- (i) \$30,455 (less applicable income tax) in reimbursement of lost remuneration; and**
 - (ii) \$15,000 (without deduction) as compensation for humiliation, loss of dignity and injury to her feelings caused by its unjustified actions; and**
 - (iii) \$71.56 in reimbursement of the fee paid to lodge her application in the Authority.**
- C. NorthTec correctly calculated the amount of redundancy**

compensation due to Ms Hamlin under her employment agreement.

Employment Relationship Problem

[1] Vania Hamlin's employment by Northland Polytechnic (NorthTec) ended on 18 February 2018. She was dismissed on the grounds of redundancy. In an organisational review carried out in the later months of 2017 NorthTec disestablished around 90 roles and created around 45 roles. Two of the disestablished roles were held by Ms Hamlin – her substantive position as a Personal Assistant and a position of Programme Leader in which she had worked, on a seconded basis, since 2015.

[2] Ms Hamlin sought redeployment to other roles created in the review. She was not successful. She raised a personal grievance and applied to the Authority for findings that NorthTec had not acted fairly in deciding to end her employment rather than to redeploy her into one of those roles. She said the decisions were contrary to assurances given to her earlier by NorthTec's former Chief Executive Mark Ewen. She sought orders for lost wages for the period from 18 February to 17 July 2018 and for compensation for distress resulting from unfair treatment.

[3] NorthTec Polytechnic said it had acted appropriately and in compliance with its good faith obligations. It said this included fairly considering Ms Hamlin's redeployment to two roles for which she applied and reasonably deciding she was either not qualified or not suitable for those roles.

[4] A further issue arose during preparation for the Authority's investigation concerning whether NorthTec had correctly calculated redundancy compensation due to Ms Hamlin.

The Authority's investigation

[5] Written witness statements were provided by Ms Hamlin, Mr Ewen, NorthTec's Manager People Operations David Harrop, and Phil Giles, a former Director of Arts, Commerce and Science at NorthTec. Ms Hamlin has reported to Mr Giles in her role as a Programme Leader.

[6] Each witness, under oath or affirmation, attended the investigation meeting, confirmed their written statements and answered questions. The parties also provided

relevant background documents. These included Ms Hamlin's employment agreement, NorthTec's organisational review documents and position descriptions for the former roles and for the newly created roles that were in issue.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.¹

The issues

- [8] The issues for determination following the investigation meeting were:
- (i) Had NorthTec, through delegated managers, acted in good faith in how the restructuring process was carried out and decisions were made?
 - (ii) Were newly created roles substantially similar to ones held by Ms Hamlin?
 - (iii) Did NorthTec meet its good faith obligations in considering prospects for redeployment of Ms Hamlin?
 - (iv) Was the redundancy compensation due to Ms Hamlin correctly calculated?
 - (v) If NorthTec were found to have acted unjustifiably in its decisions and how they were made, what remedies should be awarded considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act; and
 - (c) whether reduction of any remedies awarded was required under s 124 of the Act for blameworthy conduct, if any, by Ms Hamlin that contributed to the situation giving rise to her grievance?
 - (vi) Should either party contribute to the costs of representation of the other party?

¹ Employment Relations Act 2000, s 174C(4).

Ms Hamlin's work and the context of her grievance

[9] Ms Hamlin's roles at NorthTec had changed several times since she started work there in May 2011. Her first substantive role was split between 0.6 FTE as a Personal Assistant and 0.4 FTE as an administrator. In September 2015 she was seconded into the position of Directorate Support Manager. In July 2016 she was seconded to the role of Programme Leader for the Visual Arts (incorporating Creative Writing) and Business Administration and Computing. In March 2017 a restructuring exercise resulted in her first substantive role being disestablished. She was then formally redeployed into a revised substantive role as a Personal Assistant to support three Directors. However Ms Hamlin never worked in that role as she had continued to work in her seconded role as a Programme Leader.

[10] In October 2017 NorthTec advised staff of a further restructuring review. Ms Hamlin was told by letter from Mr Ewen that this review included proposals to disestablish both her substantive position as a Personal Assistant and her seconded role of Programme Leader. The letter said that she would have "the option of returning" to the substantive role of Personal Assistant if decisions taken impacted on her seconded role and she "would also have the option of applying in competition with others for any alternative positions, which are advertised".

[11] In a 111-page consultation document for staff NorthTec said it would "seek opportunities" to redeploy employees whose roles were proposed to be disestablished "into new/vacant roles that have similar employment terms and conditions". New or vacant roles were listed in the document and staff were asked to carefully consider whether they met the selection criteria before applying for consideration for redeployment. Those criteria were stated to be: "length of service, relevant knowledge (role and institutional), experience, skills, values, competencies, behaviours, past performance".

[12] On 6 December 2017 Ms Hamlin requested redeployment into one of four roles that she understood from the consultation document were available as new or vacant roles. Listed in her order of preference those were Pathway Manager, Business Growth Manager, Student Recruitment Team Leader and Recruitment Services Team Leader.

[13] On 8 December 2017 she was formally advised by letter from Mr Ewen that her seconded Programme Leader role and her substantive Personal Assistant position were to be disestablished. The letter said her employment would end in February 2018 unless an alternative option became available and was agreed. Potential alternative options were identified as redeployment or retraining. Redeployment was described as involving her “moving into an alternative role, if available, at the same or lower salary within NorthTec”.

[14] Further decisions in the restructuring process had removed the Recruitment Services Team Leader role from those available by the time interviews were held for roles in which Ms Hamlin had expressed an interest. She was interviewed for the three other roles but the Student Recruitment role was, soon after, also withdrawn and incorporated into another role. On 22 December Mr Harrop advised Ms Hamlin by letter that she had been unsuccessful in her applications for redeployment to the role of Pathway Manager or of Business Growth Manager. By email that day she asked one of the interviewers for clarification about those decisions because she said she had received “some conflicting feedback”. She said that feedback from the interview panel for the Business Growth role was that her “cultural competencies” were high and her leadership ability was sound but on the Pathway Manager role was told that she was “not culturally competent and ... was lacking in leadership ability”.

[15] Ms Hamlin’s case in the Authority focussed on why she was not appointed to the Pathway Manager role. The particular role she applied for had responsibility for visual arts and creative writing courses. She said this was substantially similar to the previous Programme Leader role she had been carrying out which also had a focus on the creative writing area. Documents provided by NorthTec did not disclose the details of whatever analysis the appointments committee had carried out, using the stated selection criteria, of Ms Hamlin’s suitability or otherwise for the role and why it had reached its decision not to recommend her redeployment to that position. Instead the Creative Pathway Manager role was eventually filled by an external candidate because, according to Mr Harrop’s evidence, NorthTec had “considered [and] exhausted all internal applicants”.

[16] Two new roles were also created following the disestablishment of the substantive Personal Assistant role that Ms Hamlin had formally held at the time but had not actually worked in. Those new roles comprised a 0.5 FTE role as an

Executive Assistant to NorthTec’s Development Director and a 0.5 FTE role as a Governance Administrator supporting NorthTec’s Council. Ms Hamlin asked for the job descriptions for both roles but, as acknowledged in Mr Harrop’s witness statement, those documents were not available until 22 January. Ms Hamlin did not apply for either role before her employment ended on 18 February 2018.

[17] Later in 2018 Ms Hamlin did apply for a similar Governance role when it was advertised externally some weeks later but she was not shortlisted for interview.

[18] She raised a personal grievance in March 2018.

NorthTec’s obligations – the employment agreement, the Act and case law

[19] Ms Hamlin’s employment agreement set out “options” to be considered in the event her position was declared surplus to requirements. These included:

Redeployment

The employee may be redeployed to a new job at the same or lower salary within the Polytechnic. ...

Retraining

The Employer may, following application from the employee, offer the option of retraining with financial assistance ...

Severance

The aim will be to minimise the use of severance. Where the other options are inappropriate to discharge the surplus the option of severance will be made available.

...

[20] Both parties were also subject to their mutual good faith obligations to be active and constructive in maintaining a productive employment relationship. For NorthTec this included, but was not limited to, an obligation to provide Ms Hamlin with information relevant to the continuation of her employment.²

[21] The decisions that NorthTec managers made about the future of Ms Hamlin’s employment, and how they went about making those decisions, had to meet the statutory test of justification.³ What they did, and how they did it, had to be what a fair and reasonable employer could have done in all the circumstances.

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

³ Employment Relations Act 2000, s 103A.

[22] The assessment of whether an employer has met that standard of justification in making decisions about the similarity of positions available for redeployment and a worker's suitability for such a position is guided by case law. Assessed objectively, as a matter of fact and degree, a worker could not be deemed unsuitable or unqualified for a position where the requirements of that role are substantially the same or similar to the one in which she or he has been working. There must be some sufficient, objectively discernible difference between the two roles in order to justifiably break the essential continuity of the employment relationship.⁴

[23] The selection process and its outcome also forms part of the employer's conduct to be reviewed.⁵

[24] As noted in learned commentary on this area of employment law, paying lip service to redeployment is not consistent with the good faith obligation to be active and constructive in *maintaining* a productive employment relationship. Examples of such lip service include too readily discounting an existing employee's ability to meet the requirements of a role declared to be "new", or by seeking to exaggerate the differences between the existing and new roles.⁶

[25] In *Wang v Hamilton Multicultural Services Trust* the Employment Court did not accept an employer had justifiably decided, in a redundancy situation, not to offer an employee an alternative position because that role had a higher salary. This was because the Court found the evidence showed functions of the available alternative role were within the capabilities of the worker, he had performed higher management functions in a relieving capacity and, with some upskilling, would easily be able to perform the new role. It described this as akin to the normal process of promotion in commercial enterprises.⁷

Good faith: did NorthTec meet its obligations in how it carried out the process?

[26] The first element of Ms Hamlin's case was, in paraphrased form, that Mr Ewen had misled her about her prospects for continued employment. She relied for this view on her recall and understanding of a discussion with Mr Ewen in June 2017.

⁴ *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984 at 995 and *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378, 392.

⁵ *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102 at [38].

⁶ Geoff Davenport and Frances Lear "Redundancy challenges – *Wang* eight years on" [2018] ELB 94 at 95.

⁷ [2010] NZEmpC 142 at [43].

[27] After the first restructuring exercise was completed by around March 2017, it was widely understood that there would be a further review in the near future. Ms Hamlin was concerned about what that might mean for her job security. She talked to Mr Giles about her fears for her future employment at NorthTec. Mr Giles told Mr Ewen about those concerns. He asked Mr Ewen to meet and talk with Ms Hamlin. Mr Ewen responded to the request by suggesting that they do so immediately and they both walked to Ms Hamlin's office. In the discussion that followed Ms Hamlin said Mr Ewen "indicated very strongly" that she would continue to be employed in the same or equivalent role following the anticipated restructuring. Mr Giles, in his oral evidence, recalled thinking Mr Ewen went further than he needed to in reassuring Ms Hamlin and had indicated that, if she kept going on as well as she was, there would be a place for her in the new structure. However Mr Giles also accepted that Mr Ewen had not said she would get a job in the outcome of the review.

[28] Mr Ewen did not recall that discussion specifically. He accepted he would have commended Ms Hamlin for her work but insisted he would not have pre-empted the outcome of the restructuring process by telling her she would secure an equivalent role. He also denied Ms Hamlin's account that he had made similar comments in a subsequent discussion several weeks later.

[29] On the balance of probabilities it was unlikely Mr Ewen gave Ms Hamlin a degree of reassurance about a future role such that she could say she was misled in a way that amounted to a breach of good faith. While she recalled saying to herself "I'm safe" after talking to Mr Ewen, Ms Hamlin also accepted that her level of confidence was based on assumptions rather than any commitment from him about her future employment. It was, for Mr Ewen, one of many discussions he had with staff members around that time about their future employment prospects at NorthTec. In his role he was, as he said in his oral evidence, aware of the highly-charged nature of the situation and the need to be careful about what he said so staff did not end up believing firm commitments had been made.

[30] Ms Hamlin had not, on the available evidence, established a failure of good faith by NorthTec on account of her impressions and recall of those conversations with Mr Ewen.

[31] There was, however, a failure of good faith in not providing timely information to Ms Hamlin about the new Executive Assistant and Governance Administrator roles, both half-time, for which she could also have applied. She asked for the job descriptions for both posts before the 12 December deadline set in NorthTec's restructuring decision document for applying for redeployment but those documents were not available until late January 2018. While Mr Harrop acknowledged NorthTec's failure, his evidence also sought to minimise the importance of those job descriptions for Ms Hamlin in assessing whether they were roles for which she wished to apply. He said he believed her previous experience and knowledge of NorthTec gave her "sufficient insight" into those roles so she would be able to determine if they were attractive options without looking at the job descriptions. If those job descriptions were so similar to previous roles, it begged the question why they were being described as new roles. Regardless, that failure fell well short of the good faith obligations to provide information relevant to the continuation of an employee's employment during a restructuring process. In that situation, not of her own making, Ms Hamlin could not be fairly criticised for then pursuing the option that she did have information about and that was in the area of NorthTec's business in which she had actually been working, that is the Creative Pathway Manager position.

Was the Pathway Manager role substantially different?

[32] The second element of Ms Hamlin's case focussed on why she was not redeployed to the Pathway Manager role, which she said appeared to be very similar to the role of Programme Leader she was already doing.

[33] The onus lay on NorthTec to establish that it had justifiably taken the view that the roles were so different that Ms Hamlin could not have automatically transferred into the Creative Pathway Manager role. For reasons that follow NorthTec has failed to compellingly establish that role differed sufficiently in function and responsibility from what, Ms Hamlin already did in practice and effect in the Programme Leader role.

[34] Mr Harrop, in his written evidence, said the Pathway Manager role was "both different and more senior" than Ms Hamlin's previous role so there was no obligation to redeploy her. He said more senior responsibilities and wider spans of control in the role were recognised by a starting salary set at between \$90,000 and \$93,000. This

was around \$20,000 more than Ms Hamlin's total remuneration of \$73,092 at the time. Her pay for the Programme Leader role comprised a base salary and a higher duties allowance.

[35] Mr Harrop said the Pathway Manager role was "more strategic" in nature while the Programme Leader role was primarily operational. It included an additional responsibility for managing the financial performance of the academic team as a result of the disestablishment of two Operations Manager positions who previously bore those responsibilities. It transferred responsibility for academic leadership, previously held by the Programme Leader, to senior academic staff members. It also transferred some administrative duties of the Programme Leader to an administrative support position called the Pathway Co-ordinator.

[36] A closer examination of the job descriptions and the revised structure established the differences were either not as substantial in effect as alleged on NorthTec's behalf or were not sufficiently clear to confirm a practical distinction.

[37] Firstly, a supposed difference in seniority between the roles was not clear from the relative positions in NorthTec's internal hierarchy or reporting lines before and after the restructuring. Both were 'tier 4' positions.

[38] Secondly, on financial management, there was no clear difference between the requirements in the respective job descriptions. The Pathway Manager was set an objective to "manage resources and budgets ensuring all staff have a clear understanding of NorthTec's expectations and are supported to achieve them, addressing area of concerns". The Programme Leader was set a business management objective to "ensure the appropriate allocation and effective, efficient staff deployment within targets and budgets so that delivery is cost effective and maximises capability".

[39] Thirdly, both were responsible for maintaining necessary course accreditations. For the Pathway Manager this was described as 'manag[ing] external accreditation and audit requirements'. For the Programme Leader this was described as 'ensur[ing] all courses and programmes have the necessary approvals and accreditation.'

[40] Fourthly, both had similar responsibilities for dealing with student pastoral care, student complaints and addressing underperformance by members of the academic team.

[41] NorthTec submitted it had done more than required by its contractual obligations in even considering Ms Hamlin for the Pathway Manager role. This was because the salary level for that role was higher than she got as a Programme Leader and the contractual obligation to consider redeployment referred to “a new job at the same or lower salary”. However this was too narrow a reading of its contractual obligations, placed too much emphasis on subjective elements concerning her individual salary history, and underplayed its statutory obligations. Relabelling a job title from leader to manager, given the requirements of the role and its position relative to others, did not substantively change its nature. The salary level set for the Pathway Managers resulted from an evaluation of their roles but some other Programme Leaders were already being paid at that or a higher level. Those salary ranges resulted from differences in leave, length of service, experience and performance assessments over a period of years. The lower level of salary paid to Ms Hamlin in her performance of the Programme Leader did not relate to the content of the role, compared to that of the Pathway Manager role, or her performance in it. Rather it was, assessed practically, more likely to be the result of having being seconded to do that job from her previous, more lowly paid, administrative roles.

[42] A further factor in rejecting NorthTec’s submission on this point was that its contractual obligations to redeployment could not be read in isolation to other provisions on redundancy in her employment agreement. These specifically committed NorthTec to aiming to minimise the use of severance, effectively using it as a last resort. That commitment was not met by a narrow application of the redeployment term focussing only on subjectively-set, relative salary levels as a basis of comparison for the similarity of roles.

[43] As a result NorthTec failed to establish that it acted justifiably in deciding the Creative Pathway Manager role was so substantially and discernibly different that the changes in job title and position description from the Programme Leader role Ms Hamlin performed broke the essential continuity of the employment relationship. On that view she should have been transferred to the new position rather than made to apply for it through a competitive redeployment process. However, if that conclusion

was not correct, it was necessary to assess whether what NorthTec did do to consider the prospects of redeploying Ms Hamlin was fairly conducted and concluded.

Did NorthTec meet its obligations in considering alternative roles?

[44] The third element of Ms Hamlin's case focussed on what she and NorthTec did in the process she was required to undergo in seeking appointment to the Pathway Manager role. While the evidence also canvassed what happened in relation to the prospect of appointment to other roles, both before and after her employment ended, it was this particular role that was important to her and in which the justifiability of NorthTec's actions were most clearly tested.

[45] The NorthTec restructuring decisions initially created 8.5 Pathway Manager roles although these were reduced to six positions before any appointments were made. Ms Hamlin was, according to Mr Harrop's evidence, one of three employees who applied for redeployment to the Creative Pathway Manager role. However, after interview and consideration by an appointment panel, no internal candidate was considered suitable for the Creative Pathway Manager role. It was later filled by an external candidate.

[46] Four applicants for other Pathway Managers roles were eventually appointed. Three of those applicants were previously Programme Leaders and, according to Mr Harrop's oral evidence, got pay rises as a result.

[47] However Mr Harrop's view was that NorthTec was under no obligation to interview any of the internal applicants because the Pathway Manager roles, including the Creative one, were "different and more senior" than the applicants' previous roles. For reasons given earlier in this determination that stance has not been accepted in relation to Ms Hamlin's situation. However, having decided to give her the opportunity to be considered for redeployment, NorthTec was then obliged to conduct itself fairly and reasonably in what it did to assess her application.

[48] There was no direct evidence about how NorthTec's interview panel applied or considered its declared selection criteria relating to "length of service, relevant knowledge (role and institutional), experience, skills, values, competencies, behaviours, past performance". Mr Harrop, according to his oral evidence, was not personally involved in the panel that interviewed Ms Hamlin and could not explain

the details of why she was not recommended for appointment. The letter sent to her about that decision said only that she had “obviously have considerable skills and experience” but was unsuccessful in being appointed.

[49] Ms Hamlin’s own efforts, by email inquiry to the panel co-ordinator, drew a response in early January 2018 saying she had “clearly demonstrated a positive attitude and knowledge in developing a skilled teaching team”. However the co-ordinator said “the team” felt she had “limited understanding of cultural competencies” needed to increase Maori achievement, limited experience and proven success at the leadership level required for the new role, and lacked specific industry related qualifications and networks.

[50] Ms Hamlin submitted those conclusions were neither fair nor accurate. She had a business management degree, had developed industry networks during her 18 months in the Programme Leader role, and had previously drawn praise for her leadership in promoting NorthTec programmes. Some available evidence supported those contentions. A recent NZQA monitoring report on the Bachelor of Applied Arts commended her personal initiative in promoting the degree programme to local high schools. Her most recent performance review rated her as a “solid performer”.

[51] The basis for comments about Ms Hamlin’s so-called cultural competency was also unclear. Her resume showed she had completed courses in Maori pedagogy in education, NorthTec’s own introductory Maori language course *Ko Te Ha o Te Reo* and a course on cultural competency.

[52] However the deficit in the actual evidential foundation for NorthTec’s assessment that Ms Hamlin was not suitable for the Creative Pathway Manager role was not the only problem in considering the fairness of what it had done.

[53] The restructuring decision document issued by NorthTec in December 2017 referred to a new position of “Manager Pathway Creative” being 1.5 FTE. Its scope included the visual arts and creative writing courses and its Maori language and arts programmes, Toitū Te Reo and Toi Te Waingārahu. This explained the reference in the “person specification” of the job description to essential cultural competencies including proficiency in te reo Maori and knowledge of Maori values and customs. However the 1.5 FTE allocation for the role also clearly contemplated, as Mr Harrop confirmed in his oral evidence, appointing more than one person to perform the

designated tasks. It was not clear both potential appointees would have needed the same higher competencies in understanding and use of reo and tikanga. The assessment of Ms Hamlin appeared to assume it would, resulting in an unfair emphasis on those competencies to a higher level than needed if she was appointed to the part of the role that related to other courses.

[54] Similarly, the consideration of her skills and experience for redeployment purposes was made on a competitive basis against an unfairly high standard. The assessment was not simply on ability to do the job and do it better than other contenders within NorthTec but also against the standard of some 'ideal' or better suited person elsewhere. While that standard might be suitable for assessing candidates to a vacant role, it was higher than declared by NorthTec when announcing that employees in disestablished roles would be considered for redeployment. Its December 2017 decision document NorthTec said candidates for redeployment would be selected by applying the criteria of length of service, relevant knowledge of the role and institution, experience, skill, values, competencies, behaviors and past performance. While NorthTec's initial letter about the prospect of redundancy sent to Ms Hamlin in October 2017 had referred to the "option of applying in competition with others for any alternative positions which are advertised", it did not say this would be in competition with any external candidates. The approach taken later considerably raised the hurdle for being redeployed from being sufficiently able to do the job, to that of meeting an ideal standard.

[55] The difficulty with that approach was that, it appears, no assessment was made of whether, if there truly were deficits in her skill and experience, Ms Hamlin could have met the requirements of the role by NorthTec providing her with additional training and support. The employer in the *Wang* case was found liable to do so. This was not contemplated because NorthTec had taken the view that even offering Ms Hamlin the opportunity to apply for the Pathway Manager role went beyond its contractual obligations because the salary for that role was higher than her earnings in the disestablished Programme Leader position. It submitted any common law obligations were fettered to those within the scope of its contractual obligations, which was to consider redeployment to a new job at the same or lower salary. That submission is not accepted because those contractual obligations were also subject to the statutory good faith obligations to take active steps to maintain existing relationships.

[56] As a result NorthTec failed to establish that it acted justifiably in how it carried and concluded its process of considering redeployment of Ms Hamlin. The defects in what it did were more than minor and resulted in her being treated unfairly. Her resulting dismissal for redundancy, and how it decided, were not what a fair and reasonable employer could have done in all the circumstances at the time. Accordingly she had established a personal grievance for unjustified dismissal. Her claim for remedies for that grievance must be assessed.

Redundancy compensation: was the payment to Ms Hamlin correctly calculated?

[57] Ms Hamlin said NorthTec had underpaid a redundancy compensation sum due to her under the terms of her employment agreement. The agreement provided for a payment calculated on the basis of four weeks' salary for the first year of service and two weeks' salary for subsequent years of service. A letter dated 8 December 2017, advising Ms Hamlin of the disestablishment of her roles and the prospect of dismissal for redundancy, had included an "indicative amount" that she would be entitled to receive on termination of her employment. The calculation of this amount was set out in a table that included a note saying the amount was based on her "earnings over the 12 months immediately prior to the date of this letter".

[58] Ms Hamlin's earnings in that 12 month period comprised two elements. Firstly, she was paid an annual base salary of \$55,673. Secondly, she was also paid an annual higher duties allowance of \$17,419 for additional responsibilities in her seconded role as a Programme Leader.

[59] However the calculated amount stated in the 8 December letter was not based on the combined total of those two elements. It used only the base salary. This was consistent with the clear reference in the contractual obligations to "salary" as the basis for the required payments. NorthTec was not bound by its error in the note to pay Ms Hamlin any more than an amount based on her base salary.

Remedies

Lost wages

[60] Ms Hamlin sought reimbursement for lost remuneration for the period from 18 February to 17 July 2018 when she began a new part-time role.

[61] She suffered ill-health through this period, attributable to upset caused by her dismissal for redundancy and how that happened. This affected her ability and confidence in seeking new employment but Ms Hamlin had applied for suitable jobs through February to May, eventually securing the new role she undertook from July. Those were reasonable efforts to mitigate the loss and established her entitlement to an order for at least three months' ordinary time remuneration.

[62] The circumstances of her dismissal, and its effect on her health, warranted an extension beyond that minimum period. In exercise of the discretion allowed under s 128(3) of the Act the period for the award of lost remuneration is set at five months. Ms Hamlin sought an order that the award be calculated on the basis of the salary she might have earned if appointed to the Pathway Manager role but it must be based on her earnings in the Programme Leader role from which she was dismissed. Those earnings comprise both the base salary and the higher duties allowance, totalling \$73,092. The award of five months lost remuneration is \$30,455. Within 28 days of this determination NorthTec must pay Ms Hamlin this amount, less any applicable income tax, as lost remuneration under s 123(1)(b) and s 128(3) of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[63] The circumstances of Ms Hamlin's dismissal caused her harm of the types identified in s 123(1)(c)(i) of the Act. While some of the shock she experienced arose from overconfident assumptions about her future prospects, arising from discussion with Mr Ewen, she was nevertheless distressed by a redeployment process that was unfairly conducted. This was humiliating. She took considerable pride in her work and it damaged her dignity for her employment at NorthTec to end in that way. This differed from a situation where a dismissal for redundancy was fairly carried out and the inevitable upset, absent other failures by the employer, is not compensable. Here Ms Hamlin had some prospects for continued employment which were denied to her by unfair treatment that deeply injured her feelings. Ms Hamlin reported suffering seriously disturbed sleep, nightmares and an ongoing need for medication to assist with resulting symptoms of depression. It affected her family life and confidence in engaging with others. Considering the range of awards in similar cases, and the particular circumstances of Ms Hamlin's case, those serious and ongoing effects on her warranted a compensation award of \$15,000. This is the amount NorthTec must

pay Ms Hamlin, without deduction, as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

No contributing behaviour requiring a reduction of remedies

[64] No conduct of Ms Hamlin in this matter contributed to the situation giving rise to her grievance, so no consideration of reducing remedies awarded was required.

Costs

[65] Ms Hamlin represented herself in pursuing her application. There was no information that she had incurred any costs for legal advice or representation in preparing her claim. No costs were sought. There is no order for cost but NorthTec must reimburse Ms Hamlin \$71.56 for the expense of the fee paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority