

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 504  
3078716

BETWEEN RACHEL DIMOLINE  
Applicant

AND THERMO FISHER  
SCIENTIFIC NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Marija Urlich  
Representatives: Rhys Walters, counsel for the Applicant  
Jim Roberts, counsel for the Respondent  
Investigation Meeting: 1 and 2 July 2020  
Submissions: 3 July 2020  
Determination: 4 December 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Rachel Dimoline was employed by Thermo Fisher New Zealand Limited (Thermo Fisher) from August 1992 until September 2019 when her employment ended. Ms Dimoline says her employment ended by way of redundancy or, in the alternative, variously, that she was unjustifiably constructively dismissed or, Thermo Fisher's actions amounted to a repudiation of the employment agreement which she accepted by way of cancellation. She says she is entitled to redundancy compensation under the terms of her individual employment agreement. She also says Thermo Fisher's refusal to pay her redundancy compensation unjustifiably disadvantaged her in her employment. She seeks remedies to compensate her for these alleged breaches.

[2] Thermo Fisher says Ms Dimoline was offered redeployment and her failure to accept such deprives her of any claim her employment ended by way of redundancy. It says she was not unjustifiably constructively dismissed or that the employment agreement was repudiated.

### **The Authority's investigation**

[3] In the course of the investigation the Authority heard evidence from Ms Dimoline and four witnesses for Thermo Fisher, Grant Steyn, Linda Pieretti, Tamara Hart, and Elizabeth Briggs. Submissions were subsequently filed.

[4] 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. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and the submissions of their representatives.

[5] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

### **Issues**

[6] The issues requiring investigation and determination are:

- a. Was Ms Dimoline's position made redundant under clause 12 of her individual employment agreement?
- b. In the alternative, was Mr Dimoline unjustifiably constructively dismissed or, did Thermo Fisher's actions amount to a repudiation of the employment agreement?
- c. If so, are any wage arrears or other monies owed to Ms Dimoline?
- d. Has Ms Dimoline suffered an unjustified disadvantage in her employment? If so, should compensation under s 123(1)(c)(i) of the Act be awarded?

- e. If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Dimoline that contributed to the situation giving rise to her grievance?
- f. Did Thermo Fisher breach its duty of good faith? If so, should the Authority order it to pay a penalty?
- g. Is an award of special damages warranted?
- h. Should either party contribute to the costs of representation of the other party (including a consideration of costs incurred prior to and subsequent to the filing of the statement of problem)?

### **The employment agreement**

[7] Ms Dimoline's employment agreement includes:

#### 12. Redundancy

12.1 Where any redundancy situation arises, the Employee will be given not less than one month's notice of termination.

12.2 Payment made will be on the basis of six (6) weeks for the first full year of service and two (2) weeks for each complete year thereafter. No pro rata payment will be made for part of a year and no payment will be made in respect of less than twelve (12) months' service.

[8] Given the parties' agreement as to how the employment relationship will end in a redundancy setting the key issue for the Authority to determine is whether a "redundancy situation" arose. The employment agreement does not define "redundancy situation".

### **Background**

[9] Ms Dimoline's employment with Thermo Fisher's historical predecessor, Salmond Smith Biolab Limited, started in August 1992. The business specialised in the sale of laboratory equipment and consumables in the scientific industry in New Zealand and the Pacific Islands. This was the area in which Ms Dimoline worked throughout her employment. The sale of, at that stage Biolab Limited, to Thermo Fisher in 2009 expanded the geographical scope of the business to include Australia to the extent product strategy was run from the Australian head office and ultimately product strategy was reorganised from geographical to product lines across all territories. This

geographic expansion and reorganisation is the context in which Ms Dimoline's role was restructured and ultimately, the employment relationship problem.

[10] During Ms Dimoline's long employment history with Thermo Fisher and its predecessor entities she held a number of roles. Her first role, starting 24 August 1992, was as a customer service representative. In 1994 she was promoted to a role as a sales representative. In 2003 the role title was changed to "Clinical Specialist, diagnostic products" but remained essentially the same. In June 2005 Ms Dimoline was promoted from what she described as a travelling field sales role to "Product Manager - lab products", an office-based management role. In June 2007 Ms Dimoline was promoted to "Group Product Manager – consumables laboratory products (NZ)". In April 2009 Thermo Fisher bought shares in Biolab Limited (successor to Salmond Smith Biolab Limited) and in November 2009 her employer's name changed to Thermo Fisher Scientific New Zealand Limited. The business was now part of a large multinational organisation. In January 2015 Ms Dimoline was appointed to the role "Product Manager – microbiology and diagnostic" the role she held at the time her employment ended and which she described as follows:

As of 2019, I had been in the role for just over four years...I had grown the business year on year in NZ and the South Pacific for the company. The role covered all of our markets, for example food, dairy, beverage and consultancy labs, hospital and private labs, and so on: if it had anything to do with microbiology product lines, then I was responsible. It was a position that I thoroughly enjoyed, I was well respected by my peers, and I was extremely proud of what I had achieved with my time in the position. I was looking forward to continuing in this role over the coming years.

[11] The Authority is satisfied that during Ms Dimoline's long employment history with the succeeding businesses she has moved from sales roles to product manager roles, gaining more responsibility with each role and spending less time on the road.

## **Restructuring**

*22 August 2019*

[12] On 22 August 2019 Mr Steyn wrote to Ms Dimoline seeking her comment on a proposal to disestablish her role and that, if the proposal went ahead, she would be "appointed" to a role titled "Product Specialist, microbiology". The letter made it clear that if this occurred this would not be "a redundancy situation". A proposed job

description and intended employment agreement were not attached to the letter. Prior business wide communication had foreshadowed this restructuring.

[13] On 22 August 2019 Ms Dimoline was invited to a meeting about the restructuring to be held later that morning with four representatives of Thermo Fisher management and human resources.<sup>1</sup> Thermo Fisher's record of the meeting includes:

- Mr Steyn outlined the restructure and gave Ms Dimoline an opportunity to respond and ask questions;
- Ms Dimoline said she realised change was coming and understood the rationale behind the restructure;
- in answer to Mr Steyn's query about her thoughts on the product specialist role Ms Dimoline is recorded as saying "I've done it in the past, I was the territory manager for clinical for 9 years, selling has been part of my history, also part of the PM role."<sup>2</sup>

[14] Ms Dimoline understood the product manager role to be a sales role.

[15] At the meeting Mr Steyn gave Ms Dimoline a letter which outlined the restructuring proposal which included:

**What happens if the company implements the proposal?**

At this stage Thermo Fisher Scientific has made no final decision to implement the proposal. For your information, if the company does move ahead with the proposal you would be directly appointed into the Product Specialist role based in New Zealand and there would be no situation of redundancy.

**Next steps**

We would appreciate your input and consideration of the proposal. Please take this letter away to consider its contents and implications.

We propose that the next meeting with you take place next week on 29 August 2019. You can bring a support person or representative along with you to this and any future meetings. The purpose of this meeting will be to gain feedback from you on the proposal, any alternative ideas you have and discuss any issues or questions you have in relation to the proposal and the process we intend to follow.

We will consider your feedback and any questions you have before making a decision whether or not the company will implement the proposed restructuring.

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<sup>1</sup> Grant Steyn, director portfolio management, Australia New Zealand, Tamara Hart, human resource generalist and talent acquisition lead for microbiology division Australia New Zealand Linda Pieretti, technical sales manager Australia and New Zealand and Elizabeth Briggs, New Zealand based human resource partner.

<sup>2</sup> "PM" – product manager.

[16] A job description for the Product Specialist role and proposed employment agreement were not provided at this meeting.

*29 August*

[17] On 29 August Ms Dimoline attended a further meeting regarding the proposal with Mr Steyn, Ms Pieretti, Ms Hart and Ms Briggs by telephone. The meeting was held in Melbourne where Ms Dimoline was attending training and the other attendees, except Ms Briggs, are based.

[18] Prior to or during the meeting Ms Dimoline did not provide any feedback on the proposal to disestablish her role. She said in her evidence while it was not a decision she would have made she could see the logic to it and accepted it was the business' decision to make.

[19] The focus of the meeting was the product specialist role. Thermo Fisher's notes of the meeting record the role as described as "sales", "being on the road", "Role purity: sales specialist role". Ms Dimoline is recorded as describing the new role in the meeting as "a challenge; it's nothing I haven't done before; I know about the new sales process". The notes conclude with the next steps being the provision of "paperwork to confirm new role".

[20] At the end of the meeting Mr Steyn handed Ms Dimoline a prepared letter which confirmed the outcome of the restructuring proposal including:

...

As discussed, the consultation period was an opportunity for you to provide feedback on the proposal, any alternative ideas you had and discuss any issues or questions you had in relation to the proposal and the process we intend to follow.

The consultation period has concluded. We note that we received feedback and are pleased to directly appoint you to the permanent and fulltime role of Product Specialist – Microbiology (Industrial) for New Zealand. Please refer to the attached employment documents for further details.

We note the following in relation to the employment documents:

- Your base remuneration...will remain the same. Your change in role will not impact on the regular total comp review cycle which will occur in April 2020;

- Your new employment agreement will include the following variation:
  - o The restrictions after termination of employment are for a period of six months (this is a reduction from 2 years in your current employment agreement)
  - o There will be no entitlement to redundancy compensation in the event your role is declared redundant.

...

[21] There is no dispute the letter was prepared and signed prior to the meeting or that the “attached employment documents” referred to in the letter were not provided at that time.

[22] There is no dispute the terms regarding redundancy and restraint of trade had not been discussed with Ms Dimoline prior to the letter dated 29 August being handed to her which purported to record her direct appointment to a new role.

[23] There is also no dispute those terms alone were significant changes to the existing terms of employment between the parties. The Authority understands Thermo Fisher’s position to be Ms Dimoline had accepted the offer prior to presentation of the employment documents and she was therefore bound to accept any downgrade in terms and conditions contained therein or, in the alternative, that these matters could have been negotiated between the parties.

[24] It is difficult to understand how Thermo Fisher could claim Ms Dimoline had agreed to be bound by an agreement the terms of which she did not know. Notwithstanding, the contemporaneous notes of the meeting taken by Thermo Fisher do not record Ms Dimoline’s explicit acceptance of the offer and record her need to review the necessary documentation. I do not accept there was a reasonable basis for Thermo Fisher to believe Ms Dimoline had accepted the product specialist role at the 29 August meeting.

[25] Mr Steyn’s statement in the letter handed to Ms Dimoline on 29 August as to what would be included in the employment documents is stated in the definitive “will” which does not suggest, at least in respect of the key changes identified in that letter, that there was any room for negotiation. The 22 August letter does not suggest the negotiation or discussion is possible; it asserts a “direct appointment” from one role to the other.

### *3 September*

[26] On 3 September Ms Pieretti emailed Ms Dimoline attaching the employment documents, asking her to sign and return the executed documents, that any questions could be directed to herself, Ms Hart or Ms Briggs and that Ms Briggs and Ms Kwok would be in the Auckland office in the next few days should she require assistance. The letter opened:

Further to our discussion last week, please find attached the outcome letter and contract for your review.

[27] The outcome letter referred to in Ms Pieretti's email was the letter Mr Steyn handed Ms Dimoline at the conclusion of the 29 August meeting.

[28] Ms Dimoline reviewed the documents and emailed Ms Pieretti that day that "before she printed the documents off and had them independently reviewed" she asked that the following be attended to:

- that references to the name 'Dale' be removed and only Ms Dimoline's name mentioned in the relevant places;
- whether the product specialist position came with her current vehicle allowance or a company car;
- a copy of the job description, which was stated as being attached but was not; and
- her existing long service leave entitlement.

[29] By return email Ms Pieretti advised the human resource team would address each point and return to her shortly. The proffered employment agreement records the effective date as 1 October 2019.<sup>3</sup>

### *4 September*

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<sup>3</sup> Clause 3 employment agreement offer 29 August 2019.

[30] On 4 September Ms Dimoline and Ms Briggs met briefly to discuss the terms of Ms Dimoline's long service leave. Ms Dimoline sent Ms Briggs two former employment agreements and said she would look for the handbook which contained the long service leave provision which she located and provided to Ms Briggs.

*6 September*

[31] On 6 September Ms Dimoline contacted Ms Perietti. Ms Dimoline said she told Ms Perietti she intended to seek advice about the offer and Thermo Fisher's position that the situation was not a redundancy. Ms Perietti does not recall this but does recall telling Ms Dimoline to look after herself and seek assistance for her emotional wellbeing. I find it is more likely than not Ms Dimoline expressed concerns to Ms Perietti about Thermo Fisher's offer and the redundancy situation.

*9 September*

[32] On 9 September Ms Dimoline emailed Mr Steyn, copying in Ms Perietti:

I am not sure I want to accept the "Product Specialist-Microbiology (Industrial) Role. In order to help me make an informed decision, could you please confirm the date that my employment as "Product Manager – Microbiology and Diagnostic" will come to an end?

[33] On 10 September Mr Steyn emailed Ms Dimoline, copying Ms Perietti and Ms Hart:

I am really surprised to hear you are considering changing your mind on the role. When we concluded the consultation period on 29 August, you had verbally accepted the position of Product Specialist. I confirm that the date your current role is being disestablished is 30<sup>th</sup> September 2019. You are not personally impacted by redundancy due to the appointment to the comparable and equitable role of Product Specialist Microbiology (Industrial) NZ.

Please let me know if you wish to discuss further?

[34] On 11 September Ms Dimoline emailed Mr Steyn acknowledging his advice her product manager role would, her words, "end by way of redundancy" on 30 September 2019 and stating the product specialist role was not comparable or equitable and was entirely different. In response to Mr Steyn's statement she had verbally accepted the offer Ms Dimoline wrote:

At the time of the meetings which were held in fairly rapid concession (sic), and with having no alternative option for employment within the company, I did not verbally accept the role but indicated that I would review the job offer once I had received the job description and all related paper work, and go from there with my final decision to accept or decline.

Could you please provide your calculation as to what my contractual redundancy compensation would be, if I did not accept the new position?

[35] The following day Mr Steyn wrote to Ms Dimoline asking to meet “to further discuss and understand your concerns.” The email said she could bring a representative. Copied in where Ms Hart and Ms Briggs.

[36] Ms Dimoline emailed back she did not want to meet “at this point in time” and asked again for the redundancy compensation calculation if she did not accept the new position. On 16 September Mr Steyn replied to Ms Dimoline, again copying in Ms Hart and Ms Briggs that Thermo Fisher’s view was the roles are “comparable and equitable” and that therefore a redundancy calculation was not relevant. He invited her to a meeting to discuss why she thought the roles were not comparable or to put the reasons in writing, setting a date to do so of close of business 18 September.

[37] By 16 September Thermo Fisher had not provided Ms Dimoline with an updated proposed employment agreement or a job description for the product specialist role. The reasons are inexplicable given the amount of specialist human resource support available to Thermo Fisher in this process.

[38] Ms Dimoline instructed Mr Walters who wrote to Mr Steyn on 18 September asserting Ms Dimoline was redundant under the terms of the parties’ employment agreement, seeking confirmation she was entitled to fifty-eight weeks redundancy compensation under that agreement or, if Thermo Fisher did not believe redundancy compensation was due, the legal basis for that position. The letter requested a prompt response given “...the end of our client’s employment is fast approaching...”. This is a reference to the position disestablishment date of Monday, 30 September.

[39] On 20 September Ms Briggs acknowledged the letter and advised that Thermo Fisher’s lawyers would contact Ms Dimoline’s representative the following week. On Wednesday 25 September, having not heard further, Mr Walters wrote to Thermo Fisher (addressees included Mr Steyn, Ms Hart, Ms Briggs and Ms Kwok) asking for a response to the 18 September letter and emphasising the proximity to “the end of

Rachel's employment". Having not received a reply, Mr Walters wrote again on the morning of Thursday 26 September characterising Thermo Fisher's stance and lack of responsiveness as a "clear breach of good faith", restating the relevant timeline and that Ms Dimoline "still does not know where she stands", attaching a copy of the letter dated 18 September and seeking confirmation redundancy compensation would be paid or a statement of position. The letter ended that he was instructed to commence proceedings if a response was not received that day.

[40] Later on 26 September Thermo Fisher's lawyers provided a response including:

- there is no "redundancy situation" because Thermo Fisher is not terminating Ms Dimoline's employment and the functions of her position are not superfluous to the employer's needs;
- Ms Dimoline provided no feedback through the consultation process, despite having the opportunity to do so and "based on the outcome of its consultation" written confirmation of redeployment to the Production Specialist role was provided. The role has equivalent functions and responsibilities to the Product Manager role;
- suggesting a meeting and mediation to discuss concerns about the role;
- deferring the disestablishment of the product manager role beyond 30 September;
- asking Ms Dimoline to explain why she believes the two roles are entirely different and not comparable and equitable;
- the claim of redundancy for what Thermo Fisher believes were minor and incidental changes to position functions is unreasonable;
- Ms Dimoline's employment was not terminated and Thermo Fisher had no intention to do so.

[41] Ms Dimoline's went to work on 30 September. It was her last day of employment with Thermo Fisher. At the end of the day she returned her work items to the office administrator who completed the staff exit form. No representative from human resources or senior leadership was present. For completeness, a job description and updated proposed employment agreement were not presented to Ms Dimoline.

[42] From 26 September through 1 October the representatives exchanged letters restating their client's respective positions. Correspondence between the parties continued including Thermo Fisher offering to reinstate Ms Dimoline to the product

manager role in December 2019. The parties have been unable to resolve this employment relationship problem.

## Discussion

[43] There is no dispute the restructuring of Ms Dimoline's position was for genuine, business reasons. The central issue for discussion and determination is whether Mr Steyn's communication to Ms Dimoline confirming the new structure amounted to notice of redundancy or whether Thermo Fisher was entitled to redeploy Ms Dimoline into the product specialist role.

[44] I have considered a number of cases concerning redundancy and redeployment including *Auckland Regional Council v Sanson*<sup>4</sup>, *New Zealand King Salmon Co Limited v Slotemaker*<sup>5</sup>, *Wang v Hamilton Multicultural Service Trust*<sup>6</sup> and *Waikato District Health Board v Archibald*<sup>7</sup>. Paragraph [39] of *Archibald* provides particular, relevant guidance:

Was employment offered on less favourable terms? Mrs Archibald considered it was; WDHB considered it was not. I approach the issues on the following basis. Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment? Each case is fact dependent. That means that only limited assistance can be gained from reference to earlier cases.

*Was Ms Dimoline's position made redundant under clause 12 of her individual employment agreement?*

[45] Yes. Ms Dimoline was given one month's notice of the disestablishment of her position and at the date of disestablishment there was no agreement between the parties that Ms Dimoline would be redeployed into the new role. At that date, 30 September 2019, a redundancy situation under the terms of the parties' employment agreement arose.

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<sup>4</sup> *Auckland regional Council v Sanson* [1999] 2 ERNZ 597.

<sup>5</sup> *New Zealand King Salmon Co Limited v Slotemaker* [2017] NZEmpC 99.

<sup>6</sup> *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142.

<sup>7</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132.

[46] Thermo Fisher's 11<sup>th</sup> hour extension of the disestablishment date does not vitiate the redundancy situation arising on 30 September. This is because notice under the terms of the parties' employment agreement had been given and Ms Dimoline did not consent to vary the notice.<sup>8</sup> In the absence of agreement as to the terms and conditions of any redeployment option termination was the only possible outcome.

[47] Thermo Fisher submits a redundancy situation could not have arisen because the two-step requirements of a termination for redundancy had not yet been met – Ms Dimoline's role may have been disestablished but the question of her redeployment was still live at 30 September. This argument is not accepted. Thermo Fisher could not vary Ms Dimoline's terms of employment without her agreement. The evidence is clear the product specialist role was significantly different to the product manager role including that the terms and conditions of employment under the proffered role were significantly different:

- Ms Dimoline's evidence is accepted that the new role was significantly different from her current role including that it would require her to move from a product management role to a sales role and move from a desk based role to spending more time on the road. Her evidence was based on her knowledge of the roles and her observation of colleagues in the product specialist role. The notes of the August meetings clearly characterise the product specialist role as a sales role. While it is accepted sales were part of Ms Dimoline's product specialist role it was not a "sales specialist role".<sup>9</sup>
- Thermo Fisher's assertion Ms Dimoline was not performing her product manager role consistent with her job description and if she had it would be more like the product specialist role is not accepted. There was no evidence non-compliance with the job description had been raised with Ms Dimoline prior to the restructuring. As the incumbent in the role Ms Dimoline's evidence as to how it was performed is preferred.
- The loss of redundancy compensation was a significant difference in the terms of employment of the redeployment offer as was the apparent loss of long service leave. Mr Steyn's letter of 29 August contains no rationale for the removal of the redundancy compensation clause in the parties'

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<sup>8</sup> *Malaysia Airline System BHD (New Zealand) Ltd v Malone* [2003] 1 ERNZ 494.

<sup>9</sup> Refer Thermo Fisher notes 29 August 2019 meeting.

employment agreement. Thermo Fisher never addressed the long service leave.

- The reduction in the restraint provisions in the product specialist terms and conditions could not reasonably compensate for the loss of such significant compensatory benefit as the redundancy provision.
- The legal basis of Mr Steyn’s assertion “to directly appoint [Ms Dimoline] to the permanent and fulltime role of Product Specialist – Microbiology” in the letter handed to Ms Dimoline at the meeting on 29 August is unclear. The basis cannot be agreement because the letter was prepared before the meeting and no employment documentation had been proposed to Ms Dimoline to consider and execute. Without her knowledge of the variations to the terms of her employment she could not be bound and any assertion otherwise is unreasonable.

[48] In the absence of agreement as to the redeployment offer and the notice of disestablishment of Ms Dimoline’s position the terms of the parties’ employment agreement were met and a redundancy situation arose.

*(ii) if so, are any wage arrears or other monies owed to Ms Dimoline?*

[49] Yes. Ms Dimoline is entitled to payment of redundancy compensation calculated at 58 weeks under the terms of her employment agreement.

*(iii) has Ms Dimoline suffered an unjustified disadvantage in her employment? If so, should compensation under s 123(1)(c)(i) of the Act be awarded?*

[50] Yes. It is clear from the evidence Thermo Fisher had an intention that the restructuring process would not result in a redundancy situation under the terms of the parties’ employment agreement as clearly articulated in Mr Steyn’s correspondence to Ms Dimoline of 22 and 29 August.

[51] This intention and the determination to implement it has led to Thermo Fisher breaching Ms Dimoline’s employment agreement which the Authority accepts disadvantaged her in her employment by:

- (i) asserting to redeploy Ms Dimoline without her agreement including asserting to vary significant terms of her employment agreement without her agreement (refer letter 29 August);

- (iii) conflating restructuring and redeployment, which I find is what occurred, creating uncertainty as to the process;
- (iv) failing to advise of and give reasons for the purported variation to her terms and conditions of employment prior to purporting to transfer her employment and presenting the intended employment agreement;
- (v) failing to set out clear timeframes at the commencement of the restructuring proposal which meant there was uncertainty in the process from the outset;
- (vi) presenting documentation to Ms Dimoline with clear errors and deficiencies which were not rectified;<sup>10</sup>
- (vii) failing to provide Ms Dimoline with a corrected proposed employment agreement and job description when she drew these issues to its attention;
- (viii) in the face of these clear failings and post notice of redundancy insisting Ms Dimoline justify her concerns about the role.

(iv) *Compensation*

[52] In her witness statement Ms Dimoline set out the effect of the process on her:

Right from the initial meeting held on the 22<sup>nd</sup> August 2019, through to the present day, I have endured significant levels of stress, anxiety and mixed emotions (both sadness and anger), as a direct result of what they did and how they went about it. The disestablishment of my position has been a major contributor to a declining loss of my confidence, compounded with feelings of negative self worth, in the context of me having just over 27 years of loyal service to the company. I do understand that change is inevitable these days in many large multinational companies, but I feel extremely devalued and humiliated with how this whole situation has been handled, specifically by the company's HR department and by Grant. I continue to be both mentally and emotionally drained due to the loss of sleep with both family and close friends commenting on their concerns on my appearance and with how exhausted I appear. Panic attacks (something I have never experience before) and anxiety have manifested by this ongoing situation.

[53] The impact of the restructuring process had had a profound and negative impact on Ms Dimoline. I am satisfied she experienced harm under each of the heads in section

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<sup>10</sup> Refer [28] above.

123(1)(c)(i). She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$25,000.00

*(iv) if any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Dimoline that contributed to the situation giving rise to her grievance?*

[54] No. Thermo Fisher in evidence and submissions is critical of Ms Dimoline's request for a disestablishment date and has characterised Ms Dimoline's conduct as "transfixed on orchestrating her own redundancy", that she tried to "trap the Respondent into terminating her employment by way of redundancy" and that "Her focus was instead, to try to trick the Respondent". On the evidence before the Authority there is no reasonable basis for these claims. As stated above Ms Dimoline is an experienced commercial professional. There is little wonder she would ask for the time frames her employer was working to and insist on receiving and having time to review the correct employment documentation. There is no reasonable basis on the evidence before the Authority to find Ms Dimoline acted unreasonably or in a deceitful or underhand manner as invited by Thermo Fisher. Given the considerable professional resources Thermo Fisher had access to, the clear and obvious failings in the restructuring process cannot be levelled at Ms Dimoline.

*(iv) If not, was Ms Dimoline unjustifiably constructively dismissed?*

[55] Given the above finding, there is no need to consider this issue further.

*(v) did Thermo Fisher breach its duty of good faith? If so, should the Authority order it to pay a penalty?*

[56] It is not clear to the Authority how the claim for breach of good faith is distinct from the personal grievance claim for unjustified action causing disadvantage which is addressed above.<sup>11</sup> Even if the Authority had found Thermo Fisher's actions amount to a breach of good faith that term was not incorporated into the parties' employment agreement. The breach of good faith claim is not allowed.

*(vi) special damages*

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<sup>11</sup> *Kazemi v RightWay Limited* [2019] NZEmpC 73

[57] Ms Dimoline seeks an award of special damages to reimburse her the cost of legal representation in the period leading up to the termination of her employment. The Authority is satisfied but for the breaches of the employment agreement as outlined above by Thermo Fisher Ms Dimoline would not have had to incur those costs. The amount of any such award requires the exercise of a discretion and though the Authority accepts total fees incurred were \$4,522.88 considering all the circumstances, the award is set at \$3000.

### **Interest**

[58] Ms Dimoline is entitled to an award of interest on the redundancy compensation amount. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[59] Thermo Fisher Scientific New Zealand Limited is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:<sup>12</sup>

- (i) Interest on the sum of \$122, 659.16 from 1 October 2019 until the date payment is made in full.

[60] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

### **Summary of orders**

[61] The Authority orders as follows:

- a) Within 14 days of the date of determination Thermo Fisher Scientific New Zealand Limited is ordered to pay Ms Dimoline the following sums:
  - (i) redundancy compensation of \$122,659.16;
  - (ii) compensation under s 123(1)(c)(i) of \$25,000.00;

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<sup>12</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator)

(iii) special damages of \$3000.

- b) Within 14 days of the date of determination Thermo Fisher Scientific New Zealand Limited is to calculate and pay Ms Dimoline interest on the redundancy compensation sum of \$122,659.16 as awarded in paragraph [49] above.

**Costs**

[62] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Ms Dimoline is to file and serve any costs memorandum within fourteen days of the date of determination and Thermo Fisher may file and serve any reply memorandum within a further seven days.

Marija Urlich  
Member of the Employment Relations Authority