

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [19]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 381
3109812

BETWEEN	GARY COLQUHOUN- PETHERICK Applicant
AND	LG ELECTRONICS AUSTRALIA PTY LIMITED Respondent

Member of Authority:	Leon Robinson
Representatives:	Tim Oldfield, counsel for the Applicant Andrew Schirnack, counsel for the Respondent
Investigation Meeting:	19 - 20 May 2021 at Auckland
Submissions received:	1 June 2021 from Applicant 1 June 2021 from Respondent
Determination:	30 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Gary Colquhoun-Petherick (Mr Colquhoun-Petherick) claims LG Electronics Australia Pty Limited's (LG) termination of his employment for redundancy was unjustifiable. He also claims his manager's harassment and bullying behaviour towards him constituted an unjustifiable disadvantage.

[2] LG denies any liability for any contended personal grievance raised by Mr Colquhoun-Petherick and it denies acting in breach of the mutual duty of good faith. In relation to the termination for redundancy it says that in the circumstances of the

national lockdown, its dialogue about, and implementation of, its decision was appropriate, reasonable and lawful. It says too that Mr Colquhoun-Petherick was not bullied and harassed. Instead, having regard to the context of the pressing challenges being faced by its business at the time, concerns with Mr Colquhoun-Petherick's output and the manner of delivery, his manager's interactions with him were appropriate and reasonable in the circumstances.

[3] The parties were unable to resolve the employment relationship problem themselves by mediation. Mr Colquhoun-Petherick asks the Authority to investigate and determine that the problem be settled by formal orders for reimbursement and compensation together with recommendations, the imposition of a penalty and an award of costs.

The Authority's investigation

[4] The Authority establishes the facts of this employment relationship principally through an investigation meeting held at Auckland. The parties and their witnesses lodged written statements of evidence and were examined under oath or affirmation by the Authority and the representatives. Certain LG witnesses attended the investigation meeting remotely via video link. The Authority also received documentary evidence and submissions from counsel on the evidence taken and relevant matters of law.

[5] As permitted by section 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.

Application for Non-publication order

[6] Mr Colquhoun-Petherick first asks the Authority to make an order that his name and identifying particulars not be published on both an interim and permanent basis. LG asks the Authority not to make the order.

[7] Mr Colquhoun-Petherick relies on a recent Employment Court judgment in *JGD v MBC Ltd*¹. In that judgment the Court accepted that publication of names or parties or even witnesses can have significant detrimental impacts on their ongoing prospects

¹ [2020] NZEmpC 193, Inglis CJ.

of employment, regardless of the outcome of the case. The point was one which the Court said has become well recognised in the jurisdiction over recent years.

[8] Mr Colquhoun-Petherick holds concerns for his reputation and negative impacts he apprehends there will be on his future career prospects. He says that recruiters typically google candidates' names in their searches to acquire talent. He points out that his name is unique and he will be easily identified from the Authority's public determination and via global internet search engines. He is disturbed with the prospect that his children having the same family name might suffer too, vicariously.

[9] Next, Mr Colquhoun-Petherick says that publication of his employment relationship problem with LG will impact his mental health because it would revive the negative feelings and emotions he experienced in the employment. He does not understand how there could be any public interest in the publication of his name or the fact that he had a dispute with a former employer.

[10] LG opposes an order prohibiting the publication of Mr Colquhoun-Petherick's name. It says that the Employment Court judgment relied on is not directly applicable to the present case because in seeking recommendations and penalties Mr Colquhoun-Petherick's claim goes beyond seeking mere vindication. It says too that his concerns about negative impacts on future career prospects are entirely unfounded because he has in fact gone on to secure new employment. Finally, LG says that if Mr Colquhoun-Petherick is easily identifiable because of his unique name – he invited the very attention his chosen unique name attracts.

[11] The Authority has a discretion to prohibit publication set out at Clause 10 Schedule 2 of the *Employment Relations Act 2000*:-

10 Power to prohibit publication

(1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[12] The Authority exercises its discretionary powers consistently in a reasonable manner having full regard to the objects of the Act and always on the basis of principle.

[13] The starting point is the principle of open justice. It is fundamental in our legal system that not only should justice be done, but it must also be seen to be done. The

principle of open justice serves a wider purpose than the interest represented in any particular case. It is critical to the maintenance of public confidence in the system of justice itself. It is accepted that in courts and tribunals there is a presumption that all evidence should be given in public and be freely reportable².

[14] Non-publication orders are a departure from the fundamental principle of open justice. An applicant for non-publication must establish sound reasons for the presumption favouring publication be displaced, showing that, if publication is not granted, there will be specific adverse consequences that are enough to justify an exception to the fundamental principle³.

[15] I accept that recruiters may well carry out google searches on the names of candidates for vacant situations to find out whether there is anything that might suggest the candidate is unsuitable for employment. In this world of instant global communication, internet search engines, social networks, LinkedIn and fake news, recruiters and employers are very easily able to access information about potential candidates.

[16] I accept the submission that in seeking recommendations and penalties Mr Colquhoun-Petherick's claim goes beyond seeking mere vindication. I accept too that Mr Colquhoun-Petherick in choosing his very unique name, invites the attention that distinctive name attracts. These matters I consider go to the exercise of the discretion.

[17] While it has become recognised in this jurisdiction that publication of names or parties or even witnesses can have significant detrimental impacts on ongoing prospects of employment, regardless of the outcome of the case, the point is not yet one which has been recognised as sufficiently compelling to displace the principle of open justice.

[18] I conclude that the requisite high standard has not been met. I am not persuaded of any factual basis upon which such an order could be founded. I consider that Mr Colquhoun-Petherick advances his application on the basis of a general apprehension rather than the establishment of specific likely to occur adverse consequences sufficiently compelling to displace the principle of open justice.

² Anderson -v- The Employment Tribunal [1992] 1 ERNZ 500.

³ Erceg v Erceg [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; Crimson Consulting Ltd v Berry [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

[19] **Accordingly for the reasons outlined, I decline to exercise my discretion to order that Mr Colquhoun-Petherick's name and any identifying particulars not be published. However, to preserve Mr Colquhoun-Petherick's entitlement to challenge my decision not to exercise the discretion in his favour, I grant an interim non-publication order. I order that for a period of 28 days after the date of this determination, Mr Colquhoun-Petherick's name and identifying particulars not be published.**

The issues

[20] The issues requiring investigation and determination included:

- (a) Was LG's decision of 14 April 2020 to dismiss Mr Colquhoun-Petherick by reason of redundancy, and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) Was Mr Colquhoun-Petherick's employment, or 1 or more conditions of his employment with LG, affected to his disadvantage by some unjustifiable action by LG, that unjustifiable action being his manager's harassment and bullying of him?
- (c) If LG is found to have acted unjustifiably (by disadvantaging and/or dismissing Mr CP), what remedies should be provided to Mr Colquhoun-Petherick:-
 - (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate his loss) following his dismissal?;
 - (ii) compensation under s123(1)(c)(i) of the Act?
 - (iii) recommendations
 - (iv) penalty
- (d) If any remedies are provided, should they be reduced (under section 124 of the Act) for blameworthy conduct by Mr Colquhoun-Petherick that contributed to the situation giving rise to his personal grievances?
- (e) Should either party contribute to the costs of representation of the other party?

Was Mr Colquhoun-Petherick unjustifiably disadvantaged?

[21] Mr Colquhoun-Petherick was employed by LG as its Sales Manager Information Display NZ under the terms of an individual employment agreement from

10 June 2019. He says that problems arose with his employer shortly after his 6 month probationary period ended, about mid December 2019.

[22] Mr Colquhoun-Petherick's manager Mr Dowan Kim LG's New Zealand Country Manager (Mr Kim) joined LG's Auckland office in January 2020. Mr Kim says he held concerns about Mr Colquhoun-Petherick's ability to achieve ID sales from October 2019. Mr Kim gives evidence Mr Colquhoun-Petherick was not meeting the standard and the issue was raised with Mr Colquhoun-Petherick in his October performance review. Mr Kim says he gave Mr Colquhoun-Petherick six months to settle into his role but recounts that sales performance was poor and Mr Colquhoun-Petherick's contribution during this time was "limited". Thereafter however, Mr Colquhoun-Petherick was expected to have learned the LG Way and be working towards achieving the sales targets required of his position.

[23] Mr Colquhoun-Petherick says that he was unjustifiably disadvantaged because Mr Kim harassed and bullied him contrary to the LG Harassment and Bullying Policy. That policy states:-

"Bullying is not permitted by LGEAP. Bullying is described as repeated or consistent behaviour directed at one person or group of persons that is unreasonable and may cause a risk to health and safety at work. Appropriate disciplinary action will be taken against bullies.

Examples of bullying include:

- Withholding work or being excessively supervised
- Being unreasonably or repeatedly criticised or put down in public"

[24] First Mr Colquhoun-Petherick points to a message from Mr Kim on 30 December 2019 requesting a revised financial plan for when the office reopened on 6 January 2020. Mr Colquhoun-Petherick cites this request an incident of bullying because he was on annual leave at the time (from 21 December 2019 to 5 January 2020) and because the office was closed.

[25] Mr Kim does not recall making that request and says that office was not closed except for public holidays and that many employees including him, continued to work until 31 December 2019. He says he doubts sending such a request because it was made earlier, was already late by the time Mr Colquhoun-Petherick took leave and the additional pressure brought by it would have been pointless. On balance, and because the particular message is not produced (while others are), I am not persuaded of this situation. In any case, I accept this incident is out of time. I accept however that sales

performance was poor and there were expectations on Mr Colquhoun-Petherick and a view that he was not meeting those expectations.

[26] I accept too that there were expectations on Mr Kim in this regard. Mr Kim concedes there was pressure from his boss too but he accepted that pressure because sales performance was not good and pressure is normal in a sales environment. Mr Kim says that it became necessary for him to have sales figures and information daily because he was required to understand it and report it upwards.

[27] Mr Colquhoun-Petherick complains that Mr Kim began to micro-manage him and required him to attend a meeting every day at 4.30pm. Mr Colquhoun-Petherick says that Mr Kim would berate him in these meetings, call him a failure and use a threatening raised voice. Mr Colquhoun-Petherick considers these meetings served only to humiliate him because all Mr Kim would do was point out sales figures being lower than the target and criticise him.

[28] I do not accept these daily meetings were instigated by Mr Kim to micromanage Mr Colquhoun-Petherick and to bully and harass him. Instead, I accept that the daily meetings were a directive from LG's higher management to better monitor and manage the New Zealand market's unsatisfactory sales performance. As well, I consider it was a requirement for all sales teams globally. There was pressure for the New Zealand market to improve its sales performance. I accept that both Mr Kim and Mr Colquhoun-Petherick felt that pressure.

[29] In an email of 31 January 2020, Mr Colquhoun-Petherick complained about Mr Kim berating him in front of his team and calling him a failure in a raised voice. In the email Mr Colquhoun-Petherick illustrates by way of example language that Mr Colquhoun-Petherick objected to "nothing positive" and "unacceptable". Mr Colquhoun-Petherick wrote "the action of you attacking my personal performance in front of the entire team is not acceptable or in my view legal. It could be interpreted as bullying under NZ law." Mr Colquhoun-Petherick did not want Mr Kim to attack his personal performance in front of his own team. He implored Mr Kim to manage his performance more sensitively.

[30] I consider Mr Colquhoun-Petherick's request of Mr Kim to be appropriate. I conclude that there were communication issues between Mr Kim and Mr Colquhoun-Petherick. English is not Mr Kim's first language. That being so, in my assessment he

was inclined to use words in their literal sense without any appreciation of the subtleties or connotations certain expressions or words otherwise held for those for whom it was their first language, such as Mr Colquhoun-Petherick. While it is correct that Mr Colquhoun-Petherick may not have achieved sales performance figures Mr Kim's reference to him as a "failure", while literally correct, connoted a wholly disparaging characterisation of Mr Colquhoun-Petherick that I consider Mr Kim did not appreciate.

[31] It is also my observation having spent time engaging with these parties at investigation meeting that Mr Colquhoun-Petherick was prone to obfuscation. It is also my assessment that Mr Kim was inclined to act precipitously. I accept that there were occasions where Mr Kim would act first and ask questions later. He was disinclined to take advice first. He too quickly challenged spending of \$22.50, had to retract a warning, and instructed managers to act unlawfully about annual leave.

[32] I also note too that while Mr Colquhoun-Petherick's performance was of concern to LG management, I did not appreciate the necessary counselling element to have accompanied the communication of dissatisfaction. It is not enough for an employer to say "you have failed, do better". A fair and reasonable employer will accompany that message with support and encouragement. There will be a counselling element in which the employee is shown and assisted to know exactly what is required of them, where they are going wrong and how they can improve. In Mr Colquhoun-Petherick's case, I am not persuaded that a sufficient additional counselling element accompanied the castigation of him.

[33] LG had cause to provide support to Mr Kim to assist him to improve his communication. Mr Kim has weekly coaching sessions with LGE Managing Director Sang Moo Lim and LGE CFO Ilkwan Lee. Ms Jackson states that Mr Kim has been very open to learning improved communication and management styles. I did not appreciate similar practical assistance and support being provided to Mr Colquhoun-Petherick.

[34] It is these foregoing factors that I consider characterised the communication between Mr Colquhoun-Petherick and Mr Kim. It is understandable then that relations became strained and regrettably progress towards improving sales performance in the New Zealand market became similarly constrained.

[35] While they had both committed to improving the NZ ID business, by late February Mr Colquhoun-Petherick was corresponding in a disrespectful tone to Mr Kim. Mr Kim wrote that Mr Colquhoun-Petherick should not shout, slam his laptop, storm out of the office or make rude noises.

[36] Mr Colquhoun-Petherick contacted LG's Director of Human Resources Amanda Jackson (Ms Jackson) for support and assistance. Mr Colquhoun-Petherick says that Ms Jackson signalled to him that there would be a reporting line change and that he should "hold on". Subsequently there was a changed reporting line, although Mr Colquhoun-Petherick had to continue providing Mr Kim with the sales figures every day. Mr Kim says it is his understanding that the change was not in response to allegations by Mr Colquhoun-Petherick but rather because the General Manager Information Display ANZ Mr Luke Dixon (Mr Dixon) had more experience than both Mr Kim and Mr Colquhoun-Petherick.

[37] Ms Jackson summarises her contact with Mr Colquhoun-Petherick on the matter stating she asked him how he would like the matter handled. She says he told her he was just venting and he didn't want anything to be done. She says too that the telephone conversations were usually very emotive and no tangible incidents were raised.

[38] On 26 February 2020 Mr Colquhoun-Petherick was contemplating sending an email to Mr Kim advising that he considered Mr Kim's behaviour to be consistent harassment and bullying. Mr Colquhoun-Petherick invited Ms Jackson to offer input on the email he proposed to send. In reply Ms Jackson commented "I can honestly say this boils down to a communication break down between the two of you. Instead of the email exchanges its better if you discuss in private", "you need to find a way to compromise with Dowan and have a productive professional relationship" and "Please keep in mind, performance management does not constitute harassment and bullying."

[39] I too reach a similar conclusion. There were communication issues between these parties that prevented LG from attaining the performance it desired. While I accept that Mr Kim communicated with Mr Colquhoun-Petherick in a very literal way and failed to appreciate the connotations of the language he used publicly re Mr Colquhoun-Petherick, I do not regard his behaviour as constituting bullying or harassment contrary to the LG policy. Mr Colquhoun-Petherick certainly felt the pressure of LG requiring improved sales performance but I accept that all managers felt the pressure that LG was putting on its senior management globally.

[40] I am unable to say that Mr Kim directed unreasonable behaviour towards Mr Colquhoun-Petherick. I regard Mr Kim's behaviour as legitimate performance management the communication with Mr Colquhoun-Petherick being complicated by English being Mr Kim's second language. But it was not bullying or harassment. That said, I have an abiding view that Mr Colquhoun-Petherick ought to have been assisted better by LG and Mr Kim to achieve what was expected of him.

[41] I find then that Mr Colquhoun-Petherick was not excessively supervised or unreasonably or repeatedly criticised or put down in public so as to constitute bullying or harassment within the meaning of the LG Harassment and Bullying policy. **I find that Mr Colquhoun-Petherick was not bullied or harassed and he does not have a personal grievance for unjustifiable disadvantage. There will be no formal orders accordingly.**

Was Mr Colquhoun-Petherick unjustifiably dismissed?

[42] LG made a decision to terminate Mr Colquhoun-Petherick's employment by reason of redundancy on 14 April 2020. Was that decision and how the decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time? That is the test of justification set out at section 103A of the Act.

[43] At 11.59pm on 25 March 2020 New Zealand moved to Alert Level 4 and the entire nation went into self-isolation⁴.

[44] Mr Dixon gives evidence that in April 2020 when COVID-19 hit and New Zealand was forced into lockdown the ID team were at home and were unable to travel and generate sales. In his words "the New Zealand business was haemorrhaging money". He explained that the landscape changed dramatically and meant that the only viable option was to restructure and they no longer had the benefit of time to make the decision. The decision was made to terminate Mr Colquhoun-Petherick's employment for redundancy.

⁴ At 11.59pm on 27 April 2020 New Zealand moved to Alert Level 3. The nation moved to Alert Level 2 at 11.59pm on 13 May 2020. It was not until 11.59pm on 8 June 2020 that New Zealand moved to Alert Level 1.

[45] Mr Dixon emailed Mr Colquhoun-Petherick asking his availability to meet on Tuesday 14 April 2020. Mr Colquhoun-Petherick responded that he would potentially be in the office that afternoon but he had the afternoons off.

[46] Between 9 April 2020 and 14 April 2020 Mr Dixon says he and HR were double checking that there was no alternative to Mr Colquhoun-Petherick's redundancy. No corroborative evidence is produced of these enquiries.

[47] I accept Mr Colquhoun-Petherick's evidence of the content of a telephone call at 1.38pm on 14 April 2020 he had with Ms Jackson and Mr Dixon. The telephone call lasted 12 minutes and I accept Mrs Janine Colquhoun-Petherick's evidence corroborating her husband's evidence in this regard.

[48] Mr Dixon informed Mr Colquhoun-Petherick that LG "can't sustain his [Mr Colquhoun-Petherick's] employment" and that his employment was being terminated immediately. Ms Jackson advised that LG was offering Mr Colquhoun-Petherick a 1 month ex gratia payment and 5 weeks' pay in lieu of notice but he would have to sign a release deed to receive the payments. When he asked why he was being terminated Mr Dixon responded that it was because he was the highest cost centre in the business.

[49] Mr Colquhoun-Petherick spoke up to challenge the decision and stated that there had been no notification or prior discussion with him. Mr Dixon responded that there had been, but Mr Colquhoun-Petherick reminded Mr Dixon the only conversation they had was for all team members to schedule leave which Mr Colquhoun-Petherick had done.

[50] Mr Colquhoun-Petherick then suggested they look to complete a performance management process for another team member and, in reference to himself, keep a resource that was more skilled and accomplished. He asked too why no conversation had taken place regarding salary reduction or any other option. Ms Jackson interrupted and advised Mr Colquhoun-Petherick that the management team had reviewed things and there was no discussion available. I accept that Ms Dickson ended the call at that point.

[51] LG dismissed Mr Colquhoun-Petherick effective immediately and cut off his access to its IT systems at 2.00pm that same day. LG asked Mr Colquhoun-Petherick to return its IT hardware the next day even though there was a lock down and travel and social contact was forbidden.

[52] On 16 April 2020 Ms Jackson requested Mr Colquhoun-Petherick return all LG property by 21 April 2020. A north shore staff member retrieved the hardware on 21 April 2020 while New Zealand remained under alert Level 4 and non-essential travel and contact remained forbidden.

[53] Mr Colquhoun-Petherick did not sign a deed of release in order that he receive the sums Ms Jackson had referred to on the telephone call when he was informed his employment was terminated. Mr Colquhoun-Petherick was sent a letter reminding him of his confidentiality obligations and restraint of trade which precluded him from working in the electronics or audio-visual industries anywhere in New Zealand for a period of 12 months.

[54] Mr Colquhoun-Petherick was paid one months' pay in lieu of notice and his outstanding holidays.

[55] He raised a personal grievance on 20 April 2020 and on 8 May 2020 was given a statement of the reasons for his dismissal.

[56] In an email of 29 April 2020 Mr Kim wrote "we removed Gary as of 14th Apr due to poor ID performance".

[57] Mr Colquhoun-Petherick was given no prior notice of what the telephone call on 14 April 2020 was about. LG contends that the telephone call was the consultation required of it in advance of its actual decision to terminate Mr Colquhoun-Petherick's employment. I do not accept that. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what would be done. Consultation must be a reality not a charade. In this case, there was no proper consultation and there was no discussion of alternatives to redundancy.

[58] Parties to an employment relationship are required to deal with each other in good faith. When LG formulated a proposal to make a decision that would have an adverse effect on the continuation of Mr Colquhoun-Petherick's employment it was required to provide Mr Colquhoun-Petherick access to information, relevant to the continuation of his employment, about the decision and an opportunity to comment to LG on the information before the decision was made. I find that LG did not provide Mr Colquhoun-Petherick with information about the proposal to disestablish his

position and further, I find that it did not provide him with an opportunity to comment on the information before the decision was made.

[59] I find that when Ms Jackson and Mr Dixon telephoned Mr Colquhoun-Petherick on 14 April 2020 it was the first time that Mr Colquhoun-Petherick knew of any suggestion that his position would be disestablished. I find too that the decision had already been made and the telephone call was merely to inform him of the decision. It was not made for the purposes of discussion with him so as to provide him the opportunity to comment. The decision had already been made as Ms Jackson confirmed.

[60] I find too that LG failed to investigate alternatives to redundancy once it had decided that Mr Colquhoun-Petherick's position was disestablished. I accept Mr Colquhoun-Petherick's evidence that when he raised the matter by suggesting salary reduction or other option Ms Jackson interrupted and advised that the management team had reviewed things and there was no discussion available. I consider that Ms Jackson confirmed there was no investigation of alternatives to redundancy. Mr Colquhoun-Petherick was not involved in any discussion of alternatives.

[61] I find that there was no invitation extended to Mr Colquhoun-Petherick for him to have a representative with him during the engagement which took place on the telephone call in which he was informed of the decision that his employment was terminated. I consider that no such invitation was extended because there was no discussion to be had in which a representative might have provided advice or made representations on his behalf. The decision to terminate his Mr Colquhoun-Petherick's employment had been predetermined.

[62] In my assessment, LG acted in a hasty, peremptory and insensitive fashion terminating Mr Colquhoun-Petherick's employment over the telephone with no prior engagement with him. I am unable to discern any legitimate reason why it's decision process was not able to proceed in a more fair and sensitive fashion. The nationwide lockdown in place at the time did not preclude LG from acting more fairly and sensitively. I do not accept that LG should not have consulted with Mr Colquhoun-Petherick and to have done so would have been disingenuous, and a sham in breach of the duty of good faith.

[63] In conclusion then, I find that Mr Colquhoun-Petherick was dismissed for redundancy over the telephone on 14 April 2020. I find that termination was predetermined and effected in a peremptory fashion, without the opportunity to take advice or have representation and contrary to the duty of good faith because there was no prior proposal submitted accompanied by relevant information on which Mr Colquhoun-Petherick was invited to comment. Nor was there any consultation with Mr Colquhoun-Petherick about alternatives to redundancy. For these reasons, I find that LG's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. **I find that Mr Colquhoun-Petherick has a personal grievance for unjustifiable dismissal.**

Settling Mr Colquhoun-Petherick's personal grievance

[64] I am satisfied that Mr Colquhoun-Petherick has suffered loss as a result of the personal grievance I have found. I consider it appropriate that his personal grievance should be settled by the grant of formal orders for remedies.

Reimbursement

[65] Mr Colquhoun-Petherick claims reimbursement for lost wages at the rate of \$11,500 per month. When his employment was terminated, Mr Colquhoun-Petherick lost an annual salary of \$138,000 and a vehicle allowance of \$18,000. He secured new employment from 27 November 2020 and he was paid one month's salary in lieu of notice by LG. Mr Colquhoun-Petherick produces to the Authority a table recording more than 60 roles that he made application for together with evidence of those applications. I am satisfied that Mr Colquhoun-Petherick took steps to mitigate the loss of income he suffered.

[66] I am satisfied that Mr Colquhoun-Petherick lost 6 months wages in the gross sum of \$69,000.00 because of his unjustifiable dismissal. I do not accept that reimbursement is not available to Mr Colquhoun-Petherick because the disestablishment of his position was substantively justified. I am by no means satisfied of that and I do not consider LG is entitled to have reached that view because it did not consult with Mr Colquhoun-Petherick in good faith to be in a position to properly reach that conclusion. I do not regard Mr Colquhoun-Petherick's case as one of process failures entitling him to compensation in respect of only procedural infelicities. I conclude that Mr Colquhoun-Petherick suffers loss of remuneration because his

dismissal does not meet the statutory test of justification and he has a statutory right to reimbursement flowing from that determination.

Loss of future benefits

[67] Mr Colquhoun-Petherick claims loss of future benefits on the amount of lost wages being Kiwisaver contributions at 3% and holiday pay at 8%. I am satisfied that Mr Colquhoun-Petherick has suffered the loss of these future benefits as a result of the unjustifiable dismissal.

[68] I make no award in respect of the motor vehicle allowance because I consider Mr Colquhoun-Petherick did not incur motor vehicle costs after his termination.

Compensation for humiliation, loss of dignity and injury to feelings

[69] Mr Colquhoun-Petherick says that he was brought up to be a proud provider for his family, and the stress and emotional turmoil brought about by not working and not being able to provide financially for his family is indescribable and he constantly feels despair and disgrace. To survive financially, he says he had to mortgage the family home which placed a huge strain on things. He says he has been too embarrassed to maintain contact with many of his work connections and for the first time in his life he says he suffers elements of what he imagines depression feels like. He laments the despair he feels having had to apply for over 60 jobs. He says he has lost a lot of sleep and has had to rebalance his medications to stay on top of the stress and anxiousness that being out of work brings. His state of mind has placed strain on his closest relationships.

[70] Mrs Janine Colquhoun-Petherick says her husband's redundancy has been devastating for her husband and their family both emotionally and financially. She says Mr Colquhoun-Petherick still gets upset easily and watching his little remaining confidence drain away has been very distressing for her.

[71] When he was made redundant, his wife's part-time hours were reduced because of COVID-19. The redundancy made it difficult for Mr Colquhoun-Petherick to support his family and that negatively affected his dignity as a father and a family man. Mr Colquhoun-Petherick and his wife supported their son who returned from overseas and have a daughter living with them who attends university. Mr Colquhoun-Petherick was unable to financially support his eldest daughter when she was unable to work and

was receiving only the wage subsidy. It has upset Mr Colquhoun-Petherick considerably that he has not been able to support his daughter in another way too. These financial difficulties caused Mr Colquhoun-Petherick to refinance his home.

[72] I accept that Mr Colquhoun-Petherick has suffered hurt, humiliation, and loss of dignity as a result of the personal grievance I have found. Having regard to the personal grievance and the evidence Mr Colquhoun-Petherick and his wife gave, I consider an award of \$15,000.00 compensation is appropriate.

Reduction for contribution

[73] I am required in deciding both the nature and the extent of remedies to be provided to Mr Colquhoun-Petherick to consider the extent to which any actions of his contributed towards the situation that gave rise to the personal grievance I have found. I find that there was no blameworthy conduct on Mr Colquhoun-Petherick's part which contributed to the situation that led to the personal grievance of unjustifiable dismissal I have found. He was not responsible for LG's failure to treat him fairly and sensitively and to fairly consult with him **I conclude that there is no reduction to be made to the remedies I grant to settle the personal grievance.**

Recommendation

[74] The Authority is asked to make a recommendation that LG's human resources and legal personnel receive training in New Zealand employment law. In seeking that remedy, Mr Colquhoun-Petherick points to his employment agreement that does not comply with the Act, Mr Kim's unlawful direction that employees take annual holidays and his warning letter issued without fair process and the personal grievance for unjustifiable dismissal in clear breach of sections 4 and 103A of the Act.

[75] The Authority may make recommendations to an employer about action it should take to prevent similar employment relationship problems occurring where the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance. While I consider the employment agreement to be a rather 'shabby' document, and I note Mr Kim's propensity to act without advice, I am unable to point to any particular workplace conduct or practice that was a significant factor in the personal grievance for unjustifiable dismissal. I note that Ms Jackson confirmed to me she understood the concept of the duty of good faith. I therefore decline to make the recommendation sought. I do not know whether LG's New Zealand operation was

supported by a New Zealand based Employment Relations team or an HR Business Partner in New Zealand (or Australia) with specialist knowledge of New Zealand employment law.

Penalty for breach of good faith

[76] On 8 April 2020 Ms Jackson had told Mr Colquhoun-Petherick that there would be no redundancies in New Zealand due to COVID-19.

[77] It was on 9 April 2020 that Mr Dixon emailed Mr Colquhoun-Petherick asking to meet on Tuesday 14 April 2020. The decision to terminate Mr Colquhoun-Petherick's employment had already been made by 9 April 2020.

[78] If I accept the submission that Ms Jackson correctly informed Mr Colquhoun-Petherick that there would be no redundancies due to COVID-19 because his redundancy was actually due to the poor performance of the ID team, I consider that advice was likely to mislead Mr Colquhoun-Petherick. I note again Mr Dixon's evidence that the lockdown meant the ID team were at home and were unable to travel and generate sales. COVID-19 and the lockdown was the reason Mr Colquhoun-Petherick's employment was terminated. Ms Jackson's advice was likely to and did in fact mislead Mr Colquhoun-Petherick in my view.

[79] I am mindful too that for the period between 9 April 2020 and 14 April 2020 Mr Dixon says he and HR were double checking that there was no alternative to Mr Colquhoun-Petherick's redundancy. There was no consultation with Mr Colquhoun-Petherick during this period or any other. There ought to have been in my assessment.

[80] The Act places the highest store on promoting good faith behaviour as the means of building productive employment relationships. This includes what must be done when those relationships may be nearing an end, which is clear from the specific references in section 4(1A)(c) to providing information and the opportunity to comment before final decisions are made.

[81] A penalty is warranted to punish LG for its breach of that standard and to deter employers generally from doing so in potential redundancy situations.

[82] LG must pay a penalty of \$4,000 to the Authority within 28 days of the date of this determination. I do not order any part of this penalty to be paid to Mr Colquhoun-

Petherick because I consider the other remedies I have granted sufficient to address the wrongs he has personally suffered.

[83] The Authority orders:-

- (a) LG Electronics Australia Pty Limited to pay to Gary Colquhoun-Petherick within 28 days of the date of this determination the gross sum of \$69,000.00 as reimbursement;
- (b) LG Electronics Australia Pty Limited to pay to Gary Colquhoun-Petherick within 28 days of the date of this determination the sum of \$15,000.00 as compensation;
- (c) LG Electronics Australia Pty Limited to pay to Gary Colquhoun-Petherick within 28 days of the date of this determination the gross sum of \$2,340.00 being Kiwisaver contribution as loss of future benefit;
- (d) LG Electronics Australia Pty Limited to pay to Gary Colquhoun-Petherick within 28 days of the date of this determination the gross sum of \$5,520.00 being holiday pay on the sum of reimbursement as loss of future benefit;
- (e) LG Electronics Australia Pty Limited to pay to the Authority within 28 days of the date of this determination a penalty of \$4,000.00.

Costs

[84] If they are not able to do so and an Authority determination on costs is needed Mr Colquhoun-Petherick may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum LG would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Leon Robinson
Member of the Employment Relations Authority