

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 411  
**3089934**

BETWEEN	TUNUHIA TUPE Applicant
AND	THE BOARD OF TRUSTEES OF TE MANAWA O TUHOE TRUST Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Stan Austin, advocate for Applicant Alex Hope, counsel for Respondent
Investigation Meeting:	8 September 2021 by Zoom
Submissions and/or further evidence:	6 and September 2021 from Applicant 1 and September 2021 from Respondent
Determination:	22 September 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Tunuhia Tupe, claims that he was unjustifiably dismissed on 20 January 2019 by the Respondent, The Board of Trustees of Te Manawa O Tuhoe Trust (the Trust).

[2] The Trust denies that Mr Tupe was unjustifiably dismissed and claim his employment was justifiably terminated after he failed to engage with a selection process.

**Issue**

[3] The issue for determination is whether or not Mr Tupe was unjustifiably dismissed by the Trust by reason of redundancy.

## **Background**

[4] The Trust administers the assets of approximately 6,000 beneficiaries. The Trust's principle assets and trading function comprise a dairy farm (approximately 700 head of cattle), a grazing block, and a pine forest in the Whakatane river valley Ruatoki.

[5] The Board of the Trust comprised a number of trustees (the Board), and its subsidiary company Nation Logging Limited (NLL) had directors, two of whom were also trustees of The Trust. At the time Mr Tupe was employed, Mr Tane Turei was the Chairperson of the Board and CEO of the Trust. Mr Turei was also a director and Acting CEO of NLL.

[6] Mr Tupe was initially employed in March 2016 by the Trust as Operations Trainee. He was provided with and signed an individual employment agreement signed and dated 13 April 2016. It was also signed by the then CEO of the Trust (the Employment Agreement).

[7] Mr Tupe was subsequently was appointed as NLL's Operations Manager in July 2018 on a permanent, full-time basis. He was offered the position of Operations Manager in a letter dated 24 July 2018 signed by Mr Turei in his capacity as 'Acting CEO, Nation Logging Ltd'.

### *2018 Organisation Health Check*

[8] Mr Miki Roderick said that he was engaged by the Trust in September 2018 to complete an Organisation Health Check and Assessment including a Strategic Plan review and update. Mr Roderick said that the impetus for his engagement was that the Trust was in serious financial difficulties. It had extreme difficulty paying its monthly commitments and had to use monies set aside for other purposes to do so.

[9] The most pressing issue facing the Trust in 2018 was that NLL had over \$500,000.00 of debt and the Trust was having to invest significant amounts of money in it. Mr Roderick said that unless a strategy to address the situation was adopted, NLL would be insolvent by January 2019.

[10] He had therefore devised a strategy which would, if implemented, enable NLL to achieve solvency. The strategy included ensuring contracts were put in place and if the strategy was achieved, NLL would be debt free by 2020.

[11] Mr Roderick said the structure of the Trust needed to be streamlined to match the number of employees to the size of the business units. He had assessed the work carried out by the Trust employees, including that of Mr Tupe who was doing operational tasks for both the

Trust and NLL, Mr Tupe at that time spending approximately 40 per cent of his time on work for the Trust and 60 per cent of his time on work for NLL.

[12] He said that Mr Tupe's work was purely operational not strategic. He had considered that Mr Tupe's role should be Operations Officer, and that he should be supported to attend training courses to increase his managerial skill base. However Mr Turei had appointed Mr Tupe as Operations Manager.

[13] Mr Roderick also interviewed Mr Mike Cristini, Health and Safety Manager, who had told him that the Trust needed to invest more in training. He said he had endorsed Mr Cristini's view on the primacy of a Health and Safety policy, particularly given the importance of health and safety given the Trust's forestry operation.

[14] During early 2019 there was a change to the Trustees of the Trust with Ms Janet McLean being appointed as one of the new trustees.

[15] Mr Turei retired from his position as Chief Executive of the Trust in mid-2019. He was replaced by Mr Ngatai Rangihau as Chairman of the Board in January 2020.

[16] In November 2019 Mr Roderick provided a full report for the Board's consideration. The Report contained initial financial projections with interim operational plans and included 28 recommendations together with a proposed process and timeline. In the Report Mr Roderick proposed that the positions of Operations Manager and Health and Safety Manager together with other administration roles, be disestablished and a General Manager be appointed. The Report stated:

The General Manager would oversee day-to-day operations, financial management, safety compliance, and document new farming policy and asset management procedures. Importantly they would be responsible for monitoring farm performance, identifying ETS business opportunities and developing a long term work maintenance programme for forests owned by the trust. It is envisaged that this role would combine the workload from the existing Operations Manager and Health and Safety Manager positions.

[17] There was a job description prepared for the General Manager position which set out as essential requirements of the role that the incumbent be a: "NZQA Certified Health and Safety Specialist" and have senior management experience in:

- H&S (heavy industry)
- HR and labour relations
- Financial control
- Asset Management

[18] Ms McLean said that a high priority for the new Board was the recruitment of a CEO to ensure there was a separation between the Board's role of governance and the operation of the Trust.

[19] The new Board did not believe that the report prepared by Mr Roderick for the Trust was complete in itself and on 16 July 2019 it engaged Mr Peter Madden to produce a simplified financial, staffing and investment analysis.

*The Restructure 2019 - 2020*

[20] During the interim period until a successor was appointed, the Board appointed Mr Madden as Acting General Manager of the Trust in July 2019. The letter of engagement dated 16 Hongongi (July) 2019 set out the purpose of the engagement. This being:

... to assist the Board with developing and implementing a change management plan that aligns with the organisation structure, with the strategic plan and the organisational health check report written by Miki Roderick.

[21] Mr Madden said that at the time of his engagement, the Trust had a massive infrastructure with layers of administration and small business units. As a result he presented to the Board a restructure proposal which proposed changes to the Trust's structure and staff. These included, as had been proposed by Mr Roderick, the disestablishment of the existing Operations Director and Health and Safety Manager roles and establishment of a General Manager role.

[22] Ms McLean said the Board approved the proposal structure and gave Mr Madden the delegated authority to take decisions in regard to it. The Board would to provide the penultimate signoff.

*The restructure proposal and steps taken November 2020*

[23] Mr Madden wrote to Mr Tupe and other affected employees of the Trust on 20 November 2019. In the letter he set the reason for the restructure proposal and attached a Consultation Document. In the letter Mr Madden set out that the existing structure of TMOT had been set out to deliver a strategy which was no longer viable because:

Circumstances have changed since then and the small farming operation cannot continue to carry the cost of the current administrative staff and infrastructure ...

The Board has determined the management and administrative structure must align with the scale of business operation operated by the Trust. The Trust has had extreme difficulty in paying its monthly commitments, using money put aside for other purposes, to meet those costs.

[24] It was proposed to disestablish a number of existing positions and establish some new positions. The letter dated 20 November 2019 invited feedback on the proposed restructure both in writing, and at a meeting to be held with Mr Madden.

[25] The main change proposed which affected Mr Tupe was that his existing position of Operations Manager, would be disestablished, and replaced by a new position of General Manager. The position of the Health and Safety Manager would also be disestablished and health and safety incorporated as part of the General Manager role.

[26] The proposed job description for the General Manager position was provided with the Consultation Document.

*Meetings with Mr Tupe on the Restructure Proposal*

[27] Mr Tupe attended a meeting to discuss his feedback on the restructure proposal with Mr Madden on 26 November 2019. He was accompanied by Mr Austin, and a representative of the EMA also attended the meeting on behalf of TMOT.

[28] Mr Tupe said that he provided no feedback during the meeting but Mr Austin said that he would provide a letter setting out Mr Tupe's feedback following the meeting.

[29] The letter subsequently provided and dated 29 November 2019 set out Mr Tupe's view that the General Manager role was substantially similar to his existing position, and he should therefore be redeployed to that position. The letter from Mr Austin dated 29 November 2019 stated:

...  
We agree with the underlying rationale for change – the current structure is “top heavy” and not in scale with the size of the operation and carries [an] uneconomic overhead in relation to administrative staffing.

Accordingly we agree with the proposal to remove the position of Chief Executive Officer.

We also say that we agree that the present position of Health and Safety Manager should be discontinued with appropriate and qualified H&S advice and guidance being bought in on a contract basis. ...

The effect of the removal of CEO should in our view be to simply alter Tunuhia's line of reporting to be directly to the Board of Trustees through the Chairperson. ...

We note that we have said that in our view the proposed position of General Manager is substantially the same as Tunuhia's present position even if there are moderate changes.

Tunuhia is confident he can perform the duties of the General Manager. After all, as we have said, the General Managers position proposed includes all of Tunuhia's present duties. That said Tunuhia would accept a modest level of further training .... We envisage that appropriate training could be delivered on an on the job basis ...

[30] The letter concluded:

Because of the nature of our general comments and those relating to process I have copied this correspondence to Tane Turei, Chairperson as it does seem that the Trust has set this matter in train in the basis of some quite flawed advice.

[31] Mr Madden replied to Mr Tupe on 4 December 2019 noting his agreement to the rationale for the proposal and advising him of TMOT's decision to proceed with the proposed restructure and the disestablishment of his role as Operations Manager. The letter dated 4 December 2019 from Mr Madden stated

... We note that you agreed with the underlying rationale for change and with the removal of the CEO and Health and Safety Manager positions.

... We have considered this feedback and believe that this would not be consistent with the need for a continued focus on Health and Safety at a time when obligations are becoming more strenuous in nature. We are also keen for the GM to have senior management experience that would be applied consistently through the year. ...

... after full feedback of all feedback received ... we have made the decision to proceed with the proposal to restructure. Accordingly this letter serves as formal notification that the Operations Manager position will be disestablished.

[32] Mr Tupe was advised that he would be considered for selection, as would the Health and Safety Manager, whose role was also being disestablished. Both Mr Tupe and Mr Cristini were invited to apply for the General Manager position and were advised of the selection criteria which were based upon the draft job description for the General Manager. These were:

- Required Qualifications from JD
- Required Experience from JD
- Required skills and attributes from JD
- People Management
- Financial Control
- Asset Management

[33] Following this stage, Mr Madden made a preliminary assessment of Mr Tupe's strengths and weaknesses and shared this scoring with him on 5 December 2019. Mr Cristini was also provided with interim feedback, and they were both offered the opportunity to meet to provide feedback or challenge the initial scorings.

[34] The Trust letter concluded by advising Mr Tupe that should he wish to be considered, there would be a selection meeting to be held on 6 December 2019 to discuss the preliminary rating, with the outcome of the selection process being advised on 11 December 2019.

[35] Mr Austin acting on Mr Tupe's behalf wrote to Mr Turei on 4 December 2019 seeking an opportunity to meet with the Board to discuss the proposal to disestablish the Operations

Manager position. Mr Turei in response invited Mr Austin to attend the next Board meeting on 6 December 2019.

[36] Ms McLean said that Mr Austin waited in an adjacent room on the day of the Board meeting whilst the rest of the Board members challenged Mr Turei's right to invite Mr Austin to address the Board. She said the Board made it clear to Mr Turei that Mr Madden was to be the point of contact during the change process.

[37] On 10 December 2019 Mr Turei wrote to Mr Austin by email confirming that:

The Board decided at the Friday 6<sup>th</sup> Dec meeting to grant Peter Madden permission to complete his operational change programme.

This also includes to the Board, Peters recommendation of General Manager for our consideration.

The Board will then consider Peters recommendation and make the ultimate decision on who acquires the position.

[38] Mr Madden said Mr Tupe was asked to confirm if he was interested in applying for the General Manager position by 6 December 2019, and a proposed date was set for interview that day. This date was subsequently changed to 9 December 2019.

[39] Mr Cristini had applied for the position of General Manager and was interviewed on 5 December 2019.

[40] Mr Austin responded that he was unaware that Mr Madden had a mandate from the Board to proceed and agreed to meet only after that had been provided.

[41] Mr Madden responded on 9 December 2019 stating that Mr Austin should be aware by this date that he had the mandate to proceed and suggested a meeting on 11 December 2019.

[42] Mr Austin responded that he was not available to meet on 11 December 2019 and stated in the email dated 10 December 2019 that: "there is no need to rush this".

[43] Mr Madden confirmed in an email dated 11 December 2019 that he agreed there was no need to rush, and that he would contact Mr Austin with a date when he returned to work on 6 January 2020.

[44] Mr Madden said that there was a discussion between him and Mr Austin during the first week he returned to work in January 2020 offering the dates of 23, 24, 28, 29 and 30 January 2020 for a meeting. He said he did not receive any response from Mr Austin so he contacted Mr Tupe directly.

[45] Mr Tupe emailed Mr Austin on 13 January 2020 stating that Mr Madden had requested a number of meeting dates and that Mr Madden had emailed asking if they could meet on 16 or 17 January 2020. Mr Tupe emailed Mr Madden stating that he had informed Mr Austin of the offered dates, but had received no response.

[46] Mr Madden emailed Mr Tupe on 14 January 2020 offering two dates, 17 or 20 January and set out the questions Mr Tupe was invited to answer regarding his ability to fulfil the General Manager role requirements during the meeting. There was no response to that email.

[47] Later that day Mr Madden emailed Mr Tupe again correcting the offered interview dates to 20 or 21 January 2021.

[48] Mr Madden said that on 20 January 2020 he had seen Mr Tupe in the street twice. On the second occasion he attempted to flag him down and ask if he would be attending the interview, however he said Mr Tupe ignored him.

[49] On the basis that he believed Mr Tupe had made it clear to him that he was not prepared to be interviewed because his view was that he should be automatically deployed into the proposed General Manager position, Mr Madden had made the decision to terminate Mr Tupe's employment, advising Mr Tupe of the decision in an email dated 20 January 2020:

You have missed several opportunities since early December 2019 to interview for the new GM position with Te Manawa o Tuhoe (TMOT). You have not responded to my most recent request for an interview today either.

Your actions leave me with no alternative but to draw the conclusion you do not want to be considered for the new GM position, and will leave the organisations of your own accord, in accordance with the change Management process approved by the trustees in October 2019.

[50] Mr Tupe said that on 14 January 2020 he had consulted with Mr Austin about the dates offered for interview. On the morning of 20 January he said he was about to reply to Mr Madden to confirm that either an interview on the suggested dates of 20 and 21 January would be suitable when he received the email from Mr Madden dated that day terminating his employment with TMOT on two weeks' notice.

[51] Mr Cristini was subsequently employed as Acting General Manager.

[52] Mr Tupe raised a personal grievance and was granted interim reinstatement to the role of Operations Manager by determination [2020] NZERA 132 dated 31 March 2020.

*NLL in liquidation*

[53] Following his reinstatement the Trust's evidence was that Mr Tupe worked a significant amount of time for NLL. Mr Tupe disagreed and said that he worked 40 per cent of his time in NLL and 60 per cent of his time for TMOT.

[54] Ms McLean said that the Board received a cash flow report on 13 August 2021 which showed that the restructure which removed the CEO role and reduced other costs had been effective.

[55] However the Board had been concerned about the solvency of NLL and commissioned a report from GHA Chartered Accountants and management consultants which it received on 10 August 2021. The report explained that NLL was technically insolvent and only able to pay its debts if supported by the Trust.

[56] Ms McLean said that the Trust was no longer prepared to suffer the losses which it had incurred to that date. As a result the Board made the decision to put NLL into liquidation which occurred on 3 September 2021.

**Was Mr Tupe unjustifiably dismissed by the Trust?**

[57] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

***S103A Test of Justification***

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[58] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[59] Looking firstly at the substantive justification I find that Mr Madden had provided to all the affected employees, including Mr Tupe, a restructure proposal setting out the reason for the restructure and attaching a Consultation Document.

[60] The reason for the restructure was set out in the letter dated 20 November 2019, namely that:

...the small farming operation cannot continue to carry the cost of the current administrative staff and infrastructure ...

The Board has determined that the management and administrative structure must align with the scale of business operated by the Trust.

[61] The Consultation Document also detailed the rationale for the restructure specifically noting the Trust had: “extreme difficulty paying its monthly commitments” and its aim of relieving the financial pressure.

[62] I find that TMOT had a genuine business justification for its decision to restructure the business.

[63] Mr Austin, acting in accordance with his instructions from Mr Tupe, agreed with the rationale for change in the letter dated 29 November 2019.

[64] In regard to the procedural steps, once an employer has indicated that it has a proposal to restructure its business, it must follow a fair and reasonable process.

[65] I find that Mr Madden did so. He invited feedback on the proposal and Mr Tupe attended a meeting for that purpose on 26 November 2019, providing his written feedback after that meeting.

[66] Mr Madden considered that feedback and after he had done so confirmed the restructure proposal was to continue which would involve the disestablishment of Mr Tupe and Mr Cristini’s existing positions as Operations and Health and Safety Managers, and the establishment of a General Manager position.

[67] That the positions of Chief Executive Officer and Health and Safety Manager should be disestablished was also agreed by Mr Tupe. However Mr Tupe’s view was that his role of Operations Manager was substantially similar to that of the proposed General Manager position and that he should assume that role: “with a modest level of further training”.<sup>1</sup>

[68] The Trust had two positions which would be impacted by the decision to restructure, the Operations Manager and Health and Safety Manager. The General Manager position as set

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<sup>1</sup> Letter from Mr Austin dated 29 November 2019.

out in the Consolidation Document would incorporate elements of both the Operations Manager and Health and Safety Manager role.

[69] Moreover the General Manager position, which would report to the Board, set out in the job description as essential requirements a NZQA Certification in Health and Safety, senior management experience in Health and Safety, HR and Labour Relations, Financial control and Asset Management, in addition to an essential requirement of being an effective writer of policy, procedures, processes and systems.

[70] Mr Tupe's statement in the letter dated 29 November 2019 that he: "would accept that a modest level of further training would be appropriate to equip him to perform the role" and the statement that health and safety advice would need to be "bought in" would seem to indicate an acknowledgment on his part that the requirements of the role of Operations Manager did not exactly mirror the requirements of the General Manager position.

[71] The role impacted by the restructure proposal was that of the Health and Safety Manager. As a result the Trust decided to invite both affected senior employees, Mr Tupe and Mr Cristini, to apply for the General Manager position. I find that this was the action of a fair and reasonable employer in the circumstances.

[72] Mr Tupe was invited to apply for the General Manager position and advised of the selection criteria which were based upon the draft job description for the General Manager. Mr Madden subsequently provided a preliminary assessment of Mr Tupe's abilities against the criteria and provided these to him on 5 December 2019.

[73] From that point on there were a number of dates offered by Mr Madden for a meeting but none of these took place, many as a result of a lack of engagement by Mr Tupe and his representative.

[74] At the date Mr Madden reached the decision to terminate Mr Tupe's employment he had tried a number of times to arrange a meeting. He had also faced some resistance to fulfilling his remit from the Board to carry out the restructure in that Mr Austin tried to bypass him and go directly to the Board on Mr Tupe's behalf and, acting under instruction from Mr Tupe, made aspersions on Mr Madden's lack of honesty in conducting the process.<sup>2</sup>

[75] I can appreciate that Mr Madden may have concluded in the circumstances that Mr Tupe was avoiding meeting with him, and actively avoiding his attempt on 20 January 2020 to speak to him, although I accept that on those two occasions Mr Tupe denied he had seen Mr

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<sup>2</sup> Mr Austin's letters dated 5 December 2019 and 20 January 2020.

Madden. As a result Mr Madden formed the view that Mr Tupe did not want to be considered for the General Manager position and wished to leave his employment with the Trust.

[76] I find that this decision was made pre-emptively given that the dates offered for interview had not concluded and that the fair and reasonable employer would have waited until the final date offered for interview, being 21 January 2020, had elapsed before reaching the conclusion that Mr Tupe did not wish to be considered for the General Manager position.

[77] I have considered whether or not this decision is minor in accordance with a 103A(5) of the Act which states:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) Minor; and

(b) (b) did not result in the employee being treated unfairly.

[78] However the decision did result in Mr Tupe being treated unfairly in that he lost his opportunity to be considered for the General Manager position.

[79] I determine that Mr Tupe was unjustifiably dismissed by the Trust.

### **Remedies**

[80] Mr Tupe has been unjustifiably dismissed and he is entitled to remedies.

### *Reinstatement*

[81] Section 125(2) of the Act applies where reinstatement is sought by an applicant:

If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in section 123.

[82] Reasonableness was addressed in *Hong v Auckland Transport* in which the Court stated:

Looking at reasonableness, the Court needs to consider the prospect of effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer,, The Court must broadly enquire into the equities of the parties' cases in so far as the prospective consideration of reinstatement is concerned and balance the interests of the parties and justice of their respective cases.<sup>3</sup>

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<sup>3</sup> *Hong v Auckland Transport* [2019] NZEmpC 54 at [67].

[83] Practicality is a separate consideration to reasonableness as stated by the Court in *Smith v Fletcher Concrete & Infrastructure Limited*:

Practicality and reasonableness are two separate considerations. For reinstatement to be practicable it must be capable of being carried out in action, be feasible and have the potential for the reimposition of the employment relationship to be done or carried out successfully.<sup>4</sup>

[84] It is clear that at least 40 per cent, or the equivalent of two days a week, of Mr Tupe's role as Operations Manager of the Trust has disappeared as a result of the liquidation of TMOT.

[85] There is no evidence that the Trust contrived at that liquidation situation as an obstacle to Mr Tupe's reinstatement. Mr Roderick's evidence was that at the time of his engagement in 2018 NLL was at risk of insolvency with over \$500,000.00 of debt and, that unless there was a strategy to deal with that situation adopted, it would be insolvent by January 2019.

[86] Ms McLean's evidence was that the financial position of NLL was a concern for the Board and accounting information in the form of at the GHA report and legal advice on the Trust's position was therefore obtained and provided to the Authority and Mr Tupe.

[87] Mr Tupe when questioned at the Investigation Meeting confirmed that he knew about the state of NLL's financial position and accepted that he was partly responsible for that situation.

[88] Ms McLean's evidence was that the change process commenced by the Trust was necessary to address the financial difficulties also being experienced by it and this process is to be continued. This process, as advised to the affected employees including Mr Tupe on 20 November 2019, will result in the disestablishment of the roles of Operation Manager and Health and Safety Manager and the appointment of a General Manager.

[89] The Trust's decision to institute a selection process for that purpose was one I have found to be open to a fair and reasonable employer in all the circumstances.

[90] In respect of the reasonableness aspect of reinstatement, Ms McLean gave evidence that the Board had concern about Mr Tupe's lack of experience at a senior level with its requirement for the exercise of strategic skills, in particular to write reports for the Board. Further that the Board's trust and confidence in Mr Tupe had been eroded since the events which lead to his dismissal, and in the time since his reinstatement.

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<sup>4</sup> *Smith v Fletcher Concrete & Infrastructure Limited* [2020] NZEmpC 125 at [19].

[91] Mr Tupe was invited to apply for the position of General Manager and I observe that he may still do so should he believe that he has the necessary skills to fulfil the role. However I note that the role of the General Manager may be affected by the liquidation of NLL and its consequent decrease of the areas of operation covered by the Trust.

[92] Any reinstatement to the position of Operations Manager of the Trust must be both practical and reasonable. I find that in the circumstances as set out above, reinstatement is neither practicable or practical.

[93] Reinstatement is not ordered as a remedy.

#### *Reimbursement of Lost Wages*

[94] There is no claim for lost wages in circumstances in which Mr Tupe was employed by NLL following his dismissal and paid by the Trust since his reinstatement.

#### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i)*

[95] Mr Tupe has been unjustifiably dismissed. Mr Tupe stated that he experienced shock at his dismissal and suffered distress. He also experienced embarrassment at having to inform family and friends of the situation.

[96] **TMOT is ordered to pay Mr Tupe the sum of \$8,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

#### *Contribution*

[97] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[98] Mr Tupe's engagement with the selection process was principally via his representative Mr Austin. The consequence of this was that the ability to proceed to a meeting was subject to delay as a result of Mr Austin not being available on some of the many dates offered.

[99] Mr Tupe's office was physically adjacent to that of Mr Madden. In these circumstances, whilst Mr Tupe was entitled to have representation, his failure to advise Mr Madden of the reason for delay, i.e. that Mr Austin was not available on the dates offered, seems inexplicable.

[100] There also appears to have been a marked degree of lack of cooperation with the process Mr Madden was tasked with carrying out by the Board. Mr Madden's authority to act was questioned by Mr Austin who was acting under instructions from Mr Tupe, including

accusations of dishonesty in letters sent by Mr Austin dated 5 December 2019 and 20 January 2020.

[101] Mr Austin also attempted to intervene in and circumvent the process by seeking to interact directly with the Board rather accepting Mr Madden's authority to act.

[102] In these circumstances I consider that Mr Madden's frustration and perception that Mr Tupe was impeding the process by delay was understandable and contributed to the decision to dismiss a day before the final date offered for interview.

[103] I find that Mr Tupe contributed to the situation in which he found himself and reduce the compensation ordered by 30%.

### **Costs**

[104] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[105] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent 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.

[106] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[107] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].