

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [8]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 445
3099936
3100435
3101452

BETWEEN

MATTHEW SCOTT
MCQUILLAN
Applicant 3099936

SACHIN CHANDAR RAJ
Applicant 3100435

MOHAMMED
MUZAMMIL RAFIQ
Applicant 3101452

AND

DRIVESURE LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Ramendra Narayan, counsel for Applicants
Rachael Chandra, counsel for Respondent

Investigation Meeting: 6 and 7 May and 9 June 2021

Submissions received: 9 June and 9 July 2021 from the Applicants
6 July 2021 from the Respondents

Determination: 11 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr McQuillan, Mr Raj and Mr Rafiq, (the applicants) were employed by Drivesure Limited (Drivesure) until 25 March 2020 when their employment ended by way of redundancy. Drivesure operates a vehicle testing business. Mr McQuillan and Mr Raj were employed as vehicle inspectors and Mr Rafiq worked as a VIN technician.

[2] The applicants say their redundancy dismissals were unjustified because Drivesure followed a procedure that resulted in an outcome which was flawed and unjustified and there was no genuine grounds to disestablish their positions because there were suitable alternative positions available. The applicants also say they were unjustifiably disadvantaged in their employment from the flawed consultation process Drivesure adopted. They seek remedies of lost wages and compensatory damages, an award of a penalty for breach of the duty of good faith concerning attendance at mediation and a contribution to costs incurred. In addition Mr McQuillan claims unpaid bonus payments.

[3] Drivesure denies the remedies sought or that it has breached any term of the applicant's employment. It says the applicants' dismissals for redundancy were substantively and procedurally justified and that they have been treated fairly and reasonably throughout.

The Authority's investigation

[4] By consent the applications lodged by Mr Raj, Mr McQuillan and Mr Rafiq are heard together. The Authority heard evidence from Mr Raj, Mr Rafiq and Mr McQuillan, Greg Ranson and Kavinay Prasad.

[5] 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.

Non-publication order

[6] During the investigation of this employment relationship problem Drivesure sought non-publication orders under the clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) for documents identified in a memorandum of Ms Chandra dated 3 June 2021 on the grounds of commercial sensitivity.

[7] Having considered the parties' comments I consider the information in the identified documents is commercially sensitive and there is no public interest in the material being published. This is an appropriate matter in which to issue a non-publication order.

[8] The Authority orders the documents identified in Ms Chandra's memorandum 3 June 2021 are subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

Issues

[9] The issues identified for investigation and determination are:

- a) Did Drivesure unjustifiably dismiss Mr Raj, Mr Rafiq or Mr McQuillan for reason of redundancy?
- b) Did Drivesure's redundancy process unjustifiably disadvantage either Mr Raj, Mr Rafiq or Mr McQuillan in their employment?
- c) If so, are they entitled to a consideration of remedies sought including:
 - i. Lost wages pursuant to section 123(1)(b) of the Act?
 - ii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by either Mr Raj, Mr Rafiq or Mr McQuillan which contributed to the circumstances which gave rise to their grievance?
- e) Did Drivesure breach the duty of good faith owed to either Mr Raj, Mr Rafiq or Mr McQuillan by failing to agree to attend mediation prior to the dismissals?

- f) If a breach of the duty of good faith is established is a penalty warranted?
- g) Is Mr McQuillan owed arrears in unpaid bonus payments?
- h) Are either party entitled to an award of costs?

Relevant law

[10] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The legal principals to apply to such a consideration are set out in the following statements of the Court of Appeal in *Grace Team Accounting Limited*:

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

[85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.¹

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

[11] In assessing the justifiability of a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.

The employment agreements

[12] The parties' terms of employment are set out in written individual employment agreements the key terms of which are:

Mr Raj

Schedule A

Commencement date: 16 July 2018
Description of position: Vehicle Inspector
Place of work: Henderson
...
Notice period for redundancy: 2 weeks

Mr Rafiq

Schedule A

Commencement date: Tuesday 4 June [2019]
Description of position: VIN Technician
Place of work: Drivesure Compliance – Penrose
...
Notice period for redundancy: 2 weeks

Mr McQuillan

Schedule A

Commencement date: 9 October [2017]
Description of position: Senior Vehicle Inspector
...
Notice period for redundancy: 2 weeks

[13] The applicants' employment agreements contained the following identical redundancy provision:

52. If the Employer terminates the Employee's employment for redundancy, the Employer will give the Employee the notice set out in Schedule A or pay in lieu of notice, and the Employee will not be entitled to redundancy compensation.

Background

[14] In early March 2020 Drivesure's service contract with Penrose Compliance Centre Limited (PCCL) was cancelled at the Penrose site (PCC). On 10 March Mr Ranson wrote to the applicants individually advising that on 6 March Drivesure had received advice from PCCL that "they wished to terminate our services on site. The effective date indicated...was 8 May 2020". The letter continued that this advice was unexpected, that options for the positions "currently employed at the site" were being assessed and Drivesure would be in contact in the next few days "to provide some certainty over timing going forward". The letter invited the applicants to email Mr Ranson directly if they had any queries. Mr Ranson hand delivered the letter to the applicants. The applicants were the only employees out of the seven compliance centres Drivesure operates in Auckland to receive such a letter.

[15] Mr Raj by reply email raised a query about his training bond which was addressed by Drivesure.

[16] On 17 March Mr Ranson wrote identical letters to the applicants confirming Drivesure's business operations at the site would end on 8 May 2020. The letter also set out a proposal that all the positions at PCC would be made redundant, that redeployment to other sites had been considered but was not possible, that if the proposal was implemented the applicants would receive four weeks' notice and no redundancy compensation would be payable. The letter invited the applicants to meetings on 24 March to receive their feedback on the proposal and to give them an opportunity to discuss any issues or ask any questions. The letter acknowledged the news would be concerning and unexpected, reminded them of their duty of fidelity and confidentiality and invited questions or feedback prior to the meeting.

[17] On 19 March Mr McQuillan replied to Mr Ranson:

- querying what would happen with a disciplinary investigation into his conduct which had recently commenced;
- that there were areas of redeployment Drivesure had not considered for example a part-time role at the Takanini centre filled by a Hamilton based employee;

- given a recent downturn in business it had been imprudent to employ a new staff member;
- what had Drivesure done to find new business to minimise the need for redundancies;
- what was the selection criteria for the proposed 'retrenchment';
- his position had been advertised well before the disciplinary process;
- he held a view a decision had already been made to dismiss him and the cancellation of the PCC contract was a convenient way to achieve this; and
- he was concerned he would not be treated fairly.

[18] On 20 March Mr Ranson replied to Mr McQuillan responding to the issues raised including:

- this was not a 'retrenchment' but a response to the site closing due to the loss of the service contract;
- referred to an earlier email to Mr McQuillan dated 12 March advising him the disciplinary process was put on hold until the redundancy process was complete;
- that serious thought to redeployment had been given;
- the arrangement whereby a Hamilton based staff member worked part time in Auckland was under review in response to declining inspection volumes and the Covid-19 crisis;
- noting that staff at PCC had strongly advocated not to work at other sites but that this was not a feature of the redeployment considerations;
- no new staff had been employed since 6 March;
- the loss of positions at PCC directly resulted from the termination of the contract;
- new customers were continually being looked for;
- the key criteria for selection for the proposed redundancies are the staff who spend the majority of their time filling positions at the site which will no longer be required after the contract termination date;
- denying his position had been advertised;
- denying Drivesure had decided to dismiss him;
- acknowledging it is a difficult situation but that the process was transparent and fair and there was no disparity of treatment; and

- that further feedback could be provided by email or at the proposed meeting 24 March.

[19] Also on 20 March the Prime Minister signalled the country was likely to go into lockdown in response to the developing Covid-19 crisis.

[20] On 21 March Mr Raj emailed Mr Ranson seeking further information and comments including:

- the prospects for new business with a view to minimising the impact of redundancy;
- the basis for Drivesure's view of a negative economic future which, he said, indicated the redundancy decision had been made;
- why new staff had been employed;
- a position becoming vacant at the end of the month which he thought could be offered to him;
- why Drivesure was advertising a part-time role on TradeMe when he could perform that role;
- why a staff member was being deployed from Hamilton to the Takanini branch when he could perform that role;
- the selection criteria Drivesure had used; and
- what were Drivesure's plans with regard to COVID-19 government wage subsidies which could minimise the impact of any redundancies.

[21] On 22 March Mr Ranson replied to the questions raised including:

- the potential redundancy situation had been brought about by the cancellation of the PCC contract;
- the Covid-19 situation and the downturn in work which had been expected before the cancellation was not relevant to the proposed redundancies;
- no new vehicle inspectors had been hired since the PCC cancellation notice had been received on 6 March, due to the Covid-19 crisis no additional staff would be hired and staff will not be replaced;

- the job vacancy listed on TradeMe on 24 February was removed on 21 March due to the “current economic uncertainty that has arisen in the last week and yesterday”;
- the Takanini deployment had been a few days per week to cover a down turn in the Hamilton workload and to offer professional development for the effected staff member and due to current circumstances was now under review;
- the selection process was “the staff who are for the majority of their time filling all positions at the site, which will no longer be required after the termination date”;
- since March 2019 Mr Raj had worked 87% of his time at the PCC site and a breakdown of his deployment at other sites for the same period was provided;
- he noted Mr Raj and other staff at PCC had advocated strongly to not be required to work at other sites;
- with respect to the Government wage subsidy, Drivesure had not made any decisions yet and reiterated the redundancy situation had arisen due to the cancellation of the PCC contract; and
- invited Mr Raj to provide further feedback or questions by email or at the meeting on 24 March.

[22] Also on 22 March Mr McQuillan emailed Mr Ranson seeking to shift the meeting from 10am Tuesday 24 March to 10am Thursday 26 March because his representative was unavailable until then. Mr Ranson declined the request because he was concerned a face to face meeting might not be possible with the then developing Covid-19 situation. He offered to meet any time Monday or Tuesday including before or after work.

[23] On 23 March the applicants using the signature “the team at PCC” emailed Mr Ranson inquiring how the meeting scheduled for the following day could proceed now a level four COVID-19 lockdown had been announced and asking how their wages would be paid for the then expected four week lockdown.

[24] By email dated 24 March the applicants again wrote to Mr Ranson seeking to postpone the meeting on the following grounds - due to the “current Covid-19 situation

here in NZ” they were not in the right frame of mind, Government mandated social distancing restrictions prevented the meeting, their legal advisor was not available to meet that day and their employment should be subject to the government freeze on dismissals. The email stated postponing the meeting would be fair and reasonable.

[25] By reply on 24 March Mr Ranson wrote to each of the applicants individually listing recent relevant correspondence, acknowledging the joint advice the applicants would not be attending the 24 March meeting, that this was unfortunate given the limited opportunity to hold the meeting in person and recorded they had had two weeks to make submissions on the proposal outlined in the 10 March letter. The letter responded to the applicants’ reasons for not wishing to attend the 24 March meeting:

- acknowledging this was a difficult time which emphasised the need for Drivesure to be able to make timely business decisions to be able to manage the business as a whole during the crisis;
- offered to meet remotely (by skype, messenger or telephone conference) at any time that day or in person maintaining mandated social distancing;
- confirming its cognisance of its good faith obligations and its obligation to act fairly and reasonably and that Mr Ranson had made himself available to meet any time that week and that day;
- reminding the applicants of their concomitant good faith obligations;
- that the request to postpone the meeting and the decision on the proposal could not be accommodated due to the COVID-19 crisis because “...this decision effects the whole business in a time of unprecedented uncertainty. We have an obligation to move quickly to manage the crisis”; and
- the termination freeze referred to applies to residential tenancies and the proposed redundancies do not result from the COVID-19 crisis.

[26] The letter ended asking the applicants to confirm if they wished to meet in person or remotely.

[27] Mr Raj replied by email later that day that he had received Mr Ranson’s latest email at 4.34pm that afternoon and confirming he hoped to hear from his representative soon. The email goes on to raise the following issues:

- he had not been given two weeks to reply to the restructuring proposal because he first heard about it by way of the 17 March letter;
- denying he had strongly refused to work at other sites; and
- asking how his working at PCC for 84% had been calculated;
- that he did not feel PCC was his fixed site as he had been moved around and other staff had worked at PCC too; and
- requesting further information before he could comment further.

[28] There was a further email exchange regarding Mr Raj's training bond.

[29] On the morning of 25 March Mr Ranson emailed Mr Raj in reply to his email of 4.43pm 24 March:

- with respect to having two weeks to provide a response the dates had been corrected by amended letter;
- that PCC is his base and the issues regarding work at the Papakura branch had been addressed; and
- the 84% calculation was based on timesheets which detail the locations worked and that deployment to other sites was as required for operational requirements for example covering sick leave as was the case for other staff deployed to PCC.

[30] Also on 25 March Mr Rafiq wrote to Mr Ranson providing his feedback to the redundancy proposal which included that he was a hardworking and loyal staff member who was prepared to shift work site and reduce his hours to maintain employment with Drivesure.

[31] Later on 25 March Mr Ranson wrote identical letters to the applicants:

We write to provide an update to our letter dated 17 March 2020.

The proposal itself is not effected and remains the same.

The update is in relation to your notice period which, if the proposal goes ahead, which will remain at 2 weeks in accordance with your employment agreement rather than the 4 weeks which was originally proposed on the basis that you would be working out that notice.

This is because circumstances have obviously changed dramatically since 17 March whereby all compliance services will now cease (including at the PCC site) from close of business today as a result of the government lock down.

As such, if the proposal goes ahead and you are not redeployed, you would not be required (and will not be able) to work out your notice period and you will be paid 100% of your salary (\$1240.00pw) during your two week notice period.

In terms of the decision on the proposal itself, we understand we have now received all feedback and we will be making a decision later today when the management team are able to meet virtually.

[32] Mr Raj wrote by reply email requesting mediation.

[33] Later on 25 March Mr Ranson wrote to each of the applicants near identical letters confirming the proposal their positions were redundant as a result of the cancellation of the PCC contract, that there was no redeployment opportunities and therefore their employment would end with two weeks' notice to be paid in lieu with the final day of employment being 8 April 2020.

[34] By email sent at 12.40pm dated 26 March Mr Raj wrote to Mr Ranson expressing concern and disappointment that Drivesure had not agreed to attend mediation, asked him to reconsider attending mediation and defer the final redundancy decision until mediation had occurred, that refusing to attend mediation was a breach of the good faith obligation which could expose Drivesure to a penalty, that he was stressed and a dismissal would add to the challenges he faced including financial stress. The email also requested recalculation of his pay at the appropriate rate from date he qualified as an entry certifier (20 November 2018) until 1 January 2019 when Drivesure started paying him at that rate.²

[35] Mr Ranson responded to Mr Raj later that day confirming Drivesure was willing to attend mediation as set out in the letter of 25 March and referred Mr Raj to the pay rate rationale discussed at meetings held in December 2018 and email 25 March.

Discussion

Genuine business need for restructuring

[36] The applicants' are critical of Drivesure's decision to make their positions redundant. Though they accept the PCC workshop had lost the contract they say the

² For completeness this claim is not before the Authority.

timing of their dismissals was open to negotiation with the contractor and if Drivesure had made better efforts to do so their jobs would have been secure if not permanently but for longer. They rely on information that Drivesure challenged the cancellation of the contract and was able to negotiate an extension of the contract until 10 July 2020.

[37] Drivesure says the cancellation of the PCC contract came as a surprise and the effect of the cancellation was the cessation of all work at that site. It says at the time the decision was made to make the applicants redundant the three positions they held and which were allocated to perform work at PCC were surplus to the businesses needs as a result of that cancellation. Drivesure says that it was not until after the COVID-19 lockdown had been lifted that it was able to engage with the PCC contractor to negotiate the extension.

[38] I am satisfied a genuine business need existed for the restructuring – the PCC contract was cancelled and the effect of this was the work being performed at that site was no longer required. The information before the Authority suggests Drivesure attempted to extend the cancellation date early on without success and this issue was not raised again with PCCL until late April when New Zealand moved to level 3 lockdown and the cancellation date was then moved to 10 July. I am not drawn to the notion Drivesure withheld relevant information from the redundancy consultation process about a possible extended cancellation or delayed such an extension to progress the redundancy process.

Ulterior motive

[39] The applicants say the restructuring process unfairly targeted them and was an opportunity seized on by Drivesure to end their employment. There was considerable evidence of issues in the workplace arising in the months prior to the restructuring. The applicants point to these to say Drivesure, to paraphrase an extract from an email of Mr McQuillan “had made up its mind to fire [us] well before the redundancy situation arose”.³ Having considered the evidence and the parties submissions I am satisfied these issues were appropriately dealt with by Drivesure.

³ Email Mr McQuillan to Mr Ranson 19 March 2020.

[40] There is insufficient evidence the restructuring was implemented to target the applicants.

Selection

[41] It is common ground between the parties PCC was a “2 inspector and 1 winner site”.⁴ The applicants worked in these roles and these were the positions directly affected by the cancellation of the PCC contract. The applicants repeatedly refer to themselves in documents before the Authority as the “PCC team”.⁵ Notwithstanding Mr McQuillan and Mr Raj say it was unreasonable to apply a selection criteria of those who worked a significant majority of time at Penrose because they say this is not the case and in the case of Mr Raj he seeks to rely on the written terms of his employment agreement which record his place of work as Drivesure Henderson. They also seek to emphasis a fourth staff member who worked for a period at PCC prior to Mr McQuillan’s return to the site and the timing of this return.

[42] On the information before the Authority it was reasonable for Drivesure to consider the applicants worked the majority of their working hours at PCC and they understood and indeed advocated for this to be their primary place of work.⁶ The applicants had an opportunity to comment on the selection criteria and ask questions as to the basis of such which were duly answered.

[43] The applicants were the Drivesure staff directly affected by the PCC contract cancellation. I am satisfied the selection criteria was fair and reasonable and they had a fair opportunity to comment on such.

Redeployment

[44] Drivesure had an obligation to consider alternatives to making the applicants redundant.⁷ The communications between the parties record Drivesure’s advice redeployment had been considered and no redeployment opportunities at other centres

⁴ Email Mr McQuillan to Mr Ranson 5 March 2020.

⁵ Refer email Mr McQuillan to Mr Ranson 27 February 2020, email 23 March 2020 2.24pm and 4.02pm, email 24 March 2020.

⁶ For example Mr Raj email to Mr Ranson 16 October 2019, Mr McQuillan email to Mr Ranson 27 February 2020 and email exchange Mr Rafiq and Mr Ranson 1 October 2019.

⁷ *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142, [40] – [43].

were available, no staff were being replaced, no new staff were being hired and temporary arrangements were under review. I am satisfied this was the case. The obligation to genuinely consider redeployment options does not extend to creating new positions if none exist at the time the redundancy decision-making is undertaken.

Mediation

[45] The applicants are critical of Drivesure's refusal to attend mediation before making the decision to confirm the redundancy proposal. At that time no personal grievances had been raised though I accept the parties correspondence suggest an employment relationship problem existed. Though I do not doubt mediation would have assisted the parties given they were actively engaged in a redundancy consultation process more fundamental problems existed in that process which are detailed below. On balance and in light of all the relevant circumstances the refusal to attend mediation does not amount to a breach of obligation owed to the applicants.

The impact of the COVID-19 lockdowns

[46] On 23 March at 1.40pm, in response to the COVID-19 crisis a national level 3 lockdown was announced with immediate effect along with a level 4 lockdown effective from 11.59pm 25 March. With respect to this redundancy process Drivesure responded to the impact of the lockdowns by constraining the consultation period – it decided the unavailability of the applicants' representative could not be accommodated, as I observe could reasonably have been expected in normal circumstances, and the original proposal of four weeks' notice of redundancy was reduced to two weeks due to the impact of the level four lockdown restrictions which would prevent the applicants working out their notice period. While it is wholly accepted the impact on Drivesure of the lockdowns was serious this was not the cause of the redundancy process or the reason, or indeed a contributing factor, to the ultimate decision to dismiss the applicants for redundancy which was the cancellation of the PCC contract.

[47] The lockdowns did not remove Drivesure's obligation to fairly and reasonably deal with the applicants during the redundancy process. Drivesure has constrained that process, unfairly I find, due to the lockdowns and this has disadvantaged the applicants in their employment:

- the applicants were denied the opportunity to shift the meeting by a few days to meet Drivesure with their representative to discuss the proposal. Given the range and scope of their concerns, particularly those expressed by Mr McQuillan and Mr Raj about the process and assertions about Drivesure's motivation a meeting with their representative would have been consistent with the obligation to be active and constructive in the employment relationship and would have provided a fair opportunity to comment on the information relevant to their continued employment; and
- the applicants were not consulted on the change of notice period. This was a significant change to the redundancy proposal and they were entitled to a fair opportunity to comment on that change and have any such comment considered.⁸

[48] For completeness the applicants' claim Drivesure should have applied for the Government wage subsidy for their benefit to extend their employment cannot succeed in the absence an obligation to do such.

[49] The applicants have established flaws in the consultation process which amount to unjustified actions causing disadvantage. Given the likely inevitability of their dismissals by way of redundancy due to the cancellation of the PCC contract and the lack of redeployment options, not doubt made more acute by the impact of the COVID-19 lockdowns on Drivesure's business, the applicants claims are best considered as disadvantage grievances rather than unjustified dismissals. Drivesure was unjustified in the way it acted towards the applicants and that was to the applicants disadvantage in the redundancy process.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[50] The impact of the redundancy process has had a profound and negative impact on the applicants. They feel hurt and aggrieved. The Authority is satisfied they have experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation

⁸ Section 4(1A) Employment Relations Act 2000.

particularly with regard to other awards of compensation.⁹ Given the evidence before the Authority of the impact on the applicants of the disadvantages as found my view is they have suffered a similar degree of harm and it is appropriate that the awards are the same for each. The claim for lost wages is not for consideration given the grievance established.

[51] Having regard to the particular circumstances of this case, I consider that an award of \$8,000 under section 123(1)(c)(i) is appropriate.¹⁰

Contribution

[52] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[53] This was a no fault dismissal. Drivesure suggests the applicants unreasonably refused to meet and this can contributed to the circumstances of the grievance. I do not agree – the correspondence shows the applicants sought to delay the meeting so their representative could attend and to cleave away the COVID-19 circumstances from the redundancy process. In the circumstances of this matter my view is this was reasonable.

[54] There are no deductions from the monetary remedies for reasons of contribution.

Bonus

[55] Mr McQuillan claims bonus payments. The written terms individual employment agreement does not provide for a bonus. He relies on receipt of bonuses in the earlier years of his employment the structure of which, he accepts changed, including payment in vouchers and a team bonus. These are not issues Mr McQuillan queried at the time.

⁹ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

¹⁰ *Wakaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

[56] The evidence establishes the bonus was not a term of Mr McQuillan's employment agreement and the bonus payments made were at the discretion of Drivesure. The bonus claim does not succeed.

Penalty

[57] A penalty has been sought for breach of the duty of good faith for refusing to attend mediation. The applicants have not established such a breach. The duty of good faith includes parties to an employment relationship being active and constructive in establishing and maintaining an employment relationship in which parties are responsive and communicative. Drivesure's conduct in not agreeing to attend mediation prior to concluding the redundancy process did not breach this obligation for the reasons set out above.

Summary of orders

[58] Drivesure Limited must pay Mr Rafiq, Mr McQuillan and Mr Raj the following amounts within 28 days of the date of determination:

- (i) \$8,000 each under s 123(1)(c)(i).

Costs

[59] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, the applicants are to file and serve any costs memorandum within ten working days of the date of determination and Drivesure may file and serve any reply memorandum within a further five working days.

Marija Urlich
Member of the Employment Relations Authority