

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 198
3112324
3112355
3112358
3111772

BETWEEN	ALISON MCKNIGHT First Applicant
AND	BARRY WATKINS Second Applicant
AND	STEWART ANGELO Third Applicant
AND	RAY ENGLAND Fourth Applicant
AND	NZEC MANAGEMENT LIMITED Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Kam Bailey, advocate for the Applicant
Cherie Clarke, counsel for the Respondent

Investigation Meeting: 26 and 27 April 2022 at New Plymouth

Submissions [and further Information] Received: 27 April 2022 from the Applicant and Respondent
2 May 2022 from the Applicant

Date of Determination: 16 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alison McKnight, Barry Watkins, Stewart Angelo and Ray England (when referred to collectively, the applicants) all say they were made redundant by NZEC after receiving a phone call and emailed letter following a decision to implement a 30 percent reduction in their salaries/wages. Each of them were unilaterally instructed to take annual leave.

[2] They say their dismissals on the grounds of redundancy constitute unjustified dismissals and the process or lack of process followed unjustifiably disadvantaged them in their employment because they were given no opportunity to consult on the redundancies, they were not provided with any information or given the opportunity to provide feedback in respect of their redundancies.

[3] They also say that there was no real agreement regarding the 30 percent reduction in their salaries because there was no informed consent. They say they each received a letter dated 9 April 2021 asking for feedback on a proposal to reduce their salaries. They were given the impression this was something that the company could impose, however by accepting the 30 percent reduction in salary, they could protect their employment.

[4] Each applicant says however, their employment ended out of the blue although they were paid contractual notice. The applicants claim reimbursement of the 30 percent reduction, lost salary/wages, and damages for hurt and humiliation. In each case they claim a sum of \$25,000. They also ask that a penalty be imposed on NZEC because of the breaches of good faith.

[5] NZEC Management Limited (NZEC) says that the applicants agreed to the salary/wage reduction in each case. It says that because of press releases they had issued during the period, and because of updates the company gave its staff, the applicants should have been aware the company was suffering financially and was in dire straits. Further, it says it was not required to follow any particular process, including consultation with the applicants because the respective employment agreements provided that the company could dispense with consultation where “exceptional circumstances” existed. NZEC says the sudden drop in oil prices, the company’s precarious financial position, and the Covid pandemic created exceptional circumstances.

Issues

[6] The following issues were identified:

- (a) Were the applicants (or any of them) unjustifiably dismissed?
- (b) What, if any, is the effect of the contractual position contained in the employment agreements which purport to dispense with consultation where exceptional circumstances exist?
- (c) Do the applicants' disadvantage claims arise out of the same circumstances as the claims for unjustified dismissal?
- (d) Did NZEC breach its duty of good faith and if so what penalty (if any) ought to be ordered?
- (e) If the applicants were unjustifiably dismissed, what remedies would be appropriate under the circumstances?

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made, but has not recorded all the evidence and submissions received.

Background

[8] NZEC gave evidence through its Group Chairman James Willis, and the CEO of NZEC at the time of the dismissals, Michael Adams. Each of the applicants gave evidence and in the cases of Mr Angelo, his wife Jannett Angelo gave evidence and in the case of Ray England, his wife Ann England also gave evidence. All witnesses affirmed their evidence.

[9] NZEC is a company involved in the on-shore oil and gas sector in New Zealand. Since 2014, it had struggled to maintain a positive cashflow. Although publicly listed in Canada, NZEC is not a publicly listed company in New Zealand.

[10] NZEC faced what it saw as an unprecedented situation caused not only by the decline in the price of oil, but by the Covid-19 pandemic, including when and how the pandemic might end. NZEC was also faced with the cancellation of the contract it had with First Gas to operate the Ahuroa gas storage facility, although notice of cancellation of that contract was not to be effective for a further 12 months.

[11] It was common ground that the forecasts of NZEC's financial position and cashflows described a very difficult financial position. All the shares in NZEC are held by New Zealand Energy Corporation. Although cashflow assessments were of concern, NZEC did have support and New Zealand Energy Corporation had been advised that support could be provided either by way of short-term loans or additional capital should the need arise. Accordingly, NZEC was not facing an insolvency position, although it was paramount that the company reduce costs and restructure its operations.

[12] On 6 April 2020, each of the applicants received a letter titled "Covid-19: Impact on business and consultation on proposed urgent changes to workforce". The letter advised the applicants on three important aspects.

[13] First, they were advised:

One alternative under consideration is to reduce remuneration (for those workers who are able to be retained) to 70% of their normal weekly or monthly salary or wages or daily remuneration (in case of Contractors). We wish to consult with you on this proposal before we make a decision ...

[14] The letter went on to advise that if the proposal proceeded, it would come into force on 15 April 2020.

[15] The applicants were requested to take annual leave but were advised that if agreement could not be reached then NZEC may issue a direction to use annual leave.

[16] Under the heading of ongoing arrangements, the letter thirdly advised:

It is important for you to be aware that these arrangements could be required for many months and may not be the only changes we need to make (after consultation with you). ...

[17] On 9 April 2020 the applicants were advised that NZEC was implementing the 30 per cent reduction of remuneration "with a floor of \$50,000 or by 15% where affected personnel are currently earning less than the floor".

[18] Following on from that letter, in May 2020 each of the applicants received a phone call and written advice of the termination of their employment. In some cases the call was from the CEO of NZEC, followed up by written advice, and in other cases, it was from the manager, followed up with written advice from the CEO.

[19] NZEC does not dispute this was how the process unfolded. It however makes two points defending the process it undertook. First, it says the company was communicative with staff, at least on the macro level. It issued press releases and kept staff aware of the financial difficulties the company was facing. It says therefore that none of the applicants could say that they were not aware that the company was facing difficulties and that redundancies were a possibility. Secondly, it relies on the provision in its employment agreements which provides a redundancy process as follows:

In the event we consider that your position of employment could be affected by redundancy or could be made redundant, we shall, except in exceptional circumstances, consult with you regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role).

[20] NZEC's position, is that the sudden drop in oil prices combined with the Covid-19 pandemic meant that because of its poor financial performance leading up to early 2020, the company found itself facing exceptional circumstances justifying the lack of consultation. NZEC's position was that this necessitated an immediate and truncated process which simply left no time for consultation. The company did however advise that it also had a collective agreement with E tū Inc Union. The collective agreement did contain contractual consultation and notification provisions. NZEC said although it consulted with the Union, but did not consult with the four applicants, it nonetheless followed the same process including selection criteria of last on, first off etc. It acknowledged none of this was disclosed to the four applicants.

Evidence

Stewart Angelo

[21] Mr Angelo was the first of the applicants to give evidence. His employment was covered by an individual employment agreement which he signed on 19 September 2012. Although he became an employee of NZEC no further employment agreement was entered into. Accordingly that agreement set out his terms and conditions of employment. Three aspects of the agreement are noted. First the agreement provided for variation for waiver and severance providing as follows:

The agreement may be varied by signed agreement in writing. No waiver of any breach of this agreement shall be effective unless specified in writing and signed by both parties.

Where any term, clause or provision of this agreement is deemed invalid or unlawful it shall not invalidate any other term, clause or provision and shall be deemed severed without affecting the remainder of this agreement.

[22] The agreement also had attached to it a Schedule A, Mr Angelo's job description identifying him as Engineering and Maintenance Manager.

[23] Mr Angelo was paid a salary of \$224,400 per annum. He worked on average a 50-60 hour week. When the New Zealand Government announced a level 4 response to the Covid-19 pandemic, NZEC instructed all staff who were able to, to work from home. From 30 March 2020 until Friday 1 May 2021 Mr Angelo worked from home although after Easter he took four days of planned annual leave.

[24] On 6 April 2020 Mr Angelo received a letter from Mr Willis advising of the business impact Covid-19 was having, proposing a salary and wage reduction coupled with a request that employees take annual leave. The letter was headed "COVID-19: Impact on business and consultation on proposed urgent changes to workforce". The letter contained two proposals; first to reduce salaries/wages/hourly and daily remuneration to 70 percent of normal remuneration; and secondly he was encouraged to take leave but advised that if agreement could not be reached by 12 noon on Wednesday 8 April, he may be issued with a direction to use annual leave. The letter also referred to "ongoing arrangements" as set out previously in paragraph 15 above.

[25] In terms of the salary reduction the letter provided that it would come into force on 15 April 2020. It also gave an indication that by accepting the reduction, Mr Angelo could be protecting his position. The letter stated:

One alternative under consideration is to reduce remuneration (for those workers who are able to be retained) to 70 percent of their normal weekly or monthly salary or wages or daily remuneration (in the case of contractors)...

[26] Indeed Mr Angelo gave evidence that he emailed stating he was prepared to accept the 30 percent salary reduction but did not want it to start on 15 April. He suggested 1 May. He stated he did this because he believed that according to the tenor of the letter this meant his position would continue. He also wanted to know when salaries would be restored.

[27] The company had asked for feedback on the proposal to reduce salaries. However, on 9 April 2020 Mr Angelo received another letter from Mr Willis advising firstly, the salary

reduction was going ahead, and secondly, staff were required to take leave effective immediately and until further notice.

[28] It is worth making two points here. First, reducing salary this way constitutes a variation to the employment agreement. This variation was not done in accordance with the specific terms contained in clause 1 of the agreement. There was no formal agreement in writing in respect of the reduction. If there had been, no doubt it would have set out how long the reduction was to last for as it is evident it was not designed to be permanent.

[29] On 15 April Mr Angelo emailed Mr Adams and varied the arrangement regarding leave. Ultimately Mr Angelo agreed to take two weeks leave from 4 May to 15 May.

[30] On 7 May 2020, whilst Mr Angelo was on leave, he received a call from Mr Adams and was told he had been made redundant. He says this came as a huge shock as he had not been given any indication prior to that telephone call that his position was in jeopardy. Immediately following the call, he received an email advising the termination of his employment. He was given a termination letter advising it had been necessary to disestablish roles including his, and his employment would terminate on two months' notice.

[31] Mr Angelo stated he felt extremely hurt and humiliated following that phone call. He said he had no inkling as to what the call would be about and it was devastating. He had to tell his wife. He felt hurt and humiliated and suffered a loss of dignity and self-respect. He was the only person in the engineering department and said he knew his job had to be done, or at least parts of it. There had been no face to face meeting though the entire process. He felt it was very disappointing for his employment to end this way after some seven or eight years.

[32] He said that to run an oil and gas production, an engineering function is essential as it is a regulatory function. He understood that part of his role was outsourced to external consultants. He also gave evidence regarding the financial impact. He looked for other opportunities and ultimately set up his own consultancy business. However, he remained unemployed for some six months.

[33] His evidence regarding hurt and humiliation, injury to feelings and loss of dignity was reinforced by the evidence that Janett Angelo, his wife gave. Ms Angelo said he loved the job and the challenge of it. She said she observed her husband working through the issues and trying to remain stoic and professional. She said that she observed he was greatly shocked that

his employment ended so abruptly. It has taken some time for Mr Angelo to regain his self-worth.

Barry Watkins

[34] Mr Watkins' terms and conditions of employment were also set out in an employment agreement signed by the parties on 14 January 2013. Mr Watkins' agreement had the same provision relating to variation, waiver and severance as Mr Angelo's. However, it also had a bonus provision providing simply "bonus up to ten percent salary". Mr Watkins claims he never received a bonus the entire time he was with the company and claims one now.

[35] The employment agreements contained a specific redundancy provision. NZEC relies on this provision to support its position that consultation was not necessary. I have set this clause out in full in [19] above.

[36] Mr Watkins' evidence as to what transpired was very similar to that provided by Mr Angelo. He had received the same letter in respect of pay reduction by 30 percent and received the same confirmation that this was implemented on 15 April 2020. On 6 May, around 4.20 pm he missed a call from his manager and when he returned the call he was told his employment had been terminated. On 8 May 2020 he received a dismissal letter signed by Mr Adams terminating his employment on one month's notice.

[37] Mr Watkins gave evidence of the effect the termination of employment had on him financially, emotionally, physically and mentally. He stated the effects were catastrophic. His marriage broke down and he was forced to live in a motel at a point where he was at his lowest physical and mental point. Mr Watkins became stressed and experienced severe anxiety and became medically unwell suffering from excruciating headaches. He says his self-esteem and confidence vanished. He had high levels of anxiety, stress, humiliation and a lack of trust in others which meant multiple visits to his doctor. He had to find a place to live with little or no income. He was forced to withdraw some of his KiwiSaver funds to try to set up a new business. He did not establish his boat charter business until late August 2020.

Alison McKnight

[38] Like other applicants, Ms McKnight's terms and conditions of employment were set out in an employment agreement signed by the parties on 27 August 2015. The agreement contained the same provisions as the other applicants as it related to variation, waiver and

severance. It also contained the same redundancy process as I have set out above. Ms McKnight's evidence relating to her redundancy was almost identical to the process described by Mr Angelo and Mr Watkins.

[39] Ms McKnight commenced employment with NZEC on 6 October 2014. In 2015 her role changed to that of Accounts Payable Administrator. During the level 2 lockdown on Sunday 23 March 2020, she received a call from her manager asking her to pick up her PC from work and begin working from home. Like other applicants, on 6 April 2020 she received the same letter as Mr Angelo and Mr Watkins regarding a 30 percent reduction in salary. She emailed Mr Adams querying aspects of the email and says that she was told if she had annual leave she was to take it. On 15 April, Ms McKnight's salary was accordingly reduced by 30 percent.

[40] On 6 May Ms McKnight was telephoned and advised that her position had been made redundant. She was told that as soon as her manager let Mr Adams know she had been rung, Mr Adams would send a confirmation email of this. On 6 May, Ms McKnight received the notice of termination of her employment signed by Mr Adam in the same style as the other applicants. The termination letter provided for Ms McKnight's contractual notice of one month. She spent five days training the accountant who was to take over her tasks. Ms McKnight gave evidence that the effect the termination of her employment had on her both financially and emotionally.

[41] Her salary loss was two months. She found it humiliating that she was required to train the person taking her position. The accountant already had a full workload and it was obvious he would not be able to do all of the tasks Ms McKnight had previously undertaken. She felt as her position was accounts payable, that position could not be dispensed with in the redundancy and accordingly felt that the dismissal was personal. She also felt that it was because she questioned the 30 percent reduction that she was dismissed. Ms McKnight gave evidence that she lived on her own and found it extremely stressful. She did not feel she had anyone to talk to and share her problems. She advised it took some time for her to get over the effects of the dismissal. This was especially so when she could not understand the reasoning and accordingly, as noted above, felt her redundancy was personal.

[42] Ms McKnight says that her manager had tried to argue for her retention but told her she was told in no uncertain terms "no she is out". Ms McKnight gave evidence that she found it

most embarrassing. Her daughter was there and Ms McKnight was crying and concerned about how she was going to cope. She felt she was punished for wanting further information and ended up in hospital with a panic attack.

Ray England

[43] The process followed in respect of Mr England mirrored that of all the other applicants. His terms and conditions of employment were set out in an employment agreement and Mr England was employed as a Senior Production Operator.

[44] Like the other applicants, on 6 April 2020 he received a proposal that his salary be reduced by 30 percent and he was required to take leave. He states that he only had until 12 pm on Wednesday 8 April 2020 to provide feedback on that proposal. Mr England however did reply, raising some 14 points including querying why 30 percent as he felt that a high percentage to take off his salary in one hit. Mr England did not receive a response to that email.

[45] On 11 May 2020 his manager Peter Kingsnorth rang him stating that he was about to receive an email telling him his employment had been terminated. He received the same form of letter the other applicants had received, advising him his employment was terminated with one months' notice period as provided for in his employment agreement. Like the other applicants, he says the termination came out of the blue. He had no face to face meetings or any discussions regarding an impending redundancy with anyone. He states that there was no consultation of any form with him.

[46] Mr England gave evidence that he believed he should have had the opportunity to sit down and meet with NZEC management where he could have asked questions and presented ideas about different roles he could cover. His evidence was that he was upset with the way his redundancy had been carried out and how he was treated. He became very worried about bills and mortgage payments. He started feeling sick, not eating much and found it hard to sleep at night. He says the sudden termination of his employment placed stress on his relationships with people he loved. He states that after the huge disappointment of losing his job he had to face the fact that after working 28 years in the oil and gas industry he may not be able to find a new role in the industry.

[47] He gave evidence of a number of roles he had applied for unsuccessfully. He says his sense of self-worth had taken a big dive and he still doesn't sleep well. He had been a

production supervisor in previous companies and was capable of carrying out a number of roles in the industry. He was forced to take five days leave and it took him some four months before he was working again on 28 October 2020. Mr England said he felt betrayed. He felt that by taking the reduction of 30 percent he would be retained.

James Willis - NZEC

[48] Mr Willis gave evidence that he was the Chairman and CEO of New Zealand Energy Corporation which holds all the shares in NZEC Management Limited. Mr Willis had no hands on part to play in the redundancies. His evidence was more focussed on the financial difficulties facing NZEC and the urgent steps that were needed to be taken to reduce costs and losses. He said that the decline in the price of oil, the unprecedented Covid-19 pandemic, including the uncertainty about when and how it might end, pushed the company into a very difficult financial position. His view was that NZEC had no alternative other than to embark on the cost reduction programme. He said redundancies were absolutely necessary to restructure the business. Although he said that decisions and implementation had to be undertaken at very short notice and only after consultation with personnel, but as he was not hands on, he was not in a position to say that's what happened.

[49] Indeed, the evidence from Mr Adams was that it did not. Mr Willis advised that it was not his role to provide information to the applicants as that was the role of NZEC and its CEO. He noted however, that the company had moved progressively to the use of consultants and external contractors for the conduct of many of its activities. He stated that this provided additional efficiencies as consultants are at a lower total cost as they are utilised on a part time basis.

Michael Adams - NZEC

[50] Mr Adams was the CEO of NZEC at the relevant time although he has now resigned. In terms of the redundancy process his evidence was forthright. It was apparent that Mr Adams had been impacted himself. He found the process distressing and made the comment that all the applicants had been valued employees and he struggled with the prospect of redundancies.

[51] However, he was equally clear that from his perspective matters were urgent and immediate steps were needed. He relied on the provision in the employment agreements which stated that in exceptional circumstances consultation was not required. He confirmed that no financial information was given to any of the applicants, nor were there any discussions face

to face regarding the redundancies. He stated that the company had a process, because it was required to do so in respect of those employees who were members of the E tū Inc Union. He said he felt he had no option other than to make the applicants redundant. He accepted he did so without any input from them.

[52] He said however that he spoke to the staff every quarter, and that they would know what was happening financially. Apart from the contractual provision relied on, he also observed that he didn't consult because he was hoping to avoid the redundancies. There were 32 staff and 12 people were made redundant in the first tranche followed by another three. He felt that in respect of Mr Angelo the only alternatives to redundancy would have seen him receiving a pittance which he wouldn't have accepted. He said in respect of the 30 percent reduction, he knew that these should be recorded in an agreement and signed but everything was urgent and everything was being done in a hurry. He accepted aspects of the applicant's jobs all needed to be done and that some work was contracted out.

Discussion and Analysis

[53] The decision maker in this case was Mr Adams who was the Acting CEO of NZEC at the time the redundancies affecting the above four applicants occurred. For the main part, Mr Adams agreed with the applicants' description of the process followed. As indicated above, Mr Adams says he did everything he could to avoid redundancies but in the end his hands were tied and they had to occur. For this reason he says exceptional circumstances existed which precluded the ability to consult with each of the applicants. In his words, consultation was minimum to non-existent. There was no time.

[54] Throughout the hearing, it was clear that NZEC was relying on the genuineness of the dire financial position it found itself in at this time, to justify the dismissals of the applicants. Both Mr Adams and Mr Willis were adamant redundancies had to occur if NZEC was going to get through the crisis it faced.

[55] Secondly, NZEC relied on its employment agreement with both Mr Adams and NZEC's counsel pointing to the provision in the agreement which provided that in exceptional circumstances consultation was not necessary.

[56] In support of that proposition NZEC was relying on *Auckland City Council v the New Zealand Public Service Association Inc. and Business New Zealand Incorporated intervenor*.¹ In that case, the Court of Appeal noted:

There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly, the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.

[57] NZEC's justification of the redundancies is inextricably tied to the exceptional circumstances provision contained in the employment agreement and the decision of the Court Appeal in the above case. That judgment was delivered on 10 December 2003.

[58] The immediate difficulty with that submission, is that on 1 December 2004, s 4(1A) was inserted into the Employment Relations Act. Its intention was to alter and prescribe the tests for justification for disadvantage in, or dismissal from, employment in general. The amendment enacted specific information sharing provisions. They set out a fair and reasonable employer's minimum obligations where redundancy may ensue and now form part of s 103A tests of justification. Section 4(1A) provides:

The duty of good faith in subsection (1)—

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

¹ CA 112/03 at paragraph 24.

[59] At the end of 2004, the law was changed. Consultation in a redundancy context became mandatory. NZEC did not consult. The situation it found itself in does not affect the obligation it had to do so. Section 4(1A) of the Act contains an explicit requirement for the disclosure of information and consultation in redundancy situations. When assessing NZEC's action in terms of s 103A of the Act, lack of consultation and the non-disclosure of information means that NZEC's actions were not actions that a fair and reasonable employer could have done. In any event, exceptional circumstances did not exist in this case. The fact that NZEC had time to consult with the applicable union and the fact it gave notice, in Mr Angelo's case two months, of the termination of employment means there was ample time to consult.

[60] The evidence of each of the applicants was similar. When giving evidence, each of them thought they could have made an adequate case to be retained. It was clear during the investigation meeting that Mr Adams had no particular information as to skills each of the four applicants had. Because there was no consultation nor the sharing of information, none of the applicants could ever have been in a position to avoid their redundancies.

[61] It is possible that the applicants may have been dismissed on the basis of wrong information when consultation may have corrected that.

[62] As the Court of Appeal noted in *Grace Team Accounting Limited v Judith Brake*:²

... the fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore genuine) did not alter the fact that s 103A was breached.

A justified dismissal and loss

[63] It follows therefore that each of the applicants was unjustifiably dismissed. The issue then arises what remedies should flow. Whilst I accept NZEC's submission that redundancies were inevitable, there was no inevitability that it would be the four applicants who were made redundant. With respect to lost wages, s 128(2) of the Act requires the payment of three months' wages or the actual loss, whichever is the lesser.

[64] The decision to deduct 30 percent from each of the applicants' salaries was done without informed consent of any of the applicants. The employment agreements were clear, they could not be varied without agreement in writing and such agreement was not sought.

² [2014] NZCA 541.

Further, agreement was not sought. The tenor of the employer's letter of 6 April was not seeking agreement, it was seeking feedback on what it intended to do. In any event, the 30 percent reduction in salary seemed to be linked in the letter to a form of assurance that those who accepted the reduction would have their employment continued.

[65] Because the deductions were in essence made unilaterally, and not in accordance with the employment agreements, they were unlawful. The applicants are entitled to reimbursement of any amount deducted.

[66] Although the correspondence to the applicants from NZEC regarding the taking of leave appears compliant on the face of it, the applicants say this was not the way the request was made. However after considering the evidence, the fact that none of the applicants raised an issue regarding leave at the time, it seems the applicants reached accommodation with NZEC over the taking of leave.

[67] Section 124 of the Act requires me to consider whether or not remedies should be reduced because of contributory behaviour by employees. In this case the employees were dismissed by way of a no fault redundancy. Accordingly, no reduction is appropriate.

Mr Angelo

[68] Mr Angelo gave evidence of the attempts he had made to find work unsuccessfully. His uncontested evidence was that he suffered loss of some six months' salary over and above the two months' notice he received. I order NZEC Management Limited to pay Mr Angelo four months' salary (less PAYE) of \$112,200.00.

[69] NZEC Management Limited must reimburse Mr Angelo for the 30 percent salary reduction made between 15 April 2020 and 15 May 2020 totalling \$5,600. In respect of leave Mr Angelo was forced to take it seems he reached an arrangement in that regard and I make no award under that heading.

[70] Mr Angelo gave harrowing evidence of hurt and humiliation, loss of dignity and injury to feelings. I consider Mr Angelo's claim under this heading at the higher end of the scale and order a sum of \$18,000 pursuant to s 123(1)(c)(i) of the Act.

Barry Watkins

[71] Mr Watkins has claimed that his employment agreement provided for a bonus. However, there has simply been no evidence as to how that bonus operated or was intended to operate. What the evidence did disclose, is that it had never been paid. As a bonus seems discretionary in any event, Mr Watkins claim in respect of the bonus fails.

[72] NZEC Management Limited must reimburse Mr Watkins for the 30 percent salary reduction made between 15 April 2020 and 8 May 2020. Mr Watkins was paid \$42 an hour for an average 42 hour week. I calculate he is owed 30 percent of three weeks remuneration which totals \$1,587.60 (less PAYE).

[73] Mr Watkins gave evidence that he had been unable to find work until the end of August 2020. He was however paid one months' notice. Although he had tried to establish a boat charter business in late August 2020, he received little or no income from it. His hourly rate of \$42 per hour on an average 42 hour week equates to a hourly remuneration of \$91,728. I order NZEC to compensate Mr Watkins for three months lost salary (less PAYE) of \$22,932.

[74] Mr Watkins gave compelling evidence regarding humiliation and injury to feelings and loss of dignity that he suffered. I set that out more fully in paragraph 37 above. I consider Mr Watkins claim under this heading to be at the higher end of the scale and order a sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act.

Alison McKnight

[75] Ms McKnight gave evidence of the attempts she made to find work unsuccessfully. She has suffered a loss of some two months' salary. The issue regarding leave is less clear and it seems at most it would have been half a day. I decline to make any award in respect of leave Ms McKnight took. NZEC Management is ordered to pay Ms McKnight two months' salary (less PAYE) of \$10,200.

[76] I order NZEC Management Limited to reimburse Ms McKnight for the 30 percent salary reduction she suffered between 15 April and 6 May. That is approximately three weeks salary totalling \$3,530.

[77] Ms McKnight also gave evidence regarding hurt and humiliation, injury to feelings and loss of dignity she suffered as a result of her dismissal. This was set out in paragraph 38 above.

I consider Ms McKnight's claim under this heading at the higher end of the scale and order a sum of \$18,000 pursuant to s 123(1)(c)(i) of the Act.

Ray England

[78] Mr England gave evidence of the attempts he had made to find work and says it took him some four months before he began working again at the end of October 2020. Accordingly his salary loss equals four months. Mr England was paid \$56.84 per hour for a 42 hour week which equals \$124,138.56 per annum. I order NZEC to pay Mr England a sum of \$41,379.52 on account of lost wages.

[79] Mr England also suffered a three week period during which his remuneration was reduced by 30 percent. I order NZEC Management Limited to reimburse the 30 percent which equates to a sum of \$7,161.84 (less PAYE). Mr England also gave evidence in respect of hurt and humiliation, injury to feelings and loss of dignity he suffered as a result of his dismissal. That evidence is set out more fully in paragraph 46 above. I consider Mr England's claim under this heading at the higher end of the scale and order a sum of \$18,000 pursuant to s 123(1)(c)(i).

[80] The disadvantage claims by the applicants relate to the same set of circumstances which have led to the dismissals. The fact there was no consultation, and the fact that there was no sharing of information, has significantly contributed to the finding that the dismissals were unjustified. Accordingly I decline to make a separate award for disadvantage in each case.

[81] Similarly, by not consulting and providing relevant information, NZEC is guilty of a breach of good faith. Again, however, this breach is inextricably linked to the finding that the dismissals were in each case unjustified. Accordingly I decline to impose a penalty under these circumstances.

Summary of orders

[82] NZEC Management Limited must pay Mr Angelo:

- (a) The sum of \$112,200 (less PAYE) representing six months lost salary
- (b) Reimbursement of the 30 percent salary reduction totalling \$5,600 (less PAYE);
and
- (c) \$18,000 pursuant to s 123(1)(c)(i) of the Act.

[83] NZEC Management Limited must pay Mr Watkins:

- (a) The sum of \$22,932 (less PAYE) representing three months lost salary;
- (b) Reimbursement of the 30 percent salary reduction totalling \$1,587.60 (less PAYE); and
- (c) The sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act.

[84] NZEC Management Limited must pay Ms McKnight:

- (a) The sum of \$10,200 (less PAYE) representing two months lost salary;
- (b) Reimbursement of the 30 percent salary reduction totalling \$3,530 (less PAYE); and
- (c) The sum of \$18,000 pursuant to s 123(1)(c)(i) of the Act.

[85] NZEC Management Limited must pay Mr England:

- (a) The sum of \$41,379.52 (less PAYE) representing four months lost salary
- (b) Reimbursement of the 30 percent salary reduction totalling \$7,161.84 (less PAYE); and
- (c) The sum of \$18,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[86] Costs are reserved. The parties are encouraged to resolve any issues of cost between themselves. The Authority generally adopts a tariff approach to costs of \$4,500 for the first day and \$3,500 for the second day. Adopting the tariff approach I would costs at \$6,250. If either party seeks an Authority determination that party should lodge, and then serve on the other, a memorandum of costs within 14 days from the issue of this determination. From that date of service the other party will then have 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Geoff O'Sullivan
Member of the Employment Relations Authority