**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2022] NZERA 356
3131381

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| | BETWEEN | RICHARD JOHNSON<br>Applicant |
| | AND | GEMMEUS SOLUTIONS LIMITED T/A SPEEDY SIGNS CHRISTCHURCH<br>Respondent |
| Member of Authority: | Helen Doyle | |
| Representatives: | Gwen Drewitt and Alex Beal, counsel for the Applicant<br>Jessie Lapthorne and Georgie Raymond, counsel for the Respondent | |
| Investigation Meeting: | 1 February and 25 March 2022 at Christchurch | |
| Submissions Received: | 25 March and 11 April 2022 from the Applicant<br>28 March and 21 April 2022 from the Respondent | |
| Date of Determination: | 2 August 2022 | |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] Richard Johnson wants the Authority to resolve employment relationship problems that arose during his employment as a Production Manager with Gemmeus Solutions Limited (Gemmeus) between 12 August 2019 and 24 May 2020.

[2] Gemmeus is a duly incorporated company having its registered office in Christchurch and carrying on the business of signwriting. It's two directors are Darren Lund and Jun (Angela) Wan.

[3] Mr Johnson says that he was unjustifiably dismissed from his employment as Production Manager with Gemmeus for reason of redundancy. He says that his redundancy was predetermined, for an ulterior motive, the process was unfair, and was not undertaken in accordance with good faith.

[4] Mr Johnson further says that there were unjustified actions causing disadvantage because he was not provided with sufficient opportunity to engage a support person or representative before a consultation meeting on 6 April 2020, and there was a delay in payment of his final pay. He says that he was entitled to and was not paid certain contractual entitlements.

[5] Mr Johnson seeks by way of remedy:

(a) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of $30,000 for the alleged unjustified actions causing disadvantage and the dismissal.

(b) Reimbursement of lost wages from the date of dismissal to the date of the Authority determination under s 123(1)(b) of the Act.

(c) Redundancy compensation in the sum of $5,538.44 gross.

(d) Payment for 60 hours of unpaid overtime work. This claim was not in the statement of problem but came to light from a review of records lodged by Gemmeus.

(e) Payment of 105 hours of accrued time in lieu from 16 October 2019 previously claimed as 93 hours but subsequently amended to 105 hours in the sum of $3,219.66 gross.

(f) A top up of salary from 1 April through to 29 April 2020 when Mr Johnson says he was underpaid in the sum of $3,198.48 gross.

[6] Interest is claimed on these four amounts under the Interest on Money Claims Act 2016.

[7] In final submissions Ms Drewitt asked the Authority to use its discretion to award a penalty for breaches of good faith and employment agreement obligations for late payment of final pay including holiday pay. Penalties were not claimed in the statement of problem.

[8] Gemmeus does not accept that Mr Johnson was unjustifiably disadvantaged. It says that he did have an opportunity to obtain a support person/representative for the meeting on 6 April and the delay in his final pay was due to his actions.

[9] Gemmeus does not accept Mr Johnson was unjustifiably dismissed and says that the restructure was not predetermined but arose as the result of a genuine need to reduce costs and that the process undertaken was fair. Gemmeus says that its decision to terminate Mr Johnson's employment for reason of redundancy was an action that a fair and reasonable employer could have taken in the circumstances.

[10] Gemmeus does not accept that it breached its good faith obligations owed to Mr Johnson. It does not accept that Mr Johnson had a contractual entitlement to redundancy compensation or that he had a contractual entitlement to payment of overtime or time in lieu. Gemmeus does not accept that Mr Johnson was entitled to payment at his normal rate for the period of 1 April 2020 to 29 April 2020 as he was not able to complete his role from home during lockdown and was therefore not ready, willing, and able to work. Gemmeus does not accept that Mr Johnson is entitled to the remedies he claims. It says it has paid to Mr Johnson money deducted from his final pay.

**The Issues**

[11] The Authority needs to determine the following issues in this matter:

(a) Was Mr Johnson's dismissal justified?

(b) Was there a genuine business reasons for the restructuring?

(c) Was the selection of Mr Johnson's position for reason of genuine redundancy or ulterior motive?

(d) Did Gemmeus follow a fair process in making Mr Johnson redundant and in particular:

(i) Was asking Mr Johnson to attend a consultation meeting on 6 April 2020 unjustified and did it cause disadvantage?

(ii) Was consultation fair and reasonable including provision of sufficient information for proper response?

(iii) Did a fair process include an opportunity to apply for any new role created?

(iv) Did Gemmeus close its mind to alternatives to redundancy?

(v) Was proceeding on 24 April 2020 to confirming the redundancy the actions of a fair and reasonable employer, when Mr Johnson had said he was not available?

(e) Was Mr Johnson disadvantaged by the delay in making the final payment to him and if so, was the delay unjustified?

(f) Does the signed employment agreement correctly reflect the intentions between the parties about redundancy compensation?

(g) If it does not for reason of mistake, should the Authority alter the employment agreement by way of rectification to include a clause for redundancy compensation?

(h) Has there been a default in the payment to Mr Johnson for overtime hours he worked for a period from 23 September 2019 to 15 October 2019.

(i) Was there an agreement between Mr Johnson and Gemmeus for accruing time in lieu (TOIL) for hours worked over 40 each week?

(j) Was there agreement that Mr Johnson would be entitled to payment for untaken TOIL when the employment relationship ended and/or if not, should a term be implied into the employment agreement?

(k) Was there an unlawful deduction from Mr Johnson's wages during the lockdown period in 2020?

(l) If Mr Johnson was unjustifiably disadvantaged and/or unjustifiably dismissed, then what remedies is he entitled to and are there issues of contribution and mitigation?

(m) If the Authority finds that Mr Johnson has not received his contractual entitlements, then what remedies is he entitled to?

(n) Should there be interest on contractual awards?

(o) Were there breaches of good faith?

(p) Should penalties be awarded?

**Investigation meeting**

[12] The investigation meeting was held over two separate days. The Authority heard evidence from Mr Johnson and his wife Lisa Johnson and from Ms Wan and Mr Lund.

[13] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) of the Act the Chief of the Authority decided exceptional circumstances existed to allow a written determination at a later date.

**Was the dismissal justified?**

*The legal framework within which to assess the justification of a redundancy dismissal*

[14] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake* considered and confirmed the approach to be taken in considering justification of a dismissal based on redundancy. The justification test in s 103A of the Act is to be applied. It was confirmed in *Grace Team* that it is not helpful to focus on case law before s103A in interpreting and applying that section. The test requires the Authority to determine on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.[1]

[15] The importance of assessing the genuineness of the redundancy was emphasised by the Court of Appeal.[2] There was also reference to the explicit requirements for disclosure of information and consultation in redundancy situations and that the Authority or the Court will have before it the information provided by the employer to the employee justifying the redundancy.[3]

[16] A fair and reasonable employer could be expected to comply with statutory and contractual obligations.

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[1] *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541 at [84].
[2] Above n 1 at [85].
[3] Above n 1 at [81].

[17] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and this includes consultation when making employees redundant. Parties to an employment agreement must not mislead or deceive each other or do anything likely to mislead or deceive each other. Section 4(1A)(c) of the Act requires that an employer who is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of employment, provide to the affected employee access to information relevant to the continuation of the employees' employment and give an opportunity for comment on that information.

[18] Mr Johnson's employment agreement has limited reference to redundancy. There is an issue for determination about clause 24 of the employment agreement whether redundancy compensation is payable. Clause 25 deals with restructuring with a potential new employer which is not the situation for assessment in this case.

[19] There should not be pedantic scrutiny of the process but an emphasis on substantial fairness and reasonableness. The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and actively consult before making a final decision in accordance with s 4(1A)(c) of the Act.[4]

[20] The Authority is required to objectively assess under s 10A of the Act whether the dismissal of Mr Johnson was what a fair and reasonable employer could have done in all the circumstances at the time he was dismissed.

[21] Mr Johnson says that his dismissal was unjustified both substantively and procedurally. He says that Gemmeus used a restructuring as an excuse to remove him from the business as he was considered difficult and dismissing him through the "guise of a redundancy" was the easiest way to get rid of him. Alternatively, the restructure was commenced with a pre-determined intention to make him redundant and Gemmeus closed its mind to other alternatives. Mr Johnson was critical of the process saying that the consultation and provision of information was inadequate and that there was no process for a fair selection into the new position created.

[22] Gemmeus says that it reached the view, after financial modelling, that the proposed disestablishment of Mr Johnson's position would best achieve the required savings. His salary

[4] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [60].

was higher than the other roles and it was considered that most of his responsibilities could be assumed by other employees and Mr Lund and Ms Wan. It says that it carried out a fair consultation process and sufficient information was provided.

[23] The almost total power an employer has where a business is restructured was recognised by the full Court of the Employment Court in *Vice-Chancellor of Massey University v Wrigley and Kelly*. It was stated in that judgment that to the extent an affected employee may influence a final decision, it can only do so with knowledge and understanding of the relevant issues. Employees need a real opportunity to express views about the issues.[5]

*Was there a genuine business reason for restructuring?*

[24] In February 2020 Ms Wan said that she started drafting budget projections for the year ahead and saw Gemmeus was still expecting to make a loss over the next 12 months even with costs savings already implemented. A restructure was considered but it was decided to see if sales could be improved, and profitability increased.

[25] After the lockdown was announced in March 2020, the figures were then revised and Ms Wan said in evidence that she undertook financial modelling scenarios to assess the individual impact of disestablishing each staff position and anticipated impacts on revenue and expenses. The scenario with Mr Johnson was the only one where modelling suggested a loss could be avoided.

[26] It was then decided to commence a restructuring process.

[27] I conclude there were justifiable financial reasons for the restructuring with a need to reduce costs.

*Was the selection of Mr Johnson's position for reason of genuine redundancy or ulterior motive?*

[28] Mr Johnson says that Covid-19 was used as an excuse to remove him from the business. Ms Drewitt submits that with Mr Johnson's skills in the signage industry including about 17 years running his own signage company, no fair and reasonable employer could have concluded that he was the right person to be made redundant without a fair selection process.

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[5] *Vice-Chancellor of Massey University v Wrigley and Kelly* (2011) 9 NZEmpC 37 at [48].

[29] Ms Drewitt takes issue with the financial modelling provided and says that it does not make sense and was not audited. A business can undertake its own planning and modelling and a restructuring that flows from it may not always achieve its goals. Ms Drewitt submits that the sales figures were unfairly inflated to make it look like Gemmeus would perform better without Mr Johnson. The modelling was not provided to Mr Johnson at the time of the restructuring and could only have been prepared with that intent if for the purposes of the Authority investigation meeting only. For reasons I shall come to I was satisfied it was prepared earlier.

[30] There was recent employment of two staff but the reasons for their employment was explained during the consultation process as an attempt to improve the financial situation. It was explained why it would be detrimental if their positions were disestablished during consultation.

[31] Ms Drewitt submits Mr Johnson stated in feedback that Mr Lund should not have expected to have taken drawings as an owner of a new business and should have been prepared for that. She says that Mr Lund agreed about that, and this should not have been a factor supporting a restructuring. The fact that Mr Lund was taking drawings at a lower rate to what Mr Johnson was paid and Gemmeus was sustaining losses requiring injection of capital, objectively supports the need for cost saving or increase in productivity via sales. It was not a situation that Mr Lund wanted to go on indefinitely.

[32] It is unfortunate that Mr Johnson left a role to work for Gemmeus, only to be made redundant within the year, despite understanding that if there was a downturn in work he could use his skills elsewhere in the business. I could not be satisfied that Mr Johnson was guaranteed employment with no possibility of redundancy. Ms Drewitt submits that the financial situation had not dramatically changed and in fact Gemmeus had started to turn a small profit. The financial situation objectively assessed, supported the need for cost saving and there were factors around the pandemic.

[33] Mr Johnson gave evidence that he was told he was being made redundant because his hours could not be changed, at the meeting on 6 April 2020. That was denied by Mr Lund and I am not satisfied that it was said in that way. At the consultation meeting on 21 April 2020 Mr Lund said that aspect was negotiable.

[34] I could not be satisfied from the evidence that the restructure was designed with the ulterior motive to remove Mr Johnson from the work site and/or it was a sham.

**Was the consultation process fair and reasonable?**

*Proposal and advice of restructuring 30 March 2020*

[35] Mr Johnson was advised in an email dated 30 March 2020 from Mr Lund and Ms Wan, that because of the previous year's trading and the impact of the Covid-19 pandemic, Gemmeus was considering a restructure of the area in which he worked. The company was considering making the production manager role redundant. The main points in the proposal document can be summarised as follows:

(a) There had been a review of financial results for the past year and projecting the next 12 months profit and loss showed the continued viability of the business is dependent upon increased sales and reduced costs.

(b) Covid had worsened the situation with the lockdown.

(c) There was an expectation of a lag in work on return after the lockdown.

(d) There had been attempts to overcome the challenges by hiring more sales capacity, increasing advertising, reviewing fixed costs and reducing these and replacing contract labour with lower cost permanent staff. A restructure was therefore being considered to improve financial viability.

(e) Under the proposal it was suggested that Mr Johnson's role of production manager be disestablished, and it was envisioned that the sales representative role and the directors would absorb the duties in the role.

(f) There was an opportunity for feedback on the proposal and it was expected that the consultation process would take a week with a final decision shortly thereafter.

*Mr Johnson's availability*

[36] There were initial issues with Mr Johnson's phone availability and being able to connect by Zoom over the period 1 April to 6 April 2020. Mr Johnson was unable to connect to a Zoom meeting on 2 April 2020.

[37] Ms Lapthorne set out in her submission that Mr Johnson was "deliberately illusive and uncontactable" throughout the redundancy consultation process. The lockdown presented its own set of difficulties with communication including the ability for Mr Johnson to obtain advice. As Ms Drewitt submits, the significant issues were confined to the initial period until 6 April 2020. Initially the consultation phase was to be one week however that was extended.

*Support person compromised*

[38] Mr Johnson was not able to connect to the Zoom meeting link on 2 April 2022 for a consultation meeting. He said that Mr Lund had invited Mr Johnson's support person, who was another employee, and whilst waiting for Mr Johnson to join, Mr Lund had inappropriately talked to him about the restructuring. Mr Lund denied that when it was raised by Mr Johnson during the restructuring process. He said that the only discussion, he had with the support person was an email to join the Zoom meeting and they talked whilst they were waiting for Mr Johnson to attend, which he did not.

[39] I acknowledge that Mr Johnson was concerned. There was insufficient evidence though to satisfy me that what was discussed was directly about the restructuring and compromised his proposed support person and/or amounted to pre-determination. Mr Johnson did not use the support person after 6 April and obtained some other advice.

*Fairness with the Zoom meeting 6 April 2020*

[40] It was alleged that the way this Zoom meeting unfolded was unjustified and disadvantaged Mr Johnson. In an email dated 3 April 2020 Mr Johnson was advised that there would be a Zoom meeting with him on 6 April at 8.30am, for consultation before the staff meeting on 6 April 2020, which would commence at 10.30am.

[41] Mr Johnson was unable to connect for 8.30am and he was then asked by Mr Lund to remain connected after the staff meeting. There was some discussion. The support person was present.

[42] Mr Lund sent an email after the meeting thanking Mr Johnson for attending the consultation meeting but setting out that it was noted he had not provided any feedback as he was waiting for independent advice. A further date of 10 April 2022 was offered to give him time for feedback and to obtain independent advice.

[43] Mr Johnson responded and advised in an email dated 9 April 2020 that he was trying to give feedback at the 6 April meeting and had struggled to get advice. He also referred, as set out above, to his support person having been compromised because of discussions with that person before Mr Johnson could talk to them.

[44] Mr Johnson may not have been expecting to be asked to stay on after the staff meeting on 6 April 2020 but had attempted to connect to a Zoom meeting at 8:30am, before the staff meeting that day, set for the purpose of consultation. There had been some earlier unsuccessful attempts to organise Zoom meetings and the actions of Gemmeus should be considered in this light. Mr Johnson had successfully connected to the staff meeting by Zoom and Mr Lund took the opportunity to ask him to stay online to commence consultation discussions.

[45] I am not satisfied that Mr Johnson has established that Gemmeus, in asking him and the person he initially proposed to be a support person, to stay online after the staff meeting was an unjustified action. There was no doubt an element of surprise in being asked to stay on, but with that had been the earlier attempt, before the staff meeting, to connect. I also weigh importantly that there were further opportunities for Mr Johnson to provide feedback.

[46] I do not find that a personal grievance of unjustified action causing disadvantage has been made out for this aspect of the process.

*Was Mr Johnson provided with sufficient information?*

[47] Mr Johnson had the proposal. There were some initial questions put by him and answered by Mr Lund and Ms Wan. The main feedback was provided by him on 17 April with further feedback before the 21 April consultation meeting by Zoom. The feedback was responded to by Mr Lund and Ms Wan. Ms Lapthorne submits that there was adequate information provided, supported by the amount of feedback Mr Johnson provided. After the meeting on 21 April Mr Johnson's employment was terminated on 24 April 2020.

[48] An issue arose during the Authority investigation meeting that Mr Johnson had not seen pages of financial modelling provided to the Authority to justify the redundancy. Some doubt was raised by Ms Drewitt in submissions whether in fact the financial modelling documentation was created at the time Gemmeus was considering disestablishing Mr Johnson's position.

[49] The modelling considered of scenarios of pre-Covid lockdown, Covid lockdown with no redundancy and Covid lockdown with each role made redundant. Ms Wan said in her evidence that the information was not provided because it would have breached the privacy of the employees considered and without the information about salaries it would have been meaningless.

[50] There are some matters that raise issues about whether financial modelling was undertaken before the proposal to disestablish Mr Johnson's position was made. This included a Privacy Act request that did not result in its disclosure. The closest reference to financial modelling was at the consultation meeting on 21 April 2020 when Mr Lund states:

> …You know, we had looked at all the positions and the costs and the merits and the skillsets with it so, you know, thanks very much for the feedback that you have just given us...

[51] I accept Ms Wan's evidence however that she undertook the modelling before the restructure.

[52] The proposal to disestablish the role of production manager was focussed on increasing sales and reducing costs. The financial modelling was relevant information because it formed the basis for Gemmeus proposing Mr Johnson's role only be disestablished to achieve that goal from the restructure.

[53] Mr Johnson was not provided with sufficiently precise information to be able to respond from an informed position, with his own views. He had asked questions during the consultation process about whether other roles were considered for redundancy and what other options had been considered and ruled out. The responses did not refer to financial modelling. The answer as to whether other positions were being considered was "no." The response about ruling out a sales position was because it was not conducive with increasing sale revenue. The recent hire of the production/installer was stated to save money spent on contractors. Both these positions had been considered in separate scenarios in the financial modelling. Mr Lund indicated that the company was not really considering other options and as per the restructure proposal had taken some actions to date. Redundancy was the last option.

[54] Mr Johnson had raised throughout the consultation process the possibility of involving other staff in the process. He expressed a lack of understanding as to how taking Mr Lund and another employee or employees away from sales to run production was a focus for sales set out in the restructuring proposal. He had stated that he could help with sales because he had transferrable skills and offered to reduce both his hours and pay. He advised that would save money for the company including if another person was made redundant. Gemmeus responded to the last matter that even with a reduction in hours and wages the business would still incur a loss. Further, drawings have not been taken from the business for 14 months or as clarified on 21 April had in fact been taken but put back into the company as injections of capital. It

was noted that there may still be "ad hoc opportunities." Financial modelling was relevant to all these matters.

[55] I do not conclude that the financial modelling information would have been meaningless if the other employee names or salary detail had been removed. Alternatively, a detailed summary of information drawn from the financial modelling to set out the reasons for identifying the selection of Mr Johnson's role instead of other roles could have been adequate.

[56] The selection of Mr Johnson's position only for proposed disestablishment was one that could have an adverse effect on the continuation of his employment under s 4(1A)(c) of the Act. That financial modelling information was relevant to the continuation of Mr Johnson's employment, and he did not have an opportunity to give his view about it.

[57] The evidence on behalf of Gemmeus was that the offer by Mr Johnson to reduce pay and hours was not agreed to because of the hard negotiation by Mr Johnson of his employment agreement, and a concern that he would leave after a short period. Those reasons were not discussed with Mr Johnson at the time of consultation, and he did not have an opportunity to comment on them.

[58] I find there were good faith breaches in respect of the failure to provide information about financial modelling and information as to why about any reduction in Mr Johnson's pay and hours was not considered a viable or suitable alternative.

*Did a fair process include an opportunity to apply for any new role created?*

[59] Mr Johnson was entitled to the information that resulted in his position being the one selected to be disestablished. He was not provided with this information set out in the financial modelling. I am not persuaded however by Ms Drewitt's submission that a selection process should necessarily have been undertaken for the role that was left after Mr Johnson's position was disestablished, in the circumstances of this matter. The duties of that role were divided up between the directors and a member or members of the sale team.

*Did Gemmeus close its mind to alternatives presented by Mr Johnson?*

[60] There was very limited consideration or exploration of the proposed reduction of pay or hours or other alternatives. It would not have been clear, before Mr Johnson was dismissed, the extent to which he would have been prepared to negotiate his hours and or pay. Ms Wan

said in her evidence that paying Mr Johnson even minimum wage would still result in a loss position and that in turn would create a retention issue although Mr Johnson did not have the financial modelling to put forward a view about that.

[61] Mr Johnson suggested involving other employees and considering whether they wanted to take voluntary redundancy in his feedback. This was not considered appropriate as their positions were not covered by the proposal. Mr Johnson was not paid holiday pay offered to all staff on 30 March 2020. Mr Lund in an email dated 25 May 2020 referred to this not being applicable to Mr Johnson because of the restructure going ahead. The holiday pay was paid to other staff before the proposal to disestablish was finalised on 24 April 2020.

[62] Gemmeus was entitled to have a plan in mind to disestablish Mr Johnson's position. Consultation then should have been with an open mind with Gemmeus ready to change and perhaps start again or see things differently. Instead, I find that it closed its mind to alternatives that an employer with an open mind could have been expected to have considered carefully. I could not conclude that there was real consultation.

[63] Gemmeus had applied for and was successful in obtaining the wage subsidy. Whilst the payment of the wages subsidy did not offset employee costs entirely it provided time to consult properly and fully.

*Was proceeding to decide that the position was redundant on 24 April 2020 the actions of a fair and reasonable employer when Mr Johnson had said he was not available?*

[64] On 23 April 2020 Mr Lund sent a letter to Mr Johnson inviting him to a final meeting about redundancy. The letter recorded that the preliminary consultation had been concluded and the meeting would be to discuss the process to date, alternatives to the redundancy and opportunities for redeployment within the business. The meeting was to be at 1pm on 24 April 2020 via a Zoom meeting.

[65] Mr Johnson advised by email dated 24 April 2020 that he would not be able to make the meeting because his wife had appointments with her specialist on 24 April 2020 to discuss the test results and further treatment and he needed to be able to support her. He asked for the meeting to be rescheduled early the following week. In response by email Mr Lund advised that in good faith Gemmeus proposed rescheduling the meeting for later in the day on 24 April at 4pm.

[66] Mr Lund emailed in response and wrote that he needed to support his wife and family that day. He wrote that he had requested the meeting to be rescheduled for early the following week and not later that day, as it was not a good day.

[67] Mr Johnson was advised his employment was terminated in a letter on 24 April 2020. The letter stated that the company had considered all the feedback provided and that there were no vacancies or opportunities for redeployment within the business. Mr Johnson's position was therefore redundant from 24 April 2020. He was put on garden leave for the four week notice period and not expected to work or contact clients.

[68] Gemmeus say that they had been patient throughout the process and on Friday 24 April changed the time for the meeting to accommodate Mr Johnson further. I accept that there were extensions granted and the company was anxious to finalise the matter. A fair and reasonable employer could have been expected to want to avoid an employee dealing with potentially difficult health news and a job loss on the same day.

[69] Whilst no redeployment opportunities were identified there were some matters that could have usefully been discussed at this final meeting including work that Mr Johnson could have carried out potentially when another employee was on parental leave for about two months. He may have been able to undertake some contract work. Alternatives like that could have provided some potential income stream and had not been discussed.

[70] I consider a fair and reasonable employer could have been expected to pause and reschedule the final meeting for a day early the following week. I accept the whole day was not occupied by a medical appointment, but Mr Johnson wanted to support his family. The delay would have been minimal.

[71] I have concluded that there was a business case for a restructuring and Mr Johnson's position was not identified for an ulterior motive. The failure to provide relevant information as set out above and the closed mind to alternatives meant that the process and consultation was not that of a fair and reasonable employer, undertaken in accordance with good faith obligations. The procedural fairness factors in the test of justification in s 103A have not been satisfied and not in a minor way. The process defects caused unfairness.

[72] The dismissal is unjustified. I do not find that Gemmeus' actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[73] I will deal with the remedies at the end of this determination.

**Was Mr Johnson disadvantaged by the delay in making the final payment to him and if so, was the delay unjustified**

[74] Mr Johnson was not paid for the four weeks he was on garden leave and was not paid his holiday pay entitlement at the end of that period. His final pay was then not paid for a further 3 weeks and four days after the date of termination. In total it was a period of seven weeks and four days before the final pay and then $1,348.88 was deducted from the pay. That amount was paid before the Authority investigation meeting although Gemmeus did not accept that it had been improperly deducted.

[75] Much communication took place over this period. Mr Johnson was seeking payment and Mr Lund raised concerns about damage to a van in Mr Johnson's possession needing completion of an insurance form and the failure to return company property. Without completion of an insurance form he said payment could not be processed. The claim appeared to have been ultimately processed without Mr Johnson's involvement. Mr Lund said that he was not able to quantify the final pay until the insurance claim had been processed.

[76] Mr Johnson did not accept that he had caused the damage and wanted more information about that. He said he never received that. Further he did not accept he had not returned company property. Further payments were requested by Mr Johnson including TOIL which Mr Lund denied were owing. It is clear from the emails that the relationship deteriorated significantly over this period.

[77] The starting point is the employment agreement. Clause 20 provides for deductions from wages. Clause 20.2 provides agreement for deduction of any overpayments, outstanding debts, the value of unreturned property or any property returned damaged. Clause 20.4 provides that the employer agrees to consult prior to any deduction being made.

[78] Ms Lapthorne's primary submission is that the delay in making payment of the final pay did not occur during the applicant's employment and therefore did not give rise to a personal grievance. I don't accept that submission. Mr Johnson was employed on garden leave for four weeks between 24 April 2020 until 22 May 2020. He was entitled under his employment agreement to payment during that period and clause 22.5 also provided Mr

Johnson was entitled to any annual leave entitlements under the Holidays Act 2003 on termination.

[79] Section 103(1)(b) provides for a disadvantage grievance and states:

> that the employee's employment, or 1 of more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[80] I place weight on the fact that Mr Johnson's final pay was greater than any potential justifiable deduction that could have been for damage or retention of property. Gemmeus had insurance for any potential damage to the van. Mr Johnson asked at one point for just his holiday pay to be paid out to be able to pay bills but that was not paid. He suggested Gemmeus deduct the $500 insurance excess and sort the matter out later in an email dated 18 May 2020 but that did not occur. I could not be satisfied that all the items said not to have been returned, for which money was initially deducted but then repaid, were consulted about. If some money only had been withheld, then an assessment of justification may have been different but that was not the case.

[81] Withholding the final pay was an unjustified action. Mr Johnson was without any income at all for the period of his notice on garden leave and gave evidence of living off savings, accepting financial assistance from friends and family and receiving food parcels.

[82] I find that Mr Johnson has made out a grievance that he was unjustifiably disadvantaged by the failure not to pay his wages and holiday pay when they fell due. I shall deal with remedies at the end of the determination.

**Does the signed employment agreement correctly reflect the intentions between the parties about redundancy compensation?**

[83] There is a signed individual employment agreement (the employment agreement) between Mr Johnson and Gemmeus. Mr Johnson signed the employment agreement on 21 July 2019 and his signature was witnessed by his wife Lisa. After he commenced his employment, he then initialled each page of the employment agreement. Mr Johnson maintains the employment agreement does not represent the intentions of the parties in respect of redundancy compensation and that it was signed by mistake or alternatively the incorrect agreement was deliberately presented for signature.

*The original employment agreement*

[84] By email dated 13 July 2019 Mr Lund sent Mr Johnson a letter of offer, employment agreement and employee handbook.

[85] Clause 24 of the original employment agreement is headed "Redundancy." It provides:

> If your position is made redundant, you shall not be entitled to any redundancy payment.

[86] By email dated 18 July 2019 Mr Johnson raised several matters for clarification and negotiation with Mr Lund by email including wanting a redundancy payment. He raised that other employment agreements he had entered into had a minimum of four weeks compensation. He referred to an impact on his mortgage insurance without such payment and questioned if there was room for negotiation. Mr Johnson also raised issues about shortage of work and stand down clauses in the employee handbook. He asked whether there would be a company vehicle included in the package as he would be giving one up.

[87] Mr Lund agreed to delete the sections in the handbook about shortage of work and stand down. He stated in an email dated 18 July that he had updated the employment agreement to include a redundancy provision of 4 weeks. He confirmed a company car is not included in the offer but he agreed that it was something that will be available should Mr Johnson need to perform work related travel. The revised employment agreement was attached to the email as were handwritten deleted clauses in the material pages in the employee handbook which were initialled by Mr Lund and dated 18 July 2019.

[88] Clause 24 of the revised employment agreement provided:

> If your position is made redundant, you will be entitled to a redundancy payment of 4 weeks.

*Further discussions*

[89] What happened then is disputed. Mr Lund says that on 19 July 2019 Mr Johnson called him by telephone to discuss again whether a company vehicle and entitlement to time in lieu could be included in the employment agreement. He said that at that time there was a discussion about the fact that no other staff members had redundancy compensation or entitlement to time in lieu. Mr Lund said that it was agreed that the original agreement would

be the final agreement on the basis that he would consider the provision of a company vehicle further down the track and the employee handbook clauses relating to shortages of work and standdown period would be removed.

[90] Mr Johnson denied calling Mr Lund on 19 July 2019 and said that all negotiations were by email. He refers to an email he sent Mr Lund dated 19 July 2019 at 12.56 pm in which he states that he is used to having a company vehicle and queries whether this is something that could be included in the future. He asks about another employee's vehicle and whether that may be available when that employee finishes up.

[91] Mr Lund responds to that email at 1:08pm and states that:

> Yes, it is certainly something that could be discussed in the future and particularly if you end up doing much work related driving. Luke does have a Swift as part of his contract, but it is also the general use run around and courtesy vehicle which I am planning on keeping as a spare vehicle. As mentioned this could be reviewed later.

*Employment agreement is signed*

[92] Mr Lund said that Mr Johnson dropped off a signed copy of the original employment agreement on Monday 22 July 2019 with his signature witnessed by Mr Johnson's wife Lisa. Mr Lund said that he could distinctly remember leaning over the spare desk in his office going through some pages Mr Johnson wanted to discuss.

[93] Mr Johnson denies that he had a meeting with Mr Lund that day and says that it was on the first day of his employment on 12 August 2019 that he was asked to initial each page following a walkthrough induction of the factory. He said that it was at that time he was leaning over the desk

[94] On 22 July 2019 at 2:39PM Mr Johnson emailed to Mr Lund signed pages of the hand book with the standdown and shortage of work clauses deleted and the signature page of the employment agreement signed and witnessed by his wife. He said that he signed the signature page of revised employment agreement. The reason he said for not sending through the entire signed agreement was that he had to go to the library for printing as he did not have a printer at home and only wanted to print out the important pages. Mr Lund said that the signature page was included by mistake with the emailed handbook pages as Mr Johnson had already provided a full copy of the employment agreement when they had met.

[95] On 22 July 2019 Mr Lund sent Mr Johnson an email advising he was glad to have him on board.

[96] On 24 July 2019 Mr Lund sent another email to Mr Johnson advising that a full copy of the employment agreement was attached which he had signed. He noted that he had also initialled each page and needed Mr Johnson to do the same but said "don't worry about it now- we can sort that once you start."

[97] Mr Johnson said that he believed that what was being sent to him was the revised employment agreement and he had no reason to look over the employment agreement at that point or when he initialled each page.

*Conclusions about the evidence*

[98] Ms Lapthorne submits Mr Johnson's position that he is entitled to redundancy compensation is inconsistent with the fact that after his employment commenced he initialled each page of the employment agreement. She submits that it is "incredible" that he did not check the agreement. It is appropriate to look at what occurred after the employment agreement was signed.

[99] Ms Lapthorne referred to an email from Mr Johnson dated 2 May 2020 which refers to discussions about a vehicle in the workshop to support that there was in fact a meeting consistent with Mr Lund's evidence. Mr Johnson refers in the email to when they were "originally negotiating the employment agreement" and when "the contract was sent through." He stated that he brought up that the vehicle had not been included in the package and there was a discussion that one may be added later. The statements in that email could equally apply to the negotiations following the sending through of the original employment agreement that resulted in the revised agreement. I could not be satisfied therefore the email supports Mr Lund's evidence.

[100] Ms Lapthorne accepts that there are occasional references in the emails from Mr Johnson to a "redundancy pay out" but she submits the reference is to notice and holiday pay rather than redundancy compensation. Further that his frequent references to a vehicle indicate its importance to him. There are emails from Mr Johnson in which the notice pay (garden leave) and holiday pay are separated out from the reference to "redundancy pay out." There are emails towards the end of the employment relationship in which Mr Johnson suggests that

the vehicle is a contractual term. That was at a time when he was in possession of a Gemmeus vehicle and Mr Lund was seeking its return. It was made clear to him by Mr Lund that the vehicle was never a contractual term which was the correct position.

[101] I conclude it less likely that Mr Johnson having successfully negotiated the inclusion of four weeks redundancy compensation on 18 July 2019 would agree the following day to an employment agreement without redundancy compensation on the basis there could be a company car provided in the future. Mr Johnson's evidence that he simply trusted the agreement he initialled was the revised agreement with the redundancy compensation is persuasive.

[102] It was more likely the intention that the employment agreement contain a redundancy compensatory provision continued but by mistake the wrong employment agreement was signed and initialled. The employment relationship deteriorated for reasons set out earlier before it ended.

*Rectification?*

[103] An equitable remedy of rectification is available in circumstances where a contractual document by mistake does not reflect accurately what the parties agreed. In such cases the Courts have ordered that the contract be rectified to reflect what was truly intended and give effect to that. The remedy of rectification is preserved in section 22 of the Contract and Commercial Law Act 2017.

[104] Rectification is not claimed in the statement of problem. The remedy sought was an order for payment of a contractual entitlement of four weeks redundancy compensation.

[105] On the first investigation meeting day I advised counsel that I may consider the matter as a claim for rectification. I am satisfied that the Authority has jurisdiction to consider the claim under s 162 of the Act which enables the Authority subject to ss.163 and 164 in any matter related to an employment agreement to make any order that the High Court or the District Court may make under any enactment or rule of law relating to contact.

[106] The principles of rectification require that the party seeking rectification show as summarised below:

(a) The parties had a common continuing intention in respect of a particular matter and the instrument to be rectified.

(b) There was an outward expression of the accord.

(c) The intention continued at the time of the execution of the instrument sought to be rectified.

(d) By mistake, the instrument did not reflect that common intention.[6]

[107] There is evidence of a common intention to payment of redundancy compensation as part of Mr Johnson's employment agreement. The original employment agreement was revised to reflect this and provided to Mr Johnson on 18 July 2019, so there is an outward expression of that intention. I have found that that intention continued until the employment agreement was signed by both parties, but the agreement signed by the parties did not by mistake reflect that common intention.

[108] I consider it appropriate in those circumstances to exercise my discretion and to rectify the employment agreement so that it includes compensation of four weeks payment in the event of redundancy. I do not consider rectification giving effect to the intention of the parties brings the matter within the requirements of s 164 of the Act. That is consistent with the approach in *Goodall*.[7]

[109] Mr Johnson was made redundant. Four weeks redundancy compensation has been claimed in the sum of $5538.44 gross. This is based on Mr Johnson's salary of $72,000 (weekly sum of $1384.61 multiplied by four).[8] That is the amount of redundancy compensation owed.

**Unpaid overtime**

[110] A new claim for unpaid overtime in addition to the TOIL claim was made just before the second investigation meeting date. Mr Johnson said that it was not until the respondent's bundle of documents was received with a pay spreadsheet that he became aware he was only paid overtime for weekend work in late September/early October 2019. Ms Lapthorne objected to this new claim being considered because it would be prejudicial to Gemmeus. I have balanced with her concerns that I was able to hear evidence from Mr Lund about this issue with

[6] *Swainland Buildings Limited v Freehold Properties [*2002] 2 EGLR 71 at [33], adopted by Lord Hoffman in *Chartbrook Limited v Persimmon Homes Limited* [2009] AC 1101; [2009] UKHL 38, 4 All ER 677 at [48]. These principles were applied by the Employment Court in *Goodall v Department of Corrections* [2001] ERNZ 688 at [37] to [44].
[7] Above n 6.
[8] I arrived at $5538.46 however the difference is insignificant.

some of the evidence overlapping with the claim for accrued time in lieu. I will proceed to determine this issue.

[111] Mr Johnson claims 60 hours of unpaid overtime between 23 September 2019 and when a discussion took place on 15 October 2019 at time and a half, which is what he had been paid for some weekend work. He said that he believed he was being paid for all overtime for that period because he was not supplied with payslips. The evidence on behalf of Gemmeus was that payslips were emailed to his address and that he never raised an issue about not receiving payslips. Mr Johnson says that Mr Lund agreed to vary the employment agreement to pay him for all additional hours of work at time and a half on presentation of a timesheet for the period between 23 September and 15 October 2019. Gemmeus denies that.

[112] Clause 9 of the employment agreement is headed "Hours of Work." It provides that the normal span of hours is Monday to Friday 8.00am to 5.00pm. That is consistent with item 6 of the schedule attached to the employment agreement.

[113] Clause 9.2 provides for hours of work:

> 9.1 The business' normal span of hours of operation are outlined at **Item 6** of the Schedule.
>
> 9.2 You will be required to work 40 hours per week within the business' normal hours of operation, plus any additional hours which are reasonably necessary to fulfil the requirements of your duties, or as reasonably required by the Employer.

[114] Ms Drewitt also refers to clause 3.1 (iii) in the handbook that she submits contradicts the employment agreement. That refers to overtime and materially provides as follows:

> Any hours that exceed the ordinary agreed hours must be approved by management prior to being worked. You will not be paid overtime unless this approval has been provided.

[115] The employee handbook was defined in the employment agreement to mean the employer's policies and procedures. Under clause 7 of the employment agreement, it provided that whilst Mr Johnson would comply with the policies and procedures, the specific details do not form a term of his agreement. Clause 1.4 of the handbook confirms that it does not form part of the employment agreement, although may be considered when interpreting rights and obligations under the term of employment. The references in the handbook therefore fall to be considered with rights and obligations however are not definitive.

[116] Having carefully considered the evidence I could not be satisfied that there was agreement to pay Mr Johnson at time and a half for every additional hour that he worked over 40 hours for the period claimed. It is more likely that Mr Lund agreed to pay for approved weekend work over the weeks of 23 September, 30 September, and 7 October 2019. I am strengthened in this conclusion that this work was seen as different to ordinary overtime work by the fact that Mr Johnson was paid at time and a half an hour for the weekend work. Mr Lund then made it clear that payment for unapproved overtime would not continue to be paid and timesheets need not be completed. I have weighed that the relationship at that time was satisfactory. It is less likely that Mr Lund would fail to make payments as agreed at that time.

[117] The evidence has failed to satisfy me to the required standard that there was agreement to pay overtime beyond that paid and that there was a default in the payment of overtime for that period.

[118] The claim for overtime between 23 September and 15 October 2019 fails.

**Was there an agreement about time in lieu?**

[119] Mr Johnson submits that there was an oral agreement reached in discussion with Mr Lund that TOIL would be accrued for every hour he worked over 40 hours after 15 October 2019. He says that he is owed payment for 105 hours for accumulated TOIL. This amount was amended between the first and second days of investigation from 93 hours.

[120] Mr Lund and Ms Wan deny that there was any agreement about TOIL. They say there were 72 hours when Mr Johnson was paid on a discretionary/compassionate basis for time off to attend his daughter's graduation, when his wife was admitted to hospital and when she had medical appointments. Mr Lund considered Mr Johnson was staying late when he did not need to even to the point of asking him on occasion to go home.

[121] Mr Johnson provided a schedule of hours that he had worked for which he said he accrued TOIL after 15 October 2019. There were four weeks where details were missing. Mr Johnson averaged the overtime for that period at 4.226 hours per week. From 15 October 2019 the schedule of hours showed that Mr Johnson worked for four weeks over fifty hours and for the other weeks between 39.75 and 48.75 hours.

[122] Mr Johnson said that he recorded his additional hours worked over 40 hours on a Google calendar. Mr Johnson said that he was told that Ms Wan would keep track of the extra hours worked. Ms Wan did not accept that she was tasked with that or that Mr Johnson had ever asked for TOIL.

[123] Ms Drewitt places weight on the fact that there was a spreadsheet provided by Gemmeus recording time in lieu accruing from 23 September 2019. Gemmeus says that this was only produced when the claim by Mr Johnson was made. I accept Gemmeus' evidence about that as more likely.

[124] Ms Drewitt referred me to an Authority determination in which an employer was ordered to pay accrued but untaken TOIL when he resigned.[9]

[125] In that case there was persuasive evidence of an entitlement to accrue TOIL which included an email exchange and a subsequent addendum to the employment agreement. The issue for determination then turned to the number of hours required to be worked for TOIL to accrue, amounts owing and whether a term should be implied into the employment agreement that accrued untaken TOIL be paid out at resignation.

[126] A request by Mr Johnson that he accrue TOIL for overtime worked was rejected at the time of negotiations for his employment agreement. Mr Johnson was paid a salary and was required under the terms of his employment agreement to work 40 hours per week plus any additional hours reasonably necessary or reasonably required in his employment agreement.

[127] I am not satisfied that Gemmeus kept a record of accrued entitlements to TOIL whilst employment was ongoing. I am also not satisfied that paid leave without deduction from actual or anticipated leave entitlements was recorded or requested as TOIL. I have considered references to TOIL in a series of emails after notice of termination was given. I do not find that references in emails close to the time of termination support an agreement to accrue TOIL for all hours worked over 40 hours. I cannot be satisfied that Mr Johnson and Gemmeus reached agreement to accrue TOIL.

[128] Even if I had been satisfied about that, I would have then had to consider whether a term should be implied that TOIL accrued but not taken be paid out on termination. To get to the point of implication of a term, certain conditions need to be satisfied and there is a high

[9] *Jackson v TSL Nelson Limited* [2013] NZERA Christchurch 179.

threshold to overcome for that. Particularly so in this matter where the parties had expressly agreed additional hours reasonably necessary were to be worked.

[129] This claim fails.

**Reduction of wages during lockdown**

[130] Mr Johnson's wages were reduced from 1 April to 29 April 2020 over the Covid -19 lockdown and he was only paid the government wage subsidy of $585.80 gross each week. He seeks to recover the shortfall between what he would have been paid under his employment agreement and the wage subsidy payments in the sum of $3198.48 gross.

*Was there agreement to reduced wages?*

[131] Mr Lund and Ms Wan held a staff meeting on 23 March 2020 to inform staff that the business would need to cease operating following the alert level 4 announcement. Gemmeus advised that it had applied for a wage subsidy.

[132] The declaration that Gemmeus would have been required to sign in applying for the wage subsidy at that time provided amongst other matters that:

> You agree you will, using best endeavours, retain the employees named in your application in employment on at least 80 percent of their regular income for the period of the subsidy.

[133] In an email dated 30 March 2020 sent to all employees of Gemmeus there was advice that the government subsidy had come through and would be passed on in full. It was set out that the following week there would be one normal days pay and the rest of the week would be paid with the subsidy. The email provided that those employees with holiday pay owing should take it over the lockdown period and this would be paid out in two weeks and would be on top of the government subsidy. As set out earlier, Mr Johnson was not paid out his holiday pay over this period.

[134] There was no agreement to a reduction reached.

*Ready and willing to work*

[135] Ms Lapthorne submits that Gemmeus was prohibited from operating as a non-essential service and Mr Johnson was prohibited from working as he was unable to work from home and furthermore than he was unwilling to do so.

[136] She distinguishes the situation from that considered by the Authority in *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice* where it was concluded that employees were ready and willing to work. She submits that it is important in that case that the employees were employed in managerial roles which it is assumed could at least in part have been performed from home.[10]

[137] Ms Lapthorne distinguishes the situation from that in *Sandu v Gate Gourmet New Zealand Ltd* because the employer was an essential service and the decision not to work was that of the employer.[11] Further that *Sandu* focuses on the interpretation of the Minimum Wage Act 1993. She submits that both *Dove* and *Sandu* have been relied on in subsequent Authority determinations as authority for the position that an employer could not reduce any employee's pay during lockdown without agreement. Ms Lapthorn submits that the application of this rationale is erroneous at law without closer analysis.

[138] Ms Lapthorne refers to Government press releases between 25 and 28 March 2020 and submits they show the Government was alive to the work-pay bargain being negatively impacted by the directive that workers remain at home. She submits that the guidance was clear that if a business could not operate and employees could not work from home, the obligation was to use best endeavours to top up the wage subsidy to 80% of the normal wage, but if that was not possible then the obligation was to pass the subsidy on in full.

*Ready and willing*

[139] The leading New Zealand authority pre Covid -19 lockdown about the ready and willing principle to perform contractually expected work is the Employment Court judgment in *Mana Coach Services Limited v New Zealand Tramways and Public Transport Employees Union Inc*.[12] In *Mana* notice had been given by drivers of intended strike action. Mana took steps to adopt strategies to deal with the intended strike including rearranging or cancelling bus services. Eight minutes before the notified strike when many of these arrangements were in place there was advice that the drivers were not going on strike. Mana refused to pay the drivers for four hours and the claim was about recovery of lost wages.

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[10] *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266.
[11] *Sandu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591.
[12] *Mana Coach Services v NZ Tramways* [2015] NZEmpC 44.

[140] In *Mana* there was reference to the application of the doctrine discussed by the House of Lords in *Miles v Wakefield Metropolitan District Council* and consideration whether the doctrine was consistent with the relevant collective agreement and the New Zealand legislative scheme.

[141] The Employment Court in *Mana Coach* stated about the doctrine in *Miles*:[13]

> …Miles stands for the proposition that if employees are ready and willing to perform their contractually expected work, an employer who declines to allow them to do so does not have a defence to a claim for the remuneration which would have been paid for the performance of that work. This principle expressed in Miles assumes, importantly, that the work which an employee is ready and willing to perform is also able to be provided by the employer. Miles did not deal with the situation in this case where not only was the work not available for performance by the drivers after they communicated their readiness and willingness to perform it, but where this state of affairs had come about deliberately and tactically at the instigation of the drivers themselves.

[142] There was reference in *Mana* to the position in New Zealand being different because of the provisions of the Wages Protection Act 1983 and the good faith provisions in s 4 of the Act.[14] The Court in *Mana* accepted that the employees were ready and willing to work but the reason the wages were not paid was that the employees, through their union, acted in bad faith and the time lost was because of their default.

[143] The Court of Appeal agreed with the dissenting judgment of the Chief Judge of the Employment Court in *Sandu*.[15] In the dissenting judgment the Chief Judge considered *Mana Coach Services* and a judgment about ready and willing to work in *Mickell v Whakatane Board Mills Limited*.[16] Whilst noting that the employees in these cases were unsuccessful in their claims she stated:

> ..both cases make it clear that "time lost" refers to time periods where work was agreed to be performed but then, for whatever reason, not performed. In other words, where hours of work are agreed, and end up not being performed an employee is still entitled to be paid had the work been performed.[17]

[144] Importantly, whilst there was a focus in *Sandu* on the Minimum Wage Act 1983, the Chief Judge stated that s 7(2) of the Minimum Wage Act reflected the common law rule that

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[13] Above n 11 at [111] with reference to *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089 (HL).
[14] Above n 6.
[15] *Gate Gourmet New Zealand Limited v Sandu* [2021] NZEmpC.
[16] *Mickell v Whakatane Board Mills Ltd* [1950] 481 (SC).
[17] Above n 15 at [67].

existed at the time and continues to exist, that an employee is entitled to wages in circumstances where they are ready and willing to perform work.[18]

*Was Mr Johnson ready and willing to work?*

[145] Ms Lapthorne submitted that performance of Mr Johnson's role required him to be present at the workshop to use the computer with specific software as well as operating the large printer and vinyl cutters and wide format laminating machines and attending meetings with clients. Further, that although Mr Johnson claimed he could undertake tasks at home these, other than design work, were not part of his role and the design work required attendance at the worksite. Ms Lapthorne submits that Mr Johnson could not have contacted customers because he did not have a functioning phone and difficulty connecting to Zoom.

[146] Mr Johnson had offered to go into Gemmeus' workshop and undertake essential work. His evidence was that he could also have performed some tasks at home such as preparing quotes, following up customers, preparing design work, and having customers sign off on work that was already in progress.

[147] The evidence supported that whilst there were issues with access to a phone, Mr Johnson was contactable by email throughout the lockdown and from 6 April 2020 via Zoom. Ms Lapthorne submits that the fact Mr Johnson did not undertake the work is evidence of his inability or unwillingness to do work. She referred to Mr Johnson saying under cross examination that he had attended training however Mr Lund was then able to provide evidence this was not in fact the case. She refers also to his undertaking some odd jobs about the house because he accepted in cross examination that he had taken paint brushes home to do some painting around the home.

[148] Ms Lapthorne placed weight on an email from Mr Johnson to Mr Lund dated 18 May 2020. She submits it demonstrates that he was not willing to work from home. The email stated amongst other matters that:

> The government wage subsidy you applied for was for staff that could not work from home but then you continued to pressure me to do hours during this lock down period including to go out & purchase a phone so that I could phone you during this time & to source equipment for zoom meetings.

[18] Above n 15 at [67].

[149] Mr Johnson explained in his evidence that he would have been prepared to attend the workshop with social distancing and limited staff numbers. He was reluctant however to go to a supermarket with his wife's health issues. Mr Johnson was not provided with a work computer or cell phone for use at home.

[150] Mr Lund, in an email dated 2 April 2020, advised Mr Johnson amongst other matters with respect to attendance at a consultation meeting:

> I would like to remind you that if you can work at home you are obliged to do so, and this does constitute a work meeting which I see no reason you cannot participate in.

[151] I am satisfied from the evidence that Mr Johnson was ready and willing to work. He undertook attendances that could broadly be seen as being for work purposes such as staff Zoom calls and consultation meetings about the restructuring over the four-week lockdown period during which he received the wage subsidy. He was accessible by email. He provided feedback to the restructuring. He was willing and ready to attend the workshop if required.

[152] What prevented his attendance at the work location in his employment agreement was the pandemic and lock down. Had those matters not intervened then he would have been able to have continued working as he usually did. He was not otherwise unavailable or unable to do so.

*Not able to provide work*

[153] I have found Mr Johnson was ready and willing to work. Ms Lapthorne distinguishes Mr Johnson's situation from that of other cases because they concerned provision of essential services or employees assumed to have the ability to work from home. In short, the employer had some responsibility for the situation. In this matter she submits Gemmeus was not an essential service, and it is not responsible for the situation that arose where it was not able to provide work.

[154] The starting point is the common law rule that an employee is entitled to wages in circumstances where they are ready and willing to perform work. I have found that Mr Johnson was ready and willing and able to perform work.

[155] An Arbitration Court decision about the closure of premises due to the 1918 Spanish flu epidemic concerned a similar factual background.[19] In that matter an employed barperson was unable to perform duties when the bar was closed by order of the District Health Officer. An issue arose about the obligations to pay wages during the temporary absence of the employee due to the closure. The Judge agreed with an argument on behalf of the employee that the compulsory closing relating to the business in case of epidemic does not in itself take away or affect the obligations of employers to pay wages to employees during such times. It was stated that the employee would have had to have terminated the agreement in accordance with the provision of any award or industrial award to have avoided liability. There was no evidence the employee waived the right to wages.

[156] In that case, although the employer was not responsible for the closedown, it was nevertheless liable for payment of wages where the relationship stayed on foot. I do not conclude that Gemmeus was automatically released from its obligation to pay wages over the lockdown period. What is established from earlier cases is that the focus should be on the arrangements that govern the employment relationship. In this case it was the employment agreement, statutory good faith obligations and the protections afforded by the Wages Protection Act 1983.

[157] The deductions clause in Mr Johnson's employment agreement as referred to earlier was not one that applied in a lockdown situation.

[158] Mr Johnson had negotiated before he commenced employment the removal of two clauses from the employee handbook.

[159] The first was a shortage of work clause that provided with agreement the employee may be placed on reduced hours or temporary leave. This may have resulted in reduced pay or leave without pay unless accrued leave was utilised.

[160] The second clause was a stand down provision which provided that Gemmeus may send an employee home where there is no useful work to do. This included for a cause which the employer cannot reasonably be held responsible for such as a natural disaster. It provided that the list was not exhaustive and that Gemmeus would consult with Mr Johnson prior to any

[19] *Inspector of Awards v J A Duncan* (1920) Court of Arbitration 20 Book of Awards, 490.

standdown period which generally would not be paid. If agreed however, the employee may be able to access accrued leave.

[161] The employment agreement did not provide for a reduction in Mr Johnson's payments because of the situation that faced Gemmeus in late March 2020. Mr Johnson was entitled to be paid his salary in accordance with clause 12 of his employment agreement. His pay was to be paid weekly.

[162] There was the option for Gemmeus at the time of lockdown to consult with Mr Johnson and see if he would consent to a reduction to his salary and/or consent to payment of accrued leave to reduce any shortfall.

[163] There was no consultation and agreement to a reduction of his salary. Mr Johnson is therefore owed the sum of $3,198.48 gross being the shortfall in his salary between 1 April 2020 and 29 April 2020.

**Remedies for personal grievances**

*Lost wages*

[164] The Authority must, where an employee has a personal grievance and has lost remuneration as a result, order the employer pay the lesser of a sum equal to lost remuneration or to 3 months ordinary time remuneration.[20] In this case I am asked by Ms Drewitt to exercise my discretion and award more than three months lost earnings.[21]

[165] Mr Johnson gave evidence that he had struggled to gain employment within the signage industry since his redundancy. Although he had at the time of the investigation meeting managed to obtain a role with guaranteed part time hours payment it was at a much-reduced rate. Mr Johnson seeks reimbursement of lost wages for the period from dismissal to the date of the Authority investigation meeting. Between the investigation meeting dates he lodged job applications to support mitigation. He also waited for the three-month period of restraint in his employment agreement before applying for signage industry roles. He has suspicions because he has struggled to get work in the signage area there had been unfavourable talk about him in the industry by Mr Lund. Mr Lund denies that and there is no direct evidence of that.

[20] Section 128 (1) and (2) of the Employment Relations Act 2000.
[21] Section 128(3) of the Employment Relations Act 2000.

[166] Ms Lapthorne submits that there is no basis for lost wages to be awarded because the decision to make the respondent redundant was substantively justified and it is well established that an employee is not entitled to lost wages where a dismissal is substantively justified.

[167] Ms Drewitt sets out three scenarios for consideration for lost wage assessments in a redundancy setting which I have considered.

[168] If the consultation had been full and fair and alternatives properly considered redundancy was not inevitable. I balance with that there was a genuine need to restructure and achieve cost savings. Mr Johnson was paid the highest salary. I cannot be satisfied that the relationship would have continued for the period for which reimbursement of lost wages is claimed.

[169] I am satisfied that Mr Johnson attempted to mitigate his loss.

[170] It is appropriate to limit any award made under this head to a period of three months which is the sum of $18,000 gross which is the lesser of amounts in assessing lost remuneration. The loss for three months of $18,000 is calculated based on $72,000 which was Mr Johnson's salary divided by 52 which is $1,384.61 multiplied by 13 weeks.

*Compensation*

[171] I intend to assess compensation for the unjustified disadvantage and the dismissal globally. The disadvantage about the final pay is linked to the financial difficulties that followed the redundancy and is sensibly be assessed in that manner.

[172] There was extensive evidence from Mr Johnson and his wife about the impact of the failure to pay salary for the garden leave period and for a period following of a little over three weeks. The financial difficulties then continued. There was a need to borrow, and to sell items including sports gear, to pay bills. Expected attendance at a university for their son was delayed because of the financial difficulties. The family required grocery vouchers and food parcels to survive. This was at the time of the 2020 nationwide lockdown which added to the uncertainty and stress. I weigh that the final pay was eventually paid and although money was deducted it was repaid. That would have assisted somewhat.

[173] Mr Johnson referred to putting a lot of time into his feedback to the process and was hurt about the way the process was undertaken, with little real consideration and response to

the feedback. He referred to the process and interactions including those through the garden leave period being unpleasant, frustrating, and draining. Mr Johnson was hurt by effort he had put into the Gemmeus business, working long hours helping the business grow and the fact his was the only position selected and his suggestions for alternatives not properly considered. He said that there was a toll on his mental health which continued to the time of the Authority investigation meeting. He explained struggling with sleep, headaches and having trouble sleeping. He said that it had left him with little interest in the industry.

[174] His evidence was supported by his wife Lisa who confirmed that he had become emotionally exhausted by the process and had been taking medication for depression and anxiety. The restructuring was at a time when Mrs Johnson was recovering from surgery and needing support.

[175] In all the circumstances I accept that the impact on Mr Johnson was quite significant. I am of the view that an appropriate award under this head which is consistent with awards in similar cases is $20,000.

*Contribution*

[176] It is accepted that Mr Johnson did not contribute to his redundancy. I do not accept that he contributed to the failure to pay him his final pay during and at the end of the garden leave period. Any amount that could be owing was considerably less than what was withheld and failure to pay anything at all exacerbated the situation when Mr Johnson agreed some amount could be withheld and resolved at a later time.

**Should there be an award of penalties?**

[177] I do not find that the claims for penalty were commenced by way of a claim in a pleading within 12 months of the date when the cause of action first became known to Mr Johnson or should reasonably have become known, as required by s 135 (5) of the Act. The Authority is not therefore able to consider the claim for penalties.

[178] In resolving the employment relationship problems, I am not required to separately assess good faith breaches for the purpose of a penalty.

**Other claims**

[179] There are two other claims in the statement of problem. Neither received attention in the submissions.

[180] One was for return of some personal items and another reimbursement of $70 fuel. The personal items include such items as a rule and two rulers. It has been over two years since Mr Johnson was in the workplace. If the items are in the possession of Gemmeus they may no longer able to be identified. If that is the case then it is unlikely the Authority would make an order for their return.

[181] The second claim is not straightforward. A vehicle was provided to Mr Johnson for his use, after his own vehicle needed repairs. He says that he returned it with a full tank of fuel that he paid for, not having used it over lockdown.

[182] Out of an abundance of caution if these matters are to be pursued then the Authority is to be advised within five days of the date of this determination.

**Orders made**

[183] Gemmeus Solutions Limited is ordered to pay to Richard Johnson the sum of $18,000 gross being reimbursement of lost wages under s 123(1)(b) of the Act

[184] Gemmeus Solutions Limited is ordered to pay to Richard Johnson the sum of $20,000 without deduction being compensation under s 123(1)(c) (i) of the Act.

[185] Gemmeus Solutions Limited is ordered to pay Richard Johnson the sum of $5,538 gross being redundancy compensation.

[186] Gemmeus Solutions Limited is ordered to pay to Richard Johnson the sum of $3,198.48 gross being reimbursement of a shortfall in salary paid to him between 1 April 2020 and 29 April 2020.

[187] The Authority exercises its discretion and orders interest to be paid on the two amounts in [185] and [186] under clause 11 of Schedule 2 of the Act under the Interest on Money Claims Act 2016.

[188] Interest is to be paid on the amount of $5,538.44 gross, from the last day of employment, to the date payment is made.

[189] Interest is to be paid on the sum of $3,198.48 gross from the date each payment of full salary fell due between 1 April 2020 and 29 April 2020 and was short paid, or from 29 April 2020 to the date of payment. Interest is to be calculated using the civil debt interest calculator. If there are difficulties with such calculation the Authority reserves the right for either party to return to it for assistance.

**Costs**

[190] I reserve the issue of costs.

[191] If costs cannot be resolved, then Ms Drewitt may lodge and serve a costs submission within 14 days from the date of this determination. Ms Lapthorne will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[192] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[193] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff[22].

**Helen Doyle**
**Member of the Employment Relations Authority**

[22] Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf.