

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 94  
3259739

BETWEEN	NOY PAULL Applicant
AND	WAIKANAЕ HOLDINGS (GISBORNE) LIMITED Respondent

Member of Authority: Natasha Szeto

Representatives: Ali Bendall, counsel for the Applicant  
David McLeod, advocate for the Respondent

Investigation Meeting: 6 – 7 November 2024 in Gisborne

Submissions and further information received: 15 November 2024 from the Applicant  
7 and 25 November 2024 from the Respondent

Date of Determination: 19 February 2025

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] Mr Paull was made redundant from his position as an Apprentice General Engineering with Waikanae Holdings (Gisborne) Limited (WHL), following the downturn in the engineering industry in the wake of weather events in Gisborne.

[2] Mr Paull says his dismissal on the basis of redundancy was not genuine, in that it lacked substantive justification and was procedurally deficient. Mr Paull says WHL has not acted in good faith. WHL says it did not want to make Mr Paull redundant, but there was simply no work for him. It says its procedure may have been flawed, but it did not act in bad faith.

[3] This determination resolves the issue of whether Mr Paull was unjustifiably dismissed on the basis of a redundancy and should be paid compensation and lost earnings. It also resolves whether Mr Paull should be awarded interest on underpayments and whether WHL should pay him in relation to other claimed losses.

### **The Authority's Investigation**

[4] Written witness statements were lodged by Mr Paull, his mother Jacqueline Paull and his father David Manuel. For WHL, statements were provided by Robbie McCann, Managing Director; Marvin Malia, Engineering Workshop Manager; and Liviu Schiau, Offsite Engineering Manager. All witnesses attended the Investigation Meeting in person, and answered questions under oath or affirmation.

[5] Mr Paull also summonsed a witness who provided a statement and made an application for non-publication of their name and identifying details, and the name and identifying details of the company they worked for. In the alternative, Mr Paull asked for the witness and the name of their company to be anonymised. For the reasons expanded on later in this determination, I have anonymised the name of the company, and the witness. The company is referred to as "HVW" and the witness is referred to as "HVW Manager".

[6] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

### **Issues**

- [7] The issues the Authority is to investigate and determine are:
- (a) Whether Mr Paull was unjustifiably dismissed from his employment and, if so, whether remedies should be ordered.
  - (b) Whether Mr Paull is owed interest on underpayment of shift allowance, and incorrect payment of sick leave.
  - (c) Whether WHL has breached its statutory obligation of good faith when making a decision that adversely affected Mr Paull's employment and if

so, whether a penalty should be awarded (with a portion to be paid to Mr Paull).

### **Relevant Background**

[8] WHL is an engineering business. It has a workshop operation, and supplies engineering labour to the Gisborne region. The work WHL carries out is divided into three main business streams: workshop (fitting and welding), off site (maintenance and repair), and construction.

[9] Robbie McCann is the owner of the business. Mr McCann works in the office overseeing day-to-day accounting, chasing bills and in an advisory role to the workshop. He describes himself as “not 100% hands-on as a manager” and mostly leaves the running of the engineers to his managers – Levi Schiau, the Offsite Manager (fitting); Marvin Malia, the Workshop Manager (welding and fabrication) and a third manager in charge of construction.

[10] All administration for WHL was handled by the managers. Work orders were generally written by administrative staff but signed off by someone higher up. Management at WHL sourced the work and put it out to the workers who would then accept offers to work shifts. A core part of the engineering manager role is to price jobs and deploy engineers to them. There was not usually an interchange of staff between the three divisions at WHL but if Mr Schiau needed machining work done he would bring work back to the workshop from off-site. If one team was short of workers, they would ask to borrow from another team but this usually meant Mr Schiau asking Mr Malia for staff to cover emergency work.

[11] The workstream for the Offsite team came mostly from three businesses in the Gisborne region. One of those businesses was HVW. Mr Schiau mostly dealt with a Maintenance Coordinator with respect to shift work at HVW. He would receive a roster with the required hours and deploy WHL engineers to work at HVW. Off-site engineers would be rostered on for a period of time working four days on, four days off on alternating day and night rosters.

[12] Noy Paull started working for WHL as a high school student and began full time employment as an Apprentice General Engineering on 5 February 2018. By 2020 Mr Paull was able to work unsupervised and was deployed to work off-site on maintenance

and fitting. Mr Paull's role meant he could technically work anywhere within WHL's business, but between 2018 and 2023, Mr Paull reported to Offsite Manager, Mr Schiau.

[13] Mr Paull worked at HVW in 2021 and 2022 as a site fitter. In 2022, the season at HVW finished around August and there was out of season maintenance work at HVW and various other companies. In the off-season of 2022, Mr Paull worked more than his contracted 40 hours per week.

[14] Also in 2022, Mr Paull was involved in a disciplinary incident because he was absent from work and had not clarified why. Because of this incident, Mr Paull said he felt that Mr Malia did not value him and did not give him the same opportunities in fabrication and welding as other apprentices.

#### ***Mr Paull's work prior to the redundancy***

[15] In December 2022, HVW Manager made the decision to again hire engineering staff from WHL for the season starting January 2023. Under the long-standing contract between HVW and WHL, HVW would hire labour from WHL, send WHL timesheets for hours their staff worked and WHL would invoice HVW based on timesheets. This was known as a "pay by order" system. Although HVW Manager did not request specific engineers, HVW's preference was to use WHL for engineer labour, because there was consistency of people who had familiarity with HVW's plant.

[16] Mr Schiau received the labour roster request from HVW for the "on-season" or production season from January to June 2023. Mr Schiau usually received the roster one month in advance, and he emailed it to the workers. For the 2023 on-season, Mr Schiau arranged for two engineers to be on alternating shifts for the season, one of whom was Mr Paull. Mr Paull was good with general engineering and could be used at multiple places around the plant. When Mr Paull was directed to work at HVW doing on-season shiftwork from January 2023 to June 2023, it was the third time he had worked there. A third engineer from WHL was deployed to HVW to work in the bioproducts area. During on-season maintenance, work consisted of four 12.5 hour shifts per week, and Mr Paull was regularly working 48 hours plus.

[17] WHL did not have much day-to-day oversight of employees working at HVW. Any engineering-related issues were brought to HVW Manager. If issues were more minor or administrative, they were taken to another manager at HVW. During the season, WHL employees were working to set routines within their shifts. Sometimes

HVW generated work orders for specific tasks, but this was not always the case. Mr Paull rarely went back to WHL's workshop during the on-season and estimates he was only there 10 to 12 times within a six-month period. Mr Paull's work at HVW was generally good and he did not get any complaints.

[18] Mr Paull says he was provided a work vehicle (a ute) to transport himself to and from the worksite. He mostly kept the work vehicle at home and did not return it to WHL's workshop. He understood he was allowed some personal use of the work vehicle and had to pay for diesel. Other than times he took the work vehicle in for servicing, Mr Paull kept the ute at home.

[19] On 23 May 2023 Mr Schiau went on holiday overseas. Around a week before he left, Mr Schiau gave Mr Malia the rosters for the three engineers at HVW including Mr Paull. The final roster Mr Schiau saw before he went on leave went through to 1 July 2023. Before going on holiday, Mr Schiau believed WHL would continue to receive work from HVW, and both Mr Paull and the other engineers in his team would continue to work at HVW even if Mr Schiau was not there. This assumption was based on the fact that there had been previous work for WHL at HVW in both the 2021 and 2022 seasons. Although it had not been recent practice to ask clients for work because customers now came to WHL 90% of the time, Mr Schiau had gone out to customers for work in the past.

[20] While Mr Malia was looking after Mr Schiau's team, he worked to the roster. It was a "hands-off" process and he considered it really looked after itself. Mr Malia never spoke to the employees unless he was chasing timesheets. HVW would sometimes give WHL two weeks' notice of a roster coming to an end, but this was not always the case. Mr Paull was aware that the shift work he was doing for the season was scheduled to finish around the end of June 2023. Usually after the on-season finishes, work orders are generated for repairs and maintenance in the off-season and pre-season.

[21] Mr Paull's last rostered day at HVW was Friday 23 June 2023. Mr Paull says he had a discussion with the site supervisor or foreman at HVW who told him there would be some work for him in the off-season. Mr Paull understood this to be a further couple of hours work and there might be some off-season work for the other engineers from WHL. Mr Paull then worked on Saturday 24 June and Sunday 25 June covering a few hours of other people's shifts.

[22] Around the same time, back at WHL, Mr Malia said he had a conversation with the engineer from WHL working in the bioproducts area at HVW. This engineer told Mr Malia his roster was going to be extended. Mr McCann says he had a discussion with Mr Malia about the engineers including Mr Paull not having any more work at HVW. Work had already been scaled back from 12-hour days to shorter shifts. Mr Malia rang Mr McCann and said there was no more work at HVW in the maintenance season and Mr McCann asked him whether he was sure. It took WHL by surprise that there was no work for it from HVW in the off-season because generally WHL shift engineers worked at HVW all year round. Whether the shift work was on or off, there was always seasonal maintenance and there was a verbal arrangement that there would be some continuation of work. In the previous season in 2022, Mr Paull and four to five other engineers had actually generated more work for WHL by bringing orders back from their off-site shift work for the machine and fabrication workshop.

[23] Mr McCann said he understood and expected that Mr Malia had contacted HVW to confirm the lack of work but he had not contacted HVW himself. Mr McCann said he took a bit of time to digest what Mr Malia was telling him about the lack of work from HVW.

[24] There is some dispute between the parties about when Mr Paull returned to the workshop at WHL after his last shift at HVW. Mr McCann and Mr Malia recall Mr Paull coming into the workshop on Thursday 22 June, although Mr Paull says he actually returned to the workshop on Tuesday 27 June 2023.

### ***The redundancy meeting***

[25] On Monday the 26th of June, Mr Malia says Mr McCann called him in the morning saying that he would be coming into work and they should speak about the lack of work for the two engineers that had returned from HVW.

[26] Mr McCann says he had multiple discussions with Mr Malia on Tuesday 27 June. The first conversation in the morning was to ask whether he had any work in the workshop for the two engineers. A few hours went past and there was another conversation where Mr McCann says he was still trying to find work. Mr McCann says he and Mr Malia had so many conversations because they had engineers in the workshop doing nothing. Mr Malia recalls that both engineers had been sent back to

the workshop by HVW because their shifts were finished and they were no longer needed.

[27] Mr Paull says his first day back at the workshop at WHL was Tuesday 27 June. He started work at 8:00 am and Mr Malia gave him work grinding plates. Mr Malia says the two engineers, including Mr Paull, approached him in the workshop and asked him what they should do. Mr Malia told them at present he did not have any work to give them. He assigned them tasks sweeping and tidying the workshop.

[28] That afternoon, Mr McCann asked Mr Malia to bring Mr Paull up to a meeting room. Mr Paull was clearing up in the workshop as he had been directed to do when Mr Malia approached him around 4:00 pm and asked Mr Paull to follow him. Mr Paull assumed they were going to Mr Malia's office to discuss more jobs but Mr Malia showed him into a meeting room, where Mr McCann and his wife were waiting to speak to him.

[29] Mr McCann did not intend the meeting to be a disciplinary meeting. He made the decision that Mr Paull had to be made redundant and the purpose of the meeting was to tell him that. Mr McCann took the lead and did all the talking in the meeting. Mr McCann started by putting across what was happening in the downturn and at work. There was a discussion about whether HVW were downsizing their operation, and Mr Paull said he thought they were because the weather had created a terrible season. Mr Paull told Mr McCann there was still work there for a couple of weeks for him doing maintenance work but Mr McCann replied: "That's not what I heard". Mr McCann does not recall Mr Paull raising the potential for any off-season work at HVW. Mr Paull was asked to respond, but he said it was "discounted". After a 10 minute conversation Mr McCann said "We're going to have to let you go". Mr Paull says he was not expecting his employment to end, and he was in shock. Mr McCann offered Mr Paull two weeks' pay in lieu of working out a notice period, and Mr Paull agreed. Mr McCann said his decision was not personal and told Mr Paull "don't be a stranger".

### *After the redundancy*

[30] After the meeting, Mr Paull removed his gear from the work vehicle, and was driven home by a colleague. Mr Paull says he was so distraught that later that night he messaged Mr Schiau on holiday to tell him what had happened. Mr Schiau's response

was to the effect that while he was on holiday, he did not know what was going on and could not help.

[31] Mr Paull started ringing around new potential employers later that night. He received his final pay as two weeks' wages in lieu of working. Mr Paull obtained a job with another engineering firm on 28 August. On 22 September, Mr Paull raised personal grievances for unjustified dismissal and disadvantage. He requested copies of his wages and time records as well as reasons for his dismissal.

[32] Overall WHL reduced its workforce by 17 staff in the 18 months leading up to the Authority's investigation meeting. Mr Schiau's off site team reduced from approximately 15 workers to around five.

### **Was Mr Paull unjustifiably dismissed?**

#### ***The law on redundancy***

[33] Mr Paull's employment agreement contains a redundancy clause which describes redundancy as a condition in which the company has people surplus to its requirements because whole or part of the operation closes down, and/or a reduction in the number of permanent employees is required. This is the clause Mr McCann says he followed in ending Mr Paull's employment for redundancy.

[34] When the Authority considers justification for WHL's actions including the dismissal decision, it does so by applying the test of justification in s 103A of the Act. The Authority must carefully consider on an objective basis whether the actions of WHL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[35] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations and particularly the requirement for both parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. When an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees, the employer is required to provide the affected employees with access to relevant information and an opportunity to comment on the information before the

decision is made.<sup>1</sup> Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action because a fair and reasonable employer will comply with the law.<sup>2</sup>

[36] In the context of a dismissal for redundancy, it is settled law that if an employer can show the redundancy was genuine and enacted in a procedurally fair manner, then the s 103A test may well be satisfied.<sup>3</sup> The Authority should first determine if the redundancy was genuine. This means establishing whether there was a commercial rationale for the employer's decision and that redundancy was not used as a pretext for an ulterior motive in selecting the particular employee for redundancy. In determining genuineness, the Authority's role is not to substitute its own commercial judgment for that of the employer.

[37] Secondly, the Authority must determine whether the redundancy was enacted in a procedurally fair manner. This means ensuring that notice and consultation requirements have been met. The good faith obligations set out in s 4 of the Act apply. These include a positive disclosure obligation to provide an affected employee with access to information supporting the reason for the redundancy and the detail of how it is proposed to be implemented. The Employment Court has said consultation must be a reality and not a charade.<sup>4</sup> It involves stating a proposal that has not been finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. While the employer is entitled to have a working plan in mind, they must be open to changing their mind, or starting the process again.<sup>5</sup>

***Was the dismissal substantively justified?***

[38] Mr Paull says there are two main reasons WHL's decision to dismiss him was unjustifiable: the decision to dismiss was predetermined and there was no consultation. He says that the Authority cannot be satisfied the redundancy was genuine because the decision was not properly informed. WHL relied on the fact that Mr Paull's rostered work at HVW was completed along with public knowledge that HVW was closing

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<sup>1</sup> Section 4(1A)(c) of the Act.

<sup>2</sup> *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ at [65].

<sup>3</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

<sup>4</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmp 71 at [54].

<sup>5</sup> Above n4.

down part of its operation to justify not finding any more work for Mr Paull. However, Mr Paull was not employed by HVW, he was employed by WHL. Mr Paull says that because WHL had not checked with its customers about future work, it had not explored all options for the continuation of Mr Paull's employment.

[39] WHL says the redundancy was for genuine reasons and Mr Paull's employment had to be terminated in order to protect the company. In support of this submission, it says it made another engineer redundant at the same time as Mr Paull and for the same reasons – namely because their work at HVW had ended and all other engineers had ongoing work. It further says Mr Paull did not raise the possibility of further work at HVW in the meeting, but even if the possibility had been raised, further work did not eventuate.

[40] In determining whether Mr Paull's dismissal was justified, I must consider the circumstances as they existed at the time Mr McCann made the decision on WHL's behalf to make Mr Paull redundant. Based on the evidence before the Authority, I am not persuaded WHL had any ulterior motive for terminating Mr Paull's employment. Mr Paull suspected Mr Malia made no efforts to obtain more work for him because Mr Malia did not like him but the evidence before the Authority did not support this submission. Rather, Mr Malia said he did not see it as his job to source more work for the off-site engineers and although WHL had gone out to customers in the past to source work, that had not been the practice in recent years. Mr McCann was the decision maker, and there is no evidence he had any ulterior motive in making the decision to dismiss Mr Paull.

[41] However, while Mr McCann believed there were genuine commercial reasons for Mr Paull's redundancy, I am not persuaded it was necessary to make Mr Paull's position redundant at that time because WHL had not carried out sufficient enquiries about continuation of work at HVW after the end of the season and it could not sufficiently justify its selection of Mr Paull's position for redundancy. Mr Paull was not employed to work for HVW, he was employed to work for WHL. Even if there was no further work available from HVW, a fair and reasonable employer considering reducing its workforce could have given robust thought to who it selected for proposed redundancy. The abruptness of the decision, and the lack of consultation and process by WHL leading up to the time the decision was made, undermines WHL's position

that Mr Paull's dismissal was justifiable. I conclude that Mr Paull's dismissal for redundancy was not substantively justified.

***Was the dismissal procedurally fair?***

[42] Mr Paull says there was no consultation, and his redundancy was procedurally unfair. Mr Paull submits because WHL failed to consult at all, it failed to meet its statutory obligations to act as a fair and reasonable employer. Mr Paull says WHL did not know that Mr Paull's position was superfluous to requirements at the time it made its decision: no financial analysis was done by WHL, no relevant information was given to him, and there was no follow-up by WHL when Mr Paull told Mr McCann that HVW had further work for him.

[43] WHL says it is a relatively small company without a dedicated HR department or specialised knowledge. Mr McCann did not take advice prior to commencing the restructure and utilised his own judgment as to the best process. WHL says the formal meeting was Mr Paull's opportunity to engage with the decision-maker on his proposal to terminate his employment. WHL says that if it faces any risk, it is in the area of process because Mr Paull should have been provided advance notice of the meeting held on 27 June, and given advice that he could seek and be represented.

[44] Looking objectively at the process WHL followed, I conclude Mr Paull's redundancy was not procedurally fair. The decision to make Mr Paull redundant was hasty. Mr McCann admitted he had decided to make Mr Paull redundant before he met with him on 27 June and in that sense, he had predetermined the outcome of the meeting. While Mr McCann viewed the decision as "logical, not personal", it is clear that notice and consultation requirements under the Act were not met and WHL has not acted as a fair and reasonable employer could.

[45] Firstly, WHL treated Mr Paull unfairly in relation to the way in which he was called into the dismissal meeting. Although there was some dispute between the parties about how soon the meeting was held after Mr Paull's return to the workshop, I prefer Mr Paull's recollection that the meeting occurred on his first full day back at work because this is consistent with Mr Malia and Mr McCann being concerned about having two employees whose off-site contracts had finished and who had "nothing to do" in the workshop. Even on the most generous interpretation of WHL's evidence about the timing, the dismissal meeting happened within days of Mr Paull's return to WHL. Mr

Paull was not given any advance notice of what the meeting was about. This denied Mr Paull the opportunity to prepare, including to have support at the meeting. Mr Paull's father Mr Manuel had been onsite at WHL earlier in the day and if Mr Paull had advance notice of the meeting, he could have easily arranged for Mr Manuel to be there.

[46] Secondly, Mr Paull was not provided with access to information supporting the reason for the redundancy and the detail of how it was proposed to be implemented. WHL did not tell Mr Paull that both engineers who had returned from HVW were being made redundant because their rostered shifts at HVW had come to an end. WHL did not disclose its reasons for selecting Mr Paull for redundancy above other engineers working for WHL. The failure to properly consult and advise Mr Paull of the selection criteria resulted in him forming the belief that he had been made redundant because Mr Malia disliked him and WHL had made no endeavours to obtain further work for him once his contract at HVW had ended.

[47] Thirdly, Mr Paull was not given a genuine opportunity to comment on the redundancy proposal prior to a decision being finalised. WHL says that the meeting was Mr Paull's opportunity to comment, but I am unable to accept that submission because Mr McCann acknowledged he had decided to make Mr Paull redundant before the meeting and the purpose of the meeting was to tell him. In addition, the way in which WHL called Mr Paull into a meeting without telling him the purpose and without giving him the opportunity to have a support person meant he could not reasonably have been expected to respond to a redundancy proposal. Mr McCann had already made the decision to make Mr Paull redundant and he was clear that the purpose of the meeting was to tell Mr Paull that he was being made redundant. There is therefore no evidence WHL came to the meeting with an open mind ready to listen to Mr Paull's feedback, consider his responses, and genuinely reflect before deciding what to do. I conclude there was no genuine consultation at the meeting.

[48] Lastly, WHL did not discuss alternatives to dismissal with Mr Paull. Mr McCann said all the jobs Mr Schiau had left Mr Malia to oversee were taken by other employees and there was not sufficient work for everyone. However, there is no evidence that WHL management formally confirmed this directly with HVW. There was nothing in Mr Paull's individual employment agreement that prevented him from being redeployed to work for another team within WHL, and it is not clear why redeployment was not an option that was seriously considered by WHL. There were

also other alternatives potentially available to WHL based on the evidence before the Authority. One WHL employee in the workshop had voluntarily reduced his hours. The engineer working in the bioproducts area at HVW had been permitted to re-train as a hose-doctor when he returned to WHL. While Mr McCann said he had thought about redeployment, it was not discussed in the meeting. WHL did not discuss with Mr Paull any alternatives to dismissal such as a reduction in hours or retraining. A fair and reasonable employer could have discussed alternatives.

[49] WHL says it has “broadly” met the good faith test because it was self-evident Mr Paull’s employment was in jeopardy when he was sent away from HVW and had no work to do back at the WHL workshop. I do not accept this submission. Mr Malia and Mr McCann said they had discussed the issue of industry downturn between themselves at management level, but they had not discussed it with WHL’s employees. Mr Malia accepted the meeting could have taken Mr Paull by surprise. Even if WHL had believed Mr Paull was aware of a general downturn in the industry, this falls far short of the notice and consultation obligations imposed on a fair and reasonable employer. WHL has not discharged its obligation to be active and constructive in establishing and maintaining a productive employment relationship, or discharged its good faith disclosure obligations in terms of Mr Paull’s proposed redundancy.

[50] The lack of process has impacted the fairness and reasonableness of the decision to dismiss Mr Paull on the basis of redundancy. The procedural defects and breaches of good faith I have identified above ended Mr Paull’s employment relationship prematurely in a manner that did not fall within the parameters of what a notional fair and reasonable employer could have done in all the circumstances at the time. I find Mr Paull was unjustifiably dismissed.

## **Remedies**

[51] Having found that Mr Paull was unjustifiably dismissed from his employment, he is entitled to an assessment of remedies. Mr Paull seeks:

- (a) Compensation under s 123(1)(c) of the Act.<sup>6</sup>

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<sup>6</sup> With reference to Band 2 in: *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101.

- (b) Reimbursement of lost wages under s 123(1)(b) for the period 9 July 2023 to 28 August 2023 (plus KiwiSaver).
- (c) Reimbursement of other lost benefits, being private use of the work vehicle estimated at \$2,999.00 and Southern Cross health insurance membership (unquantified).
- (d) Interest on arrears of wages (paid on 1 May 2024), for unpaid shift allowances (\$471.25) and sick leave (\$484.75).
- (e) Special damages, being reimbursement of bank loan repayments to Mr Paull's parents (\$525.08) and reimbursement of process server fee for summoning a witness to the investigation meeting (\$161.00).

### *Compensation*

[52] Mr Paull gave evidence of the physical and emotional impacts of his dismissal. He says he could not recall much initially because he was so shocked and upset that he had lost his job after working for WHL for over six years. While Mr McCann says Mr Paull did not portray being in shock at the time of the meeting, I accept Mr Paull's evidence that the meeting came as a complete surprise to him, and he had not expected his employment to be terminated. Mr Paull's account is consistent with Mr Manuel's observations about Mr Paull's state of mind later that day, and the message Mr Paull sent to Mr Schiau.

[53] Mr Paull says he was anxious and stressed and his self-esteem suffered because he felt like he "was fired for no reason". He could not motivate himself and felt ashamed. Mr Paull had worked at WHL since he was a high school student, for the entire duration of his career. Mr Paull also says certain factors of WHL's conduct after lodgement of the statement of problem should factor in to the Authority's award. Mr Paull's parents gave evidence of the impact and described how after Mr Paull's employment with WHL ended he became a "totally different person". He was depressed, lethargic and reclusive. Mr Paull worked hard to get his self-confidence and feeling of worth back and that took months.

[54] Mr Paull says an award of \$25,000 to \$35,000 would recognise the psychological and physiological harm he suffered, which was similar to that of the employee in *Henderson Travels*<sup>7</sup> who was awarded \$21,000 in the Authority, uplifted

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<sup>7</sup> *Henderson Travels Limited v Kaur* [2023] NZEmpC 181.

to \$30,000 by the Court. WHL submits that any award of compensation should be “modest”.

[55] I have considered the general range of compensation awards in other cases and particularly those relied on in submissions from Mr Paull. I take into account the impacts on Mr Paull. There is a level of vulnerability to Mr Paull’s circumstances, given he had started working for WHL when he was a high school student, had only worked for one employer for his career, and given the six year duration of his employment. I also take into account the complete lack of process by WHL, even though I accept there was no ulterior motive to Mr Paull’s redundancy. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$20,000.00.

*Reimbursement of lost wages*

[56] Under s 123(1)(b) of the Act, the Authority is able to order the employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 says the Authority must order the employer to pay lost remuneration or three months’ ordinary time remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance.

[57] WHL submits no lost wages are appropriate because the redundancy was genuine and as Mr Paull was paid his two weeks’ notice in lieu, WHL has met its contractual obligations to him.

[58] Mr Paull says he looked for work on the day he was dismissed, including applying for a role, and sending his CV to two other places. On 5 July he phoned a business directly and secured employment with them on 28 August 2023. Mr Paull acted admirably quickly to mitigate his losses in terms of lost employment. In the circumstances where I have found Mr Paull’s dismissal was substantively and procedurally unjustified, I see no reason to depart from the usual approach to award Mr Paull his lost wages under s 123(1)(b) for the period up until he secured new employment which was income lost as a result of the grievance. This covers the period

9 July 2023 to 28 August 2023 and amounts to \$7,420.00 (gross)<sup>8</sup>. Mr Paull's payslips confirm that KiwiSaver was paid at 8% on top of his gross wages, and I order a further \$593.60 to be paid as claimed.

[59] Mr Paull also makes a claim for superannuation paid by WHL, which was separate to his KiwiSaver claim. In submissions he says the estimated rate to replace the superannuation was \$210.00 per fortnight. This claim was not raised in the original or amended statement of problem and is unsubstantiated by evidence. I decline to make any orders.

*Reimbursement of private use of work vehicle estimated at \$2,999.00, Southern Cross health insurance membership, and loan from parents of \$525.08*

[60] In relation to the work vehicle, Mr Schiau confirmed in evidence that in 2022 Mr Paull was given the use of a work vehicle full time because he was on night shift. In 2023, the intended arrangement was that Mr Paull would pick up the work vehicle on day one of his shift and return it to the workshop on the fourth day of his shift. WHL says he should not have had the work vehicle for personal use on his four off-days. Despite this, Mr Paull kept the truck and although Mr Schiau apparently asked Mr Paull many times to bring the truck back on his off-days, he did not. Mr McCann says a work vehicle was not provided as part of Mr Paull's contract - it was purely there for shift work, and given there was a family relationship with Mr Paull's family, WHL was somewhat flexible on Mr Paull. WHL submits Mr Paull should not be reimbursed for access to the vehicle.

[61] Mr Paull originally claimed \$2,999.00 as the estimated value of his personal use of the work vehicle. Having tested the evidence at the investigation meeting, I find the claim for reimbursement in relation to the work vehicle is unspecified and unsupported on the evidence. Mr Paull did not have a contractual entitlement to a work vehicle and the evidence suggests he was obtaining a benefit outside the terms of his employment and company policy. I decline to make any orders in respect of the work vehicle.

[62] Similarly in relation to Southern Cross Health membership, there is no information before the Authority to support Mr Paull had a contractual entitlement to health insurance, or equivalent value of it, and I decline to make any orders.

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<sup>8</sup> Seven weeks at 40 hours per week at \$26.50 per hour.

[63] Mr Paull also claims money he borrowed from his parents to service a bank loan - and which he is required to repay to them - totalling \$525.08. WHL opposes the Authority making orders in respect of the money Mr Paull borrowed from his parents. This claim was not raised in the original statement of problem and was only quantified at the investigation meeting. Based on the evidence before the Authority, I am not satisfied the money Mr Paull borrowed from his parents to service his loan was money lost as a result of his grievance and I decline to make orders.

### **Contribution**

[64] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Paull may have acted in a way that contributed to the situation that gave rise to his grievance.<sup>9</sup>

[65] Mr Paull did not contribute to his redundancy. WHL accepts that. There is no basis to reduce an otherwise appropriate award on the basis of any contribution by Mr Paull.

### **Other amounts claimed**

#### *Interest on unpaid shift allowances and sick leave*

[66] Mr Paull claims interest on arrears of wages for unpaid shift allowances (\$471.25) and sick leave (\$484.75) which were paid on 1 May 2024.

[67] WHL accepts that if there was a delay in paying sick leave and holiday pay that interest should be awarded. The amount of \$956.00 was due (at the latest) on the termination of Mr Paull's employment which was 27 June 2023. Using the civil debt enforcement calculator<sup>10</sup>, the amount of interest incurred on the debt between 27 June 2023 and 1 May 2024 is \$46.75 and I order that to be paid.

#### *Special damages*

[68] The case law provides that there is a high threshold for the award of special damages, and there needs to be a clear distinction from other forms of relief.<sup>11</sup>

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<sup>9</sup> Employment Relations Act 2000, section 124.

<sup>10</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

<sup>11</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [96].

[69] Mr Paull claims for reimbursement of the process server's fee of \$161.00. WHL does not dispute that Mr Paull should be reimbursed for the cost of the process server and I order that to be paid. For the sake of completeness, I note that this claim could also have been made as a disbursement under a costs application, but because there is no dispute about the claim, it is appropriate that I resolve this issue for the parties.

### **Penalties**

[70] Mr Paull asks the Authority to impose a penalty on WHL for a breach of good faith under s 4A of the Act. He submits that although penalties are at the Authority's discretion, it is not necessary to establish egregious bad faith before a penalty will be imposed. Mr Paull says that while there was no "malicious" breach of good faith, it was serious, deliberate and sustained and designed to undermine the employment relationship because Mr McCann did not consult, chose not to take HR advice, circumvented Mr Paull's rights, and the impacts on Mr Paull were adverse. Mr Paull said it was sustained from the time Mr McCann decided to dismiss Mr Paull. Mr Paull submits \$6,000.00 would be an appropriate penalty, with a portion paid to him.

[71] WHL says no penalty is appropriate because nothing was done with the intention to mislead or deceive. There was no malicious breach as has been acknowledged by Mr Paull.

[72] The failure by WHL to discharge its obligation to be active and constructive in establishing and maintaining a productive employment relationship, and its specific disclosure obligations in terms of a proposed redundancy amounted to breaches of its good faith obligations to Mr Paull. However, those shortcomings have been addressed in terms of Mr Paull's personal grievance claim and the impact on him has been addressed by the compensation remedy. In the circumstances, I am not persuaded the breaches were deliberate and sustained. I decline to order a penalty.

### **Non-publication order / anonymisation**

[73] Mr Paull applied for non-publication of the name and identifying details of a witness he summonsed, as well as the company name (referred to as HVW Manager and HVW respectively). In the alternative, Mr Paull asks for the witness and company names to be anonymised.

[74] The Authority's power to prohibit publication is found in Clause 10, Schedule 2 of the Act:

10 Power to prohibit publication

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

[75] The test to be applied is whether there is a material risk of adverse consequences.<sup>12</sup> The starting point is the principle of open justice and a high standard must be met before the principle can be appropriately departed from. The Supreme Court has said a party seeking non-publication must show specific adverse consequences that are significant, to justify an exception to the fundamental rule. The majority judgment in *MW v Spiga Limited*<sup>13</sup> confirmed the approach to non-publication.

[76] HVW Manager attended the Authority under summons and answered questions, including about the non-publication application. They did not object to being named, but submitted the following in support of the application:

- (a) They did not have permission to give a statement on behalf of HVW.
- (b) They did not wish to cause any problems for HVW and had no intention of portraying HVW in a bad light.
- (c) Naming them as a witness was likely to disclose the name of HVW to the local community because of their connection to HVW.

[77] Mr Paull says the following factors should be taken into account in balancing open justice against private interest:

- (a) The circumstances of the case – this matter is not about the closing down of HVW's operations.
- (b) The interests of the person applying for non-publication – HVW Manager was compelled to give evidence under summons, they did not attend the investigation meeting voluntarily.

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<sup>12</sup> *JKL v Stirling Andersen Limited* [2022] NZEMPC 107, at [41].

<sup>13</sup> *MW v Spiga Limited* [2024] NZEmpC 147.

- (c) The interests of the parties – Mr Paull works at HVW’s premises for his new employer and it does not serve either party for HVW to be named.
- (d) The interests of a third party – HVW does not want to be named in connection with these proceedings and is worried about negative attention.
- (e) Public interest – naming HVW and HVW Manager does not advance the issues.
- (f) Equity and good conscience – HVW Manager stands by their evidence but their evidence does not go to the ultimate issue.

[78] Mr Paull says anonymising would achieve the same result as making a non-publication order in this instance.

[79] WHL says identifying HVW Manager and HVW does not satisfy any of the Criminal Procedure Act 2011 tests and should not be ordered.

[80] As noted above in this determination, I determine that HVW and HVW Manager’s names should be anonymised. This is because the evidence about HVW’s operations is only incidental to matters the Authority has investigated and determined. HVW was not a party or a witness and the Authority’s usual approach is not to name or identify individuals or companies that are not parties or witnesses. There is potential for adverse consequences in relation to HVW’s reputation if it was to be named in connection with this matter, which I find disproportionate to HVW’s involvement in, and relevance to, the matters before the Authority. While the standard of “material risk of adverse consequences” has not been met sufficient to make a non-publication order, I am persuaded that the level of risk of adverse consequences for HVW outweighs the public interest in it being named in connection with this determination. I am satisfied that the standard to justify a departure from the fundamental principle of open justice has been met for anonymising HVW’s name in this determination.

[81] The situation in relation to HVW Manager clearly needs to be considered independently, as HVW Manager was a witness. There is strength in the submission that identifying HVW Manager by name would identify HVW at least in the Gisborne community. I am satisfied the standard is met to also anonymise HVW’s name to mitigate the potential risk of adverse consequences for HVW who was not a party or witness to these proceedings.

## **Orders**

[82] Mr Paull's claim that he was unjustifiably dismissed from his employment with WHL has been successful and remedies are appropriate.

[83] I order within 28 days of the date of this determination Waikanae Holdings (Gisborne) Limited is to pay Noy Paull:

- (a) Compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act for his unjustified dismissal, in the amount of \$20,000.00.
- (b) Reimbursement under s 123(1)(b) of the Act for lost wages, in the amount of \$7,420.00 (gross)<sup>14</sup> and \$593.60 for KiwiSaver.
- (c) Interest on shift allowance / sick pay in the amount of \$46.75.
- (d) Cost of process server of \$161.00.

[84] The names of HVW and HVW Manager are anonymised for the purposes of this determination.

## **Costs**

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

[86] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Paull may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum WHL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

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<sup>14</sup> Using the calculation of 40 hours per week at \$26.50 per hour as set out in paragraph 56 of submissions.

[87] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>15</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>15</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)