IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 101
EMPC 236/2016

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	SANDEEP NATH Plaintiff
AND	ADVANCE INTERNATIONAL CLEANING SYSTEMS (NZ) LTD Defendant

Hearing:	4, 5 and 17 May 2017 (Heard at Auckland)
Appearances:	M McGoldrick, counsel for plaintiff S Langton and T von Dadelszen, counsel for defendant
Judgment:	17 August 2017

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Nath worked for the defendant company, Advance International Cleaning Systems (NZ) Ltd (Advance), for 12 years. There is no doubt that the employment relationship came to an end in 2015. What is in dispute is the date on which the employment relationship terminated and at whose initiative. Also at issue is whether the parties entered into a share transfer arrangement and whether Mr Nath is entitled to a tax-free benefit of $3,000.

[2] Mr Nath pursued his claims in the Employment Relations Authority (the Authority). They were dismissed for reasons set out in a determination dated 30 August 2016.[1] The Authority subsequently issued a costs determination,[2] ordering

1 *Nath v Advance International Cleaning Systems NZ Ltd* [2016] NZERA Auckland 293.

Mr Nath to pay the company a contribution towards its costs of $4,000. Mr Nath challenges both determinations.

[3] Mr Nath elected not to seek a full hearing of the entire matter (referred to as a hearing de novo). That is because he had no wish to upset the Authority's findings as to the jurisdictional difficulties with a counter-claim which had been advanced by the defendant, and dismissed, in that forum. Conversely, the defendant has not sought to challenge the Authority's determination against it.

[4] The nature of the challenge, and the evidence to support it, assumed some significance at the hearing. It is convenient to deal with that issue first.

What evidence was and was not relevant to the challenge?

[5] A party may elect to "challenge" a determination of the Authority. A challenge is not directly synonymous with an appeal, as the legislative choice of descriptor makes clear.[3]

[6] An election must specify the determination, or the part of a determination, to which the election relates and must state whether or not the party making the election is seeking a full hearing of the "entire matter". If a party making the election is not seeking a hearing de novo, the election must specify any error of law or fact which is alleged; any question of law or fact to be resolved; the grounds on which the election is made and the relief sought.[4]

[7] The plaintiff's statement of claim in this case identified five alleged errors of law and fact:

- The first is that, contrary to the Authority's finding, Mr Nath was dismissed, and dismissed unjustifiably, from his employment with the defendant.

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2 *Nath v Advance International Cleaning Systems NZ Ltd* [2016] NZERA Auckland 337.
3 See too Employment Relations Bill 2000 (8-2) (select committee report) at 38.
4 Employment Relations Act 2000, s 179(3)-(4).

- The second relates to the Authority's finding that Mr Nath's employment was not affected to his disadvantage (this pleading is directed at an alleged agreement relating to the allocation of shares in the company; the provision of a tax-free benefit of $3,000; and an alleged failure to comply with the requirements of s 103A(3) of the Employment Relations Act 2000 (the Act) between 2 September 2015 and 8 October 2015).

- The third is directed at the finding that Mr Nath's terms and conditions of employment were not breached in respect of the share allocation issue and the tax-free benefit.

- The fourth relates to the Authority's finding that Mr Nath was not owed arrears of wages and holiday pay.

- Finally it is alleged that the Authority's errors (as pleaded) led it into further error in awarding costs in favour of the defendant.

[8] Mr Langton, counsel for the defendant, raised a number of concerns as to the extent of the evidence given by witnesses for the plaintiff at trial. His objection was directed at the fact that the plaintiff had elected not to pursue his challenge by way of hearing de novo. It followed, he submitted, that only evidence which was before the Authority was relevant to determining what effectively amounted to an appeal from the Authority's determination, and an assessment of whether the Authority had erred.

[9] The challenge rights conferred by s 179 have most recently been considered by a full Court in *Xtreme Dining Ltd v Dewar*.[5] There the Court observed that:

> [13] The effect of s 179(3)(b) of the Act is that a hearing de novo relates to a full hearing of the entire matter which was the subject of the challenged determination. It is not possible to seek a hearing de novo for a part-only of that determination …
> …
> [16] Next, it is appropriate to refer to the relevant principles which apply to the hearing of a non de novo challenge since these differ from those relating to a de novo challenge:

[5] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136. (footnotes omitted)

> a) A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.
>
> b) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.
>
> c) Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. The Court must make its own decision, as required by s 183 of the Act.
>
> d) Section 182(3) of the Act requires that where an election states that the person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.
>
> [17] One of the difficulties which parties must consider when electing to proceed on the basis of a non de novo hearing is the scope and extent of the evidence which will be before the Court on such a challenge. No transcript is kept of the evidence received at an investigation meeting, since there is no requirement on the Authority to do so. The Act also stipulates that in its written determination the Authority need not set out a record of all or any of the evidence heard or received, or record or summarise any submissions made by the parties. These features are consistent with the statutory intention that the Authority is required to dispose of problems and disputes promptly and without undue regard to technicalities. *Consequently, when electing a non de novo challenge, careful attention should be given to the issue as to whether any additional information should be before the Court beyond that which is apparent from the determination under challenge*.
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> (emphasis added)

[10] The challenge rights in s 179 have given rise to ongoing issues and confusion, particularly in circumstances where a plaintiff has been partially successful in the Authority (for example, a claim of unjustified dismissal) and wishes to challenge particular findings only (for example, remedies). The absence of a record of evidence given in the Authority is a complicating factor and does not facilitate the usual approach to appeals applying elsewhere. The fact that the Act refers to challenges from determinations of the Authority, rather than appeals, may be said to reinforce the point that a different approach is intended.

[11] The point does not directly arise in the present case. The plaintiff wished to challenge only those parts of the determination which had been unfavourable to him and which had been the subject of his claim in the Authority. Unsurprisingly he did

not wish to challenge the Authority's determination insofar as it related to the defendant's unsuccessful jurisdictional argument. His election (not to seek a hearing de novo) was made in this context. The plaintiff wanted to provide some additional information to the Court to enable his challenge to be determined. The fact that he wanted to put further information before the Court does not, on the full Court's approach, mean that the plaintiff was obliged to seek a hearing de novo, throwing the entirety of the Authority's determination, including its findings against the defendant, up into the air. Rather, sufficiently broad directions were required pursuant to s 182(3)(b) as to the nature and extent of the hearing. That is what occurred during the course of the initial directions conference, and following discussions with counsel.

[12] The difficulty with the submission advanced by Mr Langton is that it cuts across the Court's directions, namely that the five matters identified in the plaintiff's amended statement of claim would "be determined at hearing on the basis of evidence heard afresh."[6] To facilitate this, the parties were directed to exchange briefs of evidence, containing the evidence-in-chief that would be given at trial, and to co-operate in the compilation of an agreed bundle of documents. If the hearing was to proceed solely on the basis of the evidence said to have been given before the Authority, directions as to the exchange of affidavit evidence setting out the information, documentation and evidence in that forum would have been required, or (alternatively) an agreed statement of facts. No such directions were made and neither of these options was mooted. Of course a departure from evidence given in the Authority (if established) may be more broadly relevant to a determination of the matters at issue, including as to an assessment of credibility.

[13] The plaintiff's claim essentially boils down to an allegation that the Authority got the facts wrong and that this led it into error in terms of legal outcome. As I have said, it is not uncommon for a plaintiff to wish to challenge part, but not all, of the findings made by the Authority. Following the full Court's approach, the difficulties that this might otherwise give rise to are addressed, at least to some extent, by the ability to make directions, in relation to the issues involved, as to the nature and

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[6] And it is this factor which distinguishes the present case from the approach adopted in *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84.

extent of the challenge under s 182(3)(b). As I have said, in the present case the extent of the challenge is limited by the plaintiff's unsurprising decision not to challenge the finding in his favour. Directions as to the scope of the evidence were necessary, absent agreement as to what evidence was and was not before the Authority. If it were otherwise, the hearing in this Court would have become unnecessarily complicated, tangled up in debates about what had and had not been said in evidence, and what information had and had not been before the Authority, in a forum in which no record of such matters is kept.

[14] The Authority concluded, following its investigation, that the plaintiff had not been unjustifiably dismissed and was not entitled to the claimed benefits. The plaintiff now wishes to challenge those particular findings. The direction was made that the hearing would proceed in this Court on the basis of evidence heard (and tested) afresh. That enabled each party to put before the Court the information and evidence considered relevant to the issues for determination – they reduced to whether the plaintiff had been unjustifiably dismissed; if so, what remedies he should be awarded; and whether he was entitled to certain other benefits under his employment agreement. I have considered the evidence presented by both parties and have made factual findings where necessary to decide the legal issues raised in the pleadings.

[15] I have concluded, for reasons which will become apparent, that the plaintiff has established that the Authority's determination as to his claim of unjustified dismissal was in error, on the basis of the evidence before the Court on the challenge; and that there was no error in relation to either the share transfer or bonus claims, on the basis of the evidence before the Court on the challenge.

The facts

[16] Mr Nath was employed by the defendant as an account manager from 10 March 2003. It is common ground that he performed the role well. He was promoted to the role of National Development Manager in June 2006. In 2012 the company's Managing Director, Mr Nadan, had discussions with Mr Nath about a share option. These discussions culminated in an email from Mr Nadan putting

forward what was couched as "suggestions" as to a share option plan that Mr Nath might be interested in. The proposal was that Mr Nath would be offered shares in the company to the "nominal" value of $100,000, to be exercised by 30 June 2015, with Mr Nath's contribution to the purchase of the shares being set at $10,000 per year for three years. This was to be achieved by way of salary sacrifice.

[17] There is a dispute as to how far the share transfer proposal was advanced. Mr Nath gave evidence that he verbally accepted Mr Nadan's offer in March 2012. Mr Nadan accepts that there were discussions about the proposal but denies that any binding agreement was reached.

[18] Mr Nadan wrote to Mr Nath again on 9 April 2014, following a salary review meeting. He advised that:

> I have discussed this previously however it is best I put this in writing to you so your "Boss" at home has comfort in all matters of your finance in your household.
>
> We have an allocation of $100,000.00 of shares in value for you in this business.
>
> I have been working on a phantom share scheme that will provide the details of this allocation and how it will be governed from a business perspective.
>
> I hope to have this completed in a few weeks.
>
> In terms of the salary review discussion of recent, I am pleased to advise that your salary will be increased to $120,000.00 per annum effective 1 April 2014.
>
> This increase is in line with the beginning of the annual income tax period for you.
>
> Also provided will be is a [sic] tax free benefit of $3000.00 that can be utilised for a trip to the islands for you and your family or similar.
>
> We can discuss this in more detail and how this is applied. Some discretion need be maintained here.

[19] On 16 September 2014, Mr Nath suffered a heart attack and was admitted to hospital. He subsequently returned to work around 3 October 2014. Further health issues developed and Mr Nath was diagnosed as suffering from a brain bleed, the cause of which was found to be the side-effects of medication he had previously been prescribed.

[20] On or about 28 June 2015, Mr Nath advised Mr Nadan that he was required to undergo surgery for the brain bleed and he did so on 1 July 2015. Mr Nath remained off work after that date. The company continued to meet his salary for some time, despite the fact that he had exhausted his sick leave and annual leave entitlements. The company's position changed in September 2015.

[21] On 25 August 2015 Mr Nath advised Mr Nadan that he had an appointment with his neurosurgeon on 3 September. On 3 September 2015, Mr Nadan emailed staff, including Mr Nath, advising that the company's structure was going to be altered and that it was unlikely that Mr Nath would be back in the business for several weeks/months. This advice followed a meeting with staff two days earlier, a conversation Mr Nath had had with Mr Nadan the previous day, and an email Mr Nath had sent to Mr Nadan on 3 September. Mr Nath's email of 3 September updated Mr Nadan on the outcome of his visit to the neurosurgeon and said that he had been advised that his condition was not life threatening or "hampering in any way" and that he should be back to normal work in due course; that he would be having a procedure the following week; and that the doctor's opinion was that there was a "very minor possibility (negligible) of having to do a surgery … and all being as he sees, I should be back at work at full duties by the end of September/early October." It is against this background that Mr Nadan's email to staff advising of the restructure was sent out.

[22] While Mr Nadan accepts that Mr Nath advised him of the update as to his medical status, he did not agree with the advised prognosis for a return to work. He believed that Mr Nath's recovery would not be achieved within the stated time-frame and that it would take considerably longer. It remained unclear why Mr Nadan considered himself to be in a position to form this view.

[23] On 7 September 2015 Mr Nadan emailed Mr Nath again advising that the company could not leave his position open for "potentially another four to six weeks or more"; that it had to restructure "immediately"; that he was "finally consulting with [Mr Nath] that we would like to give notice the company can no longer hold your current role due to medical incapacity"; that he wished to conclude the final decision before 9 September 2015; and that he aimed to create another role for Mr

Nath "once [Mr Nath] had fully recovered and been cleared 100 per cent fit to work". The email concluded with a series of notes for Mr Nath's attention. The notes related to an employer's obligations when dismissing an employee for medical incapacity.

[24] Mr Nath took issue with the contents of this email and wrote to Mr Nadan asserting that a fair process had not been followed, and that he had had limited communication from Mr Nadan in relation to the restructuring other than the two 7 September emails, the latter one "confirming" the decision. He also sought details of the proposed future role. Mr Nadan responded to Mr Nath's email on 15 September 2015, amongst other things advising that the company had had to adjust its business because of Mr Nath's medical condition; that it could not keep his position going; that he was medically unable to carry on his duties; and that the company had met all of its financial obligations to him.

[25] On 18 September 2015 Mr Nath's solicitors wrote to Mr Nadan raising personal grievances of unjustified disadvantage and dismissal. Later that day, Mr Nath's access to his work email and the company's computer system was removed. Four days later, on 22 September 2015, Mr Nadan wrote to Mr Nath's solicitors responding to their 18 September letter, asking for the return of all company property and requiring Mr Nath to undertake a "proper handover" of the company's intellectual property.

[26] Although a considerable amount of correspondence followed, I regard the correspondence and interactions between the parties to this point as determinative of the issue as to whether or not Mr Nath was dismissed.

A dismissal?

[27] Based on the evidence before the Court, and primarily the correspondence between the parties at the relevant time, I conclude on the balance of probabilities that Mr Nath was dismissed on 15 September 2015, if not beforehand.

[28] As the contemporaneous communications make clear, there were two asserted limbs to the company's actions. First, that there was a need to restructure the business because of Mr Nath's medical condition. Second, that he was medically incapacitated and unable to carry out the duties he had been employed to perform. Read in context, the company's correspondence constituted a clear sending away of Mr Nath.[7] In this regard Mr Nadan's email of 7 September referred to a dismissal process and notice of termination, noting that the requirements for a dismissal had been met. Mr Nadan's subsequent email of 15 September echoed the language of the individual employment agreement insofar as it related to termination for medical incapacity.

[29] Mr Langton suggested that it was relevant, in terms of the claim of unjustified dismissal, that Mr Nath could not pinpoint the precise time and date upon which he says he was dismissed. I do not regard this point as pivotal. The key point is that the defendant's actions, when objectively viewed in context, were sufficiently clear and unambiguous to amount to a termination.

[30] It is apparent that Mr Nath considered that he had been dismissed, given that his solicitor wrote a letter on 18 September requesting that the dismissal be revisited. And I infer that Mr Nadan was of the same view, given the way he couched his earlier correspondence and in light of the fact that he took no steps to disabuse Mr Nath of what he now says was a misconception that his employment had been terminated. He likely did nothing for the simple reason that his perception of what had occurred coincided with Mr Nath's. There was, in other words, no misapprehension that required correction.

[31] The steps that Mr Nadan did take immediately after receipt of the 18 September email notifying an unjustified dismissal personal grievance are revealing. Rather than telling Mr Nath that he had got the wrong end of the stick and that his employment had not been terminated, Mr Nadan arranged for Mr Nath's email access and telephone to be cut off, and directed him to return all company property. I was not drawn to the characterisation of these actions as the usual steps an

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7 *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585, [2015] ERNZ 93 at [7]-[8].

employer might take when a staff member had been away from the workplace for an extended period of time, particularly when they were not coupled with a clarifying explanation that it was an interim step pending Mr Nath's anticipated return to the workplace.

[32] The position is further reinforced by the company's actions in sending a staff member to Mr Nath's home to collect the remaining company property he had in his possession, and presenting Mr Nath with a checklist regarding his "final pay". As Mr Nadan accepted in cross-examination, this was a practice which the company adopted when a person left their employment. These actions are not consistent with an ongoing employment relationship, and I do not accept Mr Nadan's evidence to the contrary.

[33] Mr Nadan provided a lengthy formal response to the letter raising a personal grievance on 25 September, and after taking advice. Again, there is no suggestion in the letter that Mr Nath was mistaken in his view that his employment had been terminated. Indeed, Mr Nadan's email contains reference to Mr Nath having given verbal notice of resignation prior to his most recent surgery, a point which did not emerge during evidence and which appears to be at odds with the company's position at hearing that from its perspective Mr Nath's employment remained on foot at this time. On 30 September Mr Nath's legal representative at the time wrote to Mr Nadan advising that "Your email has left us confused about your intentions in respect of Mr Nath's employment…" No steps were taken at the time to clarify the position.

[34] I am also fortified in my view because of the way in which Mr Nadan couched the prospect of future work, namely as a possibility that might come to fruition at some indeterminate later date. The corollary of that is, of course, that it was not currently in existence as far as the company was concerned. I do not accept that, when read in context, the communications between Mr Nath and Mr Nadan in respect of future work can accurately be described as discussions about keeping his role open, or that he was in some sort of suspended state of employment during this time.

[35] I pause to note that while both parties referred to *New Zealand Cards v Ramsay*, I do not see the judgment as adding anything much to the analysis.[8] In *Ramsay* the employer knew that Mr Ramsay had made a mistake in believing that he had been dismissed, but did nothing to correct that misapprehension. It was in this context that the Court considered that events occurring after the alleged dismissal were relevant. I have concluded that no such misapprehension existed in this case. The events post-dating 15 September simply serve to reinforce the conclusion that the company terminated Mr Nath's employment and understood that this is what had occurred, and that Mr Nath understood that he had been dismissed. Those findings mean that there is no need to deal with the plaintiff's second alternative argument, that the company repudiated the employment agreement.

[36] The defendant did not seek to mount an argument as to justification. That was a realistic position to adopt in the circumstances. I return to the issue of remedies below.

The share transfer issue

[37] The plaintiff seeks compensation under s 123(1)(c)(ii) in relation to the loss of a benefit he says he would have received had the company not reneged on its alleged agreement to transfer shares to him. As Mr McGoldrick accepted, the share transfer issue fell to be determined on the basis of a conflict of evidence. Mr Nath said that there had been a binding verbal agreement. Mr Nadan said that there had not been.

[38] It is clear that there were discussions from an early stage about the possibility of a share option plan, under which Mr Nath could obtain an allocation of shares in the company. The discussions in March 2012 were preliminary in nature. As Mr Nath accepted in cross-examination, until the required documentation was finalised either party could pull out.

[39] Weight was placed on discussions between Mr Nath and Mr Nadan in 2013, during which Mr Nadan said that Mr Nath would have a stake in the company if the

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[8] *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

share option was finalised. It was put to Mr Nadan in cross-examination that the plan would not need to have been finalised if there had been no agreement – a proposition he agreed with. Mr McGoldrick suggested that this was illuminating. The plaintiff sought to draw further inferences from the fact that, in April 2014, Mr Nadan instructed a lawyer to draft up an allocation document. However, the document was not provided to Mr Nath and was never finalised.

[40] On 28 January 2016 Mr Nadan's representative wrote to Mr Nath advising:

> In terms of the share offer to [Mr Nath] per Phantom share allocation agreement, we will have the allocation document for execution. [Mr Nath] was offered $100,000.00 value of shares as part of the phantom share Deed. We wish to get this document concluded so our commitments as a company to [Mr Nath] is in order going forward.

[41] While it is possible to link the inferential threads together in the way suggested, I am not satisfied that this part of the claim has been made out. The contemporaneous documentation weighs against the submission that a binding agreement was reached between the parties in relation to the share transfer, and evidence given in cross-examination by the plaintiff's wife supports this.

[42] The documentation reflects that while there was certainly a proposal for a share transfer arrangement, matters never progressed to a concluded stage. Discussions between the parties had not sufficiently advanced, including as to how many shares the $100,000 would equate to, and what proportion of the company they would represent. While Mr Nath said that Mr Nadan had agreed to a $10,000 per annum salary sacrifice, there was no evidence to suggest that this occurred. Rather the evidence tends to suggest otherwise, in light of the increase in salary which Mr Nath received in 2014.

[43] On the evidence, I am unable to find that matters progressed to such an extent as to form a binding agreement. This aspect of the plaintiff's claim is accordingly dismissed.

[44] I note, for completeness, that if I am wrong about this point, and Mr Nath is entitled to $100,000 worth of shares in the company, I would have also had to find that Mr Nath had yet to pay for them, no salary sacrifice having been made out.

Tax-free benefit

[45] Similarly, I do not consider that the claim for a tax-free benefit of $3,000 has been made out. It was expressed as being conditional, as to how it was to be applied. No discussions as to how it was to be applied ever took place, and the money was never applied towards a family trip to the Islands or otherwise. That is because of reasons outside Mr Nath's control (his intervening health issues). There was evidence about Mr Nath having previously been paid a tax-free benefit for a trip, and tax-free payments while working in Christchurch, but I do not consider that those instances materially alter the position. The reality is that the offer was predicated on an event which never occurred. Because the condition was not fulfilled, the trigger for the payment was never activated. That means that the claim must fail.

[46] It follows, from the conclusions I have reached in relation to the tax-free benefit and the share allocation issue, that the plaintiff's claim to compensation under s 123(1)(c)(ii) in relation to these grievances must also fail.

Compensation for humiliation, loss of dignity and injury to feelings

[47] Mr Nath seeks the sum of $20,000 under this head in respect of his unjustified dismissal.

[48] The defendant submitted that the evidence given in the Court in support of this aspect of the claim did not reflect the evidence given in the Authority and that it had been significantly "bolstered". I have already dealt with the defendant's concerns in respect of the non de novo issue, and the scope of evidence given on the challenge. Insofar as the defendant was seeking to cast doubt on the veracity of the evidence given in the Court as to the impact of the defendant's unjustified actions on the plaintiff, I am satisfied that Mr Nath did genuinely suffer significant compensatable loss.

[49] Mr Nath had been a loyal and hardworking employee of the company for over 12 years and believed that he had a bright future with it going forward. That was unceremoniously pulled out from underneath him in a way which left him hurt

and confused. His job plainly meant a lot to him. He had the spectre of looking after his family and significant concerns about his ongoing financial capacity to do so, including meeting his daughter's school fees and other commitments. In addition, he was obliged to tell his elderly father in India about his dismissal which he found extremely difficult and humiliating. Mr Nath felt like a failure and as though he had let his father, and other family members, down. He suffered from a loss of self confidence; struggled to sleep; developed health issues; and his personal relationships were detrimentally affected.

[50] There is a need to hive off the impact of other issues which Mr Nath was grappling with at the time, including his concerns about the way in which Mr Nadan was dealing with the share transfer issue and the concerns he had about his own health. The focus must be on the injury which Mr Nath sustained as a result of the company's actions in unjustifiably dismissing him.

[51] For completeness, I have considered whether there is anything in Mr Langton's submission that the financial assistance Mr Nath received from his father, and money paid out under a health insurance policy and via a property development business, would have dulled the extent of any non-pecuniary loss suffered. Reference was also made to such financial assistance in response to the plaintiff's claim for lost remuneration, which I deal with below. Suffice to say at this point that while there may be cases in which access to money from other sources may lessen the hurt, humiliation and loss of dignity attached to an unjustified loss of employment, this is not one of them.

[52] Mr McGoldrick referred to the award in *Hall v Dionex*.[9] The present case is not on all fours with that case, although there are some similarities given the speed with which the axe fell and the impact of the employer's unjustified actions. Standing back and assessing the particular facts of this case, putting to one side the injuries which were not causally connected to the defendant's breach, and having regard to other relevant factors, including the range of compensatory awards being made by the Court in recent times, I am satisfied that an award of $16,500 is appropriate.

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9 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, (2015) 13 NZELR 157 at [104].

Lost remuneration

[53] Section 123(1)(b) provides that the Court may, in settling a personal grievance, provide for the reimbursement of a sum equal to the whole or part of the wages or other money lost by the employee as a result of the grievance. Section 128 provides that the Court must order the employer to pay the employee the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration but may, in its discretion, order a greater sum.

[54] There are four main strands to the defendant's argument:

- That Mr Nath suffered no lost remuneration because he was *incapable of returning to work* in the three months following termination of his employment;

- that Mr Nath failed to take adequate steps to *mitigate* his losses;

- that the *chain of causation* was broken on 20 October 2015, when Mr Nath bought into a company; and

- that an *intra-family cash injection* to help tide the family over when the company halted salary payments ought to be deducted from any amount ordered in Mr Nath's favour.

[55] I deal with each in turn.

Fitness to return to work

[56] Mr Langton submitted that the plaintiff had failed to establish that he would have been fit to return to work during the three-month period following termination of his employment and had accordingly not made out his claim for lost remuneration. It seems to me that this submission reads something into ss 123(1)(b) and 128 which is not there – namely that an employee pursuing a claim for lost remuneration following an unjustified dismissal must show that they were fit and

able to work during the three months immediately following termination. I do not accept this.

[57] Under s 123(1)(b) the trigger for an award of lost remuneration is not the date of the unjustified action (in this case the termination) but an established loss of wages or other money, causally connected to the breach. Section 128 refers to a three-month period but that is plainly designed as a convenient measurement of damages. Again the three months is not said to run from the date of the unjustified action. An employee may not be fit for work for three months following an unjustified dismissal but this factor cannot, on its own, automatically exclude the possibility of an award equivalent to either three months' lost remuneration or more.

[58] In any event, the argument fails on the facts. The submission that the plaintiff failed to establish that he would have been fit to return to work during the three-month period following termination of his employment was said to be reflected in a note from a consultant neurosurgeon in September 2015, stating that a CT scan would be performed within the "next 2 months to ensure resolution of the subdural haematoma". That does not, of itself, support an inference that Mr Nath was not in a position to return to work in the intervening period – rather that he would have required a CT scan at the end of that period. I do not consider that when this correspondence is read together with an earlier letter from another neurosurgeon (dated 9 September 2015) the position differs.

[59] Mr Nath's GP had provided a medical certificate on 23 September 2015, certifying that Mr Nath was fit to return to work on 28 September 2015. While he was cross-examined on the additional inquiries he might have made prior to issuing such a certificate, I am satisfied that Mr Nath was fit to return to work as at that date, consistently with the GP's professional assessment of the situation.

Mitigation

[60] Mr Nath was not fit for work until 28 September and does not claim lost remuneration until that date. While it was said that the company had made it clear that there would be work for him when he was medically able to return, and that he

failed to explore this option and accordingly mitigate his losses, I do not accept that Mr Nath undermined his position in the way contended for.

[61] As Mr Nath made plain, returning to the company was not a realistic option given the way in which he had been treated by Mr Nadan. I agree. The offer had been made at an earlier stage but was never reactivated. That is revealing, for reasons I have already referred to. The company could not reasonably have expected Mr Nath to actively pursue the offer himself, given the events which had occurred. Conversely Mr Nath could not have been criticised had he later been offered, and rejected, the possibility of returning to work at the company when his health sufficiently improved.

Chain of causation

[62] Mr Nath bought into a company on 20 October 2015. He accepted in evidence that he stopped looking for alternative work at this time, but focussed his energy on building up a new business. The defendant says that this effectively broke the chain of causation. I disagree. Mr Nath did not sit on his hands and his decision to concentrate his efforts on a new business to mitigate the losses he was sustaining was reasonable in all of the circumstances.[10]

Intra-family cash injection

[63] Mr Langton mounted an ambitious argument that a sum of money ($71,000) Mr Nath's retired father sent from India to help tide the family over immediately following the cessation of payments from the company was a payment designed to mitigate the plaintiff's losses and more than replaced the income he would have received from the defendant over this period.

[64] There are a number of difficulties with this argument, not the least being that it would result in the company benefiting substantially from Mr Nath senior's generosity. No authority was cited in support of the proposition advanced.

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[10] *Betta Foods (NZ) Ltd v Briggs* [1997] ERNZ 456 (EmpC) at 469.

[65] In exercising the jurisdiction to make orders, including as to relief, the Court is obliged to act consistently with equity and good conscience insofar as doing so would not cut across a statutory provision. I do not consider that it would be either just or equitable to effectively require Mr Nath senior to reimburse remuneration his son lost as a result of the company's default, and I do not consider that s 123(1)(b) requires such an outcome.

[66] The defendant also made reference to a substantial payout that Mr Nath received under a trauma insurance policy. I do not regard this as relevant for the purposes of assessing the company's liability for lost remuneration caused as a result of its unjustified actions in dismissing Mr Nath.

[67] Standing back, in the absence of sufficient evidence to persuade me to exercise my discretion under s 128(3) to award a greater amount, I consider that a payment equivalent to three months' lost remuneration is appropriate in all of the circumstances.

Contribution

[68] I do not consider that Mr Nath contributed towards the situation which gave rise to his grievance, and I did not understand the defendant to be suggesting that he had and that a reduction in remedies was warranted.[11]

Costs

[69] The plaintiff also challenged the Authority's costs determination, awarding costs in the defendant's favour. The Authority's costs award followed the event and must, given the outcome of the plaintiff's substantive challenge, be set aside.

[70] The Court must now make its own decision on costs. It may be that the parties can agree that issue, together with an appropriate contribution to costs in this forum. Accordingly, costs are reserved.

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[11] Employment Relations Act 2000, s 124.

[71] If costs cannot otherwise be agreed, I will receive memoranda, with the plaintiff filing and serving within 20 working days of the date of this judgment; the defendant within a further 10 working days; and anything strictly in reply within a further five working days.

Outcome

[72] The plaintiff's challenge succeeds in part. Mr Nath was unjustifiably dismissed from his employment with the defendant company. He is awarded:

- A sum equivalent to three months' lost remuneration;
- $16,500 by way of compensation under s 123(1)(c)(i);
- Interest on the amount ordered in respect of lost remuneration at the prescribed rate.[12]

[73] Mr Nath's challenge to the Authority's findings as to the unpaid tax-free benefit is dismissed.

[74] Mr Nath's challenge to the Authority's findings as to the share transfer agreement is dismissed.

[75] The Authority's costs determination is set aside.

[76] Costs on the plaintiff's challenge, and in the Authority, are reserved.

Christina Inglis
Chief Judge

Judgment signed at 4.30 pm on 17 August 2017

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[12] Interest is payable in relation to the recovery of any money and does not extend to compensatory awards, see *Reynolds v Burgess* CC5/07, 2 March 2007 (EmpC) at [112]-114]; also Employment Relations Act 2000, Sch 3, cl 14.