ATTENTION IS DRAWN TO THE NON-PUBLICATION ORDERS REFERRED TO AT [129] OF THIS JUDGMENT

IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 71
EMPC 48/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CATHERINE STORMONT Plaintiff
AND	PEDDLE THORP AITKEN LIMITED Defendant

Hearing:	18-26 October and 8-9 November 2016 Memoranda dated 24 February and 3 March 2017, and further submissions datd 22 March 2017 and 5 April 2017 (Heard at Auckland)
Appearances:	C W Stewart and C Pallant-Drake, counsel for plaintiff A Sharp, counsel for defendant
Judgment:	6 June 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] This proceeding is a challenge by the plaintiff, Catherine Stormont, to a determination of the Employment Relations Authority (the Authority)[1] and subsequent costs determination.[2]

[2] Ms Stormont is an interior designer with many years' experience. The defendant company (Peddle Thorp) is an architectural practice. Ms Stormont joined the firm in March 2010. The intention was that she would bring a full-time interior

1 *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 28.
2 *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 79.

design component to its operation, building up that side of the practice over time. Things did not develop as either party had anticipated, although each has a different perspective on why that is so. Ms Stormont's position was made redundant on 12 March 2015.

[3] While a number of issues were raised in the proceedings, the key points reduced to two. First, the correct methodology for calculating Ms Stormont's bonus payment for her first year with the company. Second, whether her dismissal for redundancy four years later was justified.

Background

[4] Prior to her employment, Ms Stormont met with two directors of Peddle Thorp, Mr Goldie and Mr Barnes. There were discussions about how the proposed Interiors division would work within the company. I accept Ms Stormont's evidence, which is consistent with a business plan she produced at the time, that the concept was that she would work collaboratively within Peddle Thorp; that resources would be pooled; and that there was a common understanding that Interiors might not pay for itself during the first year. Ms Stormont was subsequently offered employment. The agreement, which was drafted by Mr Goldie**,** provided for a three-year incentivised scheme. The agreement included provision for a bonus entitlement at the end of the first year of employment, to be measured as follows:

> Achieve at least a break even position for the interiors at Peddle Thorp Architects. Should you achieve a profit for the interiors you will receive a gross bonus equivalent to 20 % of the gross profit.

[5] Under "Clarifications" it was stated that: "in general a break even position is at around 2.2 x staff salaries".

[6] The second year incentive was a shareholding at no cost to Ms Stormont and the third year incentive was an additional shareholding.

The bonus issue

[7] On 5 May 2010, Mr Goldie sent Ms Stormont (and others) an email relating to Interiors work, advising that discussions would occur with the Peddle Thorp accountant in respect of costing and accounting. He also advised that:

> We have set up the Interiors for the first year at least as a separate cost and income centre and will necessarily partition this in the financial reporting. We will also need to be able to establish some simple protocols for when other projects internally engage interiors staff to work on projects and vice versa…
>
> Following the chat with [the accountant and another staff member] [Ms Stormont] and I will assemble [a] simple summary of the way forward and the mechanics thereof for your information.

[8] A meeting between the directors and associates, including Ms Stormont, occurred two days later. Mr Goldie sent out emailed notes following the meeting, referring to cash-flow issues and noting that: "the break even figure is $384k per month which allows a slim margin of $200k for bad debts" and that "Note these are gross figures and 33% tax must be deducted before an estimate of profit distribution can be assessed." The meeting notes refer to "The performance of the interiors will be reported separately to ascertain the viability of this."

[9] As had been foreshadowed, Mr Forrest (Peddle Thorp's in-house accountant) became involved in the financial reporting issues relating to Interiors. Mr Forrest prepared a memorandum dated 2 June 2010 (the Forrest memorandum) for Ms Stormont and Mr Goldie, which annexed a year to date income statement for Interiors. This document excited much attention at hearing. The cover memorandum referred to the statement as a "suggested format for a monthly income statement for INTERIORS". The statement referred to "[a]dmin is allocated on the basis of 80% of the coalface salaries budget." The cover memorandum went on to make the following points :

> Billings: part of the month end routine for an INTERIORS staffer will be to scan the invoices for the month and identify those that are theirs
>
> Coalface salaries: when all timesheets are in Helen [Practice Manager at the time] will run a standard report to tell us the sum of timecosts for the period.

> Admin: while for the purposes of this discussion I have set admin allocations at 80% of coalface salaries that figure will be reviewed and adjusted if necessary. I expect it to finally fall somewhere in the 80% ballpark. You will also note that the actual admin allocation is the same as the budget. The rationale for that treatment is that the budget number becomes a fixed commitment to the company. It says that INTERIORS will pick up its admin allocation budget unaltered by fluctuations in coalface salaries.
>
> Tax: we use a slightly higher rate than the basic company rate to cover non deductible costs.
>
> Multiplier: 2.1 is the minimum number if we are to proceed with confidence that the year end bucket will not be found empty because of mistakes, errors, misfortunes, acts of God, unforseens and other sundry adversities
>
> Timecost reporting: I have attached reports that Helen called up from the timesheet database. The system is flexible and can report on the basis of employee project and can cover reporting periods of other than the most recent month.
>
> Note: any time that Interiors people spend on projects under the wing of the ARCHITECTURAL division will be charged to those projects at the timecost rate of the staffer involved. Conversely any time provided by people from ARCHITECTURE will be charged to an INTERIORS project on the time cost basis of the provider.

[10] The memorandum concluded with the suggestion that Mr Forrest should meet with Ms Stormont and Mr Goldie to "chew the rag" on the discussion document he had prepared. This did not occur. While the income statement attached to the Forrest memorandum referred to further attachments (a schedule of billings and timecost report for May) Ms Stormont said she did not receive them.

[11] Ms Stormont received a number of financial summaries over time. Each followed the format of the original Forrest memorandum; was set out on a pre-tax profit basis; referred to a share of administration costs; and included reference to a multiplier of 2.6. Ms Stormont gave evidence that she did not understand all that was contained in Mr Forrest's original memorandum and the financial summaries provided over time. This tends to be reflected in the contemporaneous documentation, including a clarifying memorandum which was prepared for a company retreat in early 2011. Amongst other things Ms Stormont asked why such a high administration cost had been allocated to Interiors and what a "coal face salary" meant. She never received a response to these queries.

[12] A financial summary was prepared to 31 March 2011. That means that it coincided with the date on which Ms Stormont's bonus entitlement fell to be assessed. For the first time costs relating to marketing were included in the summary for Interiors and, as Mr Barnes accepted (but could not explain) in evidence, for the first time Interiors was shown as not achieving a profit. Further, marketing and administration costs were noted. Mr Forrest could not explain why these costs had emerged for the first time at the end of the financial year. Ms Stormont was sufficiently concerned with the financial summary that she sought advice from an investment banker who specialised in valuing businesses (and her ex-husband) Mr Hogg.

[13] Ms Stormont wrote to the directors shortly afterwards asking for clarification about the figures which had been used. She advised that her employment agreement provided for an entitlement to a gross bonus equivalent to 20 per cent of the gross profit (of Interiors) and that "[t]he suggested format 2 June 2010 (as updated to 31 Jan 2011) is not defined in terms of gross bonus or gross profit." She went on to say that the formula workings had not been addressed with her, particularly the need to exclude inherited or loss-leading projects and the "construct of allocated actual administration costs (as distinct from the rule of thumb multiple of coalface salaries) and the relevance of including tax in the format".

[14] Mr Goldie responded the same day, stating that there were "misunderstandings" in Ms Stormont's calculations of "gross profit". He concluded by advising that he would discuss matters with Mr Forrest and talk to her further. A number of communications followed, directed at the projects (or proportions of projects) which should or should not be included in the figures for both revenue and direct costs for Interiors for the purposes of the bonus calculation.

[15] Mr Forrest subsequently prepared revised assessments, reflecting the changing figures as they emerged during the course of the discussions between Mr Goldie and Ms Stormont. Although the figures altered over this time, one thing remained constant, and that was Peddle Thorp's insistence that Ms Stormont's bonus was to be calculated on the basis of net profit rather than gross profit. Furthermore, Peddle Thorp continued to allocate expenses on a pro rata basis rather than

attempting to identify expenses directly attributable to Interiors. The bonus issue remained unresolved.

[16] On 26 October 2011 Mr Forrest prepared a summary of the pro rata overhead costs to be borne by Interiors for the year ended March 2011. The calculations showed an "*Agreed* gross taxable bonus of 20%" equating to $1526.80.[3] As Mr Forrest said in evidence, his adjustments followed discussions with Mr Goldie which he assumed (it appears erroneously) had followed the outcome of discussions Mr Goldie had had with Ms Stormont. Mr Forrest did not have any discussions himself with Ms Stormont. Ms Stormont said that the reference to the bonus formula did not reflect the terms of her employment agreement and the figure had not been agreed. Mr Forrest could not recall why he had referred to an agreed figure, but thought that Mr Goldie had told him it was. Mr Goldie did not give evidence. I accept Ms Stormont's evidence that there was no agreed figure.

[17] It is apparent that around this time Ms Stormont was having difficult discussions with Mr Goldie about shareholding issues. She found it hard to keep pushing the bonus issue while at the same time attempting to extract additional resources for Interiors from him. More generally it is apparent from the correspondence that there were broader difficulties in attempting to deal constructively with Mr Goldie. For example, in an email dated 19 September 2012 Mr Goldie responded to Ms Stormont's politely worded request for additional resources in the following manner: "No f!#$$'&&g way" and "You're joking right?".

[18] Ms Stormont continued to pursue matters. During the course of her 2013 performance review she raised a concern with the directors that her first year bonus remained unresolved and was still owing to her. The directors assured her that it would be sorted as soon as possible, but she heard nothing further from them at the time.

[19] Ms Stormont then engaged the services of a chartered accountant, Mr Wilde. She provided Mr Wilde with Peddle Thorp's most recent calculations and a copy of

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[3] Emphasis added.

her employment agreement and asked him for advice. Mr Wilde contacted Mr Goldie in relation to the bonus calculation issue in September 2013 and also sent him email communications dated 26 September 2013. Mr Wilde set out his view that the definition of gross profit was the difference between revenue and the cost of providing the service before deducting overheads. Mr Goldie did not respond to these communications.

[20] Ms Stormont then met with Mr Barnes and Mr Luke (another director), on 19 December 2013 in an attempt to progress matters. In this meeting they confirmed that a mistake had been made in her employment agreement and that it should have referred to "net profit" rather than "gross profit". They questioned whether she had genuinely believed that the reference to "gross profit" in the agreement actually meant gross profit. Ms Stormont responded by stating that she did genuinely believe that that had been the intention and that it had never entered her mind that the company had intended otherwise.

[21] Ms Stormont says, and I accept, that Mr Goldie reached an agreement with her as to revenue ($473,000) and direct costs ($166,000). Applying these figures would lead to a gross profit of $307,000, 20 per cent of which equals $61,400 (gross). This forms the basis of the claim for a bonus of $61,400. Mr Forrest agreed in evidence that he had never been asked to re-do his calculations to reflect the figures agreed between Ms Stormont and Mr Goldie.

[22] On 15 January 2014 Mr Goldie wrote to Ms Stormont referring to the material from Mr Wilde and stating that he had made an honest mistake in assuming gross profit meant the income left after overheads were deducted. His email went on to advise that:

> We have received the various communications from your accountant regarding this.
>
> We agree that your employment contract states (that you are to) *'Achieve at least a break even position for the Interiors at Peddle Thorp Architects. Should you achieve a profit for the Interiors you will receive a gross bonus equivalent to 20% of the Gross Profit'.*
>
> We acknowledge also the definition of 'gross profit' provided. But obviously this is where the difference exists.

> Not being an Accountant I made an honest mistake in assuming 'gross profit' meant the income left after overheads are deducted. What I now understand is known as 'gross profit' I thought was 'nett profit' (ie profit after overheads, tax etc).
>
> I'm sure you agree that it makes little sense to reward a person in an Associate's position on the basis of overall fees achieved, with no regard to the quality of the commissions, or efficiency performing them. Further, the effect of deducting 20% of the gross profit for your bonus would be to achieve a loss for the interiors of around $40,000. Clearly this is nonsensical and would be a significant shortcoming in assessing your performance with regard to achieve(ing) at least a breakeven position for Interiors…
>
> [Mr Forrest's] bonus assessment reflects my (mis)understanding of the gross profit matter.

[23] The email concluded with the words "let's talk". Ms Stormont emailed Mr Goldie the same day querying his rationale and advising that she was happy to talk but was not happy to do so in a one-on-one meeting.

[24] Despite Mr Goldie's emailed indication that a discussion would be helpful, he then took no steps to make himself available for such a discussion or convene a meeting. This is where the bonus issue sat, some three years after it had first arisen.

Lead up to redundancy

[25] Ms Stormont's performance review was due in October 2014. She anticipated that the bonus issue would be on the agenda for discussion.

[26] Ms Stormont was invited to a meeting on 6 October 2014 and attended armed with Mr Wilde's most recent bonus calculations. The meeting did not progress in the way Ms Stormont had expected. Rather, at the outset of the meeting Mr Barnes handed her a letter asking her to meet with the directors to resolve her unpaid bonus. He then handed her a second letter stating that they were considering disestablishing her role. Ms Stormont was told that she should not say anything at the meeting and so she did not. Nor did she hand over Mr Wilde's calculations given the way the meeting had unfolded.

[27] A series of communications between Ms Stormont's legal representative at the time and Peddle Thorp followed. Requests for various documents and

information relating to the restructuring proposal (which the company largely regarded as irrelevant) were made on Ms Stormont's behalf and responses (which Ms Stormont largely regarded as inadequate) were provided. I return to this when considering the plaintiff's argument that the redundancy process was procedurally flawed.

[28] Ms Wood, director of Knowhow Ltd (a human resources consultancy), had been brought in by Peddle Thorp to assist it with the restructuring proposal. Ms Wood wrote to Ms Stormont's lawyer on 6 November 2014 stating that the amount of bonus owing to her was $1,526.80. She made it clear that it had always been intended that gross profit meant the "end result of revenue less all other costs" and that under no circumstances would the company have entered into the agreement if the definition of gross profit advanced on Ms Stormont's behalf had been applicable. The company's offer to pay a bonus of $1,526.80 was disputed by Ms Stormont.

[29] Peddle Thorp twice tried to pay Ms Stormont the sum of $1,526.80, and twice she refused to accept it. Ms Stormont's lawyer advised that the correct amount owing was $61,400. Peddle Thorp indicated, through Ms Wood, that a response would be provided. It never was. Litigation ensued.

Analysis

Bonus calculation

[30] Three stages were identified within the employment agreement as "Special Conditions" of Ms Stormont's employment. Stage 1 was expressed to be for the first year; stages 2 and 3 for the second and third years respectively. Each provided for a different incentive. Stage 1 provided for a bonus; stage 2 provided for a shareholding if a 20 per cent profit was achieved; an invitation to purchase an additional shareholding was provided for at the end of stage 3. Under the heading "Clarification" it was said that:

> 1. Income and costs for the Interiors:
>
>   a) Time spent by Interiors and other staff on interiors projects will be recorded for the purpose of

understanding Interiors costs (for comparison against income) in the Peddle Thorp time-cost system.

b) Time spent by Interiors supporting Architectural projects will be charged against these projects at pre agreed sums.

c) The costs for the interiors will include staff salaries including your own, plus the share of direct and office overheads. In general a break even position is at around 2.2 x staff salaries.

2. …

[31] Ms Stormont says that her performance in year one was to be assessed on her ability to achieve at least a break-even position for Interiors (namely by multiplying the salary costs for the projects by 2.2 to assess if revenue was equal to or more than that multiple). If that was achieved then she would be entitled to a gross bonus equivalent to 20 per cent of the gross profit of Interiors. She says that based on a costs figure of $166,000 (the figure agreed between herself and Mr Goldie), multiplying this by 2.2 amounted to $365,000 and, since the revenue was well in excess of this, she had met the bonus qualifying threshold for break-even. She described such an approach as reflecting a fair proposal and an uncomplicated formula to calculate a bonus which suited the one-off arrangement for a possible bonus payout for the first year.

[32] I understood the company to be supportive of the interpretation adopted by the Authority, namely that the requirements of "break even" and "[s]hould you achieve a profit" under the special conditions for stage 1 of the agreement refer to performance achievement after all costs had been met. The Authority found that costs and profit were to be assessed applying the provisions of the conditions set out in the Clarifications section namely that:[4]

> …the profitability position for Interiors was to be calculated utilising the revenue achieved (billings) less (i) the direct costs of the Interiors Division (which included all relevant staff salaries, including that of Ms Stormont, and a credit for the time spent by the Interiors Division on Architectural projects that had been charged to those projects), and less (ii) the share of direct and office overheads.

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4 *Stormont v Peddle Thorp Aitken Ltd*, above n 1, at [98].

[33] It was said that such an interpretation was consistent with business common sense.[5]

[34] Where the intention is clear from words used in an employment agreement, effect should be given to those words. The Court does not readily accept that people have made linguistic mistakes, particularly in formal documents.[6] The words of the written employment agreement in the present case are clear and unambiguous. The operative term is "gross" (not "net") profit.

[35] Clause 6 specifies a threshold which must be met for a bonus payment. The threshold is break-even. Break-even is assessed applying the general rule of thumb adopted by the parties for quantification purposes, namely the 2.2 x staff salaries formula referred to. Such an approach has obvious advantages in terms of ease of application. If the Interiors division achieved a profit, namely anything over the break-even figure, the entitlement to a bonus was triggered. The quantum of bonus was to be assessed having regard to the quantum of profit. Both the qualifying profit and the bonus entitlement are gross figures. That is made plain by inclusion of reference to "gross" profit and "gross" bonus.

[36] Gross profit is generally understood to mean revenue minus direct costs. Mr Goldie and Ms Stormont agreed that direct costs amounted to $166,000. It is that figure which is accordingly relevant to the calculation. Revenue to the year ended 31 March 2011 was $473,000. This leads to a bonus entitlement under the agreement of $61,400.

[37] The interpretation advanced by the plaintiff would not lead to an absurd result, whether commercially or otherwise, and would not flout business commonsense.[7] Quite the reverse. That is because the plaintiff's formulation would lead to incentivisation during the first year of employment and during the establishment phase of the Interiors division, precisely what the bonus scheme was designed to achieve.

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5 At [96].

6 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896 at 913, per Lord Hoffman.

7 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [22].

[38] Even if the term "gross profit" was objectively ambiguous in this case, which it is not, I would have construed the agreement more strongly against Peddle Thorp. That is because it was Mr Goldie who drafted the agreement.[8]

[39] I record for completeness that the defendant abandoned an argument that the Contractual Mistakes Act 1977 applied. In any event there is no evidence, other than reference in an email from Mr Goldie (who did not give evidence), and Ms Stormont's evidence that that is what she had been told by him, that he had made a drafting mistake.

Estoppel

[40] I dealt with an interlocutory issue raised by the defendant by way of judgment dated 16 February 2017, in respect of whether the plaintiff was to be taken to have admitted the defendant's affirmative defence of estoppel by virtue of her failure to file a formal response. I granted the plaintiff an extension of time for filing a reply to the defendant's affirmative defences, which was subsequently done.[9] Leave was also sought to file further submissions, which was granted. Both parties took up this opportunity.

[41] A key component of Peddle Thorp's case is that Ms Stormont is estopped from asserting her interpretation of the employment agreement because she did not raise any issues as to the company's approach to the profit issue (which underpinned its approach to the bonus calculation) until a very late stage. The strength of that submission must be assessed having regard to the parties' dealings over time.

[42] There are four components that must be established to found an estoppel. A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged; the party relying on the estoppel must establish that the belief or expectation has been reasonably relied upon by that party alleging the estoppel; detriment will be suffered if the belief or expectation is departed from; and it must be unconscionable

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8 Applying principles of contra proferentem, see Joseph Chitty *Chitty on Contracts*, (32nd ed, Thompson Reuters, London, 2015) vol 1 at 13-086.

9 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12.

for the party against whom the estoppel is alleged to depart from that belief or expectation.[10]

[43] Mr Sharp, counsel for the defendant, submitted that the plaintiff had failed to make it clear to the defendant that she did not agree with the way in which the company was assessing the profitability of Interiors, which flowed through to the bonus calculation methodology. Silence seldom founds an estoppel argument,[11] and Ms Stormont's failure to articulate a concern at an early stage falls well short of doing so in the present case.

[44] Much emphasis was placed on Mr Forrest's original memorandum and the inference that Ms Stormont must have known, based on the calculations contained within it (and subsequent documentation), what methodology the company would be adopting in assessing her bonus. The difficulty is that neither Ms Stormont nor Mr Forrest appreciated that the calculations were intended to have anything to do with the bonus, despite the fact that it was Mr Goldie who had instructed Mr Forrest to prepare the memorandum. And, as Mr Forrest also made clear, he was never given a copy of Ms Stormont's employment agreement; he had no knowledge of what her bonus provision contained; he had not been told the basis on which her bonus was to be calculated; and he was unaware of any email communications on the subject between the directors and Ms Stormont. Further, he was unaware that Ms Stormont had raised questions with the directors in respect of his original memorandum and none of the directors drew his attention to Mr Wilde's subsequent correspondence taking issue with the company's calculation.

[45] More fundamentally there is nothing particular in the original memorandum which would reasonably have put Ms Stormont on notice as to what the company had in mind for her bonus calculation. That is unsurprising as the memorandum was drafted by Mr Forrest in the absence of such knowledge. Indeed the contemporaneous documentation tends to suggest that Mr Forrest's memorandum

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10 James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trust in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 613-4. See also *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43 at [75]-[76].

11 *Equity and Trust in New Zealand* at 631, citing *Angus Group Ltd v Industrial Buildings Ltd* CA67/89, 26 October 1989.

was generated at Mr Goldie's request for the sole purpose of briefly setting out the performance of the Interiors division. Nor, contrary to Mr Sharp's submissions, do I think that Mr Goldie's email of 5 May 2010 assists the defendant. There is nothing in the email to suggest that it relates to the calculation of Ms Stormont's bonus. Rather it is evident that Mr Goldie is referring to a distribution to shareholders. I do not accept that the email or the comments made by Mr Goldie at a meeting five days later should have alerted Ms Stormont to the defendant's view of what would constitute "profit" for the purposes of assessing her entitlement to a bonus under her employment agreement, and it is clear from the evidence that she did not interpret it in this way.

[46] Further, and as Ms Stormont observed in evidence, she had no reason to raise the bonus issue before the end of the 2011 financial year, given that the bonus did not become payable and so did not need to be calculated, until after that particular point in time. From then she consistently made it plain that she took issue with the way in which the company was purporting to calculate her bonus.

[47] I conclude that it is more likely than not that Mr Goldie made an error in his drafting of the bonus clauses and twigged to that fact when it came time to carry out the necessary calculations. This then led to a lengthy series of fitful, half-hearted discussions with little substantive engagement or progress over a number of years. I infer that Mr Goldie was hopeful that Ms Stormont would eventually lose either the energy or the interest in pursuing her bonus entitlements. In doing so he significantly underestimated her persistence.

[48] The defendant's estoppel argument fails. In summary:

- Even if Peddle Thorp believed or expected that the bonus would be calculated in the way now contended for, it was not a belief or expectation which Ms Stormont encouraged (her initial silence on the issue is explicable because she did not understand communications to have the import which the company now contends for and because her bonus did not become a live issue until the end of her first year), and it was unreasonable to rely on it;

- Once the bonus entitlement clause was triggered, Ms Stormont took steps to deal with it and raised ongoing concerns about the company's proposed approach to its calculation;

- In any event I would not have found it unconscionable for Ms Stormont to have departed from any such belief or expectation in the particular circumstances as I have found them to be.

Breach of good faith in relation to bonus

[49] Section 4(1A) of the Employment Relations Act 2000 (the Act) requires parties to an employment relationship to deal with each other in good faith. Amongst other things, the duty of good faith requires parties to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative.[12] A party who fails to comply with the duty of good faith in s 4(1A) is liable to a penalty if certain threshold criteria are met, namely that:[13]

- The failure was deliberate, serious, and sustained; or
- The failure was intended to undermine … an employment relationship.

[50] The bonus issue remained unresolved for a long period of time and it is apparent that the company could have done much more to progress it at an earlier stage. I infer, based on the weight of evidence before the Court, that Mr Goldie realised that the way in which the bonus provision had been worded might generate a potentially costly outcome, and the delays and heel-dragging which followed reflected a desire to wear Ms Stormont down. This is reinforced by the chronology of events.

[51] I am satisfied that the defendant breached its obligations of good faith in its handling of Ms Stormont's bonus entitlement. The failure was deliberate, serious and sustained. It was also intended to undermine the employment relationship.

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12 Employment Relation Act 2000, s 4(1A)(b).
13 Section 4A(a), (b)(iii).

While the imposition of a penalty does not automatically follow a finding of breach, I am satisfied that a penalty is warranted in the circumstances of this case having regard to the defendant's actions/inactions in respect of the bonus issue. I deal with quantum below.

Dismissal for redundancy

[52] In order for a redundancy to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The Court must consider whether the employer met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds. The plaintiff relies on both limbs of the justification test.

[53] A number of the procedural issues identified by the plaintiff as undermining the integrity of the process are interlinked and, on the plaintiff's case, support the claim that the redundancy was not genuine. Ms Stewart, counsel for the plaintiff, submitted that the company failed to consult adequately with Ms Stormont over the proposal and failed to provide her with sufficient information relevant to the continuation of her employment to enable her to comment on it before a final decision was made.[14] The way in which the process unfolded was said to reflect pre-determination and an attempt to mask a concerted plan to secure Ms Stormont's departure from the company, the genesis for which was her dogged pursuit of the bonus issue.

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade.[15] 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

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[14] In breach of its obligations under s 4(1A).

[15] *Simpson Farms v Aberhart* [2006] ERNZ 825 (EmpC) at [63] citing *Cammish v Parliamentary Service* [1996] 1 ERNZ 404 (EmpC) at 417.

timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.[16]

[55] It is apparent that a quantity of information was sought on Ms Stormont's behalf and that she was dissatisfied with what was provided, considering it to be inadequate. An employee's subjective views on adequacy are not the yard-stick. Nor is an employer under an obligation to continue to respond to requests for information indefinitely. The issue of whether or not sufficient information relating to the proposal was provided requires a review of the facts.

[56] Ms Stormont was given notice of a proposal to make her position redundant on 6 October 2014.[17] She was invited to a meeting the following week to "discuss any alternative options or comments you wish us to consider." The letter setting out the redundancy proposal was brief and made the following salient points:

- The position of head of Interiors had been established to generate Interiors business in addition to the established architectural business;

- In reviewing the work undertaken by Interiors it was apparent to the directors that much of the recent work was serving architectural projects rather than comprising independently generated work;

- The directors' original assessment of the market for discrete Interiors' work had been overly optimistic;

- The proposal was to reduce the scope of the Interiors division to focus purely on the Interiors' work that formed part of the company's architectural practice;

- This raised issues as to whether a senior position in the Interiors division was necessary because the company's original rationale for a senior position was to secure and deliver independent Interiors' work. If the proposal was adopted, that rationale would fall away.

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16 At [62].

17 She was provided with information in tranches over the course of the following seven weeks.

[57] The letter of 6 October made it clear that the redundancy proposal was based on a consideration and review of the work undertaken by Interiors, and the source of it, together with a previous and current market appraisal for such work. Despite these statements, no review or market appraisal documentation (or any other material) was enclosed with the redundancy proposal letter or provided to Ms Stormont in advance of the meeting scheduled to obtain her input. The reason for this was because no formal review, or any 'review' in anything other than the loosest sense of the word, had been undertaken by the company. This is reflected in Mr Barnes' response to questioning about what underlay the proposal. He made it clear that the redundancy proposal was based on:[18]

> … our ongoing so-called *gut feel associated with the impression* that … increasing majority of work coming into Interiors was from our architectural briefs.

[58] It followed, he said, that because the directors had a gut feel about what was going on in the practice, there was no need for forecasting documents and no need for a formal review. Ms Wood, who provided advice throughout this part of the process, essentially echoed Mr Barnes' sentiments.

A "Gut Feel" approach to redundancy

[59] While no particular degree of formality is necessary, what is required is a fair process and a real, as opposed to illusory, opportunity for the affected employee to engage before any final decision is made. The Gut Feel approach favoured by the company undermined Ms Stormont's entitlements in a fundamental way. That is because the points which the company considered obvious were plainly less than clear to the very person it was obliged to consult with, namely the affected employee. The reality is that the proposal came out of the blue and the way in which it was presented undermined Ms Stormont's ability to grasp where the company was coming from and why. This in turn impeded her ability to engage in the consultation process in a meaningful way.

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[18] Emphasis added.

[60] The Gut Feel approach, and the paucity of information provided at the outset, also meant that the parties effectively set off on the consultation process at cross-purposes. This was reflected in the way in which Ms Stormont's requests for underlying financial material and supporting documentation and information were greeted by the company, namely that they were largely irrelevant. She regarded the company's responses as obstructive, and they fed a perception that Peddle Thorp's motivation for change was being driven by a conflict of personalities and a desire to get rid of her because she had continued to pursue the bonus issue.

[61] It is not surprising that Ms Stormont formed the view that the company's motivations for the restructuring were suspect. The underlying rationale (as expressed in the letter setting out the proposal) was that the basis on which Interiors had been set up, namely to generate independent work, had not worked out as the directors had expected, and it was the lack of independently generated work which had prompted the directors to propose that there be a shift in focus to work derived from architectural projects. Ms Stormont was adamant that this had not been the original understanding of how Interiors would operate and the evidence tends to support this view. The defendant contended that it was "incomprehensible" that a company in the middle of the global financial crisis would have appointed someone to service the firm's architectural clients (as opposed to grow an independent practice), and that the need to develop a discrete client base for Interiors could be "inferred". However Mr Barnes accepted in cross-examination that there had been no discussion during the course of Ms Stormont's pre-employment interview that there would be a need to develop a discrete client base for Interiors.

[62] Nor do I accept the suggestion that the asserted rationale for the original establishment of Ms Stormont's position (to bring independently generated work into the business), which was later to provide the pivot for the disestablishment of the position, can reasonably be gleaned from the terms of her employment agreement. While it is true that the agreement refers to performance being assessed against a number of criteria, including Ms Stormont's ability to establish new clients to the company, it did not link this to discrete Interiors work. And, as Ms Wood accepted, the reference to independently generated work could include architectural clients, attracted by the multidisciplinary services which the company could offer.

Somewhat inconsistently Mr Barnes said, on the one hand, that Ms Stormont was required to bring in new clients for Interiors as part of her employment agreement but accepted, on the other hand, that the failure to do so in line with what the defendant now says was its original expectation, was never raised as a performance issue (indeed the assessment of Ms Stormont's performance against the stipulated criteria was positive).

[63] Ms Wood gave evidence that her instructions from Peddle Thorp in relation to the restructuring proposal were that independently sourced work had been "repeatedly" raised with Ms Stormont. However, while I accept Ms Wood's evidence that this is what she was told by Mr Goldie at the time the company proceeded with the redundancy proposal, I am not satisfied that it reflected the discussions that the directors had actually had with Ms Stormont, in anything other than an oblique and indirect way.

[64] Mr Barnes gave a detailed analysis to the Court as to why the redundancy proposal had been advanced, namely to concentrate on assisting architectural clients because the original vision for Interiors had not worked out. However he accepted that this vision, and concerns about it not being met, was never explained to Ms Stormont at the time. He suggested that it had been implicit in all of the discussions with Ms Stormont over "months and years." While it may have seemed obvious to him, it ought to have been clear that it was not obvious to Ms Stormont. Ms Stormont's surprise at, and scepticism about, the company's assertion that this had been the original intention is reflected in the response which was sent on her behalf at the time; and was reinforced during the course of evidence. The reality is that the focus that the company says prompted Ms Stormont's original recruitment, and which was said to be pivotal to the viability of her role, had not been articulated in any document up until the date on which the redundancy proposal was drawn to her attention, including the employment agreement.

[65] While Peddle Thorp may not have been under an obligation to carry out a formal review prior to proposing a restructure of Interiors, it was under an obligation to adequately explain the rationale for the proposal and provide Ms Stormont with relevant information, and an opportunity to comment on it. The company failed to

do so, fatally undermining the integrity of the consultation process. The company's failings were not minor. They prejudiced Ms Stormont.

[66] The plaintiff submits that the defendant's decision to terminate the plaintiff's employment on the grounds of redundancy was substantively unjustified because it was predetermined. The submission was essentially advanced on the basis of inferences drawn from a number of key events, including that the bonus issue was live and remained unresolved at the time redundancy was proposed. Redundancy was, in Ms Stormont's view, the company's solution to what appeared to be insoluble issues relating to the bonus.

[67] I have already dealt with the first difficulty which the company's Gut Feel approach gave rise to. The second is that it makes its task of demonstrating substantive justification harder, due to a paucity of documentation and supporting analysis for disestablishing Ms Stormont's position. It also led to confusion as the company was advancing a restructuring proposal at a time when Ms Stormont was requesting additional resources to meet the demands of the work coming into Interiors, in circumstances in which she did not understand that the directors were concerned about independently generated work.

[68] The defendant maintained that the redundancy proposal was not driven by financial aspects of the Interiors business or of the practice as a whole, and this was a message that was repeatedly emphasised in correspondence responding to the plaintiff's requests for financial information prior to her dismissal. Ms Wood gave evidence that she had been advised by the directors at the time that the redundancy proposal was not motivated by financial considerations, and this was supported by Mr Barnes' evidence. However, it appears that Mr Goldie harboured other views. In this regard Ms Ball, a witness called on behalf of the plaintiff, gave evidence that she had attended the Authority's investigation meeting and that Mr Goldie had made it clear that to his mind the redundancy was driven by financial reasons. Her evidence was supported by detailed notes she took during the course of the investigation meeting and was consistent with Ms Stormont's evidence as to what had occurred in that forum. Mr Barnes could not recall this aspect of Mr Goldie's evidence in the Authority and Mr Goldie did not give evidence in the Court. As Ms Wood agreed in

cross-examination, if the reasons for the restructuring had been financial, it would have been "terribly unfair" if this had been in Mr Goldie's mind but was not disclosed to Ms Stormont. While the defendant opposed the admission of Ms Ball's evidence, her evidence on this point was directed at responding to matters raised by the defendant's witnesses as to what underlay the redundancy proposal. I am satisfied that the notes she made are reliable.

[69] In addition to the matters I have already referred to, there was the odd coincidence of timing relating to the appointment of an intern. She was brought in to the Interiors division during Ms Stormont's notice period and is now working full-time. Finally, I accept Ms Stormont's evidence that she was effectively side-lined in the period leading up to the redundancy. In this regard she said (and I accept) that Mr Goldie delegated work directly to her assistant from around mid-2014 onwards, despite having previously stated that Ms Stormont was to be the channel for all Interiors work.

[70] I am not satisfied that the redundancy was genuine. That is sufficient grounds for concluding that it was substantively unjustified.

[71] Mr Sharp made the point that Peddle Thorp is a mid-sized employer and not a multi-national oil company, and that the sort of 'bells and whistles' process that might be expected of the latter should not be imposed on the former. That is true. However, a disingenuous decision to dismiss for redundancy will not be justified no matter how small-scale the employer is. Peddle Thorp fell at this hurdle.

[72] The claim of breach of good faith in relation to the redundancy process has been made out to the requisite standard. The defendant's failure to comply with its duty of good faith was clearly intended to undermine the employment relationship, and did so. I record for completeness that I do not accept a submission advanced on behalf of the defendant that Ms Stormont's conduct ought to disentitle her (in equity and good conscience) from advancing this aspect of her claim. I was not drawn to the argument but even assuming for present purposes that it is one which is conceptually available, it would have fallen well short on the facts.

[73] The factual conclusions I have reached relating to the redundancy support the appropriateness of imposing a penalty in respect of the breach.

Redeployment

[74] What is the extent of an employer's obligation to consider or consult on redeployment in circumstances where they are confident there is no other work?

[75] Clause 5 of the employment agreement provided that in the event of Ms Stormont's position becoming redundant, the company "shall":

> 5.1.1 Consult with the employee *before arriving at a final decision to give notice* of termination of employment … in an endeavour to enable the employee to be re-deployed in any other work for which the employee is suited and which may be available within the Employer's business …
>
> 5.1.2 In the event that a decision is reached to give such notice, *engage in further consultation over the period of notice*.
>
> (Emphasis added)

[76] Peddle Thorp did not make any attempt to consult with Ms Stormont over other work for which she might be suited, as Ms Wood acknowledged. Nor did it seek to engage in any consultation with her during the notice period. I understood the company's argument to be that cl 5 effectively had no application because it had formed a view that there were no available positions which might have suited Ms Stormont.

[77] It is convenient to begin with basic principle. As the Court of Appeal stated in *AFFCO NZ Ltd v NZMW & Related Trades Union Inc*:[19]

> Contracts of employment are subject to the same rules of interpretation as apply to all contracts. The express terms are the central focus of an interpretative assessment.

[78] The wording of the relevant clause in this case is unequivocal – it required Peddle Thorp to consult with Ms Stormont over possible redeployment before reaching a final decision and to continue to consult with her during any notice period. While the defendant would prefer not to be bound by the express words of

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[19] *AFFCO NZ Ltd v NZMW & Related Trades Union Inc* [2016] NZCA 482 at [31].

the agreement it entered into, there is no scope for reading in a qualifier that such consultation was unnecessary where the company unilaterally considered no other suitable positions existed. As emphasised in *Money v Westpac Trust Banking Corporation*:[20]

> … The contractual obligation must be taken to have been entered into deliberately by the respondent with the intention of honouring it if the occasion arose.

[79] The requirements emerging from the parties' agreement in relation to consultation are reinforced by the good faith obligations contained within the Act, which make "good faith dealing obligations, including consultation, mandatory in all cases."[21]

[80] Peddle Thorp fell short in meeting its obligation to consult in relation to redeployment, and breached its contractual obligations to Ms Stormont. The fact that no alternative positions can now be retrospectively identified does not absolve the company from meeting its contractual obligations at the relevant time.

[81] As the Court of Appeal has previously observed, an employer's failure to consider redeployment may support a finding that a redundancy is not genuine.[22] I am driven to that conclusion in the circumstances of the present case.

Remedies

Penalty for breach of s 4(1A) (statutory obligation of good faith)

[82] I have already found that the company breached its obligations of good faith in relation to the bonus issue and the redundancy process. I have also concluded that a penalty is appropriate in respect of each of the established breaches of good faith.

[83] Section 135 provides for the imposition of a penalty against a company for a breach of the Act, the amount of penalty not exceeding $20,000. Section 133A sets out a number of factors which the Court must have regard to in determining an

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20 *Money v Westpac Trust Banking Corporation* [2003] 2 ERNZ 122 (EmpC) at [39].
21 *Simpson Farms Ltd v Aberhart* above n 15 at [60].
22 *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, [1998] 3 NZLR 276 (CA) at 618, 294.

appropriate penalty. It is a non-exhaustive list and was not in force at the time the breaches in this case occurred. However, as a full Court has recently confirmed,[23] the provision in many ways confirms earlier case law and may be applied as a useful guide in the present case. The factors are:

- The object stated in s 3;

- The nature and extent of the breach or involvement in the breach;

- Whether the breach was intentional, inadvertent, or negligent;

- The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;

- Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;

- The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;

- Whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

[84] As I have said, the above list is not exhaustive. In the present case I consider that two other matters are relevant to an assessment of the appropriateness of a penalty, and its quantum. The first is the need for general and particular deterrence. The second is the desirability of broad consistency with other penalties imposed in similar cases.

[85] A penalty of up to $20,000 is sought. That would be at the top end of the range.

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[23] *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [5]-[6].

[86] A review of the cases for breach of good faith in the Authority and the Court reveals a wide range of penalties in terms of quantum, the highest (involving quite a different factual context) being $15,000.[24] From March 2015 to March 2017 there appear to have been 26 cases in which a claim for a penalty for breach of good faith has succeeded, 22 of which were in the Authority. There have been four instances in which a penalty for breach of good faith has been imposed in the Court, one upholding the Authority's earlier determination.[25] In the Court the penalties imposed have been $500 in *G L Freeman Holdings Ltd* (employee resigned without giving required period of notice);[26] $1,500 in *Twentyman v The Warehouse* (providing inaccurate information; failure to follow a rehabilitation plan); $7,500 in *Lumsden v Sky City Management* (breach of a settlement agreement);[27] and $10,000 in *Caffe Coffee (NZ) Ltd* (misuse of confidential information).[28]

[87] More analogous cases have arisen in the Authority, where the following emerges: $5,000 in *Franich v Vodaphone New Zealand Ltd* (deliberate inadequate consultation over a restructuring proposal);[29] $2,500 in *Murray v South Pacific Meats* (failure to respond to employee concerns; the breach was intended to undermine the employment relationship);[30] $4,000 in *Curry v ISS Holdings Ltd* (a "serious" case involving a predetermined restructuring procedure undermining the employment relationship);[31] $2,500 in *Nee v Best Health Products Ltd* (failure to engage adequately in response to continuing requests for wage and time records).[32]

[88] There is nothing to suggest that the defendant has committed previous breaches. However, there are a number of aggravating features of its conduct (which I have identified). The breaches have plainly negatively impacted on Ms Stormont. There is a need to deter behaviour of this sort. Standing back, I consider that a

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24 *The New Zealand Meat Workers & Related Trades Union Inc v Land Meat New Zealand Ltd* [2016] NZERA Wellington 15 (for refusal to engage in a meaningful way over a bargaining process agreement).
25 *Twentyman v The Warehouse* [2016] NZEmpC 172.
26 *GL Freeman Holdings Ltd v Livingstone* [2015] NZEmpC 120.
27 *Lumsden v Sky City Management* [2017] NZEmpC 30.
28 *Caffe Coffee (NZ) Ltd v Farrimond* [2016] NZEmpC 65.
29 *Franich v Vodafone New Zealand Ltd* [2016] NZERA Auckland 7.
30 *Murray v South Pacific Meats Ltd* [2016] NZERA Christchurch 59.
31 *Curry v ISS Holdings Ltd* [2015] NZERA Christchurch 152.
32 *Nee v Best Health Products Ltd* [2015] NZERA Christchurch 84.

penalty of $2,500 is appropriate in relation to the 'bonus issue' breach of good faith; and $5,000 is appropriate in relation to the redundancy breach of good faith.

Whole of penalty to be paid to affected employee?

[89] Ms Stewart submitted that the award of a penalty pursuant to s 136(2) of the Act should be paid to Ms Stormont and not to the Crown on the basis that "no serious matters of public policy were involved in the breaches".[33] It is said that Ms Stormont has sustained the loss as a result of the employer's breach and therefore it is appropriate that the penalty be paid to her as the injured employee. The above cases reflect a range of responses in respect of the recipient of payment issue:

- 100 per cent to the Crown; nothing to the affected employer in *G L Freeman Holdings Ltd*;

- 100 per cent to the company; nothing to the Crown in *Twentyman v The Warehouse*;

- 75 per cent to the affected employee; 25 per cent to the Crown in *Lumsden v Sky City Management*;

- 50 per cent to the company; 50 per cent to the Crown in *Caffe Coffee (NZ)* Ltd;

- 50 per cent to the affected employee; 50 per cent to the Crown in *Franich v Vodaphone New Zealand Ltd*;

- 100 per cent to the affected employee; nothing to the Crown in *Murray v South Pacific Meats*;

- 100 per cent to the Crown; nothing to the affected employee in *Curry v ISS Holdings Ltd*;

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[33] As set out in *United Food Workers v Talleys* [1992] 3 ERNZ 423 at 448.

- 100 per cent to the affected employee; nothing to the Crown in *Nee v Best Health Products Ltd*.

[90] In determining issues relating to penalty apportionment, the nature of the issues involved and the extent to which they engage public, as opposed to private, interests will be relevant.[34] While I agree with Ms Stewart that the matters at issue in this case raise less acute concerns about public policy than, for example, breaches of mediator-certified settlement agreements,[35] I do not accept the proposition that it follows that in the absence of a serious matter of public policy the whole of any penalty should be awarded to the affected individual.

[91] There is a broad public interest in deterring the sort of employment practices which have emerged in this case, and which are appropriately reflected in part-payment to the Crown. It is, however, appropriate that any apportionment take into account the fact that it is Ms Stormont (not, for example, a Labour Inspector on behalf of an affected employee) who has had to go to the effort of bringing the breach before the Court (while being cognisant of the need to avoid duplication with costs). I consider it appropriate to order that 75 per cent of each of the penalties imposed be paid to Ms Stormont, with 25 per cent to be paid to the Crown.

Bonus

[92] Ms Stormont is entitled to a bonus equivalent to 20 per cent of gross profit of the Interiors division in 2010 in the sum of $61,400. She is also entitled to interest and holiday pay accruing in relation to her unpaid bonus. I did not understand the defendant to be suggesting otherwise.

Special damages – legal costs

[93] Ms Stormont has also advanced a claim for special damages, relating to the costs associated with her legal representation and Mr Wilde's services in respect to her attempts to recover the bonus during September 2013.

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34 See, for example, *Lumsden v Skycity Management Ltd* above n 27 at [69].
35 As occurred in *Lumsden.*

[94] The springboard for the plaintiff's special damages claim are the following observations by the Court of Appeal in *Binnie v Pacific Health Ltd*:[36]

> Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself.
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> …
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> In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. … Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.

[95] Special damages for legal costs do not appear to have previously have been awarded by this Court, despite the Court of Appeal's obiter endorsement of their availability in *Binnie*.[37] *Binnie* involved a common law damages claim. In *Harwood v Next Homes Ltd* Judge Travis questioned (obiter) whether special damages would be available in the context of a personal grievance claim; however in *Hall v Dionex* it was observed that there may be circumstances in which an employee can claim the costs associated with an employment investigation, such as where the employer commenced a baseless process.[38] It was also noted that such costs may be recoverable pursuant to s 123(1)(c).

[96] In this case a bright line can be drawn between the costs associated with Ms Stormont's legal representation during the redundancy process (which I have found to be fundamentally flawed and instigated for the dominant purpose of securing her departure) and the later legal costs incurred by her (with another legal representative) in respect of the filing, and pursuit, of legal proceedings to recover the unpaid bonus and the unjustified dismissal. It seems to me that the latter costs are appropriately dealt with under cl 19 of schedule 3 of the Act (the Court's power to award costs in

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36 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [17]-[18].

37 *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433 at [37]. See too *George v Auckland Council* [2013] NZEmpC 179, [2013] ERNZ 675.

38 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, (2015) NZELR 157 at [114].

any proceedings). The former are appropriately the subject of an award of special damages in the particular circumstances of this case. It cannot be right that an employee should have to incur legal costs to respond to a disingenuous dismissal process and can recover such costs in the context of a common law claim for breach of contract but not in the context of a personal grievance claim, and I do not read the Court's broad powers to order costs on personal grievance claims as preventing such a result. Care must, however, be taken to ensure that such costs have not already been incorporated within another head of relief.

[97] I have considered the costs incurred by Ms Stormont and they are reasonable and necessary in light of the defendant's action. They ought to be awarded in full. I have reached the same conclusions in respect of Mr Wilde's costs.

[98] Accordingly the defendant is ordered to pay Ms Stormont special damages in the sum of $10,837.60 in respect of legal costs and $879.75 in respect of Mr Wilde's costs.

Lost remuneration

[99] Section 128 of the Act provides that, where a personal grievance is established and the employee has lost remuneration as a result of that personal grievance, the Authority or the Court must order the employer to pay the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration.

[100] I have no difficulty accepting that Ms Stormont found it difficult to find alternative work following her dismissal from Peddle Thorp. She remained unemployed for a considerable period of time, despite having made a number of attempts to find alternative work. Mr Sharp submitted that Ms Stormont's own conduct limited her ability to secure employment, referring to information she disclosed to prospective employers about the circumstances surrounding the termination of her employment with Peddle Thorp. Mr Sharp observed that there were "few reasonable employers" in New Zealand who would want to take on an employee with "the baggage" of a dispute with a previous employer, describing it as akin to "shooting yourself in the foot in a wooden barrel". If the argument being

advanced is that Ms Stormont failed to mitigate her losses because she was honest with prospective employers and recruitment agencies, I reject it. She took reasonable steps in the circumstances to find alternative work.

[101] Ms Stewart submitted that restricting any award for lost remuneration to the statutory minimum of three months would be inappropriate in this case and that the Court ought to exercise its discretion to award significantly more. Mr Sharp took a different view. He submitted that the employment relationship would not have survived for any substantial period of time and that the three-month period should be the default position.

[102] I agree with Mr Sharp's analysis that the parties' relationship was such that ongoing employment of any significant length was unlikely. It is clear to me that Ms Stormont was not wholly enamoured with Peddle Thorp and that the feeling was mutual. This lay behind many of the company's actions which I have already referred to, and which were not consistent with its employment obligations. Although it is likely that this sort of activity would have continued and hastened Ms Stormont's departure, I do not consider it appropriate to effectively give the company credit for this by decreasing the timeframes I would otherwise have applied under s 128. To put it another way, it cannot be correct that an employer can persuade the Court to exercise its discretion against ordering lost remuneration in excess of three months on the basis that its egregious behaviour would likely have driven the employee out at an earlier date. That would lead to perverse incentives which could not have been intended when s 128 was enacted.

[103] Standing back I consider it unlikely that the employment relationship would have lasted more than six months, based on my assessment of the evidence. In the circumstances I consider that an award equivalent to six months lost remuneration is appropriate.

Compensation for humiliation, loss of dignity and injury to feelings

[104] It is submitted that Ms Stormont suffered compensatable loss under s 123(1)(c)(i), namely humiliation; loss of dignity; and injury to feelings.

[105] While there is a discernible overlap between the three identified heads of damage, they each have distinct characteristics. "Humiliation" can be summarised as where a person feels degraded, ridiculed, demeaned, put down or exposed, diminishing or damaging their status and/or self worth.[39] "Loss of dignity" has been described in the following way by the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)*:[40]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits … Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued …

[106] "Injury to feelings" may be experienced in a variety of ways, including sadness, depression, anger, anxiety, stress or guilt.[41]

[107] I am satisfied that Ms Stormont suffered humiliation and loss of dignity (in particular the undermining of her sense of self worth), injury to her feelings (which predominantly manifested in depression and stress); and that the defendant's unjustified actions (in relation to her position being made redundant) were causative factors giving rise to such losses. There is, however, a need to differentiate these compensable losses from the damage/loss suffered as a result of the way in which the bonus issue was dealt with. It clearly emerged from the evidence that she perceived a lack of engagement and obstructive attitude (through Mr Goldie), and that this was a major contributor to the feelings of stress, anxiety, depression and negative self worth which she suffered from. The claim is directed solely at her unjustified dismissal, no claim for disadvantage having been pursued. I accordingly put the injury stemming from the bonus issue (as best it can be assessed) to one side.

[108] I turn to consider quantification. An award of $40,000 compensation under s 123(1)(c)(i) is sought on behalf of the plaintiff. I note that the highest compensatory

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39 C Inglis and L Coats "Compensation for Non-monetary Loss – Fickle or Flexible? In search of a framework for pursuing, defending and deciding claims under s 123(1)(c)" (paper presented to Employment Law Conference, Auckland, October 2016) at 372.

40 *Law v Canada (Minister of Employment and Immigration* [1999] 1 SCR 497 at [53].

41 See *Director of Proceedings v O'Neil* (2000) 6 HRNZ 311, [2001] NZAR 59 at [29].

award in an employment case under this provision (or its predecessor) is $50,000.[42] That figure was described by the Court of Appeal in *Carter Holt Harvey Ltd v Pirie*[43] as the "high water mark", albeit 20 years ago. It was followed (in 2004) by the award of $50,000 in *Waugh v Commissioner of Police.*[44]

[109] An award of the magnitude sought by the plaintiff would sit well above the top end of the range for comparable cases, particularly given that it is restricted to the losses stemming from the unjustified dismissal rather than more broadly. A recent review of compensatory awards for non-pecuniary loss for unjustified dismissal (redundancy) between January 2013 and mid-July 2016 coming out of the Authority and the Court reflects a median award in the Authority of just over $6,000; in the Court for that period around $15,000.[45] Interestingly, it appears that litigants have been able to achieve somewhat higher awards in circumstances involving unjustified dismissals for redundancy as opposed to other forms of unjustified dismissal, although the reasons for this remain unclear. It seems to me that the key factors are causation and the extent of loss/damage suffered.[46] The nature of the underlying action is essentially immaterial.

[110] Mr Sharp raised concerns relating to remedial overlap. I agree with Mr Sharp that there is a need to avoid double-accounting when assessing an appropriate compensatory sum. Further, while the plaintiff has advanced pleadings in both common law and statute, where the underlying breach is the same there is no entitlement to two separate streams of relief.

[111] There is also a need to differentiate between the purpose of a compensatory award and the purpose of a penalty, part of which is payable to the affected individual. I do not however consider it appropriate to have regard to the amounts I have awarded for pecuniary loss in considering the quantum of award for non-

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42 See, for example, *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 at [140]-[142].

43 *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648 (CA) at 652, referring to the amount of $50,000 awarded in *Ogilvy & Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398; [1994] 1 NZLR 641 (CA).

44 Above n 42.

45 See tables in C Inglis and L Coats, above n 39, at 414-415.

46 See *Transmissions & Diesels v Matheson* [2002] 1 ERNZ 22 at [20]-[22] (CA). See also C Inglis and L Coats "Compensation for Non-Monetary Loss", above n 39 at 373-374.

pecuniary loss, and I did not understand Mr Sharp to be suggesting that I should. Such a global approach to relief would necessarily result in under-compensation.

[112] As Ms Stewart points out, there have been recent cases where the Court has raised concerns as to the extent to which compensatory awards have kept pace with the times, and adequately reflect the non-pecuniary loss/damage sustained.[47] These more recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).

[113] It is notable too that the top-end awards under s 123(1)(c)(i) have fallen well short of awards for the same non-pecuniary loss/damage achieved in the Human Rights Review Tribunal, most notably in the well publicised case of *Hammond v Credit Union Baywide*[48] where compensation of $98,000 for humiliation, loss of dignity and injury to feelings was ordered. *Hammond* arose out of an employment relationship and incorporated many aggravating features which are not uncommon in personal grievance claims in the Authority and the Court.

[114] In that case the Human Rights Review Tribunal referred to three bands of compensation for humiliation, loss of dignity and injury to feelings:[49] Band 1 – nil to $10,000; Band 2 - $10,000 to $50,000; Band 3 - $50,000 and over. The highest award achieved in this jurisdiction ($50,000) for the same loss/damage sits at the top of Band 2. However, once the $50,000 figure upheld by the Court of Appeal in *Carter Holt Harvey* on appeal from the Employment Court is inflation-adjusted it equates to around $75,000, so well above the bottom of Band 3.

[115] This Court has not yet adopted a banding approach to compensatory awards, and I was not invited to consider applying (by way of analogy) the bands referred to by the Human Rights Review Tribunal in *Hammond* to address the same types of non-pecuniary injury, and I do not propose to do so. Ultimately each case falls to be decided on its own facts, while it is necessary to be cognisant of the desirability of broad consistency with other cases.

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47 See, for example, *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34 at [133]-[134]; *Hall v Dionex*, above n 38, at [88].

48 *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [183].

49 At [176].

[116] I approach the quantification exercise within the following broad framework. The purpose of an award under s 123(1)(c)(i) is to compensate for loss, not to punish. That means that the egregiousness of the employer's conduct will only be relevant to the extent to which it actually increased the level of loss or harm suffered. While the subjective effect on the employee is the focus of the inquiry, along with causation, the loss to be compensated for must be objectively assessed and quantified. It is the employee who must prove, on the balance of probabilities, that they suffered loss; that the employer's breach was a material factor in the loss they sustained; and quantification of the loss. Direct evidence, rather than inference, is generally required.

[117] Ms Stormont lost her job just before Christmas, following a disingenuous process which she did not understand. She suffered a deflating loss of confidence, felt unjustly exploited and mentally and emotionally drained. Her social interactions and activity levels plummeted. Physical manifestations included depression, loss of sleep, irritability and dermatitis. Medical notes before the Court reinforced the evidence she gave.

[118] I consider that an award under s 123(1)(c)(i) of $25,000 is appropriate in a case such as this.

[119] While a separate claim for damages was mounted (in relation to breach of the implied contractual duty of good faith and of the employment agreement) I consider these aspects of the claim to have been adequately addressed in the remedies ordered in Ms Stormont's favour.[50] I agree with Mr Sharp that adopting the multiplicity of claim approach favoured in the plaintiff's pleadings runs the risk of overlap and duplication.

Contribution?

[120] The Court is required to consider the extent to which the plaintiff may have contributed to the situation which gave rise to the grievance and, if those actions so

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[50] See, for example, *George v Auckland Council* above n 37 at [133].

require, reduce the remedies which would otherwise be awarded.[51] I did not understand the defendant to be suggesting that any orders in the plaintiff's favour ought to be reduced for contribution under s 124. I do not consider, in any event, that a reduction for contribution is appropriate on the basis of the evidence.

Interest

[121] Finally, Mr Sharp submitted that interest should only be ordered from the date of judgment. I disagree.

[122] Clause 14 of sch 3 of o the Act provides that the Court may award interest in any matter or proceedings involving the recovery of any money:

> (1) Subject to subclause (2), in any proceedings for the recovery of any money, the court may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under s 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.
>
> (2) Subclause (1) does not authorise the giving of interest upon interest.

[123] As reg 11 of the Employment Court Regulations 2000 makes clear, a claim for interest must be specifically pleaded, including the method by which it is to be calculated.

[124] The only interest sought by the plaintiff relates to the bonus payment. It is appropriate that interest be ordered on the bonus from the date it became due (being 31 March 2011) through to the date on which payment is made to plaintiff in accordance with this judgment. The interest ordered is to be calculated at the rate applying throughout the relevant period as prescribed under the Judicature Act 1908.

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[51] Employment Relations Act 2000, s124.

Conclusion

[125] The plaintiff's challenge succeeds. I have reached a different view from the Authority, including having regard to the extensive evidence which emerged at trial. The Authority's substantive determination is set aside.

[126] The defendant is ordered to pay the plaintiff the following:

- $61,400 by way of unpaid bonus (at [36] above), together with holiday pay in relation to the bonus, and interest on these sums to be calculated from the date on which the plaintiff became entitled to a bonus (being 31 March 2011) through to the date on which payment is made to her in accordance with this judgment. Such interest to be calculated at the rate applying throughout the relevant period as prescribed under the Judicature Act 1908;

- $10,837.60 by way of special damages for legal costs (at [98] above);

- $879.75 by way of special damages for Mr Wilde's costs (at [98] above);

- A sum equivalent to six months' lost remuneration (at [103] above);

- $25,000 by way of compensation under s 123(1)(c)(i) of the Act (at [118] above).

[127] The defendant is also ordered to pay a penalty for breaches of its statutory obligations of good faith in relation to the plaintiff's bonus and redundancy of $2,500 and $5,000 respectively (totalling $7,500); 75 per cent of which is to be paid to Ms Stormont; the remaining 25 per cent to the Crown.

Challenge to costs determination

[128] The corollary of the outcome of the plaintiff's challenge to the Authority's substantive determination is that the plaintiff's challenge to the Authority's costs determination must also succeed. The Authority's costs determination is accordingly set aside.

Non-Publication

[129] Interim non-publication orders were made by consent in respect of client details, financial information and medical evidence before the Court. I am satisfied that it is appropriate that those interim orders should now be made permanent.

Costs

[130] Costs are reserved. The parties are encouraged to agree costs in the Court and in the Authority. If that does not prove possible the plaintiff may file and serve an application together with supporting material within 20 working days of the date of this judgment; the defendant within a further 20 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Judge

Judgment signed at 3.30 pm on 6 June 2017