IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 80
EMPC 274/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOHN WILLIAM MOUNSEY BUTLER Plaintiff
AND	OHOPE CHARTERED CLUB INCORPORATED Defendant

Hearing:	19 February 2021 (Heard at Christchurch by AVL)
Appearances:	S Austin, advocate for plaintiff No appearance for defendant
Judgment:	2 June 2021

JUDGMENT OF JUDGE K G SMITH

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[1] In the Employment Relations Authority John Butler succeeded in his claim for unjustified dismissal against his former employer, Ohope Chartered Club Inc.[1] Mr Butler was found to have been unjustifiably dismissed for redundancy from the position he had held with the Club as a courtesy van driver and door person.[2]

[2] The Authority accepted Mr Butler's position was redundant but was dissatisfied with the absence of consultation with him before he was dismissed.

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1 *Butler v Ohope Chartered Club Inc* [2020] NZERA 322 (Member Campbell).
2 At [31].

[3] Mr Butler was awarded $761.90 under s 123(1)(b) of the Employment Relations Act 2000 (the Act) for lost wages and $7,000 under s 123(1)(c)(i) for humiliation, loss of dignity and injury to his feelings.

[4] The Authority limited lost remuneration to the amount of time it considered would have been taken to complete consultation.[3] It estimated that a further two weeks would have been sufficient and awarded two weeks wages.[4]

[5] In the Authority, Mr Butler sought $25,000 for alleged humiliation, loss of dignity and injury to feelings.[5] To support this claim he said the decision "blindsided" him, and he was upset and suffered from disturbed sleep patterns for at least three months afterwards. He told the Authority that he became withdrawn and for a time cut himself off from social contact.

[6] The Authority was not persuaded by some of that evidence, because Mr Butler had been at the annual general meeting where the financial position of the Club was discussed. It held that he knew there had been talk of removing the courtesy van service for over a year and had met with the Club manager in June 2019 to discuss a reduction in his work hours as a cost saving measure.[6] During that meeting they also discussed the financial state of the Club and he had been expecting a decision to stop the van service at that time.[7] Weighing up the relevant aspects of the dismissal on Mr Butler the Authority awarded $7,000, payable within 28 days.

[7] In a separate determination, the Authority ordered the Club to pay costs to Mr Butler of $3,000.[8] They were calculated by apportioning its usual daily tariff to account for the length of the investigation meeting, at just over half a day.[9] The Authority rejected a submission for Mr Butler that there should be an uplift from the daily tariff, because of the time and expense incurred in responding to the Club's abandoned defence that he was a casual employee.

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3 At [36].
4 At [37].
5 Employment Relations Act 2000, s 123(1)(c)(i).
6 *Butler*, above n 1, at [42].
7 At [43].
8 *Butler v Ohope Chartered Club Inc* [2020] NZERA 354 (Member Campbell).
9 At [5].

The challenges

[8] Mr Butler challenged both determinations and sought a full hearing of the entire matter.[10] The relief sought was a finding that he had been unjustifiably dismissed, lost earnings equal to three months' pay and compensation under s 123(1)(c)(i) of the Act of $20,000. Costs in both the Court and Authority were claimed.

[9] Although the proceeding was served on the Club it did not file a statement of defence or attempt to enter an appearance at the hearing.

[10] While Mr Butler challenged the whole of the substantive determination, he did not seek to disturb most of its findings concentrating, instead, on seeking to increase the remedies awarded to him.

[11] I agree that Mr Butler was unjustifiably dismissed because he was not consulted at all about the Club's decision to end the courtesy van service. The decision removing that service, and to dismiss him for redundancy as a result, was made at a Club committee meeting on 26 August 2019.[11] A resolution was passed that the van driving duties, which formed the bulk of Mr Butler's work, would be carried out by volunteers and his paid position would be dispensed with.

[12] Mr Butler did not have prior notice that the Club was considering dispensing with the courtesy van driver's role at that meeting. Compounding the lack of notice was the way in which he was informed of the decision. He was not told about it until 3 September 2019, when spoken to briefly by the Club's manager. The message given to him was that his job would end on 26 September 2019 and was delivered during a handover of the courtesy van in Mr Butler's driveway.

[13] It was common ground in the Authority, and not disputed in this challenge, that the courtesy van did not make a profit. It was a service to Club members to encourage them to use its facilities. However, the Club was suffering financial losses and one of

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10 A hearing de novo.
11 *Butler*, above n 1, at [4].

the contributors to that expense was the running cost of the courtesy van service including Mr Butler's wages.[12] There was no suggestion in this Court that the Authority's conclusions about the finances of the Club were wrong or misplaced in some way.

[14] The Club's process in reviewing Mr Butler's position and how it dismissed him were unacceptable. The unfairness lay in not providing Mr Butler with an opportunity to be consulted over the potential redundancy before the decision was made. He was entitled to an opportunity to be adequately informed about the pending decision and to consult with his employer before that decision was made.[13]

[15] Those failures mean the Club cannot satisfy the test for justification in s 103A of the Act. The failure was more than minor.[14] It follows that the decision to dismiss Mr Butler was unjustified and he is entitled to remedies under the Act.

Lost wages claim

[16] Mr Austin, Mr Butler's advocate, criticised the Authority's determination because it awarded two weeks lost wages. Instead, 13 weeks' worth of wages were claimed, totalling $8,002.80. No allowance was made for the Club having already paid to Mr Butler what the Authority awarded.

[17] Mr Austin submitted the Club must be ordered to pay three months wages under s 128 of the Act because Mr Butler was unemployed for at least that length of time. That section reads:

> **128 Reimbursement**
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> (1) This section applies where the Authority or the court determines, in respect of any employee,—
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> (a) that the employee has a personal grievance; and
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> (b) that the employee has lost remuneration as a result of the personal grievance.

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12 At [22].
13 Employment Relations Act 2000, ss 4(1A) and 4(2)(e).
14 Employment Relations Act 2000, s 103A(5).

> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
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> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[18] In Mr Austin's submission it followed that the Court needed to correct the Authority's error and award the amount claimed. He drew support for this proposition from *Totara Hills Farm v Davidson* and disagreed with the Authority's reliance on *Waitakere City Council v Ioane* which was said to be irrelevant because that case was about the employee's contributory behaviour.[15]

[19] Among Mr Austin's criticisms of the determination was the approach used by the Authority to assess lost wages. It was said to involve inappropriate assumptions about how long it would have taken to complete consultation and its outcome.

[20] Two other errors were attributed to the Authority which were said to justify reaching a different conclusion on this aspect of the compensation. The first error was that the analysis had ignored the reality that there is one indivisible test for justification under the Act, exposing an inconsistency in the reasoning that considered separately the substance of the decision to dismiss Mr Butler from the procedure used. The second error was that the Authority's conclusion conflicted with its earlier finding that the Club's failure to consult was more than a minor omission.

[21] Before considering these submissions it is necessary to recall that Mr Butler challenged the whole determination under s 179 of the Act. In so doing he placed the entire matter before the Court. Where that election has been made the Court must make its own decision.[16] In making its own decision the Court is entitled to take into

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15 *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55 at [84]; *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA).

16 Employment Relations Act 2000, s 183(1).

account the Authority's determination and I consider that to be a helpful approach given the way Mr Austin presented the challenge.[17]

[22] I do not agree with Mr Austin's analysis of s 128. That section applies where the Authority or Court decides an employee has a successful personal grievance and has lost remuneration. Lost wages are fixed by ordering the employer "…to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration".[18] Section 128(2) does not mean, however, that the Court must order three months' ordinary time remuneration.

[23] The way this compensation is fixed was explained in *Ioane* and in an earlier decision of the Court of Appeal: *Telecom New Zealand Ltd v Nutter*.[19] While *Ioane* was about contributory conduct, the judgment of William Young J made comments about the correct approach to determining compensation in cases where dismissal is held to have been unjustifiable on procedural grounds.[20] He said that if it was likely that a fair process would have resulted in Mr Ioane's justifiable dismissal an allowance for that possibility should have been made in assessing damages payable to him. The Judge commented that, if a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the council's unfair process was not causative of any significant loss of remuneration.[21]

[24] Those comments in *Ioane* summarised the earlier decision in *Nutter*, where William Young J was also a member of the Court.[22] The comments in *Ioane* referred to a discussion in *Nutter* of a counterfactual analysis; that is, a hypothetical question as to how the plaintiff would have been placed in the absence of the legal wrong in issue.

[25] In *Nutter* the Court of Appeal described this situation in the following way:[23]

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17 *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA) at [4].
18 Contribution is dealt with separately in s 124.
19 *Ioane*, above n 15; *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315.
20 *Ioane*, above n 15, at [22]-[26].
21 At [24].
22 *Nutter*, above n 19.
23 At [73]

> The making of any compensation award involves the asking and answering of a hypothetical question as to how the plaintiff would have been placed in the absence of a legal wrong in issue – in other words, counterfactual analysis. The longer the period in respect of which compensation is sought, the more uncertain and speculative the assumptions underlying the eventual award becomes. …

[26] Relevant to this case the Court said:[24]

> … For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed. …

[27] Subsequently, in *Sam's Fukuyama Food Services Ltd v Zhang* a differently constituted Court of Appeal endorsed *Nutter*.[25]

[28] I do not accept, therefore, Mr Austin's submission that s 128(2) imposed an automatic requirement for compensation of at least three months' ordinary time remuneration. That would be inconsistent with *Nutter*, *Ioane* and *Sam's Fukuyama Food Services*.

[29] In referring in a shorthand way to *Ioane*, the Authority was taking into account a counterfactual analysis.[26] That analysis is required here because, while Mr Butler was unjustifiably dismissed, the reason for that decision is the absence of any consultation with him.

[30] There was no dispute that the Club faced financial difficulties. Mr Butler did not attempt to argue that the redundancy lacked genuineness because the Club's finances were better than he was led to believe. Instead, Mr Austin concentrated on saying that, had consultation been undertaken properly, Mr Butler may have retained his employment. Effectively he was cautioning against leaping to the conclusion that dismissal was inevitable.

[31] The alternatives mentioned by Mr Butler as being suitable to explore, during consultation, are unlikely to have taken long to assess. He said he would have liked to have had the opportunity to discuss whether it was viable for the Club to be open at

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24 At [81].
25 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [26].
26 *Ioane*, above n 15.

all on two days of the week, or whether the bar could have been staffed by volunteers on certain days when it was not usually well attended. He said he could have discussed whether savings could be made by staffing the early part of the bar shift each day with volunteers.

[32] I think it is unlikely that consultation, seeking savings measures elsewhere, such as by reducing or removing other Club services, would have taken long to conclude. I agree with the Authority that it is likely that consultation over the proposal to end the van service, and considering Mr Butler's possible alternatives, would not have taken more than a further two weeks. Given the common ground, that the Club had financial problems, a different outcome was very unlikely.

The claim for humiliation and loss of dignity

[33] Mr Austin's submissions criticised the Authority's decision to award $7,000 compensation under s 123(1)(c)(i) of the Act. He did so by observing that it was unclear how the Authority isolated and distinguished between feelings that arose from the unfair process and those that were associated with the loss of a job.

[34] Mr Austin's submissions sought compensation of $18,000, reduced from the amount sought in the statement of claim. Evidence relied on to support that claim was about the consequences Mr Butler faced on being dismissed. Mr Butler had described being shaken, upset and shocked when learning of his dismissal. He had no advance warning and said he was blindsided. That was because he was informed of the Club's decision to dismiss him abruptly on 3 September 2019, without further discussion.

[35] The balance of the evidence to support this claim was of a disturbed sleep for two or three months. Mr Butler described being withdrawn and having cut himself off from social contact, although he has now joined another Club elsewhere. He mentioned being short-tempered and to becoming angry when he had to talk about what had happened to him.

[36] The Court was invited to apply the banding approach in *Waikato District Health Board v Archibald*, as subsequently applied by the Court in cases such as *Hong v Auckland Transport*.[27]

[37] In *Archibald*, the Court proposed the adoption of bands to provide some consistency to fixing compensation under s 123(1)(c)(i). Three bands were proposed; band 1 involving low-level loss or damage, band 2 involving loss or damage in a mid-range and band 3 involving high level loss or damage.[28] Subsequently, in *Richora Group Ltd v Cheng*, the Court reviewed the bands and the compensation that might fall into each of them.[29] Band 1 was assessed at $0–$10,000, band 2 at $10,000–$40,000, and band 3 at over $40,000.

[38] Mr Austin submitted Mr Butler's case fell into band 2 involving mid-range loss or damage. An attempt was made to draw a comparison with *Hong*, where the Court awarded compensation of $28,500 for an unjustified suspension causing disadvantage and an unjustified dismissal, after a deduction for contributory conduct.[30] In that case the plaintiff felt ridiculed and demeaned by what happened to him, compounded by a sense of injustice at the employer not adequately explaining what he was said to have done and the instructions he was said to have failed to follow.

[39] Assessing compensation is an inexact science.[31] The assessment process can, therefore, cause difficulties in establishing and maintaining a degree of consistency across like cases while reflecting the individual circumstances of a particular case.

[40] In *Archibald*, the Court noted that a review of awards for compensation under s 123(1)(c)(i) revealed a broad range. In that case, which also involved redundancy, the Court said the central issue about quantification was the extent of the injury or loss sustained by the employee as a result of the unjustified action. The Court observed that, in cases involving a substantively justified but procedurally flawed dismissal,

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27 *Waikato District Health Board v Archibald* [2017] NZEmpC 132; *Hong v Auckland Transport* [2019] NZEmpC 54.
28 At [62].
29 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].
30 *Hong*, above n 27, at [106].
31 *Archibald*, above n 27, at [62].

such as redundancy, the injury or loss which would likely have followed, in any event, must be put to one side.

[41] Mr Butler's evidence about the impact on him was slight and some of it, such as his withdrawing from social contact at the Club, stems from the inevitable consequence of dismissal for redundancy rather than the flawed process. He attempted to refer to a further impact on him because of a speech given by the Club's president at a farewell function for him which contained what he considered to be ambiguous remarks about the reason for his departure. He did not fully explain the remarks but referred to two Club members approaching him afterwards concerned that there had been some impropriety in the losses sustained by the van service.

[42] I am not persuaded that any weight should be placed on this evidence. The Club did not dismiss Mr Butler for any reason other than redundancy because it could not afford the van service. Those Club members he said approached him did not give evidence and the remarks said to have been made were only vaguely described by Mr Butler. The speech was after the dismissal and at a farewell function to recognise his service and departure, where it seems unlikely that such allegations would be made. I consider it is unlikely that the audience would have taken anything untoward from what was said.

[43] The comparison between this case and *Hong* is not apposite.[32] Mr Hong's dismissal was not a redundancy and he did not know what had gone wrong. Mr Butler knew what the reason for his dismissal was. Further, bearing in mind what was said in *Nutter*, it is the damage flowing from the circumstances of Mr Butler's dismissal that need to be taken into account, not those which would follow from the inevitability of his dismissal for redundancy.[33]

[44] This case falls within band 1 in *Richora*.[34] The impact on Mr Butler was reasonably low-level and not long lasting. That would suggest compensation

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32 *Hong*, above n 27.
33 *Nutter*, above n 19.
34 *Richora*, above n 29.

somewhere in the range of $5,000–$10,000. Like the Authority, I consider $7,000 is appropriate.

[45] Separately, there was a challenge to the costs award by the Authority. The basis of this challenge was that, if Mr Butler succeeded in increasing the compensation awarded to him it would be appropriate to increase costs in the Authority to take account of that success. The basis of this submission was that Mr Butler had offered to settle for $10,000 pursuant to s 123(1)(c)(i) of the Act, and a contribution to his costs of a further $2,500. Underscoring this part of the challenge was Mr Austin's submission that if the Court decided to increase Mr Butler's compensation, so that the amount exceeded what was offered in settlement, an uplift in costs in the Authority was justified.

[46] Mr Butler has not succeeded in increasing the remedies awarded by the Authority. This part of the claim cannot succeed and the Authority's costs order remains undisturbed.

Outcome

[47] Mr Butler's challenge is dismissed.

[48] There is no order for costs.

K G Smith
Judge

Judgment signed at 3.30 pm on 2 June 2021