IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 151
EMPC 58/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	YAN ZHANG Plaintiff
AND	TELCO ASSET MANAGEMENT LIMITED Defendant

Hearing:	3, 4 and 5 September 2019 (heard at Wellington)
Appearances:	A Espie, counsel for the plaintiff T Cleary, counsel for the defendant
Judgment:	23 October 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Yan (Johnny) Zhang was an assistant accountant within the finance team at Telco Asset Management Ltd (Telco). After some five and a half years employment, his position was made redundant.

[2] He raised a relationship problem which ultimately resulted in a determination of the Employment Relations Authority upholding his claims and awarding remedies.[1]

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1 *Zhang v Telco Asset Management Ltd* [2018] NZERA Wellington 84.

[3] However, he was dissatisfied with the extent of the remedies and brought a late non-de novo challenge to the determination. Leave was granted to bring the challenge out of time.[2]

[4] The challenge relates to five aspects of the findings made by the Authority as to:

a) compensation for humiliation, loss of dignity and injury to feelings;

b) lost wages;

c) contributory conduct;

d) whether a penalty should be imposed for a breach of an obligation of Mr Zhang's employment agreement that there be an annual remuneration review; and

e) whether a penalty should be imposed regarding an asserted breach of good faith when carrying out the redundancy process.

[5] There was no cross-challenge by Telco, either as to the liability findings made against it or as to certain paragraphs relating to remedies which were not the subject of challenge by Mr Zhang.

[6] Prior to the hearing, I issued a direction as to the nature and scope of the non-de novo challenge, as required under s 182(3) of the Employment Relations Act 2000 (the Act). As I noted when dealing with this aspect, the making of such a direction involves a careful analysis of pleadings in order to determine the issues. I also observed that the Court is required to exercise a discretion in making the direction; s 182(3) does not contain any restrictions as to the exercise of that discretion, although, in my view, it is one which must be exercised in a fair, reasonable and rational way.

[7] After receiving detailed submissions from counsel on this issue, I directed that the nature and extent of the hearing would be in accordance with the five issues raised

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2 *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 22.

in the statement of claim, each of which would require a consideration as to whether the Authority erred in fact and in law.[3]

[8] At the hearing the parties led a great deal of evidence on all the topics the Court was required to consider. The starting point, however, must be the Authority's determination, to which I now turn.[4] Its findings, except where indicated, will be the starting point of the Court's analysis.

The Authority's determination

Background

[9] The Authority began by explaining the employment relationship problem it was required to resolve. It stated Mr Zhang had been employed by Telco at its Wellington office for almost five and a half years until 14 April 2017 when his position was disestablished.

Summary of relevant information

[10] The Authority then referred to three particular topics.

[11] First, it noted that Telco was one of a group of seven companies; and that, between August 2015 and early 2017, three of these were divested from the group. This included Isys Corporation Limited (Isys) which was sold on 31 January 2017.[5]

[12] Then, it described Mr Zhang's role. It found Mr Zhang worked as an Assistant Accountant within Telco's finance team, which comprised seven positions in total, including a Chief Financial Controller, Ms Mee Yen Sim. It noted that the company's position was that Mr Zhang's position was unique within the team, with his role focusing primarily on financial document processing.

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3 Minute of 9 May 2019, paras [5]-[10].
4 *Zhang v Telco Asset Management Ltd,* above n 1.
5 At [6] and [7].

[13] For his part, Mr Zhang rejected any suggestion his role was so limited but agreed during the investigation that document processing was a significant portion of the role.

[14] The Authority found that, immediately prior to February 2017, Mr Zhang's workload was predominantly spread between invoice processing for Isys, and for an external client, Event Cinemas. He also undertook some additional administrative work for the balance of the companies in the group as well as debt recovery work for Isys.[6]

Initiation of the restructure

[15] The Authority moved on to describe the company's initiation of a restructuring process. It found that Ms Sim undertook an evaluation of the workload within the financial team as a consequence of the divestment of three companies over the recent past, and the successful implementation of ongoing process efficiencies. This work was undertaken in February 2017. She formed the view that Mr Zhang's position was most affected by these changes and that no other role in the team was materially affected by the Isys sale or involved comparable processing work.[7]

[16] Having obtained approval from the Managing Director of the group, Mr Keith Mitchell, to restructure the finance team, she met with Mr Zhang on 27 February 2017 and informed him of a proposal to reorganise the team. She provided him with a letter which said there was a reduced work volume within the team due to the sale of two companies. Then she said that the majority of work undertaken by the Telco finance team for Isys was undertaken by one person, and that work volume was the "majority time component" for that role. She accordingly proposed that Mr Zhang's role be disestablished, since, in that role, he had been previously responsible for the Isys work; and that other existing roles in the finance team would be unchanged. She invited feedback by 4.00 pm on 3 March 2017. She suggested that Mr Zhang include in his feedback any changes to the proposal, with reasons. The company would then consider and review the feedback.

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6 At [8]-[12].
7 At [13].

[17] The Authority also said that no other information was provided to Mr Zhang at this stage; and that the timeframe was later extended at Mr Zhang's request.

The exchange of correspondence and information

[18] The next topic dealt with by the Authority related to a number of exchanges which occurred between 6 and 9 March 2017, between Mr Zhang, Ms Sim and Mr Mitchell.

[19] The Authority described Mr Zhang's first response which was sent on 6 March 2017 to Ms Sim, copied to Mr Mitchell and another director. He said Isys work was neither a majority component of his role, nor did it comprise a majority portion of the work undertaken by the finance team for Isys. He stated that the bulk of Isys work was performed by Ms Sim herself and another staff member. He also said all team members should be considered for redundancy.

[20] Then the Authority referred to the fact that, in his reply, Mr Zhang made a range of accusations concerning Ms Sim's practices as a chartered accountant. He said she had purposely distorted information on which the proposal was premised and intimated she frequently "abused accounting standards" when reporting information. He questioned why she was employed and recommended Mr Mitchell investigate her activities across the wider group. He concluded his response by advising he was reserving his right to complain to Chartered Accountants Australia and New Zealand (CAANZ), Ms Sim's professional regulatory body.

[21] Next, the Authority referred to a relatively lengthy response given by Mr Mitchell, based in Auckland, to Mr Zhang the following day. The Authority summarised Mr Mitchell's correspondence as follows:

> - The restructure was genuine. The sale down of various businesses over the past year impacted on Mr Zhang's role the most and there was a limited requirement for the deployment of his skill set within the finance team.
>
> - Measured by the processing data in Telco's SAP finance platform:
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> – there had been an overall decline in work (estimated at approximately 50 hours per week) for the finance team,

- just under 40% of Mr Zhang's role was dedicated to the Isys business, and was approximately 80% of work undertaken by the team for Isys each month.

- The balance of the existing roles in the finance team were held by team members with either tertiary qualification skill sets in accounting and/or finance, or specialist expertise not evident in Mr Zhang's skill sets.

- Mr Zhang's role was largely limited to data processing which had dramatically reduced with the sale of Isys leaving him with only the data processing work he performed for Events Cinemas as the bulk of the data processing work.

- The restructuring proposal was formulated on grounds that the reduced work volume in the finance team still required the standard or qualifications held by the four individuals with finance/accounting qualifications whereas the remaining data processing work undertaken by the team (being approximately 40% of Mr Zhang's present role i.e. Event Cinema and balance miscellaneous other work for other group companies), could be shared across existing roles within the finance team.

- The restructuring proposal was a matter between Mr Zhang and Ms Sim. Mr Mitchell advised he did not wish to intervene in the process further but extended the period by which Mr Zhang could respond to the proposal until 4 pm on Thursday 9 March.

- The allegations against Ms Sim were very serious where Mr Zhang alleged Ms Sim had engaged in financial practices which disadvantaged or discriminated between shareholders. Mr Mitchell asked Mr Zhang to provide further detail regarding the complaint which he would then investigate. Any investigation was separate to and did not affect the proposal process.

[22] The Authority stated that Mr Zhang wished to verify Mr Mitchell's analysis. There was a disagreement about the appropriateness of some material Mr Zhang requested and whether Mr Mitchell had authorised the provision of information from Telco's financial systems platform (SAP). The Authority said Ms Sim had said Mr Zhang was provided access to all material on which the proposal to restructure was based.[8]

[23] The Authority went on to describe Ms Sim supplying Mr Zhang with a table setting out the number of Isys-coded transactions entered into SAP by each position over the 13 months prior to 31 January 2017, which the Authority described as the

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8 At [20].

transaction volume. Almost every member of the team posted at least one financial document concerning Isys work over the previous year. Three team members, including Mr Zhang, routinely engaged in Isys matters. The data input of the remaining staff appeared to have been irregular and limited in volume. By contrast, Mr Zhang's role was recorded as uploading 2,733 Isys-related documents over the material timeframe – over 3.5 times more than the next most frequent user.[9]

[24] Mr Zhang furnished his final written response to Telco's proposal on 9 March 2017. On the topic of qualifications, the Authority said he referred to a range of diplomas he held in accounting as well a certificate in computer language. He disputed both Mr Mitchell's appraisal regarding the apportionment of Isys work and Ms Sim's transaction volume assessment. He included two tables he had devised.[10]

[25] In the first table, Mr Zhang removed the quantum of transactions he regarded as having been wrongly apportioned. With reference to the now revised table he said his work on Isys amounted to approximately 10 hours per month. The second table was said to reflect the proportion of time he engaged in Event Cinema's work as 77.31 per cent; this compared with 22.69 per cent of his time being spent on Isys work.

[26] Then, the Authority said, Mr Zhang commented on the number of chartered accountants who had been imprisoned in New Zealand; he advised Ms Sim should be removed from the register. He warned again that he reserved his right to complain to CAANZ.[11]

[27] Mr Zhang concluded his response by agreeing there were good reasons for downsizing the finance team, but there was no genuine reason to disestablish his role. He proposed that Telco fire Ms Sim for incompetency, internally promote an experienced accountant as finance manager, and return work allocated to another staff member several years earlier to him.[12]

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9 At [21].
10 At [22].
11 At [24].
12 At [25].

[28] Then the Authority stated that on 14 March 2017, Ms Sim wrote to Mr Zhang, in a letter which contained the following material points:

> ... the company does not agree with the analysis set out in your feedback. We maintain that the company's analysis provided to you more accurately reflects the work volume distribution and required skill sets across the Finance team in particular the role that you currently perform within the Finance team. Your feedback did not address the commercial reality presently facing the company that there has been a substantial decline of work volumes specifically the role you presently perform and there is insufficient remaining work volume within the finance team to suit or to retain your skill sets in a full time position.
>
> ... your position with the company has been disestablished. Unfortunately, and for the reasons discussed the position you hold is no longer required by Telco and is surplus to Telco's requirements. Regrettably we are unable to offer you any other alternative position within Telco and, as a result, your employment with Telco will also end.
>
> Your notice period, in accordance with your employment agreement is one month effective from today.

[29] Mr Zhang's employment ended on Friday, 17 March 2017. He was paid three months' salary as compensation for redundancy in accordance with his contractual entitlement as well as the balance of his notice period and any outstanding wages and holiday pay.[13]

The Authority's description of its investigation

[30] The Authority then summarised the process it had adopted in investigating the employment relationship problem, relevant legal provisions, and described the issues which it was required to resolve.

[31] The first of these was whether Mr Zhang had been fairly selected for redundancy. The Authority said that each party's approach to the restructuring process was problematic, although different in nature and substance.[14]

[32] Addressing the approach taken by Telco, the Authority was satisfied that the basis for selecting Mr Zhang for redundancy was premised on its view that the loss of Isys had materially impacted in his workload. The Authority therefore needed to

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13 At [27].
14 At [38].

assess whether, at the time Mr Zhang was dismissed, Telco had reasonably established that proposition.[15]

[33] Mr Zhang's prime contention was with Telco's assertion that Isys comprised 40 per cent of its workload and 80 per cent of overall finance team input with regard to Isys. Mr Zhang had contended that Telco was required to ensure the figures were correct but did not. On this basis, he asserted his dismissal was unjustified.

[34] The Authority found Mr Zhang had taken an unduly literal approach to the content of Telco's initial analysis. First, it was couched in words and phrases that indicated it was an approximate view only.

[35] The Authority then recorded that, similar to Mr Mitchell's analysis, the figures that informed Ms Sim's view regarding Mr Zhang's workload were largely extracted from Telco's SAP platform.[16]

[36] The Authority recorded Ms Sim as telling the Authority that according to SAP data, Mr Zhang's Isys processing work occupied 30 to 35 per cent of his total workload. She estimated two hours per day on average was likely apportioned to that work. Event Cinema activities were assessed at 50 to 60 per cent of Mr Zhang's workload and undertaken over three hours per day. She said a further two hours per day were likely occupied by recovery of Isys debts (not recorded in SAP) or other tasks. She accepted SAP did not provide 100 per cent scientific measure of all work but said it was highly suggestive of work-task volume – particularly with Mr Zhang's role, which was proportionately high in financial document processing.[17]

[37] The Authority found that in stark contrast to this was Mr Zhang's assertion as set out in his first table supplied to Telco, the average time he spent on Isys work per month was 40 hours (in effect approximately six to seven per cent of his workload). The Authority said that the essence of Mr Zhang's argument was that there was no correlation between the number of transactions recorded in SAP – the work volume –

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15 At [39].
16 At [42].
17 At [43].

and the amount of time required to complete a particular transaction. The Authority found there was force to Mr Zhang's contention.

[38] Ms Sim had conceded that she did not make inquiries about the length of time needed to complete Mr Zhang's Isys functions. Other than to state it did not accept his analysis, Telco did not directly respond to this aspect of Mr Zhang's opposition to its workload evaluation.[18]

[39] The Authority went on to find that, when faced with a significant disparity between its analysis and that of Mr Zhang in respect of his Isys work, a fair and reasonable employer could be expected to review its assessment to ensure it was correct before proceeding to conclude that the workload had materially diminished. Telco did not do this. The procedural failing meant it could not be certain of what proportion of time Mr Zhang's work time comprised of Isys activities. In turn, it was then unable to assess whether the loss of Isys impacted on his position.[19]

[40] Mr Zhang's assessment, however, also presented difficulties. On his analysis, his Isys workload was very limited prior to it being sold. That information tended to support a conclusion that this aspect of his workload had already diminished, likely as a result of Telco's ongoing programme of implementing improved efficiencies. The Authority, however, considered that the onus sat with the employer to establish that the reason for the dismissal was on grounds it could reasonably hold at the time of the dismissal.[20]

[41] Then the Authority found that there was no alternative evidence, separate to that of the SAP data which did not provide a reliable gauge of Mr Zhang's Isys workload, to demonstrate Mr Zhang's position was materially affected by the sale of Isys. Thus, Telco had not been able to establish that the grounds on which it wished to rely were the substantive cause for Mr Zhang's dismissal, and the dismissal was therefore unjustified.[21]

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18 At [45]-[46].
19 At [47].
20 At [48]-[49].
21 At [50].

[42] The Authority went on to identify an additional flaw in the restructuring process. It found that, faced with an overall decline in work for the finance team, a better approach would have been for Telco to notify all team members of the prospect of restructure, the reasons for it, and to allow all staff to comment on the proposal and suggest alternatives. If, following that process, Telco remained of the view there was insufficient work to sustain the current number of positions in the finance team, it was entitled to assess what skills amongst staff it required and/or no longer needed.[22]

[43] The Authority accepted it was reasonable of Telco to want to retain employees with graduate degrees. However, there were three positions, including that of Mr Zhang, held by staff without degree qualifications. Each role involved invoice-processing work. One position in particular involved work that Mr Zhang had, in part, performed previously.[23]

[44] The Authority found that, as a fair and reasonable employer, Telco could have been expected to advise each of these employees of the criteria by which it intended to select who was best suited to perform the remaining processing work and allow each employee an opportunity to promote his or her respective skills and attributes to Telco for its consideration.[24]

[45] The Authority concluded that by considering only Mr Zhang for redundancy, Telco avoided a transparent selection process. There was some evidence that two of the other employees had expertise relevant to particular clients. At the completion of a transparent selection process, it might have been the case that Telco could have reasonably concluded Mr Zhang did not have the breadth of skills to perform the remaining work. But that conclusion could only be speculative. The omission to allow Mr Zhang any possibility to contest for the work in this way, albeit he may not have been considered a strong contender, was not the action of a fair and reasonable employer and was unjustified. These procedural failings were not minor.[25]

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22 At [52].
23 At [53].
24 At [54].
25 At [55]-[56].

[46] Accordingly, the dismissal was both substantively and procedurally unjustified. I interpolate that the Authority was satisfied therefore that Mr Zhang had established a dismissal grievance with regard to the termination and a disadvantage grievance with regard to the prior redundancy process.

[47] The Authority then stated that Telco's approach to the restructuring was misguided, but there was no evidence that it was constructed to mask an ulterior motive to terminate Mr Zhang's employment, as he had alleged.[26]

Remuneration review

[48] Next, the Authority considered whether a penalty should be awarded for a failure to conduct a remuneration review in 2016.

[49] The applicable individual employment agreement (IEA) contained a provision that remuneration would be reviewed annually in terms of the company policy of adjustment which would take account of both performance in the position and market conditions. Any review would not necessarily result in an adjustment to remuneration.

[50] In a finding which is contested on the challenge, the Authority stated the evidence on the matter was scant; and that Telco's omission to undertake a remuneration review in 2016 with Mr Zhang appeared to have been an oversight.

[51] In an uncontested finding, the Authority said that the failure to conduct the remuneration review was not a minor or technical breach where there was a clear obligation on Telco to conduct its review according to the contractual terms agreed between the parties. The Authority found that Mr Zhang had not brought this matter to Telco's attention until two months after his dismissal, and almost a year after the time by which he could have expected the review to have occurred.[27]

[52] In a finding which is challenged, the Authority said that the omission made no material difference to Mr Zhang where no staff member received a salary increase in

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[26] At [57].
[27] At [60].

2016. No evidence of harm was provided. The Authority declined to impose a penalty.[28]

Remedies

[53] The Authority then dealt with remedies arising from the established grievances.

[54] It noted Mr Zhang was seeking six months' lost wages. In an uncontested finding, the Authority said he had provided evidence of applications made over that period to obtain alternative employment and that it was satisfied he had sought to mitigate his loss.

[55] Then, the Authority dealt with the question as to whether it would be appropriate for the Authority to exercise its discretion under s 128(3) of the Act and make orders for lost wages beyond the three-month period set out in s 128(2).

[56] In findings which are challenged, the Authority stated Mr Zhang's complaint alleging professional impropriety by Ms Sim was particularly serious. He had been asked to supply further details about his complaint but did not. The Authority said it had no doubt that the unsubstantiated claims fractured the employment relationship. But for the dismissal, Telco would have been entitled to commence a disciplinary inquiry. The Authority considered it unlikely the employment relationship would have lasted beyond the three-month timeframe, and it is unlikely any additional wages would have been the result of the personal grievance.

[57] Accordingly, the Authority went on to find that Mr Zhang was entitled to be paid three months' remuneration, which was $12,231.25 minus PAYE, subject to contribution.[29]

[58] Turning to compensation for humiliation, loss of dignity and injury to feelings, the Authority noted Mr Zhang requested $40,000. It found that the actions which had disadvantaged him formed part of the factual matrix leading to his dismissal, and compensation was therefore dealt with on a global basis.

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[28] At [61].
[29] At [64].

[59] The Authority recorded that Mr Zhang had denied his statements concerning Ms Sim were the product of an emotional outburst in response to the proposal. It said that those matters did not therefore inform the Authority's assessment as to the impact of the dismissal, and its surrounding process, on him.[30]

[60] In a finding which is contested, the Authority concluded that Mr Zhang felt humiliated and embarrassed by his dismissal and in particular that he had to notify his wife of the circumstances. An award of $10,000 compensation was appropriate, subject to contribution.[31]

[61] Dealing with contribution, the Authority made several contested findings. First, it was found that, although a redundancy is regarded as a no-fault dismissal because an employee through no fault of their own is losing his or her job, in this case, Mr Zhang's conduct had substantially contributed to the dismissal.[32]

[62] Second, the Authority accepted Mr Zhang was concerned that his position would be disestablished. But the nature of the allegations he made against Ms Sim, coupled with threats and inferences to report her to external bodies, was malicious and inexcusable. The Authority found that they were undoubtedly aimed to intimidate Ms Sim and discredit her reputation.[33]

[63] Third, when questioned by the Authority, Mr Zhang stated he stood by his allegations and that he understood the gravity of these against a chartered accountant. He continued to allege serious professional impropriety by Ms Sim, albeit he was unable to describe a single incidence of the kind of conduct he had asserted.[34]

[64] Fourth, the Authority found Mr Zhang's analysis sat alongside the allegations he had made, so it was understandable Ms Sim perceived his information to be unreliable. It was also understandable that she considered there could be no productive discussion between them on the issue. Ms Sim had said she was upset by Mr Zhang's

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30 At [67].
31 At [68].
32 At [70].
33 At [71].
34 At [72].

correspondence, and the Authority's impression was she had understated the effect his complaints had on her.[35]

[65] Fifth, the Authority concluded Mr Zhang had to take responsibility for creating a situation where it was reasonable of Telco to form a view he was unwilling to engage with it in good faith. That conduct was both blameworthy and, in part, causative of the dismissal. Contribution was assessed at 50 per cent.[36]

Breach of good faith

[66] The final topic addressed by the Authority related to penalties for breach of good faith. The Authority stated, in a contested finding, that the primary aspect of this portion of Mr Zhang's claim concerned Mr Mitchell's analysis of his workload. The Authority reiterated that Mr Mitchell's analysis was never intended to be an exact appraisal of Mr Zhang's workload, and concluded this was not a matter for which it was willing to impose a penalty.[37]

Result

[67] After taking into account contribution, Telco was ordered to pay Mr Zhang $6,115.26 (minus PAYE and any other lawful deductions agreed between the parties) for lost wages and $5,000 for compensation.[38]

Applicable principles when hearing a non-de novo challenge

[68] Section 179 of the Act relevantly provides for challenges to determinations of the Authority in these terms:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
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> (2) …
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> (3) The election must—

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35 At [74].
36 At [75].
37 At [76].
38 At [77].

(a) specify the determination, or the part of the determination, to which the election relates; and

(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as **a hearing *de novo***).

(4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—

(a) any error of law or fact alleged by that party; and

(b) any question of law or fact to be resolved; and

(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

(5) …

[69] As a non-de novo challenge, the present proceeding is one that falls within the parameters of s 179(4).

[70] A full Court discussed the applicable principles in respect of this type of challenge in *Xtreme Dining Ltd, (T/A Think Steel) v Dewar*.[39] It said:

> [16] Next, it is appropriate to refer to the relevant principles which apply to the hearing of a non de novo challenge since these differ from those relating to a de novo challenge:
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> a) A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.
>
> b) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.
>
> c) Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. The Court must make its own decision, as required by s 183 of the Act.
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> d) Section 182(3) of the Act requires that where an election states that the person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

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[39] *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 (footnotes omitted).

> [17] One of the difficulties which parties must consider when electing to proceed on the basis of a non de novo hearing is the scope and extent of the evidence which will be before the Court on such a challenge. No transcript is kept of the evidence received at an investigation meeting, since there is no requirement on the Authority to do so. The Act also stipulates that in its written determination the Authority need not set out a record of all or any of the evidence heard or received, or record or summarise any submissions made by the parties. These features are consistent with the statutory intention that the Authority is required to dispose of problems and disputes promptly and without undue regard to technicalities. Consequently, when electing a non de novo challenge, careful attention should be given to the issue as to whether any additional information should be before the Court beyond that which is apparent from the determination under challenge.
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> [18] In the present case, the parties required the Court to consider not only the evidence referred to in the determination, but also briefs of evidence and documents which had been placed before the Authority, as well as the extensive oral evidence which was led.
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> [19] Although this approach resulted in a substantial quantity of evidence being placed before the Court, the statutory provisions require a focus on the conclusions reached in the Authority's determination, and whether there are errors of fact and/or law in any of the asserted respects. In this case, the challenge relates to remedies only; however, that includes an assessment of issues relating to contributory fault. Accordingly, the Court must obtain a detailed understanding of the factual context. For the purposes of this issue in particular, the Court must reach its own conclusions as to the sequence of events; only then can it determine whether there is an error of fact or law as to contributory fault. This is not a case where the additional evidence called in the Court comes into play only after an error of fact or law has been established.

[71] The procedural situation faced by the full Court in *Xtreme Dining v Dewar* was similar in some respects to that which arises here. As in that case, the present challenge relates only to remedies. The parties have led full evidence with regard to the history of the relevant interactions before the Court to enable it to obtain a detailed understanding of the factual context. This Court must reach its own conclusions as to the sequence of events which are relevant to the issues before it. Only then can it determine whether there is a relevant error of fact or law. Having regard to the broad direction as to the nature and extent of the hearing, this is not a case where the additional evidence called in the Court comes into play only after an error of fact or law has been established.

Analysis

Context

[72] Before dealing with the five individual issues which the Court must resolve, it is necessary to consider the evidence led before the Court as to context. This evidence will, as I discuss later, be relevant to the Court's review of several of the Authority's assessments.

[73] The first aspect of context relates to the circumstances of Mr Zhang and his wife, Ms Xu, both of whom were employees of Telco.

[74] In 2006, Ms Xu was employed by Telco as a senior accountant. In 2011 she returned to China to marry Mr Zhang. They decided to return to New Zealand. Ms Xu continued her role at Telco. Mr Zhang obtained a New Zealand residence visa under the family reunification policy which, thereby enabled him to live and work in New Zealand. Mr Zhang had qualifications that enabled him to obtain a position with Telco's financial team, and he did so from November 2011.

[75] In July 2016, Ms Xu took annual leave, followed by extended maternity leave, since she was expecting the couple's first child. An option of returning to work was left open, with the expectation she would advise Telco of this possibility in early July 2017. Mr Zhang continued to work, although he took paternity leave for five weeks during August and September 2016. The consequence of these developments was that from July 2016, the couple received one income – that of Mr Zhang only.

[76] A related issue is that Mr Zhang does not speak good English. He is able to communicate in written form, but has difficulty in articulating and comprehending English, as was evident when he gave his evidence to the Court via a Mandarin interpreter.

[77] The impact on him of redundancy, therefore, in early 2017 was potentially very significant. Not only were there obvious financial consequences for him and Ms Xu, but the prospect of him obtaining alternative employment was challenging, given the factors I have just outlined. This is self-evident, but it is confirmed by the fact that

even at the date of the hearing, he had not obtained employment following the termination of his employment by Telco in April 2017.

[78] At the time of the redundancy, Mr Zhang had been employed by Telco for some five and a half years. There is no doubt that he valued his employment. He enjoyed social activities with some fellow employees. Having regard to the responses he gave to the redundancy proposal, it would appear that Mr Zhang has analytical skills and an ability to follow routines in an orderly – if rigid – fashion.

[79] The various circumstances and dynamics I have just described were all known to the company prior to it entering into the redundancy process. As noted, it was foreseeable that undertaking a redundancy process could well have serious consequences for this couple, particularly given the challenges Mr Zhang faces when communicating in English.

[80] Ms Xu was upset by the prospect of Mr Zhang becoming redundant. When she gave her evidence, she was at the outset very distressed when referring to the circumstances which had occurred. She said the redundancy process was brutal. She described her feelings at the couple having a six-month old baby, and the prospect of no income; then the fact that she had felt compelled to resign in July 2017 at the end of her period of leave, because of the way the company had dealt with the redundancy of her husband. It is apparent that she was personally affronted by what had occurred.

[81] She also described the many arguments which ensued between her and Mr Zhang during the redundancy process, and later. Given the circumstances I have described, that is hardly surprising. The stress created by Mr Zhang's redundancy had ongoing effects which impacted significantly on his family life. This affected the way in which Mr Zhang responded to the Telco proposal to disestablish his position. As will be explained, he decided in effect that the best defence was attack.

[82] Turning to Ms Sim's position, it is evident Ms Sim did not find Mr Zhang easy to deal with. She described communication issues that had arisen in the past, when it had been necessary for her to communicate with Mr Zhang via Ms Xu. She detailed difficulties which had arisen at the time of Mr Zhang's 2015 pay review, and the fact

she had seen it as necessary to speak with Mr Zhang in the presence of Ms Xu. At least on matters relating to his income, I find Ms Sim did not consider communications with Mr Zhang straightforward. At the time of the redundancy process they became downright difficult.

[83] Ms Sim was a resolute manager. When, in the redundancy process, Mr Zhang was pressing for backup documentation as to her assessment of volumes of work for particular clients, she was offended at the request. The issue was, for her, one of trust, because the reliability of information she had provided about workflows was being challenged; her integrity was being challenged. She was reluctant to provide the additional information being sought. As counsel for Telco, Mr Cleary, put it in his submissions, the circumstances became "an immovable force meeting an irresistible object". Ms Sim on the one hand, and Mr Zhang on the other, were convinced that their own points of view were right.

[84] Finally, I refer to Mr Mitchell's role in the relevant events. He took the view that Mr Zhang reported to Ms Sim, not himself, and that it was for her as Chief Financial Officer to be primarily responsible for the redundancy process. Although he did reply to Mr Zhang's first response to the redundancy proposal, he declined to do so when Mr Zhang forwarded his second response. He referred it to Ms Sim. He then discussed the issues with her, but made it clear the final decision was for her. As I shall explain shortly, this left her in a very difficult situation.

Lost wages

[85] Mr Espie, counsel for the plaintiff, submitted in summary:

a) When dealing with the necessary counter-factual, the Authority erred by finding that Telco would have been entitled to commence a disciplinary inquiry into Mr Zhang's conduct during the redundancy process, and that it was unlikely the employment relationship would have lasted beyond three months.

b) A fair and reasonable employer could not have dismissed Mr Zhang for the statements he made. This was because Mr Mitchell had accepted in

his evidence to the Court that if Mr Zhang could not have substantiated his complaints about Ms Sim, this would have been a performance issue.

c) Mr Zhang had told the Court that he genuinely believed the complaints he raised about Ms Sim; and Mr Mitchell also accepted in his evidence that he did not have any information which indicated Mr Zhang did not believe in the concerns he raised.

d) There was a specific basis for all those concerns. In particular:

- Mr Zhang had identified significant errors in the redundancy proposal presented to him by Ms Sim, particularly as to his workload, and the impact of the sale of Isys on his role. He believed these perceived errors could not be mistakes because Ms Sim was his direct manager and had responsibility for the Isys work of the finance team.

- Mr Mitchell had also accepted he would not take disciplinary action against an employee who raised a complaint about their manager that could not be substantiated.

- There was clear evidence that Mr Zhang held pre-existing concerns about Ms Sim's compliance with accounting standards, there being one example in 2014 and two in 2015 where he had raised this issue, although not with Mr Mitchell. These matters had never been investigated.

- Mr Zhang raised his claims about Ms Sim in circumstances where he faced the prospect of losing his role and his family losing its sole income; he was concerned the proposal to make him redundant was an attempt by Ms Sim to target him; he considered the redundancy proposal to be another example of Ms Sim behaving unethically; he sought to bring the errors he had identified in the proposal and his concerns about Ms Sim to the attention of company leaders,

including Mr Mitchell, in the hope he would put a stop to what Ms Sim was doing; and he set out his concerns about Ms Sim behaving unethically, including his past concerns, to make the seriousness of the issues he had identified clear.

- He said he did not raise the claims with the intention of trying to threaten or intimidate Ms Sim; he reserved his right to complain to the regulatory body about Ms Sim's conduct, and he was entitled to do so.

- There were no other grounds which would have justified dismissal. To the extent that Telco had sought to allege Mr Zhang, in an email to a colleague seeking access to protected data, misrepresented having authority from Mr Mitchell to access SAP, this was explained by Mr Zhang at the time. He said he needed to verify the assertions that were being made as to how much work he was processing. Moreover, Mr Mitchell at the time did not refer to this matter as being a disciplinary issue but said it would have been courteous for Mr Zhang to request the information via Ms Sim.

- If the Authority used flawed or erroneous reasoning, the Court should revisit the issue and substitute a decision which it considered to be appropriate.

[86] Mr Cleary submitted in summary:

a) The starting point for assessments under s 128(3) of the Act is that any amount additional to three months' lost wages is discretionary.

b) The correct principles are explained in *Telecom New Zealand Ltd v Nutter*,[40] and in *Sam's Fukuyama Food Services Ltd v Zhang*.[41]

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[40] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA).
[41] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

c) In the Authority, Mr Zhang claimed six months' lost earnings and proved he had mitigated his loss to that extent, but no more. Six months' lost earnings therefore represent the upper ceiling of his claim, and he had no automatic entitlement to full compensation. There is no jurisdiction in this challenge to consider whether more than six months' lost wages might have amounted to full compensation.

d) The Authority correctly assessed the situation by finding it would have been open for Telco to commence a disciplinary inquiry. Seen objectively, Mr Zhang's various accusations were directly aimed to discredit Ms Sim, and were serious. He never provided Mr Mitchell with any particulars of the matters complained about, and they were without foundation. Mr Mitchell parked any possible disciplinary action as there was an ongoing redundancy process but had agreed with Ms Sim over restricting Mr Zhang's access to data. An inquiry would have led to discovering other complaints made by Mr Zhang, including one of bribery, as it related to Ms Sim buying an employee a work cell phone. He was told at the time to be very careful about such accusations.

e) There were a range of other possibilities which included not only the possibility of dismissal, but also resignation, or that Mr Zhang was made redundant legitimately, or that his wife returned to work and he resigned to take care of their child.

Discussion of s 128(3) of the Act

[87] In *Sam's Fukuyama*, the Court of Appeal confirmed the statements made by that court, in its earlier decision of *Nutter*.[42] The court emphasised that moderation was necessary, that the actual loss sets an upper ceiling on any award and is a logical starting point for the assessment; that the assessment of compensation must be individualised to the circumstances of the particular case; all contingences must be allowed for which might, but for the unjustifiable dismissal, have resulted in

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[42] *Telecom New Zealand Ltd v Nutter,* above n 40, at [74]-[77]; *Sam's Fukuyama Food Services Ltd v Zhang*, above n 41, at [24]-[26].

termination of the employee's employment; the assessment is to be made on a broad-brush basis.

[88] For the purposes of the counter-factual analysis, there are two areas where assessments must be undertaken in order to determine whether Mr Zhang's employment would have been terminated.

[89] The first relates to the statements made by Mr Zhang about Ms Sim. These need to be described in some detail.

[90] In his first response of 6 March 2017, Mr Zhang explained at length why he considered the facts relating to the disestablishment were in error, and why Ms Sim's approach was unfair. Then he stated:

> ...
>
> In particular [Ms Sim] ... previously spent much time on ISYS work, and provided low level finance and management services. Here are 2 of many examples: [(1)] [Ms Sim] abused accounting standards to cut ISYS profit for long time to strike [two shareholders], which [leaves] ISYS financial reports unable to reflect ISYS actual performance. It is worth to investigate whether she did the similar way to other group companies. [(2)] This proposal itself is the latest example, which shows [Ms Sim] has no ability to state the basic facts of financial work. How this people can be hired as financial controller???
>
> ...

[91] He went on to state that the proposal was based on "false facts" and that any conclusion based on them would be invalid.

[92] Then he stated that, as the group financial controller, Ms Sim had "deliberately distorted basic facts on the proposal and tried to disadvantage other staff". He said that such behaviour would be a breach of the Code of Ethics of the regulator and that he reserved his right to make a claim to that body.

[93] Mr Mitchell responded to Mr Zhang in his email of 7 March 2017. After stating why he considered the proposal was not unfair, was genuine, and that Mr Zhang had not been singled out, he addressed the remarks Mr Zhang had made about Ms Sim. He said he took the complaint as to an abuse of accounting standards very seriously

and would investigate once more information was provided. He asked for particular details, and then he stated that any investigation would be separate from the proposal to reorganise and would not affect that process.

[94] Mr Zhang did not provide the further particulars which had been requested.

[95] In his next response of 9 March 2017, after analysing the data which was by then available to him in some detail, Mr Zhang returned to his contention that Ms Sim had deliberately distorted basic facts, and that this would constitute a breach of CAANZ Code of Ethics. He went on to say that he knew several chartered accountants had been sentenced to prison, and that dozens were removed from their register in 2016. Then he stated that he believed Ms Sim should be removed from the register.

[96] When advancing a proposal for an alternative solution, to the effect that he should take back a previous role, he said that Telco should "fire the incompetent finance controller" and replace her internally with an experienced accountant.

[97] In his evidence, Mr Mitchell said that, had the issues been taken further, he would have needed to investigate whether Mr Zhang's criticisms of Ms Sim could be substantiated. He agreed that he had not undertaken that process; in cross-examination, he accepted this was a performance issue.

[98] It is also necessary to describe the further facts that may well have come to light if such an investigation had been undertaken. Although unknown to Mr Mitchell or Ms Sim until after the termination, Mr Zhang had previously referred to issues relating to Ms Sim's compliance with accounting standards on several occasions.

[99] In August 2014, he emailed CAANZ asking for advice as to the regulations or laws which would apply if a chartered accountant abused accounting standards by deliberately increasing or decreasing profit for a special purpose. He told the Court he did this because he believed Ms Sim had, without good reason, written off work in progress in reports, which meant that reduced profit was recorded. The response from CAANZ was to direct him to its customer service centre. There is no evidence that he took that issue further at the time.

[100] Ms Sim told the Court she had good reasons for taking the steps she did, and that she had explained these to both Mr Zhang and Ms Xu on many occasions.

[101] In his evidence in reply, Mr Zhang maintained his concerns, stating that the process of deferral and writing off costs which had been referred to by Ms Sim was not reliable. He also said that an inventory standard published by the New Zealand Accounting Standards Board to which Ms Sim had referred, was not the applicable standard because the financial statements in question concerned project-related materials which did not meet the definition of inventories. He said that this meant that the records in question did not reflect actual economic activities for performance. He said a standard relating to entities undertaking projects was applicable.

[102] In June 2015, Mr Zhang was concerned about a bonus accrual made by Ms Sim for shareholders, which was initially introduced, then reversed. He considered this was a "false expense", as the entity in question was not making a profit. He emailed one of the shareholders, setting out data which he said supported his concern. He said that Ms Sim was "typically abusing accounting standard[s]" and that he was going to report the matter to Mr Mitchell. He asked the shareholder whether he had any comments; he responded stating he was aware of the bonus accrual but did not realise its inclusion was contrary to normal accounting practice. He asked whether Mr Zhang had spoken to Ms Sim about his concerns. In his reply, Mr Zhang provided further information, which he said supported his assertion of "false accounting" and that Ms Sim had been involved in "bribery etc". The shareholder then told Mr Zhang he needed to make sure the facts were properly documented before raising an assertion of bribery with Mr Mitchell. He pointed out this was a very serious offence and he would need to be very sure as to what he was saying.

[103] In her evidence, Ms Sim stated that the provision for a bonus had been made in line with matching principles of the Generally Accepted Accounting Principles (GAAP) – a well-known set of accounting principles. Mr Mitchell had considered whether certain individuals would receive a pay rise; he had agreed to provide them with a bonus at the end of the financial year, providing they achieved budgeted earnings. A provision was accordingly made by Ms Sim. However, when the accounts were finalised at the end of the year, Mr Mitchell determined that no bonus would be

paid, as targeted earnings had not been achieved. The bonus accrual was accordingly reversed out. She said that such an approach was orthodox.

[104] In her evidence Ms Sim also said that she did not understand what the reference to bribery was and that she had never taken or induced a bribe. In reply, Mr Zhang said he used this term because he believed Ms Sim had used a company credit card to buy mobile phones and phone cases for other employees, which they did not need. Mr Zhang referred to a particular staff member who had told him that although he had a damaged cell phone, he was provided with a replacement one which he never used. It was unclear why this amounted to bribery. In her oral evidence, Ms Sim said she provided the cell phone when she was purchasing such devices for others and gave it to the employee in question under Telco's policy, which provided for the provision of mobile phones to assist staff in meeting the company's business objectives.

[105] These were, Mr Zhang said, the previous occurrences that had concerned him and to which he made brief reference in his emails responding to the proposed redundancy. They were the matters which he believed justified the derogatory statements which he made about past non-compliance with standards or laws. He also believed the past events were relevant to his belief that Ms Sim was deliberately distorting the facts about his work responsibilities.

[106] Any investigation of the issues as to the treatment of work in progress and bonus accruals would have involved a careful consideration of accounting standards approved by CAANZ and by the NZ Account Standards Board. No expert evidence was led by either party concerning the application of these standards to the circumstances described by Mr Zhang and Ms Sim. Chartered accountants must comply with many documented standards, not only those contained in GAAP. Accordingly, it is not appropriate to make a finding one way or another on the technical accounting issues. The assertion of bribery is in a different category. That allegation is not substantiated on the evidence before the Court.

[107] It is evident that Mr Zhang genuinely believed his views were correct. Even at the hearing, he was not willing to consider an alternate point of view on the issues relevant to the allegations he made about Ms Sim.

[108] Mr Mitchell, as noted earlier, said that any investigation of the statements made by Mr Zhang in his responses to the redundancy proposal would have been treated as a performance issue; and that it is likely an investigation would have revealed the emails Mr Zhang had sent to CAANZ, and to one of the minority shareholders, in 2014 and 2015.

[109] Any investigation, however, of Mr Zhang's responses would have to take into account the context in which he made the statements. He was obviously desperate to retain his employment, facing, as he said in evidence, the prospect of losing his job and his family losing their sole income. He also believed he was being targeted because he was the only employee being considered for redundancy; and that the data relied on was inaccurate.

[110] For present purposes, I find that a fair and reasonable employer could not have ignored this context. Such an employer could, however, have concluded that even if Mr Zhang genuinely believed Ms Sim had not complied with standards or company policy, the language he used to describe her was excessive and completely unjustified, even allowing for his difficulties in using English. Whatever the merits of the assertions he made as to breaches of accounting standards in the past, and as to the analysis of his workflow, he seriously overreacted when accusing Ms Sim of dishonesty, and suggesting she should be struck off the register or implying she should be imprisoned. Such an employer could have concluded when considering this performance issue that a warning was appropriate, but not that dismissal was warranted, in the particular circumstances.

[111] I do not consider that Mr Zhang's statement to a colleague when he was attempting to access SAP data for the purposes of analysis, that he was "taking tasks" from Mr Mitchell, was potentially a disciplinary matter. As mentioned, Mr Mitchell said at the time that, as a matter of courtesy, Mr Zhang should have raised the request with Ms Sim. This matter, if raised for investigation, could not have resulted in anything other than a warning, given that it arose in circumstances where Mr Zhang had a right to be provided with such information under s 4(1A)(c) of the Act.

[112] That, however, is not the end of the counter-factual analysis because there are the various further possibilities referred to by Mr Cleary in his submissions, as to how either party may have conducted themselves had Mr Zhang's employment not been terminated according to the process the company adopted. These included contingencies such as Mr Zhang being made redundant legitimately since he lacked the specialist skills which other employees held, that he may have resigned because of the way he had been treated, and that, when Ms Xu returned to work from maternity leave, he may have ceased work to care for their child. It was argued that for any of these reasons, Mr Zhang's redundancy may well not have survived three months beyond the date when his employment was actually terminated.

[113] For present purposes, I find Mr Zhang would not have resigned if he could possibility have avoided doing so and that he would have explored alternative employment options with Telco. The process may well have taken time to work through. But given Mr Zhang's strong views, it would have been difficult to reach a consensus as to the options, and redundancy may have only been a question of time. The return of his Ms Xu to the workplace, which was scheduled to occur on 1 August 2017 would have provided a logical time for this to occur given the personal circumstances of Mr Zhang and Ms Xu. That event was a little more than three months after the termination.

[114] Adopting a broad-brush assessment of the contingencies I have discussed, I do not consider the Authority's ultimate finding was in error. Although I have reached a different conclusion as to whether Mr Zhang would have been dismissed for what he said about Ms Sim, a consideration of other circumstances would likely have led to a similar result.

[115] Accordingly, this aspect of the challenge is dismissed.

Compensation: submissions

[116] Mr Espie submitted in summary:

a) The Authority erred in making the award of compensation it did and in failing to consider the compensation bands set out by the Court. The

award made was not consistent with the actual humiliation and distress suffered by Mr Zhang.

b) In developing the first point, he submitted that, whilst the Authority noted Mr Zhang had felt humiliated and embarrassed by his dismissal, and in particular he had to notify his wife of the circumstances, the Authority did not take into account the full range of matters which affected Mr Zhang, and which could reasonably be described as life changing. Counsel referred to Mr Zhang's evidence to the Court which included his considerable anger at the result of the redundancy proposal and his dismissal, his loss of confidence and difficulty in finding a new job, his embarrassment at being dismissed and then having to apply for financial help from the Ministry of Social Development as an unemployed househusband, his sadness and isolation on the last day of his employment, the effect the dismissal, and the events leading to it had on his personality which caused far-reaching damage to his family life with his wife and new-born son.

c) These effects had to be considered in light of the significant distress Mr Zhang had already experienced throughout the process that led to the restructuring which included feeling targeted because of the incorrect assessment of his workload and the fact that he was the only employee referred to in the proposal; embarrassment at telling his wife about the redundancy proposal and attempts to avoid this, and, when presented with a letter confirming his redundancy, feelings of embarrassment, depression and being aggrieved and angry that he had been treated unfairly.

d) A relevant fact was the response to the dismissal by Ms Xu. It was argued that compensation can remedy the effects on an employee whose family life is affected, as had occurred here.

e) Counsel then referred to recent authorities on banding, and submitted that, in light of those authorities, an award of $40,000 would have been

appropriate. Evaluating the Authority's assessment of $10,000 by reference to the banding approach showed that it erred.

[117] In summary, Mr Cleary submitted:

a) The Authority Member held an investigation meeting over the course of the day which involved hearing from Mr Zhang. This resulted in an award of $10,000, on a global basis, which was within range. The Authority weighed up the humiliation and embarrassment; and excluded from the assessment matters relating to his reaction to Ms Sim because this was not caused by the grievance.

b) No irrelevant factors were taken into account. The assessment was in accordance with the principles enunciated in *Nutter*,[43] including the requirement for moderation, reasonable consistency, and that compensation should match actual consequences.

c) Mr Zhang's unjustified reaction on several topics could not form part of the assessment, since his views were unfounded. This included his view that, after receiving the proposal, he was being personally targeted by a dishonest, unethical decisionmaker, and that Ms Sim and Mr Mitchell were using the redundancy as an excuse to have him dismissed. There was no objective evidence of any wrongdoing. The erroneous view Mr Zhang held would have significantly magnified the hurt that he felt over his redundancy. His views were a major reason for Ms Xu resigning her employment with Telco and led to some of the financial hardship described. These matters had to be excluded in the assessment.

d) The Authority was not required to refer to case law as to banding. In any event, reference to such authorities as *Waikato District Health Board v Archibald* would have made no difference.[44] The plaintiff in *Archibald* was assessed at being the middle of band 2. She was awarded $20,000

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43 *Telecom New Zealand Ltd v Nutter,* above n 40.
44 *Waikato District Health Board v Archibald* [2017] NZEmpC 132.

for unjustified dismissal following redundancy. The circumstances of the plaintiff in *Richora Group Ltd v Cheng*, whom the Court would have placed in band 3, are distinguishable.[45]

e) The amount ordered by the Authority was consistent with the average for more recent redundancy dismissals, according to a table of Authority determinations.[46] Counsel referred to the mean figure of Authority awards involving redundancy, where a global assessment was undertaken: $10,333.

Discussion - compensation

[118] Before analysing counsel's submissions, it is worth teasing out the concepts which are under review. These were helpfully discussed by Chief Judge Inglis in *Stormont v Peddle Thorp Aitken Ltd*.[47] She said:

> [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. "Loss of dignity" has been described in the following way by the Supreme Court of *Law v Canada (Minister of Employment and Immigration)*:
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> > 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.
>
> (footnotes omitted).

[119] There is no doubt that Mr Zhang suffered all of these in the course of the process leading up to the termination, and from then on. As already noted, he was desperate to retain his employment, and during the redundancy process he went to considerable lengths to obtain information for the purposes of the employer's

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45 *Richora Group Ltd v Cheng* [2018] NZEmpC 113.
46 Christina Inglis, "Compensation for humiliation, loss of dignity and injury to feelings" (paper presented to Law @ Work Conference, Wellington, June 2018) at 8 and 19.
47 *Stormont v Peddle Thorp Ltd* [2017] NZEmpC 71.

consultation. This proved difficult, but when he was provided with the SAP data he sought, he was then placed under significant pressure to process it in order to meet the tight timeline which had been imposed. It is evident that he was both humiliated and angered by what he perceived as being incorrect conclusions as to his work role, and by the fact that he alone had been singled out. His wife described him as being sad and shut down; he did not want to discuss the proposal with her.

[120] He was humiliated by the fact that his long service was not recognised as he departed. I accept his evidence that he felt embarrassed, depressed, aggrieved and angry that he had been treated very unfairly despite his contribution of several years' work for the company.

[121] The family effects after the termination were significant; Mr Zhang's family life was deeply affected. Ms Xu said the unjustified redundancy, and consequences for Mr Zhang had crushed the family emotionally; her reactions inevitably affected him. In addition, the financial consequences have continued, because even now Mr Zhang has been unable to obtain substitute employment. He had to obtain a benefit. I have no doubt Mr Zhang regarded that as humiliating.

[122] All of these factors were significant. The key question is the extent to which they arose from the substantive and procedural flaws identified by the Authority, and not from any other factor.

[123] First, it is necessary to consider the uncontested finding made by the Authority. The Authority recorded that in evidence Mr Zhang had denied his statements concerning Ms Sim were the product of an emotional outburst made in response to the proposal. It concluded that those matters did not therefore inform its assessment as to the impact of the dismissal and the surrounding process had on him.[48] That is, Mr Zhang's statements that Ms Sim was acting dishonestly and unethically were not an emotional response to the redundancy process; such a factor did not therefore have to be considered for compensation purposes.

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[48] At [67].

[124] Mr Zhang told the Court that he was angry and emotionally hurt by Ms Sim's distortion of the facts. This reaction may well have led to the derogatory statements Mr Zhang made about Ms Sim; but that element must be put to one side because of the unchallenged finding made by the Authority, as just discussed.

[125] That said, I consider the primary cause of Mr Zhang's humiliation, loss of dignity and injury to feelings arose from the flaws identified by the Authority. The impact on Mr Zhang of making derogatory statements was a secondary and less significant cause of harm. However, the distinction noted by the Authority in its unchallenged finding must be noted.

[126] Next, I turn to other cases. There are relatively few judgments in this Court dealing with compensation for unjustified dismissal following a redundancy process.

[127] In *Stormont*, having regard to the particular circumstances pertaining to the employee, the Court found that $25,000 was appropriate.[49]

[128] In the subsequent judgment of *Archibald*, another redundancy case, Chief Judge Inglis considered that the injury suffered by the employer's unjustified actions fell around the middle of band 2, in the particular circumstances, the sum of $20,000 was awarded.[50] In the following year, 2018, Chief Judge Inglis found in *Richora* that band 3 was applicable (that is, over $40,000), but the award was limited by the pleading to $20,000.

[129] In *Richora*, Chief Judge Inglis also concluded for the purposes of the case that appropriate bands across the spectrum of cases in terms of quantum should be nought to $10,000 (band 1); $10,000 to $40,000 (band 2); and over $40,000 (band 3).[51]

[130] I respectfully adopt these particular bands for the present case and consider it appropriate to use them to evaluate the award made by the Authority.

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49 *Stormont v Peddle Thorp Aitken Ltd,* above n 47.
50 *Waikato District Health Board v Archibald,* above n 44, at [67].
51 *Richora Group Ltd v* Cheng, above n 45, at [67].

[131] After considering extent of loss, and where on the spectrum of cases this one sits in terms of harm suffered and quantum, it is necessary to stand back to determine what is a fair and just award in all the circumstances.

[132] I am satisfied that the correct range for the serious impacts on Mr Zhang, which arose from the flawed process adopted by Telco prior to the termination, and from the termination itself, are significant.

[133] Taking account of the primary impacts, the correct range is towards the centre of band 2, $20,000 to $25,000, which is well above the Authority's assessment. I find that the Authority erred, principally because it did not take into account the full range of impacts for which there is clear evidence before the Court.

[134] In my view, then, the appropriate figure is the mid-point of the range, $22,500; this figure is subject to contribution which I shall consider shortly.

Contribution: submissions

[135] Mr Espie's submissions were in summary:

a) The conduct considered by the Authority was the same conduct it had relied on to conclude that the employment relationship was unlikely to continue beyond three months.

b) A number of factual findings made by the Authority were erroneous because Mr Zhang had not set out to be personally vitriolic towards Ms Sim or to intimidate her. He wanted to make it clear to Mr Mitchell the seriousness of the issues which had included her deliberately distorting basic facts and trying to disadvantage other staff such as himself. Nor were there any threats in his communication. He had a right to complain to the regulatory body.

c) The Authority's view that Mr Zhang was unable to describe a single instance of the kind of conduct he had asserted, is inconsistent with the clear documentary evidence about his pre-existing concerns.

d) The Authority's views that it was understandable Ms Sim perceived Mr Zhang's counter-assessment of his workload to be unreliable, and that he must take responsibility for creating a situation where it was reasonable to form a view he was willing to engage with it in good faith, were not sustainable and legally problematic given:

- Ms Sim conceded in cross-examination that even if Mr Zhang had not made the complaints he did, he would still have been made redundant given the absence of an alternative proposal. Moreover, her view that Mr Zhang's counter-assessment was wrong and unreliable, relied heavily on information which he had not provided to him, including information from another colleague as to how long it would take to process Event Cinema's invoices.

- A failure to comply with a legal obligation to consider an employee's explanation before making a decision to dismiss, should not be characterised as "understandable". The obligation applies regardless of the employer's perception of the reliability or otherwise of any response.

- The concerns apparently held about Mr Zhang's conduct, including as Mr Mitchell put it, that the plaintiff was potentially a "business risk", a "bad leaver", or was "attempting to subvert the process", were factors which were never put to Mr Zhang for response or comment. In those circumstances, it was not reasonable for Telco to form the view Mr Zhang was not acting in good faith.

- Moreover, Mr Zhang's good faith was demonstrated by the fact that he had gone to exhaustive lengths to analyse Telco's proposal, to review the underlying information on which the company was relying, and to prepare detailed feedback; furthermore, there was no information which demonstrated that Mr Zhang did not genuinely believe the views he expressed.

e) Mr Zhang's conduct was not blameworthy, and the factor relied on by the Authority was not causative of his dismissal because:

- Ms Sim conceded that even if the complaints had not been made about her, Mr Zhang would have been made redundant regardless.

- As noted by the Authority, a redundancy is a no-fault dismissal: an employee loses his or her job through no fault of their own.

- Mr Zhang's actions could not reasonably be said to have caused the situation giving rise to the personal grievance, including Telco's failure to investigate Mr Zhang's counter-analysis, and to conduct a transparent selection process.

- This finding also conflicted with the Authority's earlier conclusions that Telco avoided conducting a transparent selection process. That decision gave rise to the disadvantage grievance, and pre-dated Mr Zhang's derogatory communications. Thus, even if he had not raised his concerns about Ms Sim, he would still have been unjustifiably dismissed. It could not be said that his conduct gave rise to the established disadvantage grievance.

[136] In summary, Mr Cleary submitted:

a) It is not correct to assert that a redundancy, being a no-fault termination, could not lead to a finding of contributory conduct. A grievant may still taint the process and outcome.[52] Nor is the test whether Mr Zhang genuinely believed what he was saying about Ms Sim.

b) The decision to consider only Mr Zhang for redundancy was a process issue and was not the reason for the Authority finding the dismissal was substantively unjustified. The dismissal was found to be substantively unjustified because of the failure to check Mr Zhang's figures.

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[52] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 at [84].

c) The correct test is not if Mr Zhang contributed to the actual personal grievance itself, but whether he contributed to the situation which gave rise to the claim of a personal grievance. Here the situation giving rise to Mr Zhang's claims was the redundancy process and the decision to make him redundant, specifically whether the decision was based on false information.

d) It was submitted Mr Zhang was blameworthy, and significantly so. Instead of engaging with the redundancy consultation process in good faith, he attacked Ms Sim by levelling serious unfounded accusations against her. These fractured the consultation process. Having made the various unfounded allegations, he did not provide particulars when asked to do so. These cannot be excused as the act of a desperate employee; they crossed the line when they became accusations of dishonest and unethical behaviour when there were no grounds for that allegation.

e) In a common-sense way, Mr Zhang's blameworthy conduct contributed to the situation of his claims for unjustified disadvantage and dismissal. His blameworthy conduct was extraordinary, and the finding of 50 per cent was proportionate to his behaviour and was open to the Authority.

Discussion – contribution

[137] Section 124 of the Act provides:

> **124 Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[138] In *Xtreme Dining v Dewar*, the full Court discussed s 124 of the Act in some detail.[53] For present purposes, the following observations are relevant:

> [175] The subsection ... requires consideration of "the situation that gave rise to" that personal grievance. It is well-established that there must be more than simple cause and effect. The cases emphasis that the employee's actions must be culpable or blameworthy or wrongful actions which have, when assessed in a commonsense way, contributed to the situation that gave rise to the personal grievance. So where the grievance is that the employee has been unjustifiably dismissed, the question will be whether the employee acted in a culpable or blameworthy way thus creating the situation that gave rise to that dismissal.
>
> [176] The subsection also requires the Authority or Court to consider "the extent to which there was a relevant contribution". That invokes the important requirement of proportionality, which is dependent on the circumstances. The analysis must reflect the fact that on occasion an employee may have been at fault but the circumstances did not justify his or her dismissal or disadvantage; and in other circumstances there is no element of contributory conduct, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.

[139] The Court also made some brief remarks as to the extent of any reduction, as a matter of practice. It referred to the finding in *Paykel Ltd v Morton*,[54] where Judge Colgan held that a reduction of 25 per cent was one of particular significance; then to the observations of Chief Judge Goddard in *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson,* that a contribution finding in the order of 50 per cent or even more should be very rare;[55] and in *Nutter*, where the Court of Appeal touched briefly on this issue, expressing the view that a finding of contributory fault of 50 per cent is a significant one.[56]

[140] Turning to the present circumstances, s 124 applies where it is determined that an employee has a personal grievance. The Authority found Mr Zhang had established a disadvantage grievance relating to the selection process, and a dismissal grievance relating to the decision to dismiss.

[141] The issue is whether the allegations made by Mr Zhang against Ms Sim contributed towards the situation that gave rise to either personal grievance.

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53 *Xtreme Dining Ltd, (T/A Think Steel) v Dewar,* above n 39.
54 *Paykel Ltd v Morton* [1994] 1 ERNZ 875.
55 *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920.
56 *Telecom NZ Ltd v Nutter*, above n 40, at [98].

[142] I find that the allegations could not have contributed to the disadvantage grievance, since the selection process was put in train before he made those allegations. The issue of blameworthy conduct falls for consideration therefore, only in respect of the dismissal grievance.

[143] The Authority found that Mr Zhang must take responsibility for creating a situation where it was reasonable for Telco to form a view he was unwilling to engage with it in good faith. However, Ms Sim told the Court he would have been made redundant, not because he was unwilling to engage with it in good faith, but because he did not advance an alternative proposal, that is, one which would have been acceptable to the company.

[144] The Authority also found that Mr Zhang had been unable to describe a single instance of the kind of serious professional impropriety which he alleged. On the evidence provided to the Court, which may not have been provided to the Authority, there were in fact several relevant instances, as discussed earlier.

[145] The Authority concluded there were a range of factors justifying the finding that Mr Zhang's conduct was both blameworthy and in part causative of his dismissal. These included the fact that Mr Zhang's analysis sat alongside the allegations of serious professional impropriety; that he understood there could be no productive discussion on the issue; and that Ms Sim was upset by Mr Zhang's correspondence. These factors may have strengthened Telco's decision to make Mr Zhang redundant, but the primary problem was, as I shall discuss more fully shortly, that Ms Sim and Mr Mitchell considered Mr Zhang's counter-assessment of workflow was wrong and unreliable having regard to a wide range of information which was never put to him.

[146] As already discussed, there is no doubt that Mr Zhang's language was excessive and quite inappropriate, whatever he believed as to the merits of his concerns. But I have also found that it was necessary to consider the wholly unjustified language in the particular circumstances within which it arose. Given that the matter would have been treated as a performance issue, it may well have warranted a warning, but not summary dismissal.

[147] Also relevant is the fact that Ms Sim was not sufficiently supported by Mr Mitchell in the final throes of what had become a difficult redundancy process. The circumstances were such that he should have remained directly involved.

[148] On the basis of the evidence before the Court, Mr Zhang's overstated allegations were blameworthy, and did contribute to the dismissal grievance, but only in part.

[149] Having regard to all these factors, I consider that an appropriate range for a finding of contribution would have been between 15 and 25 per cent. The Authority's finding was outside that range. Having regard to the s 124 criteria of the Act, a fair reduction is 20 per cent.

Breach of good faith: penalty?

[150] The Authority concluded that the primary aspect of Mr Zhang's claim for a penalty under this head concerned Mr Mitchell's analysis of his workload. It found that Mr Mitchell's analysis was never intended to be an exact appraisal and was not a matter justifying a penalty.

[151] For Mr Zhang, Mr Espie submitted in summary:

a) The Authority erred because its conclusions disregarded conduct which amounted to deliberate, serious and sustained breaches of the obligation to act in good faith. Counsel submitted there were a series of overlapping breaches, which meant that the consultation undertaken by Telco was illusory at best and had the effect of denying Mr Zhang a full opportunity to respond to and dissuade the company from its proposal to make him redundant.

b) The most clear and obvious breaches of good faith were in respect of Telco's failure to comply with its obligation to provide access to information, and to provide an opportunity to comment on that information.

c) References were made to a range of factors that were considered by Telco, and not put to Mr Zhang. These included the fact that an assessment of his workload had been undertaken while he was on parental leave in 2016; that an email sent by Mr Zhang in November 2016 was taken to suggest that his Isys workload was higher than he subsequently stated; that lengthy discussions between Mr Mitchell and Ms Sim had been conducted concerning such factors as the adequacy of Mr Zhang's skills; that they would prefer to retain other roles; that Mr Zhang's qualifications were not recognised in New Zealand; that a new business had been set up by Telco; and a due diligence process undertaken in respect of Isys.

d) A further breach related to the significant difficulties which arose when Mr Zhang was initially declined access to SAP data. When Mr Zhang finally obtained access to it, he was left with only 27 hours within which to provide further feedback; he was only able to do so by working on the date until 1.00 am of the day he was to respond.

e) This breach was aggravated by the views formed by the employer in the course of that process, which were also not put to Mr Zhang. These included Ms Sim's views that she could not trust Mr Zhang with open access to the data; that he was regarded as a security risk; that he could use the information for a complaint to CAANZ; that he would keep asking for more time to respond; and that she was distressed that Mr Zhang was challenging the accuracy of her assessment of his workload. Also, not put to Mr Zhang at the time was Mr Mitchell's view that Mr Zhang was a "business risk" and a "bad leaver".

f) As a result, Telco failed to meaningfully investigate and consider Mr Zhang's responses to the restructuring processes, as evidenced by two unchallenged statements of the Authority, that Ms Sim accepted she had not made inquiries about the length of time it took Mr Zhang to complete Isys functions, and that when faced with the significant disparity between Telco's analysis and that of Mr Zhang in respect to

Isys work, a fair and reasonable employer could be expected to review its assessment to ensure it was correct before proceeding. This was exacerbated by Mr Mitchell's view that from his perspective, he was not going to "… look into the absolute merits of the case", and that it was not necessary for him to check Mr Zhang's response because he had all of the information that he required. His statement that at the end of the process he deliberately kept remote because his focus was to ensure that the process was a fair one.

g) These breaches were compounded by the fact that Telco relied on information it knew or ought to have known was misleading; removing his access to a particular email account prior to the outcome was a yet further adverse step which demonstrated the suspicious view held by Telco about Mr Zhang. Ms Sim closed her mind to the possibility that she was wrong in her assessment of Mr Zhang's workload. The breaches of good faith fundamentally undermined consultation. All these breaches were deliberate, serious and sustained.

h) Mr Espie referred to the findings made in *Stormont*, where the Court imposed a penalty of $5,000 for breach of good faith in respect of an employer's actions during a restructuring process.[57] He also referred to the provisions of s 133A of the Act.

[152] For Telco, Mr Cleary submitted in summary:

a) In order to determine whether the Authority had erred when considering alleged breaches of good faith, it would be necessary to have evidence as to what claimed breaches of good faith were before the Authority in the first place. Without that evidence, it could not be concluded that the Authority had been wrong as a matter of fact to conclude the primary aspect of the plaintiff's claim concerned Mr Mitchell's analysis of the workload.

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[57] *Stormont v Peddle Thorp Aitken Ltd*, above n 47.

b) Without prejudice to that argument, there were no breaches in any event. Context was important. Mr Zhang had decided Ms Sim was using the redundancy process as an excuse to dismiss him, forming a view that she had been dishonest and unethical by tampering with data. He also considered Mr Mitchell was using the redundancy process to dismiss him. Then he misrepresented Mr Mitchell's authority. He was accordingly seen as a business risk; access to sensitive data was reasonably restricted. Steps taken by the company in response to these factors were legitimate.

c) There was no reliance on misleading or incorrect information. Mr Zhang had not established that the information relied on by the company was wrong, let alone that Telco knew it was wrong.

d) The consultation was not illusory but was undertaken in good faith. It was thwarted by Mr Zhang's distrust. Seen in the round, there was sufficient information, time and opportunity for a reasonable response to be made. In truth, no amount of further time or information would have been productive because of Mr Zhang's distrust.

e) In any event, if there was any breach of good faith, the high penalty threshold for the imposition of a penalty under s 4A of the Act was not met. Furthermore, any penalty would have been inappropriate where other remedies had been awarded for the same circumstances.

Analysis: penalty for breach of good faith

[153] In response to Mr Cleary's submission that there was no evidence as to Mr Zhang's claims for breach of good faith in the redundancy process, so that it could not be concluded that the Authority had erred as a matter of fact, I granted leave for the recall of Mr Zhang to produce his statement of problem which set out the wide range of claims he made in the Authority, as well as the statement in reply. I did so because the assertion raised by Mr Cleary was a new matter which had not been expressly pleaded. However, this issue is addressed by the fact that subject to the direction as to the nature and extent of the hearing, where the Court receives evidence

it must reach its own conclusions on the relevant issue.[58] This was not a case where additional evidence would come into play only after an error of fact or law had been established.

[154] I am satisfied that the catalogue of breaches of good faith outlined by Mr Espie in his submissions are established. As the redundancy process progressed, with Mr Zhang clearly challenging the basis on which it was being advanced, the important obligations which fell on the company under s 4 should have been respected. For the purposes of this case, the following statement about good faith, found in *National Distribution Union v General Distributors*, is of assistance:[59]

> Although not doing so exhaustively, the definitions of good faith dealings given in s 4 address what might be referred to as the honesty or transparency of dealings between parties so that deceiving and misleading, whether intentional or consequential, are prohibited. ...

[155] Chief Judge Inglis has recently drawn attention to the aspect of good faith which requires parties to an employment relationship "to act consistently with reasonable standards (the level at which those standards are set will depend on the circumstances, having regard to the interests of the parties)".[60] A relevant dynamic here was the power imbalance between the parties which meant Mr Zhang was vulnerable.

[156] Particularly important was the good faith obligation in s 4(1A)(c) to provide access to information and an opportunity to comment on information before any decision may be made. Many cases have considered this obligation. It suffices to mention the full Court consideration of this topic in *Vice-Chancellor of Massey University v Wrigley*, where it was observed that in most cases information that is "relevant to the continuation of the employee's employment" will include a good deal more than the information the employer relies on for the proposal for change.[61] Then it said power does not confer insight or wisdom, and that fully informed employees may have ideas of equal or greater merit than those of their employers.[62]

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58 *Xtreme Dining Ltd, (T/A Think Steel) v Dewar*, above n 39.
59 *National Distribution Union Inc v General Distributors Ltd* [2007] ERNZ 120 at [60].
60 Christina Inglis "Defining good faith (and Mona Lisa's smile)" (paper presented to Law @ Work Conference, Wellington, 31 July 2019).
61 *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138.
62 At [56].

[157] On the evidence provided to the Court, it is clear there was a wide range of information which had been considered which was never disclosed to Mr Zhang so as to provide him with a proper opportunity to respond.

[158] These breaches go further than the substantive flaw identified by the Authority, which related to the failure to explore the disparity between Telco's assessment of Mr Zhang's workload and his counter-assessment. The failure to disclose the full range of information and opinions which the employer had formed establishes a broader and equally significant failure of the redundancy process.

[159] Also relevant is the suspicion which was developed about Mr Zhang because of the accusations he was making against Ms Sim. Those factors influenced Telco's approach to the disclosure of multiple sources of information and, I find, reinforced its view that Mr Zhang's employment should be terminated.

[160] As already discussed, Telco's position on these issues was not enhanced by the fact that Ms Sim was not adequately supported by Mr Mitchell at the final stages of the process. More active intervention from him, including the possibility of meeting with Mr Zhang and entering into a more effective and direct dialogue, might well have avoided the breaches of good faith which occurred.

[161] But the issue of Mr Zhang's compliance with good faith obligations is also relevant. He was strongly critical of Ms Sim and Mr Mitchell, believing that they were distorting information to secure the desired outcome of his redundancy. As already discussed, he was at fault in expressing his concerns in an intemperate way. When considering whether the various breaches warrant the imposition of a penalty, Mr Zhang's conduct must also be assessed, as Mr Cleary submitted.

[162] Having regard to these dynamics, I am not satisfied that Telco's breaches of good faith justify the imposition of a penalty under s 4A. My conclusion is reinforced by the fact that significant remedies have been awarded, and it would not be in the

interests of justice, in this particular case, to impose a penalty on top of those remedies.[63]

[163] Although the evidence before the Court has permitted a fuller analysis of this particular claim than appears to have been available in the Authority, I am not satisfied that it erred by declining to award a penalty. This aspect of the challenge is dismissed.

Failure to undertake remuneration review in 2016: penalty?

[164] It is common ground that under Mr Zhang's IEA, Telco had an obligation to review his remuneration annually, and that any adjustment would take account of his performance in the position and market conditions. Any review would not necessarily result in an adjustment to remuneration.

[165] The Authority found that the omission appeared to have been an oversight, and that in any event it made no material difference to Mr Zhang because no staff member received a salary increase in the period. Nor was any evidence of harm provided. Consequently, it was not appropriate to impose a penalty.

[166] Mr Espie submitted in summary:

a) The Authority's findings were erroneous because Mr Zhang was disadvantaged by the omission.

b) The review process was important to Mr Zhang because he had not received a remuneration increase in the previous year, despite a significant increase in workload and no issues being raised with his performance. He had been unable to obtain an explanation from Ms Sim as to why he did not receive such an increase; consequently the 2016 remuneration review was an important opportunity for him to obtain clarity over the reasons for this, and what needed to be done to secure such an increase.

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[63] See *Xu McIntosh* [2004] 2 ERNZ 448 at [45]; *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193; *Gilbert v Transfield Services (New Zealand) Ltd* [2013] NZEmpC 71, [2013] ERNZ 135 at [183].

c) He was on parental leave at the time remuneration reviews for other staff were undertaken and was therefore in a particularly vulnerable position. By contrast, Ms Sim had taken proactive steps to undertake Ms Xu's remuneration review before she left on parental leave, she being a person whom Ms Sim described as a "valuable member of the company".

d) He felt feelings of anger, distress and that he had been secretly ignored when he found out in March 2017 that he had been omitted from the remuneration process in 2016.

e) That the omission was intentional or, at best, negligent.

[167] For Telco, Mr Cleary submitted in summary:

a) The omission was not deliberate but was inadvertent. Ms Sim had told the Court that she was busy and had overlooked the task given that Mr Zhang was on paternity leave. She had also missed a review for another employee.

b) There was no financial loss to Mr Zhang, since no one in the finance team had received a pay rise that year, because of an instruction given by Mr Mitchell.

c) It was open to the Authority not to impose a penalty in all the circumstances.

Analysis: penalty for failure to conduct remuneration review

[168] The Authority made an unchallenged finding that the failure to conduct the remuneration review was not a minor or technical breach, given the clear obligation on Telco to do so.

[169] The key question, however, is that posed by Mr Espie: Was the failure to provide the review deliberate, or negligent, warranting the imposition of a penalty?

[170] The failure to conduct the remuneration review appears to have been an isolated aberration, which occurred through oversight.

[171] Had Mr Zhang remained in employment with Telco and raised the issue when he learned of it, it is more likely than not that the review would have been conducted; and that the result would have been the same.

[172] Though it is unfortunate that this omission occurred, I accept the submission that a decision not to award a penalty was one which was legitimately open to the Authority when exercising its wider discretion under s 135 of the Act.

Disposition

[173] The conclusions of the Court are as follows:

a) The challenge is disallowed in respect of the claim for lost wages. I confirm that the amount payable for these is $12,231.25, minus PAYE and any other lawful deductions agreed between the parties as reimbursement of lost wages, subject to contribution.

b) The challenge is allowed in respect of compensation for humiliation, loss of dignity and injury to feelings; the amount payable by Telco to Mr Zhang is $22,500, subject to contribution.

c) The challenge is allowed with regard to contribution; it is assessed at 20 per cent.

d) I dismiss the challenge in respect of the claim for a penalty for breaches of good faith by Telco in the redundancy process.

e) I dismiss the challenge in respect of the claim for a penalty for failure to undertake a remuneration review in 2016.

[174] I reserve costs. These should be discussed between the parties. If they are unable to reach agreement, any application should be made within 21 days of the date of this judgment, with a response to be given 21 days thereafter.

B A Corkill
Judge

Judgment signed at 12.15 pm on 23 October 2019