IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 40
EMPC 71/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	INNOVATIVE LANDSCAPES (2015) LIMITED Plaintiff
AND	CELIA POPKIN Defendant

Hearing:	20 February 2020 and on papers filed on 5 and 13 March 2020 (Heard at Christchurch)
Appearances:	C McNoe, agent for the plaintiff E Yu and LC Taylor, counsel for the defendant
Judgment:	14 April 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms Popkin is a landscape architect. She was employed by the plaintiff company for around two-and-a-half years before her employment was terminated on the grounds of redundancy. She claimed that she had been unjustifiably dismissed. The Employment Relations Authority upheld her claim and awarded her one week's wages and $15,000 by way of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).[1] The company challenged the Authority's determination on a de novo basis.

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1 *Popkin v Innovative Landscapes (2015) Ltd* [2019] NZERA 64 (Member Dallas).

[2] During the course of the hearing, Mr McNoe, the company's director, essentially accepted that the process followed by the company, which led to the termination of Ms Popkin's employment, was substandard. He pursued two main arguments in support of the challenge: first, that the remedies ordered by the Authority were excessive; and second, that the termination was justified because of the company's financial position. The defendant accepted that there were substantive grounds for the decision to make her position redundant. A third point emerged during the course of closing submissions on which I gave the parties a further opportunity to be heard. It related to the extent to which the financial circumstances of the company might be relevant to an assessment of the level of any compensation ordered under s 123(1)(c)(i) of the Act.

Background

[3] Ms Popkin started work with the company in 2015 and left in early 2018. It is apparent that the company had not been doing well for some time and that staff, including Ms Popkin, were aware of Mr McNoe's concerns in that regard. Indeed, such was the frequency of the basis on which he made comments about whether the company would continue to operate that Ms Popkin and another employee who gave evidence, Ms Adams, came to place little weight on such musings.

[4] Matters came to a head around the middle of February 2018. While the details of what occurred at a meeting on 14 February 2018 were in dispute, what is clear is that Ms Popkin and Ms Adams met with Mr McNoe and issues relating to the current workload of various employees were discussed. Ms Popkin said in evidence that the concerns related primarily to the construction workers within the company. She herself had enough design work to carry on with. Ms Popkin and Ms Adams say that at the meeting Mr McNoe said that he "may" have to close the company and that he would probably discuss this with the rest of the company's employees the following week. Mr McNoe was adamant that he had confirmed that he "would" have to close the company and that there were no "'ifs', 'buts' or 'maybes'". The differing recollections make no material difference. That is because there was a fundamental failure in terms of meeting the requirements imposed under the employment agreement. I return to those failures later.

[5] On 19 February 2018 Ms Popkin was contacted by other employees who stated that they had been told by Mr McNoe that the company would be closing and that their positions would be made redundant. That prompted her and Ms Adams to request a follow-up meeting with Mr McNoe, which occurred on 21 February 2018. Mr McNoe told those present that notice would begin the following day, 22 February 2018. In the event, Ms Popkin received written notice on 27 February that her position was to be made redundant from 14 March 2018. She took notes at the meeting on 21 February 2018. The notes record Mr McNoe's advice that the notice period would begin on 22 February 2018.

[6] Ms Popkin subsequently raised concerns relating to the process and, in particular, the notice that had been given. On 4 April 2018 she raised a grievance for unjustified dismissal and lost wages as a result of a defective redundancy process. That then led to the claim in the Authority.

Analysis

[7] Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. While the Court may inquire into the merits of a redundancy business decision, the inquiry is directed at ensuring that the decision, and how it was reached, were what a fair and reasonable employer could have done in the relevant circumstances.[2] Once that is established, if an employer concludes that the employee's position is surplus to its needs, the Court is not to substitute its business judgment for that of the employer. As I have said, the defendant accepts that there were genuine reasons for the redundancy, so that issue can be put to one side.

[8] Although there were genuine reasons for the termination of Ms Popkin's employment, the procedure that was followed was fatally flawed, even having regard to the fact that the company appears to be a relatively small-scale business (with eight

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2 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129 at [84].

employees at the relevant time).[3] There was a failure to comply with cl 12.5 of the employment agreement, which provided:

> **12.5 Redundancy Process**
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> In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.

[9] In short, Mr McNoe did not consult adequately, if at all, with Ms Popkin regarding the possibility of redundancy before the decision was made; he did not consider whether there were any alternatives to dismissal; he failed to provide Ms Popkin with information to enable her to understand and engage meaningfully in a consultation process; and it follows that he failed to obtain her views and consider them with an open mind before making a decision as to whether her position ought to be made redundant.

[10] There was also a failure to comply with cl 13.1 of the employment agreement, which provided:

> **13.1 General Termination**
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> The Employer may terminate this agreement for cause, by providing **3 weeks'** notice in writing to the Employee. Likewise the Employee is required to give **3 weeks'** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[11] The clause requires notice of termination to be in writing. Mr McNoe advanced an argument that the provision had been satisfied because reference to the notice period can be found in the notes of meeting of 21 February 2018 taken by Ms Popkin. While it is true that Ms Popkin took written notes of the meeting, and recorded what Mr McNoe had to say, that is plainly not the sort of written notice that cl 13.1 of

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[3] Employment Relations Act 2000, s 103A(3)(a).

the employment agreement is aimed at. "Written notice" means written notice by or on behalf of the company. It does not mean verbal notice given in a meeting and recorded by an affected employee in their record of what has transpired in that forum.

[12] I agree with the submission advanced on behalf of Ms Popkin that there was a failure to meet the company's obligations of good faith under s 4 of the Act. Section 4(1A) provided that:

> (1A) The duty of good faith in subsection (1)—
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> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
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> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
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> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
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> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
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> (ii) an opportunity to comment on the information to their employer before the decision is made.

[13] The company failed to actively engage with Ms Popkin as it was required to do under both the terms of the employment agreement that it had entered into with her, and in terms of its statutory obligations as an employer. The company's procedural failings cannot be described as minor.[4]

[14] Does it follow that Ms Popkin was unjustifiably dismissed or that she suffered an unjustifiable disadvantage? As the Court of Appeal observed in *Aoraki Corp Ltd v McGavin*:[5]

> … it is not entirely clear from the statute whether, where the dismissal is substantively justifiable, procedural unfairness in implementing that decision is better described as "unjustifiably dismissed" … or "unjustifiable action" …

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4 Employment Relations Act 2000, s 103A(5).

5 *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276 (CA) at 295. Contrast *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [72]-[73], holding that a substantively justified dismissal for redundancy which was procedurally flawed gave rise to a disadvantage, rather than unjustified dismissal, grievance.

> Reported redundancy cases have tended to proceed on the assumption that the personal grievance in that respect can be classified as unjustified dismissal…
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> However, it is unnecessary to reach a concluded view on that classification point because the test of unjustifiability is the same … What is crucial, however, is to recognise that the remedy can relate only to the particular wrong, to what has been lost or suffered as a result of the particular breach or failure. In this case the personal grievance is not that the employment was terminated, but that the manner of the implementation was procedurally unfair.

[15] While I acknowledge that the characterisation issue has been left open by the Court of Appeal, and I have not heard argument on the point, I am inclined to the view that the company's actions are best described as giving rise to an unjustified dismissal. That seems to me to align with the wording of s 103A, particularly s 103A(5). Section 103A(5) provides that the Court must not determine a dismissal (or action) to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. It follows, by necessary implication, that defects which are not minor, and which did result in the employee being treated unfairly, may give rise to a finding of unjustified dismissal. It may be noted that the Court of Appeal's observations in *Aoraki* and this Court's subsequent discussion of the issue in *Simpson Farms Ltd v Aberhart*[6] pre-date the enactment of s 103A(5).

[16] I now turn to the issue of remedies.

Remedies

Unpaid wages

[17] I understood Mr McNoe to argue that Ms Popkin was not entitled to one week's unpaid wages because notice had been given, as required under the employment agreement, on 22 February 2018 rather than the later date when formal notice was given. I have already rejected that argument. It follows that Ms Popkin is entitled to one week's unpaid wages and I order accordingly.

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6 *Simpson Farms Ltd v Aberhart* above n 5.

Compensation under s 123(1)(c)(i) – financial circumstances relevant to quantum?

[18] Mr McNoe submitted that the Authority's award of $15,000 compensation for humiliation, loss of dignity and injury to feelings did not have regard to the financial situation of the company and was accordingly excessive.

[19] The challenge is being heard on a de novo basis. That means that the approach adopted by the Authority Member in arriving at the ultimate compensatory quantum can be put to one side. If the challenge had been pursued on a non-de novo basis, the position would be different. In such circumstances the Court would have to consider the Authority's analysis in terms of the compensatory award (insofar as it can be discerned from the determination), what factors were taken into account, and the issue of whether financial circumstances were relevant.

[20] In assessing an appropriate amount of compensation under s 123(1)(c)(i), I find it helpful to adopt the analytical framework set out previously in cases such as *Waikato District Health Board v Archibald*[7] and *Richora Group Ltd v Cheng*,[8] and referred to in other judgments of this Court.[9]

[21] I am satisfied that Ms Popkin experienced harm under each of the heads identified in s 123(1)(c)(i). It is evident that she felt stressed and uncertain in respect of what was happening and the bluntness of Mr McNoe's approach. It is also evident that she may well have had some useful contributions to make in terms of possible options but, given the process that was adopted by the company, she was never given the opportunity to engage on these issues. That left her cut out of the process, feeling excluded from the decision-making and powerless to influence what was happening.

[22] I accept the defendant's submission that the extent of loss suffered by Ms Popkin falls within Band 2 of the bands identified in *Archibald* (moderate harm).[10] As

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7 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

8 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 15 NZELR 996.

9 See, for example, *Allied Investments Ltd v Cradock* [2019] NZEmpC 159; *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151; *Raynor v Director-General of Health* [2019] NZEmpC 65; *CBA v ONM* [2019] NZEmpC 144; *Johnson v Chief Executive of the New Zealand Defence Force* [2019] NZEmpC 192; *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

10 *Waikato District Health Board v Archibald*, above n 6 at [66].

I have said, counsel for the defendant submitted that $15,000 compensation was appropriate. That falls towards the bottom of Band 2. A somewhat higher degree of harm appears to have been sustained in Band 2 cases attracting higher awards (for example, $20,000 in *Archibald* and $25,000 in *Marx v Southern Cross Campus Board of Trustees*).[11] Mrs Archibald was found to have experienced a deep sense of hurt as a result of her employer's unjustified actions, which was compounded by the years of faithful service she had provided to it; Mrs Marx had contemplated suicide. In the circumstances, I am satisfied that, subject to other considerations, an award of $15,000 would be appropriate.

[23] At this point the issues that Mr McNoe has raised about financial capacity need to be dealt with – to what extent, if any, is financial capacity a relevant factor in assessing a fair and just award?

[24] I provided the parties with an opportunity to provide further legal submissions in respect of this issue. While a number of judgments have referred to financial capacity, there appear to be none where the employer's ability to pay has led to a reduction in the amount of compensation ordered under s 123(1)(c)(i).[12] Research has revealed only one occasion on which the Authority has expressly referred to the employer's financial circumstances as a factor impacting on quantum.[13] In *Narayan v Damosso* the Authority reduced the amount it would have ordered by way of compensation by 50 per cent ($5,000 to $2,500), having regard to the company's financial circumstances. This can be contrasted with the approach in two other Authority determinations: *Madani v Cirrotec*[14] and *Jemmett v Saunders*.[15] In the latter case the Authority Member observed:

> [53] In the end, it cannot be right and just for Ms Jemmett to be denied a proper award just because her employer has limited means...

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11 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76, (2018) 16 NZELR 24 at [54].

12 In *Waugh v Commissioner of Police* [2002] 1 ERNZ 450 (EmpC) at [136], Chief Judge Goddard considered it would be relevant, but the issue of financial capacity did not arise, given the identity of the defendant. See too the discussion in the decision of the Employment Court in *Cain v HL Parker Trusts* [1992] 3 ERNZ 777 (EmpC) at 791.

13 *Narayan v Damosso t/a Al Ponte Italiano Restaurante* [2012] NZERA Wellington 38 at [14].

14 *Madani v Cirrotec Ltd* [2014] NZERA Auckland 239.

15 *Jemmett v Saunders* [2015] NZERA Christchurch 147.

[25] Mr Yu and Ms Taylor, counsel for the defendant, have filed helpful legal submissions on the financial capacity point. In summary, it is said that if the Court was to have regard to this factor it would involve reading into the Act a defence of financial hardship for employers which would be inconsistent with the object and scheme of the Act and the purpose of a s 123(1)(c)(i) compensatory award. It is also said that to allow a discount for financial capacity would be to speculate on the company's future ability to satisfy any order made against it. I understood the company's position to be focussed on the breadth of the Court's discretion in relation to setting remedies, and the reality of the situation in which it finds itself.

[26] Section 123(1) provides that where the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any one or more of a range of remedies, including the payment to the employee of compensation by the employee's employer for humiliation, loss of dignity, and injury to the feelings of the employee. Section 123(1) confers a discretion on the Court to order compensation where certain criteria are met. As with any statutory discretion, it must be exercised within the four corners of the Act, having regard to relevant factors and disregarding irrelevant factors.[16] It is notable that s 123(1) does not specify what factors are relevant to an assessment of the level of compensation to be ordered. That means that they must be discerned having regard to the scheme and purpose of the Act. A factor will not be considered relevant if its application would undermine or cut across the statutory scheme.

[27] As counsel for the defendant point out, the wording of s 123(2) suggests that having regard to the employer's financial circumstances in setting a compensatory award would be inconsistent with the Act. Section 123(2) provides that:

> When making an order under subsection (1)(b) or (c), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[28] The fact that Parliament has provided a particular mechanism for addressing issues relating to an employer's financial circumstances in the context of a compensatory award under s 123(1)(c)(i), suggests that a broader, unspecified,

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[16] *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 at [34].

mechanism is not to be read in. The fact that the instalment payment mechanism that *is* provided for is only available for use by the Court in restricted circumstances, namely "where the financial position of an employer *requires* it", reinforces the likely limits on the Court's discretion.

[29] This is further underscored by s 124, which expressly enables the Court to reduce an award that would otherwise be made where the employee is found to have contributed to the situation giving rise to the grievance. The point is that Parliament has not made express provision for reduction on other (financial capacity) grounds. And Parliament has made express provision for the Court to take into account an employer's ability to pay a penalty in s 133A but only in limited circumstances. To put it in a nutshell, if Parliament had intended the Court to make reductions on the ground of the financial circumstances of the employer in s 123(1)(c)(i), it likely would have said so.[17]

[30] I have not overlooked s 189 (equity and good conscience). It reflects a clear Parliamentary intent that the Court be able to deal flexibly with cases coming before it consistently with broad principles of justice. This might be said to support a multi-factored approach to the setting of compensation, allowing the Court to arrive at a quantum which reflects the individual circumstances of the parties and the employer's capacity to pay. Section 189 provides that in exercising its jurisdiction, the Court is to be guided by equity and good conscience. Two qualifiers apply however. First, the jurisdiction is to be exercised for the purpose of "supporting successful employment relationships and promoting good faith behaviour"; and second, the Court cannot make decisions and orders inconsistent with the Act, or any other Act or collective or individual agreement. I have already concluded that s 123(2), and other related provisions, tell against a broad discretion to reduce an award under s 123(1)(c)(i) on the grounds of financial capacity. In my view it is also doubtful that reducing the amount an employee obtained to remedy a loss caused to them by a breach committed

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[17] Note too that in the Sentencing Act 2002, an offender's ability to pay is expressly recognised as a relevant factor (s 8(h) – where the offender's circumstances might mean that an otherwise appropriate sentence would be disproportionately severe; s 14(1) – the Court has a discretion not to impose a fine that would otherwise be imposed if the offender cannot pay; s 40(1) – the Court must consider, when imposing a fine, the financial capacity of the defendant to pay).

by the employer, because the employer will struggle to pay, would promote good faith behaviour.

[31] It is also true, as counsel for the defendant point out, that financial fortunes ebb and flow. Making an order, although there may not be a present ability to pay, marks out the breach and its impact on the employee and enables the employee to either seek to immediately enforce the order, or keep the order in their back pocket.[18]

[32] It should not be forgotten that the fundamental purpose of a compensatory award under s 123(1)(c)(i) is to adequately address a wrong, providing effective compensation to the aggrieved employee for the non-pecuniary loss they have suffered as a result of their employer's breach. How adequate is compensation for such losses if reduced to reflect the financial circumstances of the person who caused the loss? As the Supreme Court has pointed out, albeit in a different context, if compensation is inadequate, the breach of right is not vindicated.[19] The Supreme Court of Canada, in determining what is a fair and reasonable quantum of compensation for non-pecuniary losses in personal injury cases, put it this way:[20]

> The amount of the award under these heads of damages should not be influenced by the depths of the defendant's pocket or by sympathy for the position of either party … The first and controlling principle is that the victim must be compensated for his loss.

[33] It appears that neither the Court of Appeal nor the Supreme Court in New Zealand has had the opportunity to expressly consider the relevance or otherwise of an employer's financial circumstances when arriving at an award under s 123(1)(c)(i) of the Act. The Court of Appeal did, however, have the opportunity to do so some years ago in respect of a compensatory award for pecuniary loss under s 123(1)(b). In *Telecom New Zealand Ltd v Nutter* the Court observed that there was a need for any award to address the actual consequences for the employee of the employer's unjustified actions, but that:[21]

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18 *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [43]-[45].
19 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [109].
20 *Lindal v Lindal* [1981] 2 SCR 629 at 635.
21 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [79].

> … Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).

[34] In addition, there are cases where the Employment Court has indicated a willingness to take account of financial hardship in setting remedies more generally. In *Unkovich v Air New Zealand Ltd*, Chief Judge Goddard said:[22]

> It is a matter for the exercise of discretion whether to require the employer to pay a sum greater than that which must be awarded under s 41(1). However, the discretion is intended to be for the benefit of the employee aggrieved and is normally to be exercised in favour of that employee unless the employee has forgone the right to favourable consideration by his or her own behaviour, or unless a higher payment would involve such a degree of hardship for the how just or equitable it may seem for the employee to receive it.

[35] In *Trotter v Telecom Corp of New Zealand Ltd*, Chief Judge Goddard observed that:[23]

> In this Court, an exception is made to the general rule of full compensation, regard being had to fairness to the respondent employer, including its ability to pay.

[36] He reiterated the point in *Waugh v Commissioner of Police*.[24] However, no issue of financial capacity arose in any of these cases, so the point did not need to be decided. And in *Performance Plus Fertilisers Ltd v Slako*, the possibility of a reduction was raised but rejected on the basis that the company had failed to present any "concrete evidence" of inability to pay.[25]

[37] However, all of these observations, including those of the Court of Appeal in *Nutter*, pre-dated the enactment by Parliament of s 123(2). *Nutter* was decided in July 2004. Section 123(2) was inserted, from December 2004, by s 42(2) of the Employment Relations Amendment Act (No 2) 2004. The addition of s 123(2) gave the Court a mechanism to deal with the financial capacity issues raised in the obiter observations I have referred to.

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22 *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526 at 552.
23 *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 700.
24 *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) at [136], a case which was also decided before the insertion of s 123(2).
25 *Performance Plus Fertilisers Ltd v Slako* EmpC Wellington WEC61/95, 4 September 1995 at 15.

[38] While I accept that the issue of whether or not the financial capacity of an employer is relevant to the setting of compensation for non-pecuniary loss under s 123(1)(c)(i) is not entirely straightforward, I conclude that it is not a consideration that is relevant to the exercise of the Court's discretion. Any issues can and should be considered in deciding whether instalment payments ought to be ordered, that being the mechanism Parliament has decided ought to apply to deal with difficulties the employer might face in meeting an award made against it. If I am right in my interpretation, it remains open to Parliament, if it sees fit, to broaden the scope of the section, as it has done recently with s 133A.

[39] I have reached my conclusion on the ambit of the Court's power based on my interpretation of the relevant statutory provision in context. If I am wrong about the relevance of an employer's financial capacity, I would not have reduced the amount I would otherwise have ordered in the defendant's favour under s 123(1)(c)(i). That is because if the factor is relevant, it should only rarely apply to reduce an award in circumstances where there is adequate supporting evidence that instalment payments would not otherwise appropriately address the issue, and the ultimate purpose of the award (namely to provide adequate redress to the employee to compensate for the loss caused by the employer) is not unduly undermined.

Conclusion

[40] It follows that the challenge is dismissed. The Authority's determination is set aside and the following orders are made in the defendant's favour:

(a) The plaintiff must pay to the defendant the equivalent of one week's wages within 21 days of the date of this judgment.

(b) The company must pay to the defendant the sum of $15,000 by way of compensation under s 123(1)(c)(i) of the Act within 21 days of the date of this judgment.

[41] The parties are reminded that this proceeding was allocated Category 2B for costs purposes. I anticipate costs can be agreed. If not, I will receive memoranda,

with the defendant filing and serving its memorandum within 28 days of the date of this judgment; any response by the plaintiff within a further 14 days; and anything strictly in reply within a further seven days.

Christina Inglis
Chief Judge

Judgment signed at 3 pm on 14 April 2020