**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2021] NZERA 414
3120252

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| | BETWEEN | LISA AMOS<br>First Applicant |
| | | TRACEY MENPES<br>Second Applicant |
| | | RHYS BURGESS<br>Third Applicant |
| | AND | EVANDALE PLANT PRODUCTIONS LIMITED T/A EVANDALE GARDENS<br>Respondent |
| Member of Authority: | | David G Beck |
| Representatives: | | Mary-Jane Thomas, counsel for the Applicants<br>John Farrow, counsel for the Respondent |
| Investigation Meeting: | | 30 June and 1 July 2021 at Invercargill |
| Submissions Received: | | 1 July and 20 July 2021 from the Applicants<br>1 July and 9 July 2021 from the Respondent |
| Date of Determination: | | 23 September 2021 |

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## DETERMINATION OF THE AUTHORITY

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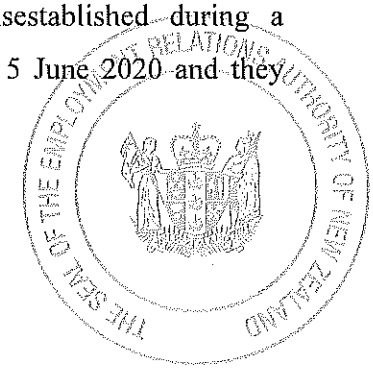
### The employment relationship problem

[1] Lisa Amos, Tracey Menpes and Rhys Burgess were employed by Evandale Plant Productions Limited trading as Evandale Gardens (Evandale), respectively as: Nursery Workers and a Dispatch Manager until their positions were disestablished during a restructuring process. The three applicants' employment ended on 5 June 2020 and they were each paid one month's pay in lieu of notice.



[2] Evandale is a well-established nursery located in Invercargill and is owned by the Nichols Garden Group.

[3] The applicants claim that Evandale unjustifiably dismissed them after conducting a restructuring process that they say was not effected in accord with statutory good faith requirements and that the decision to dismiss all three applicants was not one that a fair and reasonable employer could make. At particular issue was a suggestion that Evandale unilaterally devised an unfair selection criteria and then misled the applicants into believing they had been assessed and scored against this criteria.

[4] As remedies the applicants claim compensation for distress, lost wages and penalties for breach of good faith.

[5] By contrast, Evandale contend that the restructuring process was initiated for genuine business reasons absent of any ulterior motive and that it was based upon the applicants' positions being deemed superfluous to the company needs due to historically declining profitability exacerbated by a drop off in business both prior to and during the 2020 Covid-19 lockdown. Evandale say they acted as a fair and reasonable employer in all the circumstances and in good faith.

**The Authority's Investigation**

[6] There was no objection to the applicants pursuing their claims collectively as they arose from the same set of circumstances. At the investigation meeting I heard evidence from: Lisa Amos; Tracey Menpes; Rhys Burgess; Danielle Phillips; Craig Menpes and a brief of evidence from Kim Burgess was taken as read. For Evandale, I heard evidence from: Nathan Piggott, Evandale General Manager; Cameron Thomson, Evandale Production Manager; Jessica Lowen, Evandale Sales Manager; Ross Hanson, Nichols Garden Group, Group HR and H&S Manager and Karen Rickerby, Nichols Garden Group, Chief Financial Officer.

[7] I also received helpful submissions from counsel at and following, the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter of dispute

between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicants' claims.

**Issues**

[8] The issues I have to resolve are:

i. Were the applicants unjustifiably dismissed and/or disadvantaged or was their employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner, including questions of:

ii. Whether there were genuine business reasons for the restructure?

iii. Did Evandale comply with the relevant provisions of applicable employment agreements?

iv. Did Evandale breach any good faith obligations?

v. Is there any evidence that the restructuring was enacted for an ulterior motive?

vi. If unjustified dismissal claims are established what remedies should be awarded?

vii. If any breaches of good faith are established is it appropriate to award any penalties against Evandale?

viii. An assessment of the level of costs to be awarded to the successful party.

**What caused the employment relationship problem?**

[9] Nathan Piggott, Evandale's General Manager of over eleven years, indicated that the business was struggling with profitability up until the 2020 Covid lockdown that prompted an instruction from the Nichols Garden Group director to make cost savings to ensure a sustained future beyond the lockdown. Mr Piggott concedes he was given a broad guideline to examine operating costs and reduce staffing costs to below 30% of turnover. From his operational knowledge of the business Mr Piggott formed a view that staff reductions could be achieved by moving from separate teams to one multi-disciplinary team.

[10] Around the time of the director's instruction to trim costs, Evandale's staff had since 26 March 2020 been excluded from the workplace due to Covid restrictions and been the subject of a 6 April request from Evandale to vary their employment agreements to allow Evandale to reduce pay to the 80% government wage subsidy level after 4 initial lockdown weeks on full pay. The variation sought also included a request that staff take annual leave to assist the company to get into "recovery mode". The former change sought was abandoned by Evandale by way of a 20 April memo affirming full pay would prevail but it was accompanied by an edict that all staff had to "use up 5 days" of holidays even if that meant going into a deficit situation. Rhys Burgess challenged the legality of being forced to take annual leave. It was accepted by Ross Hanson in evidence that Mr Burgess' legal assessment was correct but it took some time for this to be resolved and as late as 8 May 2020 Mr Burgess was still communicating with Mr Hanson on the matter.

*8 May 2020 memo to all staff: proposed review*

[11] By a memorandum to all staff of 8 May 2020 headed: "Proposal for Review of Operations" and drafted with assistance and guidance from Ross Hanson, Mr Piggott set out that Evandale had been struggling with profitability for a "a number of years" and had suffered a combination of stock loss, "very little trading" and limited production during the 4-6 weeks of lockdown. Mr Piggott proceeded to say he was "implementing a formal review of our operations, proposing that we restructure the business to become profitable and viable".

[12] Mr Piggott indicated he would focus the review on the "following "areas" (in summary):

- Reducing staff and wages down to below 30% of turnover.
- Achieving the above by changing from multiple teams into one main team all working flexibly.
- Spending reductions from: limiting travel; producing in smaller more frequent batches; reducing stock and the range of stock held.

[13] Mr Piggott proceeded to outline that in moving to one team and assessing all current roles he would "take into consideration the criteria of skills, attitude, experience, and flexibility".

[14] Despite proposing to use an assessment criteria, Mr Piggott demonstrated he had already undertaken this exercise by then indicating "our proposal to reduce staff numbers and move to one team" was outlined and that he would be:

> .... contacting individuals in these potentially affected roles across our whole operation, over the next few days, consulting specifically and seeking feedback from them, on this proposal.
>
> As this review goes right across the organisation, ... I will also be seeking feedback in general around my proposed changes. I do not take these difficult decisions lightly. Please be sensitive to all colleagues during this time as there is potential in this proposal for a number of roles to be disestablished and colleagues being made redundant. I will be contacting and writing to these individuals separately from this memorandum and I will also set out a timeline for the commencement of this review and consultation process.

***Observations***

[15] I observe that this crucial piece of initial communication to all staff was somewhat confusing and lacking in tangible information for which feedback, ostensibly being sought, could be provided. No financial information was disclosed in any form and despite referring to structural changes, no proposed organisational chart was provided. On the latter point, it emerged in evidence that despite the 8 May memorandum alluding to seeking general feedback from all staff at some point, the new organisational chart was not circulated to all for such feedback.

[16] I find it would have been difficult to provide feedback on such a generally described 'proposal' and no evidence of any further process to get this feedback was provided. I have to conclude that once the general proposal was circulated Evandale then concentrated on getting specific feedback only from those identified to be losing their jobs.

[17] Of further procedural issue at the initial stage, was the criteria disclosed to review "all current roles" was not put up as a proposal for feedback and Mr Piggott confusingly implied he was going to apply the criteria but then stated that he had already "undertaken detailed analysis of all roles in relation to the above criteria". In evidence, Mr Hanson confirmed this to be the case (the criteria having been applied to assess and select individuals) and that he assisted Mr Piggott by discussing with him the application of the criteria.

*12 May letter: "Proposal to disestablish roles"*

[18] By 12 May, Evandale employees had returned to work from the lockdown and a letter of the same day over Mr Piggott's signature, was distributed by email to Rhys Burgess and Tracey Menpes and by hand to Lisa Amos (Ms Amos in evidence expressed distress at this method of delivery as other employees viewed it being handed to her). The wording in letters to all three apart from referencing their differing roles and timing of a follow up meeting, was identical. In summary the letters:

- Reiterated the proposed restructuring, repeating the rationale described in the 8 May memo.
- Suggested further that:

> .... as we enter level 2, we have been undertaking detailed workforce planning, to scope our current orders and projected work. However, it has become very evident through this process that with our current mix of skills and experience, we cannot sustain our current staffing numbers. With further more detailed analysis of our work teams operating in the "new" working environment, we have now determined that based on this proposal, we are carrying at least, 12 full-time staff, over and above our projected needs. Please see attached the proposed and current organisational charts.

**Note**: the new organisational chart disclosed a reduction of 38 – 24 FTEs and contained a new role of "Freight Co-ordinator" and the separate production and growing teams were condensed into a nursery team with a generic job title of 'nursery worker' being preferred to previously described distinct roles (no names were assigned to any roles described).

- Went on to 'propose' to make Mr Burgess' role of dispatch manager and Ms Amos' and Ms Menpes' nursery worker roles redundant.
- Suggested that Evandale wished to "consult with you around this proposal" and consider feedback prior to making a final decision.
- Identified a meeting of the next day and time (subject to confirmation) and encouraged the letter recipients to "seek independent advice and support".

[19] Mr Piggott conceded in evidence that the reference in the letter to "detailed workforce planning" was his decision to reorganise the teams.

*Observations*

[20] At this point, it would appear the step of seeking feedback from all staff on the general proposition to moving to a single flexible team had been overlooked and what was being sought was specific feedback on a proposal to disestablish individual roles from those occupying the roles identified to go.

**Correspondence between counsel and Mr Hanson**

[21] As was evident from correspondence then entered into, all three impacted chose to engage Ms Thomas as counsel and all eschewed an early meeting in favour of a strategy to seek further information prior to agreeing to engage further. This consisted of three separate but identical letters from Ms Thomas to Ross Hanson of 12-13 May asking for her clients' "full employment" files including three months' wage and time records before they could provide further feedback.

[22] Mr Hanson says the information requested was promptly provided but rather than meeting he got further correspondence as follows from Ms Thomas of 15 May:

- A request on behalf of Mr Burgess for the job description and salary pertaining to the proposed "Freight Co-ordinator role and an outline of the disputed annual leave issue seeking that five days enforced leave be "repaid".

- Identical requests on behalf of Ms Amos and Ms Menpes for:
  - Confirmation that only 12 employees received the individualised 12 May letters regarding the restructuring and why only this group were identified.
  - A copy of the detailed analysis of the work teams "relied upon to commence the restructure" and all information supporting the view that the new structure was appropriate.

- A concluding statement that: "We require this information before we meet".

[23] On 18 May, Mr Hanson provided three individual responses to Ms Thomas as follows (in summary):

1) **Tracey Menpes** – indicating that the proposal was to disestablish 13 specific roles to make "immediate savings to the organization". That Ms Menpes role of nursery worker in the production team was one role to go as Evandale moved to a "single, simple multi-team operation" and that: 'We carefully looked at specific roles and the people in these roles, using the attached selection criteria". There then followed confirmation that Mr Piggott had undertaken the analysis in a two-step manner: First, he said he had "looked very carefully at which specific roles could potentially be disestablished, or redistributed, through the management team and greater operation" – secondly once the roles were identified he had applied the attached criteria based on his knowledge of the individuals and concluded that Ms Menpes role being primarily in the production team would be surplus to requirements and her tasks would be redistributed across the "proposed new team".
2) **Lisa Amos** – indicating the same as above in the opening and referring to an attached selection criteria but providing an additional explanatory statement setting out his 'rationale' regarding the proposal to "disestablish Lisa's seed-sowing role". It stated Lisa although carrying out some nursery worker tasks and completing jobs in production, primarily engaged in the specialist task of seed sowing for which she received a higher wage to general staff and had been generally over the years the "only person with this skill". Mr Piggott then suggested as others had gained experience "we feel the higher paid position is no longer required" as other staff can do this job "and a cheaper rate" (sic). Then it suggested a manager could undertake the sowing work, it is seasonal and not required every day and: "Remaining Production staff have more skills in other areas of the business making them more multi skilled and flexible". The remainder of the main body of the letter was identical in wording to Ms Menpes' letter.
3) **Rhys Burgess** – indicating that Evandale were not now proposing to create a new role (of Freight Co-ordinator) but to distribute Mr Burgess' dispatch co-ordination across the management team with the major responsibilities of such being assumed

by Mr Piggott. Further in response to the deducted holiday pay dispute Mr Hanson confirmed payroll would reinstate the 5 days leave but then confusingly stated Evandale would revert to Ministry of Social Development's requirements and pay 80% of normal wages for the period 20 March 2020 to 3 May 2020.

*The attached selection criteria*

[24] The above letters to Ms Amos and Ms Menpes attached a two column selection criteria that frankly served to cause further confusion. The first issue being, two additional criteria were introduced from what was disclosed in the 8 May letter (above at para [13]) – these were: "Reliability" and "Vision and values". The second issue was an additional column aligned to each of the criteria was headed: "Measurement" that then detailed under each criteria a number of 'subjective' considerations – for example alongside: "Attitude, work ethic and teamwork" was:

- Positive attitude towards work.
- Staying on task/focussed.
- Collaborative working practices.
- Works willingly and effectively across teams.
- 'Can do' attitude.
- Sharing team responsibilities.
- Contributing to a positive team environment.

**Counsel's response**

[25] I find not unsurprisingly, the above created an impression that some form of hitherto undisclosed, scoring assessment had been used. Ms Thomas emailed Mr Hanson on 18 May at 5:19 pm asking that he provide "scores on the selection criteria".

**Mr Hanson's disclosure of scoring**

[26] Mr Hanson at 8:55 pm on the same day responded, providing formatted tables for Ms Amos, Ms Menpes and Mr Burgess complete with weightings and scores.

[27] Before proceeding to describe what happened next, I need to pause and reveal what was extraordinarily disclosed in evidence – that is, unbeknown to Ms Thomas and her clients at this point in time, was the scoring sheets did not exist so Mr Hanson instructed Mr Piggott

to 'retrospectively' create them. Mr Hanson's explanation in evidence was he was flustered by Ms Thomas's various information requests and he implied that by creating the scoring it may have prevented Ms Thomas from seeking further information rather than simply agreeing to meet and allow Evandale's Mr Piggott the opportunity to explain to the affected employees the rationale for selecting them as surplus. Mr Hanson openly conceded his actions were "confusing and unhelpful".

[28] Unfortunately to compound matters, in what I find was a reasonable next move, Ms Thomas on 19 May, requested selection information on all 38 employees before they could meet (that afternoon).

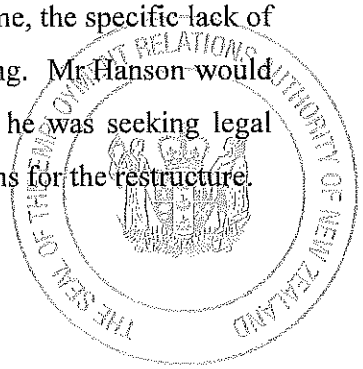
[29] In response and evidently expanding the ruse that a fair process of scoring everyone had occurred, Mr Hanson claimed there was insufficient time before their scheduled meeting (some 45 minutes away) to provide the information and he proposed continuing with the scheduled meetings and:

> ....we can discuss any additional requests or subsequent information that you may need, either during or after our meetings, as we are still in consultation and have not made any decisions around the proposal?

[30] Ms Thomas acquiesced to the above request and three separate meeting took place on the afternoon of 19 May with Ms Thomas present at each one with her clients and Mr Hanson and Mr Piggott in attendance for Evandale at all three. The meetings were recorded and I was provided with uncontested transcripts of each. The following is a precis of each.

**Tracey Menpes meeting**

[31] This was the first meeting and an initial observation I have is a tension arose between Ms Thomas and Mr Hanson on what stage the process was at. Mr Hanson claimed that consultation was only beginning and Ms Thomas expressed a view that the decision to disestablish Ms Menpes role had already been made in reliance on a criteria that had not been put out for consultation. In particular, Ms Thomas raised for the first time, the specific lack of financial information disclosed to support the decision to reduce staffing. Mr Hanson would give no commitment to the release of financial information claiming he was seeking legal advice but said he was prepared to have a broad discussion on the reasons for the restructure.



[32] Ms Thomas then alluded to non-disclosure of other employees scoring against the selection criteria disclosed. Mr Hanson did not take this as an opportunity to reveal that no scoring of others had occurred; instead he indicated: "We will take advice on the level of information we can release".

[33] Mr Hanson also sought to obfuscate on the selection process by claiming that the material provided "ran at the side" of Mr Piggott's decision-making on identifying roles to go and later that the template and analysis was not the "key decision that is forming the proposal". However, in response to being pressed by Ms Thomas, Mr Hanson conceded that only those in roles proposed to be disestablished had been provided with individual letters seeking feedback.

[34] Mr Hanson and Mr Piggott outlined that Covid was not the main driving force behind the restructuring and that concern over poor profitability had been ongoing and regularly communicated to employees. Mr Piggott described where he saw the business was going and the rationale behind switching to a multi-disciplinary team. Mr Hanson denied the proposed selection of Ms Menpes was performance based claiming it was due to an analysis of the skills and attributes required of the newly created positions.

[35] Overall, Ms Menpes asked no questions and Ms Thomas strongly emphasised the need for more information before any feedback could be given and bemoaned the lack of information on the changes proposed.

**Lisa Amos meeting**

[36] The meeting opened as above then Nathan Piggott outlined how he formulated the proposal to institute a smaller team. He said he had proposed it be

> .... a lot more weighted on the growing side of things.

He then described Ms Amos' situation as

> you've been working in the seeds sowing and production, the dual role we've got other people in that area now that have been trained to right across the board to do that role so we looked at those factors and tried to make a decision were we could save money to get within that structure that we required so it's basically an overview of how we got to that point.

[37] Then in answer to a question how was Lisa specifically chosen as a person that may be made redundant, Mr Piggott said "it's basically around the skill level and versatility across the seeds". Then when pushed further, Mr Piggott then said he had weighted Ms Amos individually lower than others as she had not "been out in the growing areas enough to understand the requirement around growing the product, maintaining the product and dispatching the product". Ms Amos contested this analysis but conceded she had not learned the growing part of the production process. This led to Mr Piggott emphasising others were more multi-skilled.

[38] At the close of the meeting Mr Hanson stressed:

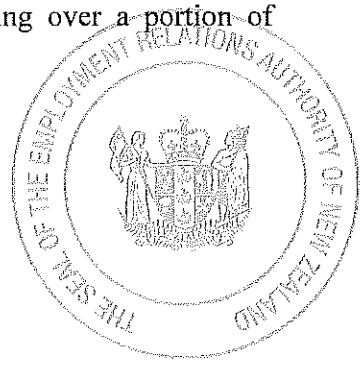
> … the decision process wasn't based solely on the restructuring selection criteria …
>
> The key decisions that have been made around this proposal have been around Nathan's analysis of the roles and the ability to redistribute some of those roles across the business to others so it hasn't been a key decision document in relation to any of the proposals.

[39] Ms Thomas then asked for further material to support the process so far, and the 'scores' related to the selection criteria that that she would formalise these requests in a letter.

**Rhys Burgess meeting**

[40] This meeting was taken up largely by an explanation from Mr Piggott on how he intended to distribute the tasks related to the dispatch manager role Mr Burgess occupied. In response to a question of who is the freight co-ordinator in the new structure, Mr Piggott indicated it was an office role and that "a person in that area that is going to handle a lot of the basics" but that was still a proposal.

[41] A discussion ensued on how Mr Burgess' role was to be re-allocated around other staff with Mr Burgess indicating 90% of his work had been allocating drivers tasks using a board – Mr Piggott claimed this had already been taken over during lockdown and drivers were self-managing in collaboration with Mr Piggott. After discussion around the practicalities of the proposal Mr Piggott conceded he would be taking over a portion of Mr Burgess' role.



[42] The meeting ended with Ms Thomas positing that no position was left for her client so why had he been the subject of the selection criteria – in response Mr Hanson alluded to it being used to assess redeployment opportunities (although none were identified).

***Observations***

[43] Whilst I find that Mr Hanson continued to mislead about the scoring of employees, both he and Mr Piggott explained carefully how they had reached the decision to select Ms Thomas's clients based on the positions they occupied. The situation with Mr Burgess being distinct, as his position simply disappeared and he did not advance reasons for it to be retained and said he was generally aware of Evandale's poor profitability. Mr Burgess' concern was his belief that the decision was pre-determined, influenced by his raising concerns about holiday pay and no alternatives were contemplated to redeploy him.

[44] Mr Hanson and Mr Piggott failed to articulate how they had individually selected Ms Menpes and Ms Amos in preference to others retained beyond a suggestion that other employees were considered more skilled and flexible. Counsel suggested in submission that: "This was not a situation where new positions were created and all staff had sufficient skill set to apply and have a prospect of selection".

[45] The main problem was the disclosed scoring left an impression with all three that they had been contrasted with others in some form of objective/subjective selection process. For Mr Burgess it seemed particularly incongruous to suggest he had been scored as he had no comparator employee. Whereas, Ms Menpes and Ms Amos who also conceded they knew of Evandale's poor profitability from monthly staff meeting feedback, could have been retained and placed in the remaining single team but were apparently not selected as a result of an assessment by Mr Piggott that was largely subjective, determined before consultation commenced and made worse by the scoring disclosed to them that suggested a fairer and more transparent process.

[46] I note that Evandale failed to provide or devise job descriptions for the newly created 'generic' nursery worker positions. Whilst my reading of the parties' correspondence up to 28 May 2020 disclosed only a request for a job description for the Freight Co-ordinator role, I would have expected that in proposing new positions an employer would disclose a job description or at least a list of expectations attached to the new roles. In submissions, counsel

for Evandale claimed the role changes were insignificant. I however, had no evidence, documentary or otherwise, placed before me to support this claim.

**Post first meeting requests**

[47] On 20 May Ms Thomas wrote to Mr Hanson requesting in summary:

- Information relied upon by Evandale to determine the disclosed 'weightings'.
- A copy of the weightings applied to other employees.
- The "analysis completed" in relation to the "financial imperatives" that led to the staff reductions.
- The position description analysis completed in order to select the "12 positions potentially to be made redundant".

[48] Evandale at this point obtained legal advice and Evandale's counsel responded in a letter of 25 May. The letter first reiterated Mr Piggott's disclosed reasoning for deciding to retain "more of the experienced growers" in preference to production workers and then indicated: "As part of Mr Piggott's evaluation, he looked at the skills, flexibility and reliability of all staff members" and then noted:

> ... copies of the weightings of the employees you represent have been provided. In order to protect the privacy of the other employees, their weightings will not be provided.

[49] Counsel then referred to a financial analysis the Chief Financial Officer had undertaken and briefly described the main points of what it had found around declining profitability and the perceived need to urgently reduce staffing overheads which led to Mr Piggott adopting a strategy to reduce capital expenditure equating to a "34% reduction in labour costs". The letter ended by inviting written feedback from Ms Thomas's clients by no later than 28 May and if required Mr Hanson and Mr Piggott would be willing to meet further on that day.

[50] Ms Thomas in a response of 26 May summarised the information 'sought and denied' and concluded:

> Unless we get this information any further meeting is a waste of our clients' time and money and further evidences the fact that this process has been predetermined and the consultation is a sham.

[51] Evandale's counsel responded on 27 May indicating in summary:

- No documentation supporting Mr Piggott's evaluation existed.
- The selection criteria "was only formatted and formalised at your request" – the proposal was not about the individuals "but the very specific role that they performed".
- Section 4(1B)(a) of the Act was a shield to unwarranted disclosure of private information.
- Mr Piggott did not 'judge' employee against employee. The assessment was with regard to position responsibilities.
- Detail of the financial analysis had been provided and "there is no written analysis material".

***Observations***

[52] The 25 and 27 May responses from Evandale's counsel continued to perpetuate the myth that a number of unspecified employees had been assessed/scored and Evandale was using privacy considerations as a justification for non-disclosure – this compounded the deceit and continued to mislead. However, Mr Hanson accepted this was his responsibility and he confirmed that he had not briefed Evandale's counsel on the ruse he was continuing. In his written brief Mr Hanson indicated:

> With the benefit of hindsight, it would have been wiser for me to more fully explain at the time that Nathan hadn't done a scoring exercise for any of the other employees … he only did the scoring after the Applicants' lawyer requested this at the meeting on 19 May 2020 and after I had provided him with a selection template.

**Note**: the evidence disclosed the scorings were provided on the evening of 18 May 2020.

[53] Mr Piggott gave evidence that he had documented his analysis but had lost this documentation (though he failed to disclose this at the time), he also openly conceded that the 'scoring' was misleading and was created later in the process and only for the three clients of Ms Thomas. Mr Piggott indicated that the director of Nichols Garden Group instructed him not to disclose 'sensitive' financial information.

**28 May meetings**

[54] Despite expressed reservations, Ms Thomas's clients attended three further individual meetings on 28 May by telephone. The meetings were recorded and transcribed. Mr Burgess' meeting was first then Ms Amos and Ms Menpes' meeting last. No further comment was provided to Evandale at each meeting and at Ms Amos' meeting Mr Hanson expressed the purpose of the meetings to be:

> .... the last opportunity to take any feedback on the structural proposal if there's any alternative, structures or ideas around the information that we have provided so that's why we have created this opportunity.

[55] By contrast, Ms Thomas's approach to the meeting was to emphasise that her clients were unable to provide any further feedback "due to the fact we have not received the information we requested". I note Ms Thomas during Mr Burgess' and Ms Amos' meetings referred to the lack of disclosed job descriptions for the new positions (wrongly claiming she had previously asked for them when the only request had been for the Freight Co-ordinator role).

[56] On the latter issue, I observe Ms Thomas also confusingly suggested for Mr Burgess, that he may be redeployed into the freight co-ordinator role and she asked for documentation around this 'new role" when Evandale had already (in their 18 May letter) specifically clarified a distinct role did not exist as the proposal had been changed from what was initially envisaged in favour of the work being redistributed amongst remaining employees.

***Observations***

[57] I observe by this point in time, the parties were clearly 'talking past each other'. Whilst I accept that the information Evandale provided focussed upon the rationale for the structural changes I do not consider it was insufficient in this aspect, to prevent Ms Thomas's clients' comment but all three chose not to contest the rationale for removing the dispatch manager role and the move to multi-disciplinary teams. In explanation, all suggested by this point in time that they had lost all confidence in their employer taking any of their views into account.

[58] However, as matters panned out I find there was insufficient financial information provided on the overall imperative for change and the documentation disclosed on how each

individual had been chosen for redundancy had already been tainted by the disclosure of additional criteria factors and individual scoring.

[59] I note at the final meetings that Mr Hanson chose not to explain the scoring issue and by omission to do so, left the continued impression that scoring had been a feature of the selection for redundancy process and others had been scored.

**The final decision**

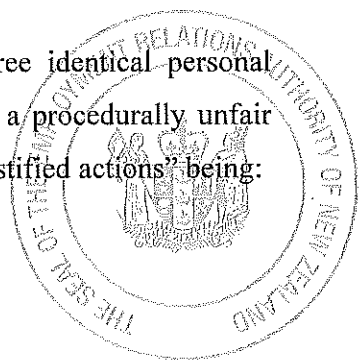
[60] By way of three largely identical letters (in regard to explaining the general rationale) of 3 June 2020, Mr Piggott outlined the decision to, after discounting redeployment as being unfeasible, end the employment of Ms Amos, Ms Menpes and Mr Burgess and advised the last day they would be required to work was 5 June 2020 and that 4 weeks' notice was provided from this date with no requirement to be at work during the notice period as payment in lieu would be provided.

[61] Ms Amos' and Ms Menpes' letters explained the move to a smaller team and the need for more flexible employees as rationale for their redundancy and Mr Burgess' letter explained the distribution of his tasks to others as decisive factor in his redundancy. However, all letters had a curious passage indicating "… the primary basis for the proposal was roles and responsibilities, not selection criteria … that the criteria was not the basis for the proposal but that it was running alongside the proposal". Further after referencing Ms Thomas's request to disclose information "relied upon in reaching the weightings", Mr Piggott indicated:

> It was also explained that, as part of my evaluation, I looked at the skills flexibility and reliability of all staff members however this assessment was secondary to the skillset-based assessment and was utilised for exploring redeployment opportunities.

[62] I observe the above, still repeated the misleading impression that some form of fair criteria based evaluation had been undertaken involving all employees being assessed and scored.

[63] By way of letters of 5 June 2020 Ms Thomas identified three identical personal grievances suggesting her clients had been unjustifiably dismissed in a procedurally unfair and substantively unjustified manner. Ms Thomas identified four "unjustified actions" being:



- Predetermination;
- Failure to consult;
- An unfair process of selection;
- Bad faith.

**Assessment: the legal framework**

*The employment agreement*

[64] The applicants' individual employment agreements all had the same brief redundancy provision under a "Termination of Employment" heading, being:

> Termination by reason of redundancy, on 4 weeks' notice;
>
> PROVIDED THAT the Employer has first followed a fair process including consultation where appropriate.

[65] The above provision has no specific definition or defined process requirements. There is no statutory definition of redundancy but it has long been established in common law that a redundancy arises where a specific position is superfluous to the needs of an employer's business to establish an abstract construct that it is the position and not the person that is redundant. [1] However, this is only an overarching definition that does not necessarily address the spectrum of how a redundancy arises and in what context.

[66] Evandale's brief redundancy provision does correctly allude to a "fair process" including a requirement for "consultation". In the context of a redundancy situation in the Employment Court decision *Stormont v Peddle Thorp Aitken Ltd*, Chief Judge Inglis outlined key consultation principles as:

> Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew. [2]

[1] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZILR 1079 (CA) affirmed as still applicable law in *Grace Team Accounting v Brake* [2015] 2 NZLR 494.
[2] *Stormont v Peddle Thorp Aitken Ltd* [2017] ERNZ 352 at [54].

[67] Where the agreements' provision is also relevantly deficient, is in not detailing that an employer has a good faith obligation to amongst other requirements put in place a fair selection process where other employees are potentially involved. [3]

[68] The employment agreements are of limited assistance. To determine whether their expressed purpose of fairness was met I must apply (below) statutory considerations of justification and good faith.

**Justification**

[69] In order to justify termination of employment including in a redundancy situation, Evandale must meet statutory requirements set out in s103A of the Act commonly referred to as the 'justification test'. This test requires the Authority to undertake an objective assessment of whether the employer's actions and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time of the ending of the employment relationship.

[70] In applying this test, the Authority must consider a number of factors including: the resources available to the employer and here in context, whether Evandale gave the applicants an opportunity to comment on the proposal to end the employment relationship and whether that comment was genuinely considered.

**Good faith**

[71] To ensure a redundancy is enacted in a procedurally fair manner, good faith obligations also apply as set out in s4 of the Act - these include a positive disclosure obligation of an affected employee being provided with access to information supporting the reason for the redundancy and the detail of how it is proposed it will be implemented.

[72] Further and crucially, an employee must be afforded an opportunity to comment on any redundancy proposal prior to a decision being finalised. The Court of Appeal in *Grace Team Accounting v Brake* has ruled that an employer claiming to be in a redundancy situation is only entitled to justifiably end an employment relationship for valid and demonstrable commercial reasons and when looking at applying the s103A tests has said:

> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a

[3] *Jinkinson v Oceania Gold (NZ) Ltd (No2)* [2010] NZEMPC 102.

> pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test. [4]

[73] In essence, the above requires the Authority to determine first if the redundancy was genuine (an assessment that has to exclude any ulterior motive) and then assess whether it was enacted in a procedurally fair manner.

**Genuineness of the redundancy**

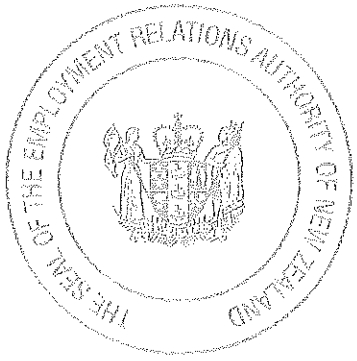
[74] I find that even if the redundancy was subjectively genuine on economic grounds which given the financial information and contextual factors belatedly provided to the Authority at the investigation meeting, appears to be the case, I have to also examine the extent to which the disestablishment of the applicants' positions was carried out in a procedurally fair manner absent any ulterior motive.

*Ulterior motive?*

[75] Despite Mr Burgess and Ms Amos advancing perceptions of ulterior motives being behind the decisions to select them for redundancy I found the evidence did not bear such out. In his own way and albeit with procedural deficiencies discussed below, I found Mr Piggott to be a credible witness faced with a difficult selection task and instruction from his company director to reduce overheads. He went about the task of reorganising the staffing structure in an informed and logical manner.

**Procedural fairness and good faith factors**

*Selection issues*




[4] *Grace Team Accounting v Brake* [2015] 2 NZLR at [85].

[76] In analysing whether the redundancies were effected in a good faith manner, I have to take into account that Mr Piggott was guided at all times by a very experienced HR practitioner in Mr Hanson and later in the process they engaged legal advice to manage information requests. However, the extent of the appropriateness of Mr Hanson's guidance was exposed at the investigation meeting.

[77] The first issue was in assisting Mr Piggott to formulate the proposal of disestablishing the identified roles, Mr Hanson should have ensured that Mr Piggott had an open mind about his plans to move people into a multi-disciplinary team and dispense with the dispatch manager role. Whilst an employer is entitled to have a working organisational plan in mind before issuing such for consultation, this does not include having already considered the personal attributes of individual workers before any feedback on the plan is received. I find the latter is what occurred in this situation as Evandale could not demonstrate despite expressing this opportunity initially, that other workers, beyond those identified to lose their jobs, were consulted on the plan to re-organise the staffing structure. This was a significant omission that apart from being misleading, signified that Evandale was not serious about consultation and had in effect pre-determined the outcome.

[78] *Harris v Charter Trucks* is an Employment Court case involving a close parallel with Ms Amos' and Ms Menpes' situation, being a selection for redundancy amongst a group of workers. Mr Harris occupied a generic driving role akin to co-workers but was singled out for redundancy with his co-workers not being involved in consultation or any selection process. Judge Couch identifying a series of issues that rendered the identification of Mr Harris as unjustified and found a: "Fundamental flaw was the failure to consult all employees affected by the proposed restructuring". [5]

[79] Here, a criteria for selecting those to be made redundant was outlined in the 8 May initial letter but this sought no feedback from employees and was as explained subsequently adjusted in response to information requests. The duty to disclose selection criteria and consult on such is a well-established legal principle.[6]

[80] It was also evident that no wider selection process was undertaken. The Employment Court has best described an employer's obligations as:

[5] *Harris v Charter Trucks,* CC 16A/07, CRC 8/06, 19 December 2007 at [69].
[6] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA).

> In the absence of contractual agreement as to selection criteria, an employer may, following genuine consultation, formulate criteria by which it will measure an employee when considering selection for redundancy. A reasonable employer will advise an employee of the selection criteria prior to assessment and assess an employee fairly and according to the criteria without reference to undisclosed considerations. Further, an employer should consider any comments an employee may make on the result of his or her assessment before a decision is made. [7]

[81] Evandale did not take such an approach as described above and I am mindful of the Court of Appeal in *Coutts* stating:

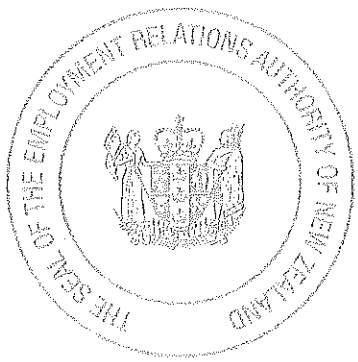
> If criteria are properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge is unlikely to be fruitful. [8]

[82] I find in the circumstances that Evandale fell well short of the expectations outlined above.

*Disclosure of information*

[83] Whilst Mr Hanson expressed frustration at the numerous requests advanced seeking information including that financial information be provided to justify the restructuring proposal, I find his reasons for resisting such, that included a suggestion that others had not made such extensive requests, to be less than convincing and he conceded that Evandale on the direction of the company director and the cloak of legal advice activly resisted disclosure. I find this was a specific misunderstanding of a well-established legal concept articulated in *Coutts* by McGrath J indicating: "Provision of information concerning business decisions is in my view no longer a matter of discretion but an implicit part of the duty of good faith". [9] It is also in breach of a statutory obligation. Section 4(1A)(c) of the Act unequivocally states it:

> ... 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 employees to provide to the employees affected -
>
> i. access to information, relevant to the continuation of the employees' employment, about the decision; and




[7] *Apiata v Telecom New Zealand Ltd* [1998] 2 ERNZ 130.
[8] [2001] ERNZ 660 at [35].
[9] At [82].

ii. an opportunity to comment on the information to their employer before the decision is made.

(my emphasis).

[84] I have carefully considered counsel for Evandale's submission that Mr Piggott engaged in a process of seeking feedback on his initial proposal and that all three applicants were generally aware of Evandale's poor financial performance and none appeared to challenge or give alternatives to the proposal to move to a single multi-disciplinary team and also the redistribution of the dispatch manager's tasks. What struck me as entirely valid was the applicants' perceptions, given the process Evandale adopted, that the decision to make each of them redundant had been pre-determined before they were 'consulted' and that this tainted any process of genuine consultation.

*Genuine business reasons?*

[85] For completeness, I was persuaded during the investigation meeting of the genuine financial and organisational reasons for the restructuring undertaken but I find this was a significantly flawed redundancy process with 'surface' consultation conducted in a misleading manner and no sharing of relevant financial information. The result was that the applicants were not provided with a real opportunity to comment on the decision to dismiss them with no feedback being sought on an already applied selection criteria that was later used in a misleading manner to justify Evandale's selection decisions. These procedural defects were not minor in terms of s 103A(5) of the Act, they resulted in the applicants being treated unfairly and Evandale has failed to meet basic considerations set out in s4 of the Act.

**Finding**

[86] The procedural defects and breaches of good faith that I have identified above ended the employment relationship in a manner that did not fall within the parameters of what a notional, fair and reasonable employer could have done in all the circumstances at the time. I find that in all of the circumstances Lisa Amos, Tracey Menpes and Rhys Burgess were unjustifiably dismissed.

**Claimed penalties for breaches of good faith**

[87] I am not persuaded that penalties for the good faith breaches identified are warranted or have reached the threshold found in s 4A of the Act for imposing such given the unusual

circumstances prevailing. In my view the transgressions, though not minor, are adequately remedied by my finding that the applicants have successfully established personal grievances that all three were unjustifiably dismissed and the remedies detailed below. I rely on s 160(3) of the Act in making this assessment.

[88] In elaboration, despite finding serious defects in Evandale's decision-making, I think their approach fell just short of the threshold of it being "deliberate, serious and sustained" [10] as although Mr Hanson did seek appropriate specialist legal advice this was at a late stage and both Mr Hanson and Mr Piggott genuinely believed that the restructuring proposal had been carefully explained and was formulated with a degree of logic. I was convinced that in hindsight, Mr Hanson recognised that his actions around the selection debacle were ill conceived but not malicious in intent.

[89] Whilst not condoning Evandale's approach and 'the hole they dug themselves into', I see no deterrent purpose in awarding a penalty for breach of good faith.

**What remedies should be awarded?**

***Lost wages***

*Rhys Burgess*

[90] The difficulty with Mr Burgess' claim for lost wages is that he did not challenge the genuineness (other than an ulterior motive that I have not found) of the decision to disestablish his position on financial and organisational grounds and I have found that Evandale established the grounds for the removal of Mr Burgess' dispatch manager role and carefully explained the reasoning for such. As the sole occupant in the role, the issue of the selection criteria and how it was applied could not be said to have practically impacted as no comparator role existed for selection purposes. Thus had Evandale properly consulted Mr Burgess and not misled him into believing he had been the subject of an individual scoring system (that he not unreasonably took to be an assessment of his performance), then the resulting loss of position would still have occurred on genuine grounds as his work was redistributed and to date, his position has not been replaced. This means that Mr Burgess' situation falls into the very rare types of case where an award of lost wages may not be

[10] Section 4A Employment Relations Act 2000.

appropriate as the loss of the position was inevitable despite the procedural errors. In coming to this conclusion, I have had regard to counsel's reference to a recent Employment Court decision of *Butler v Ohope Chartered Club Incorporated,* where despite a complete lack of consultation in a genuine redundancy situation only two weeks' lost wages were awarded and reference was made by Judge Smith to *Telecom New Zealand v Nutter* where the Court of Appeal said:

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

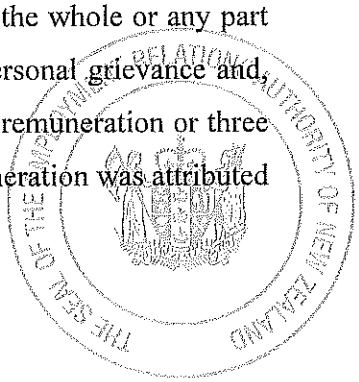
[91] Here the consultation period was not rushed and extended over nearly three weeks with Mr Burgess having two meetings where he had the opportunity to contest the rationale behind the decision. I have found that Mr Burgess was misled around the application of the selection criteria but had he not been caught up in this deception it may have curtailed the length of consultation rather than lengthened it. In the circumstances I find no award of lost wages is appropriate.

*Tracey Menpes*

[92] By contrast Ms Menpes who had worked for Evandale for over 21 years was designated a 'nursery worker' but she had extensive experience across a variety of tasks including having held team leadership roles. I find that had the process been as it was portrayed to her as the application of a fair and transparent selection process there is the distinct possibility Ms Amos could have retained an ongoing role when contrasted with other less experienced workers.

[93] Ms Menpes described applying for a number of positons before deciding to upskill by commencing study and completing her level 3 Horticultural Certificate during the period 13 July 2020 to 29 November 2020 and then finding alternative employment at a nursery in May 2021.

[94] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Menpes on a finding that she has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration. Here I find Ms Menpes lost remuneration was attributed



to her personal grievance which was that she established that Evandale did not meet key contractual and statutory procedural requirements when they disestablished her position.

[95] I have considered a number of relevant authorities including *Grace Team Accounting v Brake* where the Court of Appeal upheld the Employment Court's award of 12 months' lost earnings on the basis that but for the flawed redundancy Ms Brake's employment was likely to be ongoing and the decision outlined a discussion of the principals involved in setting lost remuneration and the contingencies that need to be considered in exercising discretion under s 128(3) of the Act. [11]

[96] I am obliged to balance matters up such as the potential that Ms Menpes may not have been selected in comparison with co-workers had a transparent process taken place. I also have to consider that Ms Menpes has made a choice to up-skill to assist her chances of continuing in an industry she obviously derives a deal of satisfaction from being involved in and in the process taken herself out of the job market. Ms Menpes counsel claimed around seven months lost wages but this took no account of the fact Ms Menpes was paid one month in lieu of notice.

[97] I consider it would be equitable in all of the circumstances, to award Ms Menpes three months' lost remuneration calculated at $576 per week ($19.20 per hour for 30 hours per week) that amounts to a total of $7,488 (gross).

*Lisa Amos*

[98] Ms Amos did not make a claim for lost wages.

***Compensation for humiliation, loss of dignity and injury to feelings***

*Rhys Burgess*

[99] Mr Burgess described being humiliated at work during and after the process of losing his job and continuing anxiety and feeling of low worth thereafter. He says he lost weight and found sleeping difficult. Mr Burgess says he dwelt on the dismissal constantly going over it and believing he had been unfairly treated. Kim Burgess described how Rhys went very quiet after his dismissal and became withdrawn from family and friends.

[11] At [101] – [108] that affirmed Judge Travis in the Employment Court decision had properly applied the principles set out in *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

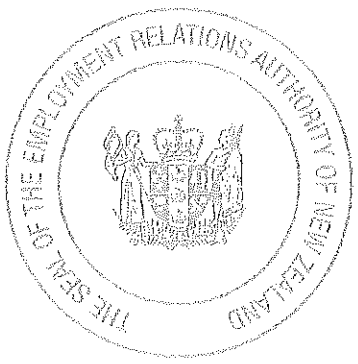
[100] Whilst I have commented on the incongruity of him being scored and the results shared with him having no practical impact on his dismissal, I do observe it was unnecessary to do an assessment and causative of additional humiliation to Mr Burgess at a time he was searching for answers as to why he was chosen to be made redundant and naturally suspicious on his holiday pay issue not being resolved.

[101] Having carefully considered Mr Burgess' evidence I am convinced that the impact of the dismissal was not transitory and he suffered significant ongoing humiliation and loss of dignity and injury to feelings including the fact that the manner by which he had been misled only came to light when Evandale employees filed witness evidence.

[102] In considering analogous cases of both the Authority and the Courts that discuss compensatory issues to be assessed, including *Stormont* and *Zhang v Telco Asset Management Limited,* that deal with redundancies found to be either 'disingenuous' (*Stormont*)[12] or not effected in accord with good faith requirements [13] I consider that Mr Burgess' level of distress at the impact of the dismissal warrants a reasonably significant amount of compensation. I fix that amount at $18,000 pursuant to section 123(1)(c)(i) of the Act.

*Tracey Menpes*

[103] Ms Menpes described a feeling of distress and humiliation at losing her position of over 21 years, particularly when she had just prior to this been granted a pay increase after a positive review of her work. Ms Menpes described feeling belittled and humiliated when approached in social situations when people approached her asking about her being singled out for redundancy and wanting to "crawl under the carpet" rather than try and explain her situation. Ms Menpes described the impact on her family of becoming withdrawn and irritable with her two teenage daughters, becoming depressed and gaining weight. Ms Menpes said she often would stay at home fearing to even go to the supermarket in case she ran into people who may know her situation. Of particular dismay to Ms Menpes was the break from the workplace and friends she had made there.




[12] [2017] ERNZ 352 at [54].
[13] *Zhang v Telco Asset Management Ltd* [2019] ERNZ 438 at [107].

[104] I find that the misleading selection and scoring would have been hurtful and humiliating to Ms Menpes and particularly galling when she later discovered no other employees had been compared with her. Craig Menpes gave evidence of the profound impact on the family and observations of Tracey becoming demotivated due to being unable to find immediate alternative work.

[105] In considering analogues cases discussed above, I find Ms Menpes' evidence at her level of distress warrants significant compensation of $20,000 pursuant to section 123(1)(c)(i) of the Act.

*Lisa Amos*

[106] Ms Amos described feeling isolated during the process of being one of 12 people to receive a letter of indicating the proposal to make her redundant as the letter was hand delivered and co-workers had observed this. Ms Amos recalled feeling a roller coaster of emotions when presented with her scoring and assessment that was inconsistent with a recent one dollar an hour pay increase. Ms Amos said she lost sleep, could not enjoy food and became depressed and felt degraded. The scoring that I have found to have been unnecessary and misleading had an impact on Ms Amos' confidence and self-worth and she said she struggled feeling she was not good enough to get other jobs. Ms Amos' daughter Danielle gave evidence she was worried her mum was displaying signs of anxiety since losing her job at Evandale and her 'happy go lucky' approach to life has significantly changed.

[107] In assessing Ms Amos' evidence that I also found compelling and contrasting it with comparable cases, I find that the humiliation and distress and loss of dignity that has been caused by the manner the redundancy was effected warrants a significant amount of compensation that I fix at $20,000 under s 123(1)(c)(i) of the Act.

**Contribution**

[108] Section 124 of the Act indicates that I must consider the extent to which, if at all, the applicants' actions contributed to the situation that gave rise to the personal grievances and assess whether any calculated remedies should be reduced. Counsel for Evandale suggested a reduction was warranted due to the applicants' lack of constructive engagement in the

process. Whilst I observe counsel's approach was 'robust' on the applicants' behalf, I have not found any of the repeated requests for information to be unreasonable.

[109] In these circumstances, I can find no cogent reason to reduce the remedies awarded above, as Evandale howsoever misguidedly rather than maliciously, misled all three applicants in effecting their dismissals.

[110] I find that the applicants did not engage in any wrongful actions and no reduction to any of the remedies awarded is warranted.

**Outcome**

[111] **Overall I have found that:**

a. **Lisa Amos, Tracey Menpes and Rhys Burgess were unjustifiably dismissed from their employment with Evandale Plant Productions Limited.**

b. **Evandale Plant Productions Limited must pay the sums below within 28 days of this determination being issued:**

c. **To Tracey Menpes:**

i. **$7,488 gross lost wages;**

ii. **$20,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**

**To Lisa Amos:**

iii. **$20,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**

**To Rhys Burgess:**

iv. **$18,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**

**Costs**

[112] Costs are at the discretion of the Authority and here the applicants were successful in their claims and have obtained significant compensatory remedies in a two day investigation meeting.

[113] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[114] If no agreement is achieved, the applicants' have fourteen days following the date of this determination to make a written submission on costs and the respondent has a further fourteen days to provide a response. I will then on receipt of submissions, determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority