

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 234
5419405

BETWEEN CHRISTOPHER BASIL ASBY
Applicant

A N D WAIARIKI INSTITUTE OF
TECHNOLOGY
Respondent

Member of Authority: K J Anderson

Representatives: M Beech and F Meikleham, Counsel for Applicant
R Harrison, Counsel for Respondent

Investigation Meeting: 12 and 13 March 2014 at Rotorua

Submissions Received: 4 April 2014 from Applicant
16 April 2014 from Respondent

Date of Determination: 13 June 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Dr Christopher Asby, claims that the termination of his employment on the ground of redundancy was procedurally and substantively unjustifiable. Dr Asby also says that prior to his dismissal, his employment was affected to his disadvantage by the unjustifiable actions of his employer on two counts:

- (a) That his employer undertook a restructuring process whilst he was medically incapable of participating substantively in that process; and
- (b) That his employer failed to reintegrate him into the workplace in accordance with its stay-at/return-to policy.

[2] Dr Asby asks the Authority to find that he has a personal grievance regarding each claim and then award him various remedies, including compensation and reimbursement of lost wages and benefits.

[3] The respondent, the Waiariki Institute of Technology (Waiariki/the Institute) rebuts the claims of Dr Asby and says that it met its obligations in regard to reintegrating him back into the workplace following his elective surgery. In regard to the other claims, Waiariki says that it provided a range of opportunities for Dr Asby to ensure that he was fully engaged during the consultation process and opportunities were provided for him to provide feedback on the restructuring proposal. Waiariki says that the dismissal of Dr Asby on the ground of redundancy was justifiable; procedurally and substantively.

[4] The Authority has received evidence from Dr Asby and Mrs Abadan Asby. Further evidence for Dr Asby has been received from Mr John Snook, Dr Henry (Harry) Pert and Ms Sue-Ellen Craig (the latter under summons to appear before the Authority). For Waiariki, there is evidence from Professor Margaret Noble, Mr Richard Bird and Dr Clarke Raymond.

[5] Counsel for the parties have most helpfully produced a common bundle of relevant documents. All of the available evidence has been closely considered, albeit it may not be specifically referred to in this determination.

Background

[6] Dr Asby commenced his employment at Waiariki on 17 July 2004. The evidence of Dr Asby is that during his career he has been occupied with learning and applying new skills to developing people, and technology application and new business; within a wide variety of management, teaching and advisory roles. Dr Asby has applied his knowledge and skills across a number of countries and cultures.

[7] The evidence of Dr Asby refers to the various roles that he has held within Waiariki, culminating in his role of Projects Manager at the time that his position was disestablished.

The redundancy of Dr Asby's position

[8] The evidence of Professor Margaret Noble, the Chief Executive of Waiariki, is that as a result of key financial and other pressures facing the Institution, a strategic review and realignment was required. A redevelopment of the Waiariki strategic plan commenced in the last quarter of 2012.

[9] Mr Richard Bird, the Director of Student and Staff Support Services, with responsibility for human resources at Waiariki, gave evidence about the circumstances that arose in 2012, pertaining to Waiariki facing a \$3.9m loss in projected revenue for 2013.

[10] The evidence of Mr Bird is that because of the significant loss of projected revenue, along with rising internal costs, Waiariki had to take some action to implement a range of cost-saving measures. The executive management team implemented a range of cost-saving measures designed to minimise job losses, but these were not sufficient. Mr Bird says that it was inevitable that a review would have to include an overall reduction in staff numbers.

[11] The further evidence of Mr Bird is that the review and realignment of organisational structures (the Review) had the objective of “achieving efficiencies, reducing costs and better aligning the organisation” to achieve “new strategic priorities”.

[12] According to the evidence of Mr Bird, the Review was conducted in two stages. Relevant to Dr Asby's situation is the first stage. This was a review of staffing in a number of key functional areas; following the consolidation of two deputy chief executive roles into one position, which occurred in late 2012.

[13] Stage 1 of the Review commenced with the presentation of a consultation paper: *Proposed Review and Realignment of Organisational Structures*.

The consultation document – request for feedback

[14] Via a letter dated 17 January 2013, from Professor Noble, Dr Asby was informed that the changes proposed in the Review may potentially impact on his current role of Project Manager. He was informed that draft job descriptions pertaining to new roles that would be available, were on the intranet “I Drive”.

Dr Asby was encouraged to “critically” consider what was being proposed and provide feedback through the consultation process. A timeline for the review was set out:

- 21st January staff informed of proposal.
- 21st January-11th February consultation period.
- 11th February-18th February consideration of feedback.
- 18th February finalisation of structures and resourcing. Staff will be advised of the outcome and how this impacts them.
- Advertising and recruitment to new positions will commence with the aim of filling these positions by 31st March.

Dr Asby’s medical circumstances

[15] Unfortunately, on 15 January 2013, Dr Asby had to undergo intracranial brain/nerve surgery to remove a Schwannoma¹ tumour located between his brain and right ear canal. This required a 4½ hour operation. Dr Asby had informed Professor Noble via an email dated 18 December 2012, that he would be absent because of the operation and that there would be a recuperation period of approximately four weeks.

[16] The evidence of Dr Asby is that he experienced several side effects immediately after the operation including: double vision, difficulties in measuring distance and speed of movement and in focusing his eyes, nausea, dizziness, difficulties with balance and walking, disruptive sleep, mood swings, difficulties with concentrating, loss of short term memory and severe headaches.

[17] Dr Asby says that the above symptoms slowly reduced in the six weeks following the operation but several of them remained; along with stabbing pains to the right side of his skull and frequent teeth and head aches. Even 10 months after the surgery, some recovery symptoms still continued.

[18] Because of the operation on 15 January 2013 and the immediate recovery period required, Dr Asby did not receive the “consultation” letter dated 17 January until 22 January 2013. He also became aware of a further letter from Waiariki dated 21 January 2013, whereby he received the consultation documents that had been given to other Waiariki staff that day. The evidence of Dr Asby is that his ability to

¹ A Schwannoma is a tumour of the tissue called the nerve sheath; it covers the nerves,.

concentrate at that time was very limited, due to the side effects of the operation. In an email to Ms Linda Neilsen² on 29 January 2013, Dr Asby records that:

I try to do a bit more each day to get moving, but still need the corridor walls to bounce off as I walk around the house – like being permanently on a rolling ship ... We have banned Waiariki talk for the interim.

[19] Dr Asby attests that he felt physically incapable in engaging in any consultation process and certainly could not participate to the extent required to meet the 11 February 2013 deadline for the end of the consultation period. Dr Asby says that the effects of the surgery prevented him from contributing any coherent argument regarding the proposed reorganisation; even to instruct people to speak on his behalf. Dr Asby adds that the stress associated with the proposal to review the central support structures took a toll on his health and his rehabilitation was significantly delayed.

[20] On 22 January 2013, Dr Asby contacted his (then) lawyers and his union, TIASA³, informing that he currently was not well enough to participate in the Review.

[21] On 31 January 2013, Dr Asby's lawyers wrote to Waiariki, the germane content being:

As you are aware, our client is currently on leave to recover from an operation to remove a tumour between his brain and ear canal. Our client is not in any fit state to participate in the consultation process due to his operation. Among other things, he is currently not able to balance or walk properly. Our client's surgeon, Dr Hamish Sillars, has directed our client to rest and avoid stress. Further, given the nature of his operation, we are advised that our client's anticipated recovery time is a minimum of 6-8 weeks. Therefore, Dr Asby is not expected to be well enough to consider the restructure proposal and engage in a consultation process for at least 6-8 weeks.

[22] Reference was also made to the fact that Dr Asby was at home recuperating and hence he was not able to access the intranet, as referred to in the letter of 17 January 2013. Finally, a request was made to Waiariki to remove Dr Asby's position from the scope of the staffing review and carry out a separate review regarding his position, in consultation with him, when he was fully recovered.

² While Dr Asby refers to Ms Neilsen as a colleague, it seems more probable that she was his acting line manager.

³ Tertiary Institute Allied Staff Association

[23] An immediate response from Mr Bird, via a letter dated 1 February 2013, acknowledged an awareness of Dr Asby being on sick leave because of the surgery. Mr Bird informed that Waiariki was not able to delay the implementation of the Review, as given the number of the funding cuts for 2013; there was a requirement to “move quickly to reduce organisational overheads and achieve efficiencies”.

[24] Mr Bird also informed that it was not practicable to remove Dr Asby’s position from the Review and carry out a separate review at a later date, as had been requested. This was because the organisational review was of “quite wide scope” and it proposed the disestablishment of the Project Office, within which Dr Asby’s role, and others, were located; along with the formation of a centre for business, research and enterprise with fewer and newly defined roles. Mr Bird informed that isolating Dr Asby’s position from the Review would: “necessitate a delay in the whole process and impact a significant number of other staff”.

[25] However, Mr Bird acknowledged that it was important that Dr Asby was informed about the review and have the opportunity to provide input. In order for Dr Asby to have “real input” into the consultation process, Mr Bird suggested that:

1. In terms of accessing I drive documents, it should be possible for him to do so from home through our Citrix portal. However, to ensure he does have access, I will arrange for this documentation to be copied onto a memory stick and delivered to him.
2. I would be happy to arrange for myself or another staff person to travel and meet you as his representative to discuss the review and Dr Asby’s views on it.
3. An alternative would be to meet with Dr Asby and you.
4. If Dr Asby would like to nominate a colleague from Waiariki he would be comfortable working with, this would be another option.

[26] In closing his letter, Mr Bird requested that Dr Asby’s lawyer should advise if she or Dr Asby would like to pursue any of these options. But if none of the options were feasible, then Waiariki would still need to proceed with the review process as it stood.

[27] In regard to the proposed suggestions of Mr Bird, the evidence of Dr Asby is that none of the options were acceptable or feasible for him. Dr Asby says that first, he was unable to access the I Drive from his home and even if the relevant material was delivered to him, he would not have been able to read it due to his condition. Secondly, and vitally as far as Dr Asby was concerned, his mental capacity denied

him “the ability to think clearly, calmly, rationally and logically” at anywhere near his former healthy pre-surgery state. Therefore, Dr Asby says, his overall post-surgery condition was such that he was unable to engage with the consultation process as required by Waiariki.

[28] Nonetheless, on 4 February 2013, Dr Asby received a USB memory stick in the post. It detailed all of the vacant positions at Waiariki; but Dr Asby says he was unable to focus on the details and he did not review the information until later, when he felt impelled to apply for some of the new roles.

[29] On 8 February 2013, Dr Asby’s lawyer wrote to Mr Bird reminding him of Waiariki’s obligation to “engage in real and meaningful consultation”. The letter advised that the proposed restructure had placed Dr Asby under considerable stress and this was exacerbated by the fact that Dr Asby could not focus his eyes or balance properly.

[30] Some appreciation was accorded to the earlier suggestions made by Mr Bird (1 February 2013) but he was informed that they were not practical in the circumstances. This was because Dr Asby was in no position to digest the volume of documentation necessary for him to provide a considered response to the proposed restructure. Dr Asby’s lawyer also informed that she was in no position to obtain appropriate instructions from Dr Asby in regard to a response from him in relation to operational matters, and it was not possible for any colleague of Dr Asby to receive a response from him.

[31] Finally, the letter informed that should Waiariki proceed with the review process, in regard to Dr Asby’s position “... we put you on notice that Dr Asby may raise a personal grievance on the grounds that such process was inappropriate and conducted in bad faith given Waiariki’s knowledge of Dr Asby’s current condition”.

[32] The reply from Waiariki dated 13 February 2013 noted that Dr Asby is a member of TIASA and that the Union was in the process of making a submission about the review on behalf of its members. It was also noted that Dr Asby was on sick leave until 15 February 2013 and hence the consultation period was extended for him until 18 February 2013.

[33] Dr Asby's lawyer responded on 15 February 2013 advising that Dr Asby had intended to return to work on 18 February but was now medically certified to remain off work for a further week; hence he was unable to provide any feedback on the review. It was acknowledged that TIASA would be making a submission on behalf of its members but Dr Asby had not been involved with that. In any event, it was pointed out (correctly), that Waiariki had an obligation to consult with Dr Asby on an individual basis.⁴

The disestablishment of Dr Asby's position

[34] Notwithstanding Dr Asby's indication that he was unable to make any submissions regarding the restructure, on 18 February 2013, Professor Noble wrote to him, informing that his position had been disestablished "in favour of reducing and reconfiguring the number of Project roles across the Institute". It appears that this is a pro forma letter that probably went to all affected employees as there is no acknowledgment or mention of Dr Asby's personal circumstances.

[35] The evidence of Dr Asby is that the letter mentioned a list of vacant positions and job descriptions being available on the I Drive, but he could not access this from his home. However, Dr Asby concluded that despite his condition, he felt he had to "get his brain into gear" and engage with the process at any level that he could as he had now concluded that he was about to be left with no position at all.

Dr Asby's return to work

[36] Dr Asby returned to work, on a part time basis, on Monday, 4 March 2013. He attests that he was still in recovery, suffering headaches, nausea, short term memory loss and dizziness.

[37] On the morning of 5 March 2013, Dr Asby had coffee with Mr Keith Ikin, the Deputy Chief Executive at Waiariki (then). Mr Ikin urged Dr Asby to take things carefully and recover and he was not to "overdo it". Dr Asby advised Mr Ikin that he felt that he would be "right" in three months. Dr Asby refers to this contact with Mr Ikin in the context that while he appreciated Mr Ikin's apparent concern for his health and welfare, no other discussion took place concerning his rehabilitation or his pending redundancy or redeployment. Dr Asby compares this with the care and

⁴ It has now been accepted that the Union was not acting for Dr Asby.

consideration that was given to other employees that he was aware of who had returned to work at Waiariki after serious illness or injury.

[38] Dr Asby referred the Authority to the *Return to Work Procedure*. This procedure states, at clause 1, that its purpose is:

To ensure the safe early return to work for employees following an injury/illness, and develop a rehabilitation plan regardless of whether the injury occurred at work or outside of work. To provide suitable duties, if possible, following the return to work e.g. by modifying the current work role or providing alternative duties, and to ensure good communication is maintained between the employer, employee, treatment provider and ACC (if applicable). The responsibility for managing the return to work procedure rests with both Waiariki and its individual employees. If applicable, ACC advisers will also be party to any return to work programmes for staff regardless of any accidents being work related or non work related.

[39] While the general focus of the procedure is on accidents, it does refer to employee illness and it is accepted that the procedure applies to both injury and illness situations where some rehabilitation is required. In particular, the procedure allows for a return to work plan to be developed, where it is considered to be “appropriate”. It allows that:

The plan will set out the actions each party must take, and may involve a combination of training and suitable duties for the employee which increase in duration and/or frequency over time. It will also provide a timeframe for monitoring progress and reviewing the plan. In order to help us develop an appropriate return to work plan for them, and to enable us to offer them suitable duties, we must obtain written permission from the employee before we release information about their injury/illness to any other party (ACC, income protection and/or medical insurance). The return to work plan will be approved by the employee’s GP or medical specialist.

[40] The procedure then sets out the respective responsibilities for the employee and the manager and/or supervisor. Relevant to Dr Asby’s claims is that the manager and/or supervisor is responsible for:

- planning and monitoring return to work activities or cooperating with the ACC case manager, (if applicable)
- negotiating a return to work plan, if appropriate
- providing a work task analysis showing details of the functional demands of the pre-injury duties and suitable duties and providing a copy of this analysis to the treatment provider
- communicating regularly with rehabilitation stakeholders, such as the injured/ill employee, treatment provider, ACC and unions

[41] Dr Asby says that Waiariki breached the procedure and he believes that the Waiariki human resources department did not go to the trouble of organising a return to work plan for him, because the Institute never intended to give him a job which he could return to.

[42] It is the evidence of Dr Asby that upon his return to work, he spent most of his time tidying his desk, files and electronic records, in anticipation of his pending redundancy; leaving the appropriate resources available to be accessed by whoever may follow him.

Interviews for other positions

[43] Via a letter dated 22 February 2013 to Dr Asby's lawyer, Mr Bird invited Dr Asby to express an interest in a number of positions within the new structure. The requirement to provide an up-to-date CV was waived and the deadline for receiving advice from Dr Asby regarding any positions he was interested in was extended to 12:00p.m. on 4 March 2013. Mr Bird also conveyed that Waiariki was open to extending the recruitment process for the roles that Dr Asby may have been interested in to allow him time to recover sufficiently to prepare for and participate in the interview processes. The evidence of Mr Bird is that Dr Asby did not seek an extension to the interview dates for the three positions that he subsequently expressed an interest in.

[44] Dr Asby expressed an interest in three of the new positions that were available: Head of Centre for Business, Research and Enterprise (CBRE), Business Project Manager and Business Information Analyst. Dr Asby believes that he had the necessary qualifications and experience to fulfil each of the three roles.

[45] On 11 March 2013, Dr Asby was interviewed for the role of Head of CBRE. His evidence is that he was still in the midst of rehabilitation. Dr Asby is critical of the "previous refusal" to accommodate his need to recover from surgery. But this appears to be at odds with the indication from Mr Bird, whereby in his letter of 22 February 2013, he conveyed that Waiariki was open to extending the recruitment process to allow Dr Asby time to recover sufficiently to prepare for and participate in the interview process. The evidence of Mr Bird is that Dr Asby never asked for any extension of time.

[46] Dr Asby also says that he believed that the role of Head of CBRE was “earmarked” for Dr Clarke Raymond; the person who was subsequently appointed. Dr Asby was notified by Professor Noble at 10.14p.m. on the day of the interview that he had been unsuccessful with his application. He was also advised that he would be required to attend interviews the next day (12 March 2013) for the other two roles that he had expressed an interest in. The interviews were scheduled to take place at 9:00a.m.

[47] The evidence of Dr Asby is that following the phone call from Professor Noble, his “nervous state deteriorated significantly” and he relates to, among other things, wandering through his home at 3:00a.m.

[48] It seems that the interviews for the role of Business Project Manager and Business Information Analyst were consolidated into one interview for both roles. Dr Asby covertly recorded the proceedings. He says that this was “due to his uneasy and fearful state of mind”. Dr Asby says that despite his mental state, he tried to put aside the issues arising from the previous day, and during the second round of interviews, he concentrated on his delivery.

[49] However, Dr Asby attests that upon playing back the recording he made of the interviews, he considers that his voice sounds tired and stressed throughout the interview with a higher pitch than normal. Dr Asby is critical of Waiariki and says that no consideration was given to the impact of the surgery in relation to his performance in the interview; albeit he does make mention of one of the interview panel jokingly making mention of “a minor operation”, and his response to that, including: “I am coming back. Pushing the boundaries as always”.

[50] Dr Asby says that his ability to participate in the interview was significantly hampered and this was not accommodated by Waiariki. Dr Asby opines that “with the benefit of hindsight” there were many examples of responses he could have given when answering the interview questions. Dr Asby says his brain “just would not work the way I needed it to”. But Dr Asby then attests that:

I thought I had done my best to demonstrate the necessary skills and aptitude for all elements of the remaining two roles I was applying for as well as a clear willingness to up skill further.

[51] Unfortunately, via a letter from Professor Noble dated 15 March 2013, Dr Asby was informed that he had been unsuccessful with his application for the roles of Business Project Manager and Business Information Analyst. Dr Asby was informed that final confirmation of appointments would not take place until the morning of 19 March 2013. Professor Noble informed that:

This delay is to give you the opportunity to request further information or provide additional information that may influence our current decision regarding the appointment of this position. Should you wish to do this please contact Richard Bird ... by no later than 12 noon Monday 18 March 2013.

[52] Dr Asby did not pursue the invitation to provide further information as he felt that further discussion would be fruitless and would only add further stress. Dr Asby adds that he simply did not have the mental strength to prolong matters. He immediately instructed his lawyer to raise a personal grievance.

[53] Dr Asby says that shortly before he left his employment, Dr Raymond came to his office. Dr Asby attests that Dr Raymond said that he personally wanted to employ Dr Asby in the role of Business Project Manager, but he was “overruled by the majority voice”. Dr Raymond acknowledges that he did speak privately with Dr Asby and expressed disappointment regarding him not being appointed. However, his further evidence is that Dr Asby expressed the view that there had been a plan to “get rid of him” to which Dr Raymond responded that, on the contrary, he had gone into the interviews with Dr Asby expecting that he would be successful, but unfortunately, Dr Asby failed to meet the requirements for the positions. Dr Raymond denies that he made any mention of being “overruled” as the decision of the interview panel was unanimous. Dr Raymond says that he was being honest with Dr Asby about his prior expectations for Dr Asby, but at the interview, he concluded that Dr Asby could not meet the requirements of either position.

The claims of Dr Asby

[54] Dr Asby now challenges the actions of Waiariki on several fronts. In summary, the submissions for Dr Asby are that Waiariki did not act as a fair and reasonable employer because:

- (a) Waiariki failed to proactively ascertain the nature of Dr Asby’s surgery and to monitor his recovery, and that this in turn led to:

- (i) A failure to consult with Dr Asby during the restructure process that led to the disestablishment of his position; and
- (ii) A failure to implement a return to work procedure in accordance with the policy of the Institute; and
- (iii) A failure to take into account Dr Asby's condition when engaging in the subsequent redeployment processes.

It is also argued by Dr Asby that Waiariki failed to:

- (b) Consider or suggest realistic alternatives to enable Dr Asby to participate in the review process, despite being put on notice that the proposals put forward by Waiariki were not viable.
- (c) Discuss redeployment options with Dr Asby despite requests from him and his representatives.
- (d) Redeploy Dr Asby with the outcome being that he was unjustifiably dismissed.

Analysis and conclusions

[55] The claims of Dr Asby are that he was disadvantaged in his employment by unjustifiable actions by his employer (the disadvantage claims), and he was unjustifiably dismissed. The test that the Authority must apply is the same for both categories of the personal grievances that have been raised. This 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.⁵

The disadvantage claims

[56] The submissions for Dr Asby are somewhat broader in their scope than one would have anticipated considering the original pleadings for the disadvantage claims. Nonetheless, I conclude that the first issue that requires determination is:

⁵ Section 103A(2) Employment Relations Act 2000

Did Waiariki commence and pursue a restructuring consultation process while Dr Asby was medically incapable of participating in that process? If so, was Dr Asby's employment unjustifiably disadvantaged?

[57] The weight of the evidence establishes that at the beginning of the consultation process, Dr Asby was medically impaired to such an extent that he was, more probably than not, incapable of making a meaningful response to the restructuring proposed by Waiariki. However, it seems that Dr Asby had a gradual improvement in his overall condition, at least to the extent that he was able to instruct his lawyers. I also accept that Waiariki made reasonable attempts, via various proposals, to accommodate Dr Asby's circumstances, bearing in mind also that there were other employees affected by the proposal⁶ whom, no doubt, would have been seeking some clarification about their respective circumstances. As submitted for Waiariki, a balance was required between the circumstances of Dr Asby and the interests of the other affected staff. While it is most unfortunate that the timing of the restructuring coincided with a medical crisis for Dr Asby, I conclude that it was not reasonable for him to expect Waiariki to suspend its consultation processes solely to accommodate his circumstances. This is particularly so given that he told the Authority that he would not have been able to participate in the consultation process, in a meaningful manner, until July 2013, more than six months after the process was notified on 17 January 2013.

[58] And the evidence of Dr Asby is that, in hindsight and 10 months into recovery from his surgery, he is of the view that the combination of the Project Office and the Project Team of the Deputy Executive Maori, into one Project Office; as part of a new Centre for Business, Research and Enterprise (CBRE) "...ignored clear and strategic differences between specific Maori cultural demands and iwi relationship management required of the DCE [Deputy Chief Executive] sponsored team" and Dr Asby's previous role. Dr Asby also says that it was apparent to him that Waiariki no longer retained a position of Deputy Chief Executive "... and the line manager for the Head of CBRE rests with a short term acting position, by default".

[59] Waiariki says that with due respect to Dr Asby, had he submitted these matters for consideration as a result of the consultation process, it would not have affected the outcome of the review. Waiariki also adds that Dr Asby's views did form part of the

⁶ The Authority understands that a total of 55 employees potentially could have been affected.

feedback made by other staff and was taken into account, but did not impact on the decision that was made to disestablish Dr Asby's position, and create the new CBRE.

[60] I also note that Waiariki submits that Dr Asby was involved with the strategic plan and hence his background knowledge was such that he would have been able to give the feedback he refers to via other sources, i.e. his lawyers or another colleague, as had been proposed by Waiariki.

[61] While it has to be accepted that Dr Asby was restricted because of his medical condition in regard to how much he could participate in the overall consultation process, I find that he was not unjustifiably disadvantaged in his employment by the actions of Waiariki in regard to how the consultation process was carried out.

[62] The second issue that arises is: **Following Dr Asby's operation and subsequent return to work, did Waiariki fail to reintegrate him back into the workplace in accordance with its *Return to Work Procedure*? And if so, was this an unjustifiable action by Waiariki that disadvantaged Dr Asby in his employment?**

[63] As set out in the Return to Work Procedure (the Procedure) at clause 2, the return to work process applies when an employee is absent because of injury or illness, or when an employee is having difficulty maintaining pre-injury/pre-illness duties. I am satisfied that Dr Asby was an employee to whom the Procedure applied, albeit I note the closing submissions for Waiariki suggest that the Procedure was not part of Dr Asby's terms and conditions of employment.

[64] It can reasonably be concluded that the main active component of the Procedure is the return to work plan at clause 5, and it does not appear to be disputed that it was appropriate that an applicable return to work plan should have been developed for the circumstances faced by Dr Asby. This is evidenced by an email from Mr Bird to Ms Craig dated 7 March 2013; whereby Mr Bird indicated that he would be grateful if Ms Craig could work with Dr Asby and his line manager, Linda Neilson, on a return to work programme as per the internal procedure. Mr Bird asked Ms Craig to let him know "how it goes".

[65] The Procedure requires that:

The plan will set out the actions each party must take, and may involve a combination of training and suitable duties for the employee which increase in duration and/or frequency over time. It will also provide a timeframe for monitoring progress and reviewing the plan.

[66] While it is not expressly stated, it seems reasonable to conclude that the fundamentals of a return to work plan would be in writing and one would envisage that there would be input from both the affected employee and an appropriate person, or people, acting for the employer. I note that a medical certificate dated 4 March 2013 from Dr Pert, opines that Dr Asby was fit for part time work from 4 March until 18 March 2013, and that he could manage three to four hours per day and this would be reviewed. A medical review took place on 14 March 2013 and Dr Pert's opinion, as expressed in a medical certificate of the same date, is that Dr Asby could continue working on a part time basis for three to four hours from 19 March until 1 April 2013 with another review to follow.

[67] The evidence of Dr Pert is that on 19 April 2013, Dr Asby was recorded as still experiencing dizziness, sweats, headaches and stabbing pains. This was the last day of employment at Waiariki for Dr Asby.

[68] The overall evidence points to a conclusion that Waiariki did not adhere to its return to work procedure. I find that a return to work plan was not established for Dr Asby; despite the fact that on 7 March 2013, Mr Bird requested that Ms Craig should coordinate a return to work "programme" for Dr Asby, along with his line manager, Ms Neilson.

[69] The evidence of Ms Craig is that an "informal" return to work plan was implemented and she told the Authority that there was no formal documentation that applied to return to work plans within Waiariki. Under cross-examination, Ms Craig said she did not have the experience to assist Dr Asby with an effective return to work process and she informed Mr Bird of this; whereby he referred her to the written procedure referred to above. Ms Craig told the Authority that there was no one within Waiariki to advise her about how a return to work plan should be implemented. Ms Craig says that she checked with Dr Asby that his work was at a manageable level and her further evidence is that she was aware that Dr Asby had had a "quite serious" operation and he was "pushing himself" more than he should.

[70] The evidence is that apart from Mr Ikin, the Deputy Chief Executive (then) speaking to Dr Asby shortly after his return to work on 4 March 2013, and Ms Craig having some contact with Dr Asby on at least one occasion, perhaps more⁷, the reality

⁷ The evidence is inconclusive about this.

is that Dr Asby returned to work after a major operation, which resulted in substantial and ongoing side effects, and he was more or less left to his own devices. This was despite the fact that Waiariki was aware of his medical condition and at the same time had disestablished his role within the organisation. Regrettably I cannot help but conclude that the senior management of Waiariki displayed a significant indifference towards the welfare of Dr Asby and it appears that the focus was more upon ensuring that the restructuring plans were implemented, regardless of his personal circumstances.

[71] I find that Waiariki failed to properly implement the return to work procedure that should have applied to the circumstances pertaining to Dr Asby. I also find that this failure was an unjustified action by Waiariki that resulted in a disadvantage to Dr Asby in his employment. This is because, the failure to have an appropriate return to work plan in place for Dr Asby, effectively left him without any means of support and/or rehabilitation following his integration back into the workplace, following what his doctor has described as “major surgery”. I will return to this matter in due course, following an analysis of all of the matters that led to the dismissal of Dr Asby.

Was Dr Asby unjustifiably dismissed?

[72] The statement of problem filed by Dr Asby alleges that the process adopted by Waiariki was procedurally flawed and there was no genuine reason for the redundancy. In regard to the genuineness of the redundancy, it does not appear to be contested by Dr Asby that Waiariki had a genuine need to save costs and that the general premise behind the review was appropriate. As I understand it, Dr Asby challenges the termination of his employment partly on the grounds raised as disadvantage grievances, which then overlap with the redeployment interviews and the failure by Waiariki to appoint him to one of the three positions that he applied. Even then, the focus is particularly on the fact that Dr Asby was not considered suitable to be appointed to the role of Business Project Manager or Business Information Analyst, as Dr Asby appears to be resigned, to some extent, to accepting the probability that Dr Raymond was the most likely candidate for the position of Head of CBRE.

[73] The primary argument is that Waiariki failed to take Dr Asby’s medical condition into account during the redeployment processes and that he was not able to

present himself as favourably as he would have, had he been given the opportunity to properly rehabilitated back into the workplace. The evidence of Dr Asby is that he found the process “extremely demanding” in regard to the interviews for the positions of Business Project Manager and Business Information Analyst (the interviews). Dr Asby says that he was unable “to think properly” or recall many of his positive experiences and the contributions that he had made during his tenure with Waiariki. Dr Asby says further that he was unable to raise his voice to give clear answers to the questions and be heard effectively, and that many of his answers “rambled” indirectly around the subject area of the questions.

[74] The evidence from Ms Craig and Dr Raymond presents a somewhat different perspective of the interviews. The evidence of Ms Craig is that she was present at the interviews on 12 March 2013, to ensure that the appropriate processes were followed. Ms Craig also organised the candidates participating in the interviews and ensured that everyone was asked the same questions. Ms Craig told the Authority that Dr Asby: “... *wasn't well – he didn't have the same level of energy*”, and that he “*wasn't at full health*” and he “*was quieter*”. But Ms Craig then says that she “*didn't come away with the impression that his [Dr Asby's] health affected the way he participated in the interview*”. Finally, Ms Craig told the Authority that:

“It wasn't how he [Dr Asby] answered the questions it was what he said”.

[75] The evidence of Dr Raymond is that he expected that Dr Asby would have been a “favourable candidate” given his experience within Waiariki. Dr Raymond attests that at the beginning of the interviews, two people enquired as to how Dr Asby was feeling and there was some concern for his wellbeing. However, Dr Raymond says that he “*certainly didn't notice he [Dr Asby] was slurred or not capable of conducting the interview*”. In response to a question from counsel for Dr Asby, Dr Raymond responded that he had no concerns about the ability of Dr Asby to engage in the interviews. And in response to a proposition put to him by counsel for Dr Asby that the interviewing panel did not turn its mind to Dr Asby's presentation, Dr Raymond responded that the panel did discuss Dr Asby's presentation and “*came to a unanimous decision that it wasn't his health that caused Dr Asby to interview poorly*”. Dr Raymond attests that at the interviews, Dr Asby was “*lucid*” and that there did not appear to be any problem in regard to “*the tiredness*” that Dr Raymond had noticed when Dr Asby first returned to work.

[76] In regard to the outcome of the interviews for Dr Asby, the evidence of Dr Raymond is that:

The panel members were unanimous that in our view that Chris was not a suitable candidate for either of the two positions. In the case of the Business Information Analyst role, the panel decided on another internal candidate. In regards to the Business Project Manager role, it was our view that neither of the two internal candidates (of which Chris was one) were [sic] appointable. Unfortunately, neither candidate seemed to have grasped the nature of the position and Chris in particular gave the impression that this was just “business as usual” for him, without seeming to appreciate what was actually required of the position.

[77] The further evidence of Dr Raymond is that he was aware that Dr Asby had been a project manager and had experience at looking for, and developing new business in education, but not in research. Dr Raymond referred to the job descriptions being the source documents for the new roles and in the case of the Business Project Manager position, the key requirement that Waiariki was looking for was to assist the Head of CBRE with business development in the areas of education, and research.

[78] Dr Raymond says that the Business Project Manager position was in effect, a business development role and while Dr Asby had experience in this area on the education side, it was apparent that this was not the case for potential research business. Dr Raymond says that potential research business was a significant factor and he would have expected Dr Asby to have indicated his ability, or desire, to pursue and manage development opportunities in this area, but he did not. Dr Raymond attests that Dr Asby talked about what he saw as some of his achievements but made no mention, or gave any indication, of his interest or ability to lead, develop and manage research business opportunities. Dr Raymond has given comprehensive (and credible) evidence in regard to his observations as to what the position of Business Project Manager required; and concludes that Dr Asby was not suitable for the role on a number of fronts.

[79] Dr Raymond says that he believes it was obvious to all of the panel members that there was no enthusiasm from Dr Asby for the positions, or consideration of what was actually required of the roles and no interest in upskilling, or reflection on what he needed to change in areas such as communication. Dr Raymond attests that it was

the unanimous view of the panel that Dr Asby did not meet the requirements of either position and he was subsequently notified of that outcome.

[80] Dr Raymond's further evidence is that the Business Project Manager role was subsequently "reshaped" into a business development coordinator role which refined some of the requirements that Waiariki was looking for. This role was then re-advertised and an appointment was made in approximately June 2013; being an external appointment.

[81] I have closely perused the transcript of the recording that Dr Asby (covertly) made during the interviews. While the transcript reveals that certain aspects of the recording are inaudible, the general impression I get is that Dr Asby answered many of the questions put to him in some detail. There does not appear to be any hesitation or incoherence in regard to his responses to the panel.

Decision on the unjustifiable dismissal claim

[82] In applying the test provided by s.103A(2) of the Employment Relations Act 2000 (the Act), I am satisfied that a fair and reasonable employer could have concluded that because of the economic circumstances that were predicted for 2013, a review and restructuring of the Institute was not only necessary, but probably essential. I also conclude that the disestablishment of Dr Asby's position was something that a fair and reasonable employer could do as an outcome of the review that Waiariki conducted; and I understand that, given his knowledge of what was happening within Waiariki generally, Dr Asby does not really dispute this.

[83] There was then an obligation in common law and under s.4 of the Act for Waiariki to consult with Dr Asby about what was being proposed and the possible effect on his position if the proposal was implemented. I have found that Waiariki did take reasonable steps, in the circumstances, to consult with Dr Asby and obtain his feedback; notwithstanding the unfortunate situation that pertained to Dr Asby before he was able to return to work.

[84] The next issue that required determination was whether Waiariki acted fairly and reasonably in regard to putting in place a return to work plan for Dr Asby, taking into account his circumstances. I have found that by its failure to follow its own procedure, where it was required to put in place a return to work plan for Dr Asby, the

actions or inactions of Waiariki were not what a fair and reasonable employer could do in all the circumstances. I also conclude that the failure to put in place a proper return to work plan to allow a proper reintegration and rehabilitation opportunity for Dr Asby, is likely to have had some effect on his ability to adequately prepare for the important interviews that had a substantial bearing on his employment future with Waiariki, and his financial resources.

[85] Dr Asby returned to work on 4 March 2013, on the basis of only working three to four hours per day. He was then required to participate in a job interview on 11 March 2013, having only been back at work for five working days. While Waiariki, via Mr Bird, informed Dr Asby that he could request more time to prepare in regard to the recruitment process, the evidence of Dr Asby is that he had serious concerns that if he delayed the process at all, he was likely to end up with no employment and hence he pushed himself to prepare as best he could in the circumstances. While Waiariki may have given the appearance of trying to accommodate Dr Asby, I conclude that his fears may have been well founded as the Institute gave him very little support when he returned to work and one can certainly understand why Dr Asby felt that the recruitment process would move on, with or without his participation.

[86] Indeed, this is evidenced by the indifferent attitude of Professor Noble towards Dr Asby following his interview for the position of Head of CBRE. Dr Asby was not notified until 10.14p.m. that he had been unsuccessful with his application and hence the interviews set down for the next day would be required. Professor Noble sought to justify her inability to contact Dr Asby earlier by saying that she could not find his phone number. Given that Waiariki appears to place some value on innovation, I find this explanation to be unconvincing and a graphic example of the indifference that Waiariki displayed to the future prospects of Dr Asby; particularly given that he was still recovering his health, and it seems that Dr Raymond had been informed by Professor Noble, that he was the successful candidate, at around 5:00p.m. that day.

[87] However, while I conclude that Dr Asby was unjustifiably subjected to disadvantages in his employment by the actions or inactions of Waiariki, to the extent that he more probably than not was not as well prepared as he might otherwise have been for the interviews on 12 March 2013, I am unable to conclude that his presentation and performance were so impaired that this is why he failed to obtain one

of the available positions. Rather, the balance of the evidence is that he acquitted himself quite well but failed to convince the interviewing panel, which decided unanimously, that Dr Asby unfortunately was not a suitable candidate for either of the positions he had applied for. I also have the impression that the interviewing panel was conscious of and empathetic to Dr Asby's circumstances, and he has also confirmed that he had a good relationship with two of the panel, Dr Raymond and Mr Ikin. The former has given comprehensive, objective and credible evidence of his disappointment that Dr Asby did not meet the essential requirements for appointment to one of the roles.

[88] A further argument has been advanced by Dr Asby that regardless of the fact he was not appointed to any of the positions he applied for, Waiariki should have retained his employment in any event, in some other capacity. But Waiariki says that there was not another suitable position available, and its financial situation was such that the Institute could not simply create a role for Dr Asby. And it is significant that Dr Asby has not been able to point to any other position that he could have been redeployed to.

[89] In summary, while I have considerable empathy for Dr Asby in regard to the overall circumstances that he had to face, I find that the termination of his employment on the ground of redundancy was something that a fair and reasonable employer could do in all the circumstances and hence Dr Asby's claim that he was unjustifiably dismissed is not successful.

The unjustifiable disadvantage claims

[90] While the claims advanced by Dr Asby have been separated out into particular categories, I have effectively taken a broad approach in regard to the disadvantages that Dr Asby had visited upon him because of the unjustifiable actions of his employer. In summary, I conclude that Dr Asby was unjustifiably disadvantaged in his employment because:

- (a) Waiariki failed to follow its return to work procedure and implement a return to work plan for Dr Asby, with the outcome that he was not reasonably reintegrated back into the workplace, nor was there any meaningful rehabilitation made available to him. And it is probable

that this affected his preparation, to some degree, for the interviews regarding the three positions he applied for; and

- (b) Waiariki failed to notify Dr Asby that he was unsuccessful with his application for the role of Head of CBRE until quite late (for his circumstances) on the evening of 11 March 2013. This was particularly upsetting for Dr Asby as in addition to being left for an unreasonable period of time, to anticipate the outcome of his interview that day, he was required to attend interviews for the two other positions at 9:00a.m. the following morning. And combined with the failure to implement a proper return to work plan, I conclude that this would have had some detrimental effect upon Dr Asby's ability to present as well as he might have done had he not been subjected to such disadvantages.

Remedies

[91] Dr Asby claims distress compensation under s.123(1)(c)(i) of the Act in the sum of \$25,000. This appears to be a consolidated claim, in anticipation of the Authority finding that he was unjustifiably dismissed.

[92] Putting the overall evidence into context, I conclude that the failure by Waiariki to implement a proper return to work plan, and the likely consequent effect on Dr Asby's preparation for the job interview process, combined with the indifference shown towards him by the Chief Executive regarding the belated notification of the outcome of the interview for the Head of CBRE role, all resulted in substantial and harmful emotional consequences for Dr Asby.

[93] It is the opinion of Dr Pert that Dr Asby was "significantly emotionally vulnerable" at the time that the restructuring was taking place and that the additional stress of his employment situation would have impacted his mental state and would "knock him back intellectually".

[94] In assessing the level of compensation to be awarded to Dr Asby, in addition to the evidence before the Authority, I also have considered the findings of the Court of Appeal in *NCR (NZ) Corporation Ltd v. Blowes*⁸ where an analysis of appropriate

⁸ [2005] 1 ERNZ 932

non-economic loss awards was undertaken. The Court of Appeal reduced an award made by the Employment Court⁹ from \$15,000 to \$7,000. In the judgment on appeal, Judge Colgan (as he then was) found that Mr Blowes had not been treated fairly throughout the redundancy process and hence an award of \$15,000 compensation was appropriate. But the Court of Appeal found that, in the circumstances pertaining to Mr Blowes, the award of \$15,000 was “so excessive as to be wrong in law”. However, the Court of Appeal noted that:

The circumstances of unjustified dismissals and unjustified disadvantage in employment are infinitely variable.

[95] It also has to be noted that the Court of Appeal was considering appropriate compensation awards in a 2005 (and earlier) context.

[96] A more recent review of compensation for non-economic loss was conducted by the Employment Court in *Simpsons Farms Ltd v. Aberhart*¹⁰. Chief Judge Colgan refers to a number of cases (at para [76]) where compensation was awarded from \$30,000¹¹ to \$75,000¹².

[97] The Chief Judge also refers to *NCR* whereby he interpreted the Court of Appeal to be saying that most compensation awards for personal grievances should fall within a range “up to about \$27,000”.

[98] The matter before the Employment Court in *Simpsons Farms* was a challenge and cross-challenge to a determination of the Authority whereby Mr Aberhart was awarded compensation of \$15,000. Referring to *NCR* and the mention of a potential upper level of \$27,000, the Chief Judge noted that the award of \$15,000 was “a little more than half of that range for unexceptional cases”. His Honour went on to hold that the while the award of \$15,000 made by the Authority was “at the highest end of discretionary awards that could have been made for the consequences of this case”; it should be affirmed.

⁹ *Blowes v. NCR (NZ) Corporation Ltd*, unreported, AC40/04, 22 July 2004

¹⁰ [2006] ERNZ 825

¹¹ *Staykov v. Cap Gemini Ernst & Young New Zealand Ltd*, unreported, AC18/05, 20 April 2005

¹² *Gilbert v. Attorney-General in Respect of the Chief Executive of the Department of Corrections* [2001] 1 ERNZ 332

[99] The very recent judgment of the Employment Court (Judge Travis) in *Brake v. Grace Team Accounting Ltd*¹³ is also of note. The applicant was awarded compensation of \$20,000, upon a finding of unjustifiable dismissal.

[100] Of course all of the above reinforces the observation of the Court of Appeal in *NCR*, that such matters are “infinitely variable”.

[101] It seems to me that given I have found that Dr Asby was not unjustifiably dismissed; his circumstances can reasonably be compared with those of Mr Aberhart in *Simpsons Farms*, to the extent that Mr Aberhart was awarded compensation of \$15,000 for his disadvantage grievance; albeit that was in 2006.

[102] However, on the basis of the medical evidence provided by Dr Asby and taking into account the inexcusable indifference and disregard exhibited by Waiariki towards his personal circumstances, in a redundancy setting, whereby Dr Asby’s career and future prospects were at considerable risk, I conclude that an award of \$20,000 under s.123(1)(c)(i) is appropriate.

[103] In conclusion, there is one other relevant matter. Dr Asby says he was not able to access an Employee Assistance Programme (EAP) because one of the directors of a company providing such services is the wife of Mr Bird. Dr Asby alludes to Mr Bird’s wife having a conflict of interest, and while he acknowledges that the potential conflict has been declared in Waiariki Council notes, Dr Asby says that somehow, he would have been affected, in a negative manner, if he had utilised the services of that particular company. But apart from Dr Asby not really explaining how this could have been so, I am satisfied that there were other EAP providers available for him to access (paid for by Waiariki) had he chosen to avail himself of such services.

Determination

[104] For the reasons set out above, I find that Dr Asby was not unjustifiably dismissed but he was disadvantaged in his employment by the unjustifiable actions of his employer; hence Dr Asby has a personal grievance.

[105] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, the Waiariki Institute of Technology is ordered to pay to Dr Asby the sum of \$20,000.

¹³ [2013] NZEmpC 39

Costs

[106] Costs are reserved. The parties are invited to reach a resolution of this matter based on the usual tariff-based approach of the Authority, as applied to a two day investigation meeting. In the event that a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 21 days to reply.

K J Anderson
Member of the Employment Relations Authority