

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 507
5332141

BETWEEN MICHELLE BALL
Applicant
AND ANGLICAN TRUST FOR
WOMEN AND CHILDREN
Respondent

Member of Authority: K J Anderson
Representatives: P Wicks, Counsel for Applicant
J Latimer, Counsel for Respondent
Investigation Meeting: 16 June 2011 at Auckland
Submissions Received: 18 July 2011 for the Respondent
5 August 2011 for the Applicant
Determination: 30 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Ball claims that she was unjustifiably dismissed, effective from 29th January 2011. She asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost remuneration, lost benefits and compensation for hurt and humiliation, pursuant to section 123 of the Employment Relations Act 2000. In the *Statement of Problem*, Ms Ball claims that she was disadvantaged in her employment by unjustified actions by her employer. The Authority now understands that this claim largely relates to matters associated or collateral to the dismissal of Ms Ball, or it is an alternative action, in the event that the claim of unjustified dismissal is not upheld. The respondent, the Anglican Trust for Women and Children (the Trust), denies the claims and says that the termination of Ms Ball's employment was due to her position becoming redundant.

Background facts and evidence

[2] Ms Ball had worked for the Trust since September 2003; initially on a part-time locum basis as a Child Psychotherapist. In early 2004, Ms Ball assumed a management position and was responsible for managing a clinical team and a social work team; on a part-time basis. In 2006, Ms Ball was employed on a full-time basis and in December that year, she was appointed to the position of Clinical Director, a senior role reporting directly to the Chief Executive Officer, Mr Wilson Irons.

[3] In May 2010, the Board of the Trust (the Board) engaged a consultant to undertake some “strategy work” which, among other things, involved a review of the professional management structure of the Trust. This was because there were concerns that: the structure did not allow for succession, there was insufficient management focus on finances, and 62 of the 72 staff all reported directly, or indirectly, to one senior manager; Ms Ball.

[4] The consultant prepared a report (dated 18th August 2010) for the Board, which was presented to it on 19th August 2010, by Mr Irons and the consultant. Included in the report was a draft restructure (the initial proposal) with a proposed new management team structure. The initial proposal was approved by the Board in regard to taking the process to the next step of advising affected staff of a proposed restructure, albeit it was expected that the organisational structure would be refined further by Mr Irons and the consultant.

[5] Via a further report dated 7th September 2010, it was proposed that seven positions would be disestablished. One of these was the role of Clinical Director, the position held by Ms Ball. On the positive side, it was proposed that eight new positions would be established. The evidence of Mr Irons is that a final proposal was approved by the Board at a meeting on 22nd September 2010.

[6] The evidence of Ms Ball is that while she had engaged in some discussions with Mr Irons about service development and expenditure within the trust, she had no reason to believe that her position was insecure, albeit she acknowledges that in mid-August 2010, Mr Irons had informed her that no staff member or service within the Trust was “safe” from redundancy, due to the current economic climate.

[7] Ms Ball says that she had an “unscheduled” meeting with Mr Irons on 23rd September 2010 where she was told by him that he believed that her role was “too big” and that she would be better suited to a role that focussed on business development and research. Ms Ball says that she was surprised by this comment, because until February 2010, she had been managing a service team in addition to performing her role as the Clinical Director. However, with the appointment of a manager for the service team, there had been a “significant reduction” in her day to day workload with the result that she and Mr Irons had been in discussion about what “new tasks” she could complete to develop the role of Clinical Director more fully.

[8] The evidence of Ms Ball is that on 30th September 2010, the Trust management team met with Mr Irons. Ms Ball says that Mr Irons “stressed to all of us” that he was committed to the current management structure but also he stated that he thought that the role of Clinical Director was too big and that Ms Ball would be better suited to a business development role.

The proposal to disestablish the role of Clinical Director

[9] On 1st October 2010, Ms Ball met “informally” with Mr Irons. This was an unplanned meeting. Ms Ball was about to depart on 5th October to attend two weeks’ of study leave in Melbourne; hence she was meeting with Mr Irons to advise him of matters that he needed to be aware of in her absence. The evidence of Ms Ball is that having briefed Mr Irons, she was about to leave his office, when he asked her to remain and to close the office door as he wished to “update” Ms Ball in regard to the restructure process. Ms Ball says that Mr Irons then gave her a document entitled “Proposed ATWC Restructure” (the proposal)¹ and then he informed her that her position of Clinical Director was to be disestablished and she would have the option of applying for a position within the new structure.

[10] The evidence of Mr Irons is that he did not inform Ms Ball that she was going to be made redundant or that her role was going to be disestablished; but he acknowledges that he did inform Ms Ball that if the proposal went ahead, then her role would be disestablished, but she would have the option of applying for a senior position within any new structure; and that he wanted to “keep her in the organisation.” Mr Irons also says that he explained to Ms Ball that she and another

¹ The evidence of Mr Irons is that the proposal was enclosed in an envelope marked “Confidential.”

senior member of staff (Ms [M]) were being advised first and their feedback would be received before other members of the staff were told of the proposal.

[11] The further evidence of Ms Ball is that Mr Irons also informed her that she could give written feedback on the proposal and there was a timeline within the written proposal for this to occur. [The proposal document has been produced to the Authority and it shows (at page 3) that 7th October 2010 was the “deadline” for responses from the Director Clinical Services and from the Manager Family Services.] It seems that there was some brief discussion about the proposal and Ms Ball sought some clarification from Mr Irons about the three new positions that were being created. Ms Ball says that Mr Irons informed her that the existing Family Start manager’s position was also to be disestablished and the incumbent in that role would be encouraged to apply for the position of Director of Social Work. Ms Ball says that she felt “particularly humiliated” when she was told this, as the position of Director of Social Work “obviously carried out a significant component” of her current role as Director of Clinical Services. Ms Ball attests that this caused her “immediate concern” as she believed that Mr Irons had predetermined the outcome of the “purported proposal” and which positions were to be filled. The evidence of Mr Irons is that he had not predetermined the outcome, as at that point in the process, he did not know who would apply for the respective roles. Mr Irons attests that he did say to Ms Ball that he wanted to keep all of the managers employed, where possible. Mr Irons also says that as of 1 October 2010, the incumbent Family Start Manager was not yet aware of the proposal and he did not know if she would apply for the new role.

[12] Ms Ball says that the discussion with Mr Irons closed with him saying that he hoped that she would consider applying for the new position of Director of Research, Culture and New Business, and for that role, her salary package would remain unchanged. Ms Ball says that Mr Irons referred to his recent remarks that he thought that Ms Ball’s role was too big and that she would be better suited to a role that developed new business for the organisation. The evidence of Mr Irons is that once he had advised Ms Ball of the proposal she was not interested in listening to him. Mr Irons says that he can “clearly recall” that the “only real comment” to him from Ms Ball was: “*This is a loss of power.*” Mr Irons says that he did not expect this reaction from Ms Ball, as a senior manager, whom he had worked with for several years, and he was “disappointed and surprised.”

[13] Ms Ball was upset by the sudden manner in which the restructuring proposal had been provided to her. She says that the presentation was “almost an afterthought” at the end of an informal meeting, for a quite different purpose; that is, to brief Mr Irons prior to her departure on study leave for two weeks. Ms Ball says that she became “even more distressed” because when reading through the proposal material, after the meeting with Mr Irons, she realised that the last date for her feedback on the proposal, would fall whilst she was away on study leave. Ms Ball says that she was also upset about the possibility, as suggested by Mr Irons, that the incumbent Family Start Manager could take up the role in the new proposed structure that appeared to be “most like” Ms Ball’s current role.

Matters subsequent to the meeting on 1st October 2010

[14] The evidence of Mr Ball is that as she was “highly distressed” she decided to go home for the rest of the day. Ms Ball says that before going home she had to attend to “urgent matters” with two other Trust staff; Ms Janet Brady (Child Psychotherapist) and Katrina Bernsten (Granger Grove Manager). Ms Ball attests that in the course of meeting with the other two women, she could not contain her distress and started crying. Ms Ball says that she then “briefly discussed” the information that she had received from Mr Irons in regard to the proposed disestablishment of her position. The evidence of Ms Brady is consistent with that of Ms Ball in that she confirms that Ms Ball was “tearful and upset.” Ms Brady also says that Ms Ball informed her that other staff would be advised of the restructure while Ms Ball was absent on study leave and Ms Ball requested that Ms Brady keep her informed about “what was said in her absence.”

[15] Mr Irons says is that it is his “understanding” that after leaving the meeting with him, Ms Ball went to another building where the reception area for the Trust is located. Mr Irons attests that Ms Ball had a meeting with staff and that she: “talked quite openly negatively” about the restructure proposal. Mr Irons also says that “staff” had told him that Ms Ball had said that she was “sacked” and that she “didn’t have a job anymore.” Mr Irons says that he was “annoyed” by this action by Ms Ball as he had “specifically told her” that he was not speaking to the other staff about the restructure proposal yet and that Ms Ball had: “derailed and undermined the process and also upset staff.” Mr Irons says that he had to undertake “damage control” by bringing forward the time for advising the staff of the restructure. But apart from the

evidence of Ms Kenderdine, the Chairperson of the Trust Board, which, with due respect, appears to be largely reliant upon what she was told by Mr Irons, there is little to collaborate the evidence of Mr Irons and in the round I find the evidence of Ms Ball, as collaborated by Ms Brady, to be more reliable. But in any event, regardless of the different perspective of what was said (or not) in the circumstances, I conclude that nothing of real substance arises from this evidence. It is what happened subsequently that is more relevant to the matters that require determination.

[16] Via a letter to Mr Irons and Ms Kenderdine dated 5th October 2010, Ms Ball responded to the proposal to disestablish her position. Of particular note, Ms Ball informed that she considered “this so-called consultation to be a sham” and that:

Furthermore I contend a primary objective of the proposed restructure is the removal of me as Clinical Director.

Ms Ball requested a meeting with Mr Irons and Ms Kenderdine upon her return from her study leave on 18th October 2010.

[17] Via an email dated 8th October 2010, Mr Irons responded to Ms Ball whereby he extended the time frame for Ms Ball to provide written feedback to the restructure proposal until 21st October 2010. Mr Irons also conveyed that:

I hope to retain you in an appropriate and meaningful role at ATWC and I am disappointed at your reaction to the proposal.

And:

It is not correct that the “primary objective of the proposed restructuring is the removal of me (you) as Clinical Director.” As stated in our letter of the 1st October 2010 “The purpose of the proposal is to ensure that ATWC is sustainable going forward. It is not a cost cutting exercise; in fact the proposal if implemented would result in higher fixed costs, for which it is anticipated will be offset by higher revenue.”

[18] Following her return from Australia, Ms Ball met with Mr Irons and Ms Kenderdine on 19th October 2010, to discuss her concerns relating to the process by which she had been informed of the restructure. The outcome of this meeting was that it was agreed that Ms Ball would have until 26th October 2010 to provide feedback regarding the restructure proposal. On 20th October 2010, Ms Ball met with the Administration Manager for the Trust, Ms [D]. The evidence of Ms Ball is that upon being asked by Ms D how she was feeling in regard to the circumstances of the restructure and how she was able to concentrate on her training in Australia, Ms Ball responded by saying that she had been told by Mr Irons that he had forgotten that Ms Ball was going to be away during the announcement of the restructure and that he had

apologised for how she had been informed. Ms Ball says that Ms D appeared surprised to hear this and then recounted how on 4th or 5th October 2010, she had raised her concerns with Mr Irons about Ms Ball not being present when the restructure was made known; and that Mr Irons had informed Ms D that he had deliberately planned the timing of the announcement of the restructure to ensure that Ms Ball was absent and that this would give the staff the opportunity to consider the proposal without any input from her. Ms Ball says that she was “very distressed” to hear this version of events as it was different to what she had been told at the meeting with Mr Irons and Ms Kenderdine on 19th October 2010. Ms Ball says that she subsequently obtained a similar version of the thoughts of Mr Irons, to that conveyed by Ms D, from Ms [S], the Counselling Service Manager for the Trust. Neither of these two people gave evidence to the Authority but nor was any doubt cast upon the evidence of Ms Ball.

The written response of 23rd October 2010

[19] Ms Ball completed a comprehensive (five A4 pages) and coherent response (or feedback) to the restructure proposal. This was forwarded to the Trust Board, as had apparently been previously agreed with Mr Irons and Ms Kenderdine on 23rd October 2010. The feedback was also sent to Mr Irons. However, the feedback to the Board was accompanied by a letter that did not go to Mr Irons. The evidence of Ms Ball is that upon preparing her feedback, and an alternative structure for the Board to consider, she concluded that her proposal was “founded on some of the concerns” she held regarding Mr Irons. Ms Ball says that:

I felt it important that the Board had my open and honest views leading to an alternative suggestion I had for their consideration and so they could understand my feedback. In essence, the primary concern for me in providing my feedback was to raise an alternative that I considered would enable any restructure to be a success. I genuinely believed the proposed structure raised two significant areas of concern for me. Firstly, there was no single point of clinical leadership in an organisation that is about integrated service delivery with it being important that staff have clinical systems and support in place. Secondly, in my experience of working with Wilson [Mr Irons] I anticipated that without strong Clinical leadership for the staff his management would lead to increased conflict and confusion with the services teams. In essence the second aspect of my feedback was legitimate concern I had around Wilson’s ability to support the day to day service delivery of the organisation. I had no concerns about his business ability.

[20] The written feedback contains two passages that appear to be relevant to subsequent events. Ms Ball conveyed:

In the proposed organizational structure, all Directors will report to the CEO. I have significant concerns about this and do not have confidence in the current CEO’s

ability to provide service leadership or clinical expertise/oversight to support the Service Directors. This was a primary objective for the current CEO to create the Clinical Director's role.

In regard to the new position, that Mr Irons had suggested that Ms Ball would be suitable for, she conveyed that:

The role of the Director of Business Development, Culture and Research is ambiguous. The job description and position in the organizational chart indicate that it will have no/little authority to direct or support the implementation of recommended service developments and as such has the potential to render it ineffective.

[21] Particularly relevant to the issues before the Authority are the following extracts from Ms Ball's letter to the Board:

- But I was also wary of Wilson. Other Managers and staff would speak openly to me about their fear of him. I had heard and saw him shouting at staff on several occasions. I would speak to Wilson about this, but was often left confused by his account of events which did not appear to match staff accounts. Some staff resigned.
- Managers in particular were struggling with a lack of clinically focused supervision from Wilson about their services. Some of this struggle was about his lack of interest or support of the operational aspects of services delivery, the complete lack of a unified structure for clinical administration support, the discrepancies between staff resourcing and the lack of a robust management structure. If staff did not agree with a decision that their manager made in regards to a multitude of things, Wilson would regularly overturn this decision without consultation with the manager, leaving the manager unsupported and unsafe.
- It was also apparent that there were increasing discrepancies in Wilson's account of events and staff accounts. These discrepancies would vary from small insignificant issues to situations of potential risk to the organisation. He continues to become extremely angry when questioned, challenged or confronted, leaving staff feeling confused and distressed. I have learnt not to take this personally but to carry on a discussion if necessary regardless of when he is shouting at me; however this has not been possible for other staff.
- In my discussions with Wilson I continued to be transparent about my observations about what I heard and observed. I regularly shared my confusion about the differing versions of accounts and my difficulty in working in this environment. During this time two managers resigned and I was managing 3 services teams. The newly appointed Family Start manager was on the verge of resigning when I became more actively involved in an informal process of mediation between Wilson and this manager. She eventually left because she told me she could never really trust Wilson again. (I can provide contact details if you would like more information.)
- Staff began to more actively question why there was no staff or service representation on the Board. Generally it appears that staff believe that some Board members are aware of Wilson's behaviour and choose to do nothing about it.
- I have also recognised that I need to work in partnership with Wilson despite our very different leadership styles. I have repeatedly challenged Wilson regarding his

behaviour towards staff and the lack of transparency in his communication. There is nothing in this letter that I have not communicated in person to Wilson.

- Wilson continues to show a lack of consistency in his decision-making, particularly in regard to staff. This has increased competition and ill feeling between staff. Wilson has demonstrated that once he has placed a staff member in a position, he provides little or no support to develop this staff member or enhance their professional capacity to do their job. This is left to staff to recognise (or not) and pursue.
- Wilson has stated on numerous occasions that he likes conflict and believes that conflict is positive. He is dismissive of his behaviour when he shouts at staff or threatens them, or when they do tell him that they feel frightened to speak out to him. He has only apologised to staff following an outburst after I, or at times another person, have had a conversation with him, but several staff have also left as a direct result of this. He argues that if managers can't step up and argue a point, even when he appears aggressive and threatening, then they shouldn't be managers. All of the current Practice Managers have conveyed to me that they are or have been fearful of him. Several have come to me in tears at some time after they have been shouted at by Wilson. Some staff have stated to me that they will avoid having conversations with him as they do not feel safe to challenge him. I recognise that as a manager in a position of power and authority that is understandable that staff may feel unnecessarily fearful and that there are times that I have been the cause of a manager's distress. However I am fully aware of the power differential in our relationship and take care not to misuse this.
- I have confronted Wilson on numerous occasions when he has lied to me about something. He may have told me that he would complete a task that he didn't, or that he had spoken to someone that he has not and I repeatedly am given different versions of an account from Wilson and managers about what was said and by whom. While I accept that as a busy manager that at times it is easy to forget to follow things through, what I am describing is deliberate. Most recently Wilson has misrepresented a funding application to the Guardian Trust in regards to [G]² agreeing to provide a reference for our program. G has confirmed to me that he was not in regard to this. This has the potential to put our relationship with both the COS and the Guardian Trust at risk.
- Wilson does not appear to value the importance of consistency and honesty in his role and I have been regularly placed in situations where I have to suddenly collude with Wilson, despite knowing facts have been misrepresented, in order to convey stability within the organisation rather than publicly question him. When I have discussed this later in private, Wilson has dismissed my concerns. I am no longer prepared to continue this.
- Wilson will regularly undermine my decisions or direct a course of action with the managers without consultation with me. He has on occasion directed that a manager was not to tell me about what he had asked them to do in regard to service delivery. He has lied to managers about what I have said. This causes the managers great duress as they are supervised by and report directly to me. The managers have raised this as an ongoing concern in the management 'team building days' and it has been raised and minuted on numerous occasions in management meetings. In the past three months Wilson has been more actively undermining my authority and managers met with him to discuss this on two occasions in September. These concerns were not resolved, however when viewed in the light of the proposed restructure it is apparent that Wilson saw no future in my current role.

² The identity (and privacy) of certain people has been protected as they are not a party to the proceedings.

- Managers have learnt that in order to create transparency and safety for themselves and their teams, to regularly communicate their conversations with Wilson to me to ensure that the information is accurate. Wilson's continuing dishonesty has created an atmosphere of general distrust within the management team regarding Wilson's motivations and actions and is completely unproductive as managers spend unnecessary time wondering who said what to whom. Because Wilson has regularly conveyed to the staff that he is the only person with Authority to speak to the Board, staff do not feel safe to come forward, nor do they believe that the Board will act on information given.

- Since 2004/5, the Board have not requested staff feedback regarding Wilson's performance. I believe if asked that staff would be happy to comment on their concerns regarding Wilson's behaviour and on some of the allegations that I have made in this letter. While some staff would prefer to give anonymous feedback, other staff have indicated to me that they would be happy to speak to Board members if asked about what they have observed and would be happy for me to pass their names to you if required.

- In finishing, I recognise that if I didn't understand Wilson so well and have such significant concerns about his ongoing behaviour, I would feel more supportive of aspects within the restructure proposal. I do strongly believe that the proposed structure lacks an integrated clinical focus which will regardless eventually fracture the organisation. I believe that by eliminating a clear point of clinical leadership across the organisation that you also remove the valuable support structure that has been created not just for services but for staff. I also believe that through strengthening this point of clinical leadership through a direct reporting line to the Board, that this will strengthen the organisation further through opening a direct line of communication to the Board and the developing services. But most importantly, for the reasons stated above, if the Directors are reporting independently to Wilson I believe that this will eventually create increased instability within ATWC and as a result the current level of service delivery becomes unsustainable and key staff will leave.

[22] Mr Irons subsequently was given a copy of the letter that Ms Ball sent to the Board and he was advised by Ms Kenderdine, that the Board had requested a response from him. The evidence of Mr Irons is that he was "utterly confused and bewildered" by the content of the letter and he was upset by the "serious criticism" of him. Mr Irons says that he was also "very disappointed" as he believed that he has been a "great supporter" of Ms Ball and that he had a good working relationship with her. Of particular note, the evidence of Mr Irons is that during the 7 years that he had worked with Ms Ball, she had not raised any of the issues in the letter with him.

[23] Mr Irons prepared a response to Ms Ball's letter.³ It opens thus:

I have worked closely with Michelle for just over 7 years and I find it disquieting to discover that she has been harbouring a number of serious concerns that she held about my behaviour throughout this time without voicing them to either, [sic] myself the board, her external supervisor, or some other advocate. Michelle is not a person

³ It appears that this was 25th October 2010.

who can be easily silenced and I am curious to reflect on why she [h]as decided to find her voice at this time. The only conclusion I can draw is that the complaint is linked to the proposed restructure and her open opposition to the suggested changes. Although not useful, it is easy to speculate that if the proposed restructure hadn't eventuated would she have raised these concerns?

Mr Irons goes on to refute the allegations made by Ms Ball saying that:

They are without substance and are damaging to my reputation and credibility.

The response then sets out in some detail, a refutation of the allegations of Ms Ball. In particular, Mr Irons says that:

- I dispute Michelle's claims of not being transparent. Although in most communications transparency is advantageous there are occasions when CEOs and managers can not divulge or share information. Michelle has struggled with this and has at times unwisely shared information with selected staff which has resulted in unnecessary unrest.
- Michelle has always had an issue with me speaking with staff and with staff communicating directly with me. She often would voice concern that staff should follow the chain of command and not have access to the CEO. I believe, and know, that she has actively discouraged staff talking with me. This is clearly evident when she is away from work.
- In conclusion it is sad that Michelle has chosen to voice 7 years of complaints in this manner at this time. During this time she could have chosen to leave, but she didn't and stayed, accepting, first part-time and then full-time positions rising through the structure to clinical director, not voicing any of these concerns.
- It would seem clear that she has lost trust in me as CEO and our working relationship (I am doubting now even if we ever had one) seems to be broken. This has been brought more sharply into focus with Michelle's opposition to the proposed restructuring, and her subsequent reluctance to communicate with me.
- Give[n] the nature of the complaints and Michelle's hostility, I have concerns about my own safety at work, especially from these unwarranted and personalised attacks from Michelle, who I did consider my closes [sic] ally. I[t] would seem in hindsight, that my judgement of supporting Michelle into the role of clinical director was wrong.

Mr Irons requested that the Board resolve this matter as soon as possible.

The termination of Ms Ball's employment

[24] On 29th October 2010, Ms Ball was required to meet with the Chairperson of the Board, Ms Kenderdine, who was accompanied by Ms Nichola Christie, a Board member. Ms Ball was accompanied by another manager, Ms Katrina Bernsten. It seems that Ms Christie, more or less, informed Ms Ball of the situation consistent with what was recorded in a letter of the same date that Ms Kenderdine had prepared and which was given to Ms Ball at the conclusion of the meeting. In this letter, Ms

Ball is thanked for her response to the restructure proposal and she is informed that after considering a “considerable amount of feedback from staff” a final structure for the organisation had been confirmed and approved by the Board. Ms Ball is informed that the position of Clinical Director was to be disestablished. It is also conveyed that:

As you are aware from the proposal and as you will read in the attached paper, the establishment of new positions at the director level are to be established and will be advertised internally. As the Chief Executive wrote to you in his email of 8 October 2010, his hope was to retain you in an appropriate and meaningful role at ATWC. At this juncture, I can confirm that on behalf of the Board, the objective of the proposed restructuring (which affected all areas of ATWC’s business), was not the removal of you as Clinical Director.

I now must refer to your letter dated 23 October 2010 which was circulated to all Board members. In summary, you have stated your serious concerns about the performance and integrity of the Chief Executive and of course it was your right to raise your concerns with the Board. You chose to circulate all Board members by email. From my point of view and in order to assist you with your concerns, my preference would have been for you to raise such concerns in the first instance with me as they arose, or perhaps with one other Trustee, should you have preferred that, rather than emailing such a document to all Board members. Your letter has not been taken lightly and needless to say raises significant questions that are in your mind about, as I have said, the performance and integrity of our Chief Executive. The Board having observed your concerns which were fully set out in your comprehensive note, has its own observations and views of the performance and integrity of the Chief Executive, from his service over many years now. In short, The Board fully supports the Chief Executive.

It is quite clear from both of your documents delivered 23 October 2010 that you have no trust and confidence in the Chief Executive. This of course means that it would be inappropriate for you to be considered for an alternative role in the new structure, under these circumstances. It would not be appropriate or viable for you to be placed in a senior role reporting to him. This would put an intolerable strain on a working relationship with the Chief Executive to the extent that it would not be possible. Accordingly, as the restructure is going to proceed, this is notice under your employment agreement that your employment will terminate on 29th January 2011. In the circumstances, you will not be required to work out the contractual notice period as for the same reasons, it would be inappropriate for you to remain at work during the three month notice period, and accordingly you will be paid in lieu. You are entitled to have the use of your car for the duration of the notice period. I will be talking to you about arrangements for your departure including an invitation for an appropriate farewell.

[25] Ms Ball is also informed that:

Unfortunately, I also have to note that the Board are extremely disappointed at the way you have, it seems talked to all and sundry about the proposed restructure, from the moment it was promulgated including outside the organisation. You have been critical of the organisation and the proposal. In your senior role, it was expected that whilst you may have felt understandable anxiety about the potential loss of your role, you would however conduct yourself professionally and in a measured way, if even for your own reputation. Unfortunately I need to advise you that if you continue to bad-mouth the organisation or any one in it, the Board may reluctantly have to consider taking action. I hope that this is not necessary and I am saddened at being obliged to raise this with you.

[26] The evidence of Ms Ball is that upon receiving the advice of the termination of her employment, she asked why the Board did not want to discuss her concerns further. Ms Ball says that Ms Christie “simply reiterated” that the Board had full confidence in Mr Irons and that they did not want to discuss the issues that Ms Ball had raised any further. Ms Ball says that she was asked to leave the premises, after she had returned Trust property in her possession and she was to discuss this Mr Irons. Ms Ball subsequently spoke to Mr Irons and it was agreed that she would clear her office during the weekend. It was also agreed that Ms Ball would email people that she had forthcoming appointments with and that she would explain to these people that she was leaving the Trust “as a result of a restructure.”

[27] Ms Ball attests that she was “extremely distressed and upset” about the lack of any discussion with the Board about the content of her letter to them. Ms Ball says that she believed that the Board would have “engaged” with her on the issues raised in her letter and that:

I just wanted the Board to consider the need for a structure that accommodated/addressed Wilson’s strengths and weaknesses. I was devastated for me not having any opportunity to explain or discuss the letter and how it should be considered.

Analysis and Conclusions

[28] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied when determining whether or not the dismissal of Ms Ball was unjustifiable. The Authority is required to consider on an objective basis, whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would⁴ have done in all the circumstances at the time the dismissal or action occurred.

[29] But as was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer’s actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer’s actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is

⁴ Given that Ms Ball was dismissed before 1st April 2011, the changes introduced by the Employment Relations Amendment Act 2010 are not applicable.

objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

And then further, in regard to the application of s103A:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss. Each of these stages are open to scrutiny although this is not to be done in a mechanical way as it is recognised that the lines between each stage are often blurred.

[30] The meaning of s103A was again clarified by a full bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

Were the actions of the Trust those of a fair and reasonable employer in all the circumstances?

[31] As established in *Air New Zealand v V* (above), in determining whether or not the actions of the Trust were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review "all of the actions of the employer up to and including the decision to dismiss."

[32] In response to the claim of Ms Ball that her dismissal was unjustifiable, it is the position of the Trust that the dismissal was justifiable; in that Ms Ball's employment was terminated, following the disestablishment of her position, which resulted in a genuine redundancy. However, I do not accept that the matter is as simple as that. This is because it appears to be commonly accepted that but for the allegations made by Ms Ball pertaining to her perception of Mr Irons, as contained in the letter of 23rd October 2010, it is more probable than not, that following the disestablishment of her position, Ms Ball would have been appointed (or redeployed) to one of the new positions, should she have been prepared to accept such; albeit this seems problematic given the perception of Ms Ball regarding her relationship with Mr Irons.

[33] But in any event, apart from the given intention of Mr Irons to retain the employment of Ms Ball, following the disestablishment of her position, and of course the fact that Ms Ball still remained in her current position, it was incumbent upon the

employer to apply the well established principles set down by such cases as *Auckland City Council v Hennessy*⁵ where the Court of Appeal stated that:

A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness. It follows that a dismissal may be held to be unjustifiable where the circumstances are such that justice or fairness requires that the employee should have the opportunity which he has not been afforded, of stating his case. Whether such circumstances exist will depend on the facts of a particular case including such matters as the nature of the employment and the occurrence that gives rise to dismissal.

[34] In Ms Ball's case, the occurrence that gave rise to the dismissal was the presentation to the Board of a letter containing serious allegations against Mr Irons as the Chief Executive, to whom she had a direct report relationship. Because of the serious nature of the allegations, it was incumbent upon the Board to initiate an investigation as to the veracity (or otherwise) of them. It did this, in part, by seeking a response from Mr Irons whereby he adamantly denied the behaviour that Ms Ball had attributed to him; in addition to conveying that Ms Ball had never spoken to him of any concerns.

[35] The Board then expressed its full confidence in Mr Irons as the Chief Executive and determined that the termination of the employment of Ms Ball was necessary. But this was without any communication to her that such action was contemplated; and without giving her an opportunity to obtain representation and then attempt to justify why she had made the allegations she had and/or endeavour to persuade the Board as to why, in her view, the sanction of dismissal was not appropriate. Regrettably, the Board failed to observe these basic principles of justice and fairness. It follows that I am bound to find that the manner in which Ms Ball was dismissed was not the action of a fair and reasonable employer in all the circumstances; hence her dismissal was unjustifiable. Ms Ball has a personal grievance.

Remedies

[36] Having found that Ms Ball was unjustifiably dismissed, pursuant to s.123(1) of the Employment Relations Act 2000 (the Act), the Authority: "may" in settling the grievance, provide for one or more remedies, including, as sought by Ms Ball, reimbursement of lost wages and benefits and compensation for humiliation, loss of

⁵ (1982) ERNZ Sel Cas 4; [1982] ACJ 699 (CA)

dignity and injury to feelings. But the Authority must also be cognisant of s.124 of the Act which provides that:

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance-

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[37] Having considered the extent to which the actions of Ms Ball contributed towards the situation that gave rise to the personal grievance, I find that her contribution was such that any remedies that I would have been of a mind to award would be reduced by 100%. This is because it is patently clear, that given Ms Ball's perception of Mr Irons, as expressed in her letter to the Board, and the subsequent response of Mr Irons, there was not a sufficient remnant of trust and confidence remaining that would have allowed these two people to work together in the future. I accept that the following submission for the Trust accurately summarises the reality of the situation:

The Letter was fatal to the applicant's opportunity for ongoing employment with the respondent. It is submitted that it cannot credibly and sensibly be argued that following receipt of the Letter, there was any possibility whatsoever for the applicant and the Chief Executive to be able to work together effectively, harmoniously and in a functional relationship. The Chief Executive advised the Board that he could not work with the applicant. The Board itself believed that it would be totally impossible for the two to work together. The Letter speaks for itself as to the applicant's strongly held criticism of the Chief Executive and of her distrust and lack of confidence in him.

[38] Indeed, while I have found that Ms Ball was unjustifiably dismissed because the Trust failed to follow the basic principles of justice and fairness prior to making the decision to terminate her employment; had that failure not been present, I would have, most probably, upheld her dismissal on the grounds that the overall conduct of Ms Ball deeply impaired or was destructive of the basic trust and confidence that is an essential of the employment relationship.⁶ This is particularly so given that there was no credible evidence to collaborate or support the serious allegations against Mr Irons.

⁶ *Northern Distribution Union v BP Oil Ltd* [1992] 3 ERNZ 483

The claim of unjustified disadvantage

[39] It has been submitted for Ms Ball that if the Authority finds that the dismissal was justified, then “in the alternative” she has an unjustified disadvantage grievance. While the reasons for advancing this grievance have not been actively advocated, I understand that it is claimed (in substance) that the Trust:⁷

- (a) Failed to provide Ms Ball with any timely and proper notice of the potential jeopardy that existed in regard to the continuation of her employment as a result of the restructure. It is said that Ms Ball should have been informed of such a possibility as early as August or September 2010; and
- (b) Acted unfairly and unreasonably in terms of planning the timing of the announcement of the restructure to Ms Ball to coincide with her being absent on study leave; and
- (c) Failed to properly and fairly consult with Ms Ball.

[40] Effectively, the above claims relate to the sudden and unexpected manner in which the restructure proposal was presented to Ms Ball on 1st October 2010. The evidence of Ms Ball is that she was upset by the manner in which the restructuring proposal was provided to her and that it was “almost an afterthought” at the end of an informal meeting that had taken place for an entirely different purpose; that is, to brief Mr Irons on operational matters prior to the departure of Ms Ball to Australia on study leave for two weeks.⁸

[41] I accept that Ms Ball was disadvantaged by the sudden and unexpected manner by which she received the restructuring proposal which led to the disestablishment of her position. I also conclude that it is more probable than not that Mr Irons deliberately planned the timing of informing Ms Ball of the restructuring proposal in order to coincide with her forthcoming absence on study leave. The evidence of Mr Irons is that the final proposal was approved by the Board on 22nd September 2010 hence there appears to be no good reason why Ms Ball could not have been notified somewhat earlier. Further, the proposal indicated that Ms Ball was

⁷ As set out in the letter to the Trust dated 11th November 2010 raising a personal grievance (attached to the *Statement of Problem*).

⁸ The evidence of how Ms Ball was affected is set out in paras [13] and [14] of this determination.

required to provide a response to the proposal by 7th October 2010, when she was out of the country.⁹

[42] I am satisfied that Ms Ball was disadvantaged in her employment in regard how a fundamental matter pertaining to her role within the organisation was managed and that the conduct of the Trust, pertaining to this matter, was unjustified and not the action of a fair and reasonable employer in all the circumstances;¹⁰ hence Ms Ball has a personal grievance.

Remedy for the unjustifiable disadvantage

[43] The evidence of the affect of how the restructuring proposal was conveyed to Ms Ball has already been set out above. I am satisfied that she was affected to a degree that warrants an award of compensation pursuant to s.123(1)(c)(i) of the Act of the sum of \$5,000. I do not consider that Ms Ball contributed in any way towards the situation that gave rise to the grievance and accordingly, I make no reduction under s.124 of the Act on account of contributory behaviour.

Determination

[44] For the reasons set out above I find that:

- (a) The dismissal of Ms Ball was unjustifiable but due to her substantial contribution towards the situation that gave rise to the grievance, it is not appropriate to award any remedies.
- (b) The employment of Ms Ball was affected to her disadvantage by an unjustifiable action by her employer. Pursuant to s.123(1)(c)(i) of the Act, the Anglican Trust for Women and Children is ordered to pay to Ms Ball the sum of \$5,000.00.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority, the outcome reached and that the investigation meeting was completed within one day.

⁹ The time for feedback was subsequently extended.

¹⁰ Section 103A of the Employment Relations Act 2000.

In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority