

identified and various allegations contained in complaints made by Melissa Bowen cannot be particularised.

[2] In terms of the various BNZ employees who are participants in the events that inform Ms Bowen's claims, these employees will have their names anonymised in this determination; they will be referred to by a string of three randomly selected letters. Attached at appendix one to this determination are two incomplete organisational charts for the BNZ that identify the teams that are relevant to this matter. These charts also identify the position of each relevant BNZ participant, with the appropriate three letter string listed in their organisational position. The charts are the organisational structure as of 1 April 2016, with two exceptions which are noted in the relevant chart.

Employment relationship problem

[3] Ms Bowen was employed by the BNZ from September 2015. Ms Bowen was employed as the Manager of the Acquisition Specialists team, which was part of the wider Small Business Acquisition team. Ms Bowen reported to HDM the Manager of the Small Business Acquisition team. The Small Business Acquisition team was one of four teams making up the Small Business unit at the BNZ, which was headed up by IWV.

[4] In the course of her employment, Ms Bowen complained about the conduct of various employees within BNZ. Ms Bowen's first complaint was made in March and April 2016; this complaint related to the conduct of one of the employees in her team (KCX) and IWV (the First Complaint).

[5] Subsequent to this when her role was put at risk of disestablishment, Ms Bowen raised a personal grievance for unjustified action causing disadvantage to her employment; the allegation being that the proposed restructure had no credible commercial basis and was motivated by retaliation from IWV for the First Complaint.

[6] Given that the personal grievance raised by Ms Bowen was based on allegations of a serious nature, BNZ suspended the restructuring process in connection with Ms Bowen until mediation occurred.

[7] On 23 November 2016 Ms Bowen made a protected disclosure to the BNZ Board. This disclosure related to [REDACTED] (the Second Complaint). BNZ, through its parent company National Australia Bank (NAB) appointed an independent investigator as part of the whistleblower program.

[8] On 1 December 2017, NAB advised BNZ that the whistleblower program had concluded its investigation.

[9] BNZ then attended mediation with Ms Bowen on 19 February 2018 and then a further mediation on 30 and 31 May 2018.

[10] Following this, BNZ recommenced consultation over the proposal to disestablish Ms Bowen's position in June 2018. On 12 July 2018 BNZ decided to disestablish Ms Bowen's position. BNZ then undertook a redeployment process however Ms Bowen was not satisfied that there were any suitable roles for her. As a result, Ms Bowen's employment finished on 31 July 2018 by way of redundancy with BNZ making a payment in lieu of notice.

[11] Ms Bowen raised various claims with BNZ regarding the way she had been treated in respect of her complaints and the restructuring process.

[12] Ms Bowen and BNZ were unable to resolve these various claims and Ms Bowen lodged a statement of problem in the Authority.

[13] Ms Bowen's claims are based on personal grievances for:

- (a) Unjustified action causing disadvantage because BNZ did not protect her from alleged bullying by IWV.
- (b) Unjustified action causing disadvantage because Ms Bowen was subjected to a restructure, in which the proposal included that her job would be disestablished, in retaliation for the First Complaint.
- (c) Unjustified action causing disadvantage because Ms Bowen was threatened with dismissal for disclosing information in relation to the proposed restructure.

- (d) Unjustified action causing disadvantage because BNZ did not follow its own whistleblower policy in relation to the Second Complaint.
- (e) Unjustified action causing disadvantage because Ms Bowen was subjected to further retaliatory conduct after the Second Complaint.
- (f) Unjustifiable dismissal when BNZ dismissed Ms Bowen for redundancy after her role was disestablished.

[14] Ms Bowen's two additional claims are that BNZ breached the duty of good faith and that BNZ breached the terms of Ms Bowen's employment agreement. Ms Bowen seeks penalties for these alleged breaches.

[15] BNZ's response to each of these claims is:

- (a) Ms Bowen did not raise her personal grievance in connection with alleged bullying by IWV within the requisite 90-day time frame.²
- (b) The First Complaint was not a protected disclosure and, in any event, there was no conduct toward Ms Bowen that could be construed as retaliatory for the First Complaint (regardless of the type of complaint it was).
- (c) Ms Bowen was not threatened with dismissal for disclosing information about the proposed restructure.
- (d) Ms Bowen did not raise her personal grievance relating to alleged breaches of the relevant whistleblower policy within the requisite 90-day time frame.³ In any event BNZ denies that there was any breach of the whistleblower policy.
- (e) There was no retaliatory action toward Ms Bowen as a result of the Second Complaint.

² Section 114 of the Employment Relations Act 2000.

³ Section 114 of the Employment Relations Act 2000.

(f) Ms Bowen's redundancy was for justified business reasons following a full and fair consultation process. There is no basis for an unjustifiable dismissal claim.

(g) It did not breach the duty of good faith or the terms of Ms Bowen's employment agreement and no penalties should be imposed against it.

The Authority's investigation

[16] Ms Bowen's claims relate to events that occurred in 2016 and 2018 and they were raised as employment relationship problems in the Authority in August 2017 and July 2018. The resolution of the employment relationship problems has taken considerable time. There have been interlocutory matters relating to removal to the Employment Court and admissibility of evidence and more recently there were issues relating to the ability of parties to proceed with an investigation meeting in the Authority. All of these things caused the investigation meeting on the substantive issues to be adjourned on occasion.

[17] In the end I was able to investigate the employment relationship problems by receiving written evidence and documents and by holding an investigation meeting on 12 June to 16 June 2023, 19 June to 22 June 2023 and 28 July 2023. I recognise the large amount of work that the parties and their representatives have put into this matter and commend them for the patience and persistence in dealing with it.

[18] In the course of my investigation meeting counsel for both parties agreed that I would limit my investigation to ascertaining liability in the first instance. The reason for this relates to evidential and procedural issues which need not be explained in this determination. For the avoidance of doubt, I record that this determination will only deal with liability in respect of the claims outlined above.

[19] As permitted by s 174E the Employment Relations Act 2000 (the Act), I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[20] As outlined above, Ms Bowen's claims are based on personal grievances for unjustified action causing disadvantage and unjustifiable dismissal, breach of the duty of good faith and breach of her employment agreement. There are additional issues in respect of two of Ms Bowen's claims raised by BNZ relating to whether the personal grievances were raised in time.

[21] I will now set out the issues for these claims and then based on this I will outline how I will analyse and resolve the claims.

Personal grievances raised within 90 days

[22] Section 114(1) of the Act sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[23] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employer wants the employer to address.

[24] So, there are two parts:

- (a) Whatever communication being relied on as raising the personal grievance must be made within 90 days of the action by BNZ giving rise to the grievance occurring or coming to Ms Bowen's notice.
- (b) The communication must make the employer aware that the employee is alleging a personal grievance. That is, did the communications sufficiently outline Ms Bowen's claims, in line with the applicable principles, so that BNZ was aware that Ms Bowen was alleging a personal grievance.

Unjustified action causing disadvantage

[25] An unjustified action causing disadvantage personal grievance is set out in section 103(1)(b) of the Act. This provides that an employee may have a personal grievance where their employment or any condition of employment is or was affected to their disadvantage by some unjustified action by their employer.

[26] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) Were the alleged actions carried out by BNZ in respect of Ms Bowen?
- (b) If so, did the actions cause any disadvantage to Ms Bowen's employment or a condition of employment?
- (c) If so, were the actions of BNZ unjustified?

Unjustifiable dismissal

[27] In a claim for unjustified dismissal, once it is established that the employee has been dismissed the employer must prove that the dismissal was justified, in line with the test for justification and the duty of good faith set out in the Act.⁴

[28] The test for justification applies to two aspects of the dismissal:

- (a) The process by which BNZ consulted over the proposed restructure, the decision to implement the restructure and the decision to dismiss Ms Bowen for redundancy; and
- (b) The substantive rationale for the decisions made by BNZ to implement the restructure and then the decision to dismiss Ms Bowen.

⁴ Sections 103A and 4 of the Act.

Breach of the duty of good faith

[29] The duty of good faith is set out in s 4 of the Act. It provides generally that an employer and an employee must act in good faith and not mislead or deceive each other. Further they must both be active and constructive and responsive and communicative with each other.

[30] I must determine if BNZ acted as alleged by Ms Bowen and if so whether this shows a failure to meet the requirements in s 4 of the Act.

Breach of Ms Bowen's employment agreement

[31] Ms Bowen alleges that BNZ has breached the terms of her employment agreement by breaching the relevant whistleblower policy and not meeting the implied term of trust and confidence. To resolve these two claims, I will:

- (a) First, establish what the terms of the contract, being Ms Bowen's employment agreement, are that are alleged to have been breached.
- (b) Second, I will establish if BNZ acted as alleged.
- (c) Third, then determine if the action by BNZ, if it did occur, amounts to a breach of the terms of Ms Bowen's employment agreement.

Steps for determining Ms Bowen's claims

[32] I will turn to each claim made by Ms Bowen and set out how the issues outlined above apply and therefore establish the steps I will take in determining each claim.

[33] The unjustified action causing disadvantage claim because BNZ did not protect Ms Bowen from alleged bullying by IWV:

- (a) First, I will consider if Ms Bowen raised a personal grievance based on alleged bullying by IWV, by identifying the communications being relied on by Ms Bowen and ascertaining if those communications were:

- i. Made within 90 days of the alleged bullying by IWV occurring or coming to Ms Bowen's notice.
- ii. Made BNZ aware that Ms Bowen was alleging a personal grievance related to bullying by IWV.

(b) If Ms Bowen did raise a personal grievance in time I will then turn to consider if:

- i. BNZ acted as alleged, i.e., it failed to protect Ms Bowen from bullying by IWV?
- ii. If so, did BNZ's actions cause disadvantage to Ms Bowen's employment or a condition of her employment?
- iii. If so, were BNZ's actions unjustified?

[34] The unjustified action causing disadvantage claim because Ms Bowen was subjected to a restructure in retaliation for the First Complaint:

- (a) Ms Bowen says the First Complaint was a protected disclosure. BNZ denies this but says, in any event, that I do not need to determine this in order to resolve Ms Bowen's personal grievance. In this regard Ms Bowen seeks a declaration that she made a protected disclosure. And it is also apparent that the wider claims of breach of good faith and breach of Ms Bowen's employment agreement have, at least in part, allegations of breach of the relevant whistleblower policy. All of this means I will, as a first step in analysing this claim, determine if the First Complaint was a protected disclosure.
- (b) The next step is to determine if BNZ's proposed restructuring as that related to Ms Bowen was in retaliation for the First Complaint.
- (c) If this was the case then the next two steps of the unjustified disadvantage grievance will be met as BNZ's action will have caused a disadvantage to Ms

Bowen's employment or a condition of her employment and it will be an unjustified action.

[35] The unjustified action causing disadvantage claim because Ms Bowen was threatened with dismissal for disclosing information in relation to the proposed restructure:

- (a) First, I will determine if BNZ acted as alleged, i.e., it threatened Ms Bowen with dismissal for disclosing information in relation to the proposed restructure.
- (b) If BNZ did threaten Ms Bowen then I will consider if this caused a disadvantage.
- (c) Then if this action caused a disadvantage I will consider if BNZ's threat was justified.

[36] The unjustified action causing disadvantage claim because BNZ did not follow the relevant whistleblower policy in relation to the Second Complaint:

- (a) As with Ms Bowen's first claim, I will consider if Ms Bowen raised a personal grievance based on an alleged breach of the relevant whistleblower policy, by identifying the communication being relied on by Ms Bowen and ascertaining if that communication was:
 - i. Made within 90 days of the alleged breach of the relevant whistleblower policy occurring or coming to Ms Bowen's notice.
 - ii. Made BNZ aware that Ms Bowen was alleging a personal grievance related to a breach of the relevant whistleblower policy.
- (b) If Ms Bowen did raise a personal grievance in time I will then turn to consider if:
 - i. BNZ acted as alleged, i.e., it breached the relevant whistleblower policy?

- ii. If so, did BNZ's actions cause disadvantage to Ms Bowen's employment or a condition of her employment?
- iii. If so, were BNZ's actions unjustified?

[37] The unjustified action causing disadvantage claim because Ms Bowen was subjected to further retaliatory conduct after the Second Complaint:

- (a) This claim relates to BNZ recommencing the proposed restructuring of Ms Bowen's role after she raised the Second Complaint.
- (b) I will need to determine if BNZ's decision to recommence the proposed restructure, as that related to Ms Bowen, was in retaliation for the Second Complaint.
- (c) If this was the case then the next two steps of the unjustified disadvantage grievance will be met as the BNZ action will obviously have caused a disadvantage to Ms Bowen's employment or a condition of her employment and it will be an unjustified action

[38] The unjustifiable dismissal claim when BNZ dismissed Ms Bowen for redundancy after her role was disestablished. Ms Bowen was dismissed by BNZ, so I will need to consider if BNZ acted justifiably in both the process it adopted when it dismissed Ms Bowen and in coming to the decision to dismiss, i.e., was it substantively justifiable.

[39] Breach of good faith and breach of contract: each will be addressed as outlined in the issues section above.

Does Ms Bowen have a personal grievance for unjustifiable actions by BNZ that caused disadvantage to her employment, in connection with the alleged bullying by IWV?

[40] The first step in my analysis of this claim is to determine if Ms Bowen raised a personal grievance within the requisite 90-day period.⁵

⁵ Section 114 of the Employment Relations Act 2000.

Did Ms Bowen raise a personal grievance within 90 days?

[41] The communication relied on by Ms Bowen is a series of discussions and email communications that she had about, and which comprised, the First Complaint. Ms Bowen confirmed in evidence that prior to raising the First Complaint she had not raised any concerns about bullying by IWV. The communications which comprise the First Complaint involve initial discussions with HDM and HR Business Partner, Retail Sales Channel, Small Business and Insurances (PEQ) and then extensive communications with the BNZ Head of Employee Relations (NTK).

[42] First, I will outline what happened in terms of the concerns Ms Bowen had and what she raised with BNZ.

[43] From November 2015 through to March 2016 Ms Bowen became concerned about two sets of events:

- (a) The behaviour towards her and another employee of her team (EVH) by KCX – KCX and EVH being colleagues and both reporting to Ms Bowen. Part of the concern about KCX's behaviour manifested out of the fact that KCX and IWV were in a personal, de facto relationship.
- (b) The apparent conduct of IWV in commercial transactions – this being two commercial arrangements in particular.⁶

[44] On 23 March 2016 Ms Bowen spoke to HDM and advised him she wished to raise various issues and needed to talk to someone she could trust. HDM then contacted the most senior person in the BNZ HR team that covered the Small Business Unit; this was BNZ Head of People – Retail, and Marketing and Strategy and Business Performance (OHD). OHD was not available so HDM contacted the next senior person in that HR team, PEQ. HDM spoke to PEQ about Ms Bowen telling him she wanted to raise issues she had and he ascertained that PEQ was available and able to assist.

⁶ Due to the various non-publication orders I cannot outline or identify the basis for Ms Bowen's concerns about IWV.

[45] The extent to which Ms Bowen identified her issues as complaints involving KCX and IWV and/or referenced these complaints as bullying in this initial contact with HDM is not, on the face of the evidence, clear:

- (a) Ms Bowen says she told HDM she had serious concerns about IWV's misconduct in commercial matters and bullying by IWV and KCX.
- (b) HDM says Ms Bowen told him she had concerns and complaints about IWV and did not know who she could trust.
- (c) PEQ says HDM spoke to her and told her that Ms Bowen had contacted him and told him that she had a sensitive and serious matter involving complaints about KCX.

[46] HDM and PEQ then called Ms Bowen to discuss her issues. In this conversation Ms Bowen did not articulate her concerns about IWV as she was concerned not to draw HDM into these issues as HDM reported directly to IWV. In this telephone conversation Ms Bowen spoke about concerns with KCX and her bullying another employee in Ms Bowen's team. It then became apparent that Ms Bowen was concerned that KCX's actions were also directed at her.

[47] After this telephone call PEQ sent Ms Bowen the BNZ policy on bullying and harassment. She says she did so in response to the concerns raised about KCX.

[48] As result of the contact between Ms Bowen and PEQ the expectation between them was that Ms Bowen would set out her concerns in writing. Whilst there had been an indication that Ms Bowen had concerns about IWV's conduct in commercial transactions, PEQ was of the view that the bullying complaint, if there was one, related to KCX and the IWV concerns were of a commercial nature. Either way it had been agreed that any written complaints from Ms Bowen would be referred to another member of the BNZ HR team to investigate.

[49] On 28 March 2016 Ms Bowen sent an email to PEQ that attached a document outlining her complaints about KCX and IWV.

[50] On 1 April 2016, the BNZ Head of Employee Relations (NTK) called Ms Bowen and told her that her complaint had been passed to him to investigate. NTK then met Ms Bowen later that day and conducted an interview with her.

[51] In this interview Ms Bowen answered questions that were mainly directed at understanding KCX's behaviour. There were also questions about IWV's actions in relation to two commercial matters. Then at the end of the interview Ms Bowen answered a question by advising things that had happened that week that made her feel the IWV was sabotaging her role; she provided her reasons why, including that she thought IWV was undermining her to HDM.

[52] As part of NTK's investigation, NTK provided a copy of his summary of Ms Bowen's complaints to IWV and IWV then provided NTK with a reply document setting out his initial responses to Ms Bowen's complaint. This document was dated 10 April 2016. NTK then interviewed IWV and KCX. Copies of the interview notes, dated 15 April 2016, were given to Ms Bowen so she could respond to them as a right of reply.

[53] On 16 May 2016 Ms Bowen sent her responses to IWV and KCX's interview notes to NTK by email. In her email Ms Bowen stated, "I would also like to have a discussion with you with regard to how the Bank will protect me from retribution for exposing these situations."

[54] Ms Bowen then received assurances from NTK and on 17 May 2016 Ms Bowen provided her additional evidence that supported her complaints to NTK.

[55] NTK then concluded his investigation and produced a report dated 24 May 2016. That report sets out very clearly at the outset that it deals with complaints by Ms Bowen about KCX, whilst acknowledging that Ms Bowen had also complained about unprofessional behaviour of IWV. The conclusion reached by NTK as expressed in his report was that KCX had not bullied Ms Bowen, but it recognised that the relationship between KCX and IWV had created problems for Ms Bowen's team. In respect of the complaints Ms Bowen had raised about IWV, NTK recorded that these various business decisions and issues raised by Ms Bowen would be referred to OHD for further consideration.

[56] On 8 June 2016 NTK's report was presented to Ms Bowen by OHD and PEQ; NTK was away from work at the time.

[57] Ms Bowen says in evidence that when she read the report she was alarmed by several things. This included that NTK had not investigated IWV for bullying, that NTK had concluded that there was no bullying by KCX, and that NTK had concluded there was no wrongdoing in respect of the IWV business conduct allegations and/or that this would be referred to OHD. However, there is no evidence from Ms Bowen, OHD or PEQ that Ms Bowen raised concerns with them about the absence of any investigation into the alleged bullying by IWV.

[58] I note here that OHD had also, by this time, looked into the various complaints about IWV's business conduct and had concluded that there was no wrongdoing. OHD told Ms Bowen that this was her conclusion.

[59] Ms Bowen asked to speak to OHD again regarding the report and her concerns. A further meeting was held on 14 June 2026. There is no evidence to show that in this meeting Ms Bowen raised concerns about the absence of any investigation into the alleged bullying by IWV.

[60] Then on 20 June 2016, Ms Bowen sent an email to PEQ and HDM, with a copy to NTK and OHD. In this email Ms Bowen raised concerns about recent behaviour towards her and concluded by stating "how does the Bank propose to protect myself and [other employee] from retribution by these parties....". This was a reference to IWV and KCX, but in this email there was no reference to bullying by either of them.

[61] Turning to my assessment of whether these various communications raised a personal grievance, I start with identifying the alleged behaviour and when it occurred. In her evidence Ms Bowen referred to bullying behaviour by IWV as including:

- (a) Being pressured by him to give KCX a bonus.
- (b) KCX taking Ms Bowen's work and presenting it as her own with IWV's approval.

- (c) Being told by IWV to fire or demote an employee in her team.
- (d) Being pressured into breaching business practices and being pressured to engage in unethical projects and initiatives.
- (e) IWV sabotaging her role.

[62] Ms Bowen says these events that comprise the bullying by IWV, occurred over a period of time up until the First Complaint. In essence this is a course of conduct and therefore the communications that comprise the First Complaint do fall within the 90 day period.

[63] On this basis the next question is, did these communications make BNZ aware that Ms Bowen was alleging a personal grievance related to bullying by IWV?

[64] The key principles for establishing if a communication, which an employee says raises a personal grievance, has sufficient detail to make the employer aware that the employee is alleging a personal grievance have been addressed in various court decisions. The key principles are:⁷

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.

⁷ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.

[65] What is clear is Ms Bowen never specifically identified to HDM, PEQ, OHD or NTK that she had a personal grievance based on bullying by IWV. I do not accept that Ms Bowen expressed her concerns to HDM and PEQ on 23 March 2016 as bullying by IWV. And Ms Bowen's written complaint, the various interview notes from NTK's investigation, responses to IWV and KCX's interviews, the additional communications around further information provided to NKT and then the two meetings with OHD and PEQ in June 2016, do not specifically identify bullying by IWV.

[66] The question is, notwithstanding this, did Ms Bowen sufficiently identify to any of those individuals the substance of her complaint in such a way that BNZ knew what it was that she was alleging, that this was in the nature of a personal grievance and that she expected BNZ to respond.

[67] As Ms Bowen's personal grievance is about bullying the communications would need to have identified bullying behaviour, either specifically as outlined by Ms Bowen or generally. In terms of general allegations applying the definition of bullying used by WorkSafe New Zealand, bullying is about behaviour that:

- (a) Is repeated and unreasonable.
- (b) Is directed at a worker (or group of workers).
- (c) Can lead to physical or psychological harm.

[68] Putting all of this together, I need to know if Ms Bowen provided information that made it clear she was alleging IWV acted toward her in an unreasonable way that was repeated and which could lead to psychological harm. And in doing this she also made it clear that she expected BNZ to respond to this.

[69] I have extensively reviewed the evidence, including the written evidence, my notes of oral evidence, and the contemporaneous documents. And I conclude that there are two areas of concern about IWV's behaviour that arise in Ms Bowen's communications that might amount to bullying:

- (a) Concerns about unethical or questionable business conduct, including favouring KCX.
- (b) Undermining Ms Bowen's work and either threatening, or attempting, to sabotage her role.

[70] I am satisfied that in raising her complaints about IWV's business conduct Ms Bowen did not do so in a way that expressed concern about feeling duress or pressure to be involved in those dealings. Rather she raised them as concerns about business behaviour that needed to be investigated by BNZ.

[71] I am also satisfied that in raising concerns about IWV carrying out acts that might sabotage her role, Ms Bowen was doing so in the context of her concern that she would face

retaliation for the First Complaint and in circumstances that do not indicate an earlier concern that amounts to bullying.

[72] In short, the context in which Ms Bowen made the First Complaint and expressed concerns did not indicate that she was asserting she had been bullied by IWV and had a grievance based on that which she expected BNZ to respond to.

[73] My conclusion is supported by:

- (a) Ms Bowen's written summary of her concerns specifically references KCX's behaviour and summarises the concerns by referring to KCX's actions as being a form of bullying. There is no reference to IWV's behaviour in same terms, either explicitly or by implication in terms of the descriptions – the focus is on IWV's involvement in commercial transactions.
- (b) NTK's report identifies bullying by KCX as being the subject of his investigation – not bullying by IWV. So NTK did not believe there was a bullying complaint about IWV's behaviour made by Ms Bowen
- (c) Whilst Ms Bowen was unhappy with NTK's report and the conclusion, she did not express this as a failure to investigate bullying by IWV in the meetings she had in June 2016 or the further communications she made.
- (d) When Ms Bowen did raise a personal grievance on 20 October 2016, it did not reference bullying by IWV.

[74] I conclude that Ms Bowen did not raise a personal grievance for alleged bullying by IWV within the requisite 90-day period.

Did Ms Bowen suffer from retaliatory action for the First Complaint and if so, is this an unjustified action that caused disadvantage?

[75] As set out above, in order to resolve this claim by Ms Bowen I will first consider if the First Complaint was a protected disclosure.

Was the First Complaint a protected disclosure?

[76] A Protected Disclosure is governed by Protected Disclosures Act 2000 (the PD Act).

Relevant clauses include:

6 Disclosures to which Act applies

- (1) An employee of an organisation may disclose information in accordance with this Act if –
 - (a) the information is about serious wrongdoing in or by the organisation; and
 - (b) the employee believes on reasonable grounds that the information is true or likely to be true; and
 - (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated;
 - (d) the employee wishes the disclosure to be protected.
- (2) ...

6A Technical failure to comply with or refer to Act

- (1) A disclosure of information is not prevented from being a protected disclosure of information for the purposes of the Act merely because –
 - (a) of a technical failure to comply sections 7 to 10 if the employee has substantially complied with the requirement set out in section 6 to disclose the information in accordance with this Act; or
 - (b) ...

...

7 Disclosure must be made in accordance with internal procedures

- (1) An employee must disclose information in the manner provided by internal procedures established by and published in the organisation, or the relevant part of the organisation, for receiving and dealing with information about serious wrongdoing

....

[77] So, a disclosure must comply with the requirements of s 6 of the PD Act to gain the protection afforded to an employee. And the disclosure must be made in accordance with s 7 of the PD Act or be a technical failing to comply under s 6A of the PD Act.

[78] The first thing to note, which I have outlined before, is that the First Complaint had two parts, bullying by KCX and concerns over business conduct by IWV.

[79] In terms of a bullying complaint about KCX I accept the BNZ view that largely bullying complaints are not protected disclosures. And in this case that is correct – whilst Ms Bowen expressed concern about retaliation for her complaint that on the face of it applied to retaliation by IWV regarding the complaints about his business behaviour. So, for the bullying complaint Ms Bowen did not make the complaint, as that relates to KCX, wishing for it to be protected.

[80] The situation is different for the complaints about IWV's business conduct and it complies with s 6 of the PD Act:

- (a) Ms Bowen's complaint was about serious wrongdoing. This is not in dispute. I cannot set out the detail of the complaint but I am satisfied that it alleged serious wrongdoing.
- (b) Ms Bowen believed on reasonable grounds that the information was correct. BNZ argue this is not the case but I do not accept that. It is clear that Ms Bowen's consideration was based on her understanding of events including events she had witnessed first-hand and events that she had been told about; it is clear from Ms Bowen's evidence that she believed them to be true.
- (c) Ms Bowen wished to disclose the information so that it could be investigated. This is not in dispute and is clear from the evidence.
- (d) Ms Bowen wished the disclosure to be protected. This is also clear from the evidence, including direct requests made of NTK by Ms Bowen for assurances that she would be protected and concerns raised that IWV was jeopardising her role.

[81] The remaining issue with regard to Ms Bowen's First Complaint relating to IWV's behaviour is the question of how the complaint was made. The questions being did Ms Bowen follow the process set by the BNZ, and, if not, was any failing by her just a technical failing.

[82] The process by which an employee of BNZ should make a protected disclosure was, in my view, confusing. The reason for this is there were conflicting policies and intranet references:

(a) The starting point is Ms Bowen's employment agreement. This did not make any reference to protected disclosures but did provide that the BNZ Code of Conduct applied to her employment as did BNZ policies, which were available on BNZ's intranet.

(b) The BNZ Code of Conduct did not reference protected disclosures but did provide the following:

If you become aware of a suspected breach of the Code of Conduct or have concerns about the conduct of another person in the workplace, you have a responsibility to speak up. You can bring it to the attention of your people leader (or another people leader) or you can call BNZ People & Communications on

You can also raise concerns in a protected and confidential manner by calling the Integrity Line on

(c) The Code of Conduct did not refer to a whistleblower policy – in contrast it specifically listed at least 20 other policies, procedures or Acts that BNZ employees were expected to be familiar with.

(d) The BNZ intranet had a section on the PD Act. This summarised the PD Act and included a reference to the "Whistleblower Programme". This was a link to the National Australia Bank Group Whistleblower Policy (NAB Whistleblower Policy). The intranet summary on the PD Act also stated, "bank employees using procedures under the [PD Act] will be protected"

(e) The NAB Whistleblower Policy had various references to complaints being raised by employees:

- i. It specifically states that the NAB Whistleblower Policy is designed to compliment the normal communication channels. And, in most cases, where employees have concerns about the proper conduct of other employees, they should raise this with their immediate supervisor or escalate through the appropriate management channels.
- ii. It outlines a duty to report known “Reportable Conduct” and that an employee can use standard communication channels for reporting or they can report it as a protected disclosure under the NAB Whistleblower Policy.
- iii. It also outlines an obligation on recipients of Reportable Conduct to refer the concerns to the NAB Whistleblower Policy so that it can be treated as a “Protected Disclosure” in circumstances where the concern is serious and it could result in reprisals against the whistleblower.
- iv. It outlines that a Protected Disclosure is a qualifying disclosure relating to Reportable Conduct that entitles an employee to support protection in accordance with the NAB Whistleblower Policy. It the states that a Protected Disclosure can be made in one of three ways – by calling the Confidential Alert Line, by referral to a Whistleblower Program officer, or by email to a Principal or regional Board Audit Committee Alert email address.

[83] It is this last reference to the ways in which an employee was to raise a Protected Disclosure under the NAB Whistleblower Policy that BNZ says identifies the process by which Ms Bowen was to raise a complaint that qualified under the PD Act.

[84] I cannot accept that the process by which BNZ required a complaint, which otherwise qualifies under s 6 of the PD Act, had to be raised was logically only done by one of three

steps set out in the NAB Whistleblower Policy. I believe this was not clear to BNZ employees various reasons including:

- (a) The primary document for BNZ employees was the Code of Conduct and this did not reference the NAB Whistleblower Policy rather it appeared to give employees two options for raising complaints – through normal management channels or by calling the Integrity Line.
- (b) On the face of it, it was not clear to an employee checking the PD Act material on the BNZ intranet that complaints under the PD Act needed to be made in accordance with the NAB Whistleblower Policy. There is a reference to using the NAB Whistleblower Policy but there is immediately after that a reference to using procedures under the PD Act.
- (c) It is not clear that the NAB Whistleblower Policy applied to BNZ employees seeking to make a disclosure under the PD Act, rather the NAB Whistleblower Policy referenced complaints made in accordance with its own definitions, which were then Protected Disclosures.
- (d) Even if a BNZ employee determined that the NAB Whistleblower Policy applied to a disclosure it wished to make concerning serious wrongdoing (either under the PD Act or otherwise) then that policy provided alternative avenues for raising complaints – it specifically references complaints being made through standard reporting or communication channels. And by referencing an obligation for recipients of complaints to treat them a protected disclosures in appropriate circumstances suggests that an employee need only really be concerned with reporting serious wrongdoing and if protection was required then BNZ would determine that.
- (e) Finally if a BNZ employee navigated all of the above references and finally came to the requirements for making a Protected Disclosure there are two relevant factors – first the three possible ways of raising a Protected Disclosure are only ways in which an employee *can* make a Protected Disclosure not must

and second the three possible ways did not directly correlate with BNZ steps, e.g. the reference is to a Confidential Alert Line not the Integrity Line.

[85] In these circumstances it is not clear that there was a procedure established by BNZ for reporting serious wrongdoing under the PD Act - that is, the final three possible ways of raising a Protected Disclosure under the NAB Whistleblower Policy. If there was a procedure it could have been understood as either using the Integrity Line (under the Code of Conduct) or raising the complaint through normal management channels (under the Code of Conduct or the NAB Whistleblower Policy). In the second option was used then a manager (people leader) receiving the complaint had an obligation, under the NAB Whistleblower Policy, to ensure it was treated as a Protected Disclosure under that policy.

[86] My conclusion therefore is that:

- (a) Ms Bowen did not fail to make her complaint in line with BNZ internal procedures.
- (b) But, if she did then that failure must be treated as technical given the difficulty an employee of the BNZ would have coming to the conclusion on what the internal procedure was.
- (c) And, finally, in any event, NTK in receiving the First Complaint including Ms Bowen's various concerns about reprisals and requests to be protected, should have treated the First Complaint a Protected Disclosure under the NAB Whistleblower Policy or a qualifying disclosure under the PD Act.

[87] All of this means that I determine that the First Complaint was a protected disclosure under the PD Act as it complied with s 6.

The proposed restructure of the Acquisition Specialists team

[88] The next question is, was the proposed restructure of the Acquisition Specialists team brought about by IWV in retaliation for the First Complaint.

[89] Ms Bowen was the Manager of the Acquisition Specialists team, a role that she took up in September 2015. Ms Bowen's team was responsible for providing advice on and implementing products and structures for BNZ small business customers in the cashflow and payment areas. The team's priority was the roll out of a new product for mobile payment, PayClip, but the team also dealt with payroll products and services (such as Edge Payroll) and life insurance.

[90] In September 2015 the Acquisition Specialists team had three employees who were managed by Ms Bowen: KCX, EVH and BEI.

[91] In the first few months in her role, Ms Bowen dealt with a number of operational issues relating to PayClip and her team focused on dealing directly with BNZ small business customers to sell PayClip as well as other BNZ products and services.

[92] By December 2015 the role of Ms Bowen's team began to change and new position descriptions were agreed in February 2016 and signed off in March 2016. HDM was involved in this process.

[93] HDM described the changes to KCX, EVH and BEI's roles in straight forward terms. HDM stated that he switched their function from being the direct channel for selling PayClip to BNZ clients to building product knowledge throughout various BNZ teams to enable BNZ client managers to have conversations with customers about PayClip.

[94] Ms Bowen acknowledged the change in emphasis for her team but described this in more complex terms stating that her team was to work across some 800 people in a scalable sales distribution model, which had been signed off across BNZ; this model was a combination of training relevant BNZ client managers, managing sales made through BNZ Business Account Managers and other BNZ client managers, as well as managing direct sales, many of which were complicated. In addition, Ms Bowen said her team had other products and services (which were often referred to as tools) that they had to promote and facilitate placement/sales with BNZ customers including Edge Payroll and life insurance.

[95] An analysis of the position descriptions for KCX, EVH and BEI both in 2015 and then the new descriptions from March 2016 supports Ms Bowen's evidence:

- (a) The position descriptions for KCX and BEI that were in place in 2015 (created December 2014) identified the focus of their roles as being to promote and sell PayClip to both existing and "new to bank" business customers. There were some references to working with both customers and staff to identify and execute PayClip acquisition strategies and opportunities.
- (b) The position description for EVH created in July 2015 had the focus of the role as being to drive improved cash flow for BNZ customers through providing specialist advice and structures/tools. The relevant tools were identified as Edge Payroll, PayClip, Icehouse, Eftplus and MarketView. The description also referred to having an emphasis on realising sales opportunities where applicable.
- (c) The position description for KCX, EVH and BEI created in February 2016 identified the purpose of each position as being to deliver on sales targets of assigned product portfolio through relevant channels, and to identify, evaluate and approach BNZ customers to facilitate and develop sales of assigned product. The accountabilities included managing relationships with suppliers and referrers to implement a plan for product growth and managing relationships with BNZ managers and sales teams to ensure they had the knowledge and confidence to promote and sell specialist products and this included developing "tactical plans" for each BNZ business sector and sales team. The accountabilities also included identifying target clients across the BNZ, proactively seeking out new business opportunities through a variety of channels, using leadership and influence to ensure the scalable distribution model for the assigned product is implemented. And finally, the accountabilities also included, for the assigned product, acquiring new to bank "group" relationships using structured sales techniques and leveraging

networks and building strong high-quality advocates in the market, to source business referrals.

[96] So, from the evidence I conclude that as of March 2016, the Acquisition Specialists team's role expanded from a focus on direct sales of PayClip, and some other BNZ tools, to three main areas of work:

- (a) Direct sales of PayClip and other BNZ tools such as Edge Payroll to existing BNZ customers.
- (b) Delivering sales targets for PayClip and other BNZ tools such as Edge Payroll, to BNZ customers through appropriate channels – BNZ account managers and team leaders. In order to do this, they were to provide training to appropriate BNZ staff on BNZ tools such as PayClip (to increase their ability to sell BNZ tools to customers) and they were to create and implement tactical plans for BNZ sectors to enable sales targets to be met.
- (c) Identifying and utilising networks, referrers and advocates for BNZ tools in the market, third-party contracts and new to BNZ relationships to seek out opportunities for business development (sales opportunities) in relation to various BNZ tools but primarily PayClip.

[97] The extent of the third area identified above becomes relevant because Ms Bowen says her role and that of her team included leveraging the BNZ relationships with large third-party organisations such as Vodafone and MYOB to increase sales of PayClip. Ms Bowen points to a presentation she gave to IWV and HDM, outlining her proposal for the development of her team and the potential for increasing PayClip sales, in November 2015 in which she identified this potential.

[98] On review it appears that this presentation captured some of the aspects that formed the change in focus of the Acquisition Specialists team reflected in the new position descriptions in March 2016. That is, the proposed strategy and plan in the presentation referred to redefining the team, engaging with the BNZ sales force, identifying quality targets,

developing external relationships and leveraging the Vodafone and MYOB relationships. So, Ms Bowen's evidence, in this regard, is credible and has merit.

[99] Ms Bowen then says the aspect of leveraging the third-party relationships was unilaterally removed from her and her team when IWV announced the secondment of MTW into the Business Performance team, which was another of the four teams making up the Small Business unit at the BNZ. Ms Bowen's point is that MTW was seconded to a newly created role of Commercialisation Manager and the purpose of this role was to work on commercialising BNZ third party contracts to maximise commercial opportunities by evaluating and approaching third parties to facilitate and develop sales opportunities. And, this was to ensure that the Small Business Unit increased the reach and distribution of core products such as PayClip, Edge Payroll, Life Insurance and Working Edge products.

[100] I will return to Ms Bowen's argument in relation to the secondment of MTW in due course as it informs her claim that IWV manipulated events to ensure her role was disestablished in the Small Business restructure that took place in 2016 and that he did this in retaliation for the First Complaint.

[101] First, I will set out the facts in terms of the chronology of events relating to the proposed disestablishment of the Acquisition Specialists team.

[102] Ms Bowen and HDM created the new position descriptions for KCX, EVH and BEI and they were signed off at the start of March 2016.

[103] On 23 March 2016 Ms Bowen first spoke to HDM about concerns that she wished to raise.

[104] The events described in paragraphs [44] – [49] occurred such that by 29 March 2016 Ms Bowen had set out the basis for the First Complaint in writing to PEQ.

[105] On 1 April 2016 NTK advised Ms Bowen that he had been appointed to investigate her complaints.

[106] At some point between 1 April 2016 and 10 April 2016 NTK forwarded the details of Ms Bowen's First Complaint to IWV for him, to respond.

[107] On 10 April 2016 IWV provided his written response to the First Complaint.

[108] On 14 April 2016 MTW signed the secondment agreement which detailed his secondment for twelve months to the newly created role of Commercialisation Manager in the Small Business Performance team. It appears that MTW commenced his secondment role earlier than this date but the evidence is unclear as to when.

[109] NTK completed his report into the First Complaint on 24 May 2016.

[110] Ms Bowen received a copy of NTK's report on 8 June 2016.

[111] In July 2016 the four managers of the teams making up the Small Business unit (the Team Managers), which included HDM, began their review and planning for the financial year ending June 2017.

[112] Through July 2016 the Team Managers met to discuss their plans for FY 2017. The first meeting included personnel from HR, Finance and Operations and covered the principles around developing a proposal for restructuring a team and some general thoughts about restructuring of their respective teams. The Team Managers then met on 18, 19 and 22 July 2016 and HDM had a separate meeting with the Manager of Small Business Planning and Innovation on 23 July 2016.

[113] From 11 July 2016 through 23 July 2016, through these various meetings with the Team Managers, HDM developed a proposal for the restructuring of the Small Business Acquisition group.

[114] HDM's proposal recorded that one of the "pain points and opportunities" was that PayClip sales and roll out remained under expectations and that the expertise of the specialist business development function (Ms Bowen's team, the Acquisition Specialists team) be aligned to (that is moved into) central. In his oral evidence HDM stated that Central was a reference to the centralised call centres, which were not part of his Small Business

Acquisition team, but part of the Small Business Distribution team (another of the four teams making up the Small Business Unit).

[115] On 24 July 2016 HDM emailed the proposal for the Small Business Acquisition group to IWV asking him if they could go through the proposal.

[116] On 26 July 2016 the Team Managers met with IWV to discuss their restructuring proposals. In this meeting HDM discussed, amongst other things, his view that the Acquisition Specialists team should not remain with the Small Business Acquisition team.

[117] On 1 August 2016 the Team Managers had a further meeting with IWV. HDM says that in this meeting the Team Managers and IWV agreed that as all client facing teams had received coaching on PayClip the client facing team leaders should have responsibility for ongoing coaching and there was therefore no need to shift the Acquisition Specialists team into the Small Business Distribution team.

[118] HDM also says that in this meeting Team Managers and IWV discussed a change in focus on the delivery/sale of PayClip and other tools to engage corporates and merchant resellers. As a result, they agreed to establish two new roles in the Small Business Performance team, these being Commercialisation Coach and Merchant Reseller Optimisation Manager.

[119] In August 2016 HDM received confirmation of the FTE allowance for his team for FY 2017 and as a result of a reduction in FTE he finalised the proposal for restructure of the Small Business Acquisition team.

[120] On 21 September 2016 the Team Managers had their last meeting with IWV to finalise the Small Business restructuring proposal, which was labelled the Small Business Change Proposal. In this meeting HDM outlined his finalised proposal for the restructure of the Small Business Acquisition team. This included the disestablishment of the Acquisition Specialists team.

[121] On 28 September 2016 MTW's secondment into the Commercialisation Manager was converted to a permanent role, which he accepted.

[122] On 3 October 2016 invitations were sent to employees in the Small Business unit who were potentially impacted by the Small Business Change Proposal. The invitations were to attend meetings where the proposed changes to team structures in the Small Business unit would be outlined.

[123] On 4 October 2016 HDM and IWV met with Ms Bowen and advised her of the Small Business Change Proposal including that the proposal was to disestablish her role and the three other roles in the Acquisition Specialists team.

[124] On 20 October 2016 Ms Bowen raised her personal grievance in connection with the proposed disestablishment of her role the three other roles in the Acquisition Specialists team.

[125] On 26 October 2016 BNZ responded to the personal grievance and amongst other things agreed to attend mediation and suspended the proposed restructuring in respect of Ms Bowen and her team until mediation had been completed.

[126] It is against these facts that I will analyse Ms Bowen's claim that the disestablishment of her role was done by IWV in retaliation for the First Complaint.

Was the proposed disestablishment of the Acquisition Specialists team in the Small Business Change Proposal retaliation by IWV?

[127] There are several aspects of the proposed restructuring of the Acquisitions Specialists team that have informed my answer to the question of whether the proposed disestablishment of the Acquisition Specialists team in the Small Business Change Proposal was created in retaliation by IWV.

[128] First, the timing of the proposed restructure of the Acquisition Specialists team. It was clear that extensive work had been undertaken in February 2016 in redefining the roles for the Acquisition Specialists team. I have set out my view of the changes and what that meant in terms of the roles established within the team in February 2016; using the label Ms Bowen put on it, there was a "scalable sales distribution model" operating across various teams and units of BNZ that had three distinct and related areas of work. This was a comprehensive change

and reflected a detailed plan. It makes no business sense to unwind all of that after less than five months of the team operating.

[129] Second, there was no evidence to show that the business drivers that prompted this significant change ceased to exist or were no longer relevant. In fact, the evidence and timeline confirms that much of the work the Acquisition Specialists team was undertaking remained. The simplest piece of evidence that supports this is HDM's initial proposal in respect of the Acquisition Specialists team was to move it to central, not to disestablish it. Other aspects that I describe below also confirm that the work remained for the team; this included a recognition that coaching was still required, the establishment of new roles dealing with sales and roll out of PayClip and other tools and that BEI continued to operate in her role in connection with PayClip and other tools for a considerable period of time once the proposed restructure of the Acquisition Specialists team was put on hold.

[130] Third, in stark contrast to the work undertaken in redefining the roles of the Acquisition Specialists team in February 2016, all of the work done on the proposal to disestablish the team and setting up new roles to support a commercialised approach to PayClip was done without involving Ms Bowen. I also accept what Ms Bowen says regarding the establishment of the proposal for her team being inconsistent with other changes in the Small Business Change proposal, such as moving credit writers, which had been openly discussed and socialised within the Small Business unit.

[131] Fourth, the development of three new commercialisation roles in the Small Business Performance team raises a number of key points:

- (a) As of 1 April 2016, the Small Business Performance team consisted of two people, the National Manager of Business Performance (CEF) and a Business Performance Analyst (SYT). CEF's role was to provide leadership and support to the Small Business Distribution team in connection with establishing process efficiencies for customer outcomes and maintaining oversight of financial planning, reporting, expense management and resourcing. There was no position description for SYT's role. It appears that the Small Business Performance team role was to analyse data to assist with

increasing efficiencies, planning and forecasting, managing expenses and resources, and assessing overall performance. This team did not appear to be a team with direct sales and/or implementation expectations and has no obvious connection to PayClip or the other BNZ tools that the Acquisition Specialists team was responsible for.

- (b) MTW's secondment role appeared to be based in large part on elements of Ms Bowen role, particularly as that relates to maximising third party contacts for sales opportunities for Small Business to increase the reach and distribution of PayClip and the other BNZ tools.
- (c) There appears to be a disconnect between MTW's role and the Small Business Performance teams. And on the face of it there is no logical explanation for why CEF would seek to second MTW into the Small Business Performance team. It seems more likely based on the circumstances and considering Ms Bowen's evidence on this matter that MTW's role was created by IWV; I accept this was the case.
- (d) The timing of MTW's secondment is inconsistent with the changes implemented for the Acquisition Specialists team. MTW's secondment role was established in April 2016 just one month after new and expanded roles had been developed and agreed for Ms Bowen's team. MTW's secondment role then became permanent less than six months into the twelve-month period of the secondment and immediately before consultation commenced with Ms Bowen on the Small Business Change Proposal.
- (e) The creation of the two new commercialisation roles for the Small Business Performance team as part of the Small Business Change Proposal is at odds with disestablishing the Acquisition Specialists team. The new roles of Commercialisation Coach and Merchant Reseller Optimisation Manger had considerable cross over with the roles in Acquisition Specialists team. I accept there was a focus on commercialisation of the sales of PayClip and BNZ tools but the relevant position descriptions show that there remained elements of

internal sales monitoring and coaching of managers, which were part of the Acquisition Specialists redefined roles. Further given the redefined roles it appears that the team had the experience, knowledge and capability to undertake the commercialisation roles. Expanding the commercialisation sales roles in the Small Business Performance team was not logical given the nature of that team. The end result was the creation of a whole new team of three specialist roles based on sales and placement of PayClip and BNZ tools within an analyst and performance measuring group, when significant parts of that team's work could be done and was being done by Ms Bowen's team.

[132] Fifth, the development of Small Business Acquisitions team restructure proposal also raises a number of key points:

- (a) HDM's initial proposal developed by 24 July 2016 proposed moving the Acquisition Specialists team to central, not disestablishing it.
- (b) HDM had said in oral evidence that he discussed moving the Acquisition Specialists team with the Manager of Small Business Distribution in a meeting on 26 July 2016 but he was unconvincing on this point as he could not recall what the manager said in response. It also seems inconsistent with the development of the team proposals that a significant part, the transfer of a team consisting of four FTE, had not already been considered and agreed. There had been a number of meetings where the Team managers had worked on their team proposals as a group and it seems likely that a significant part of this, the inter group movement of four FTE, would have been discussed and agreed in order for HDM to include it in the Small Business Acquisition team proposal.
- (c) HDM then discussed his team proposal, which included the transfer of the Acquisition Specialists team with IWV and then through subsequent meetings with Team Managers and IWV this proposal changed.
- (d) The overall position, which was put to HDM effectively in cross examination was that he had developed a proposal in which the Acquisition Specialists team

remained but was transferred and then after IWV became involved that position changed such that the team was disestablished. A logical conclusion, particularly given that IWV was the manager of HDM (and the other Team Managers) is that IWV had direct influence in change; this is a conclusion that I accept is established by the evidence.

[133] The sixth and final point is that BEI's role was maintained after October 2016 and she was moved to the Small Business Performance team. So, there was ongoing work for the Acquisition Specialists team and that sat with the newly created commercialisation team within the Small Business Performance team.

[134] I conclude that the proposed disestablishment of Acquisition Specialists team had no commercial basis. The team was disestablished rather than moved in a situation where the roles or at least significant parts of the roles remained; the position descriptions show this, Ms Bowen gave direct evidence on this as did EVH and HDM's proposal supports this.

[135] When IWV became involved in the planning, the transfer of Acquisition Specialists team to central was rejected and replaced with a proposal to disestablish the Acquisition Specialists team. Then new roles, comprising many of the tasks the Acquisition Specialists team did, were created. There was no apparent basis for the disestablishment of Ms Bowen's team and the creation of a new team other than a purported change in focus on commercialisation. A significant part of the creation of the new commercialisation team was undertaken by IWV outside of the Small Business Change Proposal when he created MTW's role and seconded him to it. IWV then closed any opportunity for Ms Bowen to be considered for that role in Small Business Change Proposal as he made MTW's role permanent, significantly only part way through the secondment.

[136] Overall, the significant changes to the Acquisition Specialists team in the Small Business Change Proposal brought about through IWV's involvement had no logical commercial basis and were contrary to the structure the Team Managers had suggested. In the absence of any compelling explanation for IWV's actions in bringing these changes about and reflecting on the way in which the changes were developed and the timing of events, I am

left with the conclusion that IWV caused these changes to occur in retaliation for the First Complaint.

Conclusion on Ms Bowen's personal grievance for unjustified action causing disadvantage arising out of retaliation for the First Complaint

[137] The proposed disestablishment of the Acquisition Specialists team was unjustified as it had no commercial basis and the work was still available for the team members. The proposal itself was unjustified but as it was an action done in retaliation for the First Complaint that was even more so. The proposal did cause a disadvantage to Ms Bowen's employment.

[138] On this basis Ms Bowen's claim for unjustified action causing disadvantage for the retaliatory action undertaken by IWV is successful.

Does Ms Bowen have a personal grievance for unjustifiable actions by BNZ that caused disadvantage to her employment because she was threatened with dismissal for disclosing confidential information?

[139] As outlined in the issues section above the first step in analysing this personal grievance claim is to determine if BNZ acted as alleged, i.e., it threatened Ms Bowen with dismissal for disclosing information in relation to the proposed restructure.

What happened?

[140] After the meeting on 4 October 2016 with HDM and IWV where Ms Bowen had been advised of, and given a copy of, the Small Business Change Proposal, Ms Bowen discussed the proposal with two people who were not BNZ employees:

- (a) On 5 October 2016 Ms Bowen called an individual from a business associated with BNZ through the PayClip service. She spoke to this individual and essentially asked him if he would be concerned if the Acquisition Specialists team would be disestablished.

(b) Ms Bowen sought legal advice on the Small Business Change Proposal and on 10 October 2016 she emailed a copy of the Small Business Change Proposal to her lawyer.

[141] HDM became aware of the call Ms Bowen made on 5 October 2016 because the individual involved called him on 6 October 2016 to discuss his concerns with the call.

[142] BNZ became aware of Ms Bowen emailing the Small Business Change Proposal to an external email address through its email monitoring facilities and HR brought this to HDM's attention.

[143] In both instances the actions by Ms Bowen were considered to be potential breaches of BNZ policy because the content of the Small Business Change Proposal was confidential and was not to be discussed externally and the Small Business Change Proposal document was not to be sent to an external email address.⁸

[144] On 6 October 2016 HDM called Ms Bowen about the call she had made to the individual. Ms Bowen says he was aggressive and threatening in this call. HDM says he was not aggressive and did not threaten Ms Bowen and in particular there was no threat in relation to dismissal or any sanction for the breach of confidentiality.

[145] On 7 October 2016 HDM sent an email to Ms Bowen that confirmed what they had discussed on 6 October. This email included:

...

I duly note that you confirmed that a discussion had taken place, and that you posed a "hypothetical" question to him based on a "what if" the PayClip specialist roles were disestablished scenario.

I need to reiterate that the change proposal, as indicated on the copy handed to you, is clearly marked "*Highly confidential: For internal discussion only and not for further distribution*".

⁸ Noting here that BNZ accepted that employees could take legal advice and it encouraged them to do this, so it accepted that discussing the content of the Small Business Change Proposal with a lawyer or advocate was not a breach of confidentiality, the concern was emailing a sensitive and confidential document to an external and unsecure email address.

Furthermore, as a person with commercial experience will understand the potential impact that this could have on the relationship between ourselves and [business].

As pointed out in the discussion, the questions that you posed to [the individual], even couched in “hypothetical” terms could potentially be viewed as a breach of the code of conduct.

I do, however, understand that this is a difficult time for all individuals whose roles may/potentially be impacted by the change proposal. Based on this, no action will be taken on this matter. As discussed, the change proposal must not be discussed - even in a “hypothetical” manner - with external parties, particularly those with whom we have a commercial relationship.

[146] On 14 October 2016 HDM and PEQ called Ms Bowen. They advised her that BNZ was aware that on 10 October 2016 she had sent, by email, the Small Business Change Proposal and this was a breach of BNZ policy.

[147] The telephone call on 14 October 2016 was recorded and a transcript was produced. This transcript shows that PEQ said:

So, we need to reinforce to you that a BNZ logs and monitors all employee emails and any activity of this sort is actually flagged and reported and we have to... We have to have a conversation with you. Normally we would be in a position where we would be under an obligation to take it further. Again, we know this is a stressful time, we know that you are trying to work through this period so again, this is another conversation we are having with you to advise you that we won't be taking action in this case.

[148] HDM then followed up on the telephone call with an email to Ms Bowen on 14 October 2016. This email recorded:

As discussed this afternoon, it has come to my attention that you uploaded an electronic copy of the confidential change proposal document to an external (non-BNZ secure) email address.

This is contrary to BNZ policy, and could be regarded as a breach of conduct.

As discussed last week on the 6th, we fully appreciate that you are currently experiencing a stressful situation during the consultative period of the proposed change, and no action will be taken. You are obviously entitled to seek confidential legal advice on the proposal and are also again encourage you to submit feedback.

Was Ms Bowen threatened with dismissal for alleged breaches of BNZ policy?

[149] Based on HDM and PEQ's written and oral evidence, the contemporaneous emails sent by HDM and the transcript of the 14 October 2016 telephone conversation I conclude that BNZ did not act as Ms Bowen alleges. BNZ did not threaten Ms Bowen with dismissal for what it viewed to be possible breaches of policy by Ms Bowen when she discussed the Small Business Change Proposal with an external party and when she emailed the Small Business Change Proposal document to an external email address.

Conclusion on personal grievance claim

[150] As there is no action by BNZ as alleged, Ms Bowen's personal grievance for unjustifiable action causing disadvantage relating to threats of dismissal for breach of policy cannot succeed.

Did BNZ breach the NAB Whistle Blower Policy and if so, does this give rise to an unjustified action causing disadvantage personal grievance?

[151] As outlined previously, the first step in my analysis of this claim is to determine if Ms Bowen raised a personal grievance within the requisite 90-day period.⁹

Did Ms Bowen raise her personal grievance within the 90-day time frame

[152] On 23 November 2016 Ms Bowen made the Second Complaint. This was a Protected Disclosure under the PD Act and the NAB Whistleblower Policy and the BNZ treated it as such.

[153] The Second Complaint [REDACTED]
[REDACTED]
[REDACTED]

[154] Ms Bowen says that on 29 November 2016 she saw the BNZ's representative under the NAB Whistleblower Policy meeting with [REDACTED]. Ms Bowen alleges that in

⁹ Section 114 of the Employment Relations Act 2000.

doing this the BNZ representative must have been disclosing to [REDACTED] details of the Second Complaint and as this was a Protected Disclosure and as she had not consented to the Second Complaint being disclosed to [REDACTED] this was a breach of the NAB Whistleblower Policy.

[155] So, Ms Bowen knew of the basis for her personal grievance on 29 November 2016 and therefore needed to raise the grievance by 27 February 2017.

[156] There was no evidence put before me that identified the relevant personal grievance being raised in this time. Further BNZ say it was not aware of the personal grievance until Ms Bowen lodged a statement of problem in the Authority.

[157] In this regard there is a statement of problem dated 2 August 2017 which identifies sufficient information to satisfy the requirement of a grievance being raised. This is outside the 90-day time frame.

[158] In the circumstances I cannot find that Ms Bowen's personal grievance based on alleged breaches of the NAB Whistleblower Policy was raised within the 90-day period and therefore I do not have jurisdiction to deal with this claim.

Did Ms Bowen suffer from retaliatory conduct for the Second Complaint?

[159] From 26 October 2016 BNZ suspended the proposed disestablishment of the Acquisitions Specialists team, including Ms Bowen's role, as set out in the Small Business Change Proposal. It was not until June 2018 that BNZ recommenced consultation over the proposal and on 31 July 2018 Ms Bowen's employment with BNZ was terminated.

[160] Ms Bowen claims that recommencing the proposed restructure and then the termination of employment of her employment were done in retaliation for the Second Complaint.

What happened?

[161] After Ms Bowen raised the Second Complaint on 23 November 2016, which was a Protected Disclosure, BNZ and Ms Bowen agreed that consultation over the proposal to

disestablish the Acquisition Specialists team, including her role, would be suspended and Ms Bowen would be on paid special leave until the Second Complaint had been resolved through the NAB Whistleblower Policy process.

[162] BNZ also agreed with Ms Bowen that the proposal to disestablish the Acquisition Specialists team would be reviewed after the Second Complaint had been resolved through the NAB Whistleblower Policy process. This review would be conducted by a BNZ Senior executive who would consider the proposal's validity based on the business rationale.

[163] On 16 May 2017 BNZ advised Ms Bowen that the review would take place sooner in order to provide certainty to other potentially impacted employees.

[164] On 1 June 2017, whilst the Second Complaint was still in the process of being resolved under the NAB Whistleblower Policy, BNZ undertook its review and the outcome was a recommendation that it could proceed with consultation over the proposed disestablishment of the Acquisition Specialists team. Despite this recommendation BNZ advised Ms Bowen that it would not proceed with her consultation until the whistleblower process had been completed.

[165] On 1 December 2017 the process under the NAB Whistleblower Policy was completed.

[166] Ms Bowen and BNZ attended mediation on 19 February 2018 and 30 and 31 May 2018.

[167] In June 2018 BNZ decided to recommence consultation with Ms Bowen over the proposed disestablishment of the Acquisition Specialists team. On 12 June 2018 BNZ wrote to Ms Bowen and advised her that consultation would recommence and it invited her to provide any feedback by 18 June 2018. BNZ acknowledged that it had received feedback from Ms Bowen in October 2016 and that HDM would consider that feedback and any additional feedback before deciding whether to proceed with the proposal to disestablish Ms Bowen's role.

[168] Ms Bowen then met with the BNZ Chief People Officer (TPI) and HDM on 10 July 2018. Ms Bowen had a support person with her.

[169] At the end of this meeting, after a short break, Ms Bowen was advised that BNZ was going to continue with the change proposal, that is, Ms Bowen's role was disestablished. As a consequence, Ms Bowen would move into a redeployment consultation process in order to ascertain if there was suitable role for Ms Bowen.

[170] Ms Bowen worked through the redeployment process with BNZ but did not find a suitable alternative role. On 31 July 2018 Ms Bowen's employment was terminated by BNZ for redundancy and she was paid in lieu of notice.

Analysis

[171] As a result of the way Ms Bowen perceives she was treated from the First Complaint through the Second Complaint and her subsequent dismissal, and as a result of BNZ's continual denial of any wrongdoing in connection with her (including through the initial stages of the personal grievance process) and her complaints, Ms Bowen has formed the view that many of BNZ's employees she has dealt with are complicit in covering up the wrongdoing she sought to expose.

[172] In her written witness evidence Ms Bowen states:

I believe that the execution of the proposal to terminate my employment was a fait accompli, and that BNZ was just going through the motions to make it seem as though it was a legitimate process. ... and that when [REDACTED] subsequently entered the process she also became complicit in perpetuating the cover up of IWV's wrongdoings, and the lies and deception about me, my protected disclosures and the validity of the change proposal to terminate my role. These people are appointed to be leaders, experts and professionals in the field; and I should have been able to rely on them for support and protection for raising my concerns, which I was required to do by law and by the BNZ Code of Conduct. Controversially however, all of them have cooperated in IWV's plan to fire me as a punishment for raising my concerns about his serious wrongdoing in March 2016.

[173] I have set this written evidence out because it captures Ms Bowen's overall view of BNZ and the relevant employees. Ms Bowen firmly believes each of [REDACTED]

team, to give effect to that restructuring and to subsequently terminate Ms Bowen's employment.

Was Ms Bowen unjustifiably dismissed?

[178] My conclusion that Ms Bowen did not suffer retaliation for the Second Complaint does not mean that Ms Bowen's dismissal was justified. That issue remains to be resolved by considering the substantive basis for Ms Bowen's dismissal and the process undertaken in coming to the conclusion to dismiss.¹⁰

Analysis - was Ms Bowen's dismissal justified in the circumstances?

[179] The proposed restructuring for the Acquisition Specialists team was formulated in July and August 2016. IWV and HDM commenced consultation with Ms Bowen on 4 October 2016 and the process was suspended shortly after that. HDM and TPI then recommenced consultation with Ms Bowen on 12 June 2018 and they did so by asking Ms Bowen if she had any additional feedback to provide on the proposal. At that point Ms Bowen has been on paid special leave since November 2016.

[180] HDM and TPI then met with Ms Bowen on 10 July 2018. In this meeting there were four relevant interactions:

(a) Ms Bowen and her support person made it very clear that they considered the proposal for the disestablishment of the Acquisition Specialists team was IWV's proposal and [REDACTED]

(b) Ms Bowen's support person noted that as far as he and Ms Bowen were aware the new roles in the Business Performance team had been filled, creating a new team of three and the Acquisition Specialists team had therefore already been disestablished. I note that relevantly, at that point Ms Bowen had not been carrying out her role for almost two years and all three of the team members

¹⁰ *E tu v Singh* [2024] NZEmpC 84.

had moved and their roles had not been filled. HDM confirmed that the roles had not been filled and the structure of the Acquisition Specialists team remained and that was what the consultation was for.

(c) Ms Bowen asked for information around PayClip performance in her absence, explaining to HDM that she had been cut off from any information about PayClip – something that HDM was not aware of. HDM agreed to provide this information.

(d) The meeting was adjourned for a 45-minute break and when HDM and TPI returned HDM advised that he had concluded that the restructure would proceed.

[181] The first three points above touch on three key aspects of the proposed restructure given the history.

[182] First, Ms Bowen's concern that [REDACTED]

[183] Second, it was not clear what the status of the Acquisition Specialists team was given the two-year hiatus and the three team members moving and given that the restructure may have occurred for other aspects of the Small Business Acquisition team and the Small Business Performance team.

[184] Third, updated financial information was required in terms of:

- (a) The business need for, and ongoing development of, PayClip and other BNZ tools.
- (b) Head count implications – given that the restructure was informed by FTE count for the year ending June 2017, an up-to-date FTE for the Small Business unit for the year ending June 2019 would have been appropriate.

[185] The fourth point then shows the problem with consultation – despite these three key issues being raised, which BNZ should have reflected on and provided full information in

response, noting that HDM agreed to provide PayClip information, BNZ simply proceeded to take a 45-minute break and then confirm the disestablishment of the Acquisition Specialist team and, in particular, Ms Bowen's role.

[186] It appears that HDM took a too simplistic approach to recommencing the consultation over the possible restructure of the Acquisition Specialists team. Given the two-year period and that the Small Business unit had moved on in terms of business it may well have been the case that the proposal to disestablish the Acquisition Specialists team was appropriate in July 2018. Whether that was correct or not was not established by the Small Business Change Proposal created in July 2016. That proposal was defective in terms of the business rationale for the proposed disestablishment of the Acquisition Specialists team at the time given the updated roles the team had commenced in March 2016 and the cross over with the new roles established in the Small Business Performance team. Further, the proposal was two years old.

[187] What was missing was information about PayClip and other BNZ tools within BNZ, particularly small business, and therefore what need, if any, there was in July 2018 for Ms Bowen and her team. That information needed to cover such things as the continued relevance of the tools, the business case in terms of sales and implementation and what had been done in terms of sales, implementation and coaching within the BNZ, with BNZ customers and with BNZ referrers or contacts (such as Vodafone). That information covered Ms Bowen's work and that of her team. Ms Bowen was being asked to comment on whether there was a place for her team in July 2018 when she had no knowledge of the state of the work the team had been doing.

[188] Without this information the BNZ was either simply ignoring the two-year time gap and saying the July 2016 business case remained the same in July 2018 (which I have already said was not sound in July 2016) or it was relying on the two-year gap to say the Acquisition Specialist team had not been working during that time so there was no role for that team going forward.

[189] Either way, the process and outcome were not justifiable. Ms Bowen should have been given relevant up to date information and absent this I cannot say if the decision to

disestablish her role was one that a fair and reasonable employer could have come to in all the circumstances.

[190] I am not satisfied that a redeployment process then fixes this. There is some criticism by BNZ of Ms Bowen for not properly engaging in the process and a suggestion by it that there could have been a suitable role for her in the BNZ. I am not satisfied that these two propositions are correct in the circumstances, so the dismissal is unjustified. And, even if these two things were true, in my view that does not correct BNZ's unjustified actions.

[191] Ms Bowen was unjustifiably dismissed by BNZ.

Did BNZ breach the duty of good faith?

[192] I have determined that BNZ was at fault for two things, an unjustified restructuring process after the First Complaint, which I have determined was retaliation by IWV and an unjustified dismissal in July 2018.

[193] I am satisfied that BNZ failed to meet its obligations of good faith as that relates to IWV's actions after the First Complaint; IWV was misleading and deceptive and was not active and constructive in dealing with Ms Bowen.

[194] I am not satisfied that BNZ breached the duty of good faith in relation to Ms Bowen's dismissal.

Did BNZ breach the terms of Ms Bowen's employment agreement?

[195] Ms Bowen's claims in relation to breaches of her employment agreement are that:

- (a) BNZ breached the NAB Whistleblower Policy by not treating the First Complaint as a Protected Disclosure and not protecting her from retaliation by IWV.
- (b) It breached the implied duty of trust and confidence by subjecting her to an unjustifiable restructuring process.

[196] I can deal with both claims in relatively short order:

(a) First, the NAB Whistleblower Policy, being the relevant policy was not a term of Ms Bowen's employment and therefore there is no breach of contract.

(b) Second, the implied duty of trust and confidence is a term of Ms Bowen's employment. However, Ms Bowen's breach of this term relates to the restructuring process which resulted in her dismissal; her claim therefore relates to dismissal and cannot be brought as a breach of contract claim.¹¹

[197] Ms Bowen's breach of contract claims are not successful and are dismissed.

Summary

[198] BNZ acted in an unjustified manner toward Ms Bowen through the retaliation from IWV for the First Complaint and this caused a disadvantage to her employment. Ms Bowen's personal grievance for this action is successful.

[199] BNZ breached the duty of good faith it owed to Ms Bowen as she suffered retaliation from IWV for the First Complaint.

[200] Ms Bowen was unjustifiably dismissed by BNZ.

[201] Ms Bowen did not raise a personal grievance for bullying by IWV within the requisite 90-day period and I do not have jurisdiction to determine this claim.

[202] BNZ did not threaten Ms Bowen with dismissal for alleged breaches of confidentiality and Ms Bowen's personal grievance for unjustified action, based on this allegation, does not succeed.

[203] Ms Bowen did not suffer retaliation from BNZ for the Second Complaint and Ms Bowen's personal grievance for unjustified action, based on this allegation, does not succeed.

¹¹ Section 113 of the Employment Relations Act. 2000.

[204] Ms Bowen did not raise a personal grievance for breach of the NAB Whistleblower Policy in relation to the Second Complaint within the requisite 90-day period and I do not have jurisdiction to determine this claim.

[205] Ms Bowen's breach of contract claims are not successful.

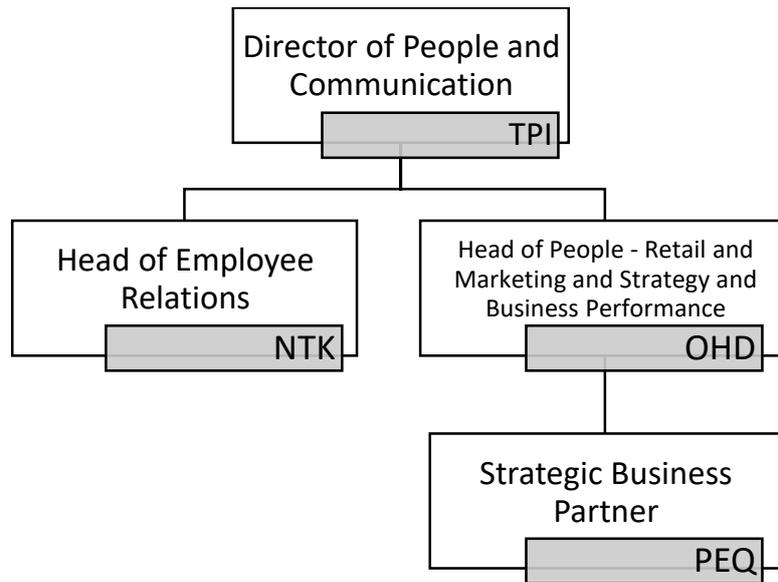
Costs

[206] Costs are reserved.

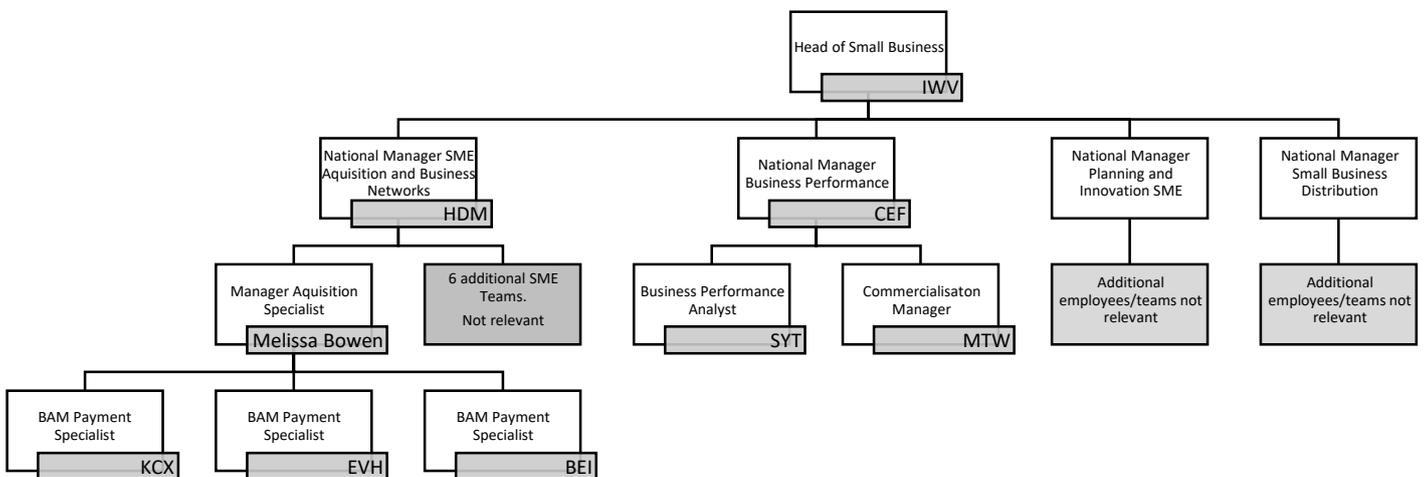
Peter van Keulen
Member of the Employment Relations Authority

Appendix One

BNZ Organisational Chart¹²



BNZ Organisational Chart¹³



¹² This is an incomplete and simplified organisational chart for the People and Communication group at BNZ. It only contains the four key people for this matter from that group. This is at 1 April 2016 except for TPI who commenced her role in 17 November 2017.

¹³ This is an incomplete and simplified organisational chart of the Small Business unit at BNZ. It only contains the nine key people for this matter, from that unit. This is at 1 April 2016 except for MTW who commenced a secondment in his role sometime in April 2016.