IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 362/07
5070040

	BETWEEN	JANE CHARLES Applicant
	AND	WAITAKERE CITY COUNCIL First Respondent
	AND	NORTH SHORE CITY COUNCIL Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Mark Ryan for Applicant Jane Latimer and Anna Clark for First Respondent Carl Blake for Second Respondent
Investigation Meeting:	14 August 2007 at Auckland
Submissions received:	5 September from First and Second Respondents; 11 September 2007 from Applicant; and 17 September 2007 in reply from Second Respondent
Determination:	19 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, who has worked as a dog control officer on Auckland's North Shore over the last 17 years, has raised a personal grievance over her present employer, the First Respondent ("Waitakere City"), removing her from that role from 11 September 2006.

[2] Waitakere City has a service contract to provide dog control services to its neighbouring city council, the Second Respondent ("North Shore City"). It employs the Applicant as one of its staff providing those services. The present services

contract is for a three year term expiring in February 2008.

[3] The Applicant disputes whether her employer was entitled to attempt to "transfer" or "second" her to a post in its animal welfare services operating in Waitakere City while complaints about her work on the North Shore were investigated. She has not worked since being removed from the North Shore role. She has provided a number of medical certificates stating she was unfit for work.

[4] She seeks orders for reimbursement of lost wages and compensation for hurt and humiliation.

[5] She also seeks a penalty against the Second Respondent ("North Shore City"), alleging that it aided and abetted Waitakere City's breaches of her employment agreement.

[6] Waitakere City denies causing any unjustified disadvantage or breach of contractual obligations to the Applicant. Rather it says the Applicant was not suspended and performance issues were raised with her when they arose. It says it sought to consult with the Applicant about options for the future and followed its internal procedures to deal with the matter by an informal performance management process.

[7] North Shore denies providing any assistance to Waitakere City in any breach of the Applicant's employment agreement. It denies any liability to a penalty under s134 of the Employment Relations Act 2000 ("the Act").

Background facts

[8] By September 2006 the Applicant was 19 months into a 36-month fixed term employment agreement. That agreement was expressly tied to the length of the dog control services contract between Waitakere City and North Shore City. It describes her position as North Shore Field Services Co-ordinator. Her job description, signed on 3 March 2005, describes the purpose of the position as "*to assist the Field Services Team Leader in effectively responding to and managing the operational needs of The North Shore Dog Control Tender*".

[9] This arrangement was effectively renewal of previous fixed term employment agreements for the same job which had run from 1998 to 2001 and 2001 to 2004, similarly linked to the dog control services contracts between Waitakere City and North Shore City for those periods.

[10] The present services contract includes the following clause at D4.4 ("clause D4.4"):

> *The [North Shore City] Council, through its Environmental Programmes Manager, reserves the right at any time to require the Contractor [Waitakere City Council] to remove from performing duties under this Agreement any person employed by the Contractor who is perceived to be unsuitable for any role or who on justifiable grounds, misconducts themselves, or is incompetent or negligent in the performance of their duties.*

[11] By letter on 29 August 2006 North Shore City invoked this clause to require Waitakere City to remove the Applicant from performing duties on the North Shore. It stated, in part:

> *North Shore City Council has for some time been receiving complaints concerning [the Applicant's] inability to professionally communicate with our ratepayers.*
> *We understand that steps have been made to manage this aspect however the number of complaints and their consistent nature has continued. Enclosed is an example of the type of complaint, received last Friday …*

[12] That same day the Applicant's manager, Neil Wells, prepared a memorandum to his manager, Grant Gillard, advising of North Shore City's requirement:

> *Today North Shore City has involved clause D4.4 of the contract by requiring the removal of [the Applicant] from performing duties on the North Shore. This is the culmination of years of dissatisfaction with Jane as team co-ordinator and was the subject of a letter from [North Shore City's Environmental Programmes Manager] Rosemary Hagg to [Waitakere City's Group Manager] Grant Gillard earlier this year.*
> …
> *There have been previous incidents reported by North Shore City where [the Applicant] has issued infringement notices without having made proper inquiry.*
>
> *The letter from North Shore City cites one recent incident and is an example of the level of [the Applicant]'s conduct. I have spoken to the complainant and this is yet another incident where [the Applicant] has not followed proper investigation.*
> …
> *This, on the face of it, is misconduct. These allegations have not been put to [the Applicant] at this stage. There was (sic) been previous*

> *matters brought to our attention by North Shore City where [the Applicant] has issued infringement notices without following due process.*
> …
> ***Secondment to Waitakere Animal Welfare***
>
> *[The Applicant] will be transferred/seconded to Animal Welfare Waitakere for the remainder of her fixed term contract, i.e. to 10th February 2008. She will report to Sarah Nicholls and work 8.00am to 4.30pm Monday to Friday and will focus on dog registrations, pick ups and such other duties as are allocated by her team leader. It will be made very clear that [the Applicant] is not being appointed to a permanent Waitakere position and her contract will expire when it is due to expire.*
>
> *[The Applicant] will not be allocated a vehicle to take home. … [The Applicant] will not be rostered for after-hours or weekend call outs so will have no requirement for a take-home vehicle.*
> *All other terms of employment will remain intact. i.e. salary, leave entitlements etc.*

[13] On 1 September Mr Wells wrote to Ms Hagg:

> *We accept your demand and can advise that [the Applicant] will be removed from performing duties on the North Shore as soon as practicable. We anticipate that arrangements can be in place that would enable us to accede to your demand with effect sometime next week. …*
> *We note that the grounds for this decision are based on [the Applicant's] "inability to professionally communicate with our ratepayers". So that we might address any performance management issues arising from this could you please provide specific incidents in additional (sic) to the one you quoted.*

[14] On 6 September 2007 Mr Wells hand delivered to the Applicant a letter advising her of North Shore City's requirement for her removal from duties on North Shore on the grounds of her "*inability to professionally communicate*" with its ratepayers. It continued:

> *This is a contractual matter and Waitakere City Council is obligated to accept and has accepted the demand. You will therefore cease working on duties related to the North Shore contract as from Monday 11 September 2006.*
>
> *I note that your fixed term contract ceases on 15th February 2008. In the meantime, and subject to acceptable performance, your employment with Waitakere City continues. As there is currently no permanent role for you, your work will be assigned to you on a daily basis.*
> *My current view is that you should work on animal welfare and control matters as part of the Waitakere Animal Welfare Field Services Team. … I would like to discuss my current view that you should return to Waitakere City Council … I ask that we meet on Thursday 7th September at 4.30pm to discuss.*

> *Needless to say, the demand from North Shore City is a serious concern to [Waitakere] Council. I am investigating their concerns and I request that you do not enter into any discussions or correspondence with North Shore City staff or others on these or related matters. It may be appropriate for me to discuss the matters with you in a disciplinary meeting.*

[15] The letter continues with requirements for the Applicant to return her North Shore uniform and the Council vehicle she used for North Shore City work and transport to and from work.

[16] By the letter on 7 September 2006, the Applicant's lawyer raised an employment relationship problem, alleging unjustified disadvantages arising from not being provided notice of North Shore City's allegations, no opportunity to respond to the allegations and a unilateral variation of her employment agreement without consultation.

Issues

[17] The following issues arose for investigation and determination:

(i) Did Waitakere City do what a fair and reasonable employer would have done when it became aware of complaints by North Shore City about the Applicant's work?

(ii) Did Waitakere City do what a fair and reasonable employer would have done once it received North Shore City's letter requiring removal of the Applicant from duties on the North Shore?

(iii) If there were breaches by Waitakere City of its employment agreement with the Applicant, did North Shore City incite, instigate, aid or abet any such breaches so as to be liable to a penalty under s134 of the Act?

(iv) If personal grievances for unjustified disadvantages are found and remedies are required, did the Applicant do enough to mitigate her losses, including whether the extent of her sick leave taken and non-attendance at work from 7 September 2006 was warranted in the circumstances?

(v) If personal grievances are found, did the Applicant contribute to the situation in which they arose so as to require reduction of any remedies awarded to her?

Justification

[18] What Waitakere City did as the Applicant's employer and how it treated her is to be measured against the statutory test of justification stated at s103A of the Act. Justification is to be determined on an objective basis, being the point of view of a neutral observer. All the circumstances of the case must be taken into account in determining whether what Waitakere City did and how Waitakere City did it were what a fair and reasonable employer would have done at the time.

[19] This necessarily involves considering whether Waitakere City observed its contractual and statutory obligations to the Applicant, including the mutual good faith obligations to be active, constructive, responsive and communicative in maintaining a productive employment relationship (s4(1A) of the Act).

The investigation

[20] Mediation prior to investigation did not resolve the employment relationship problem between the parties.

[21] For the investigation I had written witness statements from the Applicant, Waitakere City's Manager of Animal Welfare, Neil Wells; North Shore City's Group Manager for Environmental Programmes, Rosemary Hagg; and North Shore City's Environmental Protection Team Leader, Warwick Robertson. Copies of relevant documents – including the Applicant's employment agreements over 9 years and a range of correspondence and emails – were provided. At the investigation meeting each witness answered questions from the Authority and additional questions from counsel. Counsel provided detailed written submissions following the meeting.

North Shore City complaints

[22] The evidence of Mr Wells and Mr Robertson clearly establishes that North Shore City's 29 August 2006 letter requiring the Applicant's removal cannot have been a surprise to Mr Wells. Mr Wells had taken up his management role in November 2005 and says he "*became aware quite early in my employment*" that North Shore City "*had ongoing concerns about the quality of leadership being*

provided by [the Applicant]".

[23] By letter of 16 January 2006 Ms Hagg had complained to Mr Wells' manager, Mr Gilliard about performance of the services contract. Although the Applicant was not specifically identified in that letter, Mr Wells understood that many of the issues raised related to her work.

[24] Mr Wells was also aware that Mr Robertson had complained about the Applicant's work in a meeting with her previous manager in August 2005. One complaint involved an incident where a child was bitten by a dog. Mr Robertson believed a prosecution should have resulted but the Applicant had issued only a warning to the dog's owner. Another complaint concerned how the Applicant had dealt with an incident involving a dog attacking a horse. Mr Robertson believed the Applicant should have sought a prosecution but instead she allowed the dog owner to surrender the dog.

[25] Mr Robertson also considered that the Applicant had not carried out directions given to her by her manager in August 2005 to provide education sessions for dog owners and to provide Mr Robertson with a daily update on any serious dog control incidents that might result in ratepayer or media inquiries to him.

[26] These were among concerns discussed by Mr Wells and Mr Robertson during a meeting on 10 March 2006. From this discussion Mr Robertson understood that the Applicant's work would be subject to some form of performance management.

[27] Seventeen days later – on 27 March 2006 – Mr Robertson sent Mr Wells a complaint about the Applicant having refused to attend a request to remove a cat and some kittens under a house because the service contract did not cover cats.

[28] Later that same day Mr Robertson sent Mr Wells an email with "*another complaint*" about the Applicant's handling of a dog control incident – alleging she had said "*I don't care*" when the complainant tried to talk to her. The email continued:

> *I'm pretty much at the point that if this one is substantiated to ask for [the Applicant] to be removed from NSACC duties under D4.4 I have discussed this with Rosemary [Hagg] the contract manager and she agrees.*

[29] On 4 July 2006 Mr Robertson had a lunch meeting with Mr Wells where he again raised his ongoing concerns about the Applicant's performance of her duties, which by then also included a further complaint sent by email on 24 May. During that meeting Mr Robertson asked whether the Applicant would be made redundant if North Shore City invoked clause D4.4 to have her removed from performing duties under the service contract. Mr Wells referred to the prospect of the Applicant being redeployed if clause D4.4 was invoked. However he also referred again to closer management of the Applicant's performance, including putting in place starting and finishing times for her. Mr Robertson says that he was "*left with the impression that the matter was in hand*".

[30] During July Mr Robertson made two further complaints to Mr Wells. One on 20 July concerned the Applicant's response time to a wandering dog incident – taking more than 45 minutes when Mr Robertson considered it should have taken 15 minutes. The other was about the Applicant advising North Shore City staff that no further dog owner education courses would be run that year, without first discussing the issue with him or Mr Wells.

[31] On 18 August Mr Robertson received a further complaint of rudeness by the Applicant in dealing with a dog control incident. Mr Robertson then decided North Shore City should invoke clause D4.4. He drafted the letter – later dated 29 August 2007 – which Ms Hagg approved and signed. The letter included details of a written complaint received on 25 August.

How Mr Wells dealt with the complaints

[32] I now turn to the issue of whether Waitakere City – through the actions of Mr Wells – did what a fair and reasonable employer would have done in dealing with North Shore City's complaints about the Applicant and her work.

[33] The 16 January letter of complaint from North Shore City was not shown to the Applicant. Neither was she told at any point prior to Waitakere City's letter to her of 6 September that North Shore City was contemplating invoking clause D4.4 – although Mr Wells was expressly aware of that prospect by way of Mr Robertson's 27 March email and again through their 4 July luncheon meeting.

[34] Instead Mr Wells' evidence was that he had instigated a programme of informal performance management from March. He says that he let the Applicant know about the complaints and his concerns and than he sought her response. He says he talked to her about improving communication with North Shore City by calling in to see Mr Robertson regularly but she said he was "*never there*" and Mr Wells recommended calling ahead to check if he would be in. The Applicant cannot remember that request.

[35] Mr Wells says he gave priority to addressing contractual issues, specifically about the provision of education courses for dog owners. He points to four memoranda on that subject that he and the Applicant exchanged between 15 and 24 March as showing she was reluctant to answer questions and provide information.

[36] Around the same time Mr Wells also had the Applicant's team leader investigate a complaint about how the Applicant had dealt with an incident of a child being bitten by a dog on 29 October 2005.

[37] This investigation was initiated because of a complaint from Mr Robertson on 24 February. He had interviewed the owner of the offending dog. His complaint was that the dog control officer – understood to be the Applicant – appeared to have only made her inquiries about the incident over the phone. He described this as "*remote handling*" and referred to reporting "*two similar cases*" to the Applicant's previous manager.

[38] The team leader interviewed the dog owner and the parents of the child. Her report to Mr Wells concluded that an infringement notice and muzzling order issued by the Applicant were not the "*appropriate*" response in the circumstances. The report noted that the Applicant had not met with any of the people involved in the incident nor seen the dog involved. Neither did she ask to see photos taken by the victim's mother of the child's injuries. This report concluded that "*all parties involved are very unhappy with the standard of the investigation and the service they received from [the Applicant]*".

[39] The content or conclusions of this report, dated 19 March 2007, and Mr Robertson's earlier complaint regarding this incident, were never put to the Applicant

for her input or response – either at the time or at any later point prior to the release of documents to her as a result of raising her personal grievance. However Mr Wells did send Mr Robertson an email – dated 20 March 2006 and labelled as of high importance and confidential – stating:

> *My conclusion is that [the Applicant] failed to investigate this properly and in so doing made a number (sic) errors in fact. There was no face-to-face contact made with any of the parties and what telephone contacts were made were cursory. This will be the basis of a performance management issue.*

[40] Neither is there any evidence that the Applicant was told of or directly asked to respond to many of Mr Robertson's complaints such as those of 27 March (asking why an infringement notice had been issued for a supposedly wandering dog that was "laid up" with a bandaged leg) and 24 May (not providing a complainant with information). She was asked about a complaint he made on 20 July (taking 45 minutes to respond to a wandering dog causing a traffic hazard).

[41] In mid-July 2006 Mr Wells made a further effort to manage the Applicant's performance. In a meeting on 13 July she was asked to review and provide recommendations on two files, to meet with her team leader twice a week to keep her informed on any issues, and to start and finish her working day at the Waitakere office. These requests met a hostile response. The Applicant described the extra travel required in order to work out of the Waitakere office as "a waste of three hours a day". She protested that this was a change of her working conditions as she had previously been allowed to work out of a home office in Browns Bay and wanted to know why anything needed to change as "*North Shore is running smoothly*". Mr Wells told the Applicant that his requests were directives that were to be adhered to and closed the meeting. He repeated the requirements in an email the following day.

[42] It is clear from the Applicant's recorded comment in the 13 July meeting that she had no sense of the level of dissatisfaction with her work and the complaints about it. That should have been apparent to Mr Wells too. The Applicant was entitled to know about the seriousness of the concerns raised by North Shore City and the real prospect that it would invoke D4.4. In the light of the seriousness of those concerns, the Applicant was entitled to be given the opportunity to comment on and, if necessary, correct the information on which they were based and the opportunity to then change or improve her work practices, to the extent that too was necessary.

[43] That is what a fair and reasonable employer would have done in all the circumstances. However Mr Wells' actions fell short of that standard. While he told Mr Robertson in the 20 March email that the Applicant would be subject to performance management, Mr Wells' evidence at the investigation meeting was that he had started collating information about her performance issues but there was not enough to warrant a formal disciplinary process.

[44] Waitakere City's personnel policy guidelines on managing work performance problems include this statement:

> *Where the performance of an employee in carrying out his or her duties is identified by the Manager as being unsatisfactory, the Manager should specify the nature of the problem and the remedies that are required. A claim of unsatisfactory performance shall usually not in the first instance be sufficient to initiate the disciplinary warning procedure. Only when adequate guidance and opportunity for training to remedy shortcomings has been given, followed by a reasonable period to improve performance, should continued unsatisfactory performance then constitute sufficient cause for initiating the disciplinary warning procedure.*

[45] Mr Wells had clearly identified the Applicant's performance of duties as being unsatisfactory but did not initiate with her the required process for specifying the problem, remedies required and the guidance needed to reach that standard.

[46] Once Mr Robertson had told him on 10 March of the seriousness of North Shore City's concerns, Mr Wells should have acted promptly to put the issues squarely before the Applicant. Not to do so, and to continue "collating" information and issues was a breach of Waitakere's duty of trust and confidence inherent in its employment agreement with the Applicant: *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920, 928. It was also a breach of its statutory obligation of good faith to be active and communicative in maintaining a productive employment relationship with her.

[47] Waitakere City submits that Mr Wells actions can be distinguished from those of the employer in the *Dickson* case cited above, because unlike that case Mr Wells did not store up a litany of performance concerns and then "ambush" the Applicant with them. That is correct as far as it goes – but Mr Wells' conduct was more, not less, unsatisfactory. He did not ambush the Applicant with accumulated complaints.

He did not put them fully to her at any stage. In answer to questions at the investigation meeting he accepted that he had not put the content of North Shore City's complaints to her nor sought her side of the story on several matters.

[48] Throughout Mr Wells says he had access to and sought advice from Waitakere City Council's Human Resources advisors. A file note he prepared shows that at least by late July he was having "*ongoing discussion with Human Resources*" and noted "*this issue is critical*".

[49] Despite this assessment – made after the 4 July meeting at which Mr Robertson again foreshadowed the prospect of invoking clause D4.4 – no steps were taken by Mr Wells or his Human Resources advisors to put the situation and concerns before the Applicant for comment or correction and to work through a performance plan with her.

[50] Mr Wells evidence was that after the 4 July meeting:

> *"[i]n order to help [the Applicant's] performance, I intended to escalate matters to a formal process, however I was overtaken by events."*

[51] However at the investigation meeting the only 'overtaking' event that he could identify as occurring between 4 July and 29 August was that he took two weeks' annual leave. Elsewhere during that seven week period he found time to inquire into the Applicant's handling of the aftermath of an incident where a dog had killed a cat on 17 August. At Mr Wells' request the Applicant provided a report on the incident but there is no evidence that he forwarded that to Mr Robertson. He did however send an email to Mr Robertson on 18 August advising that issues between the owners of the cat and dog had been resolved and including the comment: "*not that Jane was much use*". And in a further email to Mr Robertson on 23 August Mr Wells commented: "*Jane managed to use here (sic) usual people skills so that no one wanted to deal with her*".

[52] Standing back and looking at Mr Wells' actions in the period between 10 March and 29 August, I am satisfied that his actions and how he acted – including the omission of squarely putting to the Applicant all of Mr Robertson's concerns and the content of complaints received and inquiries made – amount to unjustified breaches of

Waitakere City's contractual and statutory obligations to her and were not what a fair and reasonable employer would have done in all the circumstances at the time. She suffered an unjustified disadvantage as a result. That disadvantage was the loss of opportunities for comment and correction and the opportunity to improve her performance if that were found to be needed. Such opportunities are inherent in the duties of fair dealing, trust and confidence implied into the Applicant's employment agreement and expressed in the obligations under s4(1A)(b) of the Act.

Responding to North Shore City's 29 August letter

[53] Mr Wells accepted North Shore City's invocation of clause D4.4 as *fait accompli*. He took no real steps to check or challenge the basis on which is was done because Mr Wells accepted it was well founded, even though his internal memorandum to his own manager acknowledged that the allegations had not been put to the Applicant.

[54] His letter to the Applicant of 6 September advising of North Shore City's demand and its acceptance by Waitakere City was – as he accepted in questioning at the investigation meeting – less than frank. It advised her that he was "*investigating their concerns*". That was a reference to his 1 September letter to North Shore City asking for further information and examples. However he did not disclose to the Applicant in the 6 September letter the extent to which he was already well aware of many complaints and warnings from North Shore City. This was, I find, a breach of the statutory duty of good faith not to act in a way likely to mislead or deceive the Applicant.

[55] The letter also purported to raise for discussion with the Applicant a proposal that she would be transferred from her role on the North Shore to another position within Waitakere City's own council district. It was – as Mr Wells' memo to his manager on 29 August shows – a decision that he had already made. It was one without a proper contractual basis. The Applicant's terms of employment were expressly to work in the North Shore district in the position of Field Service Co-ordinator. Her agreement did not include a provision for transfer or secondment to other duties. The North Shore City decision to invoke clause D4.4 effectively removed her ability to carry out the duties of the position for which she was

contracted by her fixed term employment agreement to perform for Waitakere City. She was not able to perform that role and Waitakere City was not able to require her to carry out another role for it without her agreement.

Did North Shore City aid and abet Waitakere City's breaches?

[56] North Shore City had no employment relationship with the Applicant. On that basis North Shore City correctly submits it owed no statutory duties of good faith under the Act.

[57] I also accept that the Applicant has not met the evidential standard necessary to establish the grounds for any penalty against North Shore City for inciting, instigating, aiding or abetting breaches by Waitakere City of the Applicant's employment agreement.

[58] Mr Robertson and Ms Hagg were entitled to advise North Shore City's contractor – Waitakere City – of any concerns and complaints about the work of the Applicant and to warn of the consequences if these were not acted on by the contractor. They were also entitled to expect and assume that those concerns were being taken seriously and acted upon by Waitakere City. In fact Mr Wells advised Mr Robertson – on 20 March and 4 July – that performance management measures were in place.

[59] I accept at face value Mr Robertson's evidence that when he asked Mr Wells on 4 July if the Applicant might be made redundant should North Shore City opt to invoke clause D4.4, his concern was that she would have a job elsewhere, as long as it was not on the North Shore.

[60] North Shore City says it was entitled to invoke clause D4.4 because it *perceived* – in the wording of the clause – that the Applicant was unsuitable for the role and it was justified in considering she was misconducting herself or was incompetent or negligent in the performance of her duties.

[61] In submissions it questions this Authority's jurisdiction to consider North Shore City's commercial decision to invoke the clause. While I accept that review of

such a decision – if it were necessary – is not open to the Authority, the decision itself and the provisions of the service contract are part of the factual matrix in which the Applicant's claims against both Respondents are made and are open to investigation.

[62] There is also an important question of policy which is within the Authority's role and powers in equity and conscience to consider (ss 157(3) and 160(2) of the Act). It is whether the contractual provisions between North Shore City and Waitakere City as principal and contractor were structured and applied to avoid the application of employees' statutory rights against unjustified dismissal or disadvantage? That is the risk of a provision enabling a principal to require a contractor to remove one of the contractor's staff from providing services to the principal without having to justify that decision. It is an approach that is inconsistent with the statutory regime for employment relations and particularly the obligation of justification imposed on employers.

[63] It is also the issue at the heart of the so-called 'triangular employment' cases that recognise the difficult position of employers when a third party – often the principal to a service contract with the employer – requires a worker to be removed from the principal's workplace. Those cases establish however that an employer in such situations still remains bound to follow fair procedures and consult with the workers on alternative work prospects. And they also confirm an employer's responsibility to properly investigate complaints before complying with a principal's demand for removal of a worker. As stated in *G & H Trade Training Limited v Crewther* [2002] 1 ERNZ 513 (EC, Goddard CJ) at [42]:

> *There is almost always a choice. The third party can be made to understand that employees have statutory rights and employers have liabilities to employees and cannot simply bow to demands.*

[64] If I were satisfied that clause D4.4 had been operated in a calculated way by North Shore City to help Waitakere avoid its obligations of fair dealing towards the Applicant and to avoid the operation of the requirements for an employer to justify its actions, it is within jurisdiction of the Authority to make orders expressing disapproval of such actions. In this case it would be by way of a penalty under s134(2).

[65] However, on the basis of the evidence available to me, I am not satisfied that

this occurred and I decline to make the order for a penalty sought by the Applicant.

[66] The circumstances do give some force to the inference – raised in questioning by Applicant counsel – that Mr Wells may have held back from raising issues with the Applicant because he knew North Shore City would eventually invoke clause D4.4, and that Waitakere City could say, as it did, that the requirement to then remove the Applicant could not be avoided. However the evidence carried that suggestion no further than an inference of a possibility. It was not sufficient to say that it was more likely than not, that is the balance of probabilities. What I do accept is that North Shore City did no more than repeatedly advise Mr Wells of its concerns and complaints and was entitled to rely on his assurances that the matter was being dealt with. That does not establish incitement or abetting of breaches. Rather, it was Mr Wells who – by actions such as his 18 and 23 August emails – might be said to have been inciting North Shore City to operate clause D4.4 as threatened. That however relates to operation of the service contract rather than an employment agreement as contemplated by s134(2) of the Act. In turn that goes to the good faith and fair dealing obligations of Waitakere City rather than the legality of North Shore City's actions.

Remedies

[67] Having found that Waitakere City breached contractual obligations of trust and confidence and statutory obligations of good faith, the Applicant has established that she has a personal grievance. Consideration of remedies includes assessing the extent of the Applicant's losses arising out of her grievance, what the Applicant has done to mitigate her losses, and whether any remedies should be reduced because of any blameworthy conduct on her part that contributed towards the situation giving rise to the personal grievance.

Extent of Applicant's losses

[68] The Applicant remains an employee of Waitakere City but has not attended work since 6 September 2006. Since raising her grievance on 7 September through her lawyer, she has not met with Mr Wells or any other representative of her employer to discuss its proposal that she work in the Animal Welfare field services team in

Waitakere City (unless this occurred in the confidential mediation session prior to the Authority's investigation).

[69] Until 13 September 2006 the Applicant was on paid sick leave. Her entitlement was exhausted by that date and she arranged to use accumulated annual leave which ran out on 6 December 2006. Since then she has remained on unpaid sick leave apart from days of sick and annual leave entitlements that have accrued to her meanwhile.

[70] Documents provided for the investigation included medical certificates from the Applicant's GP saying she was medically unfit for work through to mid-November 2006. At the investigation meeting a copy of a further certificate was presented, dated 22 May 2007, and stating that the Applicant remained medically unfit for work. In that certificate her GP said the Applicant was "*suffering from a stress related illness related to her work situation*". He also stated that he believed she would not be fit "*to return to work until the cause of that stress in her work place has been resolved*". There is no further information about the cause of that stress or the Applicant's symptoms.

[71] The Applicant's fixed term employment agreement expires on 15 February 2008. Around the same date the dog control service for North Shore City, currently provided under the service contract by Waitakere City staff, is to go back "in house". The Applicant's employment agreement expressly excludes an entitlement to redundancy compensation at its expiry. And, in my assessment, there is little likelihood of the Applicant being offered a job "in house" with North Shore City. However that arises not from her present employer's actions but rather from North Shore City managers' dissatisfaction with her work as a result of complaints received from their ratepayers and residents in 2005 and 2006. Whether that assessment is right or wrong, it is not subject to the tests of fairness that would apply if there were an employment relationship between the Applicant and North Shore City. Accordingly, the assessment of the Applicant's full loss – for the purposes of compensation of financial loss – cannot exceed the period from September 2006 to February 2006, that is a maximum of 18 months. However, applying the principles expressed in *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315, 332, the contingencies of life must also be considered in assessing the extent of loss for which

compensation should be granted. In this case such contingencies are considered as part of the issues of mitigation and contribution by the applicant discussed below.

Mitigation

[72] I do not consider the Applicant's evidence establishes that she has been too sick to work for the entire period between September 2006 and the date of the investigation meeting, and that she will remain so until the expiry of her employment agreement in February 2008.

[73] Neither does it establish sufficiently that Waitakere City's actions in removing her from her role under the service contract were the cause of her ill health for the entire period. I accept Waitakere City's submissions on that point which note that no independent medical evidence was provided to support the Applicant's claim apart from the bare face of her doctor's certificates. While she says she has been too ill to work, she has been well enough to holiday abroad. And while she claimed at the investigation meeting to have temporarily suffered Bell's Palsy as a result of stress caused by her employment situation, she did not recall the dates or provide any medical evidence confirming the diagnosis and linking it to Waitakere City's actions.

[74] The Applicant's evidence was that she had earned no income in this period and had remained on unpaid leave from her employment with Waitakere City.

[75] I do not accept – on the evidence available to me – that the Applicant has done enough to reasonably mitigate her loss. She appears to have done nothing to explore earning other income until her case came to hearing. This is particularly unsatisfactory in light of the prospect of a job working in Waitakere City's animal welfare services. While not obliged to accept Waitakere City's proposal, it would have mitigated much of her loss in this period. She may have initially found aspects of such an arrangement uncomfortable, but would have been able to earn at least her usual salary as, I consider, it would have been difficult for Waitakere City to pay her at a lower rate even if the proposed job did not have the same level of responsibility. Any embarrassment or discomfort occasioned by being seen to have been "removed" from the North Shore would have been compensable within an award of distress damages.

[76] Looking at the evidence overall, and having seen and heard from the Applicant during the investigation meeting, I infer that the reality is, as submitted by Waitakere City, that the Applicant has chosen not to attend work while this matter is in process. Neither has she sought alternative income. Waitakere City should not – I accept – be required to bear the full cost of her decision.

[77] I do accept however that the Applicant is entitled to a shorter period of lost wages for the period immediately following what was really a standing down from her post on the North Shore. In the circumstances the Applicant could have expected to be stood down on full pay while consultation on alternative arrangements occurred. Instead, once her sick leave entitlement was exhausted, she agreed to use annual leave for a period of about six weeks, until that also entitlement ran out. I consider she is entitled to reimbursement of the resulting loss of leave entitlement for what I assess as the reasonable period of four weeks in which she was dealing with the shock of the announcement and the parties should have been consulting on mutually acceptable arrangements until the expiry of her agreement.

[78] A longer period for loss of wages or benefit is not warranted because the evidence suggests the Applicant did not subsequently do enough to mitigate her losses.

Compensation for hurt and humiliation

[79] The Applicant is entitled to a modest but significant award of compensation for the humiliation, loss of dignity and injury to her feelings suffered as a result of her employer's actions.

[80] She was suddenly removed from a role in an area where she had worked for 17 years. Her manager knew the blow was coming but did much too little to advise or warn her so that she might have taken measures to deal with the problems, including by changing her own performance. Instead she was really 'blindsided'. It was a serious failure of the employer's good faith obligations to be active and communicative and caused the Applicant to be shocked and then embarrassed amongst her fellow employees and throughout what she described as the small

"industry" of dog control services.

[81] An award of $10,000 under s123(1)(c)(i) of the Act is warranted to compensate for the humiliation and distress caused.

Other remedies

[82] No award is made for the Applicant's claim for compensation for loss of personal use of her work car as I am not satisfied – on the evidence available to me – that the extent of use made was an entitlement.

[83] No penalties are imposed on Waitakere City – either for breach of good faith obligations or the Applicant's employment agreement – because the Applicant did not seek them in her statement of problem.

Contribution

[84] As required by s124 of the Act, I have considered whether actions of the Applicant contributing towards the situation giving rise to the personal grievance require reduction of her remedies.

[85] On the basis of the Applicant's own evidence and the submissions of Waitakere City, I have concluded that a reduction for contribution is required and set the level for that at one quarter of the remedies awarded.

[86] While Waitakere City failed to raise and work through these issues fairly with the Applicant, there were clearly aspects of how she carried out the job that contributed to the overall situation. These included:

(i) inadequate attention to communicating with Mr Robertson at North Shore City; and

(ii) poor communication with some North Shore City residents involved in dog control incidents; and

(iii) failing to carry out education work for which she had become responsible; and

(iv) issuing infringement notices without proper investigation (the so-called

"remote control" approach).

[87] The Applicant offered some excuses for these issues during her evidence, such as staffing problems or indistinct lines of responsibility. She also needed to have a robust approach in dealing with some "notorious" dog owners who did not take proper responsibility for their pets. That may explain some but not all the complaints made about her work. She did, fairly, make the point that she had not previously had the chance to fully respond to and explain all the reports and complaints made about particular incidents. However she was a very experienced officer and was the senior member of the team in the field on the North Shore. Had she properly investigated incidents and been less abrasive in response to Mr Wells' requests for information and accountability, North Shore City's dissatisfaction with her would not have escalated to the level that it did.

Summary of remedies

[88] After applying the required reduction in the level of remedies awarded due to the applicant's contribution to the situation, I have determined that the Applicant's grievance is to be settled by the Respondent paying to her:

(i) three weeks' wages: and

(ii) $7500 as compensation for hurt and humiliation.

Costs

[89] The parties are encouraged to resolve any question of costs between themselves. In the event they are not able to do so, the Authority will determine costs after hearing from the parties by way of counsels' memoranda. If that is necessary, the Applicant is to lodge and serve an application for costs within 28 days of the date of this determination and the Respondents may reply within 14 days of that application being lodged in the Authority.

Robin Arthur
Member of the Employment Relations Authority