

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 85  
3023017

BETWEEN YVONNE DESMOND  
Applicant

AND ASSOCIATION OF SALARIED  
MEDICAL SPECIALISTS  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Paul McBride and Antonella Cuccurullo, Counsel for  
Applicant  
Peter Cranney, Counsel for Respondent

Investigation Meeting: 13 and 14 June 2018

Submissions and Information Received: 14 June 2018 from both parties  
and 2 July 2018 for final documents

Determination: 28 September 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Yvonne Desmond was employed by the Association of Salaried Medical Specialists Incorporated (ASMS or the Association) for approximately 22 years before her employment terminated in October 2017. She brings claims of unjustifiable action by the employer affecting her to her disadvantage, and unjustified constructive dismissal.

[2] Ms Desmond seeks financial remedies including two and a half years' lost remuneration, compensation for hurt and humiliation, interest and costs.

[3] The respondent, ASMS, denies there is any basis to Ms Desmond's claims and asks the Authority to dismiss them with costs awarded in its favour.

[4] The parties have attended mediation but have been unable to resolve the matter.

### **The parties – a brief background**

[5] Ms Desmond commenced employment with ASMS in 1995 in the role of Administration Officer. The organisation had been in existence for approximately six years at that time and had three employees before Ms Desmond was appointed.

[6] Her title was changed to Executive Officer two years later. By 2017 ASMS had grown significantly and had 18 employees. Ms Desmond led its administrative and corporate functions.

[7] ASMS is a union for senior medical specialists. Its Executive Director is Ian Powell who has held the role from April 1989. Membership of ASMS has quadrupled since that time. The Deputy Executive Director is Angela Belich, who has been with ASMS since 2001 and leads its industrial team.

[8] Ms Desmond and ASMS had a relationship of mutual respect and trust through the many years of her employment. In the last two years of her employment some issues arose that caused tension in the employment relationship.

[9] Ms Desmond raised personal grievances on 24 October 2017. Since then the parties have attended mediation but have not been able to resolve the matter.

### **Issues**

[10] The issues for determination are:

- a. whether Ms Desmond was unjustifiably disadvantaged by an action or actions of her employer; and/or
- b. whether she was unjustifiably, constructively, dismissed; and
- c. if Ms Desmond was unjustifiably disadvantaged and/or unjustifiably dismissed, what remedies should be awarded.

## Relevant Law

[11] The test of justification in s 103A of the Employment Relations Act 2000 is applicable to Ms Desmond's claims to have been unjustifiably disadvantaged and unjustifiably dismissed. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[12] It has been long established that an employee may be constructively dismissed by the employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.<sup>1</sup>

[13] Ms Desmond's claim to have been constructively dismissed is based on breaches of duty by her employer. She says it was the cumulative effect of the employer's treatment of her: its actions and its subsequent failure to address those actions that resulted in her resigning.

## Relevant events

[14] The actions alleged by Ms Desmond to have disadvantaged her are entwined with, and form the backdrop to, her claim to have been constructively dismissed. I will set out the events that led to her departure from ASMS, and the subsequent raising of her personal grievances, in some detail.

[15] In her evidence Ms Desmond referred to the environment in the ASMS office prior to the events that led to her employment ending. Approximately a year earlier an employment situation had arisen relating to another, now former, employee that led to some tensions and divisions in the office. The circumstances

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<sup>1</sup> [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

are not relevant for the purpose of this determination other than for their effect on relationships among senior managers and I shall not elaborate on them. What is relevant is that Ms Desmond became stressed and perceived that her relationships with Mr Powell and Ms Belich were strained at least partly as a result of that employment situation.

[16] Mr Powell's perspective is that other events, such as the significant expansion in staff and roles in ASMS from 2015, led to Ms Desmond perceiving she had lost status within the organisation. He thought she struggled to accept Ms Belich's seniority to her and he referred to the strained relations Ms Desmond had with some other employees in the organisation.

[17] A long-serving employee of ASMS, Henry Stubbs, who gave evidence under summons, confirmed both the unsettling effect in the office of the employment situation I have referred to above and the strains and tensions resulting from the expansion of staff in 2015.

[18] ASMS recognised that Ms Desmond was stressed and she accepted EAP assistance at the time. At Ms Belich's suggestion, and with Ms Desmond's agreement, Mr Powell also arranged a period of sabbatical leave for Ms Desmond in an attempt to ease the strain she was feeling. This took place in the latter half of 2016, and consisted of approximately three months on full pay. The sabbatical incorporated both professional development and recuperative elements. Ms Desmond visited unions in Europe that were the counterparts of ASMS as well as having time to catch up with family and friends.

[19] Mr Powell's hope was that she would return "refreshed and recharged" and back to how she had been before the tensions had arisen. Ms Desmond's hope was that the time away would allow "the dust to settle in the office, and relieve at least some of the tension". Her evidence is that, on her return in October 2016, matters "eventually became slightly more settled, but there was still an undercurrent". She acknowledged that the extended sabbatical had in part addressed the issues and difficulties of the past.<sup>2</sup>

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<sup>2</sup> In the letter of 24 October 2017 in which she raised her personal grievances.

[20] Following Ms Desmond's return from sabbatical leave in October 2016 it seems the employment relationship continued without significant disruption for several months.

[21] The immediate background to Ms Desmond's departure from her employment concerned discussions and decisions over how temporary cover was to be provided for an employee when she took parental leave. The employee in question was the Assistant Executive Officer, Ms Sharlene Lawrence, who made her pregnancy known in either late May or June 2017. She advised that she wished to take leave in late 2017 and early 2018.

[22] Ms Desmond and Ms Lawrence discussed the issue of temporary cover for the Assistant Executive Officer's role over a period of three to four months. Ms Desmond's evidence is that they, in consultation with the Executive Director and another senior staff member, formulated a comprehensive parental leave cover plan. Ms Lawrence recalls discussions being held in an *ad hoc* manner, but says she was unaware of any comprehensive plan. Mr Powell says discussions he was involved in were at a very generic level only.

[23] An employee in the administration team who reported to Ms Lawrence, and whose role was Support Services Coordinator (the coordinator), expressed interest in providing cover for Ms Lawrence when she went on parental leave. While Ms Lawrence saw merit in the idea, Ms Desmond did not view the employee as being ready to step up to the role. Ms Lawrence disagreed with Ms Desmond's assessment, but says she did not challenge her decision because Ms Desmond was her manager.

[24] Ms Desmond's evidence is that a decision was made in September 2017 to appoint an experienced relief office manager to cover Ms Lawrence's position later in the year. She describes this as a consensus decision, although Mr Powell strongly disagrees. In any event, Ms Desmond and Ms Lawrence met a recruitment consultant and Ms Desmond provided the consultant with a job description for the relief manager's position on 3 October 2017. Mr Powell was not consulted about the job description at the time and was unaware of it.

[25] On 4 October 2017 the decision was conveyed to the administration team in the course of a meeting. The coordinator had no forewarning of this, possibly due to

a misunderstanding between Ms Desmond and Ms Lawrence. She was surprised and disappointed the matter had been decided without any prior discussion with her and that she would be reporting to the temporary manager. After the meeting she was found in the bathroom in a distressed state by a colleague who informed Ms Belich about the matter that morning. The coordinator also spoke with her E Tū union delegate that day and gave her consent for the delegate to talk with Mr Powell about the matter.

[26] Ms Desmond reported the incident to Mr Powell that morning. At the time, according to Mr Powell, Ms Desmond appeared to be genuinely concerned about the coordinator's well-being following the meeting. She described the misunderstanding with Ms Lawrence over who was to have informed the coordinator about plans to recruit a relief office manager as a "lost in translation" situation, apportioning no blame over the matter.

[27] Ms Desmond's evidence is that, at the time, she expected to manage the matter directly with the coordinator. She had reported the incident to the Executive Director to keep him informed rather than to involve him in it. Mr Powell indicated he wished to think about a way forward and meet with both Ms Desmond and Ms Lawrence on Friday 6 October (he was scheduled to be out of town on Thursday 5 October).

[28] Mr Powell also met with Ms Lawrence that afternoon and ascertained that she and Ms Desmond had different ideas about how the relief office manager position would operate. They also had different views of the ability of the coordinator to take on some of the duties of Ms Lawrence's position while she was absent on parental leave.

[29] On 5 October Mr Powell was contacted by the union delegate who informed him of her contact with the coordinator without going into detail. Mr Powell informed the delegate of the meeting he had scheduled with Ms Desmond and Ms Lawrence for the following day and said he would inform her (the delegate) of any decision or approach that might arise from the meeting.

[30] Mr Powell informed Ms Desmond and Ms Lawrence of the union delegate's contact when they met on the morning of Friday 6 October. His evidence is that Ms Desmond was unhappy the coordinator had contacted the union. Ms Desmond says

she expressed surprise that the union representative was supporting the coordinator. She said E Tū was her union and she was unaware the coordinator was a union member.

[31] Ms Lawrence's evidence is that Ms Desmond made an inappropriate comment about the coordinator "showing her immaturity by running off to a union rep with her concerns".

[32] Ms Desmond's evidence is that she felt pressured in that meeting to remove the hierarchy from the job description for the relief manager. This would eliminate the reporting line between the coordinator and the temporary relief manager. Instead, both roles would report to Ms Desmond. In her evidence to the Authority Ms Desmond characterised the Executive Director's involvement as interference that took away her ability "to appropriately investigate the matter in a more measured manner".

[33] Mr Powell says Ms Desmond gave no indication of dissatisfaction or unhappiness with his involvement in the matter. He says that at an early stage of the meeting on 6 October Ms Desmond said she would accept an instruction from him on the matter. His response to her was that he would prefer to reach agreement.

[34] Ms Lawrence's evidence is that Mr Powell did not pressure anyone at any time during the meeting. She says he was very sympathetic to the situation and keen to put it right. Her contemporaneous notes of the meeting record that the temporary role was to be that of a coordinator not a manager and that, similar to a job share situation, the incumbent of the temporary position and the coordinator would each take on different aspects of the Assistant Executive Officer role.

[35] While there may sometimes be a fine line between pressure and persuasion, I find the latter likely to be a more accurate description of the method Mr Powell used to gain Ms Desmond's agreement to remove the hierarchy between the coordinator's role and that of the temporary employee. That accords with Ms Lawrence's evidence and also accords with oral evidence given by Ms Desmond to the Authority regarding the removal of the reporting line from the new job.

[36] It is Mr Powell's evidence that, during the course of the 6 October meeting, Ms Desmond was for the first time critical of Ms Lawrence in relation to the matter

she had earlier described as "lost in translation". Ms Lawrence's evidence supports that of the Executive Director. Her perception was that Ms Desmond's demeanour changed towards her and that she now blamed Ms Lawrence for the breakdown in communication that led to the 4 October situation with the coordinator.

[37] Ms Desmond's understanding of the agreements that had been reached in the 6 October meeting differed in at least one important respect from the understanding of the other two participants. Both Mr Powell and Ms Lawrence were clear that the Executive Director would meet with the coordinator, preferably that day, to inform her of the outcome of the meeting he had had with Ms Desmond and Ms Lawrence.

[38] He would advise the coordinator that, if she was comfortable, Ms Desmond and Ms Lawrence would like to meet with her, again preferably that day, to discuss in more detail what would happen from there. Ms Desmond's evidence is that she understood she and Ms Lawrence, not Mr Powell, would resolve the matter directly with the coordinator, that day if possible.

[39] Mr Powell met the coordinator the same morning, after first contacting the union delegate as he had undertaken to do. He apologised to the coordinator for what had happened, and informed her of the agreement he, the Executive Officer, and the Assistant Executive Office had reached over the parental leave cover for Ms Lawrence. In his view she responded positively to both the apology and the approach. She advised Mr Powell she would prefer not to meet Ms Desmond and Ms Lawrence that day for the discussion he proposed, as she wanted more time to process what he had said and discuss it with the union delegate. He hoped she would be able to meet them the following Tuesday, as Ms Desmond worked from home on Mondays.

[40] Ms Desmond spoke with Mr Powell in her office later the same day. She was angry because she believed other employees were talking about her and the incident involving the coordinator that had taken place two days earlier. This seemed to stem from part of a conversation Ms Desmond had overheard in the tearoom. She asked the Executive Director if he held her responsible for the incident and he assured her he did not. Mr Powell's evidence is that the conversation was difficult because Ms Desmond was angry and it was not possible to have a rational discussion.

[41] Ms Desmond's evidence is that she felt "abandoned, let down and distressed" at the "loss of dignity and lack of sympathy for (her) position" or that of her team. She says she expressed these sentiments to Mr Powell, and the effects on her health, telling him she had made an appointment with her GP that afternoon. On his advice Ms Desmond arranged an appointment with the team's development coach for Monday 9 October.

[42] Ms Desmond says she was unaware until the following week that Mr Powell had met with the coordinator on Friday 6 October and had conveyed to her the outcome of his Friday morning discussion with Ms Desmond and Ms Lawrence. Her evidence is that her exclusion from Mr Powell's meetings with the coordinator and the union representative undermined her professional integrity. She claims the impact of his actions was disempowering and disappointing.

[43] Over the weekend of 7 and 8 October, Ms Desmond reflected on the position she had agreed to on Friday morning and decided she could not support it. Under questioning as to her reason for coming to that decision, Ms Desmond said she reflected on her own role and decided she did not want the additional work that having both the coordinator and the temporary employee reporting to her would entail.

[44] Ms Desmond worked from home on Monday 9 October and did not talk to Mr Powell that day. She received an email from him, however, through which she said she learned he had spoken to both the coordinator and the union representative over the weekend. Mr Powell's email also advised that the coordinator was happy to meet her and Ms Lawrence as long as he (Mr Powell) was also present. That meeting was to take place at 11 am on Tuesday 10 October and Mr Powell asked Ms Desmond to meet him at 9 am in view of their last difficult conversation the previous Friday.

[45] Ms Desmond says she was shocked to learn of what she believed were premature conversations and of "the extent of (Mr Powell's) intervention". She did not, however, convey any such shock to the Executive Director according to Mr Powell in his account of their meeting in the morning of Tuesday 10 October. He contrasted her demeanour with that of Friday 6 October when they had spoken in her office. This time she was:

*assertive, determined, firmly in control of what she was saying and intending, adopting a controlling tone including towards me, and putting things in the context that I was either for her or against her.*

[46] The discussion did not go well. Ms Desmond asked whether Mr Powell was attending in his capacity as support person for the coordinator or for her. He replied he was attending as Executive Director. Ms Desmond informed him that, after reflection, she wished to continue with the original approach of an office manager temporarily filling the Assistant Executive Officer's role when Ms Lawrence went on parental leave. Under that approach the coordinator would report to the temporary employee.

[47] Ms Desmond sought Mr Powell's support for this. She referred to the level of skill and experience required for the role and to the coordinator's lack of maturity and experience. She cited, as an example, the fact that the coordinator had discussed her concerns with the union delegate rather than directly with her line manager (Ms Lawrence) or her (Ms Desmond). Ms Desmond says she also "affirmed that there had been no agreement on Friday that the coordinator report directly to me" during Ms Lawrence's parental leave. She said that had been "a suggested compromise that, on reflection, would be difficult to closely manage, given my own workload".

[48] Mr Powell responded that to do as Ms Desmond wished would entail going back on what had been agreed on Friday 6 October, and what he had conveyed to the coordinator. He said that, when he raised the unhappiness that would cause that person, Ms Desmond's response was to ask him whether he would rather have her unhappy or the coordinator.

[49] Mr Powell said Ms Desmond's change of attitude between their Friday and Tuesday meetings was so dramatic and forceful that he needed time to consider the issue. His evidence is that he was very concerned at Ms Desmond's behaviour. He needed time to consider the situation without responding promptly and risking rashness. He cancelled the meeting with the coordinator scheduled for 11 am that day out of concern for the effect on her health if Ms Desmond adopted the same tone she had used with him. Mr Powell's meeting with Ms Desmond ended with matters unresolved.

[50] Ms Desmond described herself as feeling devastated and disempowered by the realisation that the Executive Director had discussed their meeting on Friday "in detail" with the coordinator. Her evidence is that she was baffled and undermined by his approach and she wondered whether the situation had possibly been designed to achieve her removal from ASMS.

[51] Two days later Ms Desmond received a letter emailed from Mr Powell which it appears he had written, or at least begun, on Wednesday 11 October as it refers to their "unsatisfactory and unresolved discussion yesterday". Mr Powell noted in the letter his need to communicate more formally "to avoid further confusion". He traversed the events of the last week since the coordinator had been so distressed on 4 October over the incident at the administration team meeting.

[52] These events included Mr Powell's meeting with Ms Desmond and Ms Lawrence on Friday 6 October at which it was agreed there was to be no hierarchy in the relationship between the new temporary person and the coordinator. It also referred to the planned meeting with the coordinator at 11 am on Tuesday 10 October, which had been cancelled as a result of Mr Powell's discussion at 9 am with Ms Desmond.

[53] Mr Powell referred in the letter to Ms Desmond's notification to him that she had changed her mind over the issue of hierarchy, and her wish for the new temporary person to have a leadership role over the coordinator. He said the way Ms Desmond had described this it was more of a monitoring than a leadership role and he noted one of her justifications for this approach was her disapproval of the coordinator's action in seeking advice from the E tū union delegate.

[54] Mr Powell's letter went on to advise Ms Desmond that he had considered this and was very unhappy with the way things had unfolded since the previous Friday. He said he had decided to continue with the decision reached on Friday between himself, Ms Desmond and Ms Lawrence. His reasons included that, while he had no problem supporting any team leader, he would not do so to justify poor employment decisions, describing what Ms Desmond had proposed to him in their Monday morning discussion as being in that category.

[55] Further reasons for his decision related to the Association's obligation to provide professional development opportunities to employees where possible; the

destructive effect on the confidence of the coordinator of being required to report to a new temporary employee; and Ms Lawrence's unequivocal confidence in the coordinator's ability to step up.

[56] The final reason given by Mr Powell for continuing with the decision conveyed to the coordinator on Friday 6 October related to Ms Desmond's reference to that person's approach to the union delegate as reflecting poorly on her capability. Mr Powell described this as "not only inappropriate" but also as "inexcusable and unlawful".

[57] He noted that occasionally the Association's industrial officers came across members criticised by their employers for seeking support or advice from their union, which he described as an exercise of basic employment rights. Mr Powell made clear he would "not tolerate a situation where ASMS, as a union that employs staff, behaves like an unlawful or bad employer."

[58] The letter ended with a list of Mr Powell's expectations about what was to happen next in relation to the new part-time temporary employee; how the coordinator might expand her capacity and capability during this time; and the sensitivity and understanding that were to be provided in interactions with that person. Coaching through the Administration team's development coach was to be provided to the coordinator and also, should Ms Desmond consider it helpful, to her.

[59] Ms Desmond responded by email at 9.43 pm that evening, conveying her distress and her belief that the decision Mr Powell had taken undermined her as the Executive Officer and in the eyes of the administration team. She believed the Executive Director's approach suggested he no longer wanted her in her role. Ms Desmond said she was distraught at being treated in this way and was seriously considering her options. In the meantime she asked if Mr Powell was prepared to attend urgent mediation to discuss, and hopefully resolve, matters "and to agree that I should delay making my final decision until after that".

[60] Further email correspondence ensued in which Mr Powell, on 13 October, denied undermining Ms Desmond, noting that the coordinator was unaware Ms Desmond had sought to reverse the approach he had discussed with her the previous Friday. He said that "ultimately the decision on this sort of matter rests with me as Executive Director". He cited situations relating to Ms Belich's teams where, if they

differed in approach and she failed to persuade him to her view, his position prevailed. He noted that Ms Belich accepted such situations and did not perceive any undermining of her leadership.

[61] Mr Powell neither accepted nor rejected mediation but he proposed two alternative options whereby he and Ms Desmond would meet to discuss the situation further. They could either do this alone or in the presence of the administration team's development coach, whom Mr Powell had not met but whom he knew Ms Desmond respected. He ended his email as follows:

*Take care of yourself Yvonne. It doesn't have to be like you are describing.*

[62] On 15 October Ms Desmond advised Mr Powell she needed to carefully consider what to do, given that the Executive Director had not agreed to mediation. She emailed that, given his actions, she did not see how she could continue in her job. Ms Desmond notified that she would not be in to work that week while she took advice and finalised her decision.

[63] On 16 October Mr Powell contacted Lloyd Woods, one of the senior industrial officers at ASMS. Mr Woods had been away from the office since 4 October, for work and leave purposes. Mr Powell informed him there had been some issues in the office and that he was concerned about Ms Desmond and wanted to ensure she was alright. Mr Woods said Mr Powell knew he had a good relationship with Ms Desmond, with whom he had worked closely, and was asking for his (Mr Woods) advice about telephoning her. Mr Powell was concerned such contact from him might be taken wrongly.

[64] Mr Woods suggested he, rather than Mr Powell, should contact Ms Desmond and that suggestion was accepted. Mr Woods did so and had a discussion with Ms Desmond on the evening of 16 October, during which she conveyed that she was hurt and offended by what had happened at work and that her relationship with Mr Powell was "rocky". She was concerned and humiliated that the matter was the subject of office conversation. She also conveyed how she felt undermined by Mr Powell's pulling rank on her and her offence at the letter she had received from him.

[65] Mr Woods suggested he talk with Mr Powell and try to get the two of them together to discuss the matter. He says he proposed an informal mediation with a suitably qualified person and Ms Desmond said she was open to suggestions.

[66] Mr Woods then contacted an acquaintance who was a skilled practitioner in conflict resolution and restorative practice and ascertained that she had time available that week. He also contacted Mr Powell who supported his arranging mediation as soon as possible.

[67] The following day (Tuesday 17 October) Mr Woods spoke with Ms Desmond and the proposed mediator again and discussed a suitable date and time. Ms Desmond had two weeks' leave scheduled to commence on Friday 20 October which impacted on her availability but she agreed to consider the afternoon of Thursday 19 October.

[68] Mr Woods contacted Ms Desmond again that evening (Tuesday 17 October) and she told him she was happy for mediation to occur but thought Thursday was too rushed and she was not sure about the person Mr Woods had proposed as mediator. She said she would research alternatives and undertook to let Mr Woods know on Thursday evening what she wanted to do.

[69] On 18 October Mr Powell emailed Ms Desmond to advise that Vodafone had contacted ASMS earlier that day stating that, because Ms Desmond was no longer employed by the Association, she wished for her ASMS mobile number to be transferred to her. He asked her to clarify the situation.

[70] Some hours later, Ms Desmond emailed in response that she had reached the point where she could not currently see any way in which she could return to work for Mr Powell while also maintaining her integrity, mana and dignity.

[71] In her email Ms Desmond stated this was solely the result of the way Mr Powell had handled matters impacting on her in her employment. She noted his rejection of mediation on an urgent basis and the two alternative options he had put forward, neither of which she believed were appropriate.

[72] Ms Desmond also noted that, four days after she had requested urgent mediation, Mr Powell had asked Mr Woods to contact her to propose "some mediation by somebody who Lloyd knows on 19 October (more than two weeks

after the incident". She said Mr Powell knew she was going away on scheduled leave and the timeframe and practicalities of that meant that mediation could not occur before she left on her leave.

[73] Ms Desmond said in her email that she was prepared to have a discussion with Mr Powell on her return to Wellington to try to resolve issues. She said, however, that

*...in the meantime at least, I consider the employment to be at an end. I find that extremely unfortunate after such a long period of working with you and ASMS. I have reluctantly reached the decision based on your treatment of me.*

[74] Ms Desmond's email ended with an expression of hope that this answered Mr Powell's question regarding her mobile telephone number which, she reminded him, she had brought with her to ASMS.

[75] Ms Desmond did not return to work. Through legal counsel she raised personal grievances on 24 October 2017 for constructive dismissal, and for unjustifiable actions affecting her to her disadvantage in the lead up to the dismissal.

#### **Was Ms Desmond unjustifiably disadvantaged and/or constructively dismissed?**

[76] Ms Desmond submits it was the actions of the employer, as carried out by Mr Powell, and its subsequent failure to address these actions that comprised the constructive dismissal. She refers to the cumulative effect of a number of incidents and breaches of the employer's contractual duty to her, which destroyed the trust and confidence in the employment relationship.

[77] Those incidents came while the after effects were still being felt in the Association office from the situation I have referred to earlier relating to another (former) employee. That situation had arisen in late 2015 and early 2016 and had at least unsettled, if not strained, relationships in the office including those between Ms Desmond and the Executive Director and Deputy Executive Director.

[78] Ms Desmond itemises a range of actions undertaken by ASMS in a context of undermining and side-lining her that adversely impacted on her employment. The actions included:

- Countermanding decisions she had taken;

- Doing so in a way that undermined her;
- Addressing employee matters in discussions excluding her;
- Email correspondence from the Executive Director in which she was accused of making poor management decisions and having undertaken unlawful actions;
- Refusing to engage in urgent mediation over these matters.

[79] The cumulative effect of these events coming on top of the aftermath of the 2015/2016 situation that had unsettled relationships is cited by Ms Desmond as leading to her constructive dismissal. In her submission the "belated" attempts made by ASMS to repair matters did not remedy the breaches that had led to that dismissal.

[80] Regarding the first of these actions, I am not persuaded Mr Powell countermanded a decision of Ms Desmond's. As I have noted earlier, I considered whether Ms Desmond was pressured into agreeing in the meeting of 6 October to take a different approach from that which had been announced in the administration team meeting of 4 October. I concluded Ms Desmond was persuaded, but not pressured, to agree to the different approach.

[81] What then happened was that Ms Desmond reflected over the following three days and changed her mind about the agreement she had reached with Mr Powell and Ms Lawrence. In her meeting with Mr Powell on 10 October she proposed going back to her earlier decision and sought his support. Mr Powell responded to Ms Desmond's proposal in his letter dated 12 October, making clear that he was not prepared to change the approach that had been agreed on 6 November.

[82] Mr Powell's refusal to agree with Ms Desmond's proposal does not constitute a countermanding of a decision and was not an unjustifiable action.

[83] Nor am I persuaded the evidence supports Ms Desmond's assertion regarding her employer addressing employee matters in discussions excluding her. Apart from somewhat vague assertions about closed door meetings held by Mr Powell, Ms Desmond's evidence seems to relate to the Executive Director's contact with the union delegate and his meeting with the coordinator on 6 October.

[84] The delegate had approached Mr Powell over the distress experienced by the coordinator at the administration team meeting on 4 October. She did so with the consent of the distressed employee. Mr Powell informed Ms Desmond about the contact and I accept his evidence that she took no issue with his accepting the approach. I find nothing improper in his accepting the approach or in his follow-up contact with the delegate regarding the matter.

[85] With regard to Mr Powell's meeting with the coordinator on 6 October, I prefer Ms Lawrence and Mr Powell's evidence regarding the agreement reached in the meeting that day with Ms Desmond. This was that Mr Powell would, in the first instance, convey to the coordinator the outcome of their discussion.

[86] That would be followed up by a meeting between the coordinator and Ms Desmond and Ms Lawrence to discuss the detail of what had been agreed and how it would work in practice. I consider it likely Ms Desmond either did not remember that, or decided subsequently that she disagreed with that approach.

[87] The third unjustifiable action Ms Desmond cites on the part of her employer is the Executive Director's emailed letter of 12 October 2017 in which "she was accused of making poor management decisions and having undertaken unlawful actions".

[88] In its submissions ASMS notes that the letter followed on from the discussion of 10 October between Mr Powell and Ms Desmond and responded to the proposal she had advanced in that meeting. The Association submits Mr Powell had a duty to inform Ms Desmond why he had decided to stick with the agreement that had been agreed by her, Mr Powell and Ms Lawrence on 6 October, which he had conveyed that day to the coordinator.

[89] Mr Powell disagreed with what Ms Desmond was proposing, which he saw as a poor solution, and it was necessary for him to convey that view to her. In ASMS's submission it was important to note this was not done in the context of a disciplinary situation: it was in the context of the Executive Director explaining to a senior manager his reasons for staying with a course of action to which she had previously agreed.

[90] I accept the Association's submission. There is no doubt Ms Desmond would have been very disappointed to receive Mr Powell's 12 October letter. The content is direct, clear and forceful. It left Ms Desmond in no doubt where the Executive Director stood in relation to her proposal, and his reasons for taking that approach.

[91] In the context of the 10 October meeting that preceded it, I find the letter did not breach the employer's duty to Ms Desmond. Mr Powell was clearly shocked in the meeting at Ms Desmond's proposal to change the approach that had been agreed on 6 October regarding the temporary cover for Ms Lawrence's parental leave. He took time to respond in writing to Ms Desmond's proposal and to set out unambiguously his reasons for not agreeing to a reversal of the approach that had been agreed and already conveyed to the employee it affected.

[92] The letter reflects Mr Powell's strong reaction in particular to Ms Desmond having in part justified her proposal by criticising the coordinator's approach to her E tū union delegate for assistance. I find it was reasonable for the Executive Director to give a clear indication that he regarded this as unacceptable. It was important to Mr Powell as the Executive Director of a union to correct any misapprehension held by one of its senior executives over the right of an employee to seek advice or assistance from her own union when an employment issue arose.

[93] In the context in which the letter of 12 October was written I do not regard it as constituting a breach of ASMS's duty to Ms Desmond or to have disadvantaged her.

[94] As the most senior executive of the Association, Mr Powell asserts he had the right to make the final decision over the cover to be provided for Ms Lawrence's parental leave. I accept he had that right and that he would not routinely intervene in administrative decisions that came within the Executive Officer's jurisdiction. The circumstances in this instance were not normal, however, and in my view Mr Powell acted reasonably in becoming involved in the matter following the 4 October incident. I do not consider his involvement was intended to, or did, undermine Ms Desmond.

[95] I have considered, and reject, Ms Desmond's claim regarding her employer's refusal to engage in urgent mediation over the matters referred to above. The evidence does not support the assertion that ASMS rejected mediation. It shows Mr

Powell initially proposed alternative options for resolving the matter through discussion either with Ms Desmond alone or with the assistance of the administration team's development coach.

[96] The day after Ms Desmond had made it clear, on 15 October, that she would not accept an alternative option and was considering what to do, Mr Powell asked for Mr Woods' advice. This resulted in Mr Woods discussing mediation with Ms Desmond that same day and finding her receptive to the idea.

[97] On Tuesday 17 October Ms Desmond agreed to consider attending mediation on Thursday 19 October. The fact that mediation did not occur was because Ms Desmond decided it was too close to annual leave she had scheduled to start on Friday 20 October and she had reservations about the proposed mediator. In those circumstances I do not find it is accurate to characterise ASMS's position as refusing urgent mediation.

[98] Ms Desmond also submits her employer failed to be active, constructive and communicative and that it breached its duty of trust and confidence. I am not persuaded the evidence regarding the chain of events that I have set out in some detail earlier in this determination supports such assertions. There was a great deal of communication between the parties in the lead up to Ms Desmond's notification on 18 October that she considered her employment to be at an end "...in the meantime at least..".

[99] While the wording of her notification suggested there may still be an opportunity to resolve matters and restore the employment relationship following Ms Desmond's return from leave, that avenue was closed six days later when she notified her personal grievances for constructive dismissal and unjustifiable action.

[100] I have considered Ms Desmond's submissions regarding the cumulative effect of the actions she has alleged ASMS took or failed to take which constituted breaches of its contractual duty to her. She placed those matters in the context of following an earlier situation that had strained relationships with the Executive Director and Deputy Executive Director.

[101] After carefully considering the evidence I find ASMS took appropriate steps to repair any strained relationship issues Ms Desmond had that survived the 2015

and early 2016 situation involving a former employee which had unsettled the Association office. ASMS recognised Ms Desmond was stressed and provided EAP assistance to her. It then provided an extensive and generous overseas sabbatical.

[102] The Association acted in good faith towards Ms Desmond in that earlier situation and I find it acted fairly and reasonably in the series of events from 4 October leading to her departure from employment with it.

### **Conclusion**

[103] For the reasons given above I find Ms Desmond was not constructively dismissed. Nor was she unjustifiably disadvantaged by any actions of her employer. Her claims are dismissed.

### **Costs**

[104] The issue of costs is reserved.

**Trish MacKinnon**

Member of the Employment Relations Authority