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Hutchison v Nelson City Council [2014] NZEmpC 117 (9 July 2014)

Last Updated: 31 July 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2014\] NZEmpC 117](#)

CRC 9/13

IN THE MATTER OF a challenge to a determination of
 the
 Employment Relations Authority

BETWEEN ROBYN ANN HUTCHISON
 Plaintiff

AND NELSON CITY COUNCIL
 Defendant

Hearing: 9, 10 and 11 June 2014
 (heard at Nelson)

Appearances: H Flower, agent for the plaintiff
 M E Kirk, counsel for the
 defendant

Judgment: 9 July 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Ms Robyn Hutchison commenced work at the Nelson City Council (NCC) as an Executive Assistant (EA). Her employment commenced on 30 May 2011 and continued until her dismissal on 13 December 2011.

[2] Not long after she commenced work, issues as to the scope of her duties and the way she was carrying them out arose between her and those to whom she reported. She attempted unsuccessfully to have them resolved. Ms Hutchison became very distressed about her circumstances, as well as those of a colleague, J,¹

who died suddenly. She felt that she – and J – had been bullied.

¹ J's name, and the manner of his death, is the subject of a non-publication order.

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CRC 9/13 [9 July 2014]

[3] For its part, NCC was concerned as to Ms Hutchison's behaviour and certain email irregularities which had been discovered. A disciplinary process was commenced with her suspension; it was followed by an exchange of letters on all matters of concern, as well as two lengthy meetings. Eventually Ms Hutchison was dismissed following findings of serious misconduct.

[4] Sometime later she decided to pursue a personal grievance that her dismissal was unjustifiable. She lodged a statement of problem with the Employment Relations Authority (the Authority). The Authority identified a preliminary issue as to whether Ms Hutchison had raised her personal grievance within the 90-day period provided for in [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). The Authority determined that although counsel acting for her had written to NCC within time recording that a personal grievance was

being raised, the letter lacked the

necessary detail to be effective.² She applied under [s 114\(3\)](#) of the Act for leave to

raise her grievance after the expiry of the 90-day period. The Authority declined leave.³

[5] Ms Hutchison brought a challenge to that determination. The Court concluded that the challenge was partially successful.⁴ Ms Hutchison's application under [s 114\(3\)](#) of the Act was granted in respect of her personal grievance that she was unjustifiably dismissed. Any claim, however, for a separate personal grievance based on disadvantage arising from actions prior to her suspension would be out of time.⁵ The Court ruled that the employment relationship problem between the parties was now before the Court.⁶ The Court therefore conducted a hearing with regard to the dismissal grievance.

The facts

[6] On 30 May 2011, Ms Hutchison commenced work as an EA to

Mr Alec Louverdis (Executive Manager, Network Services) and Mr Geoffery Mullen

² *Hutchison v Nelson City Council* [2012] NZERA Christchurch 208.

³ *Hutchison v Nelson City Council (No 2)* [2012] NZERA Christchurch 280.

⁴ *Hutchison v Nelson City Council* [2013] NZEmpC 184

⁵ At [47].

⁶ At [43].

(Executive Manager, Community Relations). The role was part-time at 25 hours per week.

[7] Ms Hutchison was employed under an individual employment agreement which set out her terms and conditions of employment. Appendix 1 to the contract was a job description, which relevantly stated that the EA was to provide diary, administrative and research support to the two Executive Managers.

[8] Also appended to the agreement was a Staff Information Handbook, to which reference will be made later. The parties did not place a signed copy of the employment agreement before the Court, but the evidence suggested that Ms Hutchison accepted these terms and conditions prior to the commencement of her employment.

[9] Ms Hutchison's position was newly established. Ms Hutchison's uncontested evidence was that it was agreed by the Executive Managers that they would work with her to define and clarify specific duties, since the job description was "generic in nature".

[10] Fairly quickly Ms Hutchison became frustrated by the fact that little progress was made over a period of some three months in clarifying how she was to undertake her role. She felt she was performing random tasks on an "on-demand" basis. Meetings with each Manager were sporadic and sometimes cancelled. The Managers themselves also concluded at an early point that a cohesive working relationship would not be easily achieved.

[11] Soon after the commencement of employment, Ms Hutchison was required to attend, as note-taker, a series of performance management meetings in respect of another employee, J. The performance management meetings had commenced prior to Ms Hutchison becoming an attendee. Mr Mullen was managing these issues. A question in that context was whether health issues were impacting on J's performance. Ms Hutchison became concerned and disturbed by what she perceived as a harsh approach being taken by Mr Mullen. It seemed to her that J was being

"accused, criticised, belittled and generally treated with derision". The meetings which she attended took place on 10 June, and 14 and 20 July 2011.

[12] By early August 2011, difficulties between Ms Hutchison and her managers had become more pronounced. For her part, Ms Hutchison wrote a series of emails outlining her concerns as to what was being required of her; she said, in short, that she was not feeling supported.

[13] Mr Louverdis told Ms Hutchison that his preferred choice of communication was not by email, but by face-to-face communication. He said that he would not be responding to emails. He became increasingly concerned that there was an issue which he described as being an inability on the part of Ms Hutchison to respond to simple every-day tasks, and to follow simple instructions. Mr Louverdis was also concerned that in interactions with other staff, Ms Hutchison had undermined him as an Executive Manager. He confronted Ms Hutchison about this on 22 August 2011.

[14] Mr Mullen had different concerns. He felt that in the early stages of her employment, problems had emerged with regard to Ms Hutchison's ability. He thought she had a lack of cultural insight and an inability to follow direct instructions, an inability to think outside the square or to work as part of a team, and a lack of insight as to the effect she was having on others.

[15] On 23 August 2011, Ms Hutchison and Mr Louverdis discussed the difficulties which had arisen. Amongst other things, Mr Louverdis raised the possibility of Human Resources (HR) staff becoming involved. Ms Hutchison sent an email to an HR Administrator with whom she had been sharing her concerns as to this possibility. Her colleague said she would raise the issue with Mr Stephen Gully, a long-serving HR Manager.

[16] Ms Hutchison then visited Mr Gully on 26 August 2011. She said that by this time she was very distraught. She showed him an email which she had drafted to send to Mr Louverdis which outlined the underlying issues as to what she said was a breakdown in their relationship. She felt that no steps had been taken to address the issues, and she was now hurt, confused and at a loss to know what to do. She

became emotional in the course of the meeting. Mr Gully advised her that it would be preferable for her to talk to Mr Louverdis rather than sending an email. Mr Gully did not offer any other assistance at that stage. Ms Hutchison felt that Mr Gully showed little concern. Mr Gully said he was keeping the situation under review, and was waiting to see if there was a further approach from either Mr Louverdis or Ms Hutchison.

[17] On 29 August 2011, Ms Hutchison sent an email to Mr Gully stating that she had arranged a “catch-up meeting” with Mr Louverdis that morning, but that he was dealing with other matters, and would drop by when ready; she told Mr Gully that if mediation was now the only avenue open to resolve the issues, this should happen at the earliest opportunity. She felt that it was unfair for her to be left wondering what would happen whilst Mr Louverdis continued to be more and more demanding in his management of her activities.

[18] Later that day she sent Mr Louverdis an “off-the-record” personal email indicating that she was finding the situation very difficult, and acknowledging that it could not be easy for him. She said she was sorry if he still believed that she had undermined him; she herself had forgiven him for a particular hurtful remark which he had made. She suggested that they speak the following day.

[19] This appears to have occurred because on 30 August 2011 Ms Hutchison sent an email to Mr Gully stating there had been a lengthy discussion with Mr Louverdis and that they managed to “reach a level of understanding that allows us to move forward on a more positive footing.”

[20] On 2 September 2011, Ms Hutchison became aware that J had died the previous day. She was deeply distressed by this event which she regarded as a tragedy. She discussed her reactions with the NCC Chaplain. She told the Chaplain that she could, through her personal experiences, relate closely to J’s likely sense of powerlessness and vulnerability during the time that he had come under what she perceived as being harsh scrutiny in the performance management meetings.

[21] The circumstances of J’s death were referred to the Coroner. Ms Hutchison said she believed she would eventually be called as a witness in any Coronial Inquest, although her contemporaneous documents do not refer to such a concern.

[22] On 13 September 2011, Ms Hutchison sent Mr Louverdis an email stating that she would not be coming in to the office that day because she had obtained very little sleep and was suffering a severe headache. She also said that she was finding it difficult to manage on her current salary, and that she was looking at options for increasing her income and would appreciate any thoughts he might have had in that regard. She and Mr Louverdis met the next day. In a memorandum which he prepared some weeks later he said that he reminded her that the part-time nature of the role had been discussed when she was interviewed for the job and that this was accepted by Ms Hutchison. He later said “this raises the issue for me as to whether Robyn can in fact focus on what she is meant to do if the hours are not suited for her.” For her part, Ms Hutchison felt Mr Louverdis offered no solutions, and was somewhat confrontational.

[23] On 16 September 2011, there was an exchange between Ms Hutchison and Mr Louverdis as to whether she would need to attend a meeting of the Parks and Facilities Business Unit to discuss a particular issue. She agreed with Mr Louverdis that her attendance was unnecessary at the meeting. However, she subsequently concluded that the Unit Business Manager wished to have her present; she thought she should attend in the absence of any instruction to the contrary. The matter was then discussed between Ms Hutchison and Mr Louverdis in the presence of the relevant Manager. Mr Louverdis took the view that the issue was being “re-litigated” in front of the Manager and that this served to undermine him as an Executive Manager.

[24] As a result of what Ms Hutchison characterised as a heated exchange, she became very distressed. She went to see Mr Gully, telling him that she was being bullied. She said that Mr Gully showed little concern.

[25] On Sunday, 18 September 2011, Ms Hutchison sent emails to work colleagues which were impliedly critical of Mr Louverdis. One was of a satirical nature. Other misunderstandings arose during the remainder of September.

[26] By early October, Ms Hutchison felt that there were unclear boundaries and expectations with regard to her position, insufficient time to meet demands, and poor communication with the Managers for whom she was working, as well as other issues.

[27] On 3 October 2011, Ms Hutchison contacted Ms E Svarc, a HR Advisor, to facilitate a meeting to resolve the issues between herself and Mr Louverdis. This was scheduled for 5 October 2011. However it did not take place because Mr Louverdis was ill.

[28] On 4 October 2011 Ms Hutchison forwarded a number of private emails from her work computer to her home email address. The emails included minutes of three of the performance management meetings relating to J which she had attended as note-taker. In her evidence she told the Court that these emails were forwarded to her home address “for reasons not totally understood by me at the time (other than the pressure I was feeling on a daily basis).”

[29] On 5 October 2011, Ms Hutchison met with Mr Mullen. In an email she forwarded to him later that day, she said she was grateful for being able to express “very painful feelings that I have been enduring for what seems like an eternity”. She felt that issues between her and Mr Mullen could be resolved directly between them. She implied that these particular issues were separate from those which involved Mr Louverdis. An induction meeting had been proposed for

7 October 2011, but Mr Louverdis would be away. She did not know whether or not the meeting would proceed. She concluded her email by saying she was “no-one’s enemy and [sought] only to be an instrument of positive change as and where I am able”.

[30] On 6 October 2011, Ms Hutchison emailed her Managers, Ms Svarc, and

another colleague stating that she was feeling "... very stressed, fatigued and quite

depressed". She said this was a direct result of protracted and unresolved conflict with Mr Louverdis, and she was now at the point where she needed to see her General Practitioner (GP). However, the proposed induction meeting was scheduled for the following day; in a further email exchange with Ms Svarc she said that it was critical to proceed with the meeting if at all possible. If need be she would attend the workplace for the purposes of the meeting only.

[31] In fact, her GP certified her as medically unfit for work purposes for a period of two weeks, and the meeting did not go ahead on the following day. Ms Svarc considered it would be preferable to consider other options, such as counselling or engaging the assistance of a mediator, and deferring the meeting until she was well enough to return to work.

[32] In the event, a mediation meeting was arranged for 14 October 2011. In anticipation, and because her employment situation was becoming more complex, Ms Hutchison obtained the support of an organiser from the Nelson Public Service Association (PSA), Mr M Cunliffe.

[33] On the morning of Saturday, 8 October 2011, Ms Hutchison forwarded from her work email address to her home email address a further record of a meeting with J which had occurred on 27 July 2011. She had not attended this particular meeting as a note-taker.

[34] In the lead up to the mediation on 14 October 2011, there were email exchanges between Ms Hutchison and Mr Gully. Mr Gully acknowledged that Ms Hutchison had become stressed, fatigued and depressed; and that she had described health and financial problems. A delay in respect of her induction meeting had given rise to issues that needed resolution. It was acknowledged that she wanted clarity as to what was expected of her from her line managers.

[35] Mediation duly took place on 14 October 2011. The issues were not resolved. Later that day Mr Gully wrote to Ms Hutchison stating that NCC now had serious concerns about Ms Hutchison's conduct, and potential breaches of her terms and conditions of employment. Advice as to allegations and the investigative

procedure that would follow would be given as soon as possible. It was acknowledged that she was on sick leave and not expected to return until

21 October 2011.

[36] On 17 October 2011, Ms Hutchison sent an email to the Chief Executive

Officer of NCC asserting that she was a victim of workplace bullying. She said:

I have been on sick leave for the past two weeks, recovering from the effect of being forced to endure others' destructive behaviour towards me for quite a lengthy period and now, it would appear, that I am being perceived as the problem!

[37] The evidence establishes that at about this time NCC had become aware of the fact that work emails had been sent by Ms Hutchison to her home email address. Mr Gully told the Court that he could not now recall why information technology staff were asked to check through the plaintiff's emails, but this must have occurred at about this time because the discovery of the email issues led to the events which are about to be described.

[38] On 20 October 2011, Ms Hutchison wrote to the Chief Executive, advising him that there had been "a most shameful example of workplace bullying". She then referred to anticipated disciplinary action, and implied that this related to an email transgression which she said would have been miniscule when compared to the considerable personal email traffic that Mr Louverdis had conducted through the Council system for many months. She asked to meet with the Chief Executive with regard to her concerns.

[39] On 21 October 2011, Ms Hutchison and Mr Cunliffe as her supporter met with Mr Gully and a note-taker. Prior to the meeting, she had obtained a further medical certificate from her GP which stated that she considered Ms Hutchison to be medically fit to return to work, although the GP went on to say:

I would recommend that measures are taken to reduce emotional stress in the workplace to prevent further health issues.

[40] The record of the meeting confirms that:

Ms Hutchison had provided a copy of her medical certificate to

Mr Gully which he took time to consider.

The Chief Executive had forwarded to Mr Gully the emails

Ms Hutchison had sent to the Chief Executive previously (17 and

20 October); Mr Gully said he consequently had a strong idea of the cause of Ms Hutchison's emotional stress in the workplace.

It was confirmed that there were a range of issues which Ms Hutchison wished to raise with NCC, and that she had endeavoured to initiate a process for dealing with these by writing to the Chief Executive. This

included workplace bullying.

Mr Gully expressed the view that given the numerous previous communications, the imposition of a suspension would mitigate and reduce Ms Hutchison's emotional stress in the workplace.

He stated that the latest matter of serious concern was the emailing of records relating to J on 4 October 2011.

It was proposed that Ms Hutchison be suspended immediately on pay until further notice.

Ms Hutchison and her representative asked for the allegations to be placed in writing; Mr Cunliffe stated that the suspension was "prejudicial".

The "paid leave of absence" would mean that Ms Hutchison was not required to carry out any work either from the workplace or her home, and would stand down until advised otherwise. She would be required to attend disciplinary meetings.

[41] Later that day, Ms Hutchison sent an email to the Coronial Service Coordinator in relation to a proposed inquest for J. She said she had information

which may be of interest to the Coroner "with respect to the upcoming inquest". The Coordinator replied on 25 October 2011 stating that it was too early to say when the inquest would be but that it would be helpful to the Coroner if she could submit a report with her information, so that the Coroner could determine what, if any, further enquiries she would need to make. On 27 October 2011, the Coordinator advised her that the Coroner had directed the Inquest Officer to take a statement from her, and that the relevant Police Officer would be in touch with her shortly.

[42] On 27 October 2011, a lawyer now appointed for Ms Hutchison, Ms A,⁷ wrote to Mr Gully indicating that she had been consulted with regard to Ms Hutchison's employment issues. She stated that she understood Ms Hutchison had been suspended over a matter relating to emails, and that Ms Hutchison had raised concerns with NCC over allegations of managerial bullying and harassment in the workplace. She had accordingly suggested that the parties attend further mediation to discuss these issues.

[43] On 31 October 2011, Mr Gully wrote a comprehensive letter to Ms Hutchison. He said that there were five allegations which suggested that Ms Hutchison's conduct had brought about a breakdown in the essential relationship of trust and confidence between her and NCC. These included:

(i) *Failing to act to the required standard as an Executive Assistant to Mr Louverdis*: this allegation was based on a memorandum prepared by Mr Louverdis on 14 October 2011, which raised assertions as to technical competency and a failure to follow simple instructions, inappropriate behaviour and manipulation; and undermining Mr Louverdis as an Executive Manager. Copies of emails sent by

Ms Hutchison to Mr Louverdis⁸ were incorporated as part of the complaint.

(ii) *Unsatisfactory conduct as EA to Mr Mullen*: this was based on a memorandum from Mr Mullen also dated 14 October 2011, referring to

⁷ The lawyer's name is in this decision anonymised, since Ms Hutchison made significant criticisms of her that she as a non-party cannot answer.

⁸ As summarised at [13] above.

matters which he described as issues of trust and confidence. These were based on the factors referred to above.⁹

(iii) *Inappropriate communications with staff*: this allegation was based on an assertion that various emails sent by Ms Hutchison in September to colleagues implicitly criticised NCC management, sought to undermine her direct report managers, attempted to be divisive, and attempted to generate a lack of confidence in management generally.

(iv) *Breach of duty of good faith*: it was alleged that Ms Hutchison had emailed from her home email address to her work email at NCC documents that were considered destructive and harmful to a good and productive employment relationship; the emails included a satirical email, two documents Ms Hutchison had prepared about her direct line managers and the difficulties she was experiencing, and an email relating to the phenomenon of workplace bullying. The letter went on to assert that there had also been a breach of Ms Hutchison's obligations as to confidentiality by the emailing from her work address to her home email address the attachments that were minutes of meetings in respect of J which she had attended as note-taker.

(v) *Breach of terms and conditions with regard to secondary employment*: it was recorded that Ms Hutchison had obtained consent so that she could undertake secondary employment with the Cawthron Institute; but that she had obtained secondary employment with another entity without first obtaining consent of the Chief Executive.

[44] The letter stated that the first three matters, if substantiated could support a conclusion which would range between misconduct

and serious misconduct; that the fourth matter, if substantiated, could constitute serious misconduct; and that if the fifth matter were substantiated it was likely to constitute misconduct. Potential outcomes ranged from a warning through to summary dismissal. A meeting to

discuss the foregoing was proposed.

9 As summarised at [14] above.

[45] On 2 November 2011, the parties attended a second mediation, but no resolution was agreed.

[46] The disciplinary meeting was set down for 8 November 2011 but delayed to

9 November 2011 at Ms Hutchison's request. Those attending the meeting were Ms Hutchison and her lawyer Ms A, the NCC "decision-makers" Mr Gully and Mr Kettlewell, and an NCC representative, Mr Sanders. Ms A spoke to a letter of that date at the meeting, and provided a copy to NCC the following day. A transcript of the meeting is in evidence. It is evident that Ms A attempted to control the meeting and was somewhat assertive. In summary, Ms Hutchison's position in relation to the five allegations were that:

(i) *Failing to conduct herself to the required standard as an EA to Mr Louverdis*: a rebuttal was given in respect of the various (relatively minor) issues relating to the assertion that there was technical incompetency and a failure to follow simple instructions. As regards alleged inappropriate behaviour, it was stated for Ms Hutchison that after four months of being in her job, she was still not properly informed as to what she was required to do. Undermining was denied.

(ii) *Unsatisfactory conduct in the role of EA to Mr Mullen*: it was asserted that the issues raised confirmed the lack of support that had been offered to Ms Hutchison in her role. In particular it was noted that whilst Mr Mullen had stated that Ms Hutchison had "run down" Mr Louverdis, what had actually occurred was that, on a number of occasions, Mr Mullen had enquired as to the state of communications between her and Mr Louverdis, to which she gave honest and frank responses. These had been statements made in confidence, and it was now of concern they were being used against her in the disciplinary process. Rebuttal on other relatively minor performance issues was given.

(iii) *Inappropriate communications with other staff*: it was contended that

Ms Hutchison was justified in communicating with other staff

members; and that the email exchanges identified workplace issues which confirmed bullying, harassment and a lack of managerial support. It was noted that no steps had been taken by NCC to investigate these concerns, and Ms Hutchison had instead been criticised for expressing them.

(iv) *Breach of the duty of good faith*: in respect of the allegation that Ms Hutchison had acted inappropriately by emailing documents from an external email address to her NCC address, it was suggested that she was again being treated in a punitive way because she had raised concerns regarding what she believed was bullying by her Manager. The various emails she had sent had to be seen in that context. As regards the emails she had sent from NCC to her home email relating to J, it was stated that whilst Ms Hutchison was not required to work from home, systems were in place to enable employees to take this initiative. She had, on occasion, emailed minutes to complete over a weekend due to the difficulties of completing an anticipated workload within the hours she spent at the workplace. It was explained that she had been a note-taker in respect of three of the meetings regarding J, and that in respect of a fourth the note-taker had prepared notes and emailed them to Ms Hutchison for editing. They were then saved to the Tardis System. It was not accepted that there was a breach of confidentiality. The letter from Ms A stated that Ms Hutchison had emailed notes to her home computer so she could view them, and ensure they properly reflected the exchanges that took place. It was also stated that she had not received support from NCC following J's death, and that she had to deal with the trauma of that situation on her own.

(v) *Breach of terms and conditions relating to secondary employment*: it was explained that because Ms Hutchison worked only 25 hours per week, it was necessary for her to supplement her income. She opted to work with a particular external entity where there was no conflict of interest with the work of NCC. The work was trialled for a one-week period only, and that did not seem to her to warrant disclosure to NCC.

In summary it was contended that the various claims made were petty and mundane, and were in the nature of a "witch-hunt" so as to lead to the termination of her employment. Regrettably, it was said, Ms Hutchison's workplace concerns had not been properly addressed.

[47] On 11 November 2011, having been contacted by a Police Officer, Ms Hutchison attended the Nelson Police Station where she made a statement with regard to her observations at the meetings involving J. She provided a set of the meeting notes which she had previously emailed to her home email address. Included in the witness statement was an observation that she thought management had been "really harsh" towards J, and that he was constantly being criticised with no positive comments from management.

[48] On 21 November 2011, NCC responded to the responses given by Ms Hutchison at the meeting on 9 November, and in the letter sent by her lawyer on that date. With regard to the five allegations the following comments were made:

(i) *Failing to act to the required standard as an EA to Mr Louverdis*: a further memorandum had been obtained from Mr Louverdis, who disputed many of the responses relating to various performance and competence issues, and as to inappropriate communication. In particular he maintained his assertion that Ms Hutchison had undermined him. It was his view that the responses gave him no confidence in Ms Hutchison's technical ability, or in her ability to represent himself and Mr Mullen. He said her actions had seriously breached his trust in her. The covering letter developed these themes.

(ii) *Unsatisfactory conduct as EA to Mr Mullen*: further responses had also been obtained from Mr Mullen and he too adhered to his criticisms of Ms Hutchison.

(iii) *Inappropriate communications with other staff*: Mr Gully expressed the view that the responses were concerning because Ms Hutchison demonstrated no insight.

(iv) *Breach of duty of good faith*: the current view was that Ms Hutchison's explanations regarding the emailing of minutes of meetings with J could not be accepted. Viewed with other allegations, the preliminary view had been formed that Ms Hutchison emailed the documents to herself to use to the Council's detriment at some future date. In summary, it was not accepted that it was her intention to work on the minutes at home – particularly as she did not actually edit them in any event. The minutes were considered sensitive, confidential and were NCC property. The allegation had not been addressed to the employer's satisfaction.

(v) *Breach of terms and conditions relating to secondary employment*: whilst it had previously been considered that this matter was an issue of "mere misconduct", having regard to a clause in the employment agreement, it was now regarded as potentially constituting serious misconduct.

Mr Gully stated that a number of the responses were evasive or untruthful. An opportunity to provide further responses was given.

[49] This resulted in a further meeting being conducted on 2 December 2011. The meeting was recorded and a transcript of it provided to the Court. Again the meeting was attended by Ms Hutchison and Ms A on the one hand, and Messrs Gully and Kettlewell as decision-makers for NCC, assisted by Mr Sanders as representative. It ran from 10.33 am to 1.08 pm. An opportunity was given for Ms Hutchison and her representative to comment on all topics.

[50] A significant topic related to the emails concerning J. In the course of the discussion, Ms A stated that she was instructed to say that Ms Hutchison had

provided a statement to the Police. When questioned about this issue:

Ms Hutchison stated that the statement had been made "quite recently",
in November.

Ms A stated that Ms Hutchison did not hand any copies over to the
Police. Indeed she said these had been destroyed, and any information

Ms Hutchison had on her home computer "was gone."

Ms Hutchison said that contact had been made with the Coroner and she was told that the Police would then be in touch. It was a
period of
weeks before they had contacted her.

Asked as to what the purpose of contacting the Coroner was, Ms Hutchison said that she had the burden of having observed
something that she considered would be of interest to the Coroner and wanted to pass it on. She said it took a lot of pressure off her to
hand
that information on.

Ms A stated that at no time was it Ms Hutchison's intention when she emailed the notes to make changes to them. It had been her
intention to review the notes and make sure they clearly and accurately outlined what had occurred. The emailing of the notes to her
home address was
"work related".

Ms Hutchison stated that if she was going to make a statement to the Police and she fully intended to do so at that time, she needed to
be aware of what had taken place; she accordingly required the minutes of a meeting which she had not herself attended (27 July
2011). Then, when asked if she was saying that the reason for obtaining the notes of the meeting of 27 July was to assist her in making a
statement to the Police, she said that this was "not necessarily so". She said it was only
part of the reason that the notes were sent to her home email address.

Asked to clarify whether she intended to make a statement to the Police when she emailed the notes, she responded that the issue
had been bothering her, and she anticipated that she would probably be called as a witness. She was concerned that if she did make a
statement to the
Police she would need to do so on an accurate basis. It would then be
up to the Coroner to assess the information.

Ms A stated that Ms Hutchison had been traumatised by J's death, and there was no counselling or other process for dealing with the
situation. She had had flashbacks about the situation and she therefore wanted to
look at the emails.

[51] All other issues were also discussed.

[52] On 6 December 2011, Mr Sanders wrote to Ms A stating:

- a) At the meeting on 2 December 2011 Ms Hutchison had acknowledged that she had sent meeting minutes to her personal email address, and did so “fully intending at that time to make a statement to the Police”. It was recorded that she had stated that she needed the minutes “to assist [me] in making the statement to the Police as it was bothering me, haunting me”.
- b) So far, Ms Hutchison had failed or refused to provide a copy of the email communications she had with the Coroner.
- c) NCC considered the confidentiality clause of the employment agreement precluded disclosures to any unauthorised person. The Police were not an authorised person in the circumstances.
- d) NCC had formed a preliminary view that this breach constituted serious misconduct which could give rise to summary dismissal. An opportunity to provide a response within 24 hours was given.

[53] On 7 December 2011, Ms A responded on Ms Hutchison’s behalf. Her letter stated:

- a) The reasons for forwarding the emails to her home address were associated with Ms Hutchison’s feelings of trauma following J’s death.
- b) A number of factors influenced her at the time, including an absence of counselling or support for those employees who had been directly involved with J.
- c) It would not be correct to say that at the time of emailing the minutes she was motivated by an intention to make a statement to the Police. That was initiated by the Coroner’s Office.
- d) At the time she was under significant work-related stress as a result of ongoing and unresolved issues between her and Mr Louverdis.
- e) It was suggested that NCC should give serious consideration to “exiting my client from her employment at a reasonable settlement threshold”.

[54] On 9 December 2011, Mr Gully and Mr Kettlewell wrote to Ms A with regard to the five allegations as follows:

- (i) *Failing to act to the required standard as an EA to Mr Louverdis*: the explanations as to certain minor performance issues were accepted, and there was insufficient evidence to make a finding with regard to “inappropriate behaviours and manipulation”. However the allegations as to undermining were substantiated.
- (ii) *Unsatisfactory conduct as EA to Mr Mullen*: it was concluded Ms Hutchison had made some adverse comments about her managers and to that extent the allegations were established. However, other matters were not sufficiently proven or were not established as conduct issues.
- (iii) *Inappropriate communications with staff*: the emails sent to other colleagues were implicitly critical of NCC management, and undermined Mr Louverdis. NCC remained concerned that Ms Hutchison could not understand the emails were inappropriate.

The above three matters constituted misconduct which was detrimental to the obligations of trust and confidence.

- (iv) *Breach of duty of good faith*: emails sent from Ms Hutchison’s home email address to her work email address were contrary to the obligation of good faith. The explanations regarding the minutes sent by Ms Hutchison to her home email address were not accepted as valid, and these actions were also regarded as being contrary to the obligations of good faith. The sending of all the emails constituted serious misconduct.
- (v) *Breach of confidentiality and obligation in employment agreement*: the decision-makers concluded that the making of the statement to the Police breached Ms Hutchison’s obligations of confidentiality. This constituted serious misconduct.
- (vi) *Breach of terms and conditions as to secondary employment*: the undertaking of unauthorised secondary employment constituted serious misconduct.

[55] It was concluded overall that Ms Hutchison’s conduct had brought about a breakdown in the essential relationship of trust and confidence. The employer’s interim decision was that summary dismissal should follow; any comment was to be provided by 12 December 2011.

[56] By this time, Ms Hutchison said that she was severely exhausted, acutely depressed and had been prescribed medication for anxiety. She felt the process had been combative, and that the exercise was largely futile. She accordingly instructed her lawyer not to engage in any further communications with NCC since she felt NCC was determined to dismiss her.

[57] However, on 12 December 2011 Ms A wrote to the Mayor stating that if Ms Hutchison was dismissed “the matter will undoubtedly attract widespread media attention”. Later that day Ms Hutchison herself advised her lawyer and a NCC employee that she intended to go to the newspaper the following day to submit a story.

[58] On the morning of 13 December 2011, Ms Hutchison wrote at length to the Chief Executive of NCC. She described the events that had occurred since she commenced working for the Council, and concluded that a viable working relationship between herself and the

Council had become untenable. She had therefore resolved to resign. She said that all she was now seeking was that she be offered a reasonable settlement figure so that she would not be faced with significant hardship, as well as the trauma of having been forced to endure “a toxic employment dispute”, during the time she would be seeking alternate employment.

[59] On 13 December 2011, Mr Gully and Mr Kettlewell wrote to Ms A and noted that no comments had been made with regard to their letter of 9 December 2011. Summary dismissal was confirmed with immediate effect. Ms Hutchison was reminded of the confidentiality provisions under the employment agreement which remained in place.

[60] Despite Ms Hutchison having referred to the possibility of going to the media, she did not do so; NCC managers, however, were concerned that she might.

[61] Evidence of subsequent events has been placed before the Court and will be discussed where relevant to the Court’s consideration of individual issues.

The plaintiff’s case

[62] In Ms Hutchison’s statement of claim dated 25 October 2013, she raised eight allegations; these were reduced to the following six when Ms Hutchison gave evidence:

- a) NCC failed in its duty of care to provide a safe working environment.
- b) NCC failed to comply with the statutory requirement “to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, are responsive and communicative”.
- c) NCC failed to communicate to the plaintiff in a timely manner that there were issues pertaining to the continuation of her employment.
- d) It failed to provide an opportunity for her to comment directly to Mr Louverdis with regard to the communication breakdown which had occurred.
- e) It failed to provide an opportunity for her to comment on the material taken from her work computer, prior to it being used in a disciplinary process.
- f) NCC had conspired to effect her dismissal and relied solely on circumstantial evidence to do so.

[63] In closing submissions, additional points were emphasised; they were in summary:

- a) Ms Hutchison had a moral duty to alert the Coroner to the circumstances of J’s situation.
- b) There were several work colleagues who should have been interviewed for the disciplinary process but were not.
- c) NCC did not consider Ms Hutchison’s state of mind following her treatment by her managers.
- d) The decision to dismiss was predetermined.
- e) It was submitted the decision of *Allen v C3 Ltd* was of assistance, and that its conclusions were applicable in the present context.¹⁰
¹⁰ *Allen v C3 Ltd* [2012] NZEmpC 124, [2012] ERNZ 478; this decision however related to s 113A of the [Employment Relations Act 2000](#) in its previous form.
- f) Although Ms Hutchison was unaware of the provisions of the [Protected Disclosures Act 2000](#) (the PDA) at the relevant time, her disclosures to the Police qualified for protection under that Act.
- g) [Section 78](#) of the [Coroners Act 2006](#) operated to protect Ms Hutchison’s disclosure to the Police.

The defendant’s case

[64] Submissions were made for the defendant which stated in summary:

- a) The requirements of [s 103A](#) of the [Employment Relations Act 2000](#) (the Act) were outlined. Particular reference was made to subs (5) which precludes the Court from determining that a dismissal is unjustified solely because of minor procedural defects. All good faith and fair dealing requirements under the statute had been met and there had been compliance with the principles of natural justice. The assertion that NCC had failed in its duty of care to provide a safe working environment was not satisfactorily established on the

evidence.

b) The allegation that NCC had not established and maintained a productive employment relationship was not established. The evidence showed the lengths to which NCC had gone to in an attempt to resolve the relationship issues.

c) The assertion of failure to communicate to Ms Hutchison that there were issues pertaining to the continuation of employment was not accepted; nor was there evidence to support it. Rather, it was submitted the evidence showed that NCC had reacted in a timely way to the issues which arose.

d) Regarding the assertion that there was a failure to provide

Ms Hutchison with an opportunity to comment directly to

Mr Louverdis on his concerns, NCC relied on the email of

30 August 2011 which suggested that “things were moving forward”. Ms Hutchison had not raised further issues of that kind until her email of 6 October 2011. The parties then agreed to, and did, attend mediation.

e) As to the assertion that there was no opportunity to provide comments as to the material taken from the work computer, it was submitted this was not supported by evidence because this issue was fully canvassed in the disciplinary process.

f) In respect of the assertion of a conspiracy on the part of NCC to effect Ms Hutchison’s dismissal by constructing serious misconduct allegations on the basis of circumstantial evidence, it was submitted the serious misconduct allegations were indeed substantiated and the conclusions were based on fact.

g) It was submitted that when describing her allegations and characterising NCC’s shortcomings, Ms Hutchison was prone to using extravagant and exaggerated language. Examples included the characterisation of the meetings with J where she had said that he was “being accused, criticised, belittled and generally treated with derision”; and that the treatment of him was “abusive”. She was incorrect to say she been subjected to “interrogation” and “ridicule”.

h) Detailed submissions were provided to support the conclusions of serious misconduct that were reached. In particular, it was submitted that NCC had reached a correct conclusion on the issue of breaching an employee’s privacy by sending documents to Ms Hutchison’s home email address; that the confidentiality clause of the employment agreement was breached by the disclosure to the Police; that the PDA did not apply because Ms Hutchison did not know about it at the time and did not purport to rely on its provisions; and that the conclusion with regard to secondary employment was correct because

Ms Hutchison had not obtained approval to work for an employer other than NCC and the contract deemed this to be serious misconduct.

i) Submissions as to remedies were also provided.

[65] The question of whether the PDA was relevant arose only at the hearing. Its provisions were not pleaded by Ms Hutchison. It emerged that she learned of the existence of this statute only two days prior to the hearing. It was, however, a topic that was traversed in evidence. The defendant’s Staff Information Handbook was produced which refers to the processes for making a protected disclosure, as was the defendant’s Protected Disclosure Policy. Leave was granted for the parties to file additional submissions dealing with this topic, and as to the application of [s 78](#) of the [Coroners Act](#) which was referred to for the first time by Ms Hutchison’s agent in closing submissions.

[66] In the plaintiff’s supplementary submission it was stated that regardless of whether or not there was a reference to the PDA, s 6A of that Act operated to relieve any technical failures with regard to a process which was, in effect, compliant with the relevant provisions of the statute. It was further submitted that the plaintiff had suffered retaliatory action as a result of her disclosure, so that [s 17](#) of the PDA operated. It was also submitted that the statement made to the agent of the Coroner is protected by [s 78](#) of the [Coroners Act](#), since Ms Hutchison became a witness under that Act when she made a statement.

[67] In the defendant’s supplementary submission it was stated that reference to the PDA was a late after-thought and that the provisions of the statute do not apply. In particular, there was no “serious wrongdoing” on the part of the NCC to qualify for protection under the PDA. Section 6A should not relieve any technical non-compliance because it only applies to minor defects in process. Nor could the plaintiff establish that there had been retaliatory action on the part of the employer which could be said to be linked to the disclosure. The defendant was justified to act as it did. It was submitted that [s 78](#) of the [Coroners Act](#) did not provide any legal right or entitlement to the plaintiff in her employment situation.

Discussion

[68] Ms Hutchison’s claim is that her dismissal was not justifiable. The test of justification is set out in s 103A of the Act, which provides:

103A Test of justification

(1) For the purposes of [section 103\(1\)\(a\) and](#) (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) 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 dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer,

the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable

opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's

explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[69] Before considering the particular grounds that the employer relied on to dismiss, it is necessary to consider the circumstances which applied at the time the dismissal occurred. I also remind myself that Ms Hutchison does not have leave to pursue a separate personal grievance based on disadvantage arising out of NCC's actions prior to her suspension.

Ms Hutchison's bullying assertions

[70] When the parties met on 21 October 2011, Ms Hutchison produced a certificate which recorded that she was medically fit but recommended that measures

should be taken to reduce Ms Hutchison's emotional stress at the workplace to prevent further health issues. This followed the clear description of the various workplace issues she gave to Mr Gully on 26 August and 14 October 2011; and of workplace bullying – a very serious allegation in the circumstances – which she described to the Chief Executive in emails dated 17 and 21 October 2011.

[71] Ms Hutchison's health was plainly affected by her work circumstances. That was evidenced by two medical certificates; Mr Gully said at the time of suspension that the primary causes of emotional stress were encapsulated in her two emails to the Chief Executive. NCC reached the conclusion, however, that the issue did not need to be explored as a workplace bullying complaint by Ms Hutchison because she was for the time being not present in the workplace.

[72] Indeed, it was concluded that her health issues would be relieved by suspending her. It should have been obvious that such a possibility was inherently unlikely, not least because it failed to consider the stress and anxiety which the fact of suspension would cause. Nor was consideration given to the obvious circumstance that the unsatisfactory dynamics which plainly existed in the workplace were relevant to the conduct issues which the employer had decided to investigate. The bullying and related communication issues which Ms Hutchison raised were obvious contextual matters which the employer needed to carefully consider, given the clear way in which they had been put in a succession of communications to her managers, to Mr Gully and to the Chief Executive.

[73] The disciplinary process failed to have sufficient regard to the factors which had caused Ms Hutchison's health issues, and failed to consider whether those issues were relevant to the conduct about which the employer was concerned. As a result, the process was procedurally unfair in a significant respect.

Email issues

[74] Against that background I turn now to consider the findings as to serious misconduct. As already mentioned, the first finding of serious misconduct arose from the forwarding of minutes relating to J's performance meetings, three of which

she had attended as a note-taker, and the fourth of which she did not attend. The evidence establishes that Ms Hutchison emailed the documents to her home email address on 4 October 2011 (when she was still at work) and on Saturday,

8 October 2011 (by which time she had obtained a doctor's certificate that she should be off work for two weeks). The explanations she gave subsequently ranged from needing to work on the minutes because she had insufficient time at work to edit them (despite her not being the note-taker in respect of one of the four documents); to knowing that there was going to be a Coroner's Inquest in respect of J

and wanting to ensure the notes were clearly reflective as to what had occurred. She also told the Court that she did not understand her reasons for having forwarded the meeting notes.

[75] The meeting notes were forwarded at a time when she was stressed and fatigued to the point of being medically unfit for work. But there was an element of subterfuge in her actions, in that she appears to have attended the workplace on a Saturday to forward a set of meeting notes relating to a meeting that she had not attended. Her contemporaneous communications – particularly those sent to the Chief Executive on 17 and 20 October 2011 – show that the focus about this time was on workplace bullying. Although she considered that J had also been the subject of workplace bullying I find that the forwarding of the emails was potentially for her own purposes, not because she intended to forward them to the Coroner. Indeed, it is her position that she only provided information to the Coroner’s agent, the Police, when specifically requested to do so by the Coroner.

[76] Ms Hutchison was unaware of the provisions of the PDA,¹¹ or NCC’s Protected Disclosures Policy. She had been provided with a Staff Handbook which referred to the policy; and the policy was available on NCC’s intranet. But she was not cognisant of it until shortly before the hearing and did not contend at the time in the investigation meetings that she had acted pursuant to it. Of the very many points that were made on her behalf by her lawyer, the fact that she may have been acting

under the PDA was not one of them.

¹¹ A full analysis of that statute was recently carried out by this Court in *Bracewell v Richmond*

Services Ltd [2014] NZEmpC 111.

[77] That is not necessarily fatal, because s 6A relieves failures to comply with or refer to the PDA if the essential requirements of s 6 of that Act are established. But one of the essential prerequisites under s 6 is that the employee must wish to disclose information so that serious wrongdoing can be investigated.¹² I find that Ms Hutchison did not hold such an intention at the time the meeting notes were forwarded to her home email address. The focus of Ms Hutchison’s activities was on

her own circumstances.

[78] The employment agreement contained the following provision as to confidentiality:

You agree, during the period of your employment or at any time thereafter, not to disclose to any unauthorised person confidential Council information. You further agree not to make use of any information, process, papers or documents to which you may have access, during the period of your employment or at any time thereafter except on behalf of the Council.

[79] The removal of documents relating to a confidential performance management process of a former employee was, on the face of it, a clear breach of the confidentiality provision given that Ms Hutchison intended to use them.

[80] Of concern, however, is that NCC did not adequately factor into its assessment of this breach the contextual circumstances already referred to – the health issues Ms Hutchison was suffering and the reasons for those issues. She believed she had been and was being bullied. She had received medical advice on that matter. There was a plain statement from her doctor to the effect that the stress in the workplace needed to be reduced. The employer understood and acknowledged those issues. None of these factors were considered, and should have been. Had that happened, a fair and reasonable employer could not have concluded that serious

misconduct had occurred.

¹² [Protected Disclosures Act 2000](#), s 6(1)(c).

The statement to the Coroner

[81] The next finding to be considered relates to the statement Ms Hutchison made to the Police on behalf of the Coroner. NCC found that she disclosed confidential information to an “unauthorised person”.

[82] It is to be noted that in the course of the investigation process, Ms A told the employer on 2 December 2011 that Ms Hutchison did not hand any copies of the minutes to the Police; Ms A stated that they had been destroyed and that the information she had on her home computer was “gone”. This statement was wrong. Ms Hutchison told the Court that the statement was not made on her instructions, but that she had to “run with it” once the statement was made. It is a matter of regret that the lawyer made an unauthorised statement; but it is also of regret that Ms Hutchison did not correct the statement once it was made.

[83] It also appears that Ms Hutchison was asked to provide copies of her communications with the Coroner. It is a further matter of regret that she did not do so. NCC was entitled to know what the Police had been told about matters that had occurred in the workplace. It will be necessary to return to these matters later.

[84] It was submitted that Ms Hutchison’s perceptions as to what she had observed in meetings where she was a note-taker where she felt J had been treated very unfairly fell within the description of oppressive conduct amounting to serious wrongdoing under s 9 of the PDA.

[85] However, Ms Hutchison did not describe the information she conveyed to the Police – including the documents she had obtained – as a whistle-blowing act. Rather, she described it as being a situation where she had informed the Coroner’s Office that she had information that could be of interest to the Coroner. The Coroner through the Coronial Services Coordinator then advised her that an Inquest Officer had been directed to take a statement from her. The Coroner requested information and she provided it.

[86] As NCC recognised in its letter of 6 December 2012, the issue was whether the Police, as agent of the Coroner, could properly be

regarded as “an unauthorised person” for the purposes of the confidentiality clause of the employment agreement. The clause does not state that an approval must be given by NCC. It would need to say so if that was intended. The question is whether there was any legal means which would justify the disclosure of confidential information by the employee.

[87] It was submitted for Ms Hutchison that she acquired the immunities of a witness at a court of law, having regard to statutory protection to that effect created by [s 78](#) of the [Coroners Act](#). That immunity is an immunity from suit.¹³ What is at issue in this case is not whether there is an immunity from suit, but whether a reasonable employer could conclude that there had been a breach of the confidentiality provision of the employment agreement. [Section 78](#) is of limited relevance in the present case. If an employer issued proceedings against an employee alleging a breach of a non-confidentiality provision because that person

had given evidence to a Coroner, the employee would be protected. But that is not the case here.

[88] It is clear from the provisions of the [Coroners Act 2006](#) that a Coroner has inquisitorial powers. Included in those powers are the provisions of [s 120](#) which provide that a Coroner may by written notice require a person to supply information, documents or other things. Although a notice in terms of [s 120](#) was not served on Ms Hutchison, there was a request that she participate in a formal process in respect of evidence which the Coroner would then consider. She met with a constable and provided a statement, which became evidence submitted to the Coroner for the purposes of an inquiry which had been opened under the Act.

[89] The purpose of the [Coroners Act](#) is to help prevent deaths and to promote justice through, inter alia, the conduct of fact finding investigations. Such investigations normally rely on the cooperation of potentially relevant witnesses; but if need be a witness summons can be issued. It would be contrary to justice for an

employer to conclude in those circumstances that if an employee were to provide

13 See *New Zealand Defence Force v Berryman* [2008] NZCA 392 (CA) at [67]- [68]; and *Meadow v*

General Medical Council [2006] EWCA Civ 1390; [2007] 1 All ER 1 (CA).

confidential information to a Coroner’s agent on request, that employee was acting in breach of a confidentiality provision such as applied in this case.

[90] If any issues as to confidentiality arose, a Coroner could resolve these by reference to the principles of [s 69](#) of the [Evidence Act 2006](#), by which a Court has an overriding discretion whether to admit confidential information having regard to a range of factors which must be evaluated and assessed. But it is unlikely there would have been any such difficulties since NCC itself provided information relating to J’s workplace circumstances to the Coroner.

[91] Furthermore, NCC did not investigate the assertion made by Ms Hutchison that the Coroner requested the confidential information. This omission was a further procedural flaw.

[92] NCC did not consider or investigate any of these significant issues. It should have. I find that a fair and reasonable employer could not have concluded that the disclosure of information to the Police was serious misconduct in these particular circumstances.

Secondary employment

[93] The final ground for dismissal relied on by NCC related to the fact that Ms Hutchison had undertaken secondary employment. Ms Hutchison had financial concerns. She alerted her employer to these on 13 September 2011. She then signed a contract with Homecare Direct Shopping on 16 September 2011, whereby she would undertake part-time distribution of household and personal products by direct selling activities in her private time. This was to be on a trial basis for one week. She undertook the trial and obtained a net income of \$20 after approximately 10 hours of input. She concluded that the work was not viable. She believed that there was no possible conflict of interest with regard to her responsibilities to NCC, and did not seek the prior written approval of the Chief Executive.

[94] The employment contract stated:

Before considering engaging in any outside, remunerative activity, you shall discuss such potential activity with the Chief Executive. If, in the opinion of the Chief Executive, no conflict of interest will arise with the employer or prejudice your responsibilities with Nelson City Council, written consent, along with any conditions, may be granted. Engagement in outside remunerative activity without authority shall constitute serious misconduct.

[95] Initially NCC took the view that this issue constituted misconduct. This was before it concluded that the clause meant that any unauthorised secondary employment constituted serious misconduct.

[96] However, I consider that the clause justifies a finding of serious misconduct where an employee undertakes unauthorised secondary work which generates a conflict of interest. There is no evidence that this was the case in this instance. Furthermore it was a restrictive covenant that inhibited the right to work and was accordingly void unless able to be justified on the grounds it was reasonable.¹⁴ In this case it was not.

[97] NCC knew Ms Hutchison wanted more work, and that she had obtained other work with the Cawthron Institute. She worked for Homecare Direct Shopping for a few days only before realising that it was not commercially viable. Her net income was miniscule. None of these factors were considered, and should have been. This was not an issue on which a fair and reasonable employer could have concluded serious misconduct had occurred.

Predetermination

[98] An allegation of predetermination is raised by Ms Hutchison. NCC undertook an elaborate process; I have reviewed the correspondence sent by NCC and the transcripts of two long disciplinary meetings carefully. The employer representatives went to some lengths to provide every opportunity for substantive responses to be given on all matters. On the face of it, the contemporaneous documents and the subsequent evidence do not disclose predetermination.

14 See *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97, (2013) 10 NZELC 79-029 at [37]-[40].

[99] The only basis for reaching such a conclusion would be to infer that by pursuing a rigorous investigation in the face of counter-allegations by an employee of workplace bullying, the employer was determined to reach the point where Ms Hutchison would be dismissed, and the bullying allegations would not have to be considered further. In the absence of any reliable evidence of such motivation on the part of the decision-makers, I am unable to reach a conclusion that there was indeed predetermination.

Conclusion

[100] Drawing all aspects of this matter together and applying the test provided by s 103A(2), I find that the decision to dismiss Ms Hutchison was beyond that which a fair and reasonable employer could have done in all the circumstances at the time, since none of the serious misconduct conclusions were appropriate, and that there were significant procedural defects. The dismissal was unjustifiable.

Remedies

[101] In the fourth minute to the parties dated 17 December 2013, it was recorded that the remedies sought by Ms Hutchison are:

a) Reimbursement of \$25,000 lost income for the period from 13 December 2011 to June 2012.

b. Compensation of \$30,000 for humiliation, loss of dignity and injury to her feelings.

c) Disbursements incurred in the proceedings before the Authority and the Court.

[102] The evidence establishes that:

a) Ms Hutchison's net earnings from her role at NCC were \$919.19 per fortnight. She claims lost wages from the date of dismissal, 13 December 2011.

b. Between 25 December 2011 and 11 June 2012 she obtained net income of \$1,158.90.

[103] Ms Hutchison confirmed she received income related benefits as from

21 December 2011. However, these are not relevant in the present context. Any accounting in respect of wages received for a period where social security benefits were previously paid is a matter to be resolved between the beneficiary and the Chief Executive of the Ministry of Social Development.¹⁵

[104] Ms Hutchison's evidence as to lost wages was to the effect that she undertook a number of initiatives in an attempt to obtain replacement work in the Nelson area in the early part of 2012. Ultimately she had to relocate to Wellington where she obtained work as from 11 June 2012. I am satisfied that she made reasonable efforts to mitigate her losses.

[105] In the circumstances I am satisfied that she should be paid wages from

21 December 2011 to 21 March 2012. No reasons were advanced that would justify an award for lost remuneration for more than three months, under s 128(3) of the Act. This award is subject to the finding I make below as to contributing behaviour.

[106] Turning to the claim for compensation, I am satisfied that Ms Hutchison was significantly traumatised and frustrated by the disciplinary process and her ultimate dismissal. Corroboration as to the humiliation, loss of dignity and injury to feelings she suffered was provided by the PSA organiser who supported her during the disciplinary process in part, and who continued to take a strong interest in her circumstances. The extent of her distress and humiliation is also evident from the tenor of emails she wrote following her dismissal, making it clear that the circumstances affected her deeply.

[107] In all the circumstances, I am satisfied that an appropriate award under this head pursuant to s 123(1)(c)(i) is \$12,000, subject to my findings as to contributing behaviour.

[108] I am required to consider the extent to which the actions of Ms Hutchison contributed to the situation that gave rise to the personal grievance in this case.¹⁶

Significant problems arose in the working relationship; these difficulties were escalated to the point where serious allegations of bullying in the workplace were made, which should have been independently investigated. These focused primarily on Mr Louverdis, but also involved Mr Mullen.

[109] Whilst I have found that those factors should have been investigated because they were potentially relevant to issues of mitigation in respect of the allegations that had become the subject of the disciplinary process, that is not to say that Ms Hutchison was free from blame with regard to the somewhat dysfunctional relationship that had developed in the workplace. Whilst Mr Louverdis, in particular, did not take kindly to the issues that were being raised and reacted more assertively and at times aggressively than he should have, I find that Ms Hutchison was also unnecessarily assertive in respect of some of the issues she raised. And she attempted to enlist support from other colleagues in the workplace which included the sending of emails that were critical of Mr Louverdis, including one particular email of a satirical nature; as well she made critical comments about Mr Louverdis which undermined him.

[110] Also relevant to the issue of contribution is the way in which information was conveyed to the employer about the statement made to the Police. Elements of this aspect of the matter which are of concern include:

- a) The failure to tell NCC in advance that such a step would be taken.
- b) The failure to provide copies of the emails to/from the Coroner's

Office, when asked.

- c) The false information which was conveyed to the employer at the disciplinary meeting of 2 December 2012, when Ms A stated that the emails relating to J which had been forwarded to her home computer

had been destroyed. Ms Hutchison failed to correct the wrong

16 [Employment Relations Act 2000](#), s 124.

statement, rather than allow the employer to conclude that no documents existed any longer and that they had not been made available to the Police.

[111] The Act requires that each party to an employment relationship must deal with each other in good faith by not doing anything to mislead or deceive each other, or that is likely to do so;¹⁷ in these respects Ms Hutchison breached her good faith obligations.

[112] In all the circumstances I conclude that there should be a reduction in the remedies that have been awarded to Ms Hutchison by 30 per cent. PAYE deductions will need to be calculated on that basis.

Conclusions

[113] The Court is obliged under s 103A to consider whether the actions of NCC were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I conclude they were not and that Ms Hutchison's dismissal was not justifiable. It was both procedurally and substantively flawed.

[114] Ms Hutchison is to be paid the following:

- a. Lost wages for the period 21 December 2011 to 21 March 2012, reduced by 30 per cent. Interest thereon is payable from 21 December

2011 to the date of payment, at the applicable rate under the Judicature

Act 1908.

- b. The sum of \$8,400 for humiliation, loss of dignity and injury to feelings.

17 [Employment Relations Act 2000](#), s 4(1).

Costs

[115] Costs normally follow the event, but the parties will need to be heard on that matter if they cannot otherwise resolve this issue. Accordingly, costs are reserved.

[116] Ms Hutchison has 21 days within which to file a memorandum as to costs and disbursements; NCC will then have a further 21 days in which to respond. I make the preliminary point that Ms Hutchison was represented by an agent who was not legally qualified. It is unlikely that legal costs have therefore been incurred in conducting the challenge. Disbursements have been incurred and may need to be addressed.

[117] The Court reserved costs with regard to Ms Hutchison's leave application.

The parties will need to consider that issue in their submissions on costs.

B A Corkill

Judge

Judgment signed at 12.45 am on 9 July 2014

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