

Attention is drawn to the prohibition of publication of the names and any matters that could identify the parties in this case, the location of the rural town, and the services the respondent provides.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 395
3095212

BETWEEN MIJ
Applicant

AND KZT LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant
Andrew Shaw and Alex Beal, counsel for the
Respondent

Investigation Meeting: 29, 30 and 31 July 2020 at Christchurch

Submissions Received: 10 and 17 August 2020 from the Applicant
12 August 2020 from the Respondent

Date of Determination: 5 October 2020

DETERMINATION OF THE AUTHORITY

- A MIJ was unjustifiably dismissed from her employment.**
- B MIJ was unjustifiably disadvantaged in her employment.**
- C The interim reinstatement order is rescinded.**

- D The application for permanent reinstatement is declined.**
- E KZT is ordered to pay to MIJ:**
- (i) The sum of \$25,442.76 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000(the Act).**
 - (ii) The sum of \$763.28 and \$2,035 being the lost benefits of Kiwisaver and holiday pay on the sum for reimbursement of lost wages under s 123(1)(c)(ii) of the Act.**
 - (iii) The sum of \$25,000 without deduction for the unjustified disadvantage and dismissal under s 123(1)(c)(i) of the Act.**
- E There is no award for a penalty for a breach of good faith.**
- F Costs are reserved and failing agreement a timetable set for an exchange of submissions.**

Prohibition from publication

[1] I find that the high standard to justify non-publication is met in this matter to a level that displaces the usual principle of open justice.¹ Some of the evidence relates to matters arising from Family Court proceedings. Identification of the parties will impact on the confidentiality that attaches to those proceedings including the importance of that as it applies to MIJ's children.

[2] A non-publication order will also serve to protect the broader interests of the community that the respondent provides services to and the identities of witnesses who live and work in the community, some of whom expressed concern about being involved in the Authority investigation.

[3] There is agreement by counsel that there should be a non-publication order in light of the above.

[4] By agreement, and for the reasons set out, I prohibit from publication the names and any matters that could identify the parties in this case, the location of the rural town, and the services the respondent provides.

¹ *Erceg v Erceg* [2016] NZSC 135 (Supreme Court).

[5] The applicant will be referred to as MIJ and the respondent as KZT Limited (KZT). These are letters randomly generated. Witnesses will be identified by initials.

Employment relationship problem

[6] MIJ says that she was unjustifiably dismissed from her employment with KZT in October 2019 and was unjustifiably disadvantaged when she did not have the use of a vehicle in terms of her employment agreement. She claims a penalty for a breach of good faith. A claim of breach of privacy was withdrawn before the commencement of the investigation meeting.

[7] KZT provides professional services to a rural community and MIJ was employed to provide professional services in its business.

[8] MIJ seeks permanent reinstatement to her former position with KZT. She further seeks reimbursement for lost earnings from the date of termination to the date of an interim reinstatement order together with holiday pay and Kiwisaver contributions, compensation of the sum of \$30,000 uplifted to \$50,000 if reinstatement is not ordered, compensation for the loss of the benefit of the motor vehicle and a penalty for alleged breaches of good faith. In final submissions there was for the first time a claim for a compensatory sum for loss of accommodation of \$20,000.

[9] KZT says that the decision to dismiss for reason of redundancy was one that a fair and reasonable employer could have taken. Further, that there was no unjustifiable disadvantage with respect to the motor vehicle and no breach of the duty of good faith. KZT strongly opposes reinstatement and the other remedies sought.

The issues

[10] The Authority needs to determine the following issues in this case:

- (a) What does the individual employment agreement provide for hours of work and redundancy;
- (b) Was there an expectation that 0.7 FTE hours would change to full time hours and if so when;
- (c) What is the approach to determining justification of a redundancy;

- (d) Was there a justifiable reason for the commencement of the restructure;
- (e) Was the dismissal of MIJ for reasons of genuine redundancy;
- (f) Did KZT follow a fair and reasonable process before making the applicant redundant:
- (g) What did the letter of offer and employment agreement provide about a motor vehicle;
- (h) Should there have been another vehicle provided to MIJ after the company vehicle was written off;
- (i) Was there an unjustified disadvantage that flowed from the failure to provide the use of a motor vehicle to MIJ;
- (j) Was there a breach of good faith and, if so, should there be an award of a penalty;
- (k) If it is found that the dismissal was unjustified and/or that there was an unjustified disadvantage, then what remedies should be awarded, is reinstatement practical and reasonable; should an award of lost wages be made; should there be an award for compensation.

What did the individual employment agreement provide for hours of work and redundancy

Hours of work

[11] Hours of work are set out in clause 5 of the employment agreement:

- 5.1 Your normal hours of work will be as set out in Schedule 2. You may from time to time be required to work outside your normal hours, depending on work requirements.
- 5.2 To ensure that you are rested and refreshed, you should take reasonable tea and lunch breaks during the day. Your lunch break should be a minimum of 30 minutes and will not be counted as part of your hours of work.
- 5.3 We may wish to make reasonable changes to your hours of work to meet the needs of our business, in consultation with you.

[12] Schedule 2 to the individual employment provided for remuneration and hours of work and materially provided:

We expect that your starting hours of work will fall within the hours commencing 9am and ending 3pm each ordinary work day. We each agree that these hours may be extended by mutual agreement in the future.

Redundancy

[13] Redundancy is provided for in clauses 10.2 and 10.5. Clause 10.2 is headed “Termination by us” and provides:

As the employer, we must have good reason for terminating the employment relationship and must treat you fairly in reaching our decision. In particular we will give you a reasonable opportunity to comment on any proposal or concerns we might have that may lead to the termination of your employment. You are welcome to involve a representative or support person in the process.

[14] Clause 10.5 specifically addresses the situation of redundancy as follows:

Redundancy means the termination of your employment on the basis that we no longer intend to continue your position. A redundancy situation can arise for a number of reasons, including a reduction in the number of employees, a reallocation of duties or a change in structure, a decision to contract out the work you do, or a decision to make changes to your position that alter it substantially. Regardless any decision to make your position redundant will be made for business reasons.

We will consult you prior to making your position redundant, and will consider whether there are any viable alternatives to redundancy. We will not pay redundancy compensation.

Was there an expectation for change to the hours of work in the future?

[15] There is an issue in this matter about the hours MIJ was employed to work for KZT.

[16] KZT employs a part-time manager who is in charge of day-to-day operations. I will refer to this person from hereon as the Manager. The Manager accepted MIJ’s evidence that she may not have seen the advertisement in the bundle of documents for the position that she applied for at KZT.² I find that could be likely as MIJ was job searching through a recruitment consultancy. The advertisement refers to the permanency of the position at KZT

² Page 1 bundle of documents (BOD).

and the work being in the nature of full time 40 hours per week.³ There was some flexibility from the advertisement accorded to the right applicant.

[17] A consultant from a recruitment agency responded on MIJ's behalf to the Manager to say that they were working with her and that she was looking to work in that particular rural area. An email from the agency provided that MIJ had worked full-time since 2008 and was looking to [temporarily fill vacancies] "until the end of the year and is looking to work school hours, Monday to Friday." MIJ's curriculum vitae was attached.

[18] The Manager says that MIJ was specifically asked by him to confirm that she was available for full-time work and that her employment to that point had been full-time. He said there was never any suggestion that she had previously worked part-time. The Manager was aware of the care and time that children require and asked MIJ at the interview how she had managed. The response he said was that MIJ had employed a full-time nanny for her four children. The Manager understood that once MIJ had employed a new nanny in the rural town then she would be available for full-time work. He said that the answers to these questions were critical to him and if he had not been satisfied then recruitment would not have proceeded. MIJ disclosed during the interview that she was going through a separation and custody Family Court process. The Manager said it was only after the interview that discussion took place about school hours.

[19] MIJ did not accept that she ever agreed to move to full-time hours on the basis that she would secure childcare after she had commenced her role in discussions with the Manager before accepting employment. She said that the arrangement was that she would work 9am to 3pm and that she had not worked more than 36 hours per week since having children and had not employed an international nanny for many years. The high point about any discussion in her oral evidence was that her oldest child could babysit the others when he was 14 years old. MIJ said that in the city in which she worked before employment with KZT 30 hours per week was considered to be full time.

³ Not expressed as such but a person who worked in the profession reading this would understand this meaning.

Conclusion about hours of work

[20] The Authority was directed to a number of communications about the understandings.

[21] Professionals are not easy to attract to the rural area in which KZT is situated. The Manager was very aware of this and very pleased ultimately to have been able to recruit MIJ. He reached a view that MIJ would move to full time hours on the basis of what was said at the interview and/or because he thought that MIJ was working full time at the time of interview once she obtained a nanny.

[22] The Manager accommodated MIJ at the beginning of the relationship in a supportive and appropriate manner. There was informal discussion at the interview that MIJ was looking for a long term commitment if employed to work at KZT for 12 years. MIJ was given access to full-time employee benefits without them being pro-rated. These included rent free use of a house, reimbursement of up to \$5,000 in moving costs, reimbursement of other expenses and access to a vehicle owned by KZT, provision of a mobile phone and payment of reasonable charges for that.

[23] MIJ wanted to work 9 – 3pm, being school hours. She was unfamiliar with the rural area, did not know others well in the area and was not clear what childcare may be available. She was also preparing for participation in a Family Court case with respect to a separation and custody dispute and wanted to be available after school for her four children who at that time were all less than 12 years of age.

[24] The Manager agreed in his questioning that there was no precise date as to when MIJ would move to full time hours and there is no guidance about the timing of that from the employment agreement. Another staff member KS recalled a conversation about a nanny with MIJ but there is no certainty from her evidence about when the move to full time hours would occur. I accept that in all likelihood there was some talk of a nanny at the interview but I remain unclear about the context of that.

[25] Having heard the evidence I cannot discount a possibility of miscommunication or misunderstanding about future hours of work which was not clarified in subsequent correspondence before the employment agreement was entered into. I do not conclude to the extent it is suggested there was a deliberate attempt on the part of MIJ to mislead.

[26] I do however find it more likely than not that whatever was said to the Manager by MIJ led him to conclude that MIJ would move at a later point in time to increase her hours once childcare had been organised. I have had some regard to the meeting notes of 15 July 2019 taken by the Manager.⁴ There is reference to that understanding on the part of the Manager. MIJ disputed the contents of those notes but litigation had not been contemplated at that point and some constructive discussion about alternatives to redundancy took place at that time. That makes the notes more reliable about that aspect.

[27] The evidence that the Authority heard over three days supported some witnesses considered that MIJ was initially employed to work for full time hours. That is not correct. Her hours of work in her employment agreement were 9am to 3pm, referred to in the evidence as school hours. These were stated to be her hours by the Manager in an email dated 29 October 2018 to staff, including professionals and the Board.⁵ Those hours could have been extended with mutual agreement at an unspecified point in time in the future in accordance with the employment agreement.

What is the approach to determining justification of a redundancy?

[28] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake* confirmed that the clear words of the justification test in s 103A of the Employment Relations Act 2000 now require the Employment Court and [Authority] to determine on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer would [now could] have done.⁶ In this case the Authority applies the test to whether the actions of KZT and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[29] The Court of Appeal in *Grace Team* confirmed that it was not helpful to focus on pre s 103A case law when interpreting and applying s 103A. The importance of addressing the genuineness of the redundancy was emphasised by the Court of Appeal.

Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked

⁴ Page 109 BOD.

⁵ Page 13 BOD.

⁶ *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541.

employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirement of s 4 have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer. So the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in all the circumstances.⁷

[30] A fair and reasonable employer will also comply with statutory and contractual obligations. This includes s 4 of the Act that requires parties to an employment relationship to deal with each other in good faith that includes consultation. Parties should be responsive and communicative. Section 4(1A)(c) of the Act requires that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment to provide access to information relevant to the continuation of the employment and an opportunity to comment on the information to their employer before the decision is made.

[31] The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and actively consult before making a final decision. There should not be pedantic scrutiny of the process but an emphasis on substantial fairness and reasonableness.⁸

[32] I do take into account and weigh in an objective assessment of the process the resources available to KZT in undertaking its restructuring, operating as a small business with limited financial means.

Was there a justifiable reason for the restructure?

[33] KZT is a registered charitable company. It is owned by a not-for-profit community trust and its directors are volunteers.

[34] KZT is funded by a number of organisations. Over the past three years it has suffered net losses, attributed to a result of maintaining a range of services that were not sustainable in light of the funding provided. KZT's reserves were run down as a result. KZT was partially

⁷ At [85]

⁸ *Stevens v Hapag – Lloyd (NZ) Ltd* [2015] 224 at [60]

funded by an organisation on a temporary basis by way of quarterly payment. At a meeting in or about June 2019, the funding organisation indicated to KZT's manager that temporary quarterly payments it had provided would end at the end of June 2019. The evidence supports that was quite unexpected.

[35] There was a need for KZT to take steps to address the fact that there would not be the level of funding for 2019 and 2020 that had been available in previous years, and reduce expenditure to operate profitably without the funding. There was a comparatively short timeframe to demonstrate this to the funding organisation to enable the provision of the limited funding.

[36] Certain steps were taken at that time. The Manager communicated with the Board about the changes to funding. There was what was described by Board members in oral evidence as a "flurry of activity" and another meeting took place with the funding organisation a few days later to see what could be done. KZT was offered one last quarterly payment of \$30,000 but advised that was all. Conditions were attached to that payment in that no money would be forthcoming until KZT produced a "recovery plan that it could restructure to be self-funding."

[37] A recovery plan was circulated by the Manager amongst the Board members on or about 25 June 2019 and that was forwarded to the funding organisation by email dated 27 June 2019.

[38] Materially for MIJ's position it provided that the professional roster could be restructured from 1.5/6 to something less. With busy days identified the indication in the plan was that a roster based on 1.2 FTE should be the target. It was set out that achieving that in practice presented significant staffing difficulties and potentially large costs of change.

[39] The recovery plan provided that if the two non-employed professionals were removed then savings each day were about \$1000 but savings were offset with increase to the part time hours in MIJ's employed position. It was set out that the net saving was in the vicinity of \$90,000. The recovery plan provided that the present indications were that it would not be possible to negotiate a workable 1.2 roster with MIJ and that it was highly likely that she would be made redundant. Severance and recruitment costs were set out. By 1 July 2019 it

was known that the funding organisation would not fund KZT beyond the one off \$30,000 for the quarter ending 30 September 2019.

[40] Justifiable reasons were established from the evidence for the restructuring of KZT in or about June 2019.

Was the redundancy for genuine reasons?

[41] Ms Oberndorfer submits that, whilst there were financial issues to be addressed by KZT, the reasons behind the dismissal of MIJ were mixed.

[42] Mr Shaw submits that any claim by MIJ that this was not a genuine redundancy and that there were mixed motives “flies in the face of the financial requirements to initiate change” and the offer to MIJ of a full time role. He submits that that predominant motive for the redundancy was a genuine need to restructure and return to stability and profitability.

[43] Where there is a claim that the redundancy was not the sole or predominant reason for the dismissal the Authority must ascertain the predominant reason for the dismissal. The appropriate predominant or sole motive test that should be applied was stated by the Employment Court by Judge Colgan as the previous Chief Judge was then in *Forest Park (NZ) Ltd v Adams*:⁹

...Where, as here, an employer asserts redundancy as justification for dismissal and the Tribunal finds there are mixed motives, it bears the burden of persuading the Tribunal redundancy was both genuine and the predominant motive or reason for dismissal. Put another way, where there are mixed motives for dismissal, the Tribunal must ascertain the predominant motive. If there is a genuine commercial decision to make the position superfluous, dismissal will be justified if fairly undertaken. If the predominant motive for dismissal is other than a genuine commercial decision to make the position superfluous, dismissal will be unjustified.

[44] The evidence supported that the employment relationship was satisfactory when it started and the Manager was very supportive towards MIJ.

⁹ *Forest Park (NZ) Ltd v Adams* AC 105/99 10 December 2000 at [49].

The car accident

[45] MIJ felt that the turning point in the relationship followed a car accident. She was then absent for a period on ACC followed by a graduated return to work programme. The evidence supported a level of concern on the part of some of the staff prior to that, about personal outside of work issues impacting on work requirements and MIJ's reliability. I could not be satisfied at that time that MIJ was aware of the extent of the concerns. It seemed that in order to be supportive staff did not clearly raise these concerns.

[46] The car accident occurred on 4 April 2019 whilst MIJ was driving a company car.¹⁰ At the time she was tired and travelling back to the rural area. The car was written off and MIJ was injured and suffered concussion and injuries to her chest, leg and neck. She spent a short time in hospital.

[47] At a meeting at MIJ's home on 9 April 2019 options were put to her by the Manager and MM (one of the Directors) for a "diplomatic parting of the ways" with a payment or a continuation of employment subject to conditions with the latter described in notes taken at the time as "the preferred option." MIJ had a support person with her at the meeting.

[48] MIJ rejected the offer of a payment to leave and wanted to continue with her employment. She considered some of the conditions associated with that continuation of employment were sensible but did not agree to all.

[49] KZT was entitled to check with MIJ about her wellbeing after the accident. I acknowledge that the situation was not easy for KZT and that it had to continue to meet the demand for its services at this time with a reduction in resource to do so. There could be no criticism about an enquiry of that nature to understand and assess any impact on its ongoing requirements with MIJ's recovery needs.

[50] The meeting on 9 April 2019 involved more than that with an option of a leaving package or remaining an employee with conditions. MIJ confirmed that she felt more secure after the discussion because she was still employed. However I cannot discount that this meeting and the offer of a payment to leave had an impact on the relationship. MIJ was in a

¹⁰ I note this date was referred to variously as 3 and 4 April in some of the written evidence and in a submission as 6 April however nothing particularly turns on that.

vulnerable position and was recovering from an accident. She was reluctant to meet and there was some pressure brought to bear on her to do so. When I consider later meetings, particularly the meeting on 20 June 2019, I find a level of distrust had developed on the part of MIJ.

[51] The Manager said that MIJ withdrew somewhat after that meeting and that was the evidence of other staff. Mr Shaw correctly submits that there is no claim about this meeting however it does form part of the background to consider with the genuineness of the redundancy. It is clear that there were some concerns held by KZT at that time about MIJ.

Change proposed to hours on 21 May 2019

[52] Following that meeting a change in the structure of MIJ's hours was suggested in an email to her of 21 May 2019 from the Manager. MIJ had not returned to work by that date but there was a return to work plan by ACC underway. The email from the Manager to MIJ on this date confirmed there had been a discussion about work arrangements as well as ACC arrangements. It also expressed a goal; by the time another professional went away, that MIJ could be working different hours. These were suggested as 8 hours on Monday and Tuesday, Wednesday, day off; Thursday, 6 hours; and Friday, 8 hours. It was still 30 hours in total but the days were structured differently. The evidence did not support discussion about that email between the Manager and MIJ before a meeting on 20 June 2019.

[53] MIJ was fit to return to work on the basis of an ACC return to work plan on 17 June 2019. At that time she worked 3 hours per day for 2 days per week with hours increasing after that.

20 June 2019 and first advice about funding situation

[54] After an absence of over two months and shortly after starting back on limited hours MIJ met with an ACC staff member and the Manager about her health and return to work plan. The Manager in his written and oral evidence said that he had been invited to update MIJ on the funding position and need for change at the meeting. I am not satisfied that MIJ was aware that the Manager was attending to raise the financial concerns and the possibility of redundancy as a result of the changes to funding and the proposed change of hours. Correspondence between MIJ and the support worker after the meeting does support that the

ACC staff member did have some knowledge that the Manager was intending to raise these issues although she did not raise that with MIJ.¹¹ That is consistent with the Manager's evidence that he did check the nature of what he was going to discuss with the ACC staff member.

[55] MIJ took issue with the accuracy of the meeting notes prepared by the Manager after that meeting although that is the only record of what was discussed. Mr Shaw submits that at this meeting MIJ was offered full time employment as an alternative to redundancy. The notes provide that the Manager gave MIJ a specific assurance that she effectively had first place in any new roster. The meeting notes taken by the Manager were to the effect that on MIJ's part there was a "blanket refusal" to discuss any changes to hours of work. MIJ's written evidence is that the Manager "erroneously interpreted [her] unpreparedness as adamant that she would not budge." She accepted in her written evidence that she explained the difficulties she would have in moving to a full time roster every day because of her childcare commitments.¹²

[56] This was a meeting to assess whether MIJ was willing to negotiate a change to her hours. The view in the recovery plan that it may not be possible to negotiate a workable 1.2FTE with MIJ was circulated to the Board and provided to the funding organisation after this meeting prior to moving to a formal restructuring process.

[57] MIJ thought this meeting was to discuss rehabilitation and return to work hours. From the notes of the meeting she was clearly taken by surprise and caught off guard by discussion about the need for recovery plan, the need for staff reductions across professional and administration roles with a possibility of redundancy. The notes set out that MIJ became very upset and suggested that there was an attempt to "sack her." She is portrayed in the notes as being difficult however that has to be weighed with the unexpected turn in the nature of the discussion.

[58] At the end of this meeting MIJ did understand that the proposal for 1.2 FTE was for two professionals on a Monday and one each other day. Even though the information imparted at the meeting was quite unexpected, the Manager could reasonably conclude that it

¹¹ Page 73 - bundle of documents

¹² Second affirmed affidavit of evidence of MIJ at [26]

was unlikely agreement could be reached to the proposed roster with its corresponding increase in hours at the end of that meeting.

[59] Once matters moved beyond negotiation about changing hours to a formal restructuring, then a fair and reasonable employer could be expected to present any change to the FTE initially as a proposal for consultation rather than an offer.

[60] The initial email of 2 July 2019 that commenced the restructuring process satisfies this by setting out the preferred new roster to have two professionals on a Monday and then only one for each of the following days for eight hours per day. After that there is no clear point at which a formal offer, in terms of a new roster based on full time hours, was made. That is because matters were overtaken by discussions and offers for MIJ to work reduced hours on trial with conditions.

[61] Before a consultation meeting took place on 15 July MIJ wrote to the Manager and said that her position and discussions at the 20 June meeting had been misrepresented in the 2 July 2019 letter about the restructuring. MIJ advised that she would be writing directly to the Board and the Manager provided her with the details to contact the Chairperson and Board.

[62] In a further email MIJ also set out that she had reached a parenting order resolution which was expected to be formalised on or before 22 July 2019, requiring her and the children to stay in the rural area. She set out that that meant there would be no further court proceedings. The time required for the proceedings had been a concern raised with her on 9 April 2019.

[63] By letter dated 10 July 2019 MIJ wrote to the Chair and Board Members of KZT. She expressed concern at the reduction of the professional employees/contractors. She set out that she was not clear how 1.2 FTE was arrived at. She did accept some change needed to be made but did not accept the roster proposed was the only way forward. Some alternative proposals to reach financial savings were put forward.

The two other non-employed professionals who worked at KZT

[64] The Authority heard evidence from both non-employed professionals who had worked at KZT with MIJ. I shall refer to them as RM and WP. RM wrote to the Board in

support of MIJ on 11 July 2019. He wrote about a number of matters with some focus on whether the significant reduction in contact hours was effective and sustainable. Materially for current purposes he suggested a full discussion of the issue and options with the Manager and all professionals employed or otherwise engaged by KZT to work as a team toward a solution.

[65] In an email to the Manager dated 15 July RM suggested that if MIJ returned to her pre- contractual hours with the other non-employed professional WP's hours that would make it a total of 1.15FTE. He wrote that if he was added in for some hours then it would be 1.35 FTE. RM stated in his email that the most important driver would be to end in a situation where MIJ and WP were committed to KZT long term as younger professionals. That email was not responded to.

[66] The Manager said in his evidence that there were discussions with another business about the provision of continued services and that RM provided services to KZT when it suited him on an "as required" basis.

11 July 2019

[67] By letter dated 11 July 2019 the Manager advised MIJ that the Board required her to respond to matters raised with them.

[68] He responded to matters raised by MIJ in her letter to the Board about increasing revenue and the process. The Manager also responded to the concerns about the effects on the other non-employed professionals and acknowledged that these were valid concerns. There was reference to these being raised with the funding organisation and some other businesses.

[69] The email concluded with the Manager seeking to hold a meeting with MIJ at which KZT would be represented by him and a Board member. It was referred to as one last opportunity to meet and discuss the new roster proposal and any alternatives.

[70] It was noted that in the absence of an agreement on some alternative at the meeting the move to the new roster will prevail and it is likely [MIJ's] position was to be declared redundant.

[71] It was set out that in that event KZT considered it had satisfied the requirements of clause 10.5 of the employment agreement.

MIJ obtains representation

[72] On 12 July, Ms Ashleigh Fechner, an advocate with Ms Oberndorfer's firm, emailed the Manager and advised that she was representing MIJ. She requested some information asking for a formal written copy of the restructure proposal including other areas of focus in the restructure. Although she noted this was not absolutely necessary she wrote that if this was not provided then information may continue to be requested prolonging the process. Financial information was also sought with reference to current operating costs and forecasted savings.

[73] The evidence did not support that the recovery plan, which was the base document for the restructuring, was ever provided to MIJ or Ms Fechner. I accept that parts of the plan seen as material to MIJ were disclosed in emails and/or in telephone discussions with Ms Fechner. The Manager considered he had supplied all that was asked for. Having read the recovery plan I conclude that failure to disclose the full recovery plan would have almost inevitably had an impact on the fullness of consultation. MIJ would not have been able to appreciate the changes proposed in their broader context.

Meeting 15 July 2019 for consultation

[74] The Manager attended this meeting with MM. MIJ attended in person. Ms Fechner was connected by phone. There was discussion about the key points from the recovery plan and the need for change. Alternative rosters were discussed as well as some other matters put forward to reduce costs. This included a proposal to allow MIJ to use a cottage at the back of the business as a childcare alternative to enable longer hours to be worked by MIJ. MIJ challenged the 1.2 FTE baseline and this was discussed as to why it was justified from KZT's perspective. There was some discussion about the hours and days of the week that MIJ was prepared to start with and the notes reflect that MIJ put forward 30 hours which were those stipulated in the employment agreement. There was then some discussion about alternatives with MIJ reluctant to work eight hours on any day except Monday because of childcare

difficulties. Matters then got down to the alternatives. MIJ said that she could do 8 hours on a Monday and 6 hours on the other days. It was considered that this was not workable.

[75] Ms Fechny then suggested a 1.3FT roster with MIJ working two full eight hour days on her own and two six hours days with WP and RM working a full day alone on the Friday.

[76] The Manager indicated that he would response to this roster. The approach to this point was in the main unremarkable. There was a proposal for change to hours and consultation took place with openness on the part of KZT to alternatives to redundancy. What happened then requires some careful analysis.

16 July response to alternative roster

[77] On 16 July the Manager responded by email to the alternative roster proposed at the meeting of 15 July to Ms Fechny. He set out his understanding about the alternative roster proposed at the meeting. He noted that the proposed roster of 1.3 FTE exceeded the preferred baseline hours by four hours and to address this suggested that MIJ reduce the two days she worked six hours to four hours each day.

[78] He put forward two rosters for consideration in his email. The first was 24 hours as a trial subject to conditions that were set out. The second if the 24 hour was not acceptable was 28 hours a week roster as a trial subject to the conditions set out. There were 12 conditions in the emails expressed as being to “establish a clear and cooperative pathway that puts past difficulties behind us.” This email was forward to MIJ by Ms Fechny.

Ms Fechny’s email of 16 July 2019

[79] Ms Fechny sent an email to the Manager in response on the same day. It stated it set out the “current offer we have reached via, our numerous phone calls today.” There is a somewhat inexplicable statement in the email that MIJ has said that she is unlikely to take the offer. There are some new elements to the “offer” in the email. There was reference to 28 hours and not 24 hours and to a personal loan being made to MIJ for the purchase of a car. Instead of 12 conditions it refers to 6.

[80] The Manager was asked to let the Board know so they have an opportunity to present a new offer prior to close of business tomorrow. Otherwise MIJ will provide a response by end of business the following day.

17 July 2019 email

[81] By email dated 17 July 2019 Ms Fechny advised the Manager that the offer as emailed to both parties last night is not accepted. The email provided that MIJ would take the firm 24 hours over the trial of 28 hours with the timing of any increase to be decided by ACC. Further that MIJ wrote she wanted KZT to abide by the commitment to provide her with a company car and she suggested an appropriate vehicle. MIJ wanted the conditions of the original employment agreement to remain.

[82] In terms of the trial period I accept that MIJ mistakenly considered the proposed offer of 24 hours was not a trial but 28 hours was. In any event she confirmed in her evidence that she would not have agreed to a trial as she needed security. In his submission Mr Shaw did not consider her view that KZT could simply end employment was correct but rather he submits it was intended that processes in the employment agreement were going to be used. I accept that is what the conditions suggest.

[83] Mr Shaw submits that the trial was for MIJ to work towards full time hours. I accept Ms Oberndorfer's submission that the basis for the trial being to work towards full time hours is not clear from the email of 16 July or other emails, and in fact condition 12 suggests any move towards full time hours was discretionary. The condition at 12 is set out below:

MIJ's understanding that, while she has expressed a desire to progressively work additional hours and to eventually move to fulltime employment, any increase in her hours will be at the absolute discretion of KZT.

[84] There was another email on 17 June from Ms Fechny advising that if the Board does not accept the offer then she has instructions to have a without prejudice conversation about a possible exit.

Board decision

[85] The Manager said that the offer and counter offer was provided to the Board at a meeting on 18 July 2019.¹³ The Directors meeting minutes were provided as part of the bundle of documents. They were not disclosed to MIJ until the Authority investigation process. Materially they provide as follows under the heading staffing:

Due to the loss of sustainability funding a new roster has been necessary to implement to reduce ---- costs.

Unfortunately MIJ is unable to meet the required change to the roster and will become redundant. The Board confirmed the decision to make MIJ's position redundant and to require twelve weeks' notice. We may need to employ [temporary workers] to cover initial short fall during the working week.

MIJ concludes she has until 22 July 2020 to consider the offer

[86] MIJ provided in the bundle of document a partially redacted email that she had received from Mrs Fechny dated Friday 19 July 2019 sent at 4.29 pm.¹⁴ The portion of the email that was not redacted materially provides that Ms Fechny was unable to contact MIJ that afternoon however would be available Monday for a call. Further that "Their decision is not yet final."

Over the weekend 20 and 21 July 2019

[87] MIJ contacted the then Chair of the Board who I shall refer to as BK over the weekend and there was a discussion about the situation. Her evidence is that she was not led to believe that her position had been made redundant and understood he would talk to the Manager on the Monday. BK's evidence is that he advised MIJ that the part-time position was redundant as a full time position was required.

[88] RM also sent an email over the weekend on 20 July 2019 to BK and stated that the message he had received from MIJ was that she wanted to stay and work at KZT and did not want redundancy.¹⁵

22 July 2019 exchanges

¹³ Page 125 of the BOD.

¹⁴ Page 127 of the BOD.

¹⁵ Page 128 of the BOD.

Text message from Ms Fechney

[89] At 9.32am MIJ received a text message from Ms Fechney that she had spoken to the Manager [that day] and that he was aware of MIJ's discussion with the Chairperson over the weekend. The text message provided that the Board is not prepared to re-consider its offer but would provide MIJ with additional time to accept the new roster. She asked MIJ to call her.

Email from Ms Fechney to the Manager

[90] At 9.58 am an email was sent to the Manager from Ms Fechney that provided as discussed [in a phone call that morning] with the Manager MIJ would accept the 24 hour week roster and that matters not related to the restructure would be dealt with outside of the restructure process. She asked to be advised when the 24 hour roster would occur.

Response from the Manager

[91] In his evidence the Manager said that he took these emails to the Board. At 4.12pm he responded to Ms Fechney by email. In that email he advised that MIJ's terms for a new position were not acceptable and that they did not believe that her other claims can be set aside from the hours of work. He set out in the email that he confirmed the advice orally conveyed on 19 July that the process in clause 10.5 had been completed and that KZT's only option was to declare MIJ's position redundant. The balance of the email referred to the notice period commencing from 23 July 2019 to be completed on 14 October 2019.

[92] There was reference in the email that MIJ was to maintain professional standards and refrain from any negative comments about KZT. If there were no issues during the notice period he advised that any claim for leave taken in advance would be surrendered.

*23 July 2019 exchanges**Email from Ms Fechney to the Manager*

[93] At 9.22 am on 23 July 2019 Ms Fechney sent a further email to the Manager that MIJ did not provide any terms with her acceptance and that she accepted the 24 hours. I have taken the "terms" to be about provision of the use of a company vehicle. With respect to

conditions Ms Fechny said that these could be addressed at a later stage outside of the restructure process. The email stated that MIJ should not be punished for raising concerns and that it appeared the redundancy was “a mask for an ulterior motive.” KZT was urged to reconsider its position.

Response from the Manager to Ms Fechny

[94] At 11.13 am the Manager responded and advised the KZT’s firm view was that the matter had concluded on 19 July and referred to the email Ms Fechny had sent about a “without prejudice conversation” if the offer was not accepted by the Board. He advised in the email that the Board had considered MIJ’s concerns and her counter offer and her failure to agree unconditionally to the new hours of work meant she was redundant. His view was that was what he had conveyed to Ms Fechny on 19 July 2019. At that point he wrote negotiations were complete. The only unfinished business was the matter of the actual hours that MIJ would work during the notice period. He stated that it now seemed MIJ took an opportunity over the weekend to attempt to re-open concluded negotiations but this was out of time.

Ms Fechny responds to the Manager

[95] Ms Fechny emailed the Manager at 11.25am to the effect that the position remains the same. She set out that it was agreed on 19 July 2019 that MIJ would provide her final response to the offer on 22 July 2019 and that at 9.20 am the Manager telephoned her and state that the parties needed an agreement “ASAP.” Shortly thereafter she wrote the response that the reduced hours would be accepted. She wrote that the Manager requested this be provided by email when she advised of this by telephone.

Response from the Manager

[96] The Manager responded by email at 12.15pm and advised that was not the position of KZT. He maintained that a final decision had been advised on 19 July and the next steps were talked through. He denied any agreement to continuation of the negotiations but that he did expect a discussion about the next steps.

[97] He wrote that he had no idea MIJ would lobby the Chairperson and fellow staff over the weekend and his 9.20am call on 22 July to Ms Fechny was to find out what was going on. He described in his email her response [that MIJ would accept the reduced hours] was a surprise and therefore he asked for it in writing. He wrote that Ms Fechny had now done that and he in turn had advised the true situation and that nothing has changed since 19 July.

One final email about the 24 hour roster

[98] On 29 July 2019 Ms Fechny wrote again to the Manager and advised that MIJ would like to continue working at KZT on the 24 hour roster with the conditions agreed on in the 16 July 2019 exchange and asked that the decision be reconsidered. I accept Mr Shaw's submission that these conditions appeared to be the 6 in the counter offer rather than the 12 in the offer from the Manager. That was not clarified at that time.

[99] On 30 July the Manager confirmed that KZT was not prepared to reconsider the redundancy decision. MIJ worked out her notice period. During that period and subsequently a permanent professional has not been recruited to work for full time hours at KZT despite advertisement. The work has been covered by temporary professionals and permanent employees working limited hours each week.

Conclusion about genuineness of the redundancy

[100] As a result of the withdrawal of funding there were genuine financial reasons for the restructuring. KZT was able to take steps to make its business more profitable in a manner that was consistent with that of a fair and reasonable employer. It proposed in its recovery plan the permanent employed professional MIJ work four or more full days and savings would be made on that basis. This was because it would reduce the work needing to be undertaken by the more expensive non-employed professionals.

[101] The alternative rosters offered and counter offered during consultation could be seen at first glance to undermine the financial basis for the restructuring proposal for the employed professional at KZT to work four or more full days. I accept the reference in the email of 16 July 2019 from the Manager to Ms Fechny supported that a reduction to 24 hours would meet the preferred budget without upsetting arrangements with another business that assigned

non-employed professionals to KZT.¹⁶ In short it achieved the requisite FTE and had some financial benefits and was subject to change.

[102] Considered in the round and as matters unfolded the main factor that could point away from a genuine commercial decision about the need for a full time position is the conditions that are attached to the alternatives to redundancy. These can be viewed with the 9 April meeting and the offer at that meeting of a payment to leave employment. For reasons that I will set out, when procedural fairness is considered good faith obligations required more from KZT with respect to communication and responses to any alternative to redundancy. I find however that any procedural unfairness does not mean the predominant motive to make the position superfluous was other than a genuine commercial decision that a new roster for a full time/four or more days position was required.

[103] I could not be satisfied that the predominant reason for the dismissal was other than that of genuine redundancy.

Did KZT follow a fair and reasonable process before making the applicant redundant?

[104] Section 4(1A)(b) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship.

[105] There were breaches of the obligations of good faith to be communicative and responsive. There was, on an objective assessment, clearly confusion about the time MIJ had to respond to the alternatives and this required further discussion. I accept that matters were not assisted by Ms Fechny's communication on 17 July 2019 to the Manager about a "without prejudice" possible exit discussion if the offer of MIJ's was not acceptable.

[106] On 22 July 2019 MIJ had accepted the 24 hour roster on the basis the conditions would be dealt with outside of the restructuring process. The response from the Manager was that her terms for a new position are not acceptable and it was not believed they could be set aside from the hours of work. The following day it was clarified by Ms Fechny the acceptance was without any terms. The response from the Manager was that MIJ's failure to

¹⁶ Page 112 of BOD.

agree unconditionally to the new hours of work meant she was redundant as advised some days earlier. MIJ then agreed to the conditions although seemingly not the 12 in the original offer but the Manager confirmed that KZT was not prepared to reconsider the redundancy decision.

[107] Given that at least some of the conditions were ultimately agreed to by MIJ I will not closely examine them but they do seem more about existing employment concerns rather than commercial/restructuring matters. There was no attempt in good faith to communicate further about the 24 hour roster with MIJ as an alternative to dismissal notwithstanding there was no-one else in that role at that time or at the end of the 12 week notice period.

[108] Mr Shaw places some emphasis on the trial aspect of an offer that was never agreed to. I have not found it clear from the communication at the material time that its purpose was to move towards a full time roster. The trial seemed more directed at the possibility of change as set out in the employment agreement. A trial in employment is a significant matter and the reasons for it should be very clear.

[109] That a trial attached to the 24 hours roster had also been misunderstood by MIJ. The trial aspect was not singled out in the Manager's responses after 18 July to the agreement by MIJ to work a 24 hours roster so there was no response about that at the material time. Further discussions in good faith would have been able to clarify the nature of any trial and potentially a framework for that.

[110] There was some unfairness that MIJ was the only professional consulted about the recovery plan at the time despite the fact the other two non-employed professionals would also be impacted by any change in hours. RM's suggestion of a full discussion of issues and options with the Manager, Board and professionals was never taken up.¹⁷ RM at a later point proposed a roster with an emphasis on retaining the hours of the younger professionals rather than necessarily preserving his own. That was not responded to. It is difficult to see how consultation with all three professionals could not be advantageous in a restructuring situation about the FTE requirements for the business and with those expressed views.

¹⁷ At page 98 BOD.

[111] The Board members said that they saw the offer and counter offer for the alternative rosters before they made their decision. Their evidence was that they wanted a full time person in the role and MIJ would not accept that role when it was offered. In fact the full time roster had not been offered to MIJ after consultation because that had been overtaken and confused somewhat by offers of alternative rosters.

[112] I was not satisfied that sufficient information was supplied in particular the base document for the restructure, the recovery plan.

[113] Finally I note that there was no agreement by the Board to a mediation proposed by another organisation within the notice period although that could have assisted to resolve matters.

[114] Aspects of the process did accord with that of a fair and reasonable employer. There was advice about the restructuring, a meeting at which MIJ was represented and consultation about alternatives to the full time roster. Notice was provided in accordance with the employment agreement. For the reasons set out however the process was not that which a fair and reasonable employer could have been expected to undertake. Had there been further discussion and clarification about the alternatives to redundancy then dismissal could have been avoided.

[115] In conclusion MIJ's dismissal, whilst for reason of genuine redundancy, was procedurally unjustified and not in a minor or technical way.

[116] MIJ has made out her personal grievance of unjustified dismissal and is entitled to remedies. I will turn to these after considering the unjustified disadvantage claim and any penalty for a breach of good faith.

The Motor Vehicle – unjustified disadvantage claim

[117] The letter of offer of employment dated 11 September 2018 stated about provision of a vehicle:

You will be provided with access to a vehicle owned by KZT. Private use and the exact nature of the vehicle will be subject to the terms contained in the attached document. In your case the relevant line is headed "Fleet/Private". (Bearing in mind that this may involve the purchase of a vehicle there may be a slight delay sourcing the desired vehicle.

[118] The employment agreement provided:

A vehicle may be made available subject to a “salary sacrifice” calculated in accordance with the policies of KZT.

[119] During the initial temporary phase of employment MIJ was happy to use her own car and KZT paid her a mileage allowance. There were some efforts to find a vehicle once the permanent employment commenced and discussions took place about this. There is a dispute about whether MIJ wanted a top of the range luxury vehicle. The Manager says that she did and MIJ denies that what she asked for was of that nature. She referred to it as a mid-range vehicle.

[120] In March 2019 an agreement was reached that KZT would purchase MIJ’s second hand vehicle and allow her to use it subject to a fleet/private salary sacrifice. MIJ accepted this as a “really good solution” at the time in an email and stated that she was happy to defer the other car they had discussed until further down the line.¹⁸ She wrote that she saw it as a solution to both parties benefit. There was a small salary sacrifice in accordance with the vehicle policy.

[121] A few weeks later the vehicle was written off in the accident and the vehicle was not replaced.

[122] Mr Shaw submits that there KZT is under no legal obligation to provide access to a replacement vehicle and that there was no disadvantage because MIJ was restored to her full salary immediately after the accident.

[123] Whilst the employment agreement refers to provision of a vehicle as discretionary with the use of the word “may” the letter of offer provides that MIJ will be provided with access to a vehicle. I place weight on the fact that the parties acted in accordance with access to a vehicle rather than on the basis that such provision was discretionary. There was mileage paid to MIJ initially when she was employed on a temporary arrangement but then discussions were held between MIJ and the Manager about the nature of the vehicle to be purchased for MIJ’s use when the employment became permanent. There was then an

¹⁸ At page 36 BOD.

arrangement whereby MIJ's car was purchased by KZT for her use and on that basis MIJ understood the other discussed vehicle would be deferred.

[124] I find that it was a condition of MIJ's employment that she would have access to a vehicle owned by KZT. Such access included personal use. There was a corresponding salary sacrifice on that basis.

[125] I find that condition of employment was affected to MIJ's disadvantage when there was no access to a replacement vehicle provided after the accident. MIJ did not have the benefit of any insurance pay out to replace the vehicle. She was living rurally without public transport with her four children and there was no supermarket in the immediate vicinity. Payments to her ex-husband for transport for access increased.

[126] I find that the failure to provide access to a vehicle after the accident was unjustified. I accept Ms Oberndorfer's submission that there was a unilateral decision made to remove provision of a vehicle at the meeting on 9 April 2019 without consultation. It was put to MIJ as a condition of continued employment at that meeting a few days after MIJ's accident that she accept:

that KZT could not do anything more in the meantime about arranging a vehicle. A vehicle arrangement could be considered in 12 months if everything settled down but KZT could not make any promises.

[127] Mr Shaw submits that there were attempts to work with MIJ after the accident and, when she was ready to work, about a vehicle. He refers to the restructuring process and suggestion that KZT extend a personal loan for a car. The repayments however were advised by Ms Fechny at that time to be unaffordable in terms of MIJ's financial position as were the maintenance costs with owning the vehicle herself. Mr Shaw further submits that MIJ was directed by the Manager to a benevolent fund. If MIJ was provided with any funds they were not I find put towards a car.

[128] I find that the failure to provide access to a replacement vehicle after the company vehicle was written off in the accident was an unjustified action that caused disadvantage.

[129] The personal grievance of unjustified action causing disadvantage is made out.

Was there a breach of good faith and, if so, should there be an award of a penalty

[130] I have found that there was been a breach of good faith.

[131] A penalty is sought because it is stated that the breach was deliberate, serious and sustained under s 4A(a) of the Act.

[132] Ms Oberndorfer submits that the failing were deliberate, serious and sustained. I accept that there was a failure to act in good faith to be active and constructive in maintaining a productive employment relationship. The consideration of alternatives to redundancy was appropriate and it was only the maintenance of a strict contractual approach rather than adherence to good faith obligations that were problematic thereafter. To an extent I accept that was deliberate. It was serious and sustained.

[133] In this case I have had regard to two matters in concluding not to award a penalty. The first is that there will be an award of compensation made and to a degree a penalty will overlap with that. The second is that there are unusual circumstances in this case with the conduct of MIJ after the redundancy decision. In her employment agreement MIJ had a general responsibility “to act in a way that promotes and protects our business, reputation and relationship.”¹⁹ I cannot be satisfied that responsibility was adhered to.

[134] There is a finding that good faith is breached. There is no award of a penalty.

Remedies*Permanent reinstatement*

[135] MIJ seeks permanent reinstatement under s 123(1)(a) of the Act to her former position with KZT.

[136] Section 125 of the Act provides that reinstatement is the primary remedy and subs (2) provides:

If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

¹⁹ At clause 3.1(c) of the employment agreement.

[137] Mr Shaw accepts in his submissions that the onus of proof in establishing that it is not reasonable and practicable for reinstatement lies with KZT.²⁰

[138] The full Court of the Employment Court in *Angus v Ports of Auckland Ltd (No 2)* has held the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.²¹ Further it was held that reasonableness means that the Authority will need to consider the prospective effect of an order, not only upon the individual employer and employee but on other affected employees of the same employer or even in some cases those who may use the services of the employer.

[139] The test of practicability has been endorsed by the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* and confirmed as correct in *Lewis v Howick*.²² It is a test that requires the balancing of the interest of the parties and the justices of their cases with regard not only to the past but more particularly to the future. Practicability is capability of being carried out, feasibility or the potential for the imposition of the employment relationship to be done or carried out successfully. Practicability is not to be narrowly construed in the sense of being simply possible irrespective of consequence.

[140] I will start with MIJ's position. MIJ says that her interim reinstatement was successful and that prior to the car accident and restructuring she had a very good working relationship with her colleagues. She says that there are staff and contracted staff who are happy to work with her providing a buffer for those who are not. Further that there is the ability for physical separation possible within the work place. She says that her concerns about the process were "appropriately moved up the chain of command" and what was said about the Manager was at a time of confusion and anguish. MIJ says that she can now work 38 hours per week and that she has worked professionally with those who gave evidence that they have lost trust in her. Further that there are no concerns with her professional ability. MIJ says that she made a 12 year commitment to KZT and shifted her family to the rural

²⁰ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7]

²¹ *Angus v Ports of Auckland Ltd (No 2)* [2011] ERNZ 466 at [65]

²² Above n 23 at [2].

area, put her children in local schools and has a parenting order that she will live in that rural area. Further the permanent full time role is vacant.

[141] I accept that MIJ is very well regarded as a professional and there was no evidence to the contrary.

[142] The Authority needs to consider and balance the interests of both parties and the justices of their cases looking not only to the past but particularly to the future.

[143] The employment relationship started out on a reasonably satisfactory basis. After the notice of redundancy was given and during the notice period of 12 weeks the relationship took a different turn. On 27 August 2019 RM on behalf of MIJ and WP wrote an email to the Board, the Manager, the Funding organisation, another organisation and the Trust. The communication was to the effect that confidence had been lost in the Board and the Manager's direction and management of KZT. Further a possible explanation for the redundancy was that there were some major personal, professional or clinical issues leading to MIJ's termination. The letter concluded by stating that if the Board and the manager are unable to change their course of action it was suggested that they should consider if they are the right people to carry on in their position.

[144] An aspect of the letter supports Mr Shaw's submission that RM and WP was not aware of the full facts. That is the reference to MIJ being offered a 0.6 FTE and accepting such an offer but then the advertisement for her replacement was for a 0.8 to 1.0 FTE. This was described as undermining the whole financial rationale [for a restructuring]. The position was that the alternative hours were discussed and offered because KZT concluded not unreasonably that MIJ would not agree to the full time roster. Even when represented during the process it was not suggested that she would take up this full time role. The alternatives to redundancy were expressed as being subject to change within the terms of the employment agreement.

[145] The Manager wrote to RM after this letter and offered to meet with him to discuss the full facts. RM did not agree to meet. The fact that there were two other professionals who worked at KZT were critical of the process but not armed with the full facts also had an impact on the workplace relationships.

[146] MIJ considered moving matters (doubts) “up the chain” about the process was appropriate. Even if that could be said, and it would have to be viewed with obligations an employee has to act in good faith towards its employer, it clearly had a significant impact on trust and confidence that is required in the employment relationship.

[147] The letter caused a significant impact in the employment relationship and resulting trust issues. It also caused a divide between the three professionals, the Manager and other staff. The Board Members had to attend a meeting and explain its actions to the Trust.

[148] RM, WP and MIJ also stopped working for KZT at or about the same time when MIJ’s notice period ended in October. There had been some indication this would happen if the situation with MIJ was not resolved. It created a shortage in professionals, caused a strain in the business and impacted further on trust with a view that this was a planned action. The community was concerned as well. The other two professionals had until this time been highly regarded members of the business and staff had got along well with them. The sudden change I accept had an impact on the relationships and trust in MIJ and indeed the other two professionals.

[149] The tendency of MIJ to involve others in her employment dispute was also seen when the letter raising the grievance was sent by MIJ’s legal representative to other parties as well as KZT including the funding organisation. The then Chair of the Board, BM, said that this did create some issues for KZT. It is very clear from the Act that the grievance should be raised with the employer and that it was copied to strangers to the employment relationship is a significant and serious indication of a breakdown in the relationship. It indicates that MIJ did not have trust and confidence in her employer to resolve the matter at that time.

[150] At or about the same time supporters of MIJ in the community used social media, letters and newspaper articles to raise concerns about the actions of KZT causing issues between some in the community and KZT. MIJ distances herself from the actions taken by others but it is clear that she was aware that certain steps were being taken. There is a view by KZT staff that she could and should have done more to stop that action rather than standing by. I cannot conclude from the evidence that it was MIJ that started or escalated the community activity but she did not take steps to stop some aspects when they were discussed

with her.²³ It was activity that she no doubt felt supported her own view about the redundancy outcome.

[151] There was evidence that that community action caused significant distress to some staff to the extent that one felt so strongly about matters being misrepresented on the site that she intervened on a Facebook post. The impact in the small rural setting was to discredit KZT and it lost some of its business. KZT was constrained in any response it could make given the privacy that surrounds its employment relationship. I find some community divide continues to exist. That and the other actions in escalating views about the Board and the Manager damaged the relationship.

[152] I then turn to whether the employment relationship is able to be carried out, not simply irrespective of consequence, but successfully. The Authority heard a lot of evidence about this.

[153] For the relationship to be successful there would have to be interaction between MIJ and with staff including senior staff. As a result of some changes there would be significantly less need for interaction between MIJ and the Manager. I accept that the relationship between MIJ and Manager is now essentially irreparable, although communication remained professional when it actually occurred, which appeared not often during interim reinstatement. It also on occasion involved Ms Oberndorfer. One senior staff member KS has said that she will resign if MIJ is permanently reinstated. I accept having heard from her that she is genuine in her evidence about that. SC who has assumed more of a management role did not think the relationship with MIJ could be rebuilt. She did accept that she engaged professionally with MIJ after her return on interim reinstatement. She described however under cross examination that her own mental state was fragile and she had had to seek medical advice because of the situation with MIJ. She did not think the relationship could be rebuilt. She said that the small team has been upset and “the wounds are too deep.” SC said that she could not trust MIJ in the future.

[154] Another professional at KZT GS recognised the desperate need for professionals in the business and had remained hopeful things could sort themselves out and had kept out of

²³ Statement of evidence taken as read of MP para 7.

the matter. He said however that since MIJ's interim reinstatement he had to deal with support staff crying, withdrawing and that the team was fragmented and withdrawn. In his written evidence he explained that he had experienced staff conflict previously however not the duration and intensity of feeling that arose about this matter. He had concerns about the potential for increased error and safety risk for those using the services of KZT because of the absence of trusting communication. He described the relationship and the difficulties as not being capable of resolution and expressed views that he would not continue on if MIJ was reinstated.

[155] GS's views were reasonably forceful. Some of his views about the work environment were supported by another professional, DC, who had recently resigned from KZT at the time of the substantive investigation meeting. DC's oral evidence was that one of the reasons she had decided to resign from KZT was the "dysfunctional team dynamics" and "sad atmosphere." She said that MIJ was very good professionally and she was able to work well with her at that level and the concern was the dysfunctional team dynamic. DC started working at KZT after MIJ's employment had ended. She said that everyone got on well then and it was only after MIJ was reinstated on an interim basis that there was what she referred to as a "distinct change". She said that when people are not communicating properly and "staying in rooms" as they were, then there is the potential for information not to be passed on that can impact on those using the services.

[156] Some staff who came and gave evidence said they could work with MIJ and were positive about doing so. One however said of the atmosphere that it was "not a nice place to be." Another said that she had noticed "a deterioration/decline in the work place" and that "not a person is unaffected by the stress of the dispute."

[157] Board Members also gave evidence that they may reconsider their voluntary positions if MIJ was reinstated. There was real concern on the part of the Board Members about some staff, their well-being, and their mental health at the present moment because of the work environment.

[158] Ongoing litigation can be a disruptive factor and it can be uncomfortable for staff involved in another person's employment dispute as many have been in this matter. I am not satisfied that this factor alone is the reason for continuing dysfunction in the work place

following interim reinstatement. It is more than that. MIJ says that difficulties can be resolved once the full facts are known and it can be understood that she was not involved in the community action. She suggests some external intervention and facilitation.

[159] The evidence did not satisfy me that there was the ability to resolve key difficulties in the working relationships in KZT. I have considered whether external intervention would assist however I am not satisfied as I must be, looking to the future, that there could be good and productive relationships re-established. The evidence supported a real risk of further resignations of some experienced staff and Board Members if MIJ is permanently reinstated with resulting cost and expense to a small business providing a community service and already struggling financially. For some staff there is too much hurt to trust MIJ again with previous actions seen as divisive and destructive within KZT and the small rural community. Trust for some including those with a longstanding connection to KZT will not be capable of being re-established if MIJ is reinstated permanently. The Authority observed a level of distress on the part of staff during its investigation.

[160] I was referred to a number of different cases where notwithstanding significant difficulties reinstatement was ordered. I do not have the confidence that the Judge did in *Hobday v Timaru Girls High School Board of Trustees*²⁴ that problems in this case are not insurmountable. There is an additional element at KZT with regard to safety of those who attend the business if there is considerable workplace tension and inadequate communications that was not present in *Hobday*.²⁵ There needs to be a functional team and I am not satisfied that at the moment there is. Evidence about day to day interactions between MIJ and some staff support a level of stress in the business. The evidence is that before interim reinstatement the team was happier and more functional and operating at a more profitable level. The level of damage to the employment relationships by actions taken by MIJ after 22 July 2019 was able to be properly tested at the substantive investigation. MIJ operated well in her professional work when reinstated on an interim basis but over that time the work environment was dysfunctional. Senior and professional colleagues observed this with concern.

²⁴ *Hobday v Timaru Girls High School Board of Trustees* [1994] 1 ERNZ 724 (EC)

²⁵ Above n 26.

[161] I acknowledge the real difficulties for MIJ because she moved her family to the small rural area on the basis that her employment relationship with KZT would be a long term one. She wants her children to stay in local schools. On that basis she obtained a parenting order that she live in the rural area. That may now have to be varied. I do however not consider that it will be difficult for MIJ to obtain another position with her considerable professional skills and clear ability and that may be able to be achieved within the same area but at a different business.

[162] I am not satisfied that it would be practicable and reasonable to order MIJ be permanently reinstated. The application is declined.

[163] The interim reinstatement order is rescinded. That means that from the date of this determination there is no obligation on MIJ to continue to work and no obligation on KZT to continue to provide work for her to do. There may be some handover required for any ongoing services. The parties are professionals. I would expect this to be completed sensibly and in a co-operative manner.

Lost wages

[164] Lost wages are sought from 15 October 2019 when employment was terminated to 6 March 2020 when the interim reinstatement order took effect. Ms Oberndorfer submits that the Authority should exercise its discretion and order more than three months lost wages because MIJ was in the midst of an ACC return to work plan that was disrupted by the dismissal and that she held herself in readiness for reinstatement.²⁶

[165] Mr Shaw submits that as the redundancy was genuine then lost wages should be limited to the time need to fully consult with MIJ.

[166] The Authority must, whether or not it provides for any of the other remedies, order the employer to pay to the employee the lesser of a sum equal to the lost remuneration or to three

²⁶ *Chief Executive of the Ministry of Maori Development v Travers-Jones* [2003] Employment Court Wellington WC11/03

months ordinary time remuneration. The Authority can exercise its discretion to order the employer pay a greater sum.²⁷

[167] I cannot rule out a possibility that employment would have continued for at least three months if the process had been fair. I am not however persuaded to order reimbursement in excess of 3 months ordinary time remuneration less the ACC amounts received. There were no attempts to mitigate loss. A recent Employment Court case about consideration of lost wages and mitigation with reinstatement is *Fraser Maddigan v Director General of Conservation*.²⁸ In that case there were no steps taken within the 13 weeks to mitigate loss. Reference was made to the Court of Appeal in *Carter Holt Harvey Ltd v Yukich* that an application for reinstatement does not, of itself, alter the position in respect of mitigation.²⁹ The approach taken by Chief Judge Inglis was that mitigation should be viewed on a case-by-case basis and that blanket exclusionary or inclusionary rules are unhelpful, rather the focus was on context.³⁰

[168] The context here was that MIJ clearly wanted reinstatement and that was her focus from the time her notice period ended and her employment was terminated. She was on ACC and only able to work limited hours. I find that it was reasonable for her to have some time before it could be expected that she may look for temporary work in the area. Whilst I accept that MIJ was without a vehicle I am not persuaded that I can take that into account beyond the three month period.

[169] I find that an appropriate award subject to any issue of contribution is for a three month period with holiday pay and Kiwisaver on lost wages. The three month period commences on 15 October 2019 and ends on 13 January 2020. On the basis of information provided by Ms Oberndorfer the lost wages over that period taking ACC payments received into account was 294 hours at \$86.54 which is \$25,442.76 gross. Kiwisaver at 3% on top of that is \$763.28 and holiday pay at 8% is \$2,035.42.

²⁷ Section 128 Employment Relations Act 2000.

²⁸ *Fraser Maddigan v Director General of Conservation* [2019] NZEmpC 190.

²⁹ *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300 (CA) at [38]

³⁰ Above n 30 at [65]

Compensation (Unjustified dismissal and disadvantage)

[170] MIJ seeks \$30,000 compensation. This is for both the dismissal and disadvantage grievance as I understand submissions for a global award. I find it appropriate to address the claim separately in this case.

Disadvantage

[171] There is insufficient evidence before the Authority for it to be able to properly assess and quantify the measure of any damage suffered by MIJ had there not been a breach of her employment agreement to provide her with the use of a vehicle after the company vehicle was written off.

[172] That then leaves a claim for compensation under s 123(1)(c)(i) of the Act. Mr Shaw submits that there was no disadvantage because the salary sacrifice was reinstated. MIJ was without the use of a vehicle for the period from the date of the accident in early April to 15 October 2019. She had to rely on others for getting groceries and getting to the bus stop. Further she had to pay her ex-husband \$80 a fortnight because of changed transport arrangements for access and that negated any support that she received for the children. Her children could not participate in sports and the family could not make car trips to enjoy the area. That impacted on MIJ and caused loss of dignity. Some options were advanced by KZT of a loan and the benevolent fund but MIJ remained without a vehicle. I accept that there was humiliation, loss of dignity and injury to feelings when there was no use of a vehicle exacerbated in circumstances where MIJ had sold KZT her own vehicle.

[173] I consider a fair award, subject to any findings about contribution under this head, to be \$5000. In assessing this award I have weighed there would inevitably have been some delay in purchasing a vehicle after the accident. The restructuring process may have justified some delay in purchasing a replacement vehicle until any outcomes were known.

Unjustified dismissal

[174] Mr Shaw submits that this claim should be limited to \$10,000 because there was no independent evidence to establish the claim of the amount sought.

[175] Further he submits that MIJ was concerned about publicity however it was MIJ who generated the publicity by “going up the chain” and then within the community.

[176] I accept that the consequences of the dismissal were reasonably significant. MIJ gave evidence of the stress she had suffered and that she tried to shield her children from that. She was obliged to live in the rural area with the parenting order and dismissal was financially devastating. She gave evidence of stress and sleepless nights.

[177] MIJ says that when there were gaps in the roster following her dismissal she stayed at home and suffered the speculation of the community and was hurt as a professional because her services were not called upon.

[178] I do weigh that had the relationship between MIJ and the Manager remained functional any public communication could have been dealt with by a joint statement rather than in the piecemeal manner that it was dealt with a lack of understanding and speculation. There is no evidence that aside from the publication of rosters in the newspaper KZT entered into the public space and certainly no evidence of doing so to criticise or undermine MIJ.

[179] I accept that MIJ wanted to work for an extended period at KZT and made considerable changes to reflect that commitment. She was then made redundant in circumstances where alternatives, if they had been discussed further in good faith, may have resulted in continued employment. That was very frustrating for her professionally and unsettling in respect of her personal life causing a great deal of worry and concern.

[180] I consider in line with other cases an award of \$20,000 under this head would be appropriate subject to any issues of contribution. I do not increase that award because MIJ was not reinstated in the circumstances of this case.

[181] I also weigh that MIJ was permitted to remain in the house that KZT owned for almost a complete year rent free and was also reinstated on an interim basis and make no award for future loss of the value of the accommodation.

Contribution

[182] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require then reduce remedies that would otherwise have been awarded.

[183] This was a no fault dismissal. Mr Shaw submits that there is blameworthy conduct up to but particularly following the confirmation of MIJ's redundancy. He refers to MIJ at the meeting on 20 June being convinced that KZT was trying to terminate her employment. I cannot discount that in part the lack of trust had been caused by the nature of the earlier meeting on 9 April 2019 and that flowed through to the next meeting. I do not find that communicating with the Board to be behaviour of a blameworthy nature. The behaviour after the redundancy decision was announced has been taken into account in considering the nature and extent of the remedies in that permanent reinstatement has not been awarded.

[184] There are no deductions from the monetary remedies for reasons of contribution.

Costs

[185] I reserve costs. The parties are encouraged to reach agreement about these if possible.

[186] Ms Oberndorfer has until 23 October 2020 to lodge and serve submissions as to costs. Mr Shaw has until 13 November 2020 to lodge and serve submission in response.

Accommodation

[187] Having heard from the parties I am confident that a sensible arrangement can be made for the vacation of the property taking into account respective needs.

Orders made

[188] The interim reinstatement order is rescinded.

[189] The application for permanent reinstatement is declined.

[190] KZT Limited is ordered to pay to MIJ the sum of \$25,442.76 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[191] KZT Limited is ordered to pay to MIJ the lost benefits of Kiwisaver in the sum of \$763.28 and holiday pay of \$2,035 on the award for reimbursement of lost wages under s 123(1)(c)(ii) of the Act 2000.

[192] KZT Limited is ordered to pay to MIJ compensation in the combined figure of \$25,000 for the unjustified disadvantage and dismissal under s 123(1)(c)(i) of the Act. .

[193] There is no award of a penalty for a breach of good faith.

[194] Costs are reserved and a timetable set for an exchange if agreement cannot be reached.

Helen Doyle
Member of the Employment Relations Authority