

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 492
3021060

BETWEEN VIVIEN MARSHALL
Applicant
AND NELSON ENGLISH CENTRE
LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Nicole Ironside, counsel for the Applicant
Graeme Downing, counsel for the Respondent
Investigation Meeting: 28 and 29 March 2019 in Nelson
Submissions Received: 29 March and 23 April 2019 from the Applicant
29 March and 12 April 2019 from the Respondent
Date of Determination: 20 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mrs Marshall's claims

[1] Vivien Marshall began working part-time for Nelson English Centre Limited (NEC) in April 2001 as the Homestay Co-ordinator. NEC is a private speciality English language college.

[2] Mrs Marshall began working full-time in 2003. In July 2017 she claimed that the general manager, Miles Fitton, bullied her. Mrs Marshall says that complaint was never resolved.

[3] In August 2017, James Upton, the then Director - Marketing who had started NEC, told Mrs Marshall that he was considering a restructure of NEC and that could result in her redundancy.

[4] On 2 September 2017 Mrs Marshall told Mr Upton that she had received legal advice and was raising further personal grievances of unjustified disadvantage and unjustified dismissal in relation to her imminent redundancy.

[5] After some further meetings, including one at Mrs Marshall's home and one at NEC's premises, on 6 September 2017 Mr Upton delivered a letter to Mrs Marshall advising her that her position would be redundant and giving her three months' notice to end her employment on 6 December 2017. The letter stated that NEC would make an ex gratia payment of \$21,000 to Mrs Marshall.

[6] Mrs Marshall became unwell and was certified unable to work from 8 September to 22 September 2017. On 12 September 2017 Mr Upton phoned Mrs Marshall to ask when she was coming back. Mrs Marshall told him she was not coming back and at his request put that in writing.

[7] Mrs Marshall claims she was unjustifiably disadvantaged during her employment and unjustifiably dismissed on 6 September 2017.

[8] She claims that NEC breached its duty of good faith to her.

[9] By way of remedy she seeks reimbursement of lost wages, holiday pay and other benefits for a year and interest on those amounts. She claims compensation of \$50,000.

[10] Mrs Marshall also claims the Authority should impose penalties on NEC for breach of its good faith obligations and for NEC's breach of her contract. Mrs Marshall claims that the penalties should be paid to her.

NEC's response and counter-claims

[11] NEC denies that Mrs Marshall was disadvantaged in any way during her employment. It says that the issue with Mr Fitton was resolved before any issue of potential redundancy was raised with Mrs Marshall.

[12] NEC denies that Mrs Marshall was unjustifiably dismissed. It says that the decision on redundancy was justified and was reached after a fair process.

[13] NEC says that if any of Mrs Marshall's personal grievance claims are found to be made out any remedies she seeks should be reduced by 75 per cent because of her contribution to the situation leading to her personal grievance/s.

[14] NEC also counter-claims against Mrs Marshall. NEC says that Mrs Marshall wrongly transferred electronic documents from her work computer to her home computer and deleted a large number of emails and documents from her work computer. NEC also claims that on or about 6 September 2017 Mrs Marshall wrongly removed or destroyed hard copy documents, including homestay placement records and forward planning records.

[15] It seeks damages for Mrs Marshall's breach of contract and a penalty of \$35,000 for Mrs Marshall's breach of good faith and breaches of her contract.

Issues

[16] The issues for investigation and determination are:

- (a) Did NEC act as a fair and reasonable employer could have acted in all the circumstances in relation to Mrs Marshall's personal grievance claim of bullying by Mr Fitton?
- (b) Did NEC use a fair and reasonable process to reach the decision to make Mrs Marshall's job redundant?
- (c) Was the decision on redundancy genuine or was it a way of reducing what Mrs Marshall was paid?

- (d) Was the decision to terminate Mrs Marshall's employment justifiable in terms of the test of justification set out in s 103A of the Employment Relations Act 2000 (the Act)?
- (e) If NEC's actions were not justified what remedies should be awarded to Mrs Marshall?
- (f) Did Mrs Marshall contribute in a blameworthy way to the situation leading to her personal grievance/s?
- (g) Should interest be awarded on any remedies?
- (h) Did Mrs Marshall wrongly deal with NEC's electronic and hard copy documents in a way that led NEC to suffer loss? If so, what, if any contractual damages should Mrs Marshall pay NEC?
- (i) Did NEC breach Mrs Marshall's contract of employment? If so, should the Authority impose a penalty?
- (j) Did either party breach its duty of good faith to the other? If so, should a penalty be imposed?
- (k) If so, to whom should that penalty or penalties be paid?

The Authority's investigation

[17] The investigation meeting was originally set down for dates in 2018. However, Mr Upton became very ill and the meeting was adjourned because of his unavailability. Sadly, Mr Upton died at the end of 2018. Before he died he had completed an affidavit of evidence, with attached documents. I have considered his affidavit. I also heard evidence from Mrs Marshall and her husband, Ray Marshall. Mr Fitton gave evidence for NEC by telephone link.

[18] This determination has been issued outside the statutory period of three months after receiving the last submissions. The Chief of the Authority has decided that exceptional circumstances exist for providing this outside the latest date specified in s174C(3)(b) of the Employment Relations Act 2000.

[19] I do not refer in this determination to all evidence and submissions that I received during the investigation. However, I have read them all and fully considered them.

What happened?

Mrs Marshall's role

[20] Mrs Marshall had been involved as a homestay coordinator and assisting with marketing since she was first employed in 2001. She worked closely with Mr Upton building up the number of students and number of homestay hosts.

[21] From at least 2005 Mrs Marshall worked approximately 50 hours a week. Mr Fitton was working at NEC by 2005. Mr Fitton, Mr Upton and Mrs Marshall worked closely together in the ensuing years and all got on well. Mr Upton restructured the organisation in 2007 to free himself up to focus on marketing, external relationships and overall strategy. Mrs Marshall undertook a wider welfare role from that date which was in line with the increase in the number of homestay families and students and the consequential increase in welfare issues. From that date she moved away from active marketing work to back up assistance for marketing.

[22] In 2008 Mrs Marshall received a new position description which showed that she was homestay and marketing assistant as well as welfare and social coordinator.

[23] From 2012 Mrs Marshall agreed with Mr Upton to work fewer hours for the months from April through to the end of September. That became a permanent arrangement and applied every year from around April/May when the number of students began to drop until September when student numbers markedly increased.

[24] Part of Mrs Marshall's work had always been picking up students from the airport during the weekends and outside of work hours and taking them to their homestay hosts. In the years 2002 to 2009 and in 2014 Mrs Marshall assisted the school by undertaking overseas marketing trips to Asia. After 2014 Mrs Marshall was no longer involved in marketing trips and her involvement in marketing generally dropped away coinciding with NEC's move to more online marketing.

[25] In 2015 in Mrs Marshall's performance review it was noted that NEC was undergoing a number of technological changes and Mrs Marshall was keen to be upskilled in that area.

[26] In 2016 Mrs Marshall's position was described as homestay/welfare. At that stage that was a good description of her position and work tasks. Her performance appraisal noted that the homestay area was the one in which she had the most success and that her weakest area was computer skills. Mrs Marshall asked for a computer skills course outside of NEC. Mr Upton also noted that Mrs Marshall was moving away from evening social activities. Mrs Marshall in 2017 found a computer skills course in which she enrolled.

[27] Also, in 2016 Mr Fitton was appointed as the general manager of NEC.

[28] In his affidavit, Mr Upton described the team dynamics between Mrs Marshall, Mr Fitton and himself over the previous fourteen years as being a culture of speaking their minds fairly robustly. He says that they had generally positive relationships and the ability to pick up and repair matters where there had been disagreement or offence within the team.

Mr Fitton and Mrs Marshall's working relationship deteriorated

[29] Mrs Marshall went on holiday for five weeks in May and June 2017. Mrs Marshall says that when she returned from holiday she and Mr Fitton had a disagreement at a staff meeting. She says that this was also the meeting at which Mr Fitton announced that the school had a tax debt to the IRD of around \$40,000 "which was equivalent to one person's job". After that Mr Fitton asked if Mrs Marshall would make a job board. She said that she didn't think that she was the best person for that job. She says that she could see that Mr Fitton was very angry with her for saying that and instead asked the new staff member to do it.

[30] Mrs Marshall says that after that meeting Mr Fitton chose not to speak to her unless it was absolutely required and did not say good morning or goodbye to her. She says that he excluded her from conversations about homestay issues. Mrs Marshall also says that Mr Upton also excluded her. She gives examples of not being included in a meeting with Korean agents and Mr Fitton excluding her from meeting Brazilian agents.

[31] Mrs Marshall says Mr Fitton found fault in what she did and often communicated that to her in front of other people. Mrs Marshall says that the emails to her from Mr Fitton were extremely sharp and she found that he was watching and waiting to pounce on anything she may have done wrong.

Mrs Marshall's complaint about Mr Fitton's behaviour

[32] On 3 July 2017 Mrs Marshall requested a meeting with Mr Upton to discuss her problems with working with Mr Fitton. Mr Upton arranged a meeting on 6 July 2017 with Mr Fitton and Mrs Marshall. Mrs Marshall had an opportunity to clarify her concerns that she was feeling stressed, humiliated and excluded. Mr Fitton gave an acknowledgement to Mrs Marshall that he could have handled the situation better at the staff meeting. Mrs Marshall says that after the meeting had finished Mr Upton gave her \$200 so that she could seek counselling for her work-related difficulties.

[33] Mrs Marshall took notes at the meeting and sent her notes to Mr Upton and Mr Fitton.

[34] However, Mrs Marshall says that Mr Fitton's treatment of her did not improve after the meeting. Mr Upton had gone overseas on his marketing trip. She felt that Mr Fitton was still bullying her.

[35] On 12 July 2017 Mrs Marshall emailed Mr Upton, who was in Taiwan. Mrs Marshall informed him that she had been to the doctor that day and had been given five days' stress leave off work. She told him that her blood pressure was extremely high. She said that the last four weeks had been very stressful for her and was taking its toll. She said that her doctor had advised her to stay away from whatever was causing this stress. She had a medical certificate which required her to take five days sick leave from 12 July to 19 July 2017. She booked an appointment with a counsellor and advised Mr Upton of that in the same email.

[36] On 15 July 2017 Mr Fitton wrote Mrs Marshall a long email in which he acknowledged the feedback that she had been giving him and his hope that they could move forward and resolve any unresolved issues. He commented on some of the issues that she had raised about him and asked that when she felt better they could talk about anything that remained unresolved between them.

[37] Mrs Marshall wrote that she felt isolated from the team and that they had been treating her in a bullying manner. Mrs Marshall raised some further issues and Mr Fitton emailed back attempting to answer all of those issues for her. Both Mrs Marshall and Mr Fitton had copied Mr Upton into that email exchange.

[38] On 18 July 2017 Mr Upton responded that he had a lot of things to say about the matter:

The matter needs to be addressed in the light of the general direction of the company.

Can people just put their heads down and do their jobs SO I can finish this work here. It is 30 degrees plus and I am in taxis all day. I need the backup work done please.

I am not comfortable with the personal topics in the email exchange.

Who is setting the agenda here? Not me.

I am not happy folks.

[39] Mrs Marshall said that she knew from that email that Mr Upton was angry with her and she felt intimidated and frightened by his response. She sent a further email to Mr Fitton and in it she said she wanted to see them as co-workers being supportive and respectful of each other and if that could be achieved in a meeting then she agreed to meet with him. Otherwise she wanted a third party to attend and suggested the director of studies could attend.

[40] Mr Fitton and Mr Upton both said that they did not think she would need the director of studies to be there and Mr Upton emailed Mrs Marshall to say that he expected her to be professional enough not to drag the director of studies into a meeting.

[41] Mr Upton emailed them both to say that he was not happy and that things needed to wait until he got back. He said he did not need to read long emotional emails after he had held a meeting to deal with the matter and had a timetable to deal with it. He wrote:

Not happy with mention of [director of studies]. Not appropriate. Do I have to change my flight to come back early?

[42] Mr Fitton and Mrs Marshall met together in the morning of 19 July 2017. After that Mrs Marshall wrote to Mr Upton:

Just so you know, and are not worrying about us here in Nelson. Miles and I had an hour and half clear the air meeting this morning on our own, and we have reached a happy place.

Enjoy the heat as it has been pretty chilly here.

[43] Mrs Marshall says that she and Mr Fitton had apologised to each other and agreed to try and get back on track. She said she was hopeful that they could both do that. She says that she hoped that her email to Mr Upton would make him less angry when he returned from his trip. However, Mrs Marshall says that while she worked hard to try and get things back on track she noted that Mr Fitton kept his distance from her and believed that their working relationship remained strained.

Mrs Marshall's 2017 performance review put off

[44] Mrs Marshall says she was anticipating that her 2017 annual review would be completed in June. However, after the 13 June staff meeting, in which she had refused to make a job board, her annual performance review was postponed twice by Mr Upton and Mr Fitton. She had already completed her part of the staff yearly review document and there had been things she had wanted to discuss about her job and about Mr Fitton's behaviour.

The First Meeting about Job Restructuring

[45] On 1 August 2017, Mr Upton's first day back at work, he asked to have a meeting with Mrs Marshall. She did not know what the purpose of the meeting was or who would be attending. However, she assumed the meeting was either to discuss her problems with Mr Fitton or to have her annual review.

[46] The meeting was between Mr Upton and Mrs Marshall alone. He asked how she was. She said she was not the best and that she had been saddened by the very stressful six weeks she had had. She said that she thought she and Mr Fitton might be able to work through their differences but she thought they would need some help.

[47] Mr Upton started talking about his vision for the future of NEC and gave Mrs Marshall a number of pages of information about a proposed restructuring which included some mind maps and handwritten notes he had made. Mrs Marshall was extremely shocked by the meeting.

[48] Her evidence is that Mr Upton had told her that he was going to make her job redundant in its current form and had a plan to pay her out \$20,000 or more. He said that the new job would be half the hours that she was currently working and would have some

functions removed from it. In the meeting Mrs Marshall says that he wanted the school to become more information technology focussed and he said that “people were replaceable”.

[49] Mrs Marshall says that Mr Upton told her that it would take a few months to sort out and that he would need to take legal advice.

[50] He said that there would be no performance review regarding her current job.

[51] Mrs Marshall says she understood from the discussion at the meeting that her main roles of homestay and welfare would remain. She felt NEC still needed a person to do the homestay and welfare work but believed that Mr Upton did not want her doing that work any longer.

[52] Mrs Marshall made some detailed notes what she could recall at the meeting which she says was quite long and left her feeling somewhat numb and shocked.

[53] After the meeting Mrs Marshall asked Mr Upton for a time frame for when she would be able to ask specific questions and who she could ask questions of. She asked who else on the staff knew about the potential redundancy. She clarified that she felt that Mr Fitton was still not communicating well with her.

[54] Mr Upton responded to her that no one else knew about the proposal except the two of them and Mr Fitton. He said he did not think it was a good idea to discuss it more widely and wondered why she would want a wider discussion of something “which is a draft proposal”.

Second meeting to discuss proposed redundancy

[55] On 4 August 2017, Mr Upton again asked Mrs Marshall to meet with him. Mrs Marshall went to the meeting to discover that Mr Fitton was also present. Mrs Marshall’s evidence is that Mr Upton opened the meeting by discussing the complaint Mrs Marshall had made about Mr Fitton’s behaviour towards her. She says he reminded her of what had happened to a former employee who had raised a grievance and said that employee had lost. He told her accusations of bullying were going too far. He said he did not like it that she was maintaining a paper trail.

[56] Mrs Marshall says that Mr Fitton accused her of recording the meeting.¹ She also says he told her he did not trust her and that she was a lost cause as far as computer skills were concerned. He said he did not know how she would cope with the paperless office he intended to create.

[57] Mr Upton told Mrs Marshall he would present a proposal to her in two weeks. She understood that to mean a proposal for a new position.

[58] Mrs Marshall says she was extremely distressed after the meeting. When she went home she could not stop crying. Mr Marshall took her blood pressure, which was very high again. She went to see her doctor again and reported work stress as the cause of her illness.

[59] Mrs Marshall says she could not sleep, felt extremely anxious about her work, could not eat and vomited frequently. She felt threatened and betrayed. She felt that her complaint about bullying had been lost sight of and was overcome by the proposed redundancy.

[60] Mrs Marshall stated making a detailed account of her current work duties and tasks as she felt neither Mr Upton nor Mr Fitton actually understood what her homestay/welfare role entailed and how long it took. She sent that to Mr Upton on 17 August 2017, stating that the work could not be performed in the 3 office hours a day the document she had been given proposed.

Meeting on 22 August 2017

[61] Mr Upton invited Mrs Marshall to a meeting by way of email on 21 August 2017. She was not given any documents in advance of the meeting.

[62] At the meeting Mr Upton gave Mrs Marshall a copy of an email he had sent to Mr Fitton entitled “The Proposed Restructure of Homestay Job, Consultation and Input.” He also gave Mrs Marshall a one page document headed “Accommodation and Welfare Team Member”, which was a draft job description for the proposed new job.

[63] Mr Upton explained his thinking and drew diagrams about the new NEC structure.

¹ She was handwriting notes.

[64] Mrs Marshall says she felt sick, shaky and unable to eat after the meeting and felt numb overall. She was supposed to attend another meeting on 24 August 2017 but woke with a headache and asked for the meeting to be postponed.

[65] On 25 August 2017 Mrs Marshall emailed Mr Upton asking questions about the proposed new role, including where he got the idea that 3 hours a day in the office would be sufficient. She asked for other information about the new job. She told him he did not understand how much work was involved with pick-ups and the homestay work and gave him more information on those areas of her job.

[66] Mr Upton replied that the 15 hours a week was an estimate and that if the decision to stop Mrs Marshall's current role went ahead, her current role would remain in place until roughly December 2017.

Further meeting on 29 August 2017

[67] Mrs Marshall, Mr Upton and Mr Fitton had another meeting about the proposed new role.

[68] Mrs Marshall again asked where the 3 office hours a day had come from. Her evidence is that she asked Mr Upton whether his intention was to make her current job redundant. He said that is what he wanted to do. However, he and Mr Fitton said they thought Mrs Marshall would be the best person for the new job, but that she would need to apply for the new job.

[69] Mrs Marshall told them she found the process very stressful and found facing the two of them in the meeting without a support person intimidating.

[70] She asked for a draft of the new position and new job description so that she could give informed comment on the proposal.

Meeting on 31 August 2017

[71] Mr Upton, Mr Fitton and Mrs Marshall again met. Mrs Marshall says she was very distressed at this meeting. She says Mr Upton told her he intended to abolish her current role on 6 September 2017 and that the position would end after the three month notice period on

6 December 2017. Mr Upton gave Mrs Marshall the draft new job description and a new draft employment agreement.

[72] Mrs Marshall says she felt humiliated and extremely stressed in the meeting. She left the meeting physically shaking and says she was unable to start her car due to her shaking. She got home and was physically sick and could not stop crying. She took the following day, a Friday, off as sick leave as she was so distressed.

[73] Mr Upton sent her an email that day confirming that he intended to go ahead with making the decision about the proposed new role on 6 September 2017.

[74] On 2 September 2017 Mrs Marshall sent some further feedback, in particular, pointing out that her job could not be done in the shortened hours proposed. She sent a further email stating that she had taken some advice on the redundancy process. She pointed out that her view was that the new role “is in essence a full time role condensed into a part-time role.”

[75] She revealed that she had taken legal advice. She raised personal grievances of unjustified disadvantage and unjustified dismissal. She asked for full disclosure of all information Mr Upton had relied on to make the decision and asked if her position was the only one to be made redundant.

Events on 3 September 2017 at the Marshalls' home

[76] The following day Mr Upton visited Mr and Mrs Marshall at home. Mr Upton had suggested he come to see them that day.

[77] I accept Mr and Mrs Marshall's evidence that Mr Upton begged Mrs Marshall not to involve lawyers. He spoke of their long close working relationship and friendship. However, when Mrs Marshall did not offer to withdraw her personal grievance claims, Mr Upton told her that she would end up like the former employee and be unable to get work in Nelson again. He said that she would live to regret her approach. He asked her to stop her lawyer's involvement.

[78] Mr Upton suggested that they meet on the Tuesday to resolve issues. Mrs Marshall agreed, and asked for the meeting to again be at her home. She did not want Mr Fitton involved in the meeting. She says she still hoped she could retain her job and resolve the

work tensions and stress. Mr Upton agreed the meeting the next day could be at the Marshalls' home.

[79] Before Mr Upton left, Mrs Marshall agreed to contact her lawyer and ask for an opportunity to reach an amicable solution before any further legal involvement. Mrs Marshall said she emailed her lawyer and told her what they were going to do and their lawyer wished them well.

[80] The following day Mr Upton sent an email changing the venue of the meeting to the school and saying that Mr Fitton would also attend.

[81] Mr and Mrs Marshall attended the meeting. Mrs Marshall hoped that both sides could compromise and find a mutually acceptable solution. As part of that she wanted Mr Fitton's behaviour towards her to be addressed.

[82] However, Mrs Marshall says that Mr Upton would not consider discussing anything until Mrs Marshall retracted "our legal letter". He asked for an email "calling off the lawyers". Mr Marshall said that they had already done that. Mr Upton wanted proof of that and would not enter into a discussion without it. He demanded Mrs Marshall send her lawyer an email immediately from her work computer. Things became very heated.

[83] Mr Upton left the meeting. He says that was in the hope that without him and the level of anger he and Mr Marshall were displaying towards one another progress could be made.

[84] Mr Fitton and Mrs Marshall made some progress, for example, Mr Fitton agreed to raise the per hour rate for Mrs Marshall if she took the new role.

[85] However, by the end of the meeting Mrs Marshall realised that she could not continue working with Mr Fitton and Mr Upton.

[86] Mrs Marshall had been medically certified unfit for work from 4 to 8 September 2017. She was at home on 6 September 2017 when she received Mr Upton's letter confirming the redundancy. There was no offer of the new part-time position attached.

[87] Mrs Marshall emailed Mr Upton the following day stating that she had been working since June in a negative environment. She stated that his and Mr Fitton's approach had been

bullying and unpleasant. She stated that she did not believe a future relationship could work. She stated that she was again seeking a solution to her grievance.

[88] On Tuesday 12 September 2017 Mrs Marshall resigned.

[89] Mrs Marshall was again certified medically unfit from 8 September for two weeks. She remained medically unfit for work through November 2017.

The bullying complaint

[90] Mrs Marshall did not raise a formal personal grievance about Mr Fitton's bullying and how NEC dealt with her complaint until near the end of her employment.

[91] Mr Upton's initial approach at an informal meeting to Mrs Marshall's complaint was reasonable, given the long working relationship the three of them had. However, his response to Mrs Marshall while he was away on the marketing trip stating that he was "not happy" and making it clear he was not happy with the agenda being set by Mrs Marshall at that point were not the reactions of a fair and reasonable employer.

[92] I understand that NEC may have considered the matter settled when Mrs Marshall sent the email stating that she and Mr Fitton had "reached a happy place."

[93] However, I consider that NEC was clearly on notice by 1 August 2017 when Mr Upton and Mrs Marshall had their first meeting at which the potential redundancy was discussed that Mrs Marshall was still under stress and thought she and Mr Fitton needed help to resolve things.

[94] At the very least NEC needed to investigate Mrs Marshall's complaint and seek to resolve it. That required Mr Upton, or another person, spending time with Mrs Marshall to understand her complaint and also interviewing Mr Fitton.

[95] Mrs Marshall's evidence that at a meeting on 4 August 2017 Mr Upton reminded her of what had happened to a previous employee who had brought a personal grievance and told her the bullying allegations "were going too far" were not countered by any evidence from Mr Fitton or Mr Upton. Therefore, I accept Mrs Marshall's evidence.

[96] I have no hesitation in finding that NEC's approach to Mrs Marshall's bullying grievance was insufficient and led to her heightened sense of unfairness for the rest of her employment. I find that Mrs Marshall was unjustifiably disadvantaged in her employment.

The redundancy

[97] NEC introduced and proceeded with its intended restructuring without resolving Mrs Marshall's bullying complaint. Mr Upton and Mr Fitton decided not to proceed with Mrs Marshall's performance review in June 2017. I conclude that was not simply because they were too busy. Instead, it was because they intended to restructure Mrs Marshall's job and in light of that did not consider it time well spent. Mr Fitton's evidence was that a year previously they had considered restructuring the whole organisation. However, by May and June 2017 their view was solely on restructuring Mrs Marshall's role.

[98] The fact that NEC gave notice of Mrs Marshall's role becoming redundant three months before it was to become redundant suggests that the role may not have been surplus to the needs of the organisation at that time. It is certainly evident that there was no need to proceed with the haste with which NEC did proceed.

[99] NEC has not proved to my satisfaction that there was genuine consultation and that it only had a working plan that it was proposed to alter upon consultation. By 1 August 2017 Mr Upton was already able to tell Mrs Marshall NEC intended to pay her out around \$20,000. I accept Mrs Marshall's evidence that Mr Upton had already reached the conclusion that her role would be made redundant, although a new job description had not been settled on.

[100] Another reason that the redundancy appears to have been determined prior to any consultation with Mrs Marshall is Mr Fitton telling Mrs Marshall he no longer trusted her during the 4 August 2017 meeting.

[101] Mr Fitton agrees that he said that.

[102] Mr Fitton's evidence was also that he was aware that during the period of consultation Mrs Marshall was unwell through work related stress. Mr Upton was likewise aware of that but did not put the consultation process on hold.

[103] A fair and reasonable employer could not have proceeded with a redundancy consultation process, for which there was no need to hurry, while Mrs Marshall was so unwell and while it had not resolved the complaint of bullying against Mr Fitton. It certainly could not have included Mr Fitton in the meetings held to consult with Mrs Marshall about the eventual redundancy of her position.

[104] Mr Upton's behaviour when Mrs Marshall sought to legally challenge NEC's actions in relation to the redundancy by way of two personal grievances was not the behaviour of a fair and reasonable employer. A fair and reasonable employer could not have demanded that an employee who had raised bullying allegations and was facing redundancy should proceed without help from her lawyer and should effectively withdraw the grievances she had a legal right to raise. It is unclear to me what objection Mr Upton had to Mrs Marshall seeking and acting on legal advice when he had been clear with her that NEC intended to seek legal advice.

[105] I consider that although on 6 September 2017 NEC officially told Mrs Marshall that it her role would become redundant as at 6 December 2017, Mr Fitton and Mr Upton's behaviour towards her by that date had totally broken down any trust and confidence Mrs Marshall once had in NEC. It should have been foreseeable to Mr Upton that Mrs Marshall would resign and not be able to work out her notice.

[106] NEC did not act as a fair and reasonable employer could have acted in all the circumstances at the time. Mrs Marshall was unjustifiably dismissed.

Remedies

Lost remuneration

[107] Since finding Mrs Marshall was unjustifiably dismissed, the Authority is required to award her, even if it provides no other remedies, the lesser of a sum equal to her actual lost wages or three months ordinary time wages.

[108] Mrs Marshall seeks lost salary and benefits, which included a weekly vehicle allowance, a medical insurance contribution of \$900 per year and 3% employer Kiwisaver contributions. Mrs Marshall claims lost wages in full up to when she got a new job as well as

the difference between her old weekly salary and her new weekly wage from 23 February 2018 until 9 September 2018. Mrs Marshall's last pay from NEC was on 8 September 2017.

[109] In order to award more than the lesser of actual lost wages or three months ordinary time wages, I need to exercise my discretion under s 128(3) of the Act.

[110] I am satisfied that Mrs Marshall was too unwell to properly and confidently search for a new job at least up until November 2017. Her illness was caused by how badly NEC had treated her.

[111] I consider that had NEC acted as a fair and reasonable employer Mrs Marshall would have remained employed on the same terms and conditions at least until 6 December 2017. Standing back and assessing the matter overall, I consider that it is fair for NEC to pay Mrs Marshall the equivalent of 26 weeks wages, from 8 September 2017 until 9 March 2018, less what Mrs Marshall earned from 23 February to 9 March 2018. I have taken into account how long Mrs Marshall had worked for NEC in a senior and specialised role, the fact that there were very few comparable jobs in Nelson and her age at the time of her dismissal.

[112] Mrs Marshall is also entitled to be paid holiday pay of 8% on that gross amount of salary and the 3% Kiwisaver employer contribution.

[113] I also consider it reasonable that Mrs Marshall be paid 50% of the medical insurance amount she would have received had she remained employed.

[114] I do not award her any vehicle expenses.

Compensation

[115] Mrs Marshall seeks \$50,000 for compensation for humiliation, loss of dignity and injury to her feelings arising from how she was dealt with while in the last few months of her employment and for the effects of the termination of her employment.

[116] Mrs Marshall's health was seriously negatively affected during the period that NEC failed to deal adequately with her bullying allegation and during the consultation process. She was further distressed by the termination of her employment. There was significant evidence from Mrs Marshall, which was supported by her husband's evidence.

[117] I do not accept submissions for NEC which suggest that some of Mrs Marshall's stress was related to other life events and not related to its unjustified behaviour. It is certainly the case that aspects of Mrs Marshall's wider life, on 2 and 3 September 2017, were stressful. However, NEC cannot escape liability for the negative effects of its actions on Mrs Marshall, especially when it was acting under notice from her that she and her GP considered her symptoms to have been caused by work stress.

[118] I do not agree with submissions for NEC that Mrs Marshall's decision not to work out her three months' notice contributed to any humiliation she suffered.

[119] Taking into account all relevant circumstances, I consider that it is appropriate for NEC to pay Mrs Marshall \$20,000 for the combined significant effects the unjustifiable disadvantage and the unjustified dismissal had on her physical and emotional health, including on her confidence.

Contribution

[120] I am required to consider whether Mrs Marshall contributed to the situation giving rise to her grievances, and if she did so consider whether the remedies should be reduced to take account of that.

[121] I disagree with NEC's submission that remedies should be reduced by 75% to take account of Mrs Marshall's contribution. The fact that Mrs Marshall actively took part in discussions about the proposed restructure of her position that meant that NEC believed she would be interested in the new position cannot be said to be contributory conduct that led NEC to act in the way that it did.

[122] Mrs Marshall did want to retain her work for NEC. She actively participated in the consultation in order to ensure that any new role as accurately as possible reflected the actual work that she did and had been engaged in for a number of years.

[123] Mrs Marshall's suggestion that she was not the best person to make a job board was the event that set off Mr Fitton's change in attitude to her. That cannot be said to have contributed in a blameworthy way to the finding that NEC unjustifiably disadvantaged her in her employment.

[124] Likewise, Mrs Marshall did not contribute in any way to the way that NEC went about making her role redundant. Her decision to act within her legal right to raise personal grievances cannot be said to have contributed to the unjustified disadvantage or unjustified dismissal.

[125] NEC submitted that once it notified Mrs Marshall that her position had been made redundant her behaviour was very poor. However, this consideration does not fit within my assessment of contribution.

[126] I do not consider Mrs Marshall behaved in any way that contributed to situations giving rise to the personal grievances. Therefore, there is no deduction from the above remedies.

Interest

[127] Mrs Marshall claims that interest should be paid on the any monetary awards. I consider interest should be paid on the lost salary, holiday pay, medical insurance reimbursement and Kiwisaver contribution to be calculated under the Interest on Money Claims Act 2016² from 9 March 2018 until 31 March 2019.

Mrs Marshall's other claims

[128] Mrs Marshall claims that NEC should pay penalties for its breaches of its duty of good faith to her, and that a proportion of the penalty should be paid to her. These claims arise out of the same facts that have seen findings of unjustified disadvantage and unjustified dismissal made against NEC. I consider that Mrs Marshall's claims are more effectively dealt with by the personal grievance findings and the remedies ordered already.

NEC's counterclaims

[129] NEC presented evidence from a network engineer that it engaged to investigate and, if possible, recover emails from Mrs Marshall's computer mailbox. He found that a number of emails had been deleted on 6 September 2017, and the deleted items folder had been emptied.

[130] He recovered 1,829 emails that had been deleted that day. Mr Fitton's evidence was that a number of the emails were ones that NEC needed.

² www.justice.govt.nz/fines/civil-debt-interest-calculator/

[131] Mrs Marshall disagrees. She says that she did delete a number of emails and forward some to her personal email account. However, she says she used her work computer for her personal use and the emails she copied to her own email address remained on NEC's computer. She says the emails she deleted were junk emails, non-work related emails, personal photos and old emails from before 2012.

[132] NEC says that around the time that Mrs Marshall left a number of student registrar forms went missing. Mrs Marshall denies taking any of these.

[133] In addition, the Green Folder that contained most of the valuable homestay documents, including student feedback and student complaints, was removed by Mrs Marshall. NEC agrees that Mrs Marshall returned the Green Folder.

[134] Mrs Marshall says that she did not take or destroy any hard copy documents.

[135] NEC has not identified any loss that it has suffered from the way Mrs Marshall dealt with its documents or its emails.

[136] Mr Fitton agreed that the only cost to NEC was the cost of engaging the computer technician. That is not a cost that can be sheeted home to Mrs Marshall.

[137] In the absence of any loss and any proof that Mrs Marshall caused any loss there are no damages to be paid.

[138] NEC also claims that it suffered loss when Mrs Marshall did not work the three month notice period it gave her. That is not a sustainable claim in the light of my findings of unjustified dismissal. However, even if she had not resigned on 12 September 2017 Mrs Marshall was too unwell to work until at least November 2017. I dismiss this claim.

[139] I also dismiss NEC's claim that Mrs Marshall breached her duty of good faith and breached her employment contract.

Costs

[140] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs. I invite the parties to agree on costs. If they are unable to do so, Mrs Marshall has 28 days from the date of this determination to file and

serve her submissions on costs. NEC has 14 days from the date they receive those submissions to file submissions in reply.

[141] The Authority is likely to determine costs, if asked to do so, on its usual notional daily tariff-based approach to costs. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority