

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 13

5620971

BETWEEN            KAYLA MAY-ELLIS  
Applicant

AND                    ADVANCE  
INTERNATIONAL  
CLEANING SYSTEMS (NZ)  
LIMITED  
Respondent

Member of Authority:    Christine Hickey

Representatives:        Ben Nevell, counsel for the Applicant  
Jiwa Nadan, representative of the Respondent

Investigation meeting:    14 October 2016, in Dunedin

Submissions:            From the Applicant at the investigation meeting  
From the respondent on 31 October 2016

Determination:         24 January 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.    Advance Cleaning Systems (NZ) Limited unjustifiably dismissed Kayla May-Ellis.**
- B.    Within 28 days of the date of this determination Advance Cleaning Systems (NZ) Limited must pay Kayla May-Ellis:**
- (i) \$7,731.54 gross in lost wages,**
  - (ii) \$231.95 in Kiwisaver contributions, and**
  - (iii) \$15,000 compensation for humiliation, loss of dignity, and injury to her feelings.**

**C. Kayla May-Ellis must pay the \$231.95 Kiwisaver contribution into her Kiwisaver account within 28 days of receiving it from Advance Cleaning Systems (NZ) Limited.**

**D. I have reserved costs and set a timetable for submissions.**

### **Employment relationship problem**

[1] Kayla May-Ellis worked for Advance International Cleaning Systems (NZ) Limited (Advance) until the company dismissed her by letter dated 9 March 2016.

[2] Ms May-Ellis claims:

- she was unjustifiably disadvantaged by not being allowed to work and not being paid between 25 February and 9 March 2016, and
- she was unjustifiably dismissed, and
- her job was not kept open for her following her return from parental leave, which was a breach of Advance's obligations under the Parental Leave and Employment Protection Act 1987 (PLEPA), and
- Advance breached its duty of good faith to her.

[3] Advance denies breaching its obligation under the PLEPA to Ms May-Ellis, and denies breaching its duty of good faith. It says that it was justified in dismissing Ms May-Ellis because her actions were serious misconduct, which caused an irreconcilable breakdown of trust and confidence.

### **Background facts**

[4] Advance employed Ms May-Ellis in a customer service and administration role in March 2013. She formally commenced her parental leave in November 2015, having actually been on leave on medical advice since mid-October. Her projected return to work date was 22 February 2016.

[5] On 11 January 2016, Ms May-Ellis emailed Phil Moses, Advance's Team Leader and Sales Account Manager of the Dunedin branch, to discuss her return to work.

[6] Stephanie Morris, from Advance's head office, emailed Ms May-Ellis on 20 January reminding her that parental leave was due to end on 22 February and asking if she was seeking any changes to her terms of employment.

[7] On 25 January 2016, Ms May-Ellis replied saying that she proposed to return to work on 25 February and asked if her annual leave could be used for three days. She asked if she could have her daughter at work for a few days a week so she could remain in full-time employment, otherwise she may have to "look at reducing my hours".

[8] On 2 February 2016, Ms Morris replied that it was not feasible to have "baby Emie" at work. She recorded that Ms May-Ellis had suggested a reduced hour part-time role and had asked Mr Moses about a 30 hours, four-day week. Ms Morris wrote:

Our business in Dunedin has been very challenging with low sales over the past several months. In this regard, our view is that, we can only sustain one full-time person in the customer service/warehouse role while we build on the sales required to add more resources as required. [Mr A] has been able to carry this overall task in your absence in a diligent and effective manner.

In the best interest for all concerned, we offer a part-time position 4 hours a day/5 days a week.

[9] On the same day, Ms May-Ellis replied that the offer of part-time work was "unsustainable" for her and that rather than negotiate reduced hours:

I will simply return to work in the same full-time role I enjoyed prior to my maternity leave.

[10] On 10 February, Jiwa Nadan, Advance's CEO, replied. He welcomed Ms May-Ellis' return to full-time work from 25 February. He told her that there were proposed "operational changes" being considered for the branch, and that Advance was considering reducing staff to 2.5 full-time equivalent employees. That was one of a number of ways Advance was considering reducing operational costs. He stated that in her full-time role Ms May-Ellis was "responsible for customer services, warehouse fulfilment and administration duties".

[11] Mr Nadan wrote Advance had implemented a number of new staff audits that he would send to Ms May-Ellis, or she could get a copy of them once she returned. He asked Ms May-Ellis to confirm she could carry out the “entire job” in a possible sole position with the proposed changes in the branch:

We do note in the previous discussion you found it tough lifting stock, freighting, stock fulfilment and warehouse duties during your pregnancy. All of these duties will encompass the current/proposed role.

... it is important you consider the requirements of the role as you plan to return to work. You also have a new baby so we want to give you advance notification and ensure your safe and seamless return.

[12] On 12 February 2016, Ms May-Ellis responded:

It looks like there is still some disagreement about my full time role, we have discussed several times that I believe my job description has never included warehouse duties ... I am able to help in the warehouse as needed for cover or when busy and I am happy to do this. As for a new role I cannot confirm anything until I see a proper job description and contract. I also cannot say anything about the new branch/staff audits until I have had a chance to read them, but I have never before failed to comply with new systems set in place so I don't foresee any issues on that front.

I am happy to work with both you and Phil on any changes being made and making the branch run as smoothly as possible.

[13] On 16 February 2016, Mr Nadan replied:

Your full-time role with the company was never at risk and we expected that you would return to work.

As explained in my email dated 10 February, there will only be one position available in the branch for the Customer Service/Warehouse role. In the current climate, based on sales, it is unsustainable to have two staff to cover one role. You stated in your email dated 12 February that as you were no longer pregnant, you were capable of carrying out the required duties.

As has been evident since you have been off, this role can and has been, done by one person. This person was employed to cover your position and I believe the company has more than covered its obligations during your parental leave.

The position available on your return is covered by your current agreement and job description and does not involve any substantial changes. There is no requirement for a new contract and job description.

[14] Mr Nadan brought to Ms May-Ellis' attention clause 3 of her individual employment agreement which states:

- She agreed to perform any other reasonable duties required from time to time;

- Her duties may be amended from time to time “as business needs dictate” and “at the discretion of the Employer, following consultation with the Employee”;
- She agreed “to perform [her] duties diligently in accordance with the instructions of the Employer ... and “in a manner, which will promote the interests of the Employer.”

[15] Mr Nadan also noted that the situation was covered by s 47 of the PLEPA which provides:

If an employee who has taken parental leave fails, without reasonable excuse, to take up, on the date specified by the employer or within 7 days thereafter, any position **substantially similar to the position ordinarily held** by the employee before taking parental leave that is offered to the employee by the employee’s employer during the period of 26 weeks beginning with the day after the date on which the period of parental leave ends, that employee’s employment shall be deemed to have been at an end as from the day on which the period of parental leave began.

[emphasis added]

[16] Advance considered the role it expected Ms May-Ellis to take was “substantially similar to the position” she held before her parental leave. Mr Nadan asked for her confirmation of return to full-time work.

[17] Ms May-Ellis replied on 16 February, that she would be at work on 25 February and that she understood sales had “been low and I am willing to work with you on how things will best run within the branch.”

[18] Mr Nadan replied thanking her and stated that Mr Moses was her team leader. At this stage, Mr Nadan says that there were no outstanding issues with Ms May-Ellis as far as Advance was concerned.

[19] However, on 22 February 2016, the events that precipitated Ms May-Ellis’ suspension and dismissal occurred. That day Ms May-Ellis went into the branch office to talk to Mr Moses. A number of issues she raised upset him and things she said. After she left, he rang Mr Nadan and the next day set out his detailed view of things by email to Mr Nadan.

[20] Mr Nadan entered into correspondence with Ms May-Ellis, and eventually with Mr Nevell, expressing Mr Moses’ concerns, which Mr Nadan shared. Mr Nadan

initially invited her to a meeting to discuss Advance's concerns. He later withdrew that offer.

[21] The main reason Mr Nadan withdrew the offer to meet with Ms May-Ellis was that Mr Nevell asked for a copy of Mr A's individual employment agreement (IEA). Mr A was the staff member about whom Mr Nadan wrote had been "employed to cover (Ms May-Ellis') position". Mr Nevell asked for the IEA in an effort to establish whether Mr A had replaced Ms May-Ellis in her role while she was on parental leave. However, Mr Nadan took offence at the request and on 2 March wrote that Advance considered the request compounded Ms May-Ellis':

recent behaviour and attitude towards staff and management in the branch [that] has been the substantial cause of an irreconcilable breakdown of trust and confidence in the employment relationship. ... The company does not believe that the affairs of another person have any relevance or bearing on your situation. This is clearly a breach of company policy regarding confidentiality and is a matter of [the] Privacy Act.

[22] Mr Nadan also called Ms May-Ellis' behaviour "uncompromising and irrational". He said there was "a serious matter of concern" that needed resolving "as an urgent matter."

[23] Mr Nadan arranged for Mr Moses to lead the proposed meeting. Initially, he agreed that he would do so. However, after Mr Nevell asked for a copy of Mr A's IEA he told Mr Nadan he would not do so. Mr Moses also told Mr Nadan that if Ms May-Ellis returned to work he and Mr A would resign.

[24] No meeting took place despite Mr Nevell and Ms May-Ellis being ready and able to attend the meeting proposed for 3 March. There was further correspondence between Mr Nadan and Mr Nevell. Advance dismissed Ms May-Ellis by letter dated 9 March 2016. It paid her 4 weeks' pay in lieu of having to work out a notice period.

## **Determination**

### *Unjustified disadvantage*

[25] Ms May-Ellis claims that Advance prevented her from returning to work and that she was not paid, but should have been, from her intended date of return on 25 February 2016 until she was dismissed on 9 March 2016.

[26] Advance submits that Ms May-Ellis was not disadvantaged. It considers it was justified in not paying her because Ms May-Ellis caused an irreconcilable breakdown of trust and confidence.

[27] Section 103A of the Employment Relations Act 2000 (the Act) means I must be satisfied that a condition of Ms May-Ellis' employment was affected to her disadvantage due to Advance's unjustified action. This requires a two-step process. First, I must be satisfied of the disadvantageous actions and secondly, I must determine whether those actions were justifiable.

[28] In applying the justification test in section 103A, I cannot consider what the Authority may have done in the circumstances. I am required to consider on an objective basis whether Advance's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[29] In insisting that matters of concern to Advance be resolved before Ms May-Ellis could return to work from 25 February 2016 Advance effectively suspended her. That action disadvantaged Ms May-Ellis because it made her feel her job was less secure and it triggered Advance's decision not to pay her while she was not at work.

[30] Was it a justified action? Advance says that it gave Ms May-Ellis an opportunity to meet prior to 25 February and it was not responsible for the fact that she refused to meet before that. It also says that it was not responsible for the delay in her availability to meet because she wanted to seek legal advice.

[31] Clause 14.5 of Ms May-Ellis' IEA provides that during an investigation into allegations of misconduct Advance could have suspended her on full pay. Therefore, Advance was contractually required to pay Ms May-Ellis during the period of her suspension.

[32] I consider that its action in not paying her over the period of suspension, which I consider to be from 25 February until notification of her dismissal on 9 March 2016, was unjustified for the following reasons.

[33] First, Advance was contractually bound to pay her during her suspension. Secondly, in all the circumstances Advance was unjustified in not paying her because it unreasonably decided that she unreasonably refused to meet.

[34] I can foresee some circumstances in which an employee may unjustifiably prolong a period of suspension. However, it was reasonable for Ms May-Ellis to refuse to meet during her annual leave time, while her parents were visiting her from the US, and before she could obtain legal advice and support. Initially, Ms May-Ellis offered to talk to Mr Nadan “on Thursday”, which was to be her first day back at work. Mr Nadan wrote it was necessary that “these issues or matters (are) cleared before you return to work” and invited her to suggest a suitable time and date for the meeting.

[35] Ms May-Ellis advised she could let him know on 29 February and said that she expected to be paid for what she considered forced time off work. Mr Nadan replied that her actions were inappropriate and that Advance was not responsible for her wages.

[36] Any delay in meeting after 1 March 2016, when Mr Nevell indicated he and Ms May-Ellis were willing to meet, was caused by Advance’s unwillingness to meet with Ms May-Ellis either because of Mr Nadan’s unavailability or Mr Moses’ refusal to meet with her.

[37] In failing to pay Ms May-Ellis during the period of suspension, Advance did not, in all the circumstances, act as a fair and reasonable employer would have acted. Ms May-Ellis has proved her claim of unjustified disadvantage and is entitled to a consideration of remedies. I deal with remedies below.

#### *Unjustified dismissal*

[38] Section 103A of the Act sets out the test for justification of the dismissal. Again, I must ask, from an objective view, whether, in all the circumstances, Advance acted as a fair and reasonable employer could have acted.

[39] In addition, the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether:

- the allegations against Ms May-Ellis were sufficiently investigated,

- the concerns were raised with her,
- she had a reasonable opportunity to respond to the concerns, and
- Advance genuinely considered her explanation before deciding to dismiss her.

[40] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[41] Ms May-Ellis contends that her dismissal was not substantively justified and was procedurally unjustified.

[42] Advance submits that Ms May-Ellis was justifiably dismissed because her actions, principally in what she said in her meeting with Mr Moses on 22 February 2016, led to an irreconcilable breakdown in Advance's trust and confidence in her as an employee.

### **Procedural fairness**

[43] The following defects in the process were more than minor and meant that Advance treated Ms May-Ellis unfairly.

#### *Sufficient investigation?*

[44] I accept that Advance is a family business without specific human resource management staff. However, it is a nationwide company with a number of employees, a number of branches, and a management team. Advance had the ability to seek legal and/or human resources advice on its concerns about Ms May-Ellis and how to deal with those concerns. It chose not to do so even when Ms May-Ellis became legally represented. If Advance had taken specialist employment law advice at that stage the course of events may have been different.

[45] Advance did not undertake a sufficient investigation into the complaints Mr Moses made principally because Mr Nadan, the decision maker, initially offered to meet with Ms May-Ellis but later declined to do so. He never asked her what happened on 22 February. He accepted Mr Moses report as constituting the 'truth'. Mr Nadan did not talk to Mr A either, and accepted Mr Moses report of Mr A's view of things. There was no real investigation.

*Putting Advance's concerns to Ms May-Ellis*

[46] Mr Moses' most detailed explanation of his 22 February meeting with Ms May-Ellis is in his emails to Mr Nadan of 23 February 2016. I consider the emails to be more reliable evidence of what happened at the meeting than Mr Moses' evidence prepared for and given at the investigation meeting in so far as that evidence differed from the emails. That is because the emails were contemporaneous and time can affect clarity of recall.

[47] Mr Moses reported to Mr Nadan that:

- Ms May-Ellis said she had heard by text that Advance was employing more staff and she was unhappy about the advertisement as Mr Nadan had told her there would be only 2.5 staff. She questioned why Advance was employing someone. He did "not feel I owed her any explanations regarding company matters outside her scope."
- Ms May-Ellis had issues with the warehouse part of the role. She was happy to help out but it was not part of her job description.
- Ms May-Ellis asked if Advance would be doing deliveries and if Advance was selling the van.
- Ms May-Ellis said twice she was not happy with Mr Nadan but did not explain why.
- Ms May-Ellis wanted to start at 8.10 am, not 8 am. "Told me as opposed to asked. I explained that the position was from 8-5."
- Ms May-Ellis was specifically concerned about stock being ordered from Auckland.
- Ms May-Ellis was "very confrontational and negative" and:

with my office door open and Mr A sitting at reception desk, ... said very loudly 'so you will be getting rid of him.' At that point, I closed my office door and said that was totally out of line.

[48] Mr Moses also wrote that he considered what Ms May-Ellis said about Mr A to be:

vindictive and nasty as she was unaware of what Mr A did or did not know about changes at the branch.

and

vindictive and malicious and done with the obvious intention of Mr A hearing...

[49] Mr Moses gave his opinion that what Ms May-Ellis said about Mr A:

... was serious misconduct ... way out of line ... unhelpful and does not bode well for a happy and professional working relationship. ... she is looking for any reason to have a crack at us and go for the Employment pay-out.

I do not believe she has genuine motives or intentions of returning for any period of time.

[50] I am satisfied that Mr Nadan shared all of Mr Moses' views and opinions because he adopted the view very early on that Ms May-Ellis had done what Mr Moses said. He also agreed with Mr Moses that what she said about Mr A was said with the intention of Mr A hearing, and was done 'vindictively'.<sup>1</sup>

[51] However, Advance did not raise all of its concerns with Ms May-Ellis. It did not tell her it considered that she had acted vindictively, for example. It did not tell Ms May-Ellis that Mr Moses and Mr A refused to work with her and would resign if she came back. It did not tell her that it considered she demanded to start work at 8.10 am, and that was not appropriate, and that her questions and views about stock ordering by the Auckland branch, deliveries and the van were inappropriate.

[52] At the investigation meeting, it became clear that prior to dismissing Ms May-Ellis, Mr Nadan shared Mr Moses' view that she was difficult to get along with. They took into account events from prior to her parental leave in reaching that decision. Concerns dating from before her parental leave were never put to Ms May-Ellis for her response as a part of the disciplinary process. I note that there was no disciplinary action taken by Advance against Ms May-Ellis before her parental leave. For example, she had not received any verbal or written warnings.

[53] While an employer is able to assess an overall view of an employee's employment history in deciding what an appropriate sanction could be for misconduct, it was not appropriate in this case. That is because Ms May-Ellis had no idea of the views held about her and no opportunity to respond to them before Mr Nadan made the decision to dismiss her.

[54] Ms May-Ellis denies that she acted vindictively towards Mr A, and denies she intended him to hear her. Ms May-Ellis says she was unaware of Mr A's exact position at reception relative to her and had her back to him when she said "does that mean they will be getting rid of (Mr A)?"

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<sup>1</sup> The Oxford Online Dictionary defines 'vindictive' as "having or showing a strong or unreasoned desire for revenge."

[55] Ms May-Ellis says she thought it was appropriate to ask if Mr A, who Mr Nadan emailed her had been employed to cover her position while she was on parental leave, would be leaving, especially given that Advance intended to reduce its Dunedin staff to 2.5. She said she was confused about why, under the circumstances, Advance was advertising for a new salesperson.

*Reasonable opportunity to respond?*

[56] Mr Nadan says that Ms May-Ellis had every opportunity to give her explanation of what had happened and his letters invited her to do so. Advance's submissions admit that the failure to have a face-to-face meeting with Ms May-Ellis "is a flaw in the sequence". However, Advance submits that the onus was on Ms May-Ellis:

to supply written details for discussions. This was requested several times (and) would have assisted the Respondent minimise its risk with other distressed staff in the branch.

[57] Mr Nadan is incorrect. There is no onus on an employee who is subject to an investigation and disciplinary process to give her explanations, particularly when she was not given a reasonable opportunity to do so.

[58] I have carefully considered Mr Nadan's emails and letters to Ms May-Ellis and Mr Nevell. After ruling out a meeting, Mr Nadan asked for:

... suggestions that can mitigate the way staff feel in the branch, we do not have much choice than to give you notice to terminate your employment with the company.  
Please let me know urgently if there is anything else you wish to add or for us to consider before we make a final decision.<sup>2</sup>

In addition, after receiving an email from Mr Nevell in reply in part stating, "your decision to postpone today's meeting pending this response is unusual",<sup>3</sup> Mr Nadan wrote:

The company has been transparent in all its correspondence and dealings with Kayla.  
Please provide response to the letter of today so the company can make an informed decision going forward.<sup>4</sup>

[59] Later that same day Mr Nevell also wrote:

... Kayla and I are ready and willing to meet now...

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<sup>2</sup> Letter of 2 March 2016, sent by email on 3 March 2016.

<sup>3</sup> Email of 3 March 2016.

<sup>4</sup> Email of 3 March 2016.

I don't understand why the meeting has been delayed.  
Please advise as soon as possible when another meeting can be scheduled.

[60] Mr Nadan responded:

As advised, the employment relationship matter is attributed wholly or substantially (sic) by Kayla herself. Her behaviour and attitude towards the fellow staff and management was the substantial cause of breakdown of trust and confidence ...

As per the letter, please let us know urgently if there is anything else you wish to add for us to consider before we make our decision in the best interest of the business. Once we have your feedback, we may need to meet with you for further evaluation and will let you know accordingly.

[61] He did not arrange a meeting.

[62] Mr Nadan's requests did not amount to inviting Ms May-Ellis to put in writing her explanation for what were not very clearly detailed concerns from Advance. In all the circumstances, Advance did not give Ms May-Ellis a reasonable opportunity to give her explanation to its concerns, at least in part because it did not express all its concerns.

*Did Advance take into account Ms May-Ellis' explanation before making the decision to dismiss?*

[63] It follows, from my conclusions above that Advance had no explanations from Ms May-Ellis to take into account, apart from her belief that Mr A had been employed to fill her role while she was on parental leave.

[64] I consider Mr Nadan pre-determined that Ms May-Ellis' behaviour on 22 February was the kind of conduct that could justify her dismissal. He based that decision purely on Mr Moses' report and opinions.

*Other relevant procedural issues*

[65] Advance was misguided in attempting to make Mr Moses, as the complainant, run the meeting with Ms May-Ellis. That is because he could not have been objective.

[66] I also have some concern that Mr Nadan was, himself, a complainant, and as such, was not able to be objective. On 28 February 2016, he emailed Ms May-Ellis that "the comments about being unhappy with the MD (do) not sit well with the team either." It is not clear whether only Mr Moses and perhaps Mr A held that concern (as

the team) about Ms May-Ellis not being happy with Mr Nadan, or whether that was also Mr Nadan's view.

*Conclusion on procedural fairness*

[67] The way Advance made its decision to dismiss Ms May-Ellis was unjustified because a fair and reasonable employer could not have reached that decision in the way that Advance did.

*Was Ms May-Ellis' behaviour nonetheless so bad that Advance was substantively justified in dismissing her?*

[68] Advance's email of 9 March 2016 conveying its decision to dismiss Ms May-Ellis sets out what appear to be two conflicting situations. Mr Nadan first wrote:

Your refusal to accept the full time role offered by the company on your return from Maternity Leave and during your Annual Leave, was cause for great disappointment.

[69] However, in the next two paragraphs Mr Nadan wrote:

Your recent behaviour in the branch while you were on annual leave following your Maternity Leave, constituted serious misconduct under your employment agreement and should have resulted in summary dismissal. Having considered all the facts and responses, the company has made the decision to terminate your employment from today's date as opposed to summarily dismissing you. This is done in good faith based on your service to the company. The reasons for terminating your employment have been outlined in previous correspondence.

[70] It is not disputed that Ms May-Ellis was dismissed. Perhaps the first paragraph was written as part of a justification aimed at protecting the company under any allegations under the PLEPA, as Mr Nevell had raised that as an allegation.

[71] I find that the substantive reason for dismissing Ms May-Ellis was Mr Moses' clear refusal and Mr A's apparent refusal to work with Ms May-Ellis after her questions on 22 February and Mr Nevell's request for Mr A's IEA. Mr Nadan characterised those refusals as evidence of an irreconcilable breakdown of the relationship precipitated by what Ms May-Ellis said to Mr Moses on 22 February. Mr Nadan did not believe the workplace "could function efficiently against the background of such sustained level of conflict."

[72] The fact that Ms May-Ellis' dismissal meant that there may no longer need to be a process of restructuring and redundancy was a bonus for Advance.

[73] There was not sufficient substantive reason to dismiss Ms May-Ellis for the following reasons.

[74] Ms May-Ellis had been told by Advance, in writing, that there was to be a loss of staff, and that Mr A had been employed in her role and was diligently and effectively carrying it out. On any objective view, if Ms May-Ellis was returning to work in a couple of days asking whether Mr A was leaving her job was a reasonable question.

[75] Ms May-Ellis concedes that her manner in which she asked the question could have been different but maintains it was a reasonable question. She said at the investigation meeting that she would have been willing to meet Mr A and apologise for what he heard her say and explain why she said it.

[76] However, there was no attempt to reach a conclusion short of dismissal, such as asking Ms May-Ellis to apologise to Mr A, or by arranging a facilitated or mediated meeting between Mr Moses, Mr A and Ms May-Ellis to work out how, or if, they could work together.

[77] Ms May-Ellis was not to know that Mr A had not been told anything by Advance about potential restructuring.

[78] Mr A's level of upset was no doubt contributed to by Ms May-Ellis' question being the first he had heard that his position might be up for restructuring. Mr Moses and Mr Nadan told me that they intended to keep Ms May-Ellis employed full-time and possibly to offer Mr A a half-time sales job. It is not entirely Ms May-Ellis' fault that the first he heard about proposed restructuring was a question about whether Advance would be "getting rid" of him.

[79] Advance says that clause 3 of Ms May-Ellis' IEA meant it could amend her duties as business needs dictated at its discretion. That is correct, but it could only do so following consultation with her. Ms May-Ellis' disagreement with Mr Nadan about what her former role encompassed, and her discussion with Mr Moses about that on 22 February, objectively speaking can be characterised as part of that consultation process.

[80] Mr Moses' ultimatum put Advance in a difficult position. However, it did not justify Advance putting Mr Moses' and Mr A's expressed views ahead of duties it owed to Ms May-Ellis to treat her fairly during an investigation and disciplinary process.

[81] Mr Nadan submits that this case was an unusual and rare case as contemplated by the Court of Appeal in *NZ Fire Service Commission v Reid*.<sup>5</sup> I disagree. The cases are so factually different that *Reid* cannot be relied on to dismiss Ms May-Ellis. For example, Mr Reid had threatened a fellow employee with a knife and the Fire Commission had a report from a psychologist who had concerns about Mr Reid's mental state and his continued employment. In addition, Mr Reid had taken a number of High Court proceedings against his employer all of which had been struck out.

[82] For all the preceding reasons, and in all the circumstances, a fair and reasonable employer could not have dismissed Ms May-Ellis. Advance unjustifiably dismissed Ms May-Ellis.

*Breach of good faith*

[83] Ms May-Ellis claims that Advance should be penalised for breaching its duty of good faith to her, and the penalty should be paid to her.

[84] An employer who complies with the minimum standards of procedural fairness set out in s 103A(3) of the Act is more likely to be found to have acted in good faith. Advance did not comply with s 103A(3) and I consider it did not act in good faith towards Ms May-Ellis. It breached its duty to be adequately communicative with her and to observe basic tenets of natural justice.

[85] However, I do not consider this an appropriate situation to impose a penalty for breach of good faith. Although the consequences of the breach were serious for Ms May-Ellis she is being compensated for that through remedies for the unjustified disadvantage and unjustified dismissal.

[86] I am not convinced Advance's failure was a deliberate one. Mr Nadan gave evidence at the investigation meeting that was contrary to Advance's written advice to Ms May-Ellis that Mr A was engaged to carry out her role during her parental leave.

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<sup>5</sup> [1998] 2 ERNZ 250.

However, Mr Nadan seems to genuinely believe that those two contrary positions can stand and that he was entitled to act as he did in the best interests of the business.

[87] Advance would be well advised to take some good advice about how to run an employment investigation and disciplinary process. Any future proved breach of good faith is likely result in a penalty, given my findings.

*Breach of PLEPA obligations in not holding the same or substantially similar role open for her?*

[88] Mr Nevell submits that Advance never intended for Ms May-Ellis to return to her pre-parental leave role. Advance denies that and says it dismissed Ms May-Ellis for a substantial reason not related to her rights under the PLEPA, and therefore s 54 of the PLEPA protects it from being found to have breached its PLEPA obligations.

[89] I accept that Ms B had been employed on a fixed-term contract to replace Ms May-Ellis before she left on parental leave. Ms B resigned during the parental leave period and Mr A was employed.

[90] Advance's evidence that Ms May-Ellis' role remained open is difficult to reconcile with Mr Nadan and Ms Morris' written statements that Mr A had been undertaking Ms May-Ellis' role while she was away, and Mr Nadan and Mr Moses' oral evidence that Mr A had not been employed as her temporary replacement. That is particularly so when looked at together with the fact that Mr A was clearly to remain as a full-time employee as at 25 February 2016.

[91] There is a very real question as to why Ms May-Ellis was told the branch staff would likely reduce to 2.5, but Mr A was not told this before 22 February when he heard Ms May-Ellis question his future at Advance. That was at least partly likely because Mr Nadan wanted Ms May-Ellis' agreement to return to a "substantially similar" role.

[92] Given my finding of unjustified dismissal, s 54 of the PLEPA could not have protected Advance.

[93] The evidence supports, at very least, a credible suspicion that Advance was not fully committed to Ms May-Ellis' return to her previous position from maternity leave. However, the events culminating in Ms May-Ellis' dismissal have overtaken

this claim and it is not proved to the required standard that Advance failed to keep Ms May-Ellis' role open for her.

[94] In any event, there was insufficient evidence from the parties as to whether or not the role Advance intended Ms May-Ellis to return to was substantially similar to the role she left.

*Comment on credibility*

[95] Advance gave some evidence about aspects of Ms May-Ellis' use of its computer system and applications for other jobs made while she was working for it that it submitted called her credibility into question.

[96] I accept that the copies of Ms May-Ellis' job applications found on Advance's computer may have exaggerated her level of seniority and skill, or to put it another way, were self-serving. However, her evidence was that these were drafts and not all of them had been sent.

[97] I also accept that her evidence about what kind of an employee she had been while working for Advance was more rosy than Mr Nadan and Mr Moses' views of her. However, Advance had never formally disciplined her, so she was entitled to consider her employer harboured no serious concerns about her. In addition, Mr Moses and Mr Nadan's views of what kind of employers and managers they had been were rosier than Ms May-Ellis' opinion of them.

[98] It is normal for both parties in a dispute to believe that they are correct and to give evidence that supports their case. Both parties did that in these proceedings.

[99] Ms May-Ellis' evidence on relevant issues in the investigation was internally consistent and supported by contemporaneous documents from both parties. I am satisfied that she was a credible witness.

**Remedies**

*Unpaid wages*

[100] As part of the remedy for the proved unjustified disadvantage, Advance must pay Ms May-Ellis for the period from 25 February until 9 March 2016, inclusive. That

was a two-week period. Ms May-Ellis' gross pay for a week was \$721.15. Therefore, Advance must pay her \$1,442.30 gross.

*Lost wages*

[101] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Advance of the whole or any part of wages Ms May-Ellis lost because of her unjustified dismissal grievance.

[102] Section 128(2) of the Act provides that I must order Advance to pay Ms May-Ellis the lesser of a sum equal to her lost remuneration, or to 3 months' ordinary time remuneration.

[103] I am satisfied that Ms May-Ellis used her best endeavours to find a new job.

[104] Ms May-Ellis was paid four weeks' pay in lieu of notice. The law establishes that her employment was not terminated until the date the notice period, or, in this case, the period she was paid for, expired. That date was 6 April 2016.

[105] Ms May-Ellis obtained work within the three months after her dismissal. She started work on 1 June 2016, although at fewer hours per week and a lower hourly rate.

[106] Under s 128(2), I need to award Ms May-Ellis actual lost remuneration for the three months (thirteen weeks) after her dismissal. That takes the date to 5 July 2016.

[107] Ms May-Ellis was totally without wages from 7 April until 31 May, a period of 7 weeks and 6 days.  $7 \text{ weeks} \times \$721.15 \text{ per week} = \$5,048.05 \text{ gross}$  plus 6 days at \$618.13 gross = \$5,666.18.

[108] Ms May-Ellis' new job paid \$121.15 per week less than she was paid by Advance. Therefore, she is entitled to be reimbursed that amount from 1 June to 5 July 2016. That is a period of 5 weeks and 1 day.  $\$121.15 \times 5 = \$605.75$  plus \$17.31 = \$623.06.

[109] The total unpaid wages and wages lost because of the unjustified dismissal are \$7,731.54.

[110] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s

128(2); that is, for more than three months. In considering whether that is appropriate I need to undertake a counter-factual analysis. In other words, I need to assess whether Ms May-Ellis would have remained working full-time at Advance beyond three months, if she had not been unjustifiably dismissed.

[111] I am not confident of that. Restructuring was in the wind, and it was clear that Mr Moses, Ms May-Ellis' manager, held a negative view of her from before she went on parental leave. This is not an appropriate case to award lost wages of more than three months.

*Employer's Kiwisaver contribution*

[112] In his submissions, Mr Nevell claimed that Advance should also pay Ms May-Ellis' lost Kiwisaver employer contributions from 9 March 2016 until she began her new role on 1 June. I am sure that the claim is meant to be ending on 31 May 2016, the day before Ms May-Ellis began being paid by her new employer.

[113] The first time this remedy was claimed was at the end of the investigation meeting. I gave Advance time to respond to this in its written submissions. It did not choose to do so.

[114] Ms May-Ellis was a member of Kiwisaver and Advance was making its 3% employer contribution while she was employed. Under s 123(1)(b) of the Act, Advance must pay Ms May-Ellis the employer Kiwisaver contribution of 3% on \$7,731.54, which is \$231.95. Ms May-Ellis must pay that into her Kiwisaver account.

*Compensation*

[115] Ms May-Ellis claims compensation for humiliation, loss of dignity and injury to her feelings under s 123(1)(c)(i) of the Act for both personal grievances. She claims an unspecified amount and \$15,000 for the damage caused by the unjustified dismissal.

[116] Ms May-Ellis' evidence is that she was devastated by her unpaid suspension and then her dismissal. She says she was particularly aggrieved to not be given the chance to explain herself to Mr Nadan.

[117] Ms May-Ellis also says she was embarrassed and humiliated to tell the child care centre that she had arranged for her daughter to attend that she was at first not

being paid and not yet back and work and two weeks later that she had been dismissed.

[118] She also suffered from anxiety about her future and her earning capacity particularly with the increased costs a baby brings.

[119] In all the circumstances, I consider it reasonable to award a combined amount of \$15,000 compensation for the unjustified disadvantage and the unjustified dismissal.

### **Contribution**

[120] Section 124 of the Act requires me to consider the extent to which Ms May-Ellis' behaviour contributed to the situation that gave rise to the personal grievances. If I find her actions were so blameworthy in their contribution I am required to reduce the remedies awarded to her.

[121] Ms May-Ellis' behaviour on 22 February 2016 is the only behaviour Advance relied on that led to the situation giving rise to her personal grievances. I do not consider her behaviour was so blameworthy as to require a reduction in remedies. As I have already set out, she was trying to understand a situation in which a redundancy or redundancies were likely and yet she was being reassured her full-time role was safe, having been told that Mr A had been her replacement and that a new position was being advertised. She expressed her concerns forthrightly and perhaps unwisely given Mr A's proximity. However, she was not to know that he had not been informed of a possible restructuring of his role.

[122] In addition, without proper investigation and without any attempt to reconcile the three employees there could not be sufficient evidence to conclude that any of the blame for the unjustified disadvantage and unjustified dismissal should result in a reduction of remedies.

### **Costs**

[123] Costs are reserved. I understand from Mr Nevell that Ms May-Ellis has a legal aid grant to pursue her case. If Ms May-Ellis is required to seek a contribution towards the costs of legal aid the parties should seek to agree on costs.

[124] If a determination of the Authority is necessary, the party applying for costs has 28 days after the date of this determination to file submissions seeking costs. The other party has 14 days after that to file submissions in response. The starting point for the Authority's consideration would be \$4,500 for the one-day investigation meeting.

Christine Hickey  
Member of the Employment Relations Authority