



# New Zealand Employment Relations Authority Decisions

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## McFadden v Gateway Housing Trust (Christchurch) [2018] NZERA 1096; [2018] NZERA Christchurch 96 (3 July 2018)

Last Updated: 13 July 2018

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 96  
3023659

BETWEEN CAROLYN McFADDEN Applicant

A N D GATEWAY HOUSING TRUST Respondent

Member of Authority: David Appleton

Representatives: Peter Cranney, Counsel for Applicant

Kay Chapman, Advocate for Respondent

Investigation Meeting: 22 May 2018 at Nelson

Submissions Received: 20 June 2018 from Applicant and the Respondent. Last information received: 28 June 2018

Date of Determination: 3 July 2018

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Ms McFadden was unjustifiably dismissed by the respondent and is awarded the remedies set out in this determination.**
- B. Costs are reserved.**

### Employment relationship problem

[1] Ms McFadden claims that she was unjustifiably dismissed from her employment with the respondent with effect from 23 January 2017. She seeks remedies pursuant to [s.123](#) of the [Employment Relations Act 2000](#) (the Act). Her application for reinstatement was withdrawn at the end of the investigation meeting.

[2] The respondent denies that Ms McFadden was unjustifiably dismissed, asserting that she was justifiably dismissed by reason of redundancy following a restructure.

### Material events leading to the dismissal

[3] The respondent (Gateway) is a registered charitable trust and is currently the largest NGO1 provider of mental health services in the top of the South Island employing around 60 staff with services in Nelson, Blenheim and Motueka. It also provides a service called Snapshot which provides support for young people in the community who do not fall within the mental health criteria. Gateway's website states that Snapshot provides brief, assertive intervention with one-to-one support and

access to counselling for young people and/or their families or care givers. Referrals are accepted from Oranga Tamariki –

Ministry for Children, school councillors, the police, GPs and other community agencies.

[4] The Snapshot service was set up by Ms McFadden in early 2010 under a contract with the Ministry of Social Development and she was appointed Snapshot Coordinator in December 2010 on a fixed term individual employment agreement. Ms McFadden was appointed to the role on a permanent basis on terms and conditions of employment set out in an employment agreement dated 1 July 2013.

[5] In July 2016 a new Chief Executive (Tracey Tuhi) and Service Manager (Jaap Noteboom) were appointed. They quickly embarked on a business analysis of the organisation and its service delivery. This included meeting with team leaders of all of the services in all of the locations. Whilst Ms McFadden denies that Mr Noteboom met with her to discuss the Snapshot service, he says that she had input into the service flowchart which he created to describe the service as part of his analysis. On this conflict, I find that Mr Noteboom did discuss the service with Ms McFadden, although she may not have realised that it was a formal review of the service.

[6] Having completed the analysis, Ms Tuhi and Mr Noteboom, in conjunction with the Board of the Trust, determined that the organisation needed to be restructured to address dysfunctions and dissatisfaction that had been uncovered. In

September 2016 all staff members were informed of a proposed new structure to

1 Non-governmental organisation

Gateway which effectively excluded a tier of middle management. This tier included

Ms McFadden's role, amongst others.

[7] The Authority saw a copy of an organisational chart reflecting the structure of Gateway prior to the restructure, together with a chart which reflected the proposed restructure (which was implemented after consultation). The proposed restructure had the organisation reorganised into three streams, one concentrating on youth community support which included Snapshot, headed up by a full time Manager of the Youth Community. The second stream concentrated on adult community support, headed up by a Manager of Adult Community. The third related to the residential services for both youth and adults, including Milton Court, headed up by a Manager of Residential Services. These three managers would report to a General Manager (at that point called the Operations Manager). Under the pre-reorganised structure, Snapshot had been sited outside of the youth community service because it was funded differently and serviced a different cohort of young people.

[8] Ms Tuhi stated in her evidence that the majority of the staff were generally supportive of the proposed restructure.

[9] On 8 December 2016 Ms McFadden was provided with a letter from Ms Tuhi headed "Proposed restructuring of Gateway Housing Trust". This four page letter explained the background to the proposed restructuring, set out the proposal in more detail, explained the potential consequences for Ms McFadden and identified possible roles that Ms McFadden could apply for if her position were to be made redundant.

[10] The background to the restructuring can be conveniently summarised by quoting from the beginning of Mr Tuhi's letter to Ms McFadden, as follows:

On Track informs us to expect that the demand in mental health services will double over the next ten years, yet the available resources to fund those services is expected to increase by only 30%-

40%. The expectation of funders is that Gateway will continue to become more economically efficient.

This means the NGO sector, including Gateway, will need to be stronger with a leaner and more agile structure, an effective quality management system with strong dynamic leadership to implement and monitor defined operational systems to support compliance and continuous improvement.

[11] The document "On Track" refers to a 68-page document produced by Te Pou o the Whakaaro Nui2 and Platform Trust3 which set out a "roadmap" for NGOs providing a mental health and addiction service. Ms Tuhi also referred in her evidence to a more collaborative contract model being adopted by governmental ministries, which also was a factor behind the restructure.

[12] Ms Tuhi's letter explained that the proposal was to disestablish Ms McFadden's position together with other team leader positions and to create the three new managerial positions referred to above. It also explained that, if the proposal was implemented, Ms McFadden would be considered for redeployment, if she wished, to one of the new positions "provided [she] had the required level of expertise for the role".

[13] Ms Tuhi then set out the criteria for the three positions and also stated that consultation would take place about the proposed restructure. A timeline for consultation was set out and reference to an external counselling service made which Ms McFadden could access (the first two visits being free) if she wished.

[14] A meeting then took place between Ms McFadden and the respondent to discuss the restructuring proposal. Ms McFadden was accompanied by a union representative and asked to provide feedback. Ms McFadden was given a pack of information to

take away and was originally asked to provide her feedback by

14 December. This was extended upon request from the union representative (Mr

Andrew Irvine of E tū) to Friday, 16 December.

[15] Mr Irvine was representing other members of E tū in the restructure consultation process and wrote to Ms Tuhi and Mr Noteboom on 8 December asking a number of questions. These questions were answered by Ms Tuhi by email. A further request for an extension within which to respond until the new year of 2017 was

rejected by the respondent.

2 Described in its website as “a national centre of evidence based workforce development for the mental health, addiction and disability sectors in New Zealand.”

3 Which states in its website: “Platform champions community organisations that support New Zealanders by providing a wide range of mental health and addiction services across the country and creating a positive place for people experiencing mental health and addiction issues to live and work.”

[16] On 16 December 2016 a lengthy feedback document was provided by E tū which incorporated feedback from the particular employees directly affected by the proposed restructure. This document included feedback from Ms McFadden.

[17] Mr Noteboom and Ms Tuhi say that they took considerable time going through all the feedback, and discussing it, before coming to a decision to continue with the proposed restructure. Ms Tuhi drafted a detailed written response to all the feedback in one document and this was given to each affected employee.

[18] On 19 December a letter was given to Ms McFadden inviting her to attend a meeting on the outcome of the restructuring, and she was invited to bring a support person with her. The meeting took place on 20 December and Ms McFadden was accompanied by a fellow employee, Irene Robertson, who also was affected by the proposed restructure. Mr Irvine was on annual leave. Gateway say that they were not made aware of that when they were fixing the meeting on 20 December.

[19] As Ms Robertson was also affected by the restructure she was asked to leave as the respondent believed that it was not appropriate for her to be representing Ms McFadden. The meeting went ahead without Ms McFadden having a support person. Ms McFadden says that it appeared to her that she had no option but to continue with the meeting.

[20] At the meeting Ms McFadden was informed that the restructuring was going to proceed and that her position was being disestablished. She was also given a list of positions that the respondent was offering for redeployment, including the new Youth Manager role, and an Adult Community Support Worker role.

[21] Ms McFadden said that she had expected to see a support worker vacancy at Milton Court on the list. Milton Court is a residential service accommodating ten adults with mental illness, each person having their own individual flat. Ms McFadden says that she was told that the position was not available. According to the respondent, the position at Milton Court had become available on 17 November

2016 when a staff member had resigned, and an email had gone out to all staff seeking expressions of interest. Two staff members had been interviewed and one had been appointed on 15 December 2016.

[22] On 15 January 2017 Ms McFadden sent an email expressing an interest in the newly created Youth Manager role, and if unsuccessful, the Adult Community Support Worker role.

[23] Ms McFadden was interviewed in respect of these two positions on Thursday,

19 January 2017. Ms McFadden was told that she would only be interviewed for the Youth Manager’s position as the organisation already knew that she was capable of doing the Adult Support Worker role. Ms McFadden says that the interview suggested that Mr Noteboom and Ms Tuhi did not know what her role was and they were asking questions to find that out. She was told that she would need to attend a meeting on 23 January 2017 to find out the outcome of the interview.

[24] Ms McFadden says that on Friday, 20 January Mr Noteboom entered her office and asked to speak to her. She says that he asked if they could have a “frank and honest discussion” and, when she agreed, he told her that he felt that she may not be successful with her application for the Youth Manager position. Ms McFadden says that Mr Noteboom said that she was felt not to be a good fit for the Adult Community position but they may be prepared to appoint her to the role because the Head of Youth Justice, based in Nelson, had approached him about setting up a service for “high and complex needs (HCN) youth” and that Gateway would “pluck her out” of the adult position if and when the HCN service contract was confirmed so that Ms McFadden could set it up and run it.

[25] Ms McFadden says that she was extremely upset and in tears because they seemed to be saying she was no longer qualified to run the service that she had set up and built over the previous six years. Her evidence is that she said that, if she were offered the Adult Support Worker position on Monday 23 January she “may not accept”. She says that, when Mr Noteboom

asked her where that left them, her response was "I may be leaving on Monday".

[26] According to Mr Noteboom, he told Ms McFadden on 20 January that she was not successful in her application for the Youth Manager's role and that Ms McFadden became angry and aggressive towards him and started to argue with him. Mr Noteboom says that he offered Ms McFadden the Adult Community Support Worker role and that Ms McFadden said that she had had another look at the job

description for that role and did not want the position, and that she would not accept the role.

[27] Mr Noteboom said that he acknowledged to Ms McFadden that, whilst he believed that she would be successful in the Adult Support Worker role, her expertise was not necessarily with adults, as she had been working within the youth sector, but that another option may eventuate in around six months' time working with HCN. If that came to fruition, she could have the first option to take on that role.

[28] Mr Noteboom said that he had genuinely believed that Ms McFadden would have been interested in the opportunity and that she would have been excellent in the role. However, she told him that she was not interested and declined the offer. Mr Noteboom says that he asked Ms McFadden to think about the offer over the weekend, and meet with him again on Monday, 23 January. He says that she agreed to this and left the office. This agreement for Ms McFadden to consider matters over the weekend is not contested.

[29] On Sunday 22 January 2017, at 8.16 pm, Mr Irvine sent an email to Ms Tuhi and Mr Noteboom in the following terms:

Dear Jaap, Tracey

You have a proposed meeting at 1pm on Monday 23 January for the purpose of implementing the decision to disestablish Caro McFadden's role and discuss offers of redeployment on different terms and conditions.

Our view is that it is not legally open to Gateway to conclude Caro's employment in her present role and we will be commencing proceedings in the Employment Relations Authority this coming week to have this resolved.

In light of this, we cannot meaningfully engage with you in any discussion of alternative employment and for that reason Caro will not be attending the proposed meeting.

Please forward full copies of Caro's, and [name redacted] personal files to me as soon as possible.

Please confirm Gateway will take no further steps to implement its decision to disestablish Caro and [name redacted] roles until the Employment Relations Authority has issued a determination. We will be seeking urgency to facilitate that process as quickly as possible.

Please direct all communication about this matter to the writer.

[30] During the Authority's investigation meeting, Ms McFadden said that she had not seen this email and did not know that Mr Irvine was going to send it. Ms McFadden agreed to waive professional privilege in respect of the communications between her and Mr Irvine and showed the Authority and Ms Chapman a copy of the email she had sent to Mr Irvine around 45 minutes after the meeting she had had with Mr Noteboom on 20 January. This email said the following:

Morena Andrew

At 10.05 this morning Jaap invited me to his office. Once in there we had what he refers to as a "frank and honest" conversation. In

this conversation he explained that he did not "believe" that I would

get the youth managers position and thought they did not feel that Adult community was my strength they would be happy to offer me this position as long as I understood that when (as he met with Sally Mottram this week) HCN contracts come in I will be pulled out of the adult team and given the opportunity to set up the HCN services as this is my strength, remembering that there will be no team leaders and I am not suitable for management or words to that effect.

I told Jaap that as we were having an honest conversation that I did not believe that I would accept the adult position. He asked where that left us and I told him with me leaving on Monday. He practically begged me to take the weekend to think about this and give it real consideration as this was where they believed my strengths lay.

I was in tears and he asked if I was ok!!!!!! I explained that how many more times was I required to be slapped in the face, I am no

longer qualified to run a service that I set up and sweated blood

over, he said that was not the case, but if I choose to interpret it that way it was up to me.

I left he did ask if I needed to go home but I had a client.

I am due to finish today at 12.00 and I will be heading home. It sure has been a rough morning they are really just trying to strip us of knowledge and treating us like crap.

Thanks for the ramble

Caro McFadden

Team leader Snapshot.

[31] This email to Mr Irvine is more likely to reflect accurately what Ms McFadden said to Mr Noteboom than her recollection for the purposes of the Authority's investigation, as it was sent very shortly after the conversation. It suggests that Ms McFadden did not say unequivocally she would not accept the Adult Community Support role, but said she would be leaving on Monday. Obviously, saying she would be leaving meant effectively that she would not accept the Adult Support role and, as Ms Chapman submits, Ms McFadden's reference to Mr Noteboom begging her to reconsider supports Mr Noteboom's evidence that he understood that Ms McFadden

had said she did not want to stay employed. I therefore accept that Mr Noteboom's understanding that Ms McFadden said she was going to refuse the position but agreed to consider things over the weekend.

[32] Ms Kate David, a consultant advising the respondent, replied to Mr Irvine on the morning of 23 January saying that the meeting with Ms McFadden would take place and that Mr Irvine was entitled to attend it if Ms McFadden wished that. Ms David stated that Ms McFadden had been offered redeployment on the previous Friday, but she had declined it, and Gateway had encouraged her to reconsider that option and offered her to take the weekend to consider it. Ms David also stated that Gateway had considered Mr Irvine's request to postpone the completion of the restructuring process but did not agree to do so.

[33] On the morning of Monday 23 January, at 8:30, Ms McFadden attended a kapa haka group at work but, according to Ms McFadden, she could not stop crying and so left work afterwards, saw her GP, and was signed off sick for two weeks, until 8

February 2017. She scanned an email of the doctor's certificate to Ms Tuhi and Mr

Noteboom that day at 12.15. Her email stated:

Dear Tracey and Jaap.

Please find attached a medical certificate putting me off work till

08/02/17. After the disastrous meeting with Jaap on Friday I have found my stress levels are now at an unhealthy level.

I arrived at work today to find all I could do was cry. I have toiled<sup>4</sup>

today and been to my GP who has deemed me unfit for work from today.

My time-sheets are on my desk, you will note I was on call over the weekend and completed hours at Milton Court to cover while a staff member was off sick and till a reliever could be located in cover.

Kind regards

Caro McFadden

[34] Ms McFadden says that, on the afternoon of 23 January 2017, a letter was placed in her mailbox from Ms Tuhi in the following terms:

Dear Caro

**RE: RESTRUCTURING OF GATEWAY – NOTICE OF REDUNDANCY**

We are in receipt of your medical certificate as at 23 January, we are sorry to hear that you are unwell.

<sup>4</sup> Taken time off in lieu

As you are aware on 20 December 2016, Gateway confirmed its decision to implement the proposal to restructure.

You have had the opportunity to be considered for redeployment to two roles, and have been unsuccessful with one (Youth Services Manager) and successful with another (Adult CSW Nelson). You advised us on 20 January that you would not accept the Adult CSW role, or an additional role which was discussed following a recent opportunity that has arisen through Child, Youth and Family. You were advised to think about your options over the weekend and to attend a meeting on 23 January at 1pm to give us your final decision.

You failed to attend the meeting scheduled or notify us of your final decision by 1pm, 23 January and accordingly as a result of Gateway's decision to adopt the proposal, and you're [sic] not being redeployed to a suitable alternative position within Gateway, this letter is notice of the conclusion of your employment by reason of redundancy. Your Employment Agreement provides for 4 weeks' notice, which Gateway can pay out in lieu (payable in full on 27 January 2017) of you working your notice, accordingly your last day of work, is 23

January 2017.

If you require a certificate of service please let me know. I would also appreciate your thoughts for a farewell, to acknowledge your time and contribution to Gateway. I will come back to you soon regarding the handover of any Gateway resources.

I thank you for all you have done and the contribution you have made to Gateway during your tenure.

Yours sincerely Tracey Tuhi CEO

Gateway

[35] This letter had also been emailed to Ms McFadden at 2.33 that afternoon. Ms McFadden says that she had not been offered any position of employment by Ms Tuhi or Mr Noteboom. She says that she was also surprised to see the respondent's newsletter<sup>5</sup> come out that afternoon stating that she was redundant, and that staff members had been given positions that had not been on the available position sheet she had been given. Ms McFadden says that the Milton Court position had been secured and a senior support person in Blenheim had been filled.

### **The issues**

[36] The Authority must determine whether or not Ms McFadden was justifiably dismissed by reasons of redundancy. In order to do this, it is necessary to consider the

following sub-issues:

<sup>5</sup> This was, in effect, an email from Ms Tuhi rather than a formal newsletter.

(i) Was the restructure justified?

(ii) Was sufficient information given to Ms McFadden in relation to the proposed restructure?

(iii) Was a full and fair consultation process carried out?

(iv) Was the decision not to offer Ms McFadden the position of Manager Youth Community justified?

(v) Did Ms McFadden reject outright the position of Adult Community Support Worker as an alternative?

(vi) Should the respondent have waited until it had feedback from

Ms McFadden instead of directly moving to her dismissal?

### **Was the restructure justified?**

[37] The starting point in examining the fairness of the decision to dismiss Ms McFadden are sections 4 and 103A of the Act, which provide as follows:

#### **4 Parties to employment relationship to deal with each other in good faith**

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other. (1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

### **Section 103A Test of justification**

(1) For the purposes of section 103(1)(a) and (b), the question of

whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

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

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

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

employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the

Authority or the court may consider any other factors it thinks appropriate.

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

(a) minor; and

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

[38] It is a well-established principle that it is not for the Authority to substitute or impose its business judgment for that of the employer taken at the time. However, the then Chief Judge Colgan examined the requirements imposed by s 103A on the Authority and the Court in cases of redundancy dismissals in *Rittson-Thomas t/a*

*Totara Hills Farm v Davidson*<sup>6</sup>. He said, at [53] to [55] (case citations omitted):

[53] Section 103A does require the Court to inquire into a decision to declare an employee's position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified. The statutory mandate does not, however, go as far as the Labour Court did in *GN Hale*, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done, and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a

6 [2013] NZEmpC 39

fair and reasonable employer would/could have done and how. Those are separate and distinct standards..

[54] It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for

the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to

determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the

relevant circumstances.

[55] It may be seen that the enactment of the Employment Relations

Act and, in particular, s 103A in 2004 and as amended in 2010, did affect the previous law about justifications for dismissal on grounds

of redundancy but not to the fundamental extent of setting aside

everything that the Court of Appeal propounded in *GN Hale*.

[39] In view of this, I need to consider whether the decision to disestablish Ms McFadden's team leader role was an action that a fair and reasonable employer could have taken in all the circumstances.

[40] Having considered the evidence of both Ms Tuhi and Mr Noteboom, I am satisfied that the decision to disestablish Ms McFadden's role was one that a fair and reasonable employer could have taken in all the circumstances. I accept that there was a clear need to integrate the services in a way that improved the efficiency of service delivery within the organisation. In particular, I accept the evidence of Mr Noteboom that, even though the young people using the Snapshot service had not been referred to it by reference to the mental health criteria used by the Youth Community Support service, there were distinct overlaps in terms of psychological support that could be provided to users of both services. Merger of the services under one umbrella with a single youth manager made sense strategically and operationally.

#### **Was sufficient information given to Ms McFadden in relation to the proposed restructure?**

[41] I do not believe that any material information was withheld from Ms McFadden which left her unable to understand the proposal or prejudiced her in her ability to give meaningful feedback.

#### **Was a full and fair consultation process carried out?**

[42] Whilst a request for a second extension of time within which to provide feedback was declined, that refusal does not appear to have prevented affected

employees and Mr Irvine from giving fairly comprehensive feedback. Ms McFadden's feedback consisted of four pages, and she raised a number of concerns about the proposal in it.

[43] It does not appear that Ms McFadden was interviewed after her feedback was given but she (and other affected employees) were represented by Mr Irvine, and the respondent would have reasonably expected to have entered into dialogue with him. Ms Tuhi says that she was not contacted by Ms McFadden or Mr Irvine to discuss the proposal. I note that Ms Tuhi stated in her letter of 8 December 2016 that she would meet Ms McFadden to discuss the proposal if she wished. No complaint is raised about Ms McFadden not being interviewed about her feedback in any event.

[44] Was Ms McFadden disadvantaged by not having a support person with her on

20 December 2016? It appears that Ms McFadden was left unsupported by Mr Irvine at the meeting, and she therefor tried to engage a colleague who was also affected by the restructure. The respondent did not consider it appropriate for Ms McFadden to be supported by this colleague.

[45] It is debatable whether any harm would have ensued had the colleague been allowed to have been present. In any event, Ms McFadden does not argue that she was prejudiced by the meeting going ahead without a support person, and she could have asked for it to be postponed. Ms McFadden was not a vulnerable or inexperienced employee who could easily be browbeaten into taking part in a meeting she did not feel comfortable about.

[46] Prior to the meeting, Ms McFadden was provided with Ms Tuhi's responses to the feedback to the proposal that Mr Irvine had submitted in a single document. Ms Tuhi's responses addressed all of the feedback. Upon a later request from Ms McFadden Ms Tuhi extracted her responses to Ms McFadden's feedback alone, and sent her that on 5 January 2017.

[47] Upon standing back, I believe that a full and fair consultation was carried out by the respondent, in that it fell within the range of actions that fair and reasonable employer could have taken in all the circumstances that prevailed at the time.

## Was the decision not to offer Ms McFadden the position of Manager Youth

### Community justified?

[48] Ms Tuhi and Mr Noteboom together say that there were five reasons why they assessed Ms McFadden as not suitable for the role of Youth manager. These were:

- a. She did not have a degree;
- b. She did not display sufficient financial skills;
- c. She did not have sufficient clinical service experience;
- d. She did not have enough experience of leading a large team; and
- e. She expressed a strong view that the Snapshot and Youth Community

Support services should not be merged.

### *Degree*

[49] In seeking to justify why the role needed to have a degree, Ms Tuhi said that the Youth Manager would need to have critical analysis skills and be able to balance people management with strategic development. She believed that only studying for a degree could give that skill set.

[50] When asked why, in that case, Ms McFadden was interviewed at all, given that the respondent knew that she did not have a degree, the respondent's evidence was that Ms McFadden had indicated that the Social Workers Registration Board<sup>7</sup> could assess her practical experience and then decide whether it equated to a degree. It was at the interview that it emerged that Ms McFadden was likely to be assessed as needing to take papers which would lead to a degree level qualification and that could take up to two years.

[51] I believe that the respondent's requirement for the post holder (or more to the point, Ms McFadden) to have a degree is misconceived. Ms Tuhi's evidence was that the degree was necessary to show that the post holder had analytical and strategic skills. The position description for the Youth Manager role stated that it was essential

that the post holder had a degree level qualification which was "clinical or business

<sup>7</sup> The regulatory authority for social workers

related". It then stated, "e.g., Social Work, Counselling, Nursing, Psychology, Marketing, Communications, Business Administration etc."

[52] Mr Cranney asserted to Mr Noteboom in cross examination that the eventual post holder had a degree in theology. Mr Noteboom was unable to confirm or deny this. However, Mr Cranney was citing from the post holder's LinkedIn page, and I am inclined to accept this evidence. It has not since been contradicted by the respondent.

[53] What this suggests is that the "clinical or business related" degree that was stated to be essential in the Youth Manager position description was in fact not essential, and so Ms McFadden was effectively misled.

[54] I also believe that it is misconceived to demand a degree when the analytical skills and strategic approach required could clearly be present in someone who does not have a degree or equivalent. I believe that this approach disadvantaged Ms McFadden.

[55] I would add as an aside that Gateway risked indirectly discriminating against possible post holders by demanding a degree, by reason of ethnic or national origin, disability and/or age (and possibly other prohibited grounds) as demanding a degree level qualification may disproportionately adversely affect individuals with certain characteristics who are less likely to have a degree. However, as indirect discrimination has not been asserted by Ms McFadden, I shall say no more about this topic.

### *Financial skills*

[56] On the allegation that Ms McFadden did not display sufficient financial skills, Ms Tuhi and Mr Noteboom said that Ms McFadden had not been able to answer a question about how she would set up a budget for a new service. Mr Noteboom says that Ms McFadden also could not answer how much percentage of the budget would be allocated to labour costs.

[57] Ms McFadden asserts that she does have financial experience, and described how she would be allocated a monthly budget, and had to stay within it. She also worked with a manager to develop individual plans for supporting HCN youth.

[58] It appears that, whilst Ms McFadden did work with budgets and had done some planning, she was not able to demonstrate knowledge of how to work out a budget for an entire service. I accept that that would have been a major part of the Youth Manager role. I do not find that the conclusions of Ms Tuhi and Mr Noteboom were unreasonable in respect of Ms McFadden's financial skills.

#### *Clinical service experience*

[59] Mr Noteboom said in evidence that, whilst Ms McFadden had excellent hands-on skills working with young people, she lacked skills at a macro level, and was unable to demonstrate an ability to take a holistic approach in terms of the dynamics between the different youth services.

[60] I am unable to reach an independent view as to whether this was a reasonable conclusion to come to. However, Mr Noteboom's evidence in this respect was detailed and cogent, and I have no reason to doubt its veracity. Whilst Ms McFadden expressed a view that the process had been rigged to effectively get rid of her, she was unable to hazard a guess as to why Ms Tuhi and Mr Noteboom would have wanted to do so. I therefore accept Mr Noteboom's evidence in regard to this criterion.

#### *Leading a large team*

[61] Ms Tuhi said that the Youth Manager role was to manage 7.45 FTE staff, as opposed to the 4 FTE staff that Ms McFadden managed within Snapshot. She said that 7.45 FTE staff equated to several part time staff.

[62] I am not convinced that this difference in staff numbers alone is so significant as to justify the respondent rejecting Ms McFadden for the Youth Manager role. Of course, that was not the only reason she was rejected.

#### *Strong views expressed against the merger of Snapshot and Youth Community*

##### *Support Service*

[63] Ms McFadden denies that she expressed strong objections to the merger, but says that she simply wondered how it would work. In her evidence she said that she could not see what Gateway was looking for, or how the two services could be put together. She said that she had had "no idea".

[64] I believe that, even if Ms McFadden did not strongly oppose the merger in her interview, her expressing that she could not see how it would work would have signalled to Ms Tuhi and Mr Noteboom a fundamental concern as to Ms McFadden's ability to manage the merger and make it work. This is echoed in the evidence of Mr Noteboom and Ms Tuhi when they both expressed doubts about Ms McFadden's ability to see the "big picture" and think strategically.

[65] On balance, I believe that the belief formed by Ms Tuhi and Mr Noteboom that Ms McFadden was still against the merger was not an unreasonable one for them to reach.

#### *Conclusion*

[66] My conclusion is that, first, it was reasonable for the respondent to seek to establish by way of interview that Ms McFadden was suited for the Youth Manager role, and that it would not have been appropriate for Ms McFadden to have been appointed to the role without first adjudging her suitability. This is not like the situation in *Wang v Hamilton Multicultural Services Trust*<sup>8</sup> where Mr Wang's managers conceded that Mr Wang was "well able to perform the duties of the new position of finance manager"<sup>9</sup>. The new Manager of Youth Community role was materially different from that of Snapshot Co-ordinator in terms of breadth and depth of responsibilities.

[67] Second, I accept that, overall, the decision by Ms Tuhi and Mr Noteboom not to appoint Ms McFadden to the Youth Manager role was one that a fair and reasonable employer could have taken in the circumstances. Whilst the decision regarding the requirement to have a degree and the conclusion that Ms McFadden lacked experience in leading a large team were open to question, I believe that their other conclusions were not unreasonable.

#### **Did Ms McFadden reject outright the position of Adult Community Support**

##### **Worker and HCN worker as an alternative?**

[68] There is a fundamental difference in evidence between Ms McFadden and Mr

Noteboom over what Ms McFadden said. It is helpful, up to a point, that Ms

<sup>8</sup> [\[2010\] NZEmpC 142](#)

<sup>9</sup> Paragraph [40].

McFadden sent an email to Mr Irvine shortly after her meeting with Mr Noteboom. This suggests that Ms McFadden did say that she "did not believe she would accept" the Adult Support role. However, her wording also suggests that she said she was going to be leaving on Monday 23 January.

[69] I suspect that, because Ms McFadden became upset when she was told that she was not going to be appointed to the Youth Manager role, and because Mr Noteboom was taken aback at her reaction, there was a misunderstanding between what was said and what was heard. However, even on Ms McFadden's account, she was sending a strong signal that she was unlikely to be accepting the Adult Support role.

[70] In any event, that misunderstanding is not the end of the story because both Ms McFadden and Mr Noteboom agree that Ms McFadden would be given until Monday 23 January to reconsider her position.

**Should the respondent have waited until it had feedback from Ms McFadden instead of directly moving to her dismissal?**

[71] The events that transpired were as follows:

- a. Ms McFadden and Mr Noteboom agreed that she would think about her situation over the weekend and let the respondent know what she had decided at a meeting at 1pm on Monday 23 January;
- b. On Sunday 22 January 2017, at 8.16 pm, Mr Irvine sent an email to Ms Tuhi and Mr Noteboom saying that Ms McFadden would not attend the proposed meeting, that it is "not legally open" to Gateway to disestablish Caro's role and that E tū would commence proceedings in the Authority that coming week;
- c. Ms McFadden did not know about the email from Mr Irvine or its contents (although there was no reason for Ms Tuhi and Mr Noteboom to suspect that that was the case);
- d. The respondent's consultant replied to Mr Irvine to say that the meeting would go ahead, that Ms McFadden had declined redeployment and that Ms McFadden had been encouraged to reconsider over the weekend;
- e. Ms McFadden did not know about that email either;
- f. Ms McFadden attended work on 23 January at 8.30 am but went home upset later that morning. She emailed a medical certificate to Ms Tuhi and Mr Noteboom at 12.15, which had signed Ms McFadden off until 8 February. They had received this certificate;
- g. At 2.33 pm the same day, Ms Tuhi sent an email to Ms McFadden, to which was attached a letter dismissing her.

[72] First, the respondent cannot reasonably rely upon Mr Noteboom's

understanding that Ms McFadden had said she was not interested in the positions that had been discussed on Friday because it had been agreed immediately afterwards, and rightly so, that she was to be given time to reconsider her position over the weekend.

[73] The respondent is, not surprisingly, seeking to rely partly upon the email from Mr Irvine sent on 22 January to justify its decision to dismiss Ms McFadden. However, that argument is undermined by the fact that Ms David, on behalf of the respondent, replied saying that the meeting was to go ahead and Ms David referred to Ms McFadden having been given the weekend to reconsider. Therefore, this indicates that the respondent had rejected Mr Irvine's position, and was intending to meet Ms McFadden.

[74] The letter of dismissal refers to Ms McFadden failing to attend the scheduled meeting or notify the respondent of her final decision by 1pm on 23 January. However, the respondent knew that Ms McFadden had been signed off for two weeks by her GP prior to the meeting. In addition, there is no indication whatsoever that Ms McFadden had been told that she had to disclose her decision by 1pm or be dismissed.

[75] The only event that had occurred between Ms David sending the email saying the meeting was to go ahead, and the decision to dismiss, was that Ms McFadden had been signed off sick. It is reasonable to infer from this that the respondent did not believe that Ms McFadden was genuinely ill, but had believed that she was tactically absenting herself so as to avoid dismissal.

[76] Under cross examination, Ms Tuhi agreed that Ms McFadden's non-attendance at the meeting had been seen by her as a

refusal to accept the offer. She also agreed that she had doubted that Ms McFadden was genuinely sick “to some

degree” but that she had to accept the medical certificate and take it as genuine. This sounded as if she had since been advised that she could not question the medical certificate.

[77] In the light of this evidence, on balance I believe that the respondent had concluded that Ms McFadden had decided not to accept the alternative positions discussed on the basis that she had deliberately absented herself under the aegis of a medical certificate. However, this was not a decision that any fair and reasonable employer could have taken.

[78] As Mr Noteboom had said in his evidence, Ms McFadden had been very upset on Friday 20 January and he had rightly wanted to give her time to consider the alternative roles more calmly. However, Ms McFadden stated in her email to Ms Tuhi and Mr Noteboom on 23 January that her stress levels were “at an unhealthy level”, and that all she could do at work was cry. In addition, she had been on call over the weekend and had covered for a sick colleague.

[79] All this should have indicated to a fair and reasonable employer that Ms McFadden had not been in a position to have properly thought about her position over the weekend, and was still labouring under heightened emotions and, indeed, was now unwell.

[80] Furthermore, despite having initially been given more time to reconsider, and despite Ms McFadden not saying one way or the other in her 23 January email whether she was accepting or rejecting the alternative positions, the respondent jumped to a conclusion that she had rejected it.

[81] It is not clear, either, why the respondent rushed into a decision to dismiss. No evidence was given that a decision absolutely had to be made by 1pm on 23 January

2017.

[82] It is telling that Ms McFadden says she was never given any offer of redeployment. Whilst this is denied by the respondent, the only discussion that took place prior to dismissal was an unexpected and informal meeting with Mr Noteboom on 20 January which seemingly lasted no more than 20 minutes. Ms McFadden was not accompanied by a support person at the meeting, nor was she given the chance to be. Furthermore, Ms McFadden became very upset at the meeting. Finally, this informal meeting was not followed up by any written confirmation from the respondent of either her lack of success in the Youth Manager role (and the reasons why) nor by an offer of the Adult Support role, nor the possible HCN role.

[83] In conclusion, I find that no fair and reasonable employer could have decided to have dismissed Ms McFadden in the circumstances that prevailed at the material time without having first met with her face to face after she had recovered from her illness, and ascertained her intentions after she had had the chance to reflect on her position in a calm and collected manner. Accordingly, the dismissal was unjustified procedurally.

[84] I also find that it was unjustified substantively, as I cannot safely conclude that Ms McFadden would not have decided to have taken the Adult Community Support Worker role if she had thought things over more calmly, after her initial shock had subsided. The fact that she was seeking reinstatement until the very end of the investigation meeting suggests that this may well have been the case.

## **Remedies**

[85] I now turn to remedies. The relevant parts of s 123 of the Act provide as follows:

### **123 Remedies**

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous

to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a

result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the

employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the

personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations

to the employer concerning the action the employer should take to prevent

similar employment relationship problems occurring.

[86] Section 128 provides:

### **128 Reimbursement**

(1) This section applies where the Authority or the court determines,

in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section

124, the Authority must, whether or not it provides for any of the other remedies provided for in [section 123](#), order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration

lost by that employee as a result of the personal grievance, a sum greater than

that to which an order under that subsection may relate.

[87] Whilst Ms McFadden's loss needs to be assessed against the role of Adult Support Worker, and not her Snapshot co-ordinator role, as that was legitimately disestablished. At the time of Ms McFadden's dismissal, the top rate for the Adult Support Worker role paid \$19.14 an hour gross, or \$765.60 a week gross, and continues to do so according to the respondent. Three months' ordinary time remuneration therefore equates to \$9,952.80 gross. The HCN role did not eventuate in the end, and it would be too speculative to assume that, if Ms McFadden had not been dismissed, and if she had taken on the Adult Support Worker role, the HCN role would then have been created and Ms McFadden would have taken on that role.

[88] Ms McFadden was paid 4 weeks' pay in lieu of notice, and so her period of potential loss started on 20 February 2017. I shall assume that she would have started the Adult Support Worker role with effect from that date.

[89] After submissions Ms McFadden provided a table of her earnings post termination. From this table, I understand that Ms McFadden earned the following from 13 March 2017 until 25 June 2018:

- a. At a retirement village, \$14,506.52 gross;
- b. At a hostel, \$13,371.43 gross;
- c. At a residential school, \$19,717.41 gross.

[90] These earnings equate to a total of \$47,595.36. From 20 February 2017 until

25 June 2018 Ms McFadden would have earned \$53,701.37 gross had she not been dismissed and she had worked as an Adult Support Worker. That would have been

\$6,106.01 more than she actually earned. Her loss is therefore less than three months' ordinary time remuneration, and so Ms McFadden is entitled to an award of \$6,106.01 pursuant to s128(2) of the Act.

[91] Turning to compensation for humiliation, loss of dignity, and injury to feelings, Ms McFadden's evidence was quite full. She said that "even today after 15 months it still feels like yesterday and when having to think about it I can still feel the tears forming, and the sense of dread that comes with this".

[92] Ms McFadden said that the first month after her dismissal "is very much a blur" and that "I avoided people and places, went out at times that I knew I wouldn't run into people and spent a lot of time at home on my own attempting to come to some form of acceptance". She said that she understood that she would need a grieving period as her loss was "very raw and real".

[93] Ms McFadden said that, after her finding new employment, she would get in her car at the end of the day and cry all the way home. After a couple of weeks she went to her doctor and was given a higher dose of anti-depressants.

[94] Ms McFadden says that she never wants to find herself in a position of doing something she loved and having it taken away from her in the way it occurred. She also says that she describes 2017 as her “lost year”, and that she carries with her a shame but is unsure why. She says she has difficulty facing people she worked with and struggles to find a purpose for herself, and feels she cannot commit to a job or role. She says she accepts nightshifts so she can hide and prefers to stay at home rather than catch up with friends.

[95] Ms McFadden said that she is moody, short tempered, has little patience and fears that she will never find the passions, drive and ambition she had before.

[96] There is no doubt that Ms McFadden has been quite significantly affected by the overall experience of what occurred at the latter part of her employment with the respondent. Mr Cranney says that her humiliation, loss of dignity, and injury to feelings falls beyond the “middle of the middle band”, referring to the Employment

court case of *Waikato District Health Board v Kathleen Ann Archibald*<sup>10</sup> in which the

<sup>10</sup> [\[2017\] NZEmpC 132](#), at paragraph [62]

Court awarded \$20,000 for effects which it judged fell around the middle of ‘band 2’

(involving mid-range loss/damage). I would agree.

[97] However, it is important to distinguish between the significant effects Ms McFadden suffered at the loss of her role of Snapshot co-ordinator, which I have found stemmed from a decision of the respondent which was not unjustified, and those which stemmed from her dismissal, which was unjustified. It is impossible to accurately distinguish the effects caused by the two events, although I have little doubt that the dismissal compounded the hurt felt by the decision to disestablish her role.

[98] I believe that, if the entire and overall effects suffered by Ms McFadden were to be compensated for, I would be looking to award around \$25,000 under s

123(1)(c)(i). However, that sum is excessive when one considers the effects that are compensable from the dismissal alone. I believe that an award of \$15,000 is appropriate.

[99] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[100] I can see absolutely no grounds for reducing the awards pursuant to s 124 of the Act, and the respondent has not sought to argue that they should be.

## Orders

[101] Within 14 days of the date of this determination the respondent is to make the following payments to Ms McFadden:

- a. The gross sum of \$6,106.01 in relation to her lost wages; and b. Holiday pay on lost wages in the sum of \$488.48; and
- c. The sum of \$15,000 pursuant to s 123(1)(c)(i) of the Act.

## Costs

[102] I reserve costs. The parties are to seek to agree how costs will be dealt with. If they are unable to agree within 14 days of the date of this determination, Ms McFadden may apply to the Authority for an order that the respondent make a contribution towards her costs by Mr Cranney serving and lodging a memorandum within a further 14 days. Ms Chapman may respond by way of a memorandum served and lodged within 14 days after that. If either party seeks an extension to these timeframes they are to request the extension prior to the expiry of the due date.

David Appleton

Member of the Employment Relations Authority