IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 206
5350930

	BETWEEN	SUSAN McLEOD Applicant
	A N D	NATIONAL HEARING CARE (NEW ZEALAND) LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Gary Tayler, Advocate for the Applicant Richard Harrison, Counsel for the Respondent
Investigation Meeting	2 September 2010 at Napier
Submissions Received:	8 September 2011 from the Applicant 2 September 2011 from the Respondent
Date of Determination:	21 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Susan McLeod, has raised a number of grievances, the most significant of which is a claim she was unjustifiably dismissed by the respondent, National Hearing Care (New Zealand) Limited (National Hearing), on 4 July 2011.

[2] Ms McLeod also claims that she was unjustifiably disadvantaged in that:

(a) She was improperly suspended;

(b) The respondent failed to provide her with a written job description contrary to the provisions of s.65 of the Act;

(c) She was only paid four weeks in lieu of notice when eight weeks was the contractually required sum; and

(d) That the respondent acted in breach of the duty of good faith by failing to communicate openly with her and misleading her about her future employment prospects.

[3] National Hearing accepts that it dismissed Ms McLeod, but claims the dismissal was justified as it could no longer allow her to continue in her position due to changes imposed by the Ministry of Health in accordance with powers granted bestowed by the New Zealand Public Health and Disability Act 2000 and termination became inevitable when she refused to discuss alternatives.

[4] National Hearing denies any impropriety in respect of the other claims.

Conduct of the investigation meeting

[5] As has just been said, National Hearing accepts that it dismissed Ms McLeod. In recognition of that fact, Mr Harrison proposed, at the commencement of the investigation, that as Ms McLeod had effectively established that the respondent had a *prima facie* case to answer, it may be more efficient if National Hearing went first and attempted to justify its actions. Mr Tayler, on behalf of Ms McLeod, accepted that proposition and the investigation meeting proceeded accordingly,

Background

[6] National Hearing owns and operates hearing clinics amidst which are two in the Hawke's Bay which were previously owned by Audiology Hawke's Bay Limited.

[7] Ms McLeod, who has a certificate in hearing therapy, had been employed by Audiology Hawke's Bay as an Audiometrist since April 2007. As such, she assessed a clients hearing and hearing needs and, once trained by Ms Lisa Thompson (a co-owner of Audiology Hawkes Bay), participated in the selecting, setting up and fitting of appropriate hearing aids under Ms Thompson's supervision.

[8] Ms Thompson is a fully qualified audiologist and a member of the New Zealand Audiological Society (NZAS) but, according to Ms McLeod, the level of supervision was such that while Ms Thompson remained available for help, advice and assistance, she was afforded a considerable amount of independence. Indeed, Ms McLeod's own evidence suggests she essentially worked alone and met with Ms

Thompson at the end of each week to address the paper work required by the Ministry of Health for the payment of hearing aid subsidies.

[9] In early 2009 Audiology Hawkes Bay was purchased by National Hearing. Ms McLeod states that this did not affect either her duties or her terms and conditions of employment. She states that she received neither a replacement employment agreement nor a letter of appointment but was instead given *a general letter stating my terms and conditions of work would not change*.

[10] That is, perhaps, a simplistic summary of a six page document describing the new owners, their background, approach to business and expectations. Contained therein is advice that *your terms and conditions of employment are unaffected by new hearing centres joining the group.*

[11] However the documentation is portrayed, Ms McLeod continued in her previous role and remained fully engaged in a wide range of processes which lead to clients being fitted with hearing aids.

[12] Here it should be noted that National Hearing portrays this (the range of functions performed by Ms McLeod) as a situation it inherited and one that it had qualms about. Ms McLeod was not a fully qualified audiologist or a member of NZAS and its normal practices would not have seen her performing the range of tasks she did but, that said, it was not an issue that had to be addressed immediately. National Hearing considered it a case of gradually assimilating Audiology Hawkes Bay into its wider national operation and, in any event, there was a lack of clarity over the practice of Audiometrist's given they were, at the time, an unregulated group not covered by the Health Practitioners Competence Assurance Act 2003. This meant, from National Hearings perspective, that while Ms McLeod's modus operandi did not fit its model of care, there were no apparent issues with the Ministry of Health (the Ministry) and the subsidies it provided toward the cost of providing hearing aids and which are crucial to the sectors' revenue streams.

[13] Change was, however, on the horizon. During 2009 the Ministry's hearing aid subsidy more than doubled. That led to a greater interest in the prescription process and the Ministry's establishment of a 'task force' to review it.

[14] Around October 2010, and as a result of the work of the 'task force', National Hearing became aware that the Ministry was considering issuing a notice under

Section 88 of the New Zealand Public Health and Disability Act 2000. A s.88 notice is one that advises the terms and conditions on which either the Crown or a District Health Board will make a payment (with the hearing aid subsidy being such a payment).

[15] A draft notice was circulated in February 2011 for consultative purposes. The final version was gazetted in May and was to come into force with effect 1 July 2011. Within what is a substantial document (53 pages), is advise that:

> ***Approved assessor must assess hearing and hearing needs and provide fitting services***
>
> *i. An audiology provider must ensure that an approved assessor assesses an eligible person's hearing and hearing needs in accordance with the NZAS Standards of Practice…*

[16] There were also various staffing changes occurring with Ms Thompson advising that she wished to relocate to Auckland but once a replacement was sourced Ms Thompson changed her mind and was retained in the Bay. This occurred during the first half of 2011 and had flow on affects. The main one, from Ms McLeod's perspective, was that she was no longer required to move between clinics but asked to remain at Havelock North. While now an issue of contention, she agreed at the time and this change was effected on 27 May 2011.

[17] It was also around this time that Ms McLeod raised concerns about the manner in which her performance statistics were being collated and assessed, along with what she saw as institutional impediments on her ability to perform. On 9 May she wrote to the managing director, Mr James Whitaker, and advised her concerns.

[18] Mr Whitaker responded the following day with what Ms McLeod characterises as a rebuttal of her concerns and comments that, to her, constituted further criticism of her performance. The document was not presented in evidence and Mr Whitaker neither commented, not was questioned, about it.

[19] Shortly after receiving Mr Whitaker's email of 10 May, Ms McLeod was advised that Mr Whitaker would be travelling to Hawke's Bay and wished to speak with both her and Ms Thompson. Ms McLeod states:

> *Mr Whitaker did not say what was to be the content of this meeting but I assumed it was to be about the perceived performance issues and regarding (Ms Thompson's) upcoming extended break and how I would be supervised during this time.*

[20] The meeting occurred on 2 June and Ms McLeod states:

> *For the first part of the meeting my performance was covered and discussed. Toward the end of the 60 minute meeting Mr Whitaker drifted into the recent notice issued by the Ministry of Health pursuant to s.88 of the New Zealand Public Health and Disability Act 2000, due to become effective 1st July 2011.*

[21] Ms McLeod goes on to say:

> *Without any discussion Mr Whitaker announced to me that my inevitable dismissal would be a direct consequence of this "change", and he immediately started talking about possible "redeployment opportunities" in Nelson. I knew nothing of this notice and was left devastated and overwhelmed by Mr Whitaker's announcement. I asked if Mr Whitaker would put something in writing but he said that he would not, save that he would write "you are dismissed effective 1st July 2011"...*

[22] Mr Whitaker has a different view. He says that the first part of the meeting was a discussion about performance statistics and this issue was canvassed as a result of a direct request from Ms McLeod in her e-mail of 9 May. He states that he did not consider there was anything disciplinary about the discussion. He saw it as an opportunity to take advantage of his presence and comply with Ms McLeod's request they discuss the matter but is adamant that his prime concern was the s.88 notice and its requirement that assessors be approved. Mr Whitaker considered the notice removed previous uncertainty about whether or not Ms McLeod could continue to perform her previous range of duties. It was his reading of the notice that she could not and he had to discuss this with her.

[23] The meeting was followed, on 10 June, with an email from Mr Whitaker to Ms McLeod. Contained therein is advice that:

> *It has been a few days since I came down to Havelock and I promised to come back and see you in person to discuss the option of a move to Nelson. I did mention when we met that if you came to a decision on the move, to let me know as soon as possible in order that I may make some tentative plans… I also asked you to consider any ideas around alternative roles you would consider in National Hearing Care that would not require you to prescribe hearing aids. I was unable to think of any, but did not want that to be the sum total of the ideas process. I am very open to any suggestions.*
>
> *I have made plans to see you next Wednesday…*
>
> *As I suspected when we met, the s.88 notice has now been formally communicated. There are a number of sections in the MOH notice*

> *that now clarify, whereby previously the MOH contract was silent on the matter, that MNZAS audiologists must carry out certain elements of the hearing prescription process in order to receive government subsidy approval. If you are interested in Nelson, the role you would carry out there would not reflect the breadth of work you are currently undertaking in Havelock. It is however a much busier clinic so there are ways we can utilise your experience and the availability of MNZAS audiologists where we cannot in Havelock. The notice from my initial reading and high level understanding would not allow you the same freedom in diagnosis and prescription that you currently operate under in Havelock.*
>
> *This is an evolving position Sue, the s.88 notice is 50 pages long and I have yet to read it for the second time. I will have more to discuss with you on the notice next week.*
>
> *I trust this is all acceptable Sue. I will be booking flights on Monday so please let me know urgently if this poses any problems.*
>
> *Kind regards …*

[24] Ms McLeod responded by email that day, 10 June. She said that she had understood the previous week's meeting was to discuss her performance and she had been completely overwhelmed by news of the s.88 notice and its potential effect as that came as a complete surprise. She goes on to say:

> *During your meeting and also within your letter you assume certain inevitable outcomes from the MOH notification under s.88, and yet you concede not to fully understand these yourself. Others I have spoken to regarding the proposed changes do not reflect your views and I do not accept that my redundancy could possibly be predicated on the announced changes.*

[25] Ms McLeod goes on to say that she was deeply suspicious given recent events and, in particular, the decision to move her out of Napier when the possibility of funding changes had been known for quite some time. She then commented:

> *In short, I will not be making any decisions regarding my future on the basis of such a flawed approach. I am not convinced that these changes do preclude me from continuing to operate in HN, and I believe you have a primary duty and make that possible when it is reasonably achievable. I see no evidence of such an effort and in fact I wonder if my recent repositioning to Havelock North is part of a wider strategy to deprive me of my job.*

[26] Ms McLeod closes by advising that she would attend the Wednesday meeting but would be bringing a support person and then gave an information request aimed at helping her prepare for the meeting.

[27] The meeting occurred, as scheduled, on 15 June 2011. Ms McLeod complains that Mr Whitaker did not provide any objective analysis of the consequences of the s.88 notice but simply expected her to accept his understanding of what it meant and its possible effect. She says:

> *Mr Whitaker's concluded view was that this reference resulted in me being unable to fit private clients with aids, and still comply with the MOH funding requirements.*
>
> *Mr Whitaker was not interested in wanting to verify this beyond his understanding and he became frustrated when I argued that I should still remain able to complete my current work as an Audiometrist under the supervision of an approved assessor as in the past.*
>
> *Mr Whitaker however said this was not possible and he sought to hear my response to other redeployment options… I again urged Mr Whitaker to engage in further discussions with the MOH to gain an objective understanding of the true impact of the s.88 notice on my employment.*

[28] On 22 June Ms McLeod wrote to Mr Whitaker again asserting that she met the Ministry of Health requirements and should therefore be allowed to continue in her role.

[29] Mr Whitaker responded the following day. His response reads:

> *Dear Sue*
>
> *I am in receipt of your email of 22 June which I have given further thought to, both as to the effect of the Section 88 notice and what this means for us post 1 July 2011. I am satisfied that my original interpretation of the s.88 notice is correct and that we are not able to continue employing you in your current role.*
>
> *I promised when we met on 15 June that I would follow up directly with Y* [the Ministry contact]. *You requested this course of action, as you did not believe that my interpretation of the Section 88 notice was correct.*
>
> *As we discussed at the meeting, I have been involved in the negotiations around this notice for the past 12 months and so was reasonably confident that my assessment of the notice was accurate. Nevertheless I have followed up with Y who heads up the disability and support team at the Ministry of Health.*
>
> *I explained to Y that you were practising audiometry for an organisation that we purchased and that you had been receiving supervision. I gave her some background to the current situation. Y confirmed my interpretation of the s.88 notice as being correct. She acknowledged that there would no doubt be implications for non-qualified staff with the new process. We went on to discuss the new assistant audiology role, Y explained that while this is not yet*

> *completed in terms of the requirements, there would not be an occasion where an unqualified person practising audiology would be entitled to achieve this status.*
>
> *The issue of whether there should have been compliance earlier is not so clear. We continued with your role of prescribing hearing devices as it was in the days of your former employer, Audiology Hawke's Bay. On reflection, this may not have been appropriate though it could be argued that prior to the s.88 notice, the criteria remained somewhat blurred. The Ministry of Health, however, does not see it this way. This is why Y has said that nothing has changed. It has not from their point of view, which simply means that the steps that are now being taken are overdue. For a provider such as National Hearing Care, I believe the requirements were less clear but this is no longer the case. There is now a fundamental shift in the requirements that you must personally meet to be able to fulfil the requirements of your position.*
>
> *While I appreciate that this is not technically a redundancy as it is more about the impact of the Ministry's requirements on your ability to continue in the role, nevertheless in good faith I have taken this route as it enables us to consider alternative positions and recognises that the situation we find ourselves in is not the fault of either party, however it is something that we cannot choose to ignore.*
>
> *In terms of where we go from here, in light of the s.88 notice having effect on 1 July 2011, then as previously discussed with you at our earlier meetings, National Hearing Care is not able to continue your employment in your current role past this date. Accordingly this letter serves as notice that your employment with us in your current role will terminate on Friday, 1 July 2011.*
>
> *Sue, I would invite you in the meantime to engage with me in discussion around alternative employment opportunities. I cannot require you to engage with me on the issue of redeployment options, other than to encourage you to revisit your position. If you would like to revisit redeployment options, I would suggest that you contact me today or tomorrow so that we can discuss…*

[30] Ms McLeod states that this prompted her to contact the Ministry of Health and, on 28 June, Y advised by e-mail:

> *I would like reiterate that the introduction of the hearing aid services notice on 1 July does not introduce a change in approach regarding who can complete assessments and applications or claims for hearing aid funding and subsidies through the Ministry of Health – with the exception that provisional members of NZAS cannot complete this work without the overall supervision of an NZAS member…*
>
> *I believe that some audiology providers are now ensuring that these requirements will be met, due ot the formal introduction of the Notice, and unfortunately it appears that this has impacted on your work situation…*
>
> *In answer to your question below, I don't believe that unless you have on-site supervision from a full member of NZAS, who would take*

> *overall clinical responsibility for the application or claim, you would be able to participate in any part of the process of assessment or fitting of hearing aids.*

[31] Ms McLeod is of the view this response confirmed nothing had changed as she considered she received supervision from a full NZAS member. She had done so for the last five years and would continue to do so in the future.

[32] Ms McLeod reacted to Y's e-mail by sending one to Mr Whitaker the following day (29 June). It reads:

> *As can be seen below, Y confirms that I can indeed continue in my role so long as I do so under the supervision of an qualified audiologist who would be responsible for funding applications.*
>
> *I note that we have both been receiving mixed messages from Y but I now hope that you will accept that my position can continue as I thought it could.*
>
> *Can we now put this issue to rest and let me continue to do my job …*
>
> *I just can't accept that you could dismiss me or cause my role to cease tomorrow on your view of the application of the s.88 notice, in light of Y's advice.*
>
> *Regards,*

[33] Mr Whitaker responded the following day. He states:

> *Thank you for your email Sue. I am in Brisbane so a little behind on my emails.*
>
> *My decision regarding your role as a clinician still stands. There are no mixed messages. Y is saying that if someone were to be present with you the whole time then yes that you could work. Practically speaking that is not possible for us as it requires two people to do the same job. We simply do not have the resources to do that.*
>
> *Your role as a clinician ceases today as previously confirmed. I will meet with you on Monday as arranged to discuss any other alternative roles for you.*

[34] Ms McLeod immediately sought professional assistance and Mr Tayler wrote on her behalf that day. He suggests that Ms McLeod has been either unjustifiably suspended or unjustifiably dismissed. Mr Tayler repeats Ms McLeod's assertion that the Notice does not impinge on her ability to continue as previously and suggests a meeting with Y attending in order that the parties' resolve what is portrayed as a disputed interpretation. The letter closes by advising that Ms McLeod would not met on the Monday as suggested by Mr Whitaker and stating that she would not consider a

redeployment option until National Hearing had given full details of the alleged performance concerns so that Ms McLeod could work those into her consideration of the viability of an alternate appointment.

[35] Mr Whitaker's response was, essentially, that the letter raised nothing new and as Ms McLeod was not going to meet to discuss alternates he had no option but to confirm her dismissal.

[36] Ms McLeod was advised of this by letter dated 4 July. It is a long letter which opens with an expression of disappointment that the parties would not meet that day before stating:

> *… the Hearing Aid Services Notice … takes effect from 1 July 2011. It would be a breach of this Notice if we were to continue to employ Sue in her current position on or post that date. While it is arguable that Sue could previously undertake this work (as she did under Audiology Hawkes Bay ownership) and while this is not a view shared by the Ministry of Health, the notice puts the situation beyond doubt. There is no longer any grey area.*

[37] The letter then goes on to discuss the notice and its content before expressing frustration at Ms McLeod's response to attempts to discuss the issue. Her approach was, from National Hearings perspective, *almost a blanket refusal to accept the reality of the situation and the effect of the … notice.*

[38] It goes on to note:

> *In light of the very clear statutory provisions that came into effect on 1 July, Sue can no longer undertake work that has been a core requirement of her position. In the absence of any other realistic alternative, I can see no other option but to give notice of termination of Sue's employment. While I would have preferred that we retained the meeting scheduled for today in order to discuss these matters face-to-face, in light of Sue's decision and your advice that she not attend, I have to advise of this decision by letter…*

Determination

The dismissal

[39] As said in opening, National Hearing accepts it dismissed Ms McLeod and it is therefore required to justify its decision. National Hearings justification is that it could no longer engage Ms McLeod in the position she previously occupied and that no alternates were evident (especially as she refused to participate in discussions

aimed at identifying possibilities). In other words, and while its letters show a reluctance to apply the label, National Hearing's justification is redundancy.

[40] Section 103A of the Employment Relations Act 2000 (the Act), states that the question of whether a dismissal is justifiable

> … *must be determined, on an objective basis,* [by considering] *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 … occurred.*

[41] In a redundancy setting it is well established that:

> *When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.*
> *In Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision (Baguley v Coutts Cars Ltd [2000] 2 ERNZ 409) emphasised the need to consider the two factors (genuineness and process) separately …*
> Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[42] Notwithstanding the number of issues raised during the hearing, those impinging on the question of substantive justification are, in my view, relatively narrow. National Hearing is of the view the s.88 notice precludes Ms McLeod from performing the range of roles she had previously performed. She reads the notice differently and disagrees, claiming she can simply continue unchanged.

[43] According to the evidence Ms McLeod performed a wide range of tasks. She assessed a clients hearing and hearing needs and participated in the selecting, setting up and fitting of hearing aids.

[44] It is clear from the s.88 notice and a contemporaneous advisory / explanatory notice prepared by Y, that she could not continue to do so without direct and comprehensive supervision.

[45] The explanatory notice just referred to reads:

> *Approved Assessor*
>
> *The Assessor declaration on the new application and claims form requires that the assessment, selection and fitting of hearing aids and\or accessories to completion will be carried out in accordance with the NZAS Standards of Practice and the Ministry of Health's Disability Support Services accreditation framework.*

> *This means that provisional members of NZAS or appropriately trained Audiometrists will be able to complete parts of the assessment or fitting process provided they are directly supervised by a full member of NZAS. The role of Audiometrists in this process will be further clarified once the work to define the scope of practice and any training requirements for trained Audiometrists has been completed. In the meantime, a prudent approach should be taken if provisional members of NZAS or trained Audiometrists participate in any aspect of the assessment or fitting of hearing aids.*

[46] The s.88 notice requires that an approved assessor (ie: a fully qualified Audiologist) assesses an eligible person's hearing and hearing needs. Ms McLeod is not a qualified Audiologist. She is an Audiometrist and would therefore require direct supervision. It is her view that that already occurred and the status quo could therefore continue. I disagree. Such a contention is, in my view, undermined by her own evidence regarding the real level of supervision she received from Ms Thompson (see 8 above). Such a level of supervision is clearly inadequate in light of the notice and the missive that providers adopt a prudent (ie: cautious) approach.

[47] The level of uncertainty is exacerbated by the fact that questions would remain over the range of tasks Ms McLeod could actually perform unsupervised until an Audiometrists scope of practice was finalised by the Ministry. As the parties agreed during the investigation, that could quite possibly take years.

[48] I am satisfied from the evidence that the level of supervision now required would be such that, as Mr Whitaker said in his e-mail of 30 June, it would effectively require two people to do the work of one – one does it and the other constantly confirms the actions taken. That does not make sense and is perhaps why National Hearing's normal model of care sees diagnosis and fitting performed by a qualified Audiologist supported by unqualified staff performing non-clinical tasks. The organisation has no one else in a role vaguely similar to that occupied by Ms McLeod.

[49] Here I must quickly refer to the suggestion that the staffing changes that occurred in the Napier region not long before Ms McLeods dismissal were an attempt to make her continued employment untenable. The evidence does not support this contention. It is clear that other factors influenced this such as Ms Thompson's vacillation over a possible move to Auckland, the obvious need to retain qualified Audiologists (which is evidenced by the requirements of the s.88 notice) along with those who were to the path to attaining qualification and the slow introduction of National Hearings standard modus operandi which is, in my view, understandable

given that it clearly fits with the regulatory requirements while the previous practices of Audiologyy Hawkes Bay no longer do.

[50] In the circumstances I have no qualms in concluding that National Hearings decision to disestablish Ms McLeod's role can be substantively justified.

[51] Turning to the procedural issues. These are succinctly summarised in s.103A(3) of the Act. There it is stated that in applying that test of justification the Authority must consider whether:

a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

b. The employer raised its concerns with the employee prior to taking action;

c. The employer gave a reasonable opportunity for response;

d. The employer genuinely considered the explanation before taking action; and

e. Any other appropriate factors.

[52] These requirements are reflected in s.4(1A)(c) of the Act.

[53] I conclude that National Hearing has complied with the requirements above, and particularly those that relate to procedure – (b) to (d) inclusive.

[54] The chronology above makes it very clear that:

a. National Hearing raised its concerns (namely the possibility that the s.88 notice precluded Ms McLeod continuing in her role);

b. It listened to, or more often than not read, her responses (though the response may be simplistically summarised as an assertion that National Hearing had misread and/or misinterpreted the notice); and

c. That National Hearing considered the arguments being tendered by Ms McLeod and this is illustrated by the fact that they did follow up with the Ministry and seek advice over the notice's effect.

[55] There is, however, one issue that must be canvassed and that is the fact that in the meeting of 2 June Mr Whitaker first discussed the issue of Ms McLeod's performance statistics. This was, as he himself conceded, unfortunate in that it distracted attention from the more important issue. Whilst that is true, I do not consider this to fatally undermine National Hearing's decision for the following reasons.

[56] First, the subject was raised in response to a request from Ms McLeod and National Hearing should not be severely criticised for adhering to an employee's request.

[57] Second, and in any event, there is no obvious disadvantage. Ms McLeod's own evidence was that the shock of the news (which, I note, is quite understandable) was such that she would probably have been unable to respond coherently that day. Discussion and communication over the issue then continued for some time and she had an opportunity to provide considered input.

[58] The other issue upon which comment must be made is Ms McLeods response to the situation. I have some sympathy with the frustration expressed by Mr Whitaker in his letter to Mr Tayler of 4 July. As Mr Harrison said in his submissions, *There is simply no leeway for interpretation of these* [the s.88 notice] *provisions*, yet Ms McLeod adopted an intransigent approach and despite overwhelming evidence to the contrary, refused to contemplate the possibility National Hearing's interpretation of the notice could possibly be correct. She left National Hearing with no choice – it could no longer engage her as it had previously and her steadfast refusal to discuss or consider alternates meant her dismissal became a fait accompli.

[59] The dismissal is, for the above reasons, justified.

The disadvantage claims

[60] Turning to the disadvantage claims (see 2 above). Ms McLeod claims that she was unjustifiably disadvantaged in a number of ways.

[61] It is argued that Ms McLeod was improperly suspended when she found herself unable to work in her previous role on 1 July. First I have some doubt that Ms McLeod was suspended and the evidence does not clearly confirm she was but, in any event and even if she was, I could not conclude National Hearings action would give

rise to a personal grievance. It is well established that for an action to give rise to a personal grievance under s.103(1)(b) is must be both disadvantageous and unjustified action. Whilst the disadvantage is obvious, I find it difficult to conclude the action unjustified. For reasons already discussed, National Hearing could no longer engage Ms McLeod on the duties previously performed due to the s.88 notice and she had refused to discuss or consider alternatives. National Hearing had no choice.

[62] The respondent failed to provide her with a written job description contrary to the provisions of s.65 of the Act. This is, I conclude, a somewhat vindictive claim given National Hearing simply confirmed that previous arrangements would continue. If there has therefore been a breach surely it is also that of Audiology Hawkes Bay yet no issue is taken in that respect. I also note that s.65(2)(a)(ii) of the Act requires that the employment agreement contains a description of the work to be performed by the employee. The role is referred to by its title in the letter confirming Ms McLeod's retention by the new owners as was the fact she would simply continue unchanged. Given her training and experience the requirements should have been obvious but lastly there is the question of remedy should a breach have occurred. This is pursued as a personal grievance yet there is absolutely no evidence of a resulting harm (attributable to this alleged failure) that would support an award of compensation. I shall not, in these circumstances, consider the claim further.

[63] The third claim is that Ms McLeod was only paid four weeks in lieu of notice when eight weeks was the contractually required sum. The evidence leaves me uncertain as to what was actually paid so all I can say is that agreement is, as Mr Tayler claims, clear. Eight weeks notice is payable and if it wasn't, it should be.

[64] It is also claimed that National Hearing acted in breach of the duty of good faith by failing to communicate openly with Ms McLeod and misleading her about her future employment prospects. Communication is a two way process and I have to suggest, with reference to my earlier comments in 58 above, that if any criticism can be levelled here, it is perhaps against Ms McLeod. First the evidence supports a conclusion that National Hearing went to some length to explain the situation and the likely consequences. It was Ms McLeod who closed her mind to the possibility and adopted an intransigent 'you are wrong' approach. Second, the evidence, especially the documents prepared following discussions, show it was National Hearing that maintained an open mind to alternate employment for Ms McLeod and sought to

discuss the possibilities. It was Ms McLeod who refused to participate in such discussions.

[65] A fifth allegation is raised in closing submission. It is that National Hearing breached its employment agreement with Ms McLeod by refusing to attend mediation as requested in Mr Tayler's letter of 4 July. Whilst the Act makes it clear that mediation is both desirable and a preferred means of resolving employment conflict, there is nothing in the Act to state it is compulsory. Likewise Ms McLeod's employment agreement says that the parties will attempt to resolve any differences in a sensible and commonsense fashion and notes that Department of Labour mediators *are available to assist.* Again though, there is no statement that requires mandatory use of those mediators.

[66] For the above reasons, I conclude that Ms McLeod does not have a personal grievance. Her claim is dismissed.

Costs

[67] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event National Hearing seeks an order for costs, it is required to file its application within 28 days of this determination. A copy shall be served on Ms McLeod who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority