

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 520  
3085814

BETWEEN

CHERYL ANN  
MONTGOMERY  
Applicant

AND

CROMBIE LOCKWOOD  
(NZ) LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Andrew Schirnack and Rebecca White, counsel for the  
Applicant  
Philip Skelton and Emily Partridge, for the Respondent

Investigation Meeting: 6 – 9 July 2021

Submissions and further information received: 2 and 19 August 2021, from the Applicant  
13 and 19 August 2021, from the Respondent

Determination: 24 November 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Montgomery was employed by Crombie Lockwood (NZ) Limited (CL) from August 2010 until 20 December 2019 when her employment ended by way of redundancy. At the date of dismissal Ms Montgomery held the position of Head of Product and Facilities (HP&F) a position she had held since October 2013.

[2] In March 2019 Ms Montgomery raised serious concerns with CL about the behaviour of her manager towards herself and others. She says the investigation into

these concerns was inadequate and has given rise to a number of personal grievances for unjustified action causing disadvantage. She says her subsequent dismissal for redundancy was unjustified and seeks remedies including reinstatement to a position no less advantageous to the one she held at date of dismissal and reimbursement of lost wages and benefits and compensatory damages for hurt and humiliation.

[3] CL denies the claims and remedies sought. It says the investigation into Ms Montgomery's complaint was thorough and fair, that the redundancy and consequent dismissal were genuine and the process fair and reasonable.

### **The Authority's investigation**

[4] In the course of the investigation the Authority heard evidence from:

- a) Ms Montgomery;
- b) Carl O'Shea, CL Chief Executive Officer;
- c) Gillian Granger, CL Chief Operating Officer;
- d) Kate Devereux, former CL Executive People and Culture;
- e) Christina Van den Dop, CL HR Advisor;
- f) Matthew Park, CL Head of Agency; and
- g) Gillian Service, who provided legal advice to CL.

[5] Written submissions and further information were filed subsequent to the investigation meeting.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received. As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

### **Issues**

[7] The issues identified for investigation and determination are:

a) Was Ms Montgomery unjustifiably disadvantaged in her employment by way of:

- (i) inadequate response to concerns raised in letter 4 March 2019?
- (ii) predetermined outcome of the investigation into those concerns?
- (iii) procured a flawed investigation and report into those concerns?
- (iv) reliance on the flawed investigation report?
- (v) failure to address conduct issues during the investigation?
- (vi) reversed her 2018 bonus and unlawfully discriminating against her for raising a personal grievance?
- (vii) failure to investigate further additional concerns raised during the investigation?
- (viii) failure to respond to her request for the “HR pack”?
- (ix) failure to provide personal information relating to the investigation process when requested?
- (x) failure to provide information relating to the investigation on request?

b) Was Ms Montgomery unjustifiably dismissed by way of redundancy?

c) If so, is Ms Montgomery entitled to a consideration of remedies sought including:

- i. Reinstatement to the HP&F role, or one no less advantageous;
- ii. Lost wages pursuant to section 123(1)(b) of the Act?
- iii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- iv. Compensation for lost benefits pursuant to s 123(1)(c)(ii) of the Act including the long term incentive plan, balance of the short-term incentive payment for 2018 financial year, loss of

the chance to earn a short-term incentive payment for 2019 financial year and vehicle allowance of \$15,000 per annum.

- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Montgomery which contributed to the circumstances which gave rise to his grievance?
- e) Is either party entitled to an award of costs?

### **The parties' employment agreement**

[8] The written terms of employment are set out in a document titled "Executive Individual Employment Agreement" dated 27 September 2013. Clause 16 provides CL harassment, discrimination and bullying policy forms part of the employment agreement. The relevant policies include "Creating an Inclusive Workplace New Zealand" which has procedures for complaints and a review procedure if dissatisfied with the outcome of a complaint investigation and a Code of Conduct which sets out expected standards of conduct and behaviour. How breaches of the Code can be dealt with is included as is a global whistle-blower protection policy.

[9] Clause 20 of the parties' employment agreement provides:

#### **20. Termination for Redundancy**

20.1 Crombie Lockwood may terminate your employment at any time if your position is redundant. The position is redundant if it is surplus to Crombie Lockwood's needs.

20.2 If your position is redundant, the following entitlements apply:

20.2.1 Four weeks' redundancy notice, or pay in lieu of notice.

20.2.2 Redundancy compensation (calculated on the basis of your base salary excluding other benefits) of four weeks' pay for the first complete year of employment and a further one week's pay for every additional complete year of service after that, up to a maximum of 10 weeks' pay. If you are dismissed for another reason during the redundancy notice period Crombie Lockwood is not liable to pay the redundancy compensation.

### **The relevant law**

#### *The test for justification*

[10] When the Authority considers justification for the actions of CL including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances.

It is required to consider on an objective basis whether the actions of CL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[11] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Montgomery being treated unfairly.

[12] CL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

### *Redundancy*

[13] In a redundancy setting the legal principals to apply to a consideration of s 103A are set out in the following statements of the Court of Appeal in *Grace Team Accounting Limited*:

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.

...

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

found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.<sup>1</sup>

[14] In assessing the justifiability of a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.

[15] In *Wang v Hamilton Multicultural Service Trust* the Employment Court held the employer's actions were deficient in failing to offer Mr Wang a redeployment role when, given some training, he could have performed it:

Where I consider the Trust has failed in its obligations under the redundancy process with Mr Wang relates to the issue of redeployment. The obligation was on the Trust to consider other alternatives to making Mr Wang redundant. In this case, surprisingly, both Ms Fraser and Ms de Lisle concede that Mr Wang was well able to perform the duties of the new position of finance manager and indeed encouraged him to apply for the position when it was advertised. With the attitude of suspicion Mr Wang held he somewhat misguidedly refused to apply for the position. In the circumstances which led to that point, I nevertheless regard his attitude in that respect understandable even though most unfortunate. In view of what Ms Fraser and Ms de Lisle have said, he should have been offered the position by way of redeployment rather than having his previous position terminated and requiring him to apply for the new position when it was advertised.<sup>2</sup>

## **Background**

[16] CL is an insurance broker. In her role as HP & F Ms Montgomery oversaw negotiation and documentation of insurance product cover with insurers. It was a senior executive role with significant responsibilities reporting directly to Ms Granger, who conducted her performance reviews and was responsible for setting her performance targets.

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<sup>1</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

<sup>2</sup> *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142 at [40], [42]-[43].

[17] Ms Montgomery has worked her entire career in insurance starting as a 16 year old school leaver. There can be no doubt she was a high achieving and industry-wide well regarded senior insurance executive. She said, in respect of her role at CL that until the events which have given rise to her personal grievances she:

...loved working at CL. I was part of a tight team, and had input into the strategic direction of the company. I felt valued and respected, and consider that I achieved a huge amount for the company, including (but not limited to) successfully developing and negotiating CL's "SmartPAK" facility, to manage around \$150 million of SME business, and growing the profitability of CL's Agency division by 29% over four years. I am particularly proud of the SmartPAK facility, which completely changed the way SME insurance was dealt with at CL, and resulted in increased cover for clients and increased commissions for less effort due to the streamlined system.

I received positive performance reviews every year, and was awarded close to full bonuses and regular salary increases. I was invited to participate in CL's leadership short term incentive plan in 2013, and in March 2015 I was elected to receive a long-term incentive ("LTI") award for that year. The LTI award is an incentive provided by [CL's parent company] to the top 3-4% of employees globally and I was confirmed for the LTI again in 2016, 2017 and 2018. I was also rewarded a retention bonus for remaining in the business following [a] change in ownership...

#### *2015-2016*

[18] In 2015 Ms Montgomery experienced a stressful and difficult time in her personal life. She made Ms Granger aware of these issues and said she asked Ms Granger to keep these issues confidential but understood she would provide some context to colleagues if she was unexpectedly absent or unavailable at short notice. Ms Montgomery says she later became aware this had not occurred as she expected when Ms Granger told her in her February 2017 performance review she needed to rebuild relationships with her peers.

[19] In May 2015 a performance assessment using GAP analysis of Ms Montgomery was undertaken by a consultant external to CL. Six people were interviewed including direct reports and Mr O'Shea and Ms Granger. Areas identified for further develop included she needed to delegate more and she had been very stressed and not her usual relaxed self.

[20] Ms Montgomery's view is her relationship with Ms Granger began to deteriorate over this period. She became stressed and anxious at work and accessed EAP services twice in late December 2015 and mid-January 2016 to assist with this including being more assertive with Ms Granger.<sup>3</sup>

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<sup>3</sup> EAP is an acronym for employee assistance programme.

[21] In late January 2016 Ms Montgomery's team successfully delivered a large project. In February 2016 she had a health scare for which she had surgery and associated time off in April 2016.

[22] In March 2016 Mr O'Shea asked for a catch up. He told Ms Montgomery Ms Granger had told him about her health scare and family issues and wanted to check in with her. He said he was concerned at the level of stress these personal issues were putting on her and asked her to attend a consultation with a clinical psychologist to check in on her mental health. Ms Montgomery said she sought to understand if Mr O'Shea held concerns about her work performance and felt he was ticking a health and safety box. Notwithstanding she agreed to attend the consultation. At Mr O'Shea's suggestion she took leave for the week beginning 14 March and attended two consultations with the psychiatrist. Mr O'Shea checked in with her between the consultations and she returned to work soon after.

[23] The psychological assessment report dated 20 April 2016 was received and shared with CL with Ms Montgomery's consent. The report records the aim of the assessment was "To conduct a return to Work Psychological Health Assessment to assess the fitness of [Ms Montgomery] to be able (sic) perform designated work tasks effectively and without risk to either her own, or others' health and safety." As well as Ms Montgomery the psychologist interviewed Ms Granger and Mr O'Shea. The report concluded Ms Montgomery had no mental health issues but had been under extreme stress over the preceding 15 months due to the personal issues she was dealing with and the fact she held a senior position. The recommendations included Ms Montgomery needed to address her sleeping issues if they are causing lateness and fatigue at work and return to her self-care strategies. Ms Montgomery said she felt grateful for the support at the time.

[24] Ms Montgomery became aware during the subsequent investigation that Ms Granger had written to Mr O'Shea in March 2016 setting out her concerns about Ms Montgomery and this document was the motivator for Mr O'Shea's suggestion that she undergo a psychological assessment. The document was not provided to Ms Montgomery at the time and she was not aware of it until 5 November 2019.

[25] Following Ms Montgomery's return to work after surgery she met with Ms Granger. The discussion is recorded in an exchange of emails titled "Wrap Up – Meeting 2<sup>nd</sup> May 2016". The emails record an open exchange between Ms Montgomery

and Ms Granger that Ms Montgomery's work performance had been impacted by recent events, that she was now back at full capacity, was aware of the issues and was taking steps to address them.

*2017*

[26] In 2017 Ms Montgomery had a successful performance review. She received a bonus, pay increase and a long term incentive award and was invited to join a senior leadership incentive plan.

[27] Despite this Ms Montgomery said her relationship with Ms Granger deteriorated during 2017:

- during the February 2017 performance review she raised a concern about overlapping responsibilities of a colleague but felt she was shut down;
- her team was moved to a different location which impacted on productivity and she felt Ms Granger was not responsive to her concerns;
- Ms Granger did not take her suggestions as seriously as she had done in the past and this caused her to become nervous and tongue-tied which she observed in other reports to Ms Granger;
- consequent to the recognised recent business growth Ms Montgomery's requests for more resource for her team and her were met with recommendations to prioritise and focus on the important things;
- her team were excluded from a major project which they were required to deploy but were then blamed for errors and when she tried to sort this out with the project lead it became personal. Ms Granger's handling of this matter became an issue during the investigation. Ms Montgomery says Ms Granger told her she was being over sensitive.

[28] In last quarter 2017 Ms Montgomery experienced difficult personal issues of which Ms Granger was aware and as agreed in mid-November Ms Montgomery updated Ms Granger on the issues and plans she had in place if something similar happened again. The subsequent email exchange and meeting summary dated 27 November between Ms Montgomery and Ms Granger is very open and records they agreed Ms Montgomery could work flexible hours until the end of January and would

have regular catch-ups with Ms Granger to discuss priority issues. Ms Granger's 27 November email ends:

...you need to keep yourself in a less 'manic' state of stress or busyness is welcome and we reaffirmed that a consistent work life balance is a priority for your wellbeing and ultimately your performance at work and impact on your team.

Cheryl, as mentioned I need strong leadership amongst my immediate team. We are together at the pointy end of running a really large, and now complex business. With that comes a higher level of expectation from you and me and other in senior jobs. Keep looking after yourself, slow down at home, remove as much stress from your personal life as possible, keep your work hours regular and be confident in your abilities.

You know that EAP is available to you. I forgot to mention this. I can make a recommendation to them to ensure you get a credible person there to talk through your home domestic situation and plans of you would like?

2018

[29] In 2018 Ms Devereux oversaw the restructuring of the executive team to clarify role and accountabilities. This was necessary because the business had grown considerably in a short period of time. The impact of this restructuring cascaded to direct reports of the executive team which included Ms Montgomery.

[30] Ms Montgomery's 2018 performance review was again successful and she received a salary increase, a bonus, a long term incentive award and in June was invited to participate in STI plan for 2018 calendar year. Ms Montgomery raised concerns about resourcing for her team in her performance review document.

[31] In early to mid-March Ms Montgomery's team was relocated. Her suggestion was declined she says without a reason. She raised this with Ms Granger who, she says became defensive and said she (Ms Montgomery) had to manage her team. Ms Montgomery's concern was she did not understand the reason why she could not move where she wished.

[32] Ms Montgomery says matters became further strained when she felt her concern about possible damage to her relationship with a presenter following a strategy presentation was not responded to appropriately by Ms Granger.

[33] In April 2018 Ms Montgomery's team came under further resource pressure when a team member was away due to sickness. She was offered a contractor which in her view was inadequate. The team workload increased and there were more absences as a consequence. This was reported to Ms Granger in an October 2018 report and had been raised prior with Ms Granger including in September. Ms Montgomery felt Ms

Granger's response was dismissive and she did not appreciate how difficult it was to replace team members due to their specialist roles. For example Ms Granger told one of Ms Montgomery's staff that she was a "conspiracy theorist" which Ms Montgomery said would have reduced his confidence in her as a leader and did not set her up for success.

[34] During 2018 Ms Montgomery worked excessive hours – 27% of her logins were outside normal working hours. She says these long working hours were caused by Ms Granger requiring her to guide a co-worker who was also a direct report of Ms Granger and compromising a key project because of under resourcing issues in Ms Montgomery's team, requiring another team to be involved and other disruptions. Ms Montgomery said Ms Granger was brusque, accusatory and not interested in the workload issue or lack of resource when she sought to raise these concerns. She says given this it was unfair and unreasonable for Ms Granger to raise concerns about project delivery during the performance review February 2019.

2019

[35] As well as the 2018 issues outlined above Ms Montgomery says there are additional issues which led up to and set the scene for the February 2019 performance review including that she felt between November 2018 and February 2019 Ms Granger was micromanaging her, that her job description was changed without being fairly consulted, that Mr Granger arbitrarily shifted her team which she found distressing and felt was intended to unsettle her and Ms Granger sided publicly with another team as saving a failed project Ms Montgomery's team was involved with delivering. At this time bullying and harassment training had been provided at CL.

*February 2019 – performance review*

[36] Ms Granger held two performance review meetings on 12 and 21 February with Ms Montgomery with a follow up email sent on 15 February. At the 12 February meeting Ms Granger identified two projects with problems which were Ms Montgomery's responsibility. Ms Montgomery said this criticism came as a surprise and she did not agree with Ms Granger's assessment.

[37] Ms Granger's 15 February follow up email identified six areas in "which I see... gaps [that are] impacting on your performance" – team profile, bench strength, prioritising and resourcing, accountability, communication and meeting etiquette. The

email ended “Cheryl, most of the above is fixable and you have a great team. This does require change and a plan to make this happen.”

[38] The next meeting was held on 21 February. Ms Montgomery recorded the meeting without Ms Granger’s knowledge or consent. She said she did this because she was genuinely fearful of Ms Granger.

*Events after 21 February performance review meeting*

[39] On 22 February Ms Montgomery called in sick. She had a text message exchange and conversation with Mr Granger regarding this leave and her need to take it.

[40] On 25 February, in response to Ms Montgomery’s request for more detailed feedback, Ms Granger arranged for a communications professional outside CL to give feedback regarding her recent observation of Ms Montgomery in a meeting. The feedback included Ms Montgomery had a “propensity to be distracted by the detail”, appeared “flustered, highly strung, goes off track, defensive. Always expressing how busy you are”.

*4 March 2019 – personal grievances for unjustified action*

[41] In a letter dated 4 March 2019 Ms Montgomery’s lawyer wrote to Crombie Lockwood raising a personal grievance for actions she said were unjustified and which had caused her disadvantage in her employment. The actions were said to be those of Ms Granger and included:

- dismissing out of hand her requests for extra resources for her team;
- unpredictable and unsettling interactions with herself and others;
- repeatedly raising a minor issue in an inappropriate forum despite being made aware the issue was resolved;
- copying colleagues into emails in which concerns about Ms Montgomery were raised; and
- the manner in which Ms Montgomery’s February 2019 performance review was conducted including failing to read the documentation Ms Montgomery had prepared for the review, making a range of adverse observations about Ms Montgomery’s performance without specific details and predetermining the review outcome.

[42] The letter went on to list sixteen instances of alleged harmful behaviour of Ms Granger towards Ms Montgomery. The letter asked for these issues to be investigated, for a suspension of the pending performance rating and to restart the performance process to ensure it was fair and transparent.

*Medically unfit 4 March – 4 June 2019*

[43] Ms Montgomery was certified unfit to attend work and remained on sick leave through this period which included surgery in May and a recovery period. She says the primary reason she was too unwell to work over this period was due to the level of stress which resulted from escalating her concerns. At about this time she provided feedback to the proposed changes to her position description.

*CL response to the 4 March letter*

[44] By letter dated 7 March Mr O’Shea responded to the 4 March letter responding to the personal grievances and proposing a meeting to discuss the concerns raised. The request to suspend the rating and restart the performance review process was declined.

[45] Ms Montgomery says when she read the letter it was clear to her Mr O’Shea was backing Ms Granger and she had little confidence her concerns would be taken seriously. She said she found this distressing.

[46] The 2018 bonus was reversed. Ms Montgomery does not know the reason why.

[47] On 11 April the parties met as proposed in Mr O’Shea’s 7 March letter. Ms Montgomery says that CL’s solicitor said to her if she insisted on the investigation “You won’t come up smelling of roses”.

[48] On 18 April CL confirmed an external investigation into the issues raised by Ms Montgomery’s 4 March letter would be held. CL asked Ms Montgomery to provide a medical clearance for her to participate in the process.

*Terms of reference*

[49] On 2 May, by way of her solicitors, Ms Montgomery wrote to CL:

- she would not be well enough to participate in an investigation until she had recovered from the May procedure;
- the terms of reference could be finalised in the interim; and
- asked for a draft terms of reference and proposed reviewer.

[50] On 10 May CL advised Ms Montgomery an external investigator had been appointed and provided a draft terms of reference. A further medical clearance was sought for participation in the investigation.

[51] On 20 May Ms Montgomery proposed amendments to the draft terms of reference. The proposed amendments included consultation with Ms Montgomery if the investigator thought the scope of the investigation needed to be widened, issues for witnesses being interviewed by the investigator, that a draft report would be sent only to Ms Montgomery and Ms Granger, copying her solicitors in to all communications between CL and the investigator and all communications between CL and the investigator to be in writing other than for administrative matters and attached to the investigator's report.

[52] On 22 May CL provided Ms Montgomery a marked up version of the draft terms of reference with comments from its solicitors on the proposed amendments. Ms Montgomery provided further comment through her solicitor.

[53] A final version of the terms of reference was provided to Ms Montgomery on 24 May. The covering email noted consideration had been given to her comments but that following feedback from the investigator it was decided not to include them because "we don't believe these are reasonable or necessary and in fact add complexity and cost which is not helpful". A medical clearance was requested again to ensure Ms Montgomery was well enough to participate in the investigation process. Ms Montgomery was told on 30 May the investigator would be advised the terms of reference had been accepted unless advised otherwise by close of business. Ms Montgomery said this was confusing because it had earlier been characterised as 'final'. She asked if CL was open to more comment on the terms of reference and if so for more time to make further comments which was declined.

[54] On 28 May Ms Devereux emailed Ms Montgomery's solicitor following up the terms of reference sent on 24 May, seeking confirmation of a commencement date for the investigation and including information about Ms Montgomery's sick and leave balances. Ms Montgomery's sick leave entitlement was to expire 30 May and Ms Montgomery had 40 hours annual leave available. The investigator was copied into the email. By reply Ms Montgomery's solicitor advised they would reply the following day, that he would advise the investigator directly of Ms Montgomery's availability, copying in CL and that the information about Ms Montgomery's sick and annual leave

balances had been shared with the investigators without Ms Montgomery's consent. Ms Montgomery was concerned it would create an adverse impression.

#### *Request for special paid leave*

[55] Ms Montgomery requested special paid leave following exhaustion of her sick leave because she was unable to work due to work place stressors. The request was declined.

#### *Return to work – June 2019*

[56] Ms Montgomery returned to work on 4 June. A meeting had been set up for when she started back with Mr O'Shea and Ms Devereux. Ms Montgomery said she expected to be reintegrated into the business and her role responsibilities. She said the focus of the discussion was to minimise her involvement in ongoing projects and she was told to work at a different location and to report to Mr O'Shea. Her 2IC who had been acting in her position was not changed on her return and she felt no actions were taken to reintegrate her into the business.

[57] Ms Montgomery says Mr O'Shea was unavailable and her attempts to schedule catch ups were unsuccessful. She said she felt isolated and excluded. A friend told her he had heard she was being managed out.

#### *The investigation*

[58] Ms Montgomery first met with the investigators on 14 June 2019. The investigators requested further information which she provided. The meeting was recorded and she was provided a transcript of the recording. On 19 June Ms Montgomery provided a detailed document setting out her concerns and supporting evidence and at the request of the investigators cross referenced the evidence to the investigators' table of allegations. A meeting scheduled with the investigators on 18 June could not proceed because the terms of reference were different to that provided to Ms Montgomery – the name of the investigator was different, there was provision for Skype interviews and written responses. The amended terms of reference were provided to Ms Montgomery and the meeting was rescheduled.

[59] The investigator proceeded with interviewing other witnesses including Ms Granger. On 24 June Ms Montgomery provided a marked up version of the transcript

of her 14 June interview correcting errors. She later heard the original transcript had been provided to Ms Granger.

#### *Additional allegations*

[60] On 24 June Ms Montgomery identified three additional allegations during the document cross referencing process and raised them with the investigators. The allegations concerned deceptive behaviour of a co-worker which Mr Granger supported, a “culture of fear, blame, no trust, fundamental under resourcing, being set up to fail, high stress, burn-out, workloads, etc” and unilateral changes to Ms Montgomery’s role including changes to her position description. Ms Montgomery’s view, expressed to the investigator was these were further examples of behaviours and events causing harm and not an expansion of scope. The investigator said she would seek instructions from CL. The terms of reference provided the scope of the investigation could be widened on instruction of CL.<sup>4</sup> By email from its solicitors dated 25 June CL declined to add the additional allegations to the investigation on the grounds there had been ample time to advance all concerns and the lack of specificity was a factor. It was not clear from CL’s further reply what consideration had been given to the supporting document Ms Montgomery had provided with the new allegations.

#### *Second interview with the investigators*

[61] On 25 June the investigators provided information gathered to date (described as “further and/or contradictory evidence received from participants to date”) and the transcript of Ms Granger’s interview.

[62] Ms Montgomery’s second interview with the investigators occurred on 27 June. Ms Montgomery said though she had received Ms Granger’s transcript it was only shortly before the meeting and she did not have time to review it because she was focussed on completing her interview before responding to Ms Granger.

[63] On 3 July the investigator asked if Ms Montgomery had had a chance to review Ms Granger’s transcript. On 6 July the investigators provided Ms Montgomery further supporting material which had been provided to them by Ms Granger and asked for comment. Through her solicitor she asked for a further interview with the investigators to provide her response because she had not had time to produce a coherent narrative and many of the issues go to credibility would, in her view, be best responded to in

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<sup>4</sup> Terms of Reference 10 May 2019 (further amended on 18 June 2019) clause 2.2.

person. An interview would also allow the investigator to ask her any questions. The investigator told Ms Montgomery's solicitor she had not expected to conduct a further interview with her and so the request would be referred to CL because of the time and cost involved. The investigator's preference for Ms Montgomery to provide a written response to Ms Granger's interview was confirmed and a timeframe was provided to provide the response. Ms Montgomery duly provided written comments on Ms Granger's transcript of 23 July and the further documents of 25 July and 29 July. The investigators asked no questions and no clarification was sought. Ms Montgomery said she found this unusual.

#### *Witnesses*

[64] On 9 July the investigator provided Ms Montgomery with an audio link and transcript of her second interview on 27 June. Also on 9 July CL wrote to Ms Montgomery's solicitor advising the investigation would not be interviewing a witness she had identified because he had only recently returned to the work place after 12 months due to health reasons. It does not appear his view was first sought before CL made this decision. The email included "In reaching this decision Crombie Lockwood have balanced [the co-worker's] and Chery's respective interests and determined that it's preferable not to involve [the co-worker]. We do not believe that this adversely impacts the investigation".

[65] On 12 July the investigator wrote to Ms Montgomery asking for a suggested alternative witness who could speak about the pressures the team was under in 2018 and proposed two possible people whose names had come up during Ms Montgomery's first interview. On 15 July Ms Montgomery proposed a different witness however he declined to participate in the investigation and CL said it would not compel him. The investigator asked again about the two people Ms Montgomery had identified in her first interview and clarification was provided as to the circumstances in which the proposed witness had declined to participate.

[66] On 24 July Ms Montgomery reiterated to the investigator by email her view the originally identified witness was the best person for the investigator to speak to but identified one of the other proposed people as a suitable witness in limited respects. Also attached to the email was a recording she made of the performance review meeting with Ms Granger. On 25 July Ms Montgomery contacted one of her identified witnesses

who confirmed he had declined to be a witness “because CL HR wouldn’t give him any details”.

*Ms Montgomery’s response to Ms Granger’s interview*

[67] Ms Montgomery provided a response document on 19 July and an annotated transcript to Ms Granger’s interview transcript on 23 July. She reiterated her desire to meet in person with the investigator to “adequately convey her position”.

[68] On 25 July Ms Montgomery provided the investigators with her supporting documents and on 29 July she provided further supporting documentation she had sourced. The covering email included analysis of Ms Granger’s conduct in the performance review recording including “we note that it is clear that she engages in a range of tactics/methods that confuse, distract and undermine the other party...”. Ms Montgomery also advised she was sourcing further relevant material from the CL IT department which would be provided to the investigator. Further information was provided on 13 August.

*Investigator seeks guidance from CL’s solicitors*

[69] On 31 July the investigator asked for Ms Service’s view on the provision of material Ms Granger had provided to her on a confidential basis during the course of the investigation. The investigator expressed a view the material did not need to be disclosed as “contradictory evidence” per the terms of reference because “The documents merely verify the accuracy of Gillian’s statements to Cheryl – both during the performance review meetings and in her interview with me”. Ms Service replied she agreed with that view because “The emails allowed the investigator to verify the accuracy of Ms Granger’s statements”. This exchange was not copied to Ms Montgomery or her solicitor and her view was not sought.

*Draft investigation report*

[70] On 19 August the draft report was provided to Ms Montgomery for comment. The report finding was that the complaint of harmful behaviour in breach of CL policies arising from the sixteen examples was not established. Ms Montgomery was asked to provide any comments by close of business 22 August. Ms Montgomery says this was insufficient time. Her concerns about the draft report were set out in letter dated 23 August 2019.

### *Final investigation report*

[71] The final report is dated 26 August 2019. The original finding was confirmed. The report notes that in a different context some of the behaviour may have amounted to a breach of policy. Ms Montgomery says her concerns about the draft report and draft conclusions were paid almost no regard.

[72] On 30 August CL, through its solicitor wrote to Ms Montgomery's solicitor attaching a copy of the investigation report and included:

Now that the investigation has concluded and given the outcome, Crombie Lockwood's next step is to meet with Cheryl to discuss the outcome of the investigation and where to from here. You are of course welcome to attend.

Given the findings from this process, items on the agenda will be:

- the timing of Cheryl returning to work at Queen St and return to Cheryl's return to her normal reporting line with Gillian
- expectation of Cheryl in her role (including attendance, performance and appropriate team entertainment)
- the status of the business which has been on hold since the investigation started some months ago
- Cheryl's conduct – in particular the covert recording of a meeting with Gillian which is a clear breach of good faith and trust.

### *October 2019 – Restructuring*

[73] On 2 October 2019 Mr O'Shea emailed Ms Montgomery a meeting invitation for the following day "to update you on key business/market changes, our shareholder expectations and a proposed organisation re-structure." The email advised Ms Montgomery the changes may impact her current role and her feedback on the proposed changes were sought. She was encouraged to bring a support person, that Ms Devereux would be present and she was asked to confirm her availability and if she was bringing a support person.

[74] The proposed meeting occurred on 7 October. Ms Montgomery attended with her lawyer and Mr O'Shea and Ms Devereux for CL. CL presented a consultation document which stated the motivator for the restructuring was the recent resignation of the head of a related business had presented an opportunity to restructure that business and merge it into CL operations team reporting to Ms Granger. The knock on of this merger was the now proposed CL restructuring which directly impacted a number of roles including that held by Ms Montgomery. The consultation document also set out new roles created by the restructure which included a role titled 'Head of Agency'. A consultation timeline was included.

[75] Ms Montgomery said she was qualified for and interested in the Head of Agency role. In her view she was a suitable candidate.

[76] About the meeting Ms Montgomery said Mr O'Shea spoke about the restructure as a done deal and in particular that the decision to disestablish her role had been made. She said in her evidence she felt as if CL were going through the motions in order to get rid of her because she had raised a complaint about Ms Granger and CL had a perception she was a poor performer. At the meeting and through her lawyer Ms Montgomery asked to give her feedback to the proposal in person and Ms Devereux agreed to this however, that opportunity did not eventuate. The consultation document noted feedback was to be provided in writing.

[77] The following day Matthew Park attended a similar meeting with Mr O'Shea and Ms Devereux because his role, as SME Product Manager, was proposed disestablished. Ms Montgomery said she heard laughter coming from the meeting and thought this was surprising given the seriousness of the discussion.

[78] On 11 October, following meetings with the directly affected staff, Ms Granger sent the restructure proposal to other people in the business whose reporting lines may change as a result of the proposal to consult wider on the proposed changes. Ms Montgomery is of the view the covering email Ms Granger sent confirmed the reporting line changes would occur and that this was strange given the first line of consultation had not yet been completed. Ms Montgomery also said the effect of consulting with the second line of effected staff was to spread information about the restructure including the directly affected roles and dates of disestablishment widely through the business.

[79] On 14 October Ms Montgomery through her solicitors asked for the restructuring process to be placed on hold pending the investigation of the additional investigation matters she had raised which had not been included in the investigation.

[80] The following day Ms Montgomery's lawyers wrote again that they assumed the consultation was hold given the seriousness of the issues raised for investigation but if this was incorrect Ms Montgomery would like to provide feedback in person. CL's solicitors replied that day that CL did not agree to suspend the restructuring consultation because of the impact on others who may also be impacted by the proposal, that feedback was due the following day and Ms Montgomery was invited to provide such as outlined in the consultation document.

[81] Ms Montgomery provided written feedback on 16 October as requested. Through her solicitors earlier that day she raised her understanding an arrangement had been made for her to give feedback in person. CL did not respond directly to this issue. Also on 16 October, through her solicitors Ms Montgomery raised concerns and specified the health impacts the work situation was having on her. CL, through its solicitor asked that she raise any specific concerns directly with CL given this was an ongoing employment relationship, that EAP services were available and an assurance any health concerns raised would not form part of any redeployment assessment.

[82] On 21 October Mr O'Shea emailed Ms Montgomery and the other directly affected employees confirming CL would continue with the restructure and that a preliminary view would be provided by 25 October, five days sooner than the advised timeframe.

[83] On 26 October, by letter dated 25 October, CL wrote to Ms Montgomery and confirmed her role was disestablished with an effective date of 29 November 2019. The letter advised that based on Ms Montgomery's feedback the proposed structure was altered to include two product deployment roles. The proposed new roles were listed with position descriptions to be advised. With respect to the selection process for deployment into the new roles the letter states:

The selection process that we propose to undertake for selecting employees into the proposed new roles is to engage an independent recruitment agency to conduct the recruitment process.

If you have any feedback on the preliminary view including the proposed selection process and interest in applying for the roles (if you haven't already) please provide feedback in writing by 31<sup>st</sup> October 2019.

If you decide not to undertake a selection process into a proposed roles and there are no other redeployment roles within Crombie Lockwood the proposed outcome would be redundancy.

[84] Ms Montgomery applied for the Head of Agency role by letter dated 31 October. In the same letter she expressed interest in a role she understood had become recently vacant role – Head of OMPL. Ms Montgomery's view was she was suitably qualified and experienced for both roles. The letter sought further information about the new structure's roles and responsibilities and in particular the product development function. The letter also asked which roles were being advertised internally or externally, the timeline for interviews and an explanation of the selection criteria.

[85] CL wrote to Ms Montgomery on 1 November confirming her role would be disestablished with an end date of 15 November. The letter explained an external

recruitment agency would manage the recruitment of the Head of Agency role, that the Head of OMPL role was not formally vacant, was currently under review as part of the restructure and further details would be provided once the review was finalised. A current list of vacancies was attached and Ms Montgomery was invited to let CL know if she was interested or if she would like more information about any of the roles. Information was provided in answer to Ms Montgomery's questions about functions and responsibilities in the new structure.

[86] With respect to the selection criteria question the letter stated:

The selection criteria for the role will be based on a competency assessment & psychometric evaluation of your skills and experience against the position requirements. The final selection decision will be made by Carl and myself.

[87] The penultimate paragraph reads:

Cheryl, as part of this process I do need to advise that if you are not successful with the Head of Agency role or an alternative role within Crombie Lockwood, you will be made redundant and we will provide you with 4 weeks' notice of termination of your employment. Redeployment opportunities will remain available during the notice period. An estimated redundancy calculation will be provided if notice is given.

[88] The letter ends by acknowledging this is a difficult process, thanking Ms Montgomery for her patience and professionalism and reminding her EAP services were available.

[89] On 8 November Ms Montgomery attended an interview for the Head of Agency role with the external recruiter. The recruiter said her report would be sent to Ms Granger. This concerned Ms Montgomery because the 1 November letter said Mr O'Shea and Ms Devereux would make the final selection decision. Ms Montgomery thought the interview went well and the recruiter gave her the impression she was the preferred candidate. The recruiter's report dated 8 November has been provided. It is a behavioural assessment of Ms Montgomery's presentation in the interview.

[90] Psychometric testing had been included as part of the selection process. Ms Montgomery wrote to CL on 12 November asking for this assessment process to be removed, on the advice of her doctor not to complete them during times of high stress and tension, and because a poor performance may disadvantage her application. On 13 November CL advised the psychometric testing would be removed from the selection process for the Head of Agency role.

[91] On 15 November CL wrote to Ms Montgomery advising she had been unsuccessful in her application for Head of Agency and another internal candidate had

been selected. The letter went on to confirm her 4 week notice period would start on 18 November with the last day being 20 December and that she would not be required to work her notice under clause 18.4 of the employment agreement. Reference was made to continuing to explore further redeployment opportunities and invited Ms Montgomery to formally apply for the OMPL Director role by 19 November. The letter advised the role would be open to external and internal candidates and that if a redeployment role was not found within the notice period final pay and redundancy payments would be confirmed as would the final date of employment and conversely if she was successfully redeployed or she left before the final date there may be no redundancy payment. Details of the notice period, redundancy compensation calculation and other final payments were provided. The difficulty of such a process was recognised and details of EAP services were provided. Finally, the letter offered, if Ms Montgomery would like, to catch up for coffee next week with Ms Devereux and Mr O'Shea to discuss the decision or details in the letter.

[92] On 18 November Ms Devereux and Ms Montgomery exchanged further correspondence:

- at 12.30pm Ms Devereux emailed Ms Montgomery regarding a study application which could no longer proceed, that her access to the buildings, computer access, telephone and work credit card would be disabled “effective today”, an email regarding contractual restraints would be sent that week and a reminder the OMPL role applications closed tomorrow as well as a list of current vacancies of which there were 24 – 2 senior broker roles, 18 broker roles, 1 team manager, a claims consultant role, an HR role and an receptionist/broker support role;
- at 4.39pm Ms Montgomery replied the letter of 15 November had not advised system access would end on 18 November and as there was private information she had not uplifted requested access be extended to allow her time to do so given other commitments and that she was happy to be shadowed on the system if there were security concerns. With regard to telephone access, she asked to retain the mobile number because she had had it for 20 years and brought it with her from her previous employer. She said she would cut up the credit card and

commented "...it seems a bit premature to cut system and phone access off now when we're still sussing out alternative roles?"

[93] Later that evening Ms Montgomery wrote to Mr O'Shea and Ms Devereux:

- formally confirming her application for the Director OMPL position;
- referring relevant experience;
- asking for system access in order to access information she wished to provide in support of her application;
- that HR has told her access would be made available until 5pm the next day but it had not yet happened;
- she was happy to have coffee with Mr O'Shea, advised her availability and provided a contact mobile number; and
- she had some files with her which could be returned when she met with Mr O'Shea.

[94] On 2 December Ms Montgomery attended an interview with an external recruiter for the Director OMPL role. She said she felt the interview went well and that the recruiter noted she was the most experienced applicant for the role and had the right capabilities and competencies. Ms Montgomery told the recruiter she was still interested in the role though the salary was lower than her current role.

[95] The recruiter's report has been provided which includes:

**General Impression and Suitability:**

- Having interacted with Cheryl several times previously, we are somewhat familiar with each other, however she presented herself very professionally and formally in our interview. She was very positive for the most part, with the odd moment of frustration evident when talking about the last 12 or so months at Crombie Lockwood and the recent restructuring of the Product Team, which has resulted in her disestablishment. This definitely sounded more like frustration at the situation, rather than anger or bitterness however, so I would like to put this in context.
- I have reported against the significant competencies discussed in detail below. In summary, on paper, Cheryl appears a very strong candidate, particularly around the technical aspects of the role. However, having interviewed her against the same competencies and behaviours as the external candidates, I would have expected her to have provided stronger examples of her relationship building, persuasiveness and leadership capability than she did. I do wonder if she was being quite guarded about what she was willing to share which may have impacted on the examples she was able to draw upon?

**Summary**

- In summary, Cheryl certainly appears to meet the technical requirements of the role, but not to the same degree as one or two of the external candidates, the more behaviourally based competencies that we have assessed. Her salary expectations are

considerably above the banding for the role and should you wish to proceed, this would be a considerable point of negotiation to overcome.

[96] The recruiter's view was Ms Montgomery was capable of performing the role.

[97] On 6 December Ms Devereux wrote to Ms Montgomery thanking her for her interest and participation in the interview for the OMPL Director role, that the first interviews had been completed by the external recruiter and her evaluation had been reviewed and assessed by CL against the other candidates. Her application was not successful and unless a further redeployment opportunity was found her final day of employment with CL would be 20 December 2019.

[98] Ms Montgomery did not apply for any further roles. Her last day of employment with CL was 20 December 2019.

## **Discussion**

*Did CL's actions unjustifiably disadvantage Ms Montgomery in her employment?*

[99] Ms Montgomery raises seven personal grievances for actions of CL in and around the 2019 investigation into her complaint which she says have effected conditions of her employment to her disadvantage.<sup>5</sup> CL denies Ms Montgomery was disadvantaged as claimed. It says it acted as a fair and reasonable employer in relation to these matters raised by way of personal grievance.

(i) *Dismissal of Ms Montgomery's concerns letter 7 March 2019?*

[100] By letter dated 4 March 2019 Ms Montgomery raised serious concerns about Ms Granger's conduct towards her and a personal grievance for unjustified disadvantage. CL replied by letter dated 7 March. She says this response was a dismissal of her concerns as being an exaggeration or overreaction and this was unfair and unreasonable because the allegations had not yet been tested. She says CL was bound to consider her concerns because the "Creating an Inclusive Workplace" policy includes "all complaints will be taken seriously."<sup>6</sup>

[101] It is not accepted that the 7 March letter is a dismissal of Ms Montgomery's concerns. It is clear CL took the concerns seriously. The letter outlines immediate steps taken in recognition and acknowledgment of the seriousness of the concerns raised

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<sup>5</sup> Section 103(1)(b) Employment Relations Act 2000.

<sup>6</sup> "Creating an Inclusive Workplace" policy.

including changing her reporting line to Mr O'Shea and work location. The letter also suggests a meeting to discuss the concerns with a view to working together with a focus on the relationship going forward and to discuss the proposed investigation and how it could take place.

[102] It was not unreasonable for Mr O'Shea to seek to put the issues raised in the 4 March letter in the context as CL understood it at that time including that the concerns were raised in response to a performance review process which was acknowledged as difficult and that issues may have now surfaced which had put a strain on the relationship. Such openness, including a proposal for resolution, is entirely consistent with good faith obligations. It was also appropriate that, having received a personal grievance, that CL provide a response.

[103] This personal grievance is not established.

(ii) *Investigation concerns predetermined?*

[104] The basis of this grievance are comments allegedly made by CL representatives to Ms Montgomery at a meeting held on 11 April. The 11 April meeting resulted from Mr O'Shea's suggestion in the 7 March letter that the parties meet to discuss matters including the proposed investigation. Ms Montgomery attended with her solicitor. CL was represented by Ms Devereux and Ms Service. Ms Montgomery's evidence is she has a clear recollection of Ms Service saying to her that based on what she had seen on the file she (Ms Montgomery) "would not come up smelling of roses" if she insisted on an investigation. Ms Montgomery said she found this extremely troubling. Ms Montgomery was also concerned that CL only wanted to discuss her exiting the business and no other options were discussed at the meeting.

[105] Ms Service does not recall making the comment as alleged. She said in evidence it is very unlikely she said the alleged comment given it is not a phrase she uses and she was new to the file so would have had no basis on which to make such a statement. She has produced her contemporaneous notes of the meeting, which do not record the phrase as claimed. Ms Devereux does not recall Ms Service making the alleged comment.

[106] I have carefully considered the issues raised including the inferences Ms Montgomery has invited the Authority to draw from a range of matters including evidence filing dates in 2021. There is insufficient evidence before the Authority to

resolve the factual dispute in favour of Ms Montgomery. The claim is a serious one which could be expected to be supported by evidence of equally probative value such as a contemporaneous or near contemporaneous note or a letter written at or near the time recording the concern. There was no such evidence produced. This claim is not established.

*(iii) Procured a flawed investigation and the investigation report was flawed?*

[107] Here Ms Montgomery raises concerns including the investigators' report failed to comply with the principles of natural justice, the investigators did not follow the guidelines the investigators set themselves and they were not subject to any professional body to which concerns could be escalated. She says these failures arose from CL's procurement (and steering) of the investigation and these were not the actions of a fair and reasonable employer.

[108] Concerning the witnesses Ms Montgomery wished the investigators to speak with, these issues were open to Ms Montgomery and she was provided several opportunities to suggest alternative witnesses. Unfairness to Ms Montgomery from this issue is not established.

[109] The guidance sought by the investigator from CL's solicitor does not strike me as unreasonable or inappropriate within the context of the terms of reference.

[110] The issue concerning the regulation of the investigators was raised after the investigation report was issued and after a court judgment, in unrelated proceedings, commented on the issue of regulation of investigators. There was no evidence this was a concern either party held at the time the investigators were appointed by CL or, I am satisfied, could reasonably have been contemplated at that time.

[111] The claim of procurement or steering of the investigation is a serious one. It implies CL took deliberate and intentional steps to unsettle the investigation. All the issues raised by Ms Montgomery have been considered but I find the evidence is not sufficient to establish a claim of this nature.

*(iv) Flawed investigation and report into those concerns?*

[112] Having considered the evidence and submissions I am not satisfied this claim is established. The investigation report comprehensively documents and analyses the

issues under complaint, within the scope of the terms of reference following a fair and reasonable investigation process.

[113] The evidence is Ms Montgomery participated fully in a detailed and comprehensive investigation into her claims of workplace harm, her comments were considered and she was given a fair opportunity to comment on relevant information before the investigator. She was represented at all times and was certified fit to participate in the process. It is accepted Ms Montgomery raised concerns during the investigation process including the development of the terms of reference. Those concerns were considered and, I am satisfied appropriately considered. I note at no stage did Ms Montgomery say the issues raised as concerns were such that she could no longer participate in the investigation. This grievance is not established.

(v) *Unreasonably relied on the flawed investigation?*

[114] On 8 October CL advised Ms Montgomery it could rely on the investigator's report. Ms Montgomery says this was unreasonable due to the flaws in the investigation report, her letter dated 23 August setting out her concerns about the report and her further letter of 14 October setting out why the report could not be relied on.

[115] CL says the investigator's report was safe to rely on for the reasons already canvassed and that it was not obliged to consult with Ms Montgomery about whether or not it would accept the findings in the investigator's report because the outcome of the report would not have an adverse effect of the continuation of Ms Montgomery's employment.

[116] As the decision-maker Mr O'Shea had the final say on whether the report was accepted or not. He accepted it and this was an option open to him. He said in evidence it did so because he was satisfied it was independent. For the reasons set out above he had a reasonable basis for forming this view. This grievance is not established.

(vi) *Failed to address issues concerning Ms Granger's conduct during the investigation?*

[117] On 24 June Ms Montgomery identified to CL three further examples of harm caused to her by alleged workplace conduct of Ms Granger. CL did not agree to these

issues being added to the investigators' terms of reference on grounds Ms Montgomery had had "ample time" to advance her concerns and the claims lacked specificity.

[118] It is not accepted CL declining to add these additional matters was a breach of any obligation owed to Ms Montgomery. An investigation with an established scope was underway. Because CL did not agree to add the further matters raised to this investigation did not mean CL did not take the concerns seriously as required by the workplace policy or preclude them being investigated in a different process. This is understood to be the point made on Ms Montgomery's behalf in the letter 8 October. This personal grievance is not established.

*(vii) Failure to investigate the concerns further?*

[119] After the investigation report was issued Ms Montgomery sought to further pursue the additional allegations raised during the investigation. CL declined to look into them further. The relevant policy required all concerns to be taken seriously. While it is accepted a threshold assessment would need to be made before further consideration of a concern I am not satisfied that occurred fairly or reasonably. This was an unjustified action. This personal grievance is established.

*(viii) Reversal of 2018 bonus payment?*

[120] This claim is about the delayed payment of the 2018 bonus payment. Ms Montgomery's evidence was she had arranged her affairs in expectation of the bonus being paid and it caused distress not receiving it until seven months later.

[121] Not clearly articulating why the bonus was not being paid as expected amounts to a withholding of a bonus and disadvantaged Ms Montgomery in her employment. This personal grievance is established.

*(ix) Requests for the "HR pack"?*

[122] Ms Montgomery says CL failed to comply with its statutory obligation to provide the personal information requested "as a soon as reasonably practical".<sup>7</sup> She says the document (11 pages in total) was readily accessible and any redactions would

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<sup>7</sup> Section 40(1), Privacy Act 1993.

not be time consuming. Ms Devereux's evidence was the documentation did take time to prepare and was provided within the statutory timeframe.

[123] Whether or not there has been compliance with Privacy Act obligations is not within the Authority's jurisdiction. Notwithstanding, the document was provided within the statutory timeframe and the evidence of the complier is that is how long it took. There was insufficient evidence to directly challenge that this was indeed the case. This disadvantage grievance is not established.

(x) *Failure to provide personal information on request?*

[124] This personal information request concerned collation and provision of CL's interactions with the investigators including interactions not in writing. On 19 November CL declined the request to commit the unwritten communications to writing because this was outside the investigators terms of reference. Ms Montgomery says this is a breach of a statutory duty owed under the Privacy Act as was the failure to advise her she could raise a complaint to the Privacy Commissioner and that the refusal was not fair and reasonable particularly given at the time the restructuring of Ms Montgomery's role was underway and redeployment was being explored. It is unclear what breach of obligation or arising disadvantage is being claimed in respect of this personal grievance. The request was considered and responded to and Ms Montgomery may have a remedy available under the Privacy Act if she chooses to pursue that avenue. This personal grievance is not established.

*Was Ms Montgomery's dismissal for redundancy unjustified?*

[125] Ms Montgomery says she was unjustifiably dismissed because she should have been appointed to the role Head of Agency and the reasons for not appointing her were not put to her for comment before the successful internal candidate was appointed. She also says she was capable of performing the role of Director OMPL and given this her employment should not have been terminated.

*Did CL approach the restructuring with an open mind?*

[126] The announcement of the restructuring process was proximate to the final investigation report being provided. Ms Montgomery is critical of her reintegration to the business on her return from leave and says the effect of this was to isolate her from her colleagues and the wider industry. She says CL should have taken active steps to reintegrate her to the business including return her key responsibilities and workload,

attend mediation and engage a facilitator to help to restore her relationship with Ms Granger.

[127] The difficulty with Ms Montgomery's criticism of CL's reintegration of her to the business is that she had raised serious concerns about the investigation with CL, including making a whistle-blower complaint, and sought further investigation of the additional allegations made against Ms Granger during the investigation. Given this it may have been premature or even unfair to Ms Montgomery to take the active reintegration steps she suggests should have been taken. Though it is accepted without a discussion to see what was possible Ms Montgomery may have felt marginalised in all the circumstances CL's approach to Ms Montgomery's post-investigation reintegration was reasonable.

[128] CL had a genuine business reason for the restructuring. Ms Montgomery was not the only employee directly affected by the proposed restructuring and the catalyst for the restructuring was genuine.

[129] CL took specific steps in the restructuring process which sought to ensure it was a fair process including third party recruiter assessments being commissioned and Ms Montgomery's request to remove the psychometric testing component being readily agreed. However, there were other steps taken which imply the process was not wholly objective:

Mr O'Shea met with the other internal candidate for the Head of Agency role to assure him of his value to the organisation and that best efforts would be made to find him an alternative role if he was not successful in his application for Head of Agency. He did not hold such a meeting with Ms Montgomery;

Ms Montgomery was told CL would meet with her to receive her feedback and altered that without discussion;

CL failed to respond to Ms Montgomery's request for access to the work system to retrieve personal items and information relevant to the application for OMPL role.

[130] These are flaws in the process which have left CL vulnerable to the claim that it did not approach the restructure with an open mind.

*Head of Agency and OMPL Roles redeployment opportunities?*

[131] Yes. This is how CL characterised them in the consultation documents and subsequent correspondence with Ms Montgomery. Any vacancies Ms Montgomery was interested in applying for were characterised as redeployment opportunities.<sup>8</sup>

*Did CL discharge its obligation to Ms Montgomery to fairly consider her for the redeployment opportunities?*

[132] No. There were two roles third parties had assessed Ms Montgomery as capable of performing. The final assessment was then made by Mr O’Shea and Ms Devereux. The evidence revealed this final assessment was made based on the third party assessments, the applications including their CVs and their own knowledge and experience of the applicants. There was no opportunity for Ms Montgomery to address the decision makers on any concerns they had about her ability to perform the roles and no transparency about how they were going to make that assessment. There are particular features of CL’s approach to the assessment of each of the redeployment opportunities which need to be considered further.

*(i) Head of Agency*

[133] Mr O’Shea’s reliance on brokering skills as a determinative factor in deciding the appointment was not clear from the job description or emphasised in the recruitment assessment. A fair process would have ensured Ms Montgomery had an opportunity to address any concern Mr O’Shea may have had about her brokering skills. The failure to provide that opportunity has meant the selection criteria was not clearly advised to Montgomery and has denied Ms Montgomery a fair opportunity to apply for the role.

*(ii) OMPL role*

[134] With respect to the OMPL role the Authority is not satisfied the ability to apply for a position along with external candidates discharges CL’s obligation that “redundancy will only occur once all options have been explored and no suitable alternative position has been found”.<sup>9</sup> The third party assessment assessed Ms Montgomery as capable of performing the role. To put her application into a pool with external candidates was not consistent with the obligation to explore redeployment options before redundancy occurred. CL’s action in writing to Ms Montgomery on 1

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<sup>8</sup> Refer consultation document.

<sup>9</sup> Consultation Document 7 October 2019.

November advising her position was redundant was inconsistent with this obligation. It gives the impression CL was no longer committed to exploring redeployment opportunities for Ms Montgomery which casts a shadow over the fairness of the assessment of her application which was effectively diluted by being put in a pool with external candidates.

[135] This is not a situation where the employer could fairly call halt to an exhausted process. CL had told Ms Montgomery she would not be declared redundant until all options for redeployment had been explored. It then included the OMPL role as a redeployment option for which she was invited to apply and then, inconsistent with the restructuring process, declared her position redundant.

[136] For these reasons Ms Montgomery has established her dismissal was unjustified.

### **Remedies**

[137] Ms Montgomery has established personal grievances for unjustified disadvantage and unjustified dismissal. She is entitled to a consideration of the remedies sought.

#### *Reinstatement*

[138] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>10</sup> The remedy of reinstatement is to the employee's former position or one no less advantageous.<sup>11</sup> It must be awarded wherever practicable or reasonable to do so.<sup>12</sup>

[139] Ms Montgomery submits reinstatement is reasonable and practicable:

- a party opposing reinstatement would have to prove reinstatement was not reasonable or practicable;<sup>13</sup>
- though she acknowledges the relationship with CL over the period of dispute has been difficult it has not broken down completely and she is prepared to put in the work necessary to restore the relationship

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<sup>10</sup> Section 123(1) Employment Relations Act 2000.

<sup>11</sup> Section 123(1)(a).

<sup>12</sup> Section 125(2) Employment Relations Act 2000.

<sup>13</sup> *Humphrey v Canterbury District Health Board Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

particularly noting she and Ms Granger have not attended facilitation or mediation;

- hers was a no fault dismissal for redundancy;
- the fact of a personal grievance and defence of that grievance is not a factor in assessing practicability or reasonableness;
- the availability of a vacancy is not a requirement for reinstatement;<sup>14</sup>
- CL is a large employer with over 950 staff and CL has been on notice since filing her claim in December 2019 that she was seeking reinstatement;
- CL offered no evidence of a strained relationship with any staff member except Ms Granger, one of a large number of staff;
- the act of secretly recording a conversation with Ms Granger, within context, cannot automatically be considered a breach of good faith obligations weighing against reinstatement.

[140] CL says Ms Montgomery should not be reinstated because to do so is not practical or reasonable.

[141] CL says it is neither practicable nor reasonable to reinstate Ms Montgomery into the Director OMPL role because the role is not vacant. The incumbent has been in that role since December 2019 and it CL's evidence he is carrying it out successfully. It is neither practicable nor reasonable to reinstate Ms Montgomery into another role at CL because the trust and confidence irreparably destroyed.

[142] The availability of a vacancy is not a requirement of reinstatement.<sup>15</sup> The considerations are practicability and reasonableness. CL is a large business and at date of the investigation meeting there were 44 vacancies. Ms Montgomery accepted in evidence none of the identified vacant roles would be suitable reinstatement options for her. This is reasonable given none of the roles could be considered senior executive roles which would be no less advantageous to the one she held when her employment

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<sup>14</sup> *Walker v Firth Industries* [2014] NZEmpC 60.

<sup>15</sup> *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

ended. While CL has been on notice from the outset of Ms Montgomery's claim that she is seeking reinstatement the inevitable disruption to the organisation of CL's senior executive team if Ms Montgomery's reinstatement was awarded means reinstatement would not be practicable.

[143] In evidence and submissions Ms Montgomery has characterised senior employees of CL, to whom, if reinstated, she would inevitably have a close functional relationship if not report to, as "behaving highly unethically and breaching its legal obligations". She said following receipt of Ms Granger's response to the investigators was one of the worst days of her life. Ms Montgomery's response to the investigators was to raise concerns that Ms Granger had fabricated evidence and was misleading the investigators. The evidence before the Authority is that Ms Montgomery still holds that view.

[144] This employment relationship problem, at its heart, concerns how issues can be raised and resolved in a workplace setting, including uncomfortable issues, amongst senior executives in a dynamic commercial environment. Decisions which may result from such issues will involve judgement calls and high levels of trust and integrity are required. In this context the potential impact of reinstatement on third parties who will have to make those calls is a factor which weighs against reinstatement.

[145] Careful consideration has been given to the fact the people concerned have known and worked together for many years and Ms Montgomery's evidence that she believes the relationships could be re-established. While it is accepted this belief is sincerely held Ms Montgomery's evidence of her view of the individuals concerned does not support that this is a likely possible outcome. The Authority is not satisfied the employment relationship can be successfully re-established. These factors make it unreasonable to order reinstatement.

[146] Ms Montgomery's claim for reinstatement is unsuccessful.

#### *Reimbursement*

[147] Ms Montgomery seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and section 128 of the Act. The period of claim is from date of dismissal to date of reinstatement (if awarded) or date of determination.

[148] CL submits, if Ms Montgomery's dismissal is found to be unjustified, that it would be reasonable for the Authority to award between three to six months' lost wages giving consideration to the following factors.

(i) *off set redundancy compensation*

[149] The parties' employment agreement provides redundancy compensation will be paid "if your position is redundant".<sup>16</sup> This payment is to compensate the loss of a job not to address a loss arising from a personal grievance.<sup>17</sup> It is not accepted the redundancy compensation Ms Montgomery received under the terms of her employment agreement for the loss of her job should not be offset against lost wages resulting from her personal grievance for unjustified dismissal.<sup>18</sup>

(ii) *mitigation*

[150] CL says Ms Montgomery has acted unreasonably in failing to mitigate her claim for lost remuneration.<sup>19</sup> In support of its submission that Ms Montgomery's mitigation attempts were unreasonable CL points to her evidence that she had not applied for a single position in the 18 months since being made redundant, had not registered with a recruitment agency and formed a view she had not been approached for roles due to rumours about her dismissal. Mitigation is a relevant factor to consider in assessing an award of lost wages.

*Lost wages award*

[151] The evidence of the negative impact of the dismissal and employment investigation on Ms Montgomery is clear. It is appropriate for the Authority to exercise its discretion and award more than three months lost remuneration as a result of the personal grievance. On Ms Montgomery's evidence she "came right in March/May 2020", six months after her employment with CL ended. It is accepted factors such as the global pandemic would have further impacted on her ability to secure another position but this must be balanced by the evidence which strongly suggests Ms

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<sup>16</sup> Individual Employment Agreement 27 September 2013, clause 20.2.

<sup>17</sup> Ms Montgomery received a redundancy compensation payment in accordance with the terms of the employment agreement.

<sup>18</sup> *Muru v Coal Corp of NZ Ltd* (1997) 5 NZELC AEC 19/97.

<sup>19</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

Montgomery took no steps to find another job even after, on her evidence, she was able to do so.

[152] After reviewing the evidence of loss and Ms Montgomery's attempts to mitigate that loss the Authority is satisfied she is entitled to an award of eight months' lost remuneration to be calculated at her rate of remuneration at date of dismissal.

*Benefits*

[153] Ms Montgomery's employment agreement included benefits for participation in CL's long term incentive plan, a short-term incentive scheme for 2018 and 2019 and a vehicle allowance.

(i) *Long term incentive scheme*

[154] Ms Montgomery is entitled to reimbursement of this benefit for the period of eight months for which lost wages has been assessed. The parties are to agree the amount.<sup>20</sup>

(ii) *Short-term-incentive scheme 2018*

[155] Ms Montgomery has received this incentive payment. She has not established she is entitled to a greater amount.

(iii) *Loss of a chance to earn a short-term incentive for the 2019 financial year*

[156] It is accepted Ms Montgomery earned a STI in previous years but the events of 2019 make it difficult to assess with any certainty that this was a likelihood in 2019. This claim does not succeed.

(iv) *Vehicle allowance*

[157] Ms Montgomery is entitled to be reimbursed the vehicle allowance benefit prorated for eight months of \$10,000.

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<sup>20</sup> This arrangement was proposed by the parties and accepted by the Authority.

### *Compensation*

[158] In evidence Ms Montgomery said she cannot overstate the impact these events have had on her and her family. As a result of losing her income she has faced significant financial difficulties as well as emotional distress.

[159] As well as Ms Montgomery's evidence the Authority has received a medical certificate and psychological assessment outlining the impact on Ms Montgomery's health of the events presented to the Authority. The medical certificate from Ms Montgomery's general practitioner dated 12 February 2021 outlines the clinical impacts of her employment situation including that since late 2018/2019 she has suffered anxiety, depression, sleep issues and high blood pressure. The certificate records Ms Montgomery has been physically and psychologically affected by her work circumstances, that during the workplace investigation in 2019 her conditions worsened and the financial pressure and 'humility' (which should likely read 'humiliation') of her redundancy worsened her stress and depression. The certificate also records Ms Montgomery and a family member have received specialist psychological support and that Ms Montgomery has taken medication to control anxiety and depression.

[160] The Authority also has Ms Montgomery's psychological assessment dated 22 September 2020. The assessment records Ms Montgomery as presenting with high distress and symptoms of depression including, low mood, loss of confidence and feelings of worthlessness in her ability to care of her family. The history of her presenting concerns is recorded as starting with her relationship breakdown "five years ago", the impact this had on her job with a knock on effect on her standing with her peers and being slowly phased out of important roles which, along with a toxic work environment, for which she raised grievances, resulted in her redundancy.

[161] The evidence suggests the causes of Ms Montgomery's ill health are mixed that is, both personal and work-related. CL cannot be liable in an assessment of compensatory damages for the impact of circumstances outside its control. That said, Ms Montgomery made CL aware of her personal stressors and drew her concerns about the workplace and its impact on her to its attention. CL's actions for which personal grievances have been found were taken with the knowledge of Ms Montgomery's circumstances including issues which negatively impacted her wellbeing. In addition matters entirely within CL's control have augmented the negative consequence of Ms Montgomery's dismissal and the process leading up to her dismissal. Declining to allow

Ms Montgomery to access the CL system to collate material to support her application for a redeployment opportunity and refusing to allow her to take her mobile phone number have added to Ms Montgomery's sense of hurt and distress.

[162] It is accepted the impact of the unjustified actions which have been established and the restructuring process and consequent dismissal has had a profound and negative impact on Ms Montgomery. The Authority is satisfied she experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Ms Montgomery is entitled to a global award to compensate the humiliation, loss of dignity and injury to feelings she has suffered consequent to her established personal grievances of \$40,000.00.<sup>21</sup>

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Montgomery that contributed to the situation giving rise to his grievance?*

[163] No deduction from the remedies awarded is to be made under s 124 of the Act. Ms Montgomery's dismissal was a "no fault" redundancy and her raising of concerns which led to the workplace investigation and participation in such did not contribute in a blameworthy way to the situation giving rise to her personal grievances.

### **Summary of orders**

[164] Crombie Lockwood Limited unjustifiably disadvantaged and unjustifiably dismissed Ms Montgomery. The following orders are made:

- a) Within 28 days of the date of determination Crombie Lockwood Limited is to make the following payments to Ms Montgomery:
  - i) \$40,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
  - ii) eight months lost remuneration pursuant to section 123(1)(b) and s 128 of the Employment Relations Act 2000;
  - iii) \$10,000 for vehicle allowance prorated to eight months; and
  - iv) payment under the long term incentive scheme.

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<sup>21</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

## **Costs**

[165] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Ms Montgomery is to file and serve any costs memorandum within 14 days of the date of determination and Crombie Lockwood may file and serve any reply memorandum within a further 7 days.

Marija Urlich  
Member of the Employment Relations Authority