

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dianne Murray (Applicant)
AND Access Homehealth Limited (Respondent)
REPRESENTATIVES Christine French, Counsel for Applicant
Richard Cunliffe, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 5 April 2005
6 April 2005
DATE OF DETERMINATION 1 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mrs Murray, says she was unjustifiably disadvantaged and unjustifiably dismissed from her employment as a home health co-ordinator with the respondent in its Southland operation prior to and in the course of a restructuring. She seeks reimbursement of earnings she claims to have lost in the sum of \$5,040.00 and compensation for hurt and humiliation in the sum of \$30,000 and costs.

[2] The respondent denies that it unjustifiably disadvantaged Mrs Murray in her employment or that it dismissed her unjustifiably on the ground of redundancy. It declined to meet her remedies and chose to defend its position.

[3] The parties attempted to resolve the issues in mediation but were unable to do so.

The Background

[4] The applicant was originally employed by WDFH Home Help as a home help co-ordinator and transferred to the respondent company when it assumed responsibility for services provision in the Southland region. Prior to this time, Ms Jean MacNicol had been the regional manager and she retired in April 2002. Her role was then undertaken by Ms Jemma McArthur from October 2002.

[5] The co-ordinators, including the applicant, were under pressure in providing services across the region and had put their concerns to management on a number of occasions. Management had undertaken reviews of its operations in other regions and was rolling out a new computer system on a region by region basis.

[6] In his report to the Board in mid June 2003 the Chief Executive Officer, Mr Titcombe advised of the progress of the roll-out in Southland and Canterbury. He also spoke of the review undertaken in the West Coast region.

[7] In his report of 6 May 2002 he had stated to the Board: *There is no doubt in my mind that they (Southland) are overstaffed at co-ordinator level. This is partially due to the manual operations and will be addressed as the new systems are rolled-out.* He also refers to a jockeying for position amongst staff following the retirement of the former regional manager Ms MacNicol.

[8] Following her appointment, Ms McArthur says she started the job with a completely open mind and went out of her way to seek the co-operation of all staff including the applicant in an effort to improve the quality of service. Further she says that on a number of occasions she sought input from the applicant and in particular information, recognising that the applicant had considerable experience. She goes on to say that she felt that the applicant did not recognise her position or her authority as regional manager.

[9] For her part the applicant says that she did not specifically target Ms McArthur but that she sought to raise issues with her that she believed that were relevant either to the service or her own role within in.

[10] In an attempt to ease the load on the co-ordinators Ms McArthur put a trial in place in which the staff members responsible for the placement of carer relief took on the role of carer placement for the Invercargill co-ordinators. The objective was to provide some relief for the co-ordinators so they could cope with the existing level of home visits for initial and review assessments, as well as supervision of the quality of service delivered in the home by the carers. Prior to putting this trial in place Ms McArthur says she had one on one discussions with various members of staff about it on a informal basis. The matter was also discussed in a staff meeting and the objective was to improve efficiency and streamline the services provided by the organisation as well as to better manage the workload of the field co-ordinators. She says she was not aware of any resistance to this change and so the trial implemented.

[11] Ms McArthur says she believed the trial went well as it relieved the field co-ordinators of very time consuming tasks and it freed them up to give more time to carry out the role of visiting clients and keeping track of the quality of service being delivered. She says as the trial went well it became a permanent change.

[12] The applicant says that in the course of this exercise she lost some managerial tasks such as setting pay rates for carers and says she has been disadvantaged by this action.

[13] It is clear from the evidence that for her part Ms McArthur felt intimidated by the applicant's manner while the applicant says she believed she was being singled out from other staff by Ms McArthur. To the outside observer it is obvious that the relationship was mutually strained. However, in her evidence Ms McArthur says that a trying situation between herself and the applicant deteriorated seriously in June/July 2003 following an altercation between Sharon Morrison and the applicant in the reception area. Ms McArthur intervened and says that Mrs Murray was behaving unprofessionally towards Ms Morrison. Further, she says that in the course of trying to deal with the situation, she was asked by Mrs Murray to have a meeting in order to address a number of complaints the applicant had. Ms McArthur pointed out that she was dealing with an urgent ACC matter and having dealt with that would be happy to meet with the applicant. Having attended to the matter in hand Ms McArthur went to look for Mrs Murray and discovered that she had gone home upset. The regional manager then attempted to contact the applicant, ringing her at home several times and finally reached her about 6pm that evening. Ms McArthur asked how the applicant was and whether she would be able to meet with her the following

morning. However, the applicant indicated she did not know whether she would be well enough to attend work that day. This incident place on 10 June 2003.

[14] The following day the applicant returned to work with a medical certificate stating that she would be absent from work due to medical reasons. The applicant was initially absent from 11 June 2003 until 16 June 2003 then subsequently provided two further certificates valid until 7 July 2003 when she returned to work. Ms McArthur says she had no idea as to why the applicant was absent and says the first she heard of what may have occasioned the absence was when she spoke to one of the administration staff who said Mrs Murray was asking for extra sick leave on the basis that she was off work on stress leave.

[15] In June 2003 Mrs Murray had sent to Mr Titcombe a number of issues which she wished to be settled in a mediation setting. Mr Titcombe's reply to the applicant's letter dealt with each of the concerns she had raised. However, the chief executive states his view that in most cases the matters raised were issues of management and did not lend themselves to a mediation environment. He asked Ms McArthur to meet with Mrs Murray.

[16] A meeting was duly arranged and took place on 16 July 2003 beginning at 9am. The meeting was lengthy taking two hours and Ms McIntosh, a senior co-ordinator, took minutes of that meeting. The applicant was accompanied by her husband Alister.

[17] It is apparent that neither party was satisfied with the outcome of the meeting. The applicant says the meeting got off to a poor start because she says Ms McArthur told her and her husband that she would deal only with the job description issue as Mr Titcombe had dealt with all other matters in his letter. She points out that this was contrary to the letter she had received from Ms McArthur arranging the meeting in which Ms McArthur says *I have been instructed by the chief executive officer, Graham Titcombe, to meet with you to try and resolve the issues you have raised with him in relation to your job description and provide any clarification that you may wish regarding his letter to you. If there are other issues to which you wish a response, please inform Tracy McIntosh and these will be added to the agenda for the meeting.* As it transpired, Ms McArthur did agree to discuss other issues.

[18] The applicant also complained that having asked for a copy of the minutes of the November 2002 staff meeting where she says the announcement about her role had been made, Ms McArthur had said that the minutes had been mislaid. The applicant says that later, another staff member advised her that prior to this meeting under discussion, Ms McArthur had asked for the minute folder which the staff member gave to her and which she says Ms McArthur had taken into her office. That staff member was able to locate the minutes in question which were still in the folder which had previously been in Ms McArthur's possession.

[19] The applicant also complains that the copy of the minutes of this meeting were incomplete and a considerable number of matters have been omitted. Mrs Murray says that following the meeting she received a letter offering her a weeks paid leave and three counselling sessions. The applicant's written evidence was that she declined the offer because whatever benefit may have accrued would have been lost, because nothing had changed in her relationship with Ms McArthur. In her oral evidence however, she told the Authority that she had a counsellor available to her from the period of stress leave she had taken previously. Mr Murray confirmed the account of the meeting set out in his wife's brief of evidence.

[20] Ms McArthur says that the discussions started focusing on the applicant's job description and her view that changes had been made without her being consulted. She says she told the applicant she had been unable to find a national job description and these needed to be designed and put in place. Ms McArthur also said that there seemed to be no one agreed role for co-ordinators within

the organisation, explaining that jobs had evolved in different regions and that she was attempting to put structure and job descriptions in place. Further, Ms McArthur says she proceeded to respond to the applicant's criticism of the management of the Invercargill office. She pointed out to the applicant that the office had not been running efficiently and that co-ordinators had been complaining of overload in that they did not have sufficient time to do their work, in particular short term visits to clients.

[21] Ms McArthur says she responded to the applicant's concerns regarding payroll and payments which the applicant says had previously been part of her responsibilities. Ms McArthur says she went through the rationale for the changes which allowed the care co-ordinators to visit clients for initial and review visits thus permitting them more time with both the carers and the clients they were attending to. She pointed out that matters of payroll were the responsibility of two other staff members, namely Margaret and Jane and that administration staff were responsible for accounts.

[22] Ms McArthur says that the applicant complained there had been no consideration given to her health status upon her return to work after extended sick leave. Ms McArthur says that she told the applicant that she felt vulnerable in respect of Mrs Murray and did not wish to open herself up to a rebuff. She also said that she found the applicant to be very intimidating. Ms McArthur says that the applicant responded by saying that she was not intimidating but being assertive and that she needed to get things off her chest.

[23] Ms McArthur says she felt drained by the meeting and what she described as the applicant's intimidating demeanour. She goes on to say *I had come to the end of my tether having experienced inappropriate behaviour and conduct towards me over recent months. I arranged for some external supervision sessions for staff and also had access to supervision myself. I offered supervision to Dianne Murray in a letter dated 18 July 2003. I never received any response from her.*

[24] Ms McArthur says she was under considerable stress at the time and that things had built to such an extent that she believed she needed to write to Mr Titcombe expressing her exasperation. The relevant sections of that letter were as follows:

It is impossible to work effectively in such a disruptive situation. I know that you are aware that this situation has existed for a long time and is not new since my appointment. I have to spend many unproductive hours dealing with the fallout from the behaviours exhibited by Mrs Murray.

I feel that I will not be able to carry on in this position unless something is done urgently to remove Mrs Murray soon. There is also the possibility that a number of other staff will also will also [sic] resort to the same action.

I would appreciate it if I and the others who have written reports could have access to the employment lawyer you consult over this issue in the event that we are challenged and have to answer to any legal representative Mrs Murray may engage.

The letter was sent on 21 July 2003.

The review and restructuring process

[25] In February 2002 Mr Titcombe went to Invercargill and met the staff to discuss a range of matters. The minutes of that meeting on 12 February 2002 say there is to be restructuring within Access Homehealth and these proposals are not yet before the Board, so Mr Titcombe was unable to give definite answers as to what would happen in Invercargill. Those minutes also record that the co-ordination costs for Southland are alarmingly high, they have doubled within two years and need to be addressed. It is clear from this that Mr Titcombe was signalling that he and the Board were

intending to review the situation in the Southland region. In his evidence Mr Titcombe said that around March 2003 he had become increasingly concerned at the resistance to change that was occurring within the Southland region despite what he calls extensive consultation and agreement. He says a number of staff members were frustrating the change being introduced and that in part his visit on 12 February 2002 was an attempt to encourage all staff to adopt more efficient methods of working. Further, he says that in July 2003 both he and the Board had become concerned at the rapidly declining profitability of the Southland region and accordingly, in that same month, he decided that the planned formal review needed to be brought forward as a matter of urgency. His evidence is that the review would have occurred upon the completion of the introduction of the computer system, but that he was of the view that a successful introduction was unlikely to occur without change in the Invercargill office. Mr Titcombe requested that Glenda Rich, the national operations manager, undertake the review and to advance proposals to remedy the situations that she discovered. Ms Rich she undertook the review in the light of the development of the Home and Community Support Sector Standard and its subsequent audit tools which were designed to ensure accountability within the homecare sector.

[26] After undertaking preliminary data investigation, Ms Rich visited the Invercargill office on 7 and 8 August 2003 and had programmed time to speak with each staff member regarding the work tasks they were doing, how the tasks were being undertaken, and the geographical area they were servicing. In a memo to Jemma McArthur dated 1 August 2003, Mr Titcombe outlined the structural review giving the reason for the review, the approach Ms Rich would be adopting and welcoming of employee input into the process. Ms Rich says that her objective was to understand how each position fitted in the whole service for Southland and in particular to identify gaps in service that would create possible risks for the organisation and overlaps in responsibility which could be removed to streamline the operation.

[27] During the time she was in Invercargill, Ms Rich met with each employee and took handwritten notes of each interview. After meeting staff she then turned her mind to reviewing information in the existing computer system in order to determine exact client and support working numbers that each co-ordinator was managing. She also obtained further information from payroll and invoicing to assist her in developing a clear picture of the existing situation in the Southland region.

[28] Her review findings were completed and provided to the chief executive officer on 19 August for comment. Briefly, Ms Rich found that there was an over allocation of co-ordinator hours for the Invercargill office which was seen in co-ordination training and at senior co-ordination level. Accordingly, she recommended that there should be a reduction of 65 hours per week in total from the co-ordination area. She recommended that new job descriptions needed to be issued, that there were a variety of employment agreements in existence which needed to be realigned, that systems were not being used nor were policies and procedures being consistently followed resulting in some task repetition by staff members. Further, she found that co-ordinators were undertaking a wider range of tasks which prevented them from achieving their main objectives and discovered there were gaps in the service which might expose the organisation to failures in the service delivery.

[29] Ms Rich then went about establishing criteria for the selection of employees under the new proposed structural arrangements. She says these were selected following a review of future developments within the health sector and the need to upskill the employees within the organisation generally. At the investigation meeting she explained that she developed these in the light of guidance from District Health Boards, the Ministry of Health and the Accident Compensation Corporation. The criteria established were

- Relevant qualifications in the health setting;

- Skills relating to a health setting;
- Knowledge of a health setting;
- Performance;
- Behaviour;
- Attitudes;
- Length of service.

[30] Having established these criteria, Ms Rich then called for the personnel files of existing staff and constructed a spreadsheet setting out qualifications, skills, experience and the roles currently undertaken to assist in the selection process. The nub of the report provided by Ms Rich from the applicant's point of view, is that it identified the loss of the position held by Mrs Murray if the proposal as it stood was to be adopted. This was on the basis that she alone among staff did not have a qualification relative to health.

The consultation process

[31] On 1 August 2003 Mr Titcombe had written to the regional manager advising that Ms Rich had been undertake the review and on 28 August 2003 he and Ms Rich met with each member of the staff individually to discuss the proposal. They met with the applicant on that day and he says that *as Dianne was the employee most affected by the proposed change she was visibly and understandably upset. Accordingly we spent additional time in outlining the importance of us receiving from her any suggestions as to the roll that she believed she could fill, identifying skills and gaining any ideas, suggestions or input that she considered relevant. She confirmed that she would be available for a meeting the following day and that she would bring her solicitor with her. We agreed that that was certainly appropriate.*

[32] The following day they met with staff members again to receive from each individual the initial feedback on the proposals. Mrs Murray was not present at the office that day and having had no contact with her, Mr Titcombe asked that her husband Alister meet with them as they were seeking her input into the proposal. Mr Murray advised that his wife was sick because the proposal had upset her and Mr Titcombe went through the reasons behind the restructure and Ms Rich explained the procedure she had followed in establishing the suggested structure. Ms Rich also advised that the major reason for Dianne not being chosen for a co-ordinator role was that she did not have a health qualification while all other existing staff did. Mr Titcombe says in his evidence that on at least three occasions he and Ms Rich stressed their willingness to receive the applicant's feedback regarding other positions in the proposed structure that she could fill or her suggestions regarding alternatives.

[33] Mr Murray's evidence was that he found the meeting somewhat unsatisfactory and he asked Ms Rich for some material in writing. He says Ms Rich told him the proposal was with the chief executive and it was not appropriate to give it to him, but that she promised to get something back to him when she returned to her office, which she expected to be the following Tuesday, 2 September 2003. The witness says that nothing arrived until Saturday 6 September 2003 and the letter was much more specific than the verbal advice he had been given at the meeting.

[34] On 3 September 2003 Ms Rich and Mr Murray spoke again, and he says that it was in the course of this phone contact that he learned for the first time that there were selection criteria. The

comparison between the notes taken during this phone call and the notes taken by Mr Murray at his meeting with the respondent's representative supports this contention.

[35] Significantly, Ms Rich said that she intended to make a decision by the coming Friday which was 5 September 2003. The witness says that although Ms Rich said during his conversation with her that she had now sent the information he had requested, he says it did not arrive until Saturday 6 September 2003 by which time the decision had already been made.

[36] In respect of this written communication Ms Rich says *I left the issue with me telling Alister that I would send the written proposal to Dianne and await her response. However I again stressed the need for me or Graham to have some discussions with Dianne around the proposal. I then mailed to Dianne's home a letter and a copy of the proposal.*

[37] Significantly, Ms Rich's letter is dated 2 September 2003 and confirms that she will be making a final decision on Friday 5 September. She goes on *I can only stress the importance of receiving any feedback that can provide me before I make my decision.*

[38] It is significant that Ms Rich's evidence is that she *mailed* the letter and a copy of the proposal to the applicant. In respect to their notifying all employees including the applicant of the decision she used *couriered letter*. She says although these letters were dated 5 September they were couriered from the Christchurch office of Access Homehealth Ltd on Monday 8 September.

[39] Ms Rich's evidence is that the new employment agreements and job descriptions prepared for the staff were posted to their regional manager on 17 September 2003. This is important because the applicant complains that following her meeting with Mr Titcombe and Ms Rich on 28 August 2003 all staff apart from her had been handed what she believed to be employment agreements requiring signatures.

[40] Ms Rich's letter of 5 September 2003 states

The result of this decision is that the position of domestic assistants co-ordinator is disestablished resulting in your redundancy. Your employment agreement provides for a six week notice period. The period will begin from receipt of this letter making an end date of 21 October. I would appreciate it if you could provide me with some guidance on whether you would wish to work your notice period or would you prefer a payment in lieu of notice.

[41] The applicant chose not to return to the workplace and received payment in lieu of notice.

Analysis and discussion

[42] Following the investigation meeting I was left in no doubt that the respondent's Invercargill office was a far from happy work place. Historical methods of operation developed over time, vied with newer approaches, and interpersonal conflicts were revolving around who did or did not complete tasks around client complaints and other incidents evident in the documents and correspondence lodged with the Authority.

[43] Following the appointment of Ms McArthur and her efforts to improve the system and operational methods, the situation appears to have deteriorated as the *old guard* resisted changes in methodology.

[44] The applicant alleges that the trial initiated in November 2002 deprived her of managerial tasks specifically, her setting of the wage rates for caregivers. The evidence confirmed in the minutes of the meeting on 4 November 2002 is that the trial involved Tracy Kubala taking a role as

senior co-ordinator, two others undertaking all placement of carers and this in order to free up three co-ordinators, including the applicant, to undertake more client visiting. The same minutes record that carer pay rates were under review after Patsy Gordon of Rural Woman Liaison Group had raised this issue with the Board of the respondent. The minutes states *Jemma (McArthur) will be reviewing all pay rates.*

[45] As I indicated above, Ms McArthur's evidence is that she believed that the trial had worked well and that as a result it became a permanent fixture.

[46] The applicant's email of 13 June 2003 to Mr Titcombe appears the first time that this concern had been raised with the respondent. While I accept the applicant's evidence that she was upset over these unilateral changes to her duties, one has to ask why it took over seven months for her to raise this formally with her employer.

[47] The evidence at the meeting clearly established that a considerable degree of antipathy developed between the applicant and the regional manager within a short time of the latter's appointment. Ms McArthur says she was open to input from the applicant in the same way in which she invited other staff members to contribute. She complains that Mrs Murray was frequently aggressive in her dealings with other members of staff and generally resistant to organisational change. For her part, the applicant says that her regional manager made belittling comments to staff about her and that she failed to address Mrs Murray's concerns about major flaws or lack of action when dealing with client complaints. Inevitably in such situations, staff tend to take sides and it is not difficult to see how the perception of two factions operating in the office came to the surface.

[48] In his reply to the applicant's email Mr Titcombe says *In fact I have personally spent more time on issues raised by you than with any other of our 4,500 employees. Much of the disharmony appears to me to be created by your continual refusal to recognise the right of management to manage in a manner that may not suit your personal wishes.* Significantly, Mr Titcombe says *Dianne I have grave difficulties as to the claim that Invercargill is no longer a happy place to work.* While he may have held that view at the time, a view which I consider to be moderately shallow, he could have been in no doubt after he received the letter of 21 July 2003 from his regional manager. To his credit he promptly organised a meeting between the applicant and Ms McArthur on 16 July 2003. I have no doubts that Mr Titcombe's intentions in arranging this meeting were genuine and well intentioned. Regrettably, it seems to have exacerbated the frustrations felt by each of the protagonists. The evidence of attempts at conflict resolution, the applicant taking sick leave, the offer of counselling and the like, is clear indication that battle fatigue was setting in and affecting both woman.

[49] The applicant has claimed that the respondent failed to resolve the disharmony in the Invercargill office. This appears to have some merit but the question to be addressed is whether the employer, having become aware of the disharmony, took reasonable and active steps in an attempt to resolve the issues.

[50] In support of the claim of unjustifiable dismissal the applicant points the Authority to the decision by the CEO to advance the review of the Southland operation, the alleged bias of Mr Titcombe in her regard and the procedural irregularities in carrying out the restructuring. In May 2002 Mr Titcombe had reported to the National Council that the performance of the Southland operation had been disappointing financially. He said *there is no doubt in my mind that they are overstaffed at co-ordinator level. This is partially due to the manual operations within the region and will be addressed as the new systems are rolled out.* At a meeting with the staff in the Invercargill office on 12 February 2002, Mr Titcombe advised the staff that there was to be restructuring within the organisation as a whole, that those proposals were not yet in front of the Board and that he could give no definite answer what will happen in Invercargill thereby signalling

to all staff that a review was to be conducted in the future. His statement to the National Council linked this review to the roll out of new computer systems.

[51] In his evidence Mr Titcombe said that both the Board of Access Homehealth Limited and he had become extremely concerned at the rapidly declining profitability of the Southland region and so decided in July 2003 that the planned review was to be brought forward as a matter of urgency. The applicant has invited me to consider her view that this decision was made following Ms McArthur's letter to Mr Titcombe *to remove Mrs Murray soon* and because the chief executive himself had developed a disliking for her.

[52] In considering this invitation I have carefully considered the documentation relating to the review and also the clear signalling given to the Invercargill staff. I take the view that a restructure was inevitable as part of the ongoing restructure of the respondent's national operations. I also observe that the introduction of the new data base system which the chief executive tied to the review had been undertaken at the time of his announcement on 1 August 2003. I have also taken into account the evidence given on the financial status of the Southland operation which Mr Titcombe says was the primary reason for undertaking the review promptly.

[53] The respondent had the right to address what it regarded as inefficiencies in its operations and address the diminishing financial returns in its Southland branch. The issue that then arises is whether or not, in pursuing this undertaking, it has treated the applicant as a fair and reasonable employer ought.

[54] Mr Titcombe told the Authority that he asked Ms Rich to undertake the review and put in place a proposal as he wished to ensure the transparency of the process and also because of her experience in conducting reviews and preparing proposals for other segments of the respondent's business elsewhere. On the basis of the evidence before the Authority it is clear that Ms Rich undertook these tasks in a professional and complete manner and, prior to preparing the proposal, had interviewed all available staff at the Invercargill office, including the applicant. Ms Rich later returned accompanied by Mr Titcombe. The purpose of the visit being to go through the proposal with each available staff member. In preparation for these meetings Ms Rich had prepared a letter explaining the proposed changes and also a draft employment agreement. Ms Rich's evidence was that the applicant was not provided with this package when they met on 28 August 2003. Ms Rich's evidence was *It was felt that it would be best to spend some time with her (Dianne) going through the proposal and the effect this would have upon the position she occupied and exploring options with her.* I am satisfied that Ms Rich and Mr Titcombe did go through the proposal. However, I also accept that once Mrs Murray became aware that it was her position which was to be totally disestablished her attention would have then focused on that outcome.

[55] The applicant has taken issue with the fact that she was not able to provide input on the matter of the selection criteria in the proposal. Given that the offer put to her in the meeting of 28 August was a proposal, it follows that the selection criteria outlined within it was also a proposal and able to be challenged by the applicant. What I find disconcerting about the events of 28 August 2003 is that Ms Rich did not provide the applicant with a copy of the proposal nor of a draft employment agreement. That failure is significant because once this became known to staff and to the applicant, it was evident that Mrs Murray was being treated differently from other staff. That, in its turn, would support the view that at least in respect of "criteria for selection" the applicant's position was the one that was going.

[56] Mrs Murray left that meeting in a highly distressed state. I accept that Ms Rich asked the applicant that they set a time for a further meeting so the proposal could be further explored. The applicant replied that she would meet them again only if accompanied by her solicitor.

[57] Later that morning Ms Rich received a phone call from Mr Murray and outlined to him the basics of the proposal. During this conversation Ms Rich asked Mr Murray to confirm as early as possible what time a meeting could be arranged as she and Mr Titcombe were meeting with all staff again the following day. Having heard nothing from Dianne with regards to a further meeting, Ms Rich contacted Mr Murray and asked his advice on how he wished to proceed. Mr Murray told her that his wife was in a very distressed state and would not be able to attend a meeting that day but that he himself would meet with Mr Titcombe and Ms Rich to discuss the matter further that morning. In the course of the meeting Mr Murray says he asked for something in writing in order to be able to take it to his wife and discuss the matters. However, Ms Rich told him it was not appropriate that she give him the actual proposal as it was said to contain commercially sensitive information. She did promise to provide him with information once she had returned to her Wellington office on Tuesday 2 September 2003. This is consistent with Ms Rich's evidence. She says she contacted Mr Murray on Tuesday 2 September 2003 and told Mr Murray that she would send the written proposal to the applicant and await her response stressing the need for herself or Mr Titcombe to have some discussions with Dianne around the proposal. She says she then mailed a copy of the proposal and a letter to the Murray's home address. I am quite clear that Ms Rich advised Mr Murray that the respondent needed to speak with his wife before it made its decisions on Friday 5 September 2003.

[58] Unfortunately the letter did not reach the Murrays until Saturday 6 September 2003. Commenting on para 29 of Mr Murray's evidence Ms Rich on page 20 of her written evidence says *I posted the proposal to Dianne on 2 September. As no response was received from Dianne the proposal was implemented.*

[59] It is difficult to see the need for Ms Rich to act with such haste given that she knew the applicant was upset and concerned at the proposed disestablishment of her position. I do not doubt that she posted the proposal to the applicant on 2 September 2003 as she stated. Given the tight timeframe I am surprised the documents were not sent by courier. The vagaries of the postal delivery system cannot be laid at her door. However, given the circumstances referred to above, I find it difficult to understand why Ms Rich did not attempt to contact Mr or Mrs Murray to determine whether the document had arrived and to gauge a response to it. I think to place the onus of notifying her that the package had not arrived cannot be fairly placed on Mrs Murray who was, as I say, in a distressed state. I am of the view that the respondent failed to ensure it had the required feedback from Mrs Murray before implementing its proposal.

[60] Another matter which was raised before the Authority was the issue of the respondent's behaviour regarding some minor damage done to the applicant's vehicle while using it in the course of her work. While I regard the respondent's initial attitude to meet the cost of repair from its policies as somewhat churlish, the fact that it later relented and attended to the matter at its own cost goes to its credit. Nonetheless the initial refusal put additional pressure on the applicant's already relatively fragile state.

[61] The Authority heard evidence at the investigation meeting of the reasons for the sick leave taken by the applicant in June 2003. The respondent had received two medical certificates excusing the applicant from returning to work until 7 July 2003. Those certificates simply stated that Mrs Murray was absent due to "medical reasons". Ms McArthur became aware of the applicant's view that this leave was in fact "stress" leave after one of her administrative staff approached her to relay a request from the applicant for further sick leave. From the written evidence provided by Mrs Murray's general practitioner to the Authority, it is now clear that in his view the applicant was suffering from work related stress. The difficulty the Authority faces is not with that evidence, but the fact that it was not brought to the employer's attention at the time.

The determination

[62] I find that the applicant Mrs Murray was not disadvantaged in her employment by the reorganisation of the co-ordinators' tasks or by the alleged failure of the respondent to resolve the disharmony in the office or by being treated unreasonably by the regional manager. I accept that there was mutual frustration between the applicant and Ms McArthur, but I find that does not meet the threshold required for a finding of unjustified disadvantage. I find the respondent did take serious steps in an attempt to resolve conflict in the Invercargill office. Regrettably, they did not succeed.

[63] I find that the applicant was unjustifiably dismissed not because she was singled out for redundancy, but because she was irrevocably prejudiced by the respondent's conduct in the restructuring and consultation procedures. I find this to be so because Mrs Murray was treated differently from other staff in the initial stages of putting the proposal to the staff and by the precipitous implementation of the proposal without any input from the applicant.

[64] In her letter of 7 October 2003 to the applicant's counsel, Ms Rich states *The failure of Dianne to have a relevant qualification determined her selection for redundancy. All other employees hold a relevant qualification. This did not preclude my desire to discuss other employment options with Dianne.* It was the hasty implementation of the proposal in respect of the applicant that precluded discussion of other employment options with the applicant.

Remedies

[65] In the statement of problem lodged with the Authority Mrs Murray sought payment of lost earnings from the date of determination of her employment through until 15 December 2003 less the redundancy compensation paid. The claim was \$5,040.00. Mrs Murray also sought compensation for distress, hurt and humiliation in the sum of \$30,000. She also sought legal costs.

[66] The assessment of lost remuneration requires the Authority to have regard to the actual loss suffered by the applicant. In coming to my determination on this issue I have been guided by the decision of the Court of Appeal in *Telecom NZ Ltd v Nutter* (2004) CA127/03. In para 81 the Court said:

We also emphasise that full compensation must be assessed in light of all contingencies and in no circumstances should an award be made that exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employees employment. For instance, where dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for likelihood that had a proper procedure been followed the employee would have been dismissed.

[67] Having considered the evidence before the Authority and having evaluated the probability that consultation, properly undertaken, would have altered the respondent's decision to disestablish the applicant's position, I find on the balance of probabilities that the applicant would have been unlikely to alter the proposal in respect of her position even if consultation had been properly effected. I therefore decline Mrs Murray's remedy under the head of lost remuneration.

[68] The Authority heard considerable evidence from the applicant and her husband, which evidence was supported by the applicant's general practitioner, of considerable work related stress and anxiety. Had the details of the applicant's condition been made available to the employer prior to the decision to declare the position redundant, it may be that the respondent's approach may well have been considerably more mellow. I accept that Mrs Murray has suffered hurt and humiliation

resulting from the loss of her employment and in particular the respondent's implementation of its proposal without hearing from the applicant. However slim the opportunity to have the respondent change its mind may have been, it was nonetheless an opportunity she lost and understandably is considerably hurt thereby. Having weighed the matter of compensation in the light of the facts of this particular case, I award Mrs Murray the sum of \$8,000 under s123 of the Employment Relations Act 2000.

Costs

[69] The parties are to attempt to resolve the issue of costs between themselves. In the event this is not achievable Ms French's memorandum is to be filed no later than 4pm Friday 31 March 2003. Mr Cunliffe is to have 14 days within which to respond.

Paul Montgomery
Member of Employment Relations Authority