

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

2013 NZERA Christchurch 233  
5375306

BETWEEN                      SUSAN TULLOCH  
Applicant

A N D                              RESOURCE DEVELOPMENT  
COUNSULTANTS LIMITED  
Respondent

Member of Authority:        Christine Hickey

Representatives:              Peter Moore, advocate for the Applicant  
Raewyn Gibson, advocate for the Respondent

Investigation meeting:        4 July 2013 at Christchurch

Submissions Received:        At the hearing from both parties, further submissions 18  
July 2013 from respondent and 18 and 30 July 2013  
from applicant

Date of Determination:        12 November 2013

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Susan Tulloch has a personal grievance that she was unjustifiably dismissed.**
- B. Resource Development Consultants Limited must pay Susan Tulloch what she would have earned had she remained employed until 29 February 2012.**
- C. Resource Development Consultants Limited must pay Susan Tulloch \$6,000 in compensation for humiliation, loss of dignity and injury to her feelings.**

**Employment relationship problem**

[1] Susan Tulloch began her employment with Resource Development Consultants Limited (RDC) on 18 July 2011 as a water management scientist based in Christchurch. Dr Tulloch also assisted in setting up the Christchurch office and was the office manager.

[2] She was made redundant on 3 February 2012.

**The claims**

[3] Dr Tulloch claims that she was unjustifiably dismissed by way of redundancy. She says the decision to make her redundant was unjustified, and there was insufficient consultation and that she should have been offered redeployment.

[4] Dr Tulloch also says that RDC breached its duty of good faith to her:

- (a) In the meeting on 13 January 2012 and in the subsequent consultation process; and
- (b) By failing to be responsive and communicative especially during November 2011 to February 2012.

[5] Dr Tulloch says she was unjustifiably disadvantaged in her employment by:

- (a) The loss of her office management role on 13 January 2012; and
- (b) The requirement unilaterally imposed on her on 13 January 2012 to obtain \$8,000 of work by the end of February 2012 or face losing her job; and
- (c) Not being given any work in her field of technical expertise over the entire period of her employment despite numerous requests for such work.

[6] Dr Tulloch also says that RDC was in breach of ss.63A(2) and 65(2)(a)(ii) of the Employment Relations Act 2000 (the Act) by failing to provide her with a description of work to be done and failing to provide her with an employment agreement.

[7] By way of remedy Dr Tulloch claims:

- (a) Lost remuneration;
- (b) Compensation of \$15,000 for humiliation, loss of dignity and injury to her feelings;
- (c) Compensation of \$12,500 for failure to provide her with any work in her primary area of technical expertise;
- (d) \$2,000 for each breach of the Employment Relations Act 2000;
- (e) \$2,000 for each breach of ss.63A and 65 of the Employment Relations Act;
- (f) An order that all penalties are paid to her; and
- (g) Legal costs.

[8] RDC resists all the claims. It says that the redundancy was justified in all respects and that Dr Tulloch was not disadvantaged in her employment and that it has not breached any of its obligations under the Act. RDC also says that the penalty claims are not for breaches that occurred within the twelve months prior to the claims being made.

### **Issues**

[9] The Authority needs to determine:

- (a) Did RDC have genuine reasons for the redundancy?
- (b) Did RDC follow a fair and proper process which resulted in Dr Tulloch's redundancy? Did RDC breach its duty of good faith to Dr Tulloch?
- (c) Was Dr Tulloch disadvantaged in her employment in any way?
- (d) Whether Dr Tulloch is entitled to any remedies,
- (e) Whether RDC breached any of its obligations under the Employment Relations Act 2000, and

- (f) Whether any penalties should be awarded against the respondent and paid to Dr Tulloch.

## **Determination**

### ***Background facts***

[10] Dr Tulloch was recruited after being interviewed by a recruitment consultant, Bernie Lyons, who worked for RDC. Mr Lyons recommended Dr Tulloch to Cam Wylie, RDC's managing director. RDC was not advertising or actively searching for a water management specialist but believed it could attract water management opportunities for Dr Tulloch, largely from within its existing client base. Dr Tulloch and Mr Wylie met briefly at Christchurch airport and Dr Tulloch was offered the role, which she accepted. She began work in the Christchurch office on 18 July 2011.

[11] There is no dispute that Mr Lyons told Dr Tulloch that:

- (a) RDC was confident of winning a number of contracts for which it required her technical expertise in water management; and
- (b) RDC wanted her to assist with setting up and running a new office in Christchurch.

[12] RDC publicised Dr Tulloch's appointment on its website about two weeks after she began work:

*Susan Tulloch (PhD, water policy) and Paul Sykes (mining engineer) have joined Rachel Baggs in the Christchurch Office. This is to strengthen the Christchurch operation which is strategic to RDCL, and to add skill to our existing capacity.*

*Susan Tulloch has been involved with and run her own business, as well as earning a PhD in "water" from Lincoln, most specifically the 'social aspects of water being policy, availability stakeholder consultation etc'. Susan will help look after the daily functions of the Christchurch office. In her spare time we will be working to leverage Susan into our current projects and develop opportunities for her.*

[13] Dr Tulloch worked in the same office as William Walker, who she describes as her line manager. Mr Walker and Mr Wylie indicated to Dr Tulloch that while there was not yet any water management work for her they were confident that the Bathurst work on the West Coast would yield water management work as would work in the Philippines, where

RDC was assisting a client with copper mines. When that happened they were confident that Dr Tulloch would be fully occupied with water management work.

[14] At the beginning of Dr Tulloch's employment Mr Wylie introduced her to a number of clients and to a contact at Straterra.

[15] Dr Tulloch and Mr Walker discussed the possibility of her "door knocking" for potential water management clients. They agreed that should not begin until after she returned from her leave which was to be for five weeks in late September and October 2011. They agreed that when she returned from her planned leave they would go "door knocking" together to *announce the ... New Water Management capacity*. However, Dr Tulloch returned to work in early November 2011 to find that Mr Walker had been made redundant and Matt Every had been appointed as RDC's Business Manager. He was based in the Havelock North office.

[16] RDC underwent significant change between October and December 2011. Its Wanaka office was closed. The positions of Senior Geologist, Principal Geologist, General Manager and Marketing Manager were made redundant. RDC ceased offering field geology services.

[17] On 9 November 2011 Mr Wylie sent an e-mail to all staff. He wrote:

*We are working our business. We have been cutting down to our core business, removing overheads and non-productive "assets", and in parallel are re-focussing our business on what we do best. .... Really I got ahead of myself and lost the core business focus. So I've been "unpicking" that. Apologies if it has been unsettling but allows us to focus on what we want to do, and do it best.*

[18] In relation to Dr Tulloch he wrote:

*Susan T is back from holiday. Full of ideas. Keen to help mould the Christchurch group. She's going to be the Office Manager there:*

- *What are we going to do with "water"*
- *Treatment?*
- *Policy? ...*

*I'm down to the Straterra board meeting tomorrow. Board papers indicate interesting opportunities especially as it relates to water (Susan T give me a call please).*

[19] Dr Tulloch says that when she came back from leave she tried to contact Mr Wylie but that he was overseas in the Philippines most of the time and that emails and calls to him went unanswered.

[20] On 23 November 2011 Dr Tulloch sent Mr Wylie, Mr Every and Guy Boaz<sup>1</sup> a proposal that RDC become the Australasian and South African provider and operator of Below Detectable Limits wastewater treatment technology.

[21] Mr Wylie responded asking her to consider the costs to RDC, opportunities in New Zealand and elsewhere and to *bring it to meeting next week*.

[22] On 28 November Mr Wylie sent the following email to Dr Tulloch:

*As it relates it [sic] the RDCL “water” initiative, I realise I have not been proscriptive nor particularly helpful as it relates to going about building a water market, or even direction.*

*We need to get better at that though. So ... let me help.*

- *RDCL opportunities are around building on our existing customers. Viz Francis Group, L+M and Bathurst so far and to who you have had exposure. That may take some time.*
- *What is our strategy to push this?*
- *As it relates to what you have been doing in the Canterbury Board/NZ water market,*
  - *Can you please summarise your initiatives to date?*
  - *Who have you been calling at what organisations?*
  - *Where are with that stuff and what looks most prospective?*
  - *What inroads should be generally taken into the water marketplace?*
  - *Who are the groups we should be talking to.*
- *As relates to the BDL initiative:*
  - *Which target companies do we need to talk to?*
  - *What are the costly [sic] involved to RDCL?*
  - *What is the plan?*
- *Time to try and get a strategy around all things we are doing. If you can have a think on this and get some notes ready for Thursday and Friday that would be great.*

*Cheers  
Cam*

[23] On 29 November 2011 Dr Tulloch responded thanking Mr Wylie, Mr Every and Mr Boaz for the input with the *prompt questions* and attaching her overview of the strategy for RDC’s water services. Under the heading of *Costs to RDCL*, Dr Tulloch wrote:

*I would really appreciate some help with this! ☺*

---

<sup>1</sup> RDC’s geologist working with Bathurst to secure ongoing work for RDC.

*For start-up, my time for business development, and potential training costs. Also input for development of business plan from Cam, Matt, and Guy.*

[24] The RDCL annual general meeting was held on 1 and 2 December 2011. Mr Wylie announced to all staff that he wanted to focus on the core competencies of the company but also that the company *wants to be in water and water is blue sky at the moment*.

[25] On 5 December 2011, Dr Tulloch sent an email to Mr Wylie, Mr Boaz and other staff with an attached draft contacts list for RDCL clients that she should contact in order to undertake water market research. On 7 December 2011, Mr Wylie responded:

*A quick note – many of these aren't quite right. Shows you how much of a shambles we are in!*

*You will have to hold fire for a while.*

[26] On 13 January 2012, Dr Tulloch, Mr Wylie and Mr Every had a strategy meeting by Skype. It was arranged after Dr Tulloch requested Mr Wylie and Mr Every to meet with her to give her some greater direction. She set out some things that she wished to discuss in the meeting, including:

- (a) Christchurch office management. She asked for some clarification of her role and company expectations; and
- (b) Water management business development.

[27] That prompted Mr Every and Mr Wylie to meet prior to the Skype meeting and make some decisions which they conveyed to Dr Tulloch at the meeting on 13 January. Dr Tulloch was told that:

- (a) She no longer was required to undertake any office management duties and that those duties would be undertaken by Mr Every from the Havelock North office;
- (b) She needed to win \$8,000 worth of water management work by the end of February 2012 to secure her ongoing employment.

[28] Both parties agree that Mr Wylie told Dr Tulloch that he would not have time to assist her in obtaining any water management work because he was already fully engaged

in the business. However, Mr Wylie says there would have been others available to talk to Dr Tulloch over that time.

### **Emails of 23 January 2012**

[28] On 23 January 2012 Dr Tulloch sent an email update to Mr Wylie about her progress to date. She listed the clients and potential clients she had been in contact with and concluded that RDC was *starting to gain a little traction – it's a matter of firstly, the timing of the work coming online ...*

[29] Mr Wylie responded *Thanks. Please keep Matt, Guy and Rachel informed.*

### **Letter of 24 January**

[30] On 24 January 2012, Mr Every wrote to Dr Tulloch with a proposal to disestablish her role as water management scientist. He wrote:

*You are aware that during recent reviews it has become apparent that your role is not generating the income required to sustain position costs associated with your role Water Management Scientist. Further, we are concerned that there is no significant indication of any change to this trend going forward.*

*RDCL introduced your role as water management scientist on the basis of being able to provide further specialist consultancy in this field to complement our core activities. In introducing the role of a highly qualified consultant water management scientist it was our expectation that the role would generate both work and billings to a profitable level, achieving at minimum, an income level that covers associated salary and overhead costs and most certainly within a reasonable time from role introduction.*

*In reviewing all billing records since your commencement in July 2011, it is noted that the continuing shortfalls in income generation are significant to the point where we deem them unsustainable. With no indication of any change to this concerning revenue-generating pattern I now regrettably advise that we are proposing to disestablish your role as Water Management Scientist.*

[31] The letter stated that it was the commencement of a consultation process with Dr Tulloch about its proposal to disestablish her role and, unless an alternative timeframe was agreed on, final decisions would be made on Wednesday, 1 February 2012. Dr Tulloch's feedback on the proposal was asked for by Tuesday, 31 January 2012. She was offered further time if she needed it. Mr Every also wrote:

*Should this restructuring proposal be implemented in its current form (i.e. your role be disestablished), we will then explore mutually agreeable alternative options to redundancy such that may exist.*

**Letter of 30 January 2012**

[32] On 30 January 2012, Dr Tulloch responded by letter. Her letter reminded RDC she had been instructed to embark upon a six week period of attempting to gain water management work to the value of \$8,000 by the end of February. Dr Tulloch reminded RDC that interest in a water management service had been expressed by Solid Energy and Environment Canterbury but that key personnel at other potential clients were on annual leave until early February.

[33] She pointed out that new business start ups do not typically generate significant returns within the first one to two years. She pointed out that she had not been made party to *early business strategies, cash-flow projections and resourcing arrangements.*

[34] Dr Tulloch also wrote that:

*Certainly, on a personal level the on-going absence of expected projects has been both personally frustrating and professionally damaging.*

*I have been asked for my recommendation; this would be to make use of the start-up funding which will already have been earmarked for this project, and "hold the line", at least until the end of February, if not longer. Other possibilities would be making better use of my proven team and project management experience, to enhance communication within the company and with its clients. This would also facilitate smoother running of projects and delivery of value added outcomes for all concerned, benefiting the company's reputation for excellence.*

*I look forward to the opportunity to discuss my response and recommendations with you.*

[35] On 1 February 2012, Mr Every responded to Dr Tulloch's letter advising her that RDCL had decided to proceed with the proposal to disestablish her role. She was asked to comment on any mutually acceptable alternatives to redundancy. However, Mr Every said that no other vacancies had been identified by RDCL. The reasons given for the redundancy were:

*As a small business, it is important for RDCL to ensure that all work streams remain profitable to enable continuity of operations. Whilst we recognise that it takes time to achieve targeted billings and that fluctuations in project work across all work streams can and do occur, RDCL is not able to sustain significant shortfalls in income*

*generation at the levels being requested. I note that you have reported some “opportunity for and interest in this service” being expressed but unfortunately at this time this has not translated into billable work at a level and within the time scale required. I therefore regret to advise that I am unwilling to agree to an extension to the February [sic] before further review.*

*You have further submitted a proposal for RDCL to consider the utilisation of your team and project management experience elsewhere in the business ... Whilst we very much appreciate this offer, we unfortunately do not have any vacancies or funding available at this time to utilise these skills in addition to the existing staff complement in all other areas of work.*

## **Determination**

### **Was the redundancy genuine?**

[36] It is established law that an employer is entitled to make its business more efficient by the introduction of cost saving steps, including reducing the numbers of employees by way of redundancy. The Authority is not able to substitute its own judgment for the employer’s judgment on whether it would have made the employee redundant or not, but must consider the issue objectively<sup>2</sup>.

[37] The \$8,000 of business that Dr Tulloch was instructed to obtain by the end of February 2012 was not based on any accounting or other financial analysis or advice. Mr Wylie said that there was not any *hard science* about the figure. However, it was open to RDC to re-focus its business on the provision of geological services and to decide not to further or for any longer pursue opportunities in water management. I accept that was a change in the business strategic direction so that there was no further need for Dr Tulloch’s water management skills and expertise. It was also open to RDC to decided that there was not sufficient office management work for a separate position of office manager because Mr Every could do the work. The redundancy was substantively genuine.

### **Was the way the decision was made reasonable in all the circumstances? Were there breaches of RDC’s duty of good faith?**

[38] Even if a redundancy is decided upon for genuine business reasons if the justification for the redundancy is challenged by an employee the employer must be able to prove to the Authority that the decision made and how it was reached was what a fair and

---

<sup>2</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA)

reasonable employer could have done in the circumstances that existed at the time<sup>3</sup>. In applying the tests under s.103A of the Employment Relations Act 2000 (the Act), Chief Judge Colgan of the Employment Court has recently explained that:

*[54] It will be insufficient under section 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to enquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*<sup>4</sup>

[39] Genuine consultation with an affected employee is required.

[40] At the investigation meeting RDC asserted that Dr Tulloch should have known that she was required to generate business as soon as possible and that she should have done more to create water management work. However, there is no evidence that Dr Tulloch was ever expressly told, prior to 13 January 2012, when expected opportunities from existing clients fell through that she was expected to have already generated enough on going water management work to fund her employment.

[41] Mr Wylie says that when Dr Tulloch was employed there was no timeframe in mind for making her position profitable. Certainly none was conveyed to Dr Tulloch at that time.

[42] Although in Mr Every's 1 February 2012 letter confirming the redundancy he refers to Dr Tulloch's billable work not being *at a level and within the time scale required* no level of earnings or required time scale were ever communicated to Dr Tulloch before 13 January 2012. And then on 24 January 2012 the end of February time scale was overridden by the redundancy proposal.

[43] The evidence suggests that until late in 2011 or perhaps early 2012 no detailed consideration or strategy development had been completed within RDC about gaining water management work if the expected work did not eventuate from the Bathurst or Filipino clients. RDC's expectations of Dr Tulloch were either not fully formed or if they were they were not adequately communicated to her.

---

<sup>3</sup> Section 103A Employment Relations Act 2000.

<sup>4</sup> *Michael Rittson-Thomas trading as Totara Hills Farm v Davidson* [2013] NZEmpC 39

[44] There was no suggestion at the time the decision to make the position redundant was because of any dissatisfaction with Dr Tulloch herself or her work. As at 28 November 2011 Mr Wylie acknowledged that he had not been of as much assistance to Dr Tulloch in gaining water management work as he could have been and started to be specific about how he thought Dr Tulloch should target her work.

[45] However, RDC's position changed significantly over the course of a night. On 23 January 2012, when Dr Tulloch sent her interim report about her efforts to date to secure water work Mr Wylie responded simply that she should keep other RDC employees informed. But by 24 January 2012 RDC had decided to make the water management scientist position redundant.

[46] Mr Wylie says that he decided on the basis of Dr Tulloch's 23 January email that there was no realistic prospect of her achieving \$8,000 of work by the end of February and that her position was therefore redundant to RDC's ongoing needs. RDC simply decided that although it had hoped to get into water management work because it had not done so by January 2012 there was no foreseeable likelihood of so doing and so the role was surplus to its ongoing needs.

[47] A fair and reasonable employer would either not have proposed the end of February target for Dr Tulloch to reach or would, once it had done so, allowed her the opportunity to gain sufficient water management work within that time without making her position redundant earlier.

[48] I consider that the procedural failings of RDC were more than minor and resulted in Dr Tulloch being treated unfairly.

[49] Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Both parties have a duty to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

[50] In addition to a general mutual duty of good faith set out in s.4 of the Act s.4(1A)(c) imposes a special duty of good faith on an employer when there is a proposed redundancy. It requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

- (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before a decision is made*

[51] My Wylie says that RDC knew by October 2011 that the Bathurst work had been delayed and that the clients in the Philippines stopped the two copper mining projects. Mr Wylie knew then that no water management work would be coming RDC's way from the clients it had hoped would provide that work for Dr Tulloch. However, until 13 January RDC did not discuss the implications of that on Dr Tulloch's future employment with her.

[52] Mr Wylie says that his 9 November 2011 newsletter to all staff made it clear that RDC was refocusing on its core business and Dr Tulloch should have known that from the restructuring that was going on at the time she returned from leave in November 2011. However, I do not accept that newsletter gave any adequate signal to Dr Tulloch that her role may have been in jeopardy because in the same newsletter also talked about her and her role in water for the company. Also, and more significantly, at RDC's December annual general meeting Mr Wylie said that water was still a focus for the respondent.

[53] At the 13 January 2012 meeting Dr Tulloch asked where the figure of \$8,000 came from and was told simply that the figures did not add up. She asked what those figures were and was told again that the figures did not add up. Dr Tulloch was not given access to information relevant to the continuation of her employment; that is whatever information Mr Wylie and Mr Every took into account in making her position redundant. Nor was Dr Tulloch given any information about why the RDC approach changed between 13 January and 24 January 2012.

[54] RDC breached its duty of good faith under s.41A(c)(i) of the Act to provide Dr Tulloch with information relevant to its decision to discontinue the position of water management scientist.

[55] I have already found that RDC breached the specific duty of good faith it owed to Dr Tulloch to supply her with sufficient relevant information about its decision to make her position redundant. The same facts can also be characterised as a failure by RDC to be adequately communicative with Dr Tulloch. That is

especially about why it so quickly changed its mind about allowing her a six-week period to find water management work of \$8,000 value.

[56] Mr Wylie also says that he is sure that Dr Tulloch understood, and if she did not then she should have, that RDC expected her to generate sufficient water management work so that her role paid its way within a short time. However, I consider that this was never expressly communicated to her prior to 13 January 2012.

**Did RDC adequately consider whether Dr Tulloch could be deployed to other activities?**

[57] Clause A12.3 of Dr Tulloch's employment agreement says:

*In the case of this position becoming redundant to the business of the Company, and the employee not being able to be deployed in other activities within the Company, notice of termination will be given.*

[58] Dr Tulloch submits that a new employee, Kent Jacobson, was appointed in the Havelock North office, around about the time that she was made redundant and that she should have been offered the work he was offered. She says that she had studied many of the same things Mr Jacobson studied for his degree and could have done his role. Also, she was capable of undertaking the data processing work that Mr Jacobson was initially engaged on.

[59] RDC says that Kent Jacobsen has a bachelor's degree in Engineering. He was initially engaged on a fixed-term contract in December 2011 to carry out data-processing work. That work came about after Mr Jacobson approached RDC. However, Mr Jacobsen was employed in early February 2012 to do geotechnical engineering work and is based in Havelock North. RDC disputes that Dr Tulloch has sufficiently similar qualifications to Mr Jacobson to allow her to do the work of a geotechnical engineer and says that at no time did she express a willingness to move from Christchurch for redeployment.

[60] Dr Tulloch made suggestions about what other work she could do for RDC instead of water management work. In addition to asking RDC to utilise her team and project management skills she suggested that she could write a regular newsletter. I consider that RDC did consider those alternatives but did not consider there were other activities within the company that Dr Tulloch could be deployed in. It was entitled to make that decision. It was also entitled to consider that Dr Tulloch

does not have equivalent qualifications to Mr Jacobson that are of use to RDC in the field of geotechnical engineering.

[61] RDC adequately considered the possibility of deploying Dr Tulloch in other activities.

**Was the dismissal on the grounds of redundancy unjustified?**

[62] Although RDC breached its duty of good faith under s.4(1A)(1)(b) of the Act it is not appropriate to consider a separate remedy for the breaches of good faith. Instead, the breaches of good faith contribute to my finding that the decision to make Dr Tulloch redundant, specifically the manner in which the decision was made, was not the action of a fair and reasonable employer in all the circumstances. Therefore, Dr Tulloch is entitled to remedies.

**Was Dr Tulloch unjustifiably disadvantaged in her employment?**

A. *Did the loss of the office administration duties unjustifiably disadvantage Dr Tulloch?*

[63] Clause A.1 of Dr Tulloch's employment agreement is headed *Job Description*. It says that Dr Tulloch must faithfully undertake her duties as detailed in the job description and that the employer may change any of her duties and responsibilities following consultation with her.

[64] My Wylie says that although Dr Tulloch was primarily employed to develop a water business for RDC he spoke to her about assuming the Office Manager title to provide overall co-ordination to the Christchurch team. However, he says in 2011 RDC *experimented* with the office manager title and has not proceeded with it as RDC has very professional and motivated staff and a very flat structure. His view is that RDC does not need an office manager.

[65] On 13 January 2012, without any discussion or consultation, Dr Tulloch was told that her office administration duties would be undertaken in Havelock North by Mr Every. Mr Wylie says that the purpose of that decision was to free Dr Tulloch up to concentrate on gaining water management work. I am satisfied that purpose was not explained to Dr Tulloch at the time. She was not consulted about the change in

her duties and responsibilities which was in breach of clause A.1 of her employment agreement.

[66] A personal grievance of unjustified disadvantage is confined to a situation where one or more conditions of an employee's employment have been affected to the employee's disadvantage because of the employer's unjustified action.

[67] Dr Tulloch was disadvantaged in her employment by the unilateral removal of her office management duties. To that date office management and administration had formed a significant part of Dr Tulloch's work for RDC. The purpose of the change may have been justifiable; however, RDC's lack of consultation about the change in Dr Tulloch's duties was unjustifiable. However, it is not appropriate to consider any remedy for this in addition to remedies for unjustified dismissal considered.

*B. Was Dr Tulloch unjustifiably disadvantaged by the requirement to obtain \$8,000 of work by the end of February or risk losing her job?*

[68] RDC, as Dr Tulloch's employer, was entitled to set a target for her to reach to obtain water management work. However, this requirement was overtaken by the redundancy decision which I have already found to be unjustifiable. It is not necessary to make a separate determination about whether Dr Tulloch was unjustifiably disadvantaged by this requirement.

*C. Was Dr Tulloch unjustifiably disadvantaged by RDC's failure to provide her with work in her field of technical expertise?*

[69] Dr Tulloch was aware when she was engaged that there was no water management work within RDC at the time and that the work was expected to be achieved or developed from existing clients and new clients. RDC did not undertake to provide Dr Tulloch with technical water management work at all costs and within the first six months or so and was not required to do so. The failure of RDC to secure any water management work was unfortunate but is not an unjustifiable action that disadvantaged Dr Tulloch in her employment over and above her unjustifiable dismissal.

[70] A penalty was claimed for an alleged breach of an implied term in Dr Tulloch's contract to provide her with work in her area of technical expertise. That is

based on the same facts as her being unjustifiably disadvantaged by the lack of water work. However, the penalty claim was not made within 12 months of the alleged breach and could not have been imposed even had I found RDC to be in breach.

**Did RDC breach its Employment Relations Act 2000 obligations to provide Dr Tulloch with a written employment agreement and a written job description?**

[71] Dr Tulloch began work on 18 July 2011 was given an individual employment agreement on 10 August 2011. Her role was described as Water Management Scientist. The employment agreement did not contain a job description.

[72] Section 63A(2) of the Act states:

- (2) *The employer must do at least the following things:*
- (a) *provide to the employee a copy of the intended agreement under discussion; and*
  - (b) *advise the employee that he or she is entitled to seek independent advice about the intended agreement; and*
  - (c) *give the employee a reasonable opportunity to seek that advice; and*
  - (d) *consider any issues that the employee raises and respond to them.*

[73] RDC supplied Dr Tulloch with a written employment agreement within four weeks of the start of her employment. There is no requirement for an employer to provide a written agreement before the start of the employment or within a specified period from the start. RDC provided Dr Tulloch with an employment agreement within a reasonable period and did not breach s.63A(2) of the Act.

[74] Mr Moore submits that the failure of RDC to provide Dr Tulloch with a *description of the work to be performed* played a large role in the difficulties experienced in the employment relationship. He suggests that because RDC failed to provide Dr Tulloch with a job description the Authority should impose a penalty on RDC for that failure.

[75] Section 65(2) of the Act states:

- (2) *However, the individual employment agreement—*
- (a) *must include—*
    - (i) *the names of the employee and employer concerned; and*
    - (ii) *a description of the work to be performed by the employee; and ...*

[76] Section 65(4) specifies that an employer who breaches s.65 is liable to a penalty only in an action brought by a Labour Inspector.

[77] Crafting a written job description for Dr Tulloch at an early stage may have meant that RDC would have given earlier and more detailed consideration to its expectations of Dr Tulloch and communicated those to her. It may also have meant that when water management projects from RDC's existing clients failed to materialise it was more quickly obvious to Dr Tulloch, Mr Wylie and Mr Every that Dr Tulloch's water management position was becoming precarious.

[78] However, since the claim for a penalty is not an action brought by a Labour Inspector the Authority does not have jurisdiction to consider the claim for a penalty.

## **Remedies**

### *Wages reimbursement*

[79] Dr Tulloch's employment at RDC was terminated on the basis of redundancy. I have found Dr Tulloch was unjustifiably dismissed based on *how* the decision was made. However, the redundancy was genuine in that RDC had no water management work for her and had no prospect of water management work in the foreseeable future. Consequently no remedy can be awarded for the loss of a job<sup>5</sup>.

[80] However, I consider that RDC should have remained committed to the date of the end of February which would have allowed Dr Tulloch further opportunity to find water management work if that was possible. For that reason I consider that Dr Tulloch should receive reimbursement of wages to the end of February 2012.

### *Compensation*

[81] Dr Tulloch claims \$12,500 compensation for RDC's failure to provide her with work in her primary area of expertise. However, I have found that this failure was not an unjustifiable disadvantage and therefore no remedy can be awarded.

[82] Dr Tulloch also claims \$15,000 compensation for humiliation, loss of dignity and injury to her feelings under s.123(1)(c)(i) of the Act arising out of the redundancy.

---

<sup>5</sup> *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601

[83] Having found that the redundancy was substantially justified for lack of water management work and a genuine change in the company's focus away from water work I cannot take into account any effects on Dr Tulloch for non-economic loss that are attributable to the loss of her role. Dr Tulloch and Mark Walker, her partner, gave evidence about the initial and the on-going effects on Dr Tulloch of the loss of her job. However, I can only consider the distress directly attributable to the way in which the decision was made, which was extremely sudden.

[84] I am aware of other cases in which compensation has been awarded for distress arising out of the manner in which a redundancy decision was made and communicated<sup>6</sup>. Mr Walker says that when Dr Tulloch *lost her job just like that she basically had the snot kicked out of her ... it was an incredibly low point*. In this case I consider \$6,000 compensation to be reasonable in all the circumstances.

#### *Contribution*

[85] Having determined Dr Tulloch has a personal grievance s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly. Dr Tulloch did not engage in any blameworthy conduct, so remedies are not to be reduced on the grounds of contribution.

#### **Costs**

[86] Costs are reserved. As the successful party Dr Tulloch is entitled to a reasonable contribution towards her actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Dr Tulloch has 28 days within which to file a costs memorandum and RDC has 14 days within which to respond.

[87] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs of \$3,500 per investigation meeting day. The parties are therefore invited to identify any factors which

---

<sup>6</sup> *NCR (NZ) Corporation Ltd v Blowes (CA)* [2005] ERNZ 932, [43] –[48]

they say should result in an adjustment to the notional daily tariff. The investigation meeting took one day.

Christine Hickey  
Member of the Employment Relations Authority