

**Attention is drawn to the
order prohibiting publication
of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 19
5401983

BETWEEN ANNE GARRICK
Applicant
AND PAE (NEW ZEALAND) LIMITED
Respondent

Member of Authority: David Appleton
Representatives: Kathryn Dalziel, Counsel for Applicant
Bronwyn Heenan, Counsel for Respondent
Investigation Meeting: 22 and 23 January 2014 at Christchurch
Submissions received: 23 January 2014 from Applicant
23 January 2014 from Respondent
Determination: 5 February 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed and was subject to an unjustified disadvantage in her employment.**
- B. Costs are reserved.**

Prohibition from publication

[1] During the Authority's investigation, notes made by Ms Garrick's counsellor were produced. These contain information of a personal nature, as did the evidence given to the Authority by the counsellor. I prohibit from publication the contents of these notes and of that evidence, save insofar as it has been detailed in this determination.

Employment relationship problem

[2] Ms Garrick raises a personal grievance that she was unjustifiably dismissed by the respondent and that her employment was affected to her disadvantage by an unjustifiable action by the respondent. She also complains that the respondent has breached its obligations to her of trust, confidence and good faith and seeks an inquiry into penalties. Her personal grievances arise out of her dismissal by reason of redundancy which took effect on 3 August 2012.

[3] The respondent resists the personal grievances, denying that Ms Garrick was unjustifiably dismissed or subjected to unjustifiable disadvantage and, further denies that it breached its obligations of trust, confidence and good faith to Ms Garrick.

Brief account of events leading to dismissal

[4] Ms Garrick is an accountant by training and was employed as an accountant by the respondent working for the United States Antarctic Programme (USAP) based in Christchurch. Her employment on the USAP commenced on 12 January 2009 when she was employed in the same role by Raytheon Polar Services (NZ) Limited, which was a contractor to the National Science Foundation (NSF) which runs the USAP.

[5] Around December 2011 Ms Garrick was informed that a new contractor, Lockheed Martin, had been appointed by the NSF to take over the Antarctic Support Contract (ASC) from Raytheon. Lockheed Martin then subcontracted all the USAP Christchurch operations to the respondent. The respondent officially took over the contract on 1 April 2012.

[6] In February 2012 the respondent offered employment to all of the staff formerly employed by Raytheon and all but one of those staff accepted their offers. The position that was left unfilled was administration co-ordinator, formerly held by Ms Hope Rogers. Ms Garrick's evidence is that she offered to take over responsibility for the administration co-ordinator role but was told by her manager, Kerry Chuck, that he would not rush into making a decision. Ms Garrick's evidence is that Ms Rogers' work was absorbed across the staff until a replacement (Ms Tibbotts) was recruited, starting employment on 11 June 2012.

[7] Ms Garrick says that, during April 2012, she and the other staff were inducted into the respondent company, receiving training on its policies and procedures. It is worth mentioning that PAE is a relatively large company in New Zealand (with a \$44m turnover last year and around 400 staff) fulfilling a number of significant contracts in New Zealand, including government contracts, in the areas of facilities management, asset management, building maintenance services, grounds and landscaping services, cleaning of waste services, securities services and other specialist services. This is to be contrasted with Raytheon Polar Services (NZ) Limited, which was a New Zealand subsidiary set up by the US parent company especially to run the Antarctic support contract functions in Christchurch. Therefore, when it was awarded the USAP subcontract the respondent already had a presence in New Zealand, with its head office based in Wellington.

[8] In around January 2012, after the respondent had been awarded the subcontract, the CEO of the respondent, Philip Orchard, attended the Christchurch office with the then PAE transition manager, Mr Parkinson, to meet all of the staff. Ms Garrick says that the meeting was a formal one and included a power point presentation about the company, their strategy and plans.

[9] Ms Garrick says that, during the meeting and presentation, a staff member stated that they believed that *PAE had not done well in telling us they were advertising our jobs prior to letting us know about our jobs*. Ms Garrick says that Mr Orchard apologised for that and that both Mr Orchard and Mr Parkinson stated that PAE was not going to make any changes in staff over the next 12 to 18 months. This evidence was supported by Ms Rogers, who gave evidence to the Authority on this point. Ms Garrick says that all staff left feeling reassured and happy that they had their jobs for the next 18 months. Mr Orchard denies that he said this, saying he would never have made guarantees about jobs in a brand new contract situation, and he did not recall Mr Parkinson saying this. On balance I believe that Mr Parkinson, who did not give evidence, did make the statement attributed to him.

[10] Ms Garrick signed an employment agreement with the respondent on 22 February 2012. This contained a position description that set out Ms Garrick's role.

[11] Ms Garrick says that, in the first few weeks after PAE took over the contract, she worked closely with the respondent's Chief Financial Officer and head

accountant, Mr Yi, and with IT personnel who visited from Wellington to learn about the financial and IT systems that had been operated in Christchurch under Raytheon. Ms Garrick said that the impression she had at that time was that she and the Wellington based staff were all working together to integrate the Christchurch operations into the Wellington systems so as to allow her to do her job in Christchurch in alignment with the respondent's systems.

[12] Ms Garrick says that, between 1 April and 11 June 2012, aspects of her role were being transferred away from her to be done by the Wellington finance function. She said she had not been too worried about this though because she remembered the statement made by Mr Parkinson and Mr Orchard about there being no changes to jobs for at least 12 months and also said that Mr Yi had told her that there was going to be plenty of work for her to do.

[13] Ms Garrick's evidence is that, on Monday 11 June 2012, Ms Tibbotts, hired to replace Ms Rogers in the position of administration coordinator, started work in the Christchurch office. Ms Garrick's evidence is that this had been a complete surprise to her and that she had only found out the previous Friday when Ms Tibbotts had come in to sign her employment agreement. This timing is disputed by the respondent, although it is conceded that Ms Tibbotts did start work on 11 June, and they do not challenge Ms Garrick's evidence that she did not know about the appointment prior to the previous Friday.

[14] The date of 11 June 2012 is significant because, around 9.30am the same day, Mr Chuck came into Ms Garrick's office and told her to come into his office for a meeting. She says that she was not told that she could have representation present at this meeting but that, during it, Mr Chuck told her that her role was under consideration for disestablishment and that *it wasn't good*.

[15] Ms Garrick's evidence is that she asked Mr Chuck why the company could not wait until the busy season (the quiet season having started around May) and that, if it did, the respondent would have a better picture of her workload during the busy season.

[16] Ms Garrick was told to go home and was told that there would be a formal meeting later that afternoon. Ms Garrick says that she was very upset and distressed and rang Mr Chuck from home and asked for the formal meeting to be delayed until

the following day. Accordingly, on 12 June Ms Garrick attended a formal meeting with Mr Chuck and Mr Ambler, the terminal operations manager, who took notes on behalf of the respondent. Ms Garrick had the IT supervisor with her as a support person.

[17] At the meeting Mr Chuck gave Ms Garrick a copy of a memorandum, which had been written by Mr Chuck and addressed to Mr Orchard. The memorandum was dated 12 June 2012 and recommended the disestablishment of the accountant's position. The Authority saw a copy of the same memorandum dated 28 May 2012. Mr Chuck says that he re-dated the memorandum 12 June as it was the date when he gave it to Ms Garrick.

[18] The four page memorandum set out the background to the Antarctic Support Contract being awarded by the NSF to Lockheed Martin, and referred to the fact that it had been determined that the organisational structure of the Christchurch office would initially remain the same because of the significant amount of uncertainty regarding how PAE would implement the systems and processes in Christchurch. The memorandum stated that individual employment agreements and position descriptions had been written based on the Raytheon model and that it had been difficult to determine if the respondent's systems and processes could be utilised and the potential effect that these could have on staff and the general functions of the Christchurch operation. It was for this reason that employment had been offered to all of the incumbent staff formerly employed by Raytheon.

[19] The memorandum described how PAE New Zealand management had travelled to Christchurch on numerous occasions to provide induction, training, pre-employment testing and detailed discussions with staff on systems and processes. It stated that the departments most affected were procurement, information technology and finance. It stated that the respondent had incorporated the information and data supplied by the Christchurch office into its own software programme and that, whilst training and adjustments were ongoing, it was generally accepted that the procurement and finance programme were functional in Christchurch.

[20] The memorandum then stated the following:

Review of position

As the staff was introduced to the new systems it highlighted that a number of tasks previously completed in Christchurch would be transferred to the main office in Wellington. As a result of the transfer I have undertaken a review of the Procurement and Accountant PD's. While the majority of functions performed by the procurement staff remain the same, the Accountant's functions are materially different.

The Accountant's PD is primarily based on the business model that was used by RPSNZ [Raytheon Polar Services (NZ) Limited]. It identifies a number of processes that will either not be used by Lockheed Martin/PAE NZ or tasks that will be the responsibility of the corporate office in Wellington.

When considering each bullet point in the Accountant's PD, it seems that the majority of the tasks and responsibilities are no longer required as part of this role. The breakdown of these tasks and responsibilities are listed below and form the basis of my review of the Accountants' role. My comments are provided as sub bullets:

[21] There then followed a replication of the tasks and responsibilities of Ms Garrick's role derived from her position description, with comments against several of them (but not all). I set out below a number of these, as I believe that the language used in this memorandum is indicative of predetermination by the respondent and that it had decided to carry out changes to Ms Garrick's role prior to having commenced the consultation. I refer, for example, to the following, which is not a complete list:

Key Tasks and Responsibilities:

- *Be the key Financial Manager for the NSF.*
 - *This task is performed by a Budget Analyst in Denver.*
- *Provide overall Finance leadership and direction on behalf of PAE NZ.*
 - *Leadership will be provided by the PAE NZ financial staff in Wellington.*
- *Assist the Contracts Operations Manager (COM) in ensuring overall contract value for money, ensure contract compliance, and service outcomes to meet the Statement of Work.*
 - *Support will be provided from PAE NZ staff in Wellington.*
- *Direct contact with NSF representatives and staff.*
 - *The Accountant does not have direct contact with the National Science Foundation staff on budget matters under the business model of LM/PAE NZ. Financial matters are discussed between a Subcontract Administrator (SCA) and PAE NZ. Any discussion with*

NSF on the Christchurch budget will be the responsibility of Lockheed Martin.

- *Administer all Finance activities included within the contract. Assist COM to prepare an annual NSF Contract budget.*
 - *It is unknown at this time what role the Accountant will have in the preparation of future budgets but current budgeting is being undertaken by PAE staff in Wellington.*
- *Prepare required Financial Reports on contract activities and performance for NSF, LMC, and PAE NZ National Office.*
 - *Reports are generated out of the PAE NZ programme in Wellington.*
- *Responsible for the development and maintenance of effective Health, Safety Environmental and Quality Assurance systems.*
 - *The Health & Safety Portfolio is an ancillary position that is held by another person.*
- *Ensure effective Health, Safety, Environmental and Quality outcomes are produced, audit inspections are undertaken and records are maintained.*
 - *Responsibility of the on-site Quality Management Lead, H&S Officer and the corporate office in Wellington.*

[22] The memorandum went on to state:

Summary

As previously stated the PD for the Accountant position was based on the business model of RPSNZ. Now that PAE NZ has implemented the procurement and finance software program the role description is no longer accurate.

Financial management of the ASC in New Zealand is the responsibility of the COM, through the Chief Executive Officer, to the LM SCA. Monitoring and reporting of actual versus planned spending will be the responsibility of the finance staff in Wellington.

In addition another core function of the accountant was to manage a \$1 million bank account but a process change has resulted in the negating a requirement to have a bank account in Christchurch. Issuance of travel funds to deploying participants is another task that will not be carried out in Christchurch under the Lockheed Martin business model.

Conclusion

Based on the above analysis I have provisionally determined that the current position of Accountant no longer fits the new operating model, and there appears to be little justification for such a position within the ongoing Christchurch operation.

Accordingly I propose to consult with the current incumbent on a proposed intention to disestablish the role. Subsequent to this consultation I propose to make a final decision as to whether my proposal should stand as is, should be modified, or should be abandoned and take the appropriate action to implement my decision.

Your approval to pursue this course of action is hereby sought.

*Kerry Chuck
Contract Operations Manager
NSF ASC Christchurch Operation
28 May 2012*

[23] Ms Garrick was asked to provide feedback on the memorandum by Friday 15 June 2012.

[24] Ms Garrick says that she was very shocked at the contents of the memorandum and only realised it was not addressed to her outside of the meeting. She says that she worked out from the contents of the memorandum that 16 parts of her role had already been moved to Wellington or would be done by an administrator. She also said that she also worked out that there were another five parts to her position under consideration to be moved. She said that this had not been spelled out to her in the meeting though.

[25] Ms Garrick and Mr Chuck then had another two meetings which Ms Garrick described as *off the record*. Ms Garrick says that, during one of these meetings, she asked a number of questions of Mr Chuck. She says he told her that the review of her role was not to do with her performance, that Mr Chuck did not give a reason why the respondent could not wait till the busier season, that she could speak to Mr Orchard if she wished, and that the review was *not to do with money*.

[26] Ms Garrick says that she stated to Mr Chuck that, before she could respond to the proposal, she needed something official and addressed to her personally. Ms Garrick says that she was later approached by Mr Chuck and asked to provide a response by 15 June, but that she did not provide a response by that date because she had still not received a formal proposal addressed to her. Mr Chuck therefore extended the time in which to respond to 22 June.

[27] Ms Garrick says that she had also raised concerns about a breach of confidentiality, given that she had asked that no one be told about her proposed redundancy but that she had subsequently heard that others had been told. She said

that Mr Chuck said he had informed the travel supervisor because he trusted him. It appears from the evidence that the possibility of Ms Garrick's redundancy had, however, leaked to at least one other member of staff who did not need to know of it.

[28] Ms Garrick states that, by 22 June, she still had not provided her written response because she had still not received a document addressed to her personally, and that Mr Ambler spoke to her in a very forceful and aggressive tone demanding it. She said that she explained to him that she had still not received the written proposal addressed to her. Ms Garrick says that she then received a memorandum from Mr Chuck on 23 June 2012 addressed to her. This stated:

Subject: Proposed Disestablishment of Christchurch Accountant Position

Introduction

A review of the accounting functions for the PAE NZ NSF ASC operation has been undertaken. As a result of that review it is proposed that the Accountant position in Christchurch be disestablished. The proposal is now subject to consultation with you, as the current incumbent in the position, as described below.

Consultant

In commencing consultation on the proposal I met with you on 11/06/12 and provided you with a copy of my memorandum, dated 11 June 2012, [sic] to the PAE Chief Executive detailing the proposal and the reasons supporting it.

At the meeting I asked you to take away the memorandum and consider whether any of the duties of your position had been missed from the review and also whether there were any items in the review that you wished to comment upon.

I requested that you provide feedback to me by close of business 22/06/12. Subsequently, I have received from you an email dated 22 June 2012 in which you state:

"I am awaiting something addressed to me in writing with what exactly you require, and what the process is, as we both agreed last week.

As all I have at the moment is a memo from you to Philip Orchard.

As soon as I get the request in writing from you, I will work on it straight away. I will be seeking professional advice which may take time."

I believe that what was required was made clear to you at the meeting but, for the avoidance of doubt, what I am seeing from you as part of the consultation process is as follows:

1. *Feedback on whether any of the duties of your position have been missed from the review and if so what they are.*
2. *Whether there are any other elements of the review that you wish to comment on. Such comments may include, but are not limited to, agreement/disagreement with the description of the duties of the current role, agreement/disagreement of the impact of the transfer of the duties as described, and any other matter you consider relevant.*

The feedback can be provided in either written or verbal form.

1. *If you wish to provide the feedback in writing form I would like to receive that feedback by Sunday, 1 July 2012.*
2. *If you wish to provide the feedback verbally I will be able to meet with you on Wednesday 4 July 2012.*

Next steps

Once I have received your feedback I will review my proposal and make my final decision on whether to disestablish the position or not. I will then advise you of my decision.

In the event that a decision is made to disestablish the position I will work with you to see what options, if any, that are for redeployment within the wider PAE NZ business. In the event that redeployment is not possible then reasonable support will be provided to assist with the search for a position outside PAE NZ.

*Kerry Chuck
PAE NSF ASC Christchurch Contract Operations Manager*

[29] Ms Garrick says that, after receiving that memorandum, she then asked Mr Chuck if she could go on a course, and that Mr Chuck asked for the date of the course. She said she told him the date and that she needed to book quickly to secure a place, offering to book and pay for herself. She says that she received no response, which was completely out of character for Mr Chuck. Ms Garrick says that this made her feel that the decision had already been made to make her redundant.

[30] Mr Chuck's evidence was that he chose not to approve the training at the time it was requested as he was unsure of the outcome of the proposal to make Ms Garrick redundant and he considered that there would be sufficient time to approve the training if his decision was that the proposal was not going to be implemented.

[31] Ms Garrick prepared a written response to the memorandum from Mr Chuck on or around 5 July 2012, in which she stated that she believed she had been singled out, and put in a no-win situation. She said that she had been asked to justify her position without a full idea of what she had to do and that the tasking has not been fully established.

[32] Ms Garrick submitted in her written response that her expertise and training was still required and that her skill as a trained accountant *has always been invaluable in the program and will continue to be*. She made reference to Ms Tibbotts starting on the same day that she had been told her position could be disestablished. Ms Garrick stated that she believed that Mr Chuck was making a judgement too early on the role but that it seemed there was nothing she could say to change his mind. She said she was not willing to put herself through the stress of fighting for her position when it would be in vain. She hoped that Mr Chuck would keep her position open until the end of the current operational season and re-evaluate it at that time. She concluded her short written statement by expressing her disappointment that several members of staff seemed to know already about her situation, which made it even more difficult than it already was.

[33] A meeting took place on Monday 9 July 2012 in which Mr Chuck asked Ms Tibbotts to sit in as a witness. At the meeting Mr Chuck gave Ms Garrick a letter which stated that he had concluded that his proposal to disestablish the accountant's role was sound and that he had decided that the accountant's position would be disestablished with effect from Friday 3 August 2012. The letter stated that the company had looked for alternative employment for Ms Garrick but that there were no vacancies for an accountant in the organisation. The letter concluded by offering assistance in updating Ms Garrick's CV and it thanked her for her contribution to PAE and to Raytheon.

[34] Ms Garrick's evidence is that, after the meeting, Ms Tibbotts was very upset in front of the other staff and said multiple times that she had no idea, when she took on the role, that she was going to take over Ms Garrick's work. Ms Tibbotts' evidence was that she had never said this.

[35] Ms Garrick says that Ms Tibbotts was shocked and upset and said that this was not the position she had applied for and told Ms Garrick that she had been informed by Mr Chuck on the day that she started that she would be taking on Ms Garrick's

work. Ms Garrick says that those comments confirmed to her that the redundancy had been decided well before she had been given notice of the situation. Ms Tibbotts' evidence was that she had been told by Mr Chuck on the day she started that she may have to take on aspects of Ms Garrick's role if her role was disestablished, but that she (Ms Tibbotts) had said that she did not mind. She was not a trained accountant and was not doing any significant part of Ms Garrick's role. I accept that evidence of Ms Tibbotts.

[36] A personal grievance was raised on behalf of Ms Garrick by way of a letter dated 2 October 2012.

The issues

[37] The following issues need to be determined:

- a. Whether Ms Garrick's dismissal was justified;
- b. Whether she suffered an unjustified disadvantage in her employment;
and
- c. Whether a penalty should be imposed upon the respondent.

[38] In deciding whether the dismissal of Ms Garrick by reason of redundancy was justified, it is necessary to consider the following issues:

- (a) Whether there was a genuine reason to disestablish Ms Garrick's role;
- (b) Whether the requirements of s.4(1A) of the Employment Relations Act 2000 (the Act) and s.103A of the Act have been complied with.

The law

[39] Section 4(1A) of the Act provides as follows:

- (1A) *The duty of good faith in subsection (1) –*
 - (a) *is wider in scope than the implied mutual obligations of trust and confident; and*
 - (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

- (c) *within limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
- (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[40] Section 103A of the Act provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because*

of defects in the process followed by the employer if the defects were –

(a) *minor; and*

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

Was the redundancy genuine?

[41] Counsel for Ms Garrick submits that Ms Garrick was dismissed because, for some reason, her face did not fit the PAE model. This submission is based upon evidence given by Mr Orchard, in which he said that, when PAE takes over contracts, it typically assesses the existing staff if inherits from the previous contractor, deciding which ones they wished to retain. Ms Dalziel's submission is also based upon Ms Garrick's feeling that she had been *singled out* when she was told that her job could be restructured.

[42] Having heard evidence from Mr Orchard and Mr Chuck, I do not find that Ms Garrick was dismissed because of any concerns that PAE had with Ms Garrick on a personal or professional level. I make this finding primarily on the basis that Mr Orchard, as the CEO of the New Zealand company, did not know Ms Garrick and also because Mr Chuck had known and worked with Ms Garrick for at least the preceding 3½ years without any apparent difficulties. Mr Orchard's evidence was that he leaves hiring and firing decisions to the managers in charge of each business unit and that this was the case in respect of the Christchurch ASC.

[43] It is not a surprise to me that Ms Garrick felt that she could have been singled out for personal reasons given the manner in which her role was dismantled prior to her redundancy (and I say more about this below), but I did not hear any cogent evidence to persuade me that she was indeed singled out for any personal reasons.

[44] No evidence was heard from Mr Yi and it emerged during evidence from Mr Chuck and Ms Garrick that it was likely to have been Mr Yi's decision to take away from Ms Garrick several aspects of her role but, in the absence of evidence from Ms Garrick that Mr Yi had behaved towards her in any unprofessional manner, I cannot draw an inference that his decisions were based on anything other than ones involving the structure of the finance operation rather than Ms Garrick personally.

[45] In conclusion, therefore, I do not believe that Ms Garrick was personally targeted.

[46] However, I do have difficulty in concluding positively that there were genuine reasons for disestablishing Ms Garrick's role in light of the fact that no evidence was given by the respondent as to why her role was effectively dismantled task-by-task between 1 April 2012 and the end of May 2012 without her being given any opportunity to comment upon that process, either prior to it commencing, during the process, or afterwards. Mr Chuck's evidence was that he believed that 80% of Ms Garrick's role had either ceased to be carried out at all or, in the most part, had been transferred to Wellington by the time he wrote his memorandum to Mr Orchard dated 28 May 2012.

[47] Mr Orchard's evidence was that it was not his decision to transfer aspects of Ms Garrick's role to Wellington; I accept that evidence. Mr Chuck's evidence was that it was not his decision to do so either. I accept his evidence as well. It would appear that the piecemeal dismantling of Ms Garrick's role was carried out by Mr Yi.

[48] It is now well known that the leading decision on redundancies since the enactment of s.103A of the Act, *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, is not to be interpreted to endorse a proposition that an employer can simply say that there was a genuine business reason for a redundancy and that the Authority cannot examine the merits of that assertion (as has been explained by the Chief Judge in *Rittson-Thomas t/a Totara Hills Farms v. Davidson* [2013] NZEmpC 39).

[49] In making its inquiry into the merits of the assertion, the Authority can expect evidence to be adduced by the respondent to prove the fairness and reasonableness of the decision that was taken. However, no evidence whatsoever has been adduced by the respondent to explain on what basis each element of Ms Garrick's role was absorbed into the Wellington finance operation, other than the overriding explanation of *efficiency*. Mr Chuck was unable to explain why each element had been absorbed into the Wellington function and, indeed, his evidence was that he did not speak to Mr Yi about this gradual *trickling away* of Ms Garrick's role as he put it. He garnered the information that her role was being trickled away by talking to Ms Garrick after each visit by Mr Yi and the head of IT to the Christchurch office.

[50] In the absence of cogent evidence about the rationale behind the decision to remove each aspect of Ms Garrick's role, as set out in the 28 May memorandum, I am unable to conclude with any satisfaction that those actions were justified. It is perfectly conceivable that Ms Garrick's role could have been retained and that she could have worked within the PAE systems with the Wellington operation in a way that improved efficiency.

[51] Given that it was the dismantling of Ms Garrick's role over a period of two months that directly led Mr Chuck to propose the disestablishment of it, I am unable to conclude that there were justified reasons for that disestablishment. In conclusion, I must therefore find that I am not satisfied on the evidence put before the Authority that the reason for Ms Garrick's role being disestablished was fair and reasonable in all the circumstances.

Procedural fairness

[52] Just as Mr Chuck did not know the specific reason behind the decisions over time to remove aspects of Ms Garrick's role to Wellington, so that by 28 May 80% of it had been removed or ceased, nor did Ms Garrick have that understanding. Even a cursory glance at the memorandum that was given to Ms Garrick dated 12 June 2012 shows that most of her functions had already been removed by the time the consultation started. Her evidence was that she had to read the memorandum carefully and from that inferred that 16 of her functions had already gone and that another five were under consideration. This was not information that Mr Chuck, or anyone else, gave her directly.

[53] Ms Garrick was, of course, aware between 1 April 2012 and 11 June 2012 that aspects of her role were being absorbed into the Wellington function but she said that she was not concerned about this because Mr Yi had told her that there would be plenty more work for her to do. She, understandably, took this at face value. The respondent was introducing new systems and integrating the Christchurch operations' existing roles and functions into those new systems and so Ms Garrick could not possibly have been expected to know what the respondent's plans in respect of her role were. She was also mindful of the statement made during the presentation meeting in January 2012 that there would be no changes to jobs within 12 to 18 months. It therefore came as a shock to Ms Garrick when she was told by Mr Chuck on 11 June 2012 that her role could be disestablished.

[54] Mr Chuck's evidence was that, if only Ms Garrick had made representations to him during the consultation process that these transferred functions could be done by her in Christchurch, he would have explored that proposal further. However, during his evidence under cross-examination, Mr Chuck conceded that he had no control over the taking away of Ms Garrick's functions by the Wellington finance operation and so it is unlikely that he would have had any control over clawing them back.

[55] In any event, it is to my mind disingenuous to assert that Ms Garrick should have argued that Wellington should effectively give her back her functions to save her job when the memorandum text given to her by Mr Chuck stated clearly that the majority of those functions had already either been transferred to Wellington or had been discontinued. If there had been any possibility of those functions somehow being returned to Ms Garrick, that should have been made completely clear to Ms Garrick so that she would have been able to argue for such a move.

[56] Furthermore, in order for her arguments to have been in any way effective, Ms Garrick would have had to have been given sufficient details of the reasons why each function had been transferred to the Wellington finance operation. No such information was given to her and, it seems, Mr Chuck did not know it in any event.

[57] Overall, this process of consultation was fundamentally flawed as Ms Garrick's job had already effectively disappeared before the consultation process with her began.

[58] This is not to say that I believe Mr Chuck entered into the consultation process in bad faith. He had never conducted a redundancy process before and he relied on advice given to him by Mr Orchard. Mr Orchard's evidence was that he had been involved in many restructurings and that he had 35 years' experience. There is no doubt that Mr Orchard has extensive experience of restructuring. However, it would appear that the taking over of the ASC presented a unique situation for the respondent, in the sense that it involved more complex processes and functions than PAE normally dealt with.

[59] However, despite this being a new situation for the respondent, it does not excuse it complying with its fundamental obligations under the Act. Section 4(1A) of the Act makes clear that the duty of good faith 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 one or more of its employees to provide to that employee access to information, relevant to the continuation of the employee's employment about the decision and an opportunity to comment on the information to the employer before the decision is made. No information was given to Ms Garrick relating to the gradual dismantling of her role. She was presented with a fait accompli and there was nothing, in my opinion, she could realistically have done in those circumstances which could have enabled her to give effective feedback which would have had any chance to save her job.

[60] In summary, the process followed was not one which a fair and reasonable employer could have followed in all the circumstances at the time and Ms Garrick's dismissal was unjustified.

Did Ms Garrick suffer an unjustified disadvantage in her employment?

[61] Ms Garrick complains about other aspects of the process as follows:

- (a) She was given an oral notice to attend a meeting without any advice about legal representation;
- (b) She met resistance when she asked for more information in writing;
- (c) Two meetings took place in which she was not afforded the opportunity to have a witness or support person present;
- (d) Mr Chuck told Ms Garrick that he was also finding the situation difficult and stressful;
- (e) No notes were taken relating to the meetings despite a note taker being appointed;
- (f) Ms Garrick was subjected to bullying and aggressive behaviour by another manager as part of the process;
- (g) Her suggestion that the company wait until the peak season before a decision was made was not taken into account;
- (h) No real assessment was made of other roles within which Ms Garrick could have been redeployed;

- (i) There was a breach of confidentiality by the respondent; and
- (j) Ms Garrick had to repeatedly chase Mr Chuck for a reference.

[62] I shall address each of these points as follows.

Notice of the meeting with no advice about legal representation

[63] Ms Garrick was told on 11 June 2012 in a meeting of which she had no notice that her role was under consideration for disestablishment and *it wasn't good*. She was told that there was to be a formal meeting later that afternoon. She says that she cannot remember Mr Chuck telling her that she could have representation or support.

[64] I do not believe that there was any breach of process by Mr Chuck giving Ms Garrick an oral heads up that there was to be a meeting in which the possible disestablishment of her role was to be discussed. There has to be communication of the initial formal meeting in some way and an oral communication of a later formal meeting does not constitute a breach of this process.

[65] On balance, I believe that Mr Chuck did not tell Ms Garrick that she could have a support person or representative at the meeting. However, because Ms Garrick's husband advised her of that right, she was able to bring one along to the formal meeting. I do not believe that Ms Garrick suffered a disadvantage in her employment as a result of this error therefore.

[66] I would also comment that it is unfortunate that there was no written notice of the formal meeting. If there had been, it may have enabled Mr Chuck to think more carefully about the procedural requirements of the meeting and have enabled him to make clear to Ms Garrick that she was entitled to have a support person or legal representative present.

Request for more information

[67] This complaint primarily relates to Ms Garrick asking for a written document to be addressed specifically to her, setting out what feedback was expected of her, given that she had been provided with a copy of a memorandum addressed to Mr Orchard. Whilst Mr Chuck says that he told Ms Garrick exactly what feedback he needed from her, she was entitled to request confirmation of that feedback in writing, especially when she was not clear what was expected of her. She was undergoing a

stressful process in which she had been told that she could lose her job and it is not appropriate for an employer to expect an employee to absorb everything that they are told orally under such circumstances. I am particularly mindful that the respondent is a large and sophisticated organisation with plentiful resources, and that it would have not been at all onerous for a written communication to have been provided at the start of the process setting out the proposal and detailing what feedback was being sought.

[68] A personal memorandum was eventually given to Ms Garrick on 23 June 2012. It is not clear why it took so long for this memorandum to be given to her, but I have little doubt from Ms Garrick's evidence that the delay in doing so would have exacerbated her anxiety. I am satisfied that this delay caused a disadvantage in Ms Garrick's employment, and that the delay was unjustified in all the circumstances.

Meeting without witnesses or support

[69] There was a fundamental difference in evidence as to whether Ms Garrick requested the *off-the-record* meetings (as Ms Garrick calls them) or Mr Chuck did, who said they were not off the record. I am simply unable to decide who called them, but whether it was Ms Garrick or Mr Chuck, given that they discussed important aspects of the consultation process, it is not appropriate for the meetings to have been held with no support person present and no notes of those meetings having been taken. However, no valid personal grievance appears to have been raised by Ms Garrick about these meetings.

Lack of notes of the meetings

[70] Mr Chuck was unable to say why notes taken by the management note taker (Mr Ambler) were not provided either to him or to Ms Garrick. Clearly, they should have been and this is a procedural flaw. Whilst it might be tempting to view this as a minor flaw that did not result in unfairness, I would disagree with that characterisation as the meeting at which Mr Ambler was present was a formal meeting to discuss a possibility of the disestablishment of Ms Garrick's role and it would be reasonable for Ms Garrick to expect proper notes to be taken of that formal meeting and a copy provided to her. Such a flaw did cause a disadvantage in Ms Garrick's employment, and was not justified in all the circumstances.

Aggressive behaviour by a manager

[71] Ms Garrick alleges that Mr Ambler visited her office, demanding her response to the memorandum that had been given to her, using a very forceful tone resulting in her feeling very distressed and targeted. She said she felt intimidated by the behaviour and bullied and that Mr Ambler was *quite aggressive* and she felt that he wanted to rush through the process.

[72] The respondent did not call Mr Ambler to rebut this evidence and no other respondent witness was in a position to do so. On balance, therefore, I find that this was truthful testimony from Ms Garrick, who presented herself as a very credible witness in general. However, it appears that this issue has never been raised validly as a personal grievance by Ms Garrick, and so I am unable to find that it constituted an unjustified disadvantage in her employment.

Mr Chuck's saying that he found the situation difficult and stressful

[73] Ms Dalziel submits that this was not appropriate in that it created an impact on Ms Garrick when she herself was going through a stressful process. I am mindful of the fact that Mr Chuck and Ms Garrick had a working relationship going back 3½ years and that that relationship, up to the point of the redundancy consultation process, appears to have been amicable, even friendly. Therefore, on balance, even if this statement by Mr Chuck did have an adverse impact on Ms Garrick, I do not believe that Mr Chuck's action was motivated by anything other than his recognition of a relatively close professional relationship with Ms Garrick. I do not believe that his action was an action that no fair and reasonable employer could have done in the circumstances.

Feedback about waiting until the season before making a decision not being taken into account

[74] Mr Chuck's evidence was that he did take Ms Garrick's submission into account but that he did not believe it would make any difference to the overall situation. I accept that evidence and do not, therefore, find that this allegation constituted an unjustified disadvantage in Ms Garrick's employment.

No real assessment of other roles into which Ms Garrick could move

[75] Mr Chuck's evidence was that he asked the Wellington office whether there were any other positions Ms Garrick could fill and that he also assessed whether there were any administration functions Ms Garrick could fulfil. He was told that there were no financial positions in Wellington and he concluded that there were no administration roles in Christchurch. I accept this evidence.

[76] It was suggested that Ms Tibbotts was recruited as the replacement administration co-ordinator at a time when Mr Chuck knew that Ms Garrick's role could be disestablished. However, having heard the evidence, I do not accept this to be the case. I accept that Mr Chuck approached Ms Tibbotts (whom he had known because she had held the same role in previous years) prior to him realising that Ms Garrick's role had disappeared to the extent that it was likely to be disestablished.

A breach of confidentiality

[77] The fact that Mr Chuck told Mr Cameron about the restructuring of Ms Garrick's role clearly caused Ms Garrick more upset. It therefore caused her disadvantage in her employment. There appears to have been no business reason why Mr Chuck broke his promise to keep the matter confidential, and so I find that the disadvantage was unjustified, as no fair and reasonable employer could have acted in this way in the circumstances.

Ms Garrick having to repeatedly chase Mr Chuck for a reference

[78] The evidence is that Ms Garrick asked Mr Chuck for a reference on three occasions and that it was only on the third occasion that he provided it. On balance, I believe that this is true, although there does not appear to have been any significant disadvantage to Ms Garrick given that Mr Chuck did provide a positive reference, a copy of which the Authority saw, and that it helped Ms Garrick to secure a position with a Mike Pero company, prior to the expiry of her notice with PAE on 3 August 2012.

Summary

[79] Given the evidence that the Authority heard, and my conclusions set out above, I am satisfied that Ms Garrick suffered a substantial disadvantage in her employment by reason of the manner in which the consultation process occurred. In

particular, Ms Garrick was effectively presented with a *fait accompli*, in which she was told that most of the elements of her role had ceased or had been transferred to Wellington, but that she was nevertheless required to provide feedback.

[80] I note that, in the memorandum from Mr Chuck to Ms Garrick dated 23 June 2012, the feedback that was requested was on whether any of the duties of her position had been missed from the review, whether she had any description of the duties of the current role or any disagreement on the impact of the transfer of the duties as described. There was no specific reference to feedback on whether the duties should have been transferred in the first place. In any event, the feedback should have been sought prior to the duties being transferred.

[81] I also find that unjustified disadvantage was caused during the process by the delay in giving Ms Garrick the memorandum addressed to her personally, setting out what feedback was required, and by the failure to provide minutes of the formal meetings that were held.

[82] In light of this, I conclude that the disadvantage suffered by Ms Garrick by the manner in which the consultation process was carried out was unjustified in that no fair and reasonable employer could have carried out the consultation in the way that the respondent did in all the circumstances.

[83] I also find, separately, that Ms Garrick suffered an unjustified disadvantage by her request for confidentiality being breached.

Remedies

[84] Section 123(1)(a) to (c) of the Act provides as follows:

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

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

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

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

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

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

Loss of wages

[85] Ms Garrick does not seek reinstatement but does seek lost wages for 13 weeks, despite having secured a job prior to the expiry of her notice with the respondent. She asserts that this is on the basis that her replacement job with a Mike Pero company ended after two months, again because her role was disestablished. To be able to succeed in this argument, Ms Garrick must show that the chain of causation between her losing her employment with the respondent unjustifiably and her subsequent loss of income after dismissal from the Mike Pero job was not broken.

[86] In support of asserting that the chain of causation was not broken Ms Dalziel states that Ms Garrick had an ongoing medical condition of trauma as a result of the respondent's actions and that impacted upon her ability to find secure employment. This is simply not sustainable on the evidence. Whilst Ms Garrick is to be commended for finding new employment so quickly, that new employment ended, on her own evidence, because the Mike Pero accountant's role she took was a new one, was uncertain from the beginning, and was subsequently discontinued due to a decision to outsource the function.

[87] I did not see any cogent evidence to support the assertion that Ms Garrick had been forced to take that job with an uncertain role because of the effects she suffered at the hands of the respondent. There was no medical evidence adduced to show that she had suffered trauma, for example, nor any detailed evidence of what other jobs were available, and what Ms Garrick had applied for. I therefore decline to find that the chain of causation was not broken when she lost her role with Mike Pero.

[88] Ms Garrick also gave evidence to suggest that she earned at least as much during her employment with Mike Pero as she would have earned in the same period if she had not been dismissed by the respondent. I therefore find that there was no continuing loss. In summary, Ms Garrick is not entitled to any reimbursement under s. 123(1)(b) of the Act.

Loss of any benefit

[89] Ms Garrick seeks compensation for the loss of a number of benefits, which she received during her employment with the respondent, which were not continued after her dismissal, and which she might reasonably have been expected to have continued to obtain if the personal grievance had not arisen. These are as follows:

- a. Membership of her NZICA. She restricts her loss to \$172.50, which is the cost to her of membership for three months. I believe that she is entitled to compensation for the loss of this benefit.
- b. Three months training to maintain her CDP points at a cost of \$1,000. She estimates that it would cost her around \$4,000 a year to pay for the courses to ensure she got enough points. I understand that Chartered Accountants are required to complete 120 hours of relevant CPD over each rolling three year period, of which 60 hours must be verifiable. A minimum of 20 hours CPD must be completed in each year. On the basis that it is not necessary to complete 40 points each year, it is not fair and just on the respondent to assume that she would have done so in 2012 if she had not been dismissed. I therefore award compensation in the sum of \$500, being 25% of the estimated cost of undergoing 20 hours of accredited study in 2012.
- c. Gym membership. Ms Garrick did not have a contractual right to gym membership but did have a de facto right to use two gyms while employed by the respondent. She estimates that it would cost her \$482.50 for three months' gym membership in Christchurch including a \$99 joining fee. I accept this evidence and award compensation in the sum of \$482.50.
- d. Health insurance. She estimates that she enjoyed a package worth \$200 a month. This sum has not been disputed by the respondent, and so I award the sum of \$600 in respect of compensation for the loss of this benefit.
- e. Blackberry use plus data. Ms Garrick claims \$436 for the loss of the use of her work Blackberry for two months, on the basis that she was given a phone at Mike Pero. However, I have already found that the

chain of causation was broken when she took on employment at Mike Pero, and so decline to award any compensation in respect of the loss of the use of a mobile phone.

[90] I award a total of \$1,755 net in respect of loss of benefits under s.123(1)(c)(ii).

Damages

[91] Ms Garrick claims medical costs, namely counselling, in the sum of \$510 for four sessions. This is not a benefit lost, but a claim for damages. I am satisfied on balance that, but for the way in which she was treated by the respondent, she would not have needed counselling. However, having seen the notes of the counsellor, by the third session it is clear that a range of issues were being discussed not involving the respondent. I am therefore not prepared to award more than the net sum of \$255, in respect of two sessions of counselling.

Compensation for humiliation, loss of dignity, and injury to Ms Garrick's feelings

[92] Turning to the issue of compensation for humiliation, loss of dignity, and injury to Ms Garrick's feelings, she is not entitled to receive compensation arising out of both the unjustified dismissal and the unjustified disadvantage where that disadvantage was caused by deficiencies in procedure, as that would amount to a double recovery. However, I believe that the breach of confidentiality was not part and parcel of the redundancy process and that it should be considered for a separate award.

[93] Dealing with that breach of confidentiality first, Ms Garrick said in her written feedback that it made the process even more difficult than it already was. I accept that, and believe that an award of \$1,000 is reasonable compensation for that breach of confidentiality.

[94] Turning to the unjustified dismissal, it was plain during the investigation meeting that Ms Garrick was still very upset at her experience of having been made redundant. I perceived that some of that upset was caused by her feeling that she had been singled out, although I have found that she was not singled out in the sense of having been dismissed for personal reasons.

[95] However, her feeling singled out was largely due to the inadequate process that had been followed by the respondent. The evidence of her counsellor was that Ms Garrick was upset at the speed with which the process had happened and that the redundancy had come completely out of the blue. This perception by Ms Garrick almost certainly arises from the failure of the respondent to consult with her prior to aspects of her role being removed and the earlier statement by Mr Parkinson that there would be no changes to jobs within 12 to 18 months. By the time the consultation had started, her role had been all but dismantled and there was nothing, in practice, that she could have said to have saved her role. Whilst the evidence of the counsellor was not unassailable in the sense that Ms Garrick did not consult her until after she had been dismissed, and because the counsellor could not recall very much at all about the four sessions (one of which post-dated her second dismissal from Mike Pero) I am satisfied from Ms Garrick's own evidence, and from her demeanour in the Authority's investigation meeting, that she suffered above average feelings of humiliation, loss of dignity, and injury to her feelings.

[96] Ms Garrick seeks \$20,000. This is a little too high in my view as, although Ms Garrick suffered reasonably strong and long lasting effects arising from the manner of her dismissal, they were not, it appears, significantly medicalized. I do accept, however, that she was put on medication by her GP. I believe that an award of \$15,000 is appropriate.

Contribution

[97] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, it must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[98] The respondent argues that Ms Garrick failed to properly engage in the consultation process. However, I find that she was severely handicapped in the way that the proposal was presented to her, so that she genuinely felt that the decision had been made to disestablish her role and that she could not realistically say anything to reverse that decision. In any event, she did say in her feedback document that she believed that she had a valuable role to play in the company. Under those

circumstances, I do not accept that she had engaged in the process in bad faith. I therefore decline to reduce the award of \$15,000 compensation or the sum of \$1,755 in respect of loss of benefits.

[99] I also do not find that Ms Garrick contributed to the breach of confidentiality that caused her a separate disadvantage in her employment. I therefore decline to reduce the \$1,000 compensation.

Penalties

[100] Section 4A of the Act provides as follows:

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

- (a) the failure was deliberate, serious, and sustained; or*
- (b) the failure was intended to undermine—*
 - (i) bargaining for an individual employment agreement or a collective agreement; or*
 - (ii) an individual employment agreement or a collective agreement; or*
 - (iii) an employment relationship; or*
- (c) the failure was a breach of section 59B or section 59C.*

[101] I am not convinced that the respondent's failings in its treatment of Ms Garrick during the redundancy consultation process were deliberate, nor that there were intended to undermine the employment agreement or the employment relationship. I believe that they were borne out of a lack of understanding of how a fair restructuring process should be undertaken. I therefore decline to impose a penalty upon the respondent.

Orders

[102] I order the respondent to pay to Ms Garrick the following sums:

- a. Compensation under s.123(1)(c)(i) in the sum of \$16,000;
- b. Compensation under s.123(1)(c)(ii) in the net sum of \$1,755;
- c. Damages in the net sum of \$255.

Costs

[103] Costs are reserved. The parties are to seek to agree how legal costs are to be dealt with between them. In the absence of an agreement within 28 days of the date of this determination, Ms Garrick may seek a contribution to her legal costs by serving and lodging a memorandum of counsel within a further 14 days, and the respondent may serve and lodge a memorandum of counsel in reply within a further 14 days.

David Appleton

Member of the Employment Relations Authority