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## Graham v Bank of New Zealand (Christchurch) [2010] NZERA 950 (22 December 2010)

Last Updated: 11 January 2011

**IN THE EMPLOYMENT CHRISTCHURCH  
RELATIONS AUTHORITY**

CA 237/10 5151785

BETWEEN JAN GRAHAM

Applicant

A N D BANK OF NEW ZEALAND

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Dated:

Philip Cheyne

Owen Graham, Advocate for Applicant Emma Butcher, Counsel for Respondent

29 and 30 July 2010 at Dunedin

12 August 2010 & 30 August 2010 from Applicant

24 August 2010 from Respondent

Date of Determination:

22 December 2010

### **DETERMINATION OF THE AUTHORITY**

#### **Employment relationship problem**

[1] Jan Graham worked for BNZ from 1973 until 1983 and again from 1996 until April 2009 when her employment was terminated by BNZ due to medical incapacity. That decision came after exchanges between Mrs Graham and BNZ's managers from December 2008 against a background of a restructuring in 2007 that resulted in Mrs Graham having to perform some different duties. The changed duties aggravated a pre-existing injury which was accommodated by light duties and other placements before BNZ initiated a process in December 2008 which resulted in the decision to dismiss Mrs Graham.

[2] In her statement of problem, Mrs Graham lists four causes of action. They are an unjustified disadvantage grievance in relation to actions by her area manager on and after 16 December 2008; an unjustified disadvantage grievance relating to the restructuring in 2007; a breach of contract also based on events at the time of the restructuring; and an unjustified dismissal personal grievance. All these claims are resisted by BNZ.

[3] I will determine each of these causes of action separately, starting with the two actions relating to the 2007 restructuring followed by the December 2008 and April 2009 grievances. In what follows, I will set out the facts relevant to each cause of action but will refrain from repeating those facts if they are relevant to more than one cause of action. I should also say that I have not found it necessary to resolve many of the disputes apparent from the exchange of submissions after the

investigation meeting.

[4] It is useful first to briefly mention Mrs Graham's medical capacity issue that predated the restructuring.

### **Mrs Graham's medical condition**

[5] From 1996, Mrs Graham worked as a teller, initially part time and then full time from early 1998. Sometime after starting that teller work, Mrs Graham began to experience aching in her shoulders and her arms and elbows. That led to an ACC claim and several specialist assessments. In April 1998, an orthopaedic surgeon noted that this was not a case for surgery, referred to advice to Mrs Graham from a BNZ occupational health nurse about work station set-up, micro-pauses and stretching exercises, and stated:

*Her elbows are unlikely to resolve completely while she continues in her present occupation and if the condition were to worsen in the future her best course of action would be to change to a different type of occupation where there is less use of repetitive movements and also less stress.*

[6] There was also a workplace assessment by an occupational health physiotherapist in June 1998. The health issue seems to have settled somewhat as the next record of Mrs Graham having any concern is October 2000 when her doctor referred her to physiotherapy. It does not appear from the evidence that Mrs Graham raised this with BNZ at the time.

[7] I have not been given access to the ACC file but, as I understand it, in 1999 BNZ successfully sought a review of ACC's decision to cover Mrs Graham's injuries as work-related.

[8] Mrs Graham continued to work as a teller at the South Dunedin branch and from 2002 at the Dunedin branch.

[9] On 2 November 2004, Mrs Graham told her doctor that her job had changed, requiring her to do bulk teller duties intermittently which included dealing with bulk coins which she found too heavy. The medical notes refer to Mrs Graham's concern about a recurrence of the chronic arm/elbow problem. The doctor wrote to Mrs Graham's manager (Janice Laing), referring to the earlier health issues and the problem with lifting of heavy coins involved with the bulk teller position and requesting modification of Mrs Graham's work to avoid these problems. Ms Laing had Mrs Graham complete a discomfort report which was forwarded to BNZ's health and safety adviser (Jan Stickney). Ms Stickney and Ms Laing gave Mrs Graham advice about how to minimise heavy lifting. In addition, Mrs Graham was not assigned to bulk teller duties. The pain issue again appears to have settled down.

[10] Between June 2005 and April 2006, Mrs Graham worked as a banking adviser, a role that did not involve the duties identified by her doctor as likely to aggravate her chronic epicondylitis and fibromyalgia conditions. Towards the end of this period, Mrs Graham requested a transfer to a different job and from 1 May 2006 she was seconded to the University of Otago branch as a customer services representative (CSR), initially on a temporary basis then on a permanent basis. The CSR role did not involve teller duties. Mrs Graham was in that position when the 2007 restructuring arose.

### **2007 restructuring**

[11] In July 2007, BNZ initiated consultation with staff about changes to the roles of teller and CSR. BNZ proposed conflating the two positions into one role to be called customer services consultant (CSC). The CSC position would have to perform across the counter teller duties as well as the front of counter CSR duties. The consultation started on Friday, 13 July 2007 with branch managers holding meetings of potentially affected staff to show them a video presentation, explain the consultation process, answer questions and give staff a briefing pack with details of the proposal and how to provide feedback.

[12] Lloyd Maole was manager of the University of Otago branch at the time. He had some knowledge of Mrs Graham's medical situation, or at least the extent to which it caused her not to do any bulk teller work. In his statement of evidence, he says that Mrs Graham was at work on Friday, 13 July 2007 for the video presentation and she received the briefing pack from him. Mrs Graham's evidence is that she was on leave and did not return to work until Monday, 16 July 2007. When questioned, Mr Maole accepted that Mrs Graham might not have returned to work until the Monday. Accordingly, I accept Mrs Graham's evidence that she was not present at work when the presentation was shown and briefing pack distributed to other staff.

[13] Mr Maole's evidence, which I accept, is that managers discussed how to deal with briefings for any staff that were away on the day of the presentation. He says that he gave Mrs Graham a copy of the briefing materials and showed her the video when she returned. Mrs Graham's evidence is that she first heard about the restructuring from a colleague about two or three weeks after returning to work and she does not recall having seen the video presentation. I find that Mr Maole probably did provide Mrs Graham with the briefing materials and probably did show her the video presentation sometime shortly after Mrs Graham's return to work. Mrs Graham has probably forgotten this now with the passage of time.

[14] Both Mr Maole and Mrs Graham agree that they had a discussion over Mrs Graham's concerns about the restructuring. Mr Maole says that Mrs Graham's objection was about the loss of status for CSRs which had been a step above the teller's

position. He says that Mrs Graham did not mention any concern about her previous health issues; that he did not say or imply that her employment would be terminated if she did not accept the changes; nor did he pressure Mrs Graham in any way to accept those changes. Mrs Graham says that she worried about the effect of the teller work on her health; that she went into Mr Maole's office and told him that she did not want to do the teller work and that she was worried about its effect on her arms; and that Mr Maole's response was that if she did not like it she could *go down the road*, meaning leave.

[15] Mrs Graham was a FINSEC union delegate and a branch health and safety representative at the time. In the former role, she received communications from the Union about the restructuring proposal and had a role in dissemination of Union material about concerns with the change proposal. Mrs Graham gave written feedback about the change proposal, but concentrated on the themes identified by FINSEC. She did not mention her own health concerns in that written feedback.

[16] On balance I find that Mrs Graham is mistaken when she says that she spoke to Mr Maole about her health issues at the time of their discussion over the restructuring. I find that she spoke to Mr Maole about the general CSR concerns promoted by FINSEC, rather than any individual concern about her own health. The branch manager briefing guide makes it clear that CSRs would be transferred to the new CSC role which, in BNZ's view, was a comparable position so that there would be no redundancies. It is likely that Mr Maole gave that explanation to Mrs Graham who read into what was said that she would have to leave if she did not accept the new role.

[17] Following the consultation phase, BNZ decided to proceed with its proposal. Mrs Graham received a letter dated 21 August 2007 confirming a change in title from CSR to CSC effective 1 October 2007 and advising that there were no changes to her existing terms and conditions of employment. From 1 October, Mrs Graham began to perform CSC duties which included rotating between teller and front-of-counter duties. Mr Maole's evidence, not disputed by Mrs Graham and which I accept, is that the affected staff (including Mrs Graham) agreed to a rotating roster of four weeks on teller duties followed by a week of front-of-counter duties. It is common ground also that Mrs Graham raised no complaint at the time.

### **Breach of contract**

[18] Mrs Graham now says that BNZ breached the employment agreement between her and the bank by not properly consulting with her; by requiring her to perform different duties without her agreement; and by misleading her about her contractual rights. Any purported agreement by Mrs Graham to the new CSC role is attacked on the basis of having been obtained by duress and/or for want of consideration.

[19] At the relevant time, Mrs Graham was a member of FINSEC and there was a collective employment agreement between the Union and BNZ that covered Mrs Graham's work. There are several clauses in the 2005-2007 collective agreement that should be mentioned:

#### *6.3 Consultation*

*The bank recognises that there are a number of workplace related issues for employees which need to be addressed in order to ensure our commitment to deliver optimal customer service and provide employee satisfaction.*

*The bank is committed to promoting harmony and ensuring that consultation and cooperation are the basis for relationships between the bank and employees. The bank's objectives include:*

- *Developing a closer working partnership between the bank and employees.*
- *Increasing the efficiency, flexibility and competitiveness of the business.*
- *Recognising employees' contributions.*
- *Improving the working environment.*

#### *10.1 Policy*

*The Bank is committed to the health and safety of all its employees. The Bank recognises that the health of employees is an important ingredient in a productive and efficient workplace and that the promotion of good health and safety practices is preferable to dealing with illness and accidents.*

#### *12.5 Redundancy*

##### *12.5.1 Definitions*

*"Redundancy" means a situation where your employment is terminated by the bank, the termination being attributable wholly or mainly to the fact that the position you fill is, or will become, superfluous to the needs of the bank, because of the cessation of the whole or any part of the bank's operations or where your job function is no longer required.*

*"A directly comparable position" shall mean a position which has the same grade and salary, is in the same location or at another location within a reasonable commuting distance of your place of residence, does not involve a change in duties significant enough as to be unreasonable in the circumstances of your skills, abilities and work history, and does not involve a*

change in working hours which would place an unreasonable imposition on you in terms of your personal circumstances, for example, your responsibility for the care of children or dependants. This shall be assessed on a case by case basis.

13.

### Terms of employment

#### 13.2 Variation of duties

The bank may reasonably require you to work in other sections of the bank or otherwise reasonably vary the duties you are required to perform. If your position is redundant, the redundancy provisions will

apply.

[20] A schedule to the collective employment agreement sets out the remuneration system under which Mrs Graham, as a CSR, was graded *L* and paid at the mid-point of that grade. The grade for tellers was *M* and the mid-point salary about 10% lower than grade *L*.

[21] In April 2006, when Mrs Graham was temporarily seconded to the CSR position at the University of Otago branch, it was agreed with her that any restructuring of the seconded role would result in her returning to her original position rather than her being made redundant. However, that would no longer have applied once Mrs Graham was permanently appointed to the CSR position later in 2006.

[22] As noted, BNZ was entitled under the applicable collective agreement to *reasonably vary the duties* it required Mrs Graham (and other staff) to perform, subject to the application of the redundancy provisions if the position was redundant. The requirement of reasonableness no doubt imports a need for proper consultation. That consultation was subject to the statutory obligations of good faith. The same obligations applied to the restructuring, being an issue arising under or in relation to the collective agreement and consultation about the employees' collective interests.

[23] In *Simpson Farms Ltd v. Aberhart* [2006] NZEmpC 92; [2006] ERNZ 825, the Chief Judge said:

*The consultation principles were stated by this Court in a redundancy case, Communication and Energy Workers' Union Inc v. Telecom NZ Ltd [1992] NZCA 577; [1993] 2 ERNZ 429, as having been extracted from the judgment of the Court of Appeal in Wellington International Airport Ltd v. Air NZ Ltd [1992] NZCA 577; [1993] 1 NZLR 671 (CA). Fundamental elements of consultation that are now strengthened and required by s.4 in redundancy cases include (as summarised by Mr Menzies for SFL):*

- *Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.*
- *If consultation must precede change, the proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.*
- *Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
- *Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek a consensus. Consultation involves a statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.*
- *The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.*

*It is equally plain that the consent of persons consulted is not necessary following proper consultation and that there need not be an agreement: Cammish v. Parliamentary Service [1996] 1 ERNZ 404, following Wellington International Airport. In Cammish, the Court stated at p. 417, per Chief Judge Goddard:*

*"Consultation is to be a reality, not a charade. The parties to be consulted must be told what is proposed and must be given sufficient precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation."*

[24] Mrs Graham submits that it was unreasonable to transfer her to a position that she was medically unfit to perform. However, the evidence available to BNZ at the time did not establish that Mrs Graham was medically unfit for teller duties. At that point, the most recent information was the letter from Mrs Graham's GP dated 2 November 2004 that read:

Janice Laing

BNZ

re: Janet Lesley Graham

Dear Janice,

*The above has had significant problems with chronic epicondylitis and fibromyalgia of both forearms from 1997 to 1999. This eventually resolved with modifications to her work and work environment.*

*She is finding that heavy lifting of coins involved with the intermittent position of bulk teller is aggravating the old condition. It is likely that if this work continues, then the previous medical condition will resurface, causing significant problems of her ability to work.*

*I would be grateful if you could give consideration to modifying her ongoing work. It would be helpful if you could discuss with her what may be suitable tasks, so as to avoid future problems.*

*Many thanks for your help.*

*Yours sincerely, Dr Tim Carey-Smith*

[25] Following that letter, Mrs Graham was removed from any bulk teller work but continued her position as a teller at the Dunedin branch until June 2005 when she became a bank adviser. What BNZ knew in 2007 was that there had been significant problems between 1997 and 1999 when Mrs Graham was a teller which were resolved with appropriate management, and that bulk teller work was likely to aggravate that condition. It was not unreasonable for BNZ to expect that Mrs Graham would be medically capable of resuming teller work on a rotational basis as envisaged by the CSC position. This is especially so since Mrs Graham did not raise any objection to her capacity to perform the full range of duties expected of the new position.

[26] The period from 16 June 2007 until 21 August 2007 was sufficient time for consultation on the proposal. BNZ gave Mrs Graham sufficiently precise information about the proposal. There is no evidence to establish that the BNZ decision-makers did not have open minds and did not listen to and consider all feedback before making their decision. The proposal was not acted on until after the consultation ended. There is no reason to think the process was a charade. I find that BNZ complied with its contractual and statutory obligations to Mrs Graham in consulting about the change in role from CSR to CSC.

[27] It is possible that a proper assessment at the time would have concluded that the CSC role was not a *directly comparable position* for Mrs Graham so that she should have been regarded as redundant. However, by the time Mrs Graham commenced duties as a CSC, a new collective employment agreement had come into force. I note that it provided for the new CSC position rather than the previous CSR position. Mrs Graham then worked as a CSC performing the range of duties without protest from 1 October 2007 until September 2008. She must be taken to have affirmed her appointment as a CSC.

[28] Nothing about what happened over the restructuring amounted to a breach of the health and safety policy.

[29] It follows that there was no breach of the employment agreement between BNZ and Mrs Graham arising out of the change from CSR to CSC in 2007.

### **Unjustified disadvantage grievance**

[30] As an alternative to the alleged breach of contract argument, it is said that Mrs Graham has an unjustified disadvantage personal grievance arising from the same facts. I will assume (without finding) that a grievance was raised within time on the basis that the disadvantage did not become apparent or known to Mrs Graham until later in time. Other hurdles to such a grievance are that s.103(3) excludes from the relevant definition of personal grievance any action deriving solely from the operation of any provision of any employment agreement; and that even if the transfer fell within the definition of a personal grievance, BNZ's actions were not unjustified.

[31] Mrs Graham does not have a personal grievance arising from the change from CSR to CSC.

### **Contractual validity**

[32] There is also an argument that Mrs Graham's agreement to the changed duties required BNZ first to advise her of the proposed change and the reasons for that and specifically advise her of her right to independent advice and give her an opportunity to obtain that advice. That argument is based on the contention that new individual terms and conditions were being negotiated so as to bring the situation within s.63A of the Act. I am not persuaded that BNZ and Mrs Graham were *bargaining for terms and conditions of employment* as envisaged by s.61(1) of the Act. Rather they were engaged in a consultative process in accordance with the applicable collective agreement. In case I am wrong in that conclusion, I note that s.63A(4) provides that the failure to comply with the requirements of s.63A(2) as alleged here *does not affect the validity of the employment agreement between the employee and the employer*. It would be necessary to seek relief in terms of the statutory code for unfair bargaining set out in s.68 and s.69 of the Act. None of the qualifying grounds set out in s.68(2) arise

in this case, as explained elsewhere.

### Events up to December 2008

[33] From November 2007 until September 2008, Mrs Graham performed her duties as a CSC without complaint or limitation. As it happened, she was not required to do any bulk teller work because there were two other employees who principally did that work. However, sometime around September 2008, it happened that one of those persons was on leave and the other was ill. The work done by the bulk teller is crucial so these absences exposed a business risk.

[34] Mr Maole, the manager, decided that he and all his CSC staff should be trained to provide contingency cover for bulk teller duties. He told staff (including Mrs Graham) this at a staff meeting. Mr Maole's evidence, not disputed by Mrs Graham and which I accept, is that Mrs Graham came to him the next day and told him about pain in her arms. Mrs Graham completed a *record of accident or incident* form on 12 September 2008 about a sore shoulder. Mr Maole put Mrs Graham on light duties in the meantime that effectively mirrored her old CSR duties and prevented other CSCs performing the full range of their duties.

[35] Mrs Graham saw her doctor on 9 October 2008. The doctor's notes record her identifying pain as a problem over the previous three months. The next day, Mrs Graham completed a further *record of accident or incident* form. Later, Mrs Graham's GP provided her with a medical certificate certifying her as unfit for teller and many counter duties from 9 October 2008 until further notice. The GP also arranged specialist referrals. Mrs Graham saw an occupational specialist on 18 November 2008 who diagnosed her condition as an aggravation of the earlier injury to be managed by her avoiding forceful gripping and lifting activities associated with teller duties. Mrs Graham also saw an orthopaedic surgeon who confirmed the occupational specialist advice and recorded that there was no role for surgery. Mrs Graham continued on her restricted duties.

[36] In November 2008, Laura McConaghy took over from Mr Maole as manager of the Otago University branch, having worked there as a banking adviser for some time beforehand. Ms McConaghy was told about Mrs Graham's light duties restriction. She discussed that with Mrs Graham and later saw or was made aware of the diagnosis and prognosis in the reports from the occupational specialist and the orthopaedic surgeon. Mrs Graham's light duties restriction meant that other CSCs could not rotate away from teller duties and did not have the opportunity to do the front-of-counter work. Ms McConaghy's evidence, which I accept, is that the morale of the other staff was affected by not being able to perform the full range of CSC duties. I also accept Ms McConaghy's evidence that she was concerned about the forthcoming busy period (Otago University orientation) and wanted matters fully resolved by then. Ms McConaghy spoke to her area manager (Maurice Bell) for advice about how to deal with Mrs Graham's situation. They decided to meet with Mrs Graham *to find a way to get Jan back to her permanent CSC role as soon as possible*.

[37] Mr Bell and Ms McConaghy met with Mrs Graham on 16 December 2008. Mrs Graham was not given any forewarning of the purpose of the meeting. There is some dispute in the evidence about what Mr Bell said to Mrs Graham and about his demeanour. Mrs Graham made some notes after the meeting and her evidence reflects these notes. She says that Mr Bell asked her where she thought the bank was going; told her that the job comprised teller duties and customer services which needed to be rotated; told her that he needed to know if she was going back to teller duties and that the bank was willing to rehabilitate her; to which she replied that she could not do teller duties because of problems with future ACC cover; and Mr Bell told her she had until Friday, 19 December to decide whether she would return to teller duties.

[38] Mrs Graham sought Union advice after this meeting and spoke to a Union official the next morning. Notes made by that official record Mrs Graham telling him that she was told *you go on counter or find another job*. During a second call later that day, the official noted Mrs Graham telling him *meeting Tuesday and said bank changing and if can't do teller's* [unreadable] *look to another job*. Mrs Graham's evidence is that the note reads *the bank is changing and if I don't do teller's, we can part look for another job*.

[39] Mr Bell's evidence is that they discussed the possibility of a rehabilitation process and seeing an occupational therapist to allow a gradual return to work; that he was surprised by Mrs Graham's response that rehabilitation would not work because she would still be doing the teller duties that would cause strain on her arms; that he recapped that BNZ's focus was to get Mrs Graham back to full health and full working duties as the temporary arrangements could not continue; that he said it was not clear what other roles there might be if Mrs Graham was not willing to work to the full CSC duties; and that he asked her to consider what she would like to do and meet again on Friday, 19 December.

[40] Both Mrs Graham and Ms McConaghy say that Mr Bell referred Mrs Graham to the intranet for rehabilitation options but Mrs Graham says that an occupational therapist was mentioned only at the later meeting. I prefer Mrs Graham's evidence on this point. Ms McConaghy's evidence is that she does not recall Mr Bell telling Mrs Graham that she had to go back to the teller counter or find another job, but that she would recall this if it had been said. I find that Mrs Graham took that meaning from what was said to her by Mr Bell. It was either said directly as recalled by Mrs Graham or it was reasonably implicit in what was actually said.

[41] There is a further conflict between Mrs Graham and Ms McConaghy about what Ms McConaghy said after the meeting. In

her statement of evidence, Mrs Graham says *when I left the meeting room in the company of the branch manager she explained to me "bloody hell, if I had known it was going to be like that ..."*. When questioned, Mrs Graham accepted that Ms McConaghy stayed in the meeting room with Mr Bell so her evidence about them leaving the meeting room in one another's company must be wrong. Ms McConaghy's evidence is that she later spoke to Mrs Graham and offered to help her access information over the intranet but never made the comment attributed to her. On balance, I prefer Ms McConaghy's evidence about this point.

[42] The final point is whether Mr Bell was threatening or intimidating during this exchange. I am sure that he never intended to threaten or intimidate Mrs Graham. His evidence is that he did not do so and that Mrs Graham gave no sign of being intimidated or threatened. Ms McConaghy supports that evidence. Neither Mrs Graham's notes of the exchange, the Union official's notes of her description of the exchange nor the first letter from Mrs Graham's solicitor mention this point about Mr Bell's demeanour as being threatening and intimidating. On balance, I find that Mrs Graham has come to think that Mr Bell behaved in a threatening and intimidating manner because of her perception that her future employment was under threat. As to the tone of the meeting itself, I therefore prefer the evidence of Mr Bell and Ms McConaghy.

[43] There was a second meeting between Mrs Graham, Mr Bell and Ms McConaghy on Friday, 19 December 2008. Again there is some dispute about what happened. Mrs Graham's evidence is that Mr Bell needed to know her decision about whether she would start rehabilitation and he said he wanted the branch to start rotation as soon as possible. He said that the bank wanted to rehabilitate Mrs Graham and that if she did not go back to teller duties there would be no job for her. Mrs Graham said that she was unable to go back on teller duties to which Mr Bell responded *so you refuse to be rehabilitated?* Mr Bell kept pressing for an answer and Mrs Graham told him that it was not a question of *wouldn't* but that she *couldn't* and she was not prepared to discuss this with him until she had consulted with her representative. Mrs Graham stated that the occupational specialist had said she should not do teller duties. Mr Bell said that he wanted an answer by Monday and that he had a business to run and grow. At some point during these exchanges, Mr Bell told Mrs Graham that an occupational therapist would be made available to assist her with rehabilitation.

[44] Mr Bell's evidence is that he told Mrs Graham that the aim of rehabilitation was to ensure that she was fit and well enough to return to full work duties. He accepts that during the meeting Mrs Graham mentioned about her Union representative. Mr Bell denies telling Mrs Graham that he had a business to run and grow but accepts that he may have said that others' roles were being affected and that they needed to get resolution of these issues. Mr Bell says that they stopped the meeting when Mrs Graham mentioned that she was waiting to hear from her representative except to say that they wanted a definite decision about rehabilitation by Monday, 22 December 2008. Ms McConaghy's evidence supports Mr Bell's account.

[45] After this second meeting, Mr Bell had a phone discussion with the FINSEC official. I am told by Mrs Graham that the official's notes record Mr Bell saying that CSC and banking adviser were the only roles available for Mrs Graham, that he needed Mrs Graham rehabilitated through a graduated return to teller duties which needed to get under way on Monday, 22 December and that Mr Bell was unsure of the bank's view if Mrs Graham could not do teller duties for health reasons but he did not want Mrs Graham transferred to the banking adviser role.

[46] Mr Bell and Mrs Graham differ significantly on their recollection of Mr Bell's tone and demeanour during this meeting. As with the first meeting, I find that Mrs Graham has come to think that Mr Bell behaved in an intimidatory manner. However, I accept Mr Bell's evidence that he did not behave unreasonably during this meeting. Later on 19 December, Mrs Graham left work and consulted her doctor who certified her as unfit for work from 19 December and likely to be fit to return to her usual restricted duties on Monday, 29 December 2008.

[47] Mrs Graham's solicitor sent a letter to Mr Bell by email at 3.24pm on Friday, 19 December. In part, that letter reads:

*We understand that on Tuesday of this week you met with Mrs Graham, without prior warning, to discuss a proposal to change her existing duties so that she works five weeks as a teller and one week on customer services. You required Mrs Graham to meet with you again this morning despite the fact that her union representative was unavailable either to attend the meeting with her, or to advise her on her options. Our instructions are that you have advised that Mrs Graham that she will be able to undertake the teller's duties provided that she follows appropriate rehabilitation procedures and that if she does not agree to the change in her existing duties there is no position at the bank for her.*

[48] I accept that represents an accurate summary of what Mr Bell conveyed to Mrs Graham at the two meetings, except to say that by *change her existing duties* was meant that Mrs Graham needed to resume the full range of CSC duties, including teller work. The letter also sought information, indicated that Mrs Graham was unlikely to provide a response before 19 January 2009 and referred to the 9 October 2008 medical certificate (mentioned above) with respect to her cash handling duties.

[49] On Monday, 22 December 2008, Mr Bell received a call from Mrs Graham's husband (Owen Graham) who told him about Mrs Graham's medical certificate. Mr Bell also had a phone conversation with Mrs Graham's solicitors and sent them an email in answer to some of the points in the 19 December letter saying:

*Jan is currently employed as a Customer Services Consultant with the Bank. In response to your email, we are not proposing any*

changes to Jan's employment. Jan filled in a work-related accident/injury form and BNZ investigated whether this accident/injury is work-related. During this medical investigation Jan and the Bank mutually agreed to alternative duties...

*There is no suggestion from the specialist that Jan needs to be rehabilitated. The bank, as a good employer wanted to ensure Jan's comfort and work and rather than return her immediately to normal duties, we offered her a process where Jan would go back to her normal duties over a period of two to three weeks.*

*Jan's health and wellbeing is of paramount importance. We would like to continue working with her towards finding a solution as soon as possible and encourage her to keep communicating with me on a regular basis. We would prefer to communicate with Janet directly rather than through lawyers, however respect her decision to take advice.*

[50] Mrs Graham returned to work on 29 December 2008. She was asked to meet with Mr Bell and Ms McConaghy. They phoned a BNZ health and safety adviser who also participated. Mrs Graham made a note of the exchange after the meeting. It reads:

*Returned to work today after stress leave to be confronted by area and branch manager. Was told to go into office. Maurice then asked me if I had seen the email he had sent to Fiona, I said I had. Area and branch manager had set up a call with the bank's expert on health and safety (Etta Lilic) to discuss rehabilitation options for me in order to get me back to teller duties. The H&S officer stated that the medical certificate didn't say that I couldn't go back to work as a teller only recommends that I don't go back to teller's duties and that I needed to go back to the doctor to get a certificate to state that I could no longer do any teller duties. I questioned why the bank viewed the certificate of the doctor over that of the specialist. If I was unable to go back to teller's then the bank would need to find me an alternative position. Maurice at that stage said that the bank could not accommodate me as there were no positions available to me. I must add that the first thing that Maurice said to the H&S officer was that he was very disappointed in me, how I deliberately and deviously contacted my lawyer on the previous Friday and how I put my work mates under great strain in the week leading up to Xmas by not coming in to work and subjecting them to more stress. He questioned the legitimacy of the medical certificate I obtained from the doctor to say I was away sick and would be back at work on the 29th. H&S officer has the view that there isn't much difference between the heavy lifting duties on teller's as opposed to what I do in everyday life. I reiterated that the specialist told me not to go back to teller's, if I did I would risk more injury and possible nerve damage. Maurice stated that he would need to get back to his lawyer and would again see me the following day.*

[51] Mr Bell's evidence is that he met with Mrs Graham on 29 December 2008 to ensure that she understood what BNZ meant by rehabilitation and what the bank could do to help her back into her CSC role as she could not continue with the light duties indefinitely. The health and safety adviser said that BNZ would pay for an occupational therapist to assess Mrs Graham's needs, to ensure that there would be no heavy lifting or forceful gripping. Mrs Graham said that she was not willing to do that. There was discussion about whether Mrs Graham could come back to work even if only to answer phones or help out *behind the scenes* until the situation was sorted out. Mr Bell says that he did not use the words described in Mrs Graham's evidence (based on her notes). Ms McConaghy supports Mr Bell's account of the exchange.

[52] Mrs Graham's evidence is that Mr Bell was *absolutely ropeable* at this meeting and that he pulled the phone cord out of the wall. Ms McConaghy's evidence is that the phone cord came out of the wall, not due to anger but just by accident since there were three people in the office. Mr Bell's evidence is that he was *possibly upset* because even though Mrs Graham had a medical certificate, the situation was putting pressure on other staff. He says it would not be his style to pull a cord out of the wall in anger. It is unlikely, I find, that Mr Bell would have angrily pulled the telephone cord from the wall, but it is also probable that he was upset and showed that by expressing frustration and annoyance at Mrs Graham's insistence that she could not do teller duties.

[53] I find that Mr Bell told Mrs Graham that she needed to return to her doctor for a further medical certificate; he said that there were no alternative positions available; he expressed disappointment over her seeing her lawyer; and he said she had put strain on her work colleagues. Mr Bell left things on the footing that he would talk to BNZ's lawyers and revert to Mrs Graham the next day.

[54] After this meeting, Mrs Graham had lunch with her husband and related to him the events of the meeting. That caused Mr Graham to go into the bank where he spoke to Ms McConaghy, telling her that they were harassing Mrs Graham, that Mrs Graham was feeling stressed and that all communications were to go through their lawyer. Ms McConaghy's evidence is that she felt intimidated by Mr Graham's manner. Ms McConaghy impresses as someone well able to handle difficult interactions, so I do not accept that she was intimidated. After this exchange, she rang and relayed the details to Mr Bell. Meantime, when he returned home, Mr Graham wrote an email sent at 1.20pm to Mrs Graham's lawyer in which is recorded an outline of both exchanges that day as follows:

*I met Jan for lunch a short while ago and she told me she had been met by the branch manager and Maurice Bell, (literally at the door) and instructed to meet with them in the manager's office. Maurice had arranged for a health and safety adviser from the bank to be online by phone to allow him to progress his process.*

*Jan will make detailed notes and speak with you, but for now you should be aware that she has been blamed for the BNZ*

problems and this is having an effect on her self-esteem and her confidence. She has been told she faked the medical certificate, that she caused difficulties for the bank when she was off last week, that the BNZ does not accept she cannot do any teller duties and is wanting to put her back into that role, in some limited fashion, asap. They refute that the series of meetings with Jan (without her having any support) have been intimidatory and bullying. Maurice and the brch manager have ignored the letter from Barry which clearly states how we have decided communications should be handled. There is a concern for Jan now that she will be asked to do teller duties tomorrow, Tuesday. She will refuse.

On hearing this I was concerned that Jan's good nature was being taken advantage of by the sneak meetings arranged by Maurice, without Jan able to have any representation present. I spoke with the branch manager in the bank chambers about this. I explained that it was harassment and that Maurice and she cannot do that. I asked and it was confirmed for me that they have the letter from Barry and they understand what it says. In fact the manager knew better than I when Barry is due back. I had stated that the matter is not one that Maurice can try to resolve at the employee level now without Jan having legal advisers. The branch manager agreed that it was not acceptable to be placing such stress and pressure on Jan. I stated that as an employee of over 12 years service, this treatment was not acceptable. I was firm but I was not aggressive or threatening. My concern is that Jan is being taken advantage of, and the BNZ is trying to reach a point where it controls the outcome beyond your input, before Jan's legal advisers are available in the new year.

[55] Around afternoon tea on the same day, Mr Bell again visited the branch to speak to Mrs Graham. There is less disagreement about this exchange and Mr Bell and Mrs Graham say respectively that it was amicable and not of an aggressive nature. The conclusion was that Mrs Graham needed to deal with matters through ACC but could remain on her restricted duties at the branch in the meantime.

[56] After seeking advice from BNZ's health and safety consultant, Mr Bell sent an email to Mrs Graham on 31 December 2008. Mr Bell asked Mrs Graham to see her doctor to obtain advice and a medical certificate about alternative duties and access to ACC assistance. That led to an email exchange between Mr Graham and Mr Bell. Mr Graham repeated the instruction for Mr Bell to deal with these matters through Mrs Graham's lawyer and referred him to the 9 October 2008 medical certificate to the effect that Mrs Graham was unfit for teller duties, including heavy lifting and so on. In response, Mr Bell repeated the request for an ACC 45 medical certificate indicating whether Mrs Graham was fit or unfit for normal duties; made the point that

BNZ could no longer sustain keeping Mrs Graham on restricted duties; and set out his view that while Mrs Graham was entitled to have a representative at meetings, the BNZ did not have to delay meetings during the solicitor's absence over the Christmas period.

[57] Mrs Graham says that she has an unjustified disadvantage personal grievance arising from this sequence of events. Mrs Graham has a grievance if her employment or one or more conditions of her employment is affected to her disadvantage by an unjustifiable action by BNZ. Justification is determined on an objective basis by considering whether the employer's actions and how the employer acted were those of a fair and reasonable employer in all the circumstances at the time.

### **Unjustified disadvantage grievance**

[58] Mrs Graham relies on the following actions which she says disadvantaged her and which are unjustifiable:

- Meeting with Mrs Graham on 16 December without forewarning her of the purpose of the meeting and giving her an opportunity to be represented; and specifically denying her an opportunity to be represented at the 19 December meeting (Statement of problem 2.10 a, b & c). There is also criticism of Mr Bell's demeanour at these meetings;
- Meeting twice with Mrs Graham on 29 December, communicating directly with her and insisting on resolving matters immediately, in breach of [s.236](#) of the [Employment Relations Act 2000](#) (Statement of problem 2.10 d & f). There is criticism of Mr Bell's demeanour at the first of these meetings;
- There is criticism of what Mr Bell said at these meetings as follows: Accusing Mrs Graham of providing a misleading medical certificate, unreasonably refusing rehabilitation and refusing to obtain documents required by BNZ; Insisting on rehabilitation and a return to normal duties contrary to medical advice; Denying that it required Mrs Graham to undertake rehabilitation; Telling Mrs Graham that there were no alternative duties but insisting on a certificate to say that she was fit only for alternative duties.

[59] I will deal with each alleged disadvantageous action in turn.

[60] The meetings on 16 and 19 December were not disciplinary in nature. There was no requirement to forewarn Mrs Graham of the purpose of the meetings or give her an opportunity to seek support or representation before initiating the discussion with her about BNZ's desire for her to resume normal duties so that other staff could rotate through their full range of duties. In hindsight, Mr Bell may have been better advised to signal the purpose of the meetings in advance and give Mrs Graham an opportunity to seek advice and support but his failure to do so falls short of any breach of obligation and does not establish any grievance. Mr Bell's frustration about Mrs Graham's resistance to resuming the full range of duties may have been displayed, but I do not accept that it got to the point of being bullying or intimidatory as alleged.

[61] There is complaint about Mr Bell's breach of [s.236](#) of the [Employment Relations Act 2000](#). That section reads:

*236 Representation.*

*(1) Where any Act to which this section confers on any employee the right to do anything or take any action*

*(a) In respect of an employer; or*

*(b) In the Authority or the Court, -*

*that employee may choose any other person to represent the employee for that purpose.*

*(2) ...*

*(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.*

*(4) The acts to which this section apply are -*

*(a) This Act;*

*(b) ...*

[62] Mrs Graham was entitled to seek advice and instruct counsel to represent her but she was not exercising *the right to do anything or take action* under the [Employment Relations Act 2000](#) or any other statute. The opening words of [s.236\(1\)](#) make it clear that the section has no application where an employer seeks to meet with an employee in circumstances such as the present: see *Gurnell v. School Centre Irene Ltd* (Member Dumbleton, 22 January 2008, AA18/8).

[63] In some circumstances, an employer who persists with attempts to meet with an employee without their representative being present may create an impediment to later proof of justification for an action or a dismissal. It is also conceivable that the persistent employer might breach an implied term of the relationship not to conduct themselves in a manner calculated or likely to damage the relationship of trust and confidence. However, neither is the present case. Mr Bell's attempts to resolve the matter without waiting for Mrs Graham's lawyer to return from leave were effectively stonewalled as will become apparent.

[64] It is said that Mr Bell accused Mrs Graham of various things, insisting on her undertaking rehabilitation and then denied making various statements. Mr Bell is also criticised for saying that the bank had no alternative duties and insisting on a medical certificate. In general, Mr Bell expressed a perspective about the situation that differed from Mrs Graham's. That included not accepting at face value what had been said about Mrs Graham's work capacity in the medical certificate dated 9 October 2008. In expressing those views, Mr Bell did not affect Mrs Graham's employment or any condition of her employment to her disadvantage. No grievance can therefore arise.

[65] Overall, the exchanges between Mrs Graham and Mr Bell in the latter part of 2008 were upsetting for Mrs Graham and frustrating for the bank. However, I do not accept that they give rise to any actionable breach of obligation owed by the bank to Mrs Graham.

### **January 2009 until April 2009**

[66] BNZ continued to press for an ACC medical certificate. An email on 9 January 2009 from Mr Bell to Ms Lilic shows that BNZ planned to send Mrs Graham home on unpaid sick leave that day if she did not have a certificate. There was a discussion between Ms McConaghy and Mrs Graham who then went to her doctor that day. The doctor certified Mrs Graham with a disability such that she should avoid teller duties, counting coins and paper money and forceful gripping and heavy lifting (including coins and drawers) but fit for customer service duties. Note was made of the considerable stress placed on Mrs Graham. The certificate was copied to BNZ on 12 January 2009 and there were some exchanges between Mrs Graham's lawyer and Mr Bell. Mrs Graham was treated as being on paid sick leave until temporary light duties were found for her at the Dunedin branch.

[67] BNZ involved its employee relations consultant (Sally Beale) and there was substantial correspondence between her and Mrs Graham's solicitors about the issues in dispute. It is not necessary to set out that correspondence for present purposes.

[68] BNZ with Mrs Graham's agreement arranged a referral to the occupational medicine specialist seen by Mrs Graham in November 2008. Dr Robb provided a further opinion on 4 March 2009. He confirmed that Mrs Graham suffered from *bilateral tennis elbow which is aggravated by, but has not been caused by, forceful manual activity at work* such as cash handling, money counting, keyboard data entry and lifting coin bags. Other tasks (such as CSR tasks) did not aggravate her elbow pain. Dr Robb thought that the prospects for effective medical rehabilitation seemed poor but that it was worthwhile considering a trial of corticosteroid injections.

[69] Following Dr Robb's report Mrs Graham consulted with her doctor and decided not to trial corticosteroid injections. That was conveyed to BNZ and there was mediation and correspondence but no mutual resolution of matters.

[70] By letter dated 1 April 2009 BNZ sought to meet to consider whether Mrs Graham's employment should be terminated on the grounds of medical incapacity in accordance with the collective employment agreement. The response was that Mrs Graham saw little point in meeting in light of her view that the bank had long since decided on that course of action. Next BNZ wrote on 3 April setting out the reasons leading to a *proposed termination for medical incapacity*. To summarise: BNZ understood that Mrs Graham was unable then and in the future to undertake teller work because of her medical condition; that there was no purpose in obtaining a workplace assessment by an occupational therapist or arranging rehabilitation or a graduated return to work programme; that BNZ could no longer continue indefinitely to provide light duties; that there were no other suitable roles available; and that there seemed little prospect that a short period of unpaid sick leave might result in a lasting improvement in Mrs Graham's condition. Mrs Graham was given an opportunity to respond to these views by 6 April 2009. Mrs Graham's response, through her solicitor, did not directly address the points raised by the bank except with respect to a point about her ability to work with a keyboard. That and some other comments led the bank to provide further comment and suggest deferring matters for two weeks while Mrs Graham was on annual leave.

[71] The exchange resumed on 20 April 2009 upon Mrs Graham's return from leave but it is not necessary to canvass the points made by both sides. By letter dated 22 April 2009 BNZ gave Mrs Graham notice of the termination of her employment for medical incapacity. It is not suggested that there was anything improper in the way this was managed by BNZ.

### **Justification for dismissal**

[72] Justification must be assessed objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances.

[73] I should mention the relevant provision in the employment agreement. It says:

#### *16.4 Termination of employment for medical incapacity*

*16.4.1 The Bank may terminate the employee's employment on four weeks' notice, if, in the view of the Bank, the employee is unable to, within a reasonable period of time, resume work as a result of physical or mental illness or injury.*

*16.4.2 Before the Bank takes any action in relation to the termination of the employee's employment, relating to the employee's medical incapacity, the Bank will inform the employee and, where requested, the employee's representative, that the Bank is considering the termination of the employee's employment. The Bank will make its decision in reliance on the medical information available to the Bank at the time. However, if requested, or at the employee's request, the employee will have the opportunity to seek a medical examination by a registered medical practitioner (determined after consultation with the employee) at the expense of the Bank. The Bank will take account of any resulting report or advice and any representations made by the employee or the employee's representative before making a decision of whether or not to terminate the employee's employment for medical incapacity.*

[74] By letter dated 27 April 2009 Mrs Graham's solicitor raised her personal grievance claim in relation to the dismissal. The basis for her grievance was the contention that Mrs Graham was medically fit for the duties required of the position for which she was employed although it was accepted that she was not medically fit for cash handling duties. That contention cannot survive the finding expressed above that BNZ lawfully varied Mrs Graham's duties in 2007 to include cash handling as part of the CSC position. It follows that BNZ's view that Mrs Graham was not able to resume her work as a result of a physical injury was a view that any fair and reasonable employer would have come to.

[75] BNZ scrupulously complied with the requirements set out in clause 16.4.2 of the collective agreement.

[76] It has been suggested that there was an element of predetermination in light of things said by Mr Bell in December 2009. It was Mr Bell's decision to dismiss Mrs Graham. Although drawn out, there is no basis for saying that Mr Bell improperly predetermined the situation. It was Mrs Graham's position on medical advice that she could not perform all the tasks of a CSC and there were no other suitable positions so termination of the employment was in prospect. Mr Bell simply recognised that.

[77] I find that BNZ justifiably dismissed Mrs Graham.

### **Summary**

[78] All Mrs Graham's claims fail.

[79] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority