

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 76
5595459

BETWEEN NGAIRE JOY HEATHMAN-
 ANNGOW
 Applicant

A N D BED BATH & BEYOND NZ
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Philip de Wattignar, Advocate for Applicant
 Cathy Crichton, Advocate for Respondent

Date of Investigation Meeting: 2 June 2016 at Dunedin

Submissions Received: On the day

Date of Oral Indication: 2 June 2016

Date of Written Determination: 10 June 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ngaire Heathman-Anngow was employed as a shop assistant at the Dunedin store of Bed Bath & Beyond NZ Limited (BBL) from 2006. On 24 September 2015, BBL terminated Ngaire's employment as the result of a restructuring it had undertaken in the Dunedin store (the Store).

[2] Ngaire claims that this dismissal was unjustified as the consultation and selection process was flawed. Ngaire says that her position was not superfluous and there was bias in her selection. The restructuring was simply an opportunity for BBL to get rid of her rather than deal with issues she had raised regarding another employee's behaviour.

[3] BBL says that the restructure was in response to a downturn in business and the need to implement a better structure in the Store. This included creating an Assistant Store Manager role and cutting the hours of the Sales Assistants to the extent that it disestablished one permanent Sales Assistant role. BBL says it treated Ngaire fairly and any complaint she has about another employee was a separate matter that it investigated and resolved outside of the restructure process.

[4] Ngaire has also raised a personal grievance for unjustified disadvantage in relation to the other employee's conduct towards her and the failure by BBL to resolve that issue.

[5] In connection with the unjustified action causing disadvantage grievance evidence was presented to me about an employee who was accused of behaviour by Ngaire that amount to bullying and harassment. As this person took no part in the proceedings, I prohibit from publication any details of which may lead to her identification, save as otherwise set out in this determination. She will be referred to in this determination as Ms X.

The issues

Unjustified action causing disadvantage

[6] The issues pertaining to Ngaire's personal grievance of unjustified action causing disadvantage arising out of the actions of the other employee include:

- (a) What did BBL do in relation to the complaint that Ngaire made regarding another employee's actions towards her;
- (b) Were any of BBL's actions or failures to take steps unjustified;
- (c) If any of the actions of BBL were not justified, then has such unjustified action caused disadvantage to Ngaire's employment or a condition of it;
- (d) If there has been an unjustified action causing disadvantage, what remedies should I award to Ngaire?

Unjustified dismissal

[7] The issue pertaining to Ngaire's personal grievance for unjustified dismissal is, is the redundancy genuine and have the notice and consultation requirements of s.4 of the Employment Relations Act 2000 (the Act) been complied with such that the restructure and termination of Ngaire's employment by reason of redundancy is justified¹?

The facts giving rise to the employment relationship problem

[8] Ngaire commenced employment with BBL in 2006. At the time of the termination of employment, she was a permanent part time Sales Assistant. She worked 25 hours per week and was paid \$15.50 per hour.

[9] Since her employment in 2006 right through to her termination, there were no issues with Ngaire's work.

[10] In January 2015, the Store operated with:

- a. a Store Manager employed on a permanent full time basis;
- b. an Assistant Store Manager employed on a permanent full time basis;
- c. two permanent part time Sales Assistants, one working 25 hours per week and the other 20 hours per week; and
- d. various part time Sales Assistants employed on a casual basis and used only when required.

[11] In January 2015, BBL had already made a decision to cut back on the number of employee hours that the Store operated with. This reduction in hours did not affect the permanent staff but rather resulted in casual staff being rostered on less than they may have been in the past.

[12] Around March 2015, BBL promoted the Store Manager to the role of Cluster Manager. This left a vacancy that the then current Assistant Store Manager, Avril Michelle, took over on a temporary six-month trial. BBL employed a new employee

¹ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541

to take over the role of Assistant Store Manager and the part time Sales Assistant roles remained the same.

[13] In May 2015, the new Assistant Store Manager resigned and BBL made a decision not to replace her role. Rather, it decided that the Store could operate without an Assistant Store Manager and that the rostered hours could be allocated to a new permanent part time Sales Assistant with some additional hours been provided to casual part time Sales Assistants.

[14] This meant that from 1 June 2015, a new permanent part time Sales Assistant commenced work in the Store. This was Ms X. Ms X worked 20 hours per week.

[15] In August 2015 the store operated with:

- a. a Store Manager employed on a permanent full time basis;
- b. three permanent part time Sales Assistants, one working 25 hours per week (Ngaire) and two working 20 hours per week (Ms X and Deborah Te Ata); and
- c. various part time Sales Assistants employed on a casual basis.

[16] The number of hours allocated to the Store for employees was reduced at this time from the hours immediately prior to that. This was because BBL was concerned that the Store's wage cost was high compared to the percentage of sales. It is notable that this also affected the decision not to replace the Assistant Store Manager at that time.

[17] Ms X and Ngaire's relationship was a little strained. Outside of work there was an issue between their families and friends which neither Ms X nor Ngaire were directly involved in but it appeared to influence, at least, Ms X's attitude towards Ngaire. For the purposes of this matter, I did not investigate or understand fully those external events and the issues that arose from them, it is simply relevant to provide context as to Ngaire's contention that Ms X behaved badly to her at work in such a way that she became concerned about Ms X's behaviour. The other permanent part time Sales Assistant, Deborah, confirmed this behaviour.

[18] Ngaire became worried about Ms X's attitude towards her and her behaviour over time became more rude and aggressive. This got to such a level that Ngaire kept notes of what was occurring and told the Store Manager, Avril, of her concerns.

[19] On Sunday, 16 August 2015, this behaviour came to a head when Ms X was very rude and aggressive to Ngaire in the store in front of customers. The following Monday morning, Ngaire asked Ms X what was wrong and was told by Ms X that she thought Ngaire was despicable and disgusting and that she hated her. She said she did not want to work with Ngaire or talk to her.

[20] Ngaire was so concerned about this that she called Avril who was not working on that day and left a message with her. Avril called her back later to check if she was okay to carry on with work. Avril said she would meet with her later to talk about it.

[21] On Tuesday, 18 August 2015, when Ngaire went to discuss her concerns with Avril, Avril told her that she did not want to be involved and did not want to take sides. Avril told her that she had spoken to Cathy Crichton, the Regional Manager, and was going to leave it to Cathy to handle this matter.

[22] Because of this conversation, Ngaire recorded her concerns in writing and sent this to Avril to forward on to the head office of BBL. The letter Ngaire drafted dated 19 August 2015 states:

Dear Avril, I am writing to you personally to draw your attention to and express my concern at the declining attitude of a fellow staff member [Ms X] over the last few weeks.

This attitude change has resulted in what I perceive is a full personal attack on me this last Monday in the store. (17th Aug).

Sunday 16th [Ms X] was somewhat moody from the start of work with her verbal interactions being short and aggressive throughout the day. Some of which occurred in front of customers.

Monday 17th, Sunday's behaviour carried on at the start of Monday's work day culminating in a very aggressive response to me when I stopped and asked her directly "is there something wrong and if so what is it?". She was vacuuming at the time and turned off the unit and stated the following with a customer present in the shop.

Her response was "you are despicable and disgusting and I hate you and don't want to talk to you or work with you!".

This comment I found not only unacceptable in a workplace but quite bullying and personalised leaving me somewhat stressed especially when I wanted to speak with you about this to resolve whatever issues she may have. The fact that her behaviour towards me has carried on over some two days I can only interpret as nothing short of harassment.

Your immediate attention to this matter would be appreciated.

Regards

[23] Avril forwarded on this letter to the HR administrator team in BBL head office. One of those employees, Hayley Churches, forwarded that email and the letter onto Cathy. Hayley then rang Ngaire on 20 August 2015 and told her that she had received the complaint regarding Ms X, that Ngaire had done the right thing by letting head office know and that the complaint was being investigated. Hayley also told Ngaire that Avril was to be in the Auckland office to discuss the Store's performance shortly and in the interim, she would arrange the rosters in the store so that Ngaire and Ms X would not have to work together over the weekend.

[24] Hayley then sent a letter to Ngaire dated 21 August 2015 which confirmed receipt of the complaint, that Avril would be spending a couple of days in the Auckland office as part of a wider review of the Store's performance and that BBL would fully investigate the matter raised and come back to Ngaire in due course.

[25] Cathy, who was tasked with investigating the complaint, then spoke to Ms X and Avril by telephone on 20 August 2015.

[26] On 21 August 2015, Cathy called Ngaire to discuss the complaint. Cathy gave Ngaire an opportunity to explain what had occurred. Ngaire outlined to Cathy the events that she had complained of regarding 16 and 17 August 2015. She also mentioned that Ms X had also said things to her like *I am stalking you on Facebook*, that Ms X had sworn a couple of times, and whilst that was not directed at Ngaire personally, it was unpleasant for her. Cathy concluded the call by asking Ngaire if she was able to continue to work with Ms X and Ngaire responded by saying that she wanted to keep her work relationship professional and that she was prepared to work with Ms X and simply get on with her job.

[27] Because of her calls with Ms X, Avril and Ngaire, Cathy was of the view that the matter was now at an end. In contrast, Ngaire believed that the matter was still going and Cathy was investigating further. Ngaire anticipated some conclusion or at

least further action from Cathy would eventuate. She merely believed the request of being able to continue to work with Ms X from Cathy related to the interim arrangements for the weekend pending a suitable outcome of the investigation and BBL taking some action to resolve the problem.

[28] It transpires that BBL took no further steps in respect of investigating or dealing with the complaint, that Ngaire had raised. On 2 September 2015 when Ms X's 90-day trial period ended, BBL confirmed her employment as permanent. Cathy refers to this in her evidence as saying nothing in Ms X's work performance warranted terminating her employment under the 90-day trial period so her contract remained in place and unchanged.

[29] In August 2015, BBL became concerned at the performance of the Store. The sales figures for the three months ending June 2015 were down 6% on the previous quarter. Cathy described this in evidence as saying the Store went from being an over-performing store in respect of sales in the first quarter of 2015 to being an under-performing store in the second quarter.

[30] Cathy met with Trevor Brown, the CEO of BBL, in August 2015 to discuss the financial results for the Store and to consider why it had performed so poorly and what they could do. In the first instance they identified that there might be an issue with Avril as the Store Manager. They determined that they should meet with Avril to discuss her performance in managing the Store, the overall performance of the Store including the performance of staff and look at what could be done to support Avril in her role to improve performance of the Store.

[31] The meeting with Avril, Trevor and Cathy was booked to take place on 26 August 2015. This was the meeting that Hayley referred to in her telephone conversation and correspondence with Ngaire.

[32] In their review Cathy and Trevor looked at the financial year by quarters, including weekly and monthly reports on financial performance. They determined that the decline in the three months to the end of June 2015 correlated directly to the changes to the staff structure at the Store. This being the period in which the Store had operated without an Assistant Store Manager and with only Avril acting as the Store Manager.

[33] The meeting with Avril took place as planned. The meeting included some training for Avril and various discussions around solutions for improving her performance and improving the performance of the Store. Cathy's evidence was clear in respect of the purpose of the meeting and the outcome being that BBL was to support Avril in her ongoing position as Store Manager through training and exploring options for improving performance, both her own and that of the other employees in the Store.

[34] This is in contrast to Ngaire's evidence where she says that on her return from her meeting in Auckland, Avril told her that BBL had demoted her to Assistant Store manager. Ngaire is particularly clear on this and says that she was concerned for Avril and asked her what that meant with Avril reassuring her that BBL was continuing to support her and pay her at the same level.

[35] There was no evidence led before me from anyone who could directly contradict what Ngaire said about the conversation with Avril. I appreciate that it is hearsay and I must have some caution as to the weight that I place on it. In the circumstances, there is no reason for me to doubt what Ngaire says. I conclude that whilst Cathy and Trevor may have intended that the meeting with Avril would show support for her, the result of that meeting, left Avril thinking that BBL had demoted her or she had no choice but to take the role of Assistant Store Manager in the upcoming restructure.

[36] What followed from the meeting with Avril was that Cathy and Trevor made a decision to restructure the Store. That decision was that the Store should return to a structure that included a Store Manager and an Assistant Store Manager. The restructure would mean BBL would employ an Assistant Store Manager and BBL would disestablish one of the permanent part time Sales Assistant Roles. It was also the case that there would be a consequential effect on the number of hours available for casual part time Sales Assistants.

[37] Cathy says that she and Trevor did a comparison on the cost and return by looking at the cost of increasing the wage component to factor in an Assistant Store Manager as opposed to a part time Sales Assistant against a projected return that an Assistant Store Manager would create by increased sales and some efficiency that might increase profit.

[38] I noted in questioning that it appeared somewhat counterintuitive to remedy a store's drop in profit and sales figures by increasing one of its fixed costs, being wages. Cathy explained that actually what they had decided was increasing the amount of senior management experience in the Store would actually increase sales. Managers by their very nature were not simply managing from an office but were working in the Store and with their experience and training would be able to encourage the sales staff and act in a way themselves that would increase sales. It was BBL's view that a Store Manager and Assistant Store Manager would provide better management for part time Sales Assistants that would increase sales. A new Store Manager or Assistant Store Manager would bring ideas to the table around his or her selling knowledge, how to sell or increase sales to customers, how to maximise sales through merchandising and other sales oriented solutions for the Store.

[39] The result was that Cathy commenced consultation with the Store's employees over a potential restructure on 7 September 2015.

[40] This commencement of consultation took place with a telephone call. Cathy provided information to the employees regarding the downturn in sales and the proposal to change the structure by reinstating the previous Store management structure of a Store Manager and Assistant Store Manager. She finished the call by asking for feedback on the proposal by 9 September 2015.

[41] Following the telephone call on 7 September 2015, BBL sent the employees of the Store a letter dated 10 September 2015. That letter stated:

As discussed with you on 7 September at 8.30am, our company is considering a proposal to restructure the roles and roster hours for Bed Bath & Beyond Dunedin.

As this directly relates to your position as a part time retail assistant at 25 hours per week, you have been advised of the proposed changes and your consultation and input sought.

As discussed in our meeting the commercial reasons behind the proposal are based on the store sales and profit performance not meeting expectations. Part of the proposed changes include reinstating a store manager and assistant manager structure, which we believe will best manage the Dunedin store; this has proven as the ideal structure in stores with similar turnover within our business.

It is important to note that no final decision has been made and that a decision will only be made following the consultative process, which includes any consideration, input or suggestions that you or others

impacted employees provide, of which a timeline of 4pm Wednesday 9 September was set in our meeting on Monday 7 September.

[42] The letter then went on to record the proposed new structure by reference to the positions and hours that would be available for the part time sales employees. The letter then recorded further:

You will be invited to apply for any of the new proposed roles. A selection process will be discussed with you and will be transparent, fair and objective.

In the event that our decision is to go ahead with the proposal and an employee's position is disestablished, it is important to note that there is no provision for redundancy compensation and notice will be given in accordance with individual employment agreement or paid in lieu thereof.

You can be assured that we will not make any decisions before we have considered your feedback.

I would like to schedule a meeting at 9am on Monday 14 September with Trevor Brown where he will advise you of our decision. You are welcome to bring a support person with you to the meeting and we would encourage you to do so.

[43] It appears from the evidence that that BBL sent the letter to Ngaire on 10 September 2015 at 4.45pm. Ngaire's evidence was that, on receiving the letter, she was concerned that she had missed the deadline for giving feedback, went ahead, drafted her feedback in writing, and sent that through. However, the email that Ngaire sent to BBL giving her feedback on the proposed restructure was sent at 9.45am on 10 September 2015. It is also notable that the heading on the email was "*Proposal for increasing sales*". I conclude, therefore, that Ngaire was confused in her evidence and misremembered the timing of events. This is supported by the content of the email that suggests that in fact Ngaire's email was feedback that came out of the call and not in response to the letter.

[44] The email that Ngaire sent containing feedback in relation to increasing sales outlined nine points that Ngaire suggested might increase sales figures during what she described as a temporary downturn. These things included increasing advertising in local papers, having a late night with specials and other initiatives that might draw in more customers to the Store.

[45] Ngaire's feedback did not include any comment on the proposed restructure. That is, she did not provide any comments on the suggestion that the Store needed an

Assistant Store Manager and Store Manager structure and that the part time Sales Assistant roles be reduced from three as it currently operated back to two operating on 20 hours per week. It is clear from Ngaire's evidence that she did not appreciate from the telephone call on 7 September 2015 that BBL was proposing this in order to remedy the loss in sales figures. Ngaire did not know that BBL was seeking feedback on the proposed restructure, that is the employee allocation of hours and whether increasing the management in the Store would help increase sales.

[46] I conclude that this was the case because Cathy did not adequately explain this in the 7 September 2015 telephone call. BBL did not provide any financial information other than the 6% downturn in sales per quarter. BBL did not provide any of the information that Cathy and Trevor considered in terms of the comparison of various financial reports and the analysis of increased costs versus projected sales by bringing in a Store Manager and Assistant Store Manager structure to any of the employees. BBL did not discuss the rationale for the restructure in sufficient detail so that the employees could understand and comment on whether it was appropriate.

[47] Ngaire said that when she received the 10 September 2015 letter it was clear to her that BBL had already decided it would proceed with the restructure. In the context of the telephone conversation on 7 September 2015, the provision of feedback earlier on 10 September 2015 and then receipt of the letter saying that a decision would be given on 14 September 2015, Ngaire believed that BBL had made up its mind and it was intending to proceed with the restructure.

[48] On 11 September 2015, Cathy and Trevor met to decide whether BBL would proceed with the restructure as proposed. The only information provided in respect of feedback from the employees was Ngaire's email on 10 September 2015. None of the other employees of the Store provided feedback. In that meeting on 11 September 2015, BBL decided that it would implement the restructure as proposed.

[49] On 14 September 2015, Trevor met with employees of the Store to discuss the restructure. In his meeting with Ngaire, he confirmed the rationale for the restructure and confirmed that the restructure was going ahead. Ngaire and her support person, Alan Heathman, challenged Trevor's analysis and explanation and suggested to him that in fact what this represented was merely a reduction in hours amongst the permanent part time Sales Assistants. Their point was that could be done by way of consultation over hours rather than consultation over a restructure and in fact it might

be that employees would agree to a reduction in hours, which their individual employment agreements contemplated. Consultation over this would resolve that issue rather than requiring a restructure that would disestablish roles and require employees to apply for jobs.

[50] Trevor dismissed that notion and told Ngaire that BBL was continuing with the restructure and that all of the part time Sales Assistants would need to apply for positions. He did say that they could apply for any of the positions available. He said he would provide job descriptions.

[51] After the meeting with Trevor on 14 September 2015, BBL did not provide any job descriptions in respect of the roles available. BBL did not provide any information about the criteria for selection for roles and what might be expected in the interview process.

[52] On 16 September 2015, Ngaire sent a letter to Trevor stating:

Further to our meeting on Monday 14 September 2015.

I would like to bring to your attention my following concerns:

The restructuring process is flawed.

I do not accept that my current position can be disestablished and my contract changed without my agreement.

I fail to see why I am being required to reapply for this position.

To be clear, I wish to continue in my current position under existing hours, terms and conditions working in the position of part time permanent retail assistant.

The information you have provided setting out the options I have been presented with to apply for is unclear. Are all the current positions' terms and conditions entitlements such as annual leave, lieu days, sick leave and service entitlements including your remuneration to remain the same and are they permanent positions you are offering.

I await your prompt response.

[53] On 17 September 2015, Ngaire received an email on behalf of Trevor. This email stated:

We believe the restructure process has been fair and reasonable and have certainly invested significant time and effort to ensure this.

You were advised of the proposal we were considering on Monday 7 September.

All affected parties then had three days to provide us their input and suggestions regarding the proposal. We took into consideration team members' feedback and then advised you of our decision on Monday 14 September.

Your current contract is a retail assistant working 25 hours per week.

This role will not exist post the restructure.

You have therefore been invited to apply for any of the roles as detailed post the restructure.

As stated by Trevor, during his meeting with you, if you require any further explanation please feel free to call Cathy, Trevor, Hayley or Nitika to discuss further.

I can confirm all entitlements such as annual leave, hourly rate, lieu days and sick leave remain unchanged.

All positions offered are permanent.

[54] On 18 September 2015, Ngaire applied for a permanent part time Sales Assistant role.

[55] On 24 September 2015, Ngaire had an interview with Cathy for the permanent part time Sales Assistant role.

[56] On 25 September 2015, Cathy met with Trevor to discuss the applications for the permanent part time Sale Assistant roles. Four employees of the Store had applied for roles. They were Ngaire, Deborah, Ms X and Leigh, who was employed as a casual part time Sales Assistant but had applied for a permanent part time Sales Assistant role. In that meeting, Cathy and Trevor decided to appoint Ms X and Leigh to the two permanent part time Sales Assistant roles.

[57] On 25 September 2015, Cathy called Ngaire and advised her that she had not been successful in obtaining a role and as a result, her employment would be terminated for redundancy. She would be paid two weeks' notice in accordance with her employment agreement but that could be paid in lieu if she wished.

[58] BBL confirmed this in a letter dated 25 September 2015. That letter stated:

We have taken into consideration all feedback and information from the interview process and regret to inform you that you have been unsuccessful in your application for the role of 10-20 hours at Bed Bath & Beyond, Dunedin.

It is important to note that there is no provision for redundancy compensation as per clause 10(a) of your employment agreement. Two weeks' notice is being given in accordance with IEA/CA with your last day of employment being 9 October 2015.

[59] Later that day on 25 September 2015, Ngaire responded to the letter by email to Cathy requesting, amongst other things, to be told *what part of my application, work history and experience was unsatisfactory in regards my being suitable for the position after 9 years of loyal service?*. Ngaire concluded the email by requesting an immediate response that day to her concern. Ngaire did not receive a response to her email.

[60] On 8 October 2015, Ngaire raised a personal grievance through her representative for unjustified action causing disadvantage in relation to BBL's failure to deal with the allegations regarding Ms X adequately and unjustified dismissal arising out of the restructure and termination of her employment for redundancy.

Unjustified action causing disadvantage

[61] On more than two occasions, Ngaire raised concerns with the Store Manager about the actions of Ms X towards her at work. This included the complaint that she put in writing on 19 August 2015. That complaint included specific examples of behaviour that Ngaire complained of and general allegations of bullying and harassment.

[62] BBL did respond to this complaint by investigating it. That investigation involved Cathy's discussions with Avril, the Store Manager at the time, and Ms X as well as a discussion with Ngaire.

[63] However, it is my view that that investigation was not adequately resolved. Cathy's evidence was that, because of the telephone conversation that she had with Ngaire on 21 August 2015, she believed that the matter was resolved. So, in the course of that telephone conversation, Cathy must have heard Ngaire's account of events and decided that the matter could be resolved by getting an assurance from Ngaire that she was prepared to work with Ms X. Cathy made this decision without taking any time to consider what she had heard from Ngaire and weigh it up against what the other employees had said or even go back to the other employees to hear what they had to say about Ngaire's account.

[64] In my view, the duty of good faith requires more from an employer when investigating a serious complaint regarding bullying and harassment. I expect an employer to investigate fully by, first, speaking to the complainant and then based on what the complainant advises, establishing whom it should speak to next. In this case, it would have been appropriate to then speak to Ms X specifically about the allegations. Then Cathy could speak to Avril to see if she could corroborate either account or comment generally on the nature of the relationship or any of the behaviour that she may have witnessed. It would then have made sense probably to investigate further by interviewing the other part time Sales Assistant, Deborah, who may well have witnessed the behaviour having worked with Ngaire and Ms X together.

[65] That process may then have necessitated going back to Ngaire to obtain her views on what the others had said.

[66] Cathy should then have concluded the investigation by making a decision about whether the behaviour complained of had occurred and if it had, what would be required to remedy it. I am not satisfied that in this case that Cathy turned her mind properly to that, or if she did, she must have dismissed the allegations after speaking to Ms X because she gave no weight to the call that she had with Ngaire in which Ngaire explained the allegation further.

[67] In my view, it would have been appropriate, having made a conclusion, to then relay that back to Ngaire and Ms X and explain what action BBL was going to take. In this case, it appears that Cathy prematurely decided that she could not resolve the issue as to whether the behaviour was occurring or not, and the answer was simply to get an assurance from Ngaire and separately from Ms X that they were both prepared to work together. That was insufficient.

[68] A failure to investigate the complaint properly and a failure to conclude the complaint conclude properly, was unjustified.

[69] I find that that unjustified action did cause disadvantage to Ngaire's employment and on this basis she has made out her personal grievance of unjustified action causing disadvantage.

Unjustified dismissal

[70] Given the decision by the Court of Appeal in *Grace Team Accounting v. Brake*² a question of whether a dismissal arising out of a restructuring and redundancy process is justifiable turns on whether the employer can show:

- a. that the redundancy is genuine; and
- b. that the notice and consultation requirements of s.4 of the Act have been duly complied with; so
- c. that the test of justification in s.103 and 103A of the Act has been satisfied.

[71] It follows that there may be requirements other than just s.4 of the Act which may go towards satisfying the test of justification.

[72] Turning first to showing that a redundancy is genuine the onus of doing so rests with the employer but the onus is not to be set too high³.

[73] Whilst I have some concerns about the motivation in selecting Ngaire for redundancy through the restructuring process, I am satisfied that the decision to restructure which ultimately led to the redundancy was genuine. There was a commercial concern for BBL regarding the sales and profit figures generated by the Store in the quarter to the end of June 2015. An analysis of those figures and the Store's performance led BBL to believe that the Store's performance might increase with a return to a structure that included a Store Manager and an Assistant Store Manager.

[74] However, BBL failed to provide sufficient information regarding the restructure to affected employees at many of the stages of consultation.

[75] At the commencement of the restructure consultation, in the telephone conference on 7 September 2015, BBL failed to provide information that supported the proposed restructure. There was a clear disconnect between downturn in sales performance and the need to put in a new structure in the Store. Whilst Cathy

² [2014] NZCA 541

³ *GN Hale & Son Ltd v. Wellington Caretakers IUOW* [1991] 1 NZLR 151

explained that rationale credibly in the investigation meeting, that explanation was not provided satisfactorily in the telephone call.

[76] This is best evidenced by Ngaire's view that the downturn in sales was problematic and BBL wanted feedback on how that could be improved. This is why her email of 10 September 2015 outlined various advertising, marketing and sales initiatives, which might increase turnover. Separately to that, in terms of the restructure, she saw that as simply being a change to hours for permanent part time Sales Assistants that could be effected through the consultation over the number of hours people worked rather than a consultation over restructure and potential redundancy. There was no clear connection in her mind as to a downturn in business informing a decision to put a new structure in place in the Store and therefore she was unable to provide any meaningful feedback on it.

[77] As I said to BBL in the investigation meeting, surely existing staff including some who were long term employees, would have been well placed to provide information to BBL about how the Store could best operate.

[78] Avril, Ngaire and Deborah were all employees who worked for a considerable period in the Store when it had a Store Manager, Assistant Store Manager and permanent part time Sales Assistants working 20 and 25 hours. Surely, they could provide some of the best feedback on whether that structure was an efficient way of operating and whether they thought that structure best supported sales within the Store.

[79] Rather than making a decision based solely on figures, BBL could then have made a decision about the proposed restructure on feedback from employees who had operated under both structures.

[80] It appears to me that there were any number of different options that employees could have given feedback on which might have indicated that the temporary structure could continue to operate with various changes made. BBL removed that opportunity by the failure to provide clear information in the initial consultation meeting.

[81] BBL compounded this failure to provide information by the fact that no reports were generated, no financial information was provided and no logical or clear

analysis was presented to the employees to understand the rationale for the proposal and what the proposal might look like.

[82] BBL then failed to provide adequate information in relation to its decision to implement the restructure and the application process for new roles. In relation to the proposed roles and the process for applying for them, Trevor advised Ngaire in the meeting of 14 September 2015 that BBL would provide a job description but BBL did not do this. In the letter of 10 September 2015 in reference to the application for new proposed roles, BBL stated: *a selection process will be discussed with you*. BBL never discussed that selection process with Ngaire and Ngaire was not aware of criteria for selection for the newly created two permanent part time Sales Assistant roles.

[83] Once BBL had made its decision regarding the appointment of the two permanent part time Sales Assistant roles, BBL did not give any feedback to the employees who had failed in their application and it did not give them any opportunity to consider that decision and provide further information. In the circumstances, BBL should have conferred with Ngaire over why the other applicants were preferred to see if she had anything to say about that before it implemented the decision to award the positions to the two other employees⁴.

[84] Once BBL had decided not to appoint Ngaire to a part time Sales Assistant role, it moved immediately to a decision to terminate Ngaire's employment. BBL failed to consider whether there might be other roles available for Ngaire in the Store. When asked about this, Cathy simply said that because Ngaire had applied for a permanent part time position, she assumed she would not want a position that was a casual role or that she would not be available for a position in another store because that would be in another town (there not being another BBL store in Dunedin). It may well be the case that Ngaire was not interested in a casual Sales Assistant position and it may well have been the case that Ngaire was not interested in any position that might be available outside of Dunedin, but that was not a decision that Cathy should have made without discussing that with Ngaire first. In my view, BBL should have met with Ngaire once it had made a decision that she would not be appointed to one of the new the roles to discuss with her whether there were any alternatives to making her redundant.

⁴ *Vice Chancellor of Massey University v Wrigley* [2011] NZEmpC 37

[85] I also find that BBL could have done more between the telephone conference of 7 September 2015 and making its decision on 11 September 2015 to proceed with the proposed restructure. BBL only received one lot of feedback in relation to the proposed restructure and that was the email from Ngaire. That email addressed initiatives that Ngaire believed could increase sales in the Store. The feedback did not address the proposed restructure and provide any information around the allocation of hours and functions within the Store. No other employees provided feedback and in the absence of any information around those issues, I am surprised that BBL did not inquire further with the employees to check that they understood the basis for the restructure and what it was that they were asking for feedback on. I am not suggesting that all employers would have to do this as in some restructures employees simply elect not to provide feedback on the basis they have no comments to make. In this particular case though, I think BBL could have done to ensure that the employees understood the restructure and provided feedback.

[86] The procedural failings by BBL in effecting the restructure and redundancy meant that the dismissal is unjustifiable.

[87] These procedural failings, however, do not merely render the dismissal unjustifiable from that procedural aspect. I find that the failings meant that Ngaire did not have the opportunity to provide information that might have influenced the outcome. This is so for three things: the decision to proceed with the restructure as proposed; the decision to appoint the permanent part time Sales Assistant roles to Ms X and Leigh; and the decision to make Ngaire redundant without exploring other opportunities.

[88] I cannot say that, if BBL had given Ngaire these opportunities the outcome would have remained the same. That is, when I stand back and objectively view what has occurred, I cannot conclude that notwithstanding the procedural failings, a fair and reasonable employer in these circumstances would have made Ngaire redundant in any event. On this basis, the dismissal is unjustifiable from a substantive perspective as well as a procedural one.

[89] As the dismissal is unjustifiable, it is not necessary for me to consider whether the selection of Ngaire was genuine. However, I do comment on this because Ngaire's advocate raised it in the course of the investigation meeting. I do accept there is a basis to infer that Ngaire's redundancy was motivated by a desire to resolve

an issue between employees and/or resolve what may have been a performance issue for part time sales staff that was reflected in the sales figures. All that I say about this is I accept that there was a commercial basis for the restructure and on that basis the restructure process was genuine. However, there is some doubt in my mind as to the genuineness of the selection process and in the absence of information explaining the objective criteria for assessing employees for new roles, including the failure to provide that to the employees, I note that BBL has left itself open for me to draw that inference. As I have concluded that there is an unjustified dismissal I will not make a decision on whether selection was genuine but point out that in order to protect itself against such allegations, BBL should be more transparent in its process and criteria for selection for roles in such a situation.

Remedies

[90] As the unjustified disadvantage grievance and unjustified dismissal grievance are quite separate events, I believe it is appropriate to award separate amounts for hurt and humiliation arising from each grievance.

[91] The evidence from Ngaire in respect of the hurt and humiliation she suffered because of BBL failing to deal with her complaint over Ms X's behaviour adequately was limited and to a certain extent combined with overall discussion of the hurt and humiliation she suffered because of losing her job. I have analysed the evidence that I have heard and am satisfied that there was hurt and humiliation suffered to a limited extent in respect of BBL's failure to deal with her complaint appropriately and award \$3,000.00 compensation in this regard.

[92] There was clearer evidence provided to me regarding the hurt and humiliation that Ngaire suffered because of the unjustified dismissal. This centred on being upset and humiliated by the manner in which BBL had treated her through the process, particularly given that she had been an employee for nine years. Ngaire spoke of the stress that this caused her being without work particularly at a time when she had a short holiday booked to Australia. Because of the financial implication of losing her role, Ngaire and her husband had to make a decision about that pending trip, her husband elected not to travel, and Ngaire travelled on her own. This compounded Ngaire's stress. Ngaire spoke of attending a doctor and obtaining medication for the stress that she was suffering. There was no medical evidence to verify this but I take it on face value that this occurred. Ngaire's brother spoke of witnessing Ngaire in

various states of distress including being tearful and upset and significantly stressed by the events that had taken place.

[93] Standing back and considering the evidence that I have heard in relation to hurt and humiliation, I conclude that the hurt and humiliation is in the middle range of symptoms in respect of these matters and at the lower end of that. On this basis, I award \$9,000.00 for hurt and humiliation.

[94] Ngaire also seeks reimbursement of the sum equal to the wages she has lost as a result of the unjustified dismissal pursuant to s.123(1)(b) of the Act. She has calculated that loss based on 25 hours per week at \$15.50 per hour over a 13-week period. Ngaire has then given credit, as she must do for earnings that she has obtained during that time. On the evidence before me, I accept that Ngaire has lost \$2,546.25 as a result of her dismissal. Ngaire is entitled to reimbursement of this sum pursuant to s.123(1)(b) of the Act.

[95] I must consider whether Ngaire has contributed to her grievance. As I expressed in the oral indication that I gave on 2 June 2016, I am satisfied that there is no contribution by Ngaire in respect of this matter. In fact, I commended Ngaire for her efforts to try to provide feedback in difficult circumstances and her efforts to get BBL to engage in the process correctly. She was the only employee of those affected by the restructure to provide feedback and she actively raised issues that she had about the process in order to have it resolved. She raised questions about the information provided to her in relation to the roles and did her best to apply for and retain a position. I am completely satisfied that there is no contribution at all in this instance. I do not reduce the remedies I have awarded.

Determination

[96] BBL acted unjustifiably to Ngaire's disadvantage in failing to deal with her complaint regarding Ms X's behaviour.

[97] BBL dismissed Ngaire unjustifiably as a result of the restructure consultation process, the implementation of the restructure and the job application process and in its decision to make Ngaire redundant as a result of her not being successful in her application for a permanent position.

[98] As a result, Ngaire's personal grievances for unjustified action causing disadvantage and unjustified dismissal are accepted.

[99] BBL is to pay Ngaire the sum of \$12,000.00 without deduction pursuant to s.123(1)(c)(i) of the Act as compensation for hurt and humiliation she has suffered from those grievances and it must pay the sum of \$2,491.25 gross as reimbursement of the wages lost as a result of the unjustified dismissal grievance.

Costs

[100] Costs are reserved. The parties are encouraged to resolve any issues of costs between themselves.

[101] If they are not able to do so and a determination as to costs is needed, Ngaire's advocate may lodge and serve a memorandum on costs within 28 days of this determination. BBL will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

[102] I advised the parties in my oral indication that if I am required to determine costs, then they can expect me to do so, on the usual daily tariff basis. I will only adjust the tariff up or down depending on the particular circumstances of the case as set out in any memorandum they provide⁵.

Peter van Keulen
Member of the Employment Relations Authority

⁵ *PBO Ltd v. Da Cruz Ltd* [2005] 1 ERNZ 808