

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 472  
5331440**

BETWEEN                      JOANNE McFADGEN  
   Applicant  
  
AND                              AUCKLAND COUNCIL  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Sarah Blick, Counsel for Applicant  
   Katherine Burson, Counsel for Respondent  
  
Investigation Meeting:        23 August 2011 at Auckland  
  
Submissions received:        30 August 2011 from Applicant  
   30 August 2011 from Respondent  
  
Determination:                2 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Joanne McFadgen, claims that the Respondent, Auckland Council, breached the employment agreement between them by failing to pay the contractual redundancy compensation due to her (“The Redundancy Compensation”).

[2]     Ms McFadgen also claims that she has suffered an unjustifiable disadvantage in her employment as a result of Auckland Council resiling from previous express assurances that it would pay her The Redundancy Compensation.

[3]     Ms McFadgen further claims Auckland Council breached the duty of good faith which it owed to her.

[4]     Auckland Council claims that the Authority does not have jurisdiction to hear Ms McFadgen’s claim on the basis that Ms McFadgen did not have an employment relationship with Auckland Council.

[5] Auckland Council further claim that the Authority does not have jurisdiction to order Auckland Council to pay redundancy compensation since such compensation is expressly excluded by operation of the Local Government (Auckland Transitional Provisions) Act 2010 (“Transitional Provisions Act”), section 104(1).

### **Issues**

[6] The issues for determination are:

- a. Whether the Authority has jurisdiction to hear Ms McFadgen’s claim against Auckland Council.
- b. Whether Auckland Council breached the employment agreement by failing to pay Ms McFadgen The Redundancy Compensation;
- c. Whether Ms McFadgen suffered an unjustifiable disadvantage by Auckland Council resiling from previous assurances that it would pay her The Redundancy Compensation;
- d. Whether Auckland Council breached the duty of good faith which it owed to Ms McFadgen.

### **Background Facts**

[7] Ms McFadgen commenced employment with Auckland City Council (“ACC”) as a Business Process and Systems Consultant on 19 January 2009. Ms McFadgen worked in the Data Services division.

[8] Ms McFadgen was employed subject to an individual employment agreement (“IEA”) with ACC which provided at clause 11.5 that, in the event of redundancy, Ms McFadgen would be entitled to compensation of eight weeks’ fixed pay for the first year or part year of service, and for two weeks’ fixed pay for the second and each subsequent year or part year.

[9] ACC is a local authority pursuant to the Local Government Act 2002. Auckland Council was established on 1 November 2010 following the merger of a number of prior local authorities, referred to as Existing Local Government Authorities (“ELGO”), of which ACC was one.

[10] The Auckland Transition Agency (“ATA”) was a statutory body established under the Local Government (Tamaki Makaurau Reorganisation) Act 2009, and was appointed to oversee the transition of the ELGOs to the new Auckland Council. The ATA ceased to exist on 31 October 2010.

[11] Pursuant to the Local Government (Auckland Transitional Provisions) Act 2010, the Interim Chief Executive of Auckland Council (“ICE”), or the ATA acting on his behalf, made decisions regarding whether ELGO employees would be provided with offers of employment with Auckland Council, or would have their employment terminated, following transition.

[12] The Local Government (Auckland Transitional Provisions) Act 2010 specified that redundancy compensation was not available in cases where ELGO employees received an offer of employment from the ICE or ATA that was the same or substantially similar to their existing terms and conditions of employment.

[13] Ms McFadgen said that existing employees were encouraged by the ATA to apply for jobs within the new Auckland Council structure, these jobs being advertised internally by means of “New job notification emails” sent from the “Snaphire” system.

[14] Ms Elvidge, currently Human Resources Business Partner – Finance and Governance, Auckland Council, was previously employed by ACC and had been seconded to work full-time for ATA for four work streams: Finance and Treasury, Risk and Assurance, CCO Monitoring and Property. Ms Elvidge said that in her role with ATA she was responsible for writing workforce plans, determining whether the roles identified in those plans were substantially similar or substantially different when compared with existing roles in ELGOs, and communicating this information to employees.

[15] Ms Elvidge explained that during the time of her secondment to the ATA, she had worked at two different locations, these being either in the central city building, or at the Graham Street building, where she had a desk next to Mr Craig Morris, who had also been seconded to the ATA team from Manukau City Council during the period August 2010 until 30 October 2010.

[16] Ms Elvidge said that there was an information session for Finance Groups within ACC in early June 2010, which Ms McFadgen confirmed that she herself had attended. Ms Elvidge stated that one of the key messages presented at the information session highlighted that where the new roles were substantially similar to existing roles, and where there were the

same number of roles in both the current structure and the proposed structure, the new roles would be filled by matching existing staff to them. Ms Elvidge explained that this approach was consistent with the intent of the applicable legislation which was aimed at minimising redundancies and ensuring that most of the ELGO employees transferred to Auckland Council.

[17] Ms McFadgen said that she had been informed at the information session that if employees were offered a substantially similar role based at the same location, there would be no entitlement to redundancy compensation.

[18] Ms Elvidge said that the information provided at the information session was made available on the ATA Staff Transition website and intranet for employees to access, and that employees were also provided with hand-outs containing the information.

[19] Ms Elvidge said that in early September 2010 ATA began the process of issuing letters to all ELGO employees. The letters either confirmed that the employee had an offer of employment and if so, what were the terms of this offer, or advised the employee that their employment would terminate on Transition. Ms Elvidge explained that the ELGOs were not involved in this process, other than by providing information to the ATA, and delivering the ATA letters to employees.

[20] Ms McFadgen said that she received a letter dated 16 September 2010 confirming that she had been matched to a position in the Auckland Council, this being a Financial Systems Analyst position, which was substantially similar to the position she held with ACC. The letter stated:

*Please note that as this position is the same/substantially similar to your current position with **Auckland City Council** you will only be entitled to redundancy compensation if you decline the offer and the location of the position meets the test of a 'different' location. (Refer s98 (4) & (5), s104(1), Local Government (Auckland Transitional Provisions) Act 2010) ....*

*If you wish to accept this offer, you must sign and return a copy of this letter by **Tuesday 21<sup>st</sup> September 2010**. Acceptance of this offer will mean that you will not be considered for other roles through the change process. However if you wish to continue with any other job process please advise us urgently.*

[21] The signature on the letter is not legible, but the letter was stated as being signed on behalf of Doug McKay, Interim Chief Executive of Auckland Council.

[22] Ms McFadgen said that she had considered the position offered, but also applied for one other position, with the job title IS Business Relationships Analyst Finance. This position was substantially different to her existing position with ACC, but Ms McFadgen said she had been attracted to the position because it offered her additional challenges. The position was advertised as being a salary band 'H' position, whereas her existing position was salary band 'G'; this meant that the IS Business Relationships Analyst Finance role offered more room for long term career and salary growth than her existing position, or the substantially similar role which she had been offered. Additionally in this role Ms McFadgen said she could make greater use of her IT skills which was attractive to her.

[23] Ms McFadgen said that as the letter of offer for the Financial Systems Analyst position had to be signed and returned before the probable date when she would learn the result of her application for the IS Business Relationship Analyst- Finance position, she was advised to accept this offer.

[24] Ms McFadgen stated that on 28 September 2010, the ATA wrote to her offering her the IS Business Relationships Analyst Finance position. The letter stated:

*I am pleased to offer you employment as **IS Business Relationships Analyst – Finance, Customer Relations, Information Services with Auckland Council** from 1 November 2010. This position is not the same/substantially similar to your current position with **Auckland City Council**. ...*

*Please note that as this position is not the same/substantially similar to your current position with Auckland City Council you will be entitled to redundancy compensation if you decline the offer (Refer s104(1), Local Government (Auckland Transitional Provisions) Act 2010) and you are not offered a substantially similar position that is not in a "different" location (s98 (4) & (5) (Local Government (Auckland Transitional Provisions) Act 2010)*

[25] Ms McFadgen said she was very pleased and excited to receive the offer given the prospects for growth and the higher salary banding. On 9 October 2010 Ms McFadgen received an email from Ms Stephanie Bannister, a Recruitment Coordinator at the ATA, asking her which of the two positions she wished to accept.

[26] Ms McFadgen replied by email on 11 October 2011, confirming acceptance of the IS Business Relationships Analyst Finance position, and asking Ms Bannister to confirm the salary for the position. Ms Bannister replied the same day, confirming that Ms McFadgen's acceptance of the offer had been entered on the database, and confirming the salary as \$80,000 per annum.

[27] Ms McFadgen stated that shortly after receiving Ms Bannister's confirmation of her acceptance of the IS Business Relationships Analyst Finance position, she noticed on the ATA Staff Transition website that the position had been listed as being salary band 'G'. This was a matter of concern to Ms McFadgen, who said that one of the main reasons she had been interested in the position was that it had been advertised as being salary band 'H'.

[28] Ms McFadgen said that, assuming it to have been incorrectly recorded on the Transition website as salary band 'G', she immediately emailed Ms Bannister requesting that the listing be amended to salary band 'H'. Ms Bannister replied by email on 12 October 2010, stating that she had discussed the matter with the remuneration manager, who had confirmed that the position was a salary band 'G' position.

[29] Ms Bannister emailed Ms McFadgen the same day attaching the original job listing which specified a salary band grade of 'H'. Ms McFadgen requested clarification of the details of her new position as soon as possible.

[30] On 13 October 2010 Ms McFadgen received an email from Mr Morris to whom the matter had been referred by Ms Bannister. In the email Mr Morris confirmed that he had checked the job evaluation for the position, confirmed it was salary band 'G' and that the Snaphire reference to the position as salary band 'H' was a data entry error.

[31] Ms McFadgen responded in an email later that same day, 13 October 2010, explaining that: "*I had already been offered and accepted a position in band 'G', and that the salary band grading had been the main motivation for her acceptance of the IS Business Relationships Analyst Finance position. Ms McFadgen asked for further clarification around the salary band issue for the IS Business Relationships Analyst Finance position*

[32] Mr Morris responded by email later that day, explaining that he had met with the Careers Centre Manager to clarify the situation, and confirmed that it was not only the IS Business Relationships Analyst Finance position, but also other positions had been incorrectly advertised as salary band 'H'.

[33] On 14 October 2010 Ms McFadgen emailed Mr Morris again, attaching the 28 September 2010 offer letter for the IS Business Relationships Analyst Finance position, which contained no reference to a reduction to salary band 'G'.

[34] Mr Morris responded to that email later that day. Mr Morris advised that:

*The offer letter sent to you is an offer of a new job. Your first job offer letter from Auckland City Council did not specify a job band and neither does this one..*

[35] Mr Morris continued in the email to explain that although there had been an error in the original advertisement of the IS Business Relationships Analyst Finance position, there was no intention to review the salary banding of the role. Mr Morris stated at the conclusion of the email:

*In view of the circumstances of your acceptance, if you wish to decline the offer then we will advise your ELGO that you will be entitled to redundancy compensation.*

[36] Mr Morris explained that his offer to Ms McFadgen of redundancy compensation was made on the basis of his erroneous assumption that she had declined two substantially different roles, and was therefore eligible for redundancy.

[37] Ms McFadgen said that upon receipt of the email and this information, she had looked at clause 11.5 of the IEA which set the redundancy compensation to which she would be entitled in the event of redundancy. Ms McFadgen said she had calculated that she would be entitled to a payment equal to approximately 10 weeks' salary.

[38] On 18 October 2010, having considered her options, Ms McFadgen had advised Mr Morris by email that she had decided to accept his offer of redundancy, and asked if Mr Morris could pass on this information to her ELGO, which Mr Morris confirmed he would do by return email stating "Will do". This email was copied to Ms Elvidge.

*Email Correspondence 19 October 2010*

[39] At 10.00 a.m. on 19 October 2010 Ms McFadgen received an email from Ms Elvidge which stated:

*Hi Joanne,*

*It sounds like there is a bit of confusion around your situation.*

*You were offered a Type 1, Substantially Similar role.*

*Where there is a vacancy, and a Substantially Similar Type 1 Candidate, a fixed term position with delayed redundancy is not an option to be offered.*

*Your job is still in the new structure. You have been offered the role. If you turn it down, you will not be entitled to redundancy.*

*Please advise by COB you (sic) acceptance or not. There really is no more time to make these decisions.*

*Please call me if you have any questions, or would like to discuss.*

[40] Ms Elvidge said she was not exactly sure how she had become aware of Ms McFadgen's situation, but did remember having seen Ms McFadgen's name on a redundancy spreadsheet and had investigated this as she was aware that Ms McFadgen had been offered a substantially similar position.

[41] Ms McFadgen said she had been confused by Ms Elvidge's email as it was contrary to Mr Morris' assurances regarding her entitlement to redundancy compensation.

[42] Ms McFadgen emailed Ms Elvidge at 11.14 a.m. explaining:

*You are correct, I was offered a type 1 role for this position of which I declined, because I accepted another role in ITC for a Business Relationship Analyst in Finance. Changes in the circumstances of this "new" role I was offered, ended up with me being offered redundancy (please see attached email), of which I accepted.*

[43] Ms Elvidge responded by email at 11.21 a.m. confirming that as Ms McFadgen had been offered a substantially similar role in the new structure, which still existed and was vacant, Ms McFadgen was not eligible for redundancy compensation. Ms Elvidge concluded that email by asking Ms McFadgen to contact her if she wanted to discuss the matter.

[44] Ms McFadgen replied by email at 11.44 a.m., stating that the process had left her feeling upset and disillusioned, thus that she wanted to leave ACC irrespective of a redundancy entitlement. Ms McFadgen thanked Ms Elvidge for her offer to discuss the situation in person, but concluded: *"I think I need time to get my head around this before I can speak to anyone.*

[45] At 11.50 a.m. Ms Elvidge responded reconfirming that her offer to meet to discuss the matter was still open, and that the substantially similar role position was still vacant.

[46] Ms McFadgen emailed Mr Morris at 12.21 p.m. informing him that her ELGO had told her she would not be eligible for redundancy compensation, and asking him for clarification.

[47] Mr Morris stated that he had discussed the matter with Mr Eddy Van Der Weerd, at that time Acting Group Manager, Human Resources at ACC. Mr Van Der Weerd said Mr Morris had explained to him that Ms McFadgen was declining an offer of a substantially different position to her existing position with ACC and that consequently she was entitled to redundancy compensation. Mr Van Der Weerd said he had had no difficulty with the approach proposed by Mr Morris.

[48] Mr Morris emailed Ms McFadgen at 2.17 p.m.. In the email Mr Morris stated: "*I have been in touch with Eddy Van Der Weerd and he has agreed to redundancy.*"

[49] Ms McFadgen said that Mr Morris' assurance that Mr Van Der Weerd had confirmed her redundancy entitlement set her mind at rest, given Mr Van Der Weerd's position as the Acting Group Manager, Human Resources at ACC. Ms McFadgen said that she had believed on the basis of this assurance that both the ATA and her ELGO had approved her redundancy.

[50] At 14.42 p.m. Ms McFadgen emailed Ms Elvidge stating: "*I have had confirmation from Craig Morris in the ATA Change Support team, that for my unique situation, they have agreed to redundancy.*"

[51] Ms Elvidge responded at 14.50 p.m. explaining that when Mr Morris had provided Ms McFadgen with the redundancy entitlement information, he had been unaware that she had turned down a substantially similar position, and reiterating that Ms McFadgen was not entitled to redundancy compensation. Ms Elvidge asked Ms McFadgen to confirm whether she wished to accept the substantially similar role.

[52] Ms McFadgen stated that she was confused and distressed by the conflicting information she was being given by Ms Elvidge, Mr Morris and indirectly from Mr Van Der Weerd. At 3.38 p.m. Ms McFadgen emailed Ms Elvidge with copies to Mr Morris and Mr Van Der Weerd. Ms McFadgen asked for clarification of the process, explaining

*... throughout this process I have always been under the assumption that all the offer information was readily available to the people I engaged with throughout this conversation. I would also like to add that Craig was aware of the other offer, as we had discussed it in our earlier emails (13<sup>th</sup> October), when I was given the option to return to that role, so I assumed he had access to the specifics of this agreement. The disclosure of the previous offer (email 13<sup>th</sup> October) was made prior to the offer of redundancy being made (14<sup>th</sup> October), and I did not seek redundancy, it was offered to me when we could not come to an agreement about an HR error made in regards to the conditions of another offer made to me.*

[53] Ms McFadgen said she received no response to this email from Ms Elvidge, nor did Mr Morris or Mr Van Der Weerd contact her.

[54] On 20 October 2010 Ms McFadgen received a letter from the ATA, dated 19 October 2010, confirming the termination date of her employment as the 31 October 2010. The letter stated that Ms McFadgen would not be paid a redundancy entitlement on the grounds that she had previously declined a substantially similar position. The letter also confirmed that Ms McFadgen was entitled to apply for any vacancies with Auckland Council until 31 October 2010.

[55] Not having had a response to her email of 3.38 p.m. on 19 October 2010, Ms McFadgen emailed Ms Elvidge on 21 October, copied also to Mr Morris and Mr Van Der Weerd, asking for clarification of the situation, requesting a discussion regarding the terms of her departure from ACC, and seeking an extension to her termination date.

[56] Ms McFadgen said that having received no response from Ms Elvidge, Mr Morris or Mr Van Der Weerd, she telephoned Ms Elvidge and asked if Ms Elvidge had read her email. Ms Elvidge said she had not done so but assured Ms McFadgen that she would do so.

[57] Ms McFadgen said that despite these assurances, Ms Elvidge did not respond to her emails of 19 and 21 October 2010, and so she telephoned Ms Elvidge again on 22 October 2010 and left a message. Receiving no response, Ms McFadgen emailed Ms Elvidge, Mr Morris and Mr Van Der Weerd at 16.00 on 22 October 2010 seeking clarification.

[58] On 26 October 2010 Ms Elvidge emailed Ms McFadgen. Ms McFadgen said that in the email Ms Elvidge refused an extension to Ms McFadgen's leaving date and failed to address any of the substantive issues raised by Ms McFadgen.

[59] Ms McFadgen's employment terminated on 31 October 2010.

### **Determination**

#### **Does the Authority have the jurisdiction to hear Ms McFadgen's claim against Auckland Council?**

[60] Ms McFadgen was employed by ACC, which ceased to exist on 31 October 2010. The purpose of the ATA as defined in s 7 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 included:

- i. *to establish a single unitary authority to govern the entire Auckland region on and from 1 November 2010*
- ii. *to dissolve the existing local authorities that govern the Auckland region ...*
- iii. *to establish an entity to facilitate the transition to the new local government arrangements ...*

[61] Functions and duties of the ATA as defined in s 13 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 included:

- iv. *to plan and manage all matters in relation to the reorganisation ...*
  - (d) *to provide information to existing local government organisations and their employees in relation to the reorganisation*
  - (2)(b) *to develop a change management plan that includes protocols and processes for managing the transition of*
    - (ii) *staff from existing local government organisations to the Council structure ...*

[62] The functions and duties of the ATA also included the ability to second employees from any existing local government organisation to the ATA, pursuant to s 13(f) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009. Employees of the ATA who were seconded remained employed by the relevant ELGO pursuant to s (13)(4) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009.

[63] The Local Government (Auckland Transitional Provisions) Act 2010 set out in s 107 which employer was to be responsible for the payment of compensation in the event of redundancy. In respect of Ms McFadgen this was to be her existing employer since her employment was terminated on 31 October 2010:

*(1) If an employee's employment is to be terminated, the employee's existing employer must ensure that any compensation payable under section 104 is paid to the employee on or before 31 October 2010.*

[64] Ms McFadgen was not employed by the ATA, however I find the ATA to have been acting in effect as an agent for the ELGOs, including ACC, at all material times. Although the ATA was established by statute, rather than being specifically authorised by the ELGOs to act on their behalf, I consider that by virtue of the statute the ATA was authorised to act on

behalf of the ELGOs in the matter of determining either the termination of employees of the ELGOs, or their transition to Auckland Council.

[65] Significantly it was the ELGOs who funded the redundancy costs. I also find it significant in reaching the conclusion that the ATA acted in an agency capacity that all the employees of the ATA remained employed by their respective ELGOs, and in particular that Ms Elvidge remained employed by ACC during the period of her secondment when acting in respect of the implementation of the redundancies by the ATA, and indeed Mr Morris remained an employee of Manukau City Council during the period of his secondment to the ATA

[66] I consequently find that ACC remained liable for the termination of Ms McFadgen's employment. In these circumstances s 35 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 becomes relevant:

*S 35 Dissolution of existing local authorities*

*(1) On 1 November 2010 each existing local authority is dissolved and –*

*(a) the functions, duties, and powers of each existing local authority under any enactment become the functions, duties, and powers of the Auckland Council;*

...

*(e) all rights, liabilities, contracts, entitlements, and engagement of each existing local authority become the rights, liabilities, contracts, entitlements, and engagements of the Auckland Council; and*

*(f) anything done, or omitted to be done, or that is to be done, by, or in relation to, each existing local authority ... must be treated as having been done, or having been omitted to be done, or to be done by, or in relation to, the Auckland Council; and*

*(h) The completion of a matter or thing that would have, but for this section, been completed by an existing local authority, must be completed by the Auckland Council.*

[67] I find that liability for the actions of both ACC, and the ATA acting as agent on its behalf, transferred to Auckland Council.

[68] In the event that my reasoning on this point as set out above is deemed to be at fault, I nonetheless consider that it would not be either equitable or natural justice to leave Ms McFadgen without any means of recourse in this matter, and in this respect s 161 of the Employment Relations Act ("the Act") is relevant.

[69] Section 161(1) of the Act states that the Authority has: “*exclusive jurisdiction to make determinations about employment relationship problems generally,*” and subsection 161(1)(r) states that this includes:

*Any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)*

[70] In these circumstances, I determine that the Authority has the jurisdiction to hear Ms McFadgen’s claim against Auckland Council.

**Did Auckland Council breach the employment agreement by failing to pay Ms McFadgen redundancy compensation?**

[71] The Local Government (Auckland Transitional Provisions) Act 2010 set out at s 104 the conditions governing the employee’s entitlement to redundancy or other compensation. Section 104 makes it clear that in the event that an employee accepted or declined an offer of a position which was the same or a substantially similar to their existing position with their ELGO and was based at the same location, no compensation is payable. In the event that an employee declined an offer of a position that was not the same or substantially similar to their existing position with their ELGO, contractual compensation would be payable.

[72] Ms McFadgen had accepted the first offer made to her, which was a substantially similar position, but subsequently accepted the substantially dissimilar position in preference to that first offer.

[73] Ms McFadgen had been advised that in the event of an employee declining a substantially similar position at the same location, the employee would not be entitled to redundancy compensation, Ms McFadgen confirmed at the Investigation Meeting that her understanding on this point was quite clear.

[74] Although Ms McFadgen subsequently accepted and then declined a substantially dissimilar position, I find that this would not displace the provisions pertaining to redundancy entitlement in s 104 of the Local Government (Auckland Transitional Provisions) Act 2010.

[75] Moreover I find that clause 11 .6 of Ms McFadgen’s employment agreement is relevant to consideration of whether there has been a breach of s McFadgen’s employment agreement in respect to the payment of redundancy compensation:

*In the event of the restructure, merger, amalgamation, lease or reconstruction of all or part of Auckland City Council, or privatisation, such that your employment is terminated and you are offered employment with any party to the restructured, merged, amalgamated, leased or reconstructed entity on terms and conditions which are generally no less favourable than your existing terms and conditions, Auckland City Council will be under no obligation to provide you with any form of notice of redundancy or compensation.*

[76] However Ms McFadgen's claim to redundancy compensation does not arise out of the transition process *per se*, but rather as a result of representations made by Auckland Council's representatives in the matter, and I shall now address this aspect of Ms McFadgen's claim.

**Did Ms McFadgen suffer an unjustifiable disadvantage by Auckland Council resiling from previous assurances that it would pay her redundancy compensation?**

[77] I consider that the doctrine of promissory estoppel is relevant to this case. Promissory estoppel is an equitable doctrine, and the Authority, pursuant to s 157(3) of the Act, is enjoined to act: "*as it thinks fit in equity and good conscience*".

[78] The elements which must be established to found an action based on promissory estoppel are:

- A clear unambiguous representation or promise on the part of one party to the other party; and
- Reliance by the party to whom the representation was made to such an extent that it would be inequitable to resile from the representation.

*Clear and unambiguous representation*

[79] In *National Westminster Finance NZ Ltd v National Bank of NZ*<sup>1</sup> Tipping J stated:<sup>2</sup>

*The decisions of the Court in Wham-O MFG Co v Lincoln Industries [1984] 1 NZLR 641 and Gillies v Keogh [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so.*

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<sup>1</sup> [1996] 1 NZLR 548

<sup>2</sup> Ibid at 549

[80] Ms McFadgen was offered and accepted a position which had been advertised as being on salary grade 'H'. It was only sometime subsequent to her acceptance of the position that Ms McFadgen discovered that the position had been incorrectly advertised as being salary grade 'H' when it was in fact salary grade 'G'. This error was made, and freely admitted to have been made, by or on behalf of the ATA.

[81] Mr Morris having confirmed that an error had been made, advised Ms McFadgen that there was no intention to review the salary banding for the IS Business Relationship Analyst Finance position and that ATA would advise Ms McFadgen's ELGO, ACC, of her entitlement to redundancy compensation.

[82] Ms McFadgen had not raised the issue of redundancy compensation, nor had she sought it. It was Mr Morris, a senior member of the ATA Support Change Team who made the representation to Ms McFadgen.

[83] Mr Morris stated in evidence that he had made the offer of redundancy compensation to Ms McFadgen on the basis that she had received an offer of a different role, had accepted it and only after she had accepted it, had been advised that the remuneration band had been erroneously advertised. The offer of redundancy compensation was made in order to allow Ms McFadgen to decline the different role of IS Business Relationship Analyst Finance position which she had accepted based on the original representations made by ATA which were subsequently found to be erroneous.

[84] Mr Morris stated that at the time of making the redundancy compensation offer, he was under the mistaken impression that Ms McFadgen had been offered two substantially different positions.

[85] However the email from Mr Morris sent to Ms McFadgen on 14 October 2010 indicates that Mr Morris had seen the first offer letter made to Ms McFadgen. In that email Mr Morris refers to the first job offer not having specified a job band, something of which Mr Morris would only have been aware if he had seen the letter. The first offer letter dated 16 September 2010 clearly stated that the position offered was "*the same/substantially similar to your current position*". Consequently Mr Morris should have been aware that the other offered position being the same or substantially similar to Ms McFadgen's meant Ms McFadgen was ineligible for redundancy compensation based on the statute provisions.

[86] I consider on this basis that Ms McFadgen reasonably believed, based on Mr Morris' email of 14 October 2010 that Mr Morris was aware of the first job offer and that he was

aware that it was the same or substantially similar, and that therefore the redundancy compensation offer that he made was related to the second job offer and was in recognition of the error which had been made.

[87] I find Ms McFadgen's reliance on Mr Morris' assurance as to redundancy compensation to have been reasonable given Mr Morris' senior position in the ATA, his assurance that Mr Van Der Weerd had confirmed her redundancy entitlement, and the fact that Mr Morris had all the relevant information concerning Ms McFadgen's job offers available to him, and his indication to her by way of his email reply on 14 October 2010 that he was aware of the content of the job offers.

[88] I find that there was no intention on Ms McFadgen's part to deceive Mr Morris, and she was entitled to rely on his email of 14 October 2010 as confirmation that he was aware of the substantially similar offer she had received.

[89] Moreover Ms McFadgen had, in an email dated 13 October 2010, provided Mr Morris with the information that she had already accepted a position on the same salary banding as her existing position. It would have been reasonable of Ms McFadgen to conclude that this information would have alerted Mr Morris to the fact that this was a substantially similar position and if there had been any confusion on Mr Morris' part as to what job offers she had been made, he could have checked this information, given that he was a senior member of the ATA Change team with access to the ATA records.

[90] Having received this unsolicited offer of redundancy compensation from Mr Morris, Ms McFadgen considered her options, and having done so, decided to accept Mr Morris' offer. Ms McFadgen confirmed her acceptance of his offer to Mr Morris on 18 October 2010 and requested that he inform her ELGO of her decision. Mr Morris confirmed to Ms McFadgen that he would inform her ELGO, there was no indication at this point to Ms McFadgen that he had made any error by offering her redundancy compensation, and therefore Ms McFadgen was entitled to continue to rely on Mr Morris' assurances as to her entitlement to redundancy compensation.

[91] Following Ms Elvidge's advice to her that she was not entitled to redundancy compensation, Ms McFadgen confirmed her understanding to Ms Elvidge in an email dated 19 October 2010 that it was the "*Changes in the circumstances of this "new" role*" which had resulted in the offer of redundancy compensation to her.

[92] Following Ms Elvidge's response, Ms McFadgen informed her (Ms Elvidge) that the process had left her feeling upset and disillusioned, so much so that she wanted to leave ACC even without redundancy compensation.

[93] Ms McFadgen also emailed Mr Morris to inform him that her ELGO had advised her that she was not eligible for the redundancy compensation offered by him. Mr Morris' response was to discuss the matter with Mr Van Der Weerd.

[94] I find that it would have been prudent of both Mr Morris and Mr Van Der Weerd to have undertaken some investigation as to the reason Ms McFadgen had been informed that she was not entitled to redundancy compensation, but in fact neither did so. I find this surprising given that there were clearly defined circumstances in which redundancy would be declined, and of which Ms McFadgen said she was aware. It is therefore surprising that two senior employees did not make take any investigatory steps to ensure this reason was excluded.

[95] Mr Morris not only would have had access to redundancy spreadsheets, but also could have asked either Ms McFadgen for the reason why she had been informed she was ineligible, or could have discussed the issue with Ms Elvidge who in fact sat next to him from time to time.

[96] Mr Van Der Weerd said that he had made no independent enquiries but had solely relied on Mr Morris' information in approving the redundancy compensation payment to Ms McFadgen. I find it significant in considering this issue that at the Investigation Meeting Mr Van Der Weerd agreed that it was reasonable for Ms McFadgen to have relied on Mr Morris' assurances as to the redundancy compensation payment.

[97] I find it was entirely reasonable for Ms McFadgen to have relied upon Mr Morris' subsequent assurance as to her entitlement to redundancy compensation, given Mr Morris' confirmation that Mr Van Der Weerd had approved her redundancy compensation payment, given that Mr Van Der Weerd was Acting Human Resources Manager for her ELGO, and Mr Morris was a senior member of the ATA Change Team.

[98] As a result of Mr Morris' assurances as to her entitlement to redundancy compensation, Ms McFadgen had changed her position and chosen to decline the IS Business Relationship Analyst Finance position which she had previously accepted.

[99] I find that there had been an unambiguous representation on the part of Mr Morris on which Ms McFadgen relied. As a result of Mr Morris' assurances Ms McFadgen had declined the previously accepted position of IS Business Relationship Analyst Finance position, a position which she had originally been excited to accept on the basis that it had offered a higher remuneration banding, and therefore more opportunity for long term career and salary growth.

[100] Given the error in the detail advertising the position, Ms McFadgen had been aware that the opportunities offered by the higher salary banding had no longer existed, however I observe that Ms McFadgen had also been attracted to the position because of the opportunity it provided to utilise her IT skills.

[101] In *Burberry Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd*<sup>3</sup> Richardson J commented:

*It is well settled that where one party has by words or conduct made to the other a clear and unequivocal promise or assurance intended to affect the relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance is bound by that assurance unless and until he has given the promise a reasonable opportunity of resuming his position.*

[102] Ms Elvidge had offered Ms McFadgen the substantially similar role of Financial Systems Analyst which she had previously accepted, she did not offer Ms McFadgen the IS Business Relationship Analyst Finance position.

[103] As held by Richardson J in *Burberry*, an estoppel will be prevented where the promise is provided with a reasonable opportunity to resume her position. Ms McFadgen was not offered this opportunity. Ms McFadgen had been offered, and had accepted, the IS Business Relationship Analyst Finance position at salary band 'H', to prevent an estoppel arising Ms McFadgen should have been offered this position. Ms McFadgen was not offered the opportunity to proceed with this preferred role at salary band 'H', nor was Ms McFadgen offered the opportunity to proceed with this preferred role at the lower salary band of 'G'. Consequently I find that an estoppel was created.

[104] As a result of these representations by Mr Morris and the subsequent refusal to honour the assurances concerning Ms McFadgen's entitlement to redundancy compensation I find that Ms McFadgen suffered an unjustified disadvantage in her employment which caused

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<sup>3</sup> [1989] 1 NZLR 356

her considerable anxiety and distress. I also find that the failure of Ms Elvidge, Mr Morris and Mr Van Der Weerd to engage with Ms McFadgen following her request for clarification on 19 October 2010 compounded this situation.

[105] I determine that Ms McFadgen has suffered an unjustifiable disadvantage grievance in her employment.

**Did Auckland Council breach the duty of good faith which it owed to Ms McFadgen.?**

[106] I have found that Auckland Council by virtue of s 35 (e) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 became liable for the actions of both ACC and the ATA.

[107] Ms McFadgen had accepted a job offer at salary banding 'H'. Upon being advised that there had been an error made in the advertising detail of that position and that there was no intention to review the salary banding, Mr Morris offered Ms McFadgen compensation.

[108] Ms Elvidge's email to Ms McFadgen of 19 October 2010 effectively withdrew this offer of compensation on the basis that in circumstances in which Ms McFadgen had accepted a substantially similar role, there was no entitlement to redundancy compensation.

[109] During 19 October 2010 Ms McFadgen was again assured that she was entitled to redundancy compensation, and subsequently again informed that she was not so entitled.

[110] Despite Ms McFadgen's request for clarification on 19 October 2010 made to

- Ms Elvidge, employed by ACC and seconded to the ATA at the relevant time;
- Mr Morris, employed by another ELGO and seconded to the ATA at the relevant time; and
- Mr Van Der Weerd, employed by ACC at the relevant time,

Ms McFadgen received no response.

[111] However what Ms McFadgen did receive the following day, 20 October 2010, was a letter from the ATA terminating her employment with effect from 31 October 2010. Ms

McFadgen then emailed Ms Elvidge, copied to Mr Morris and Mr Van Der Weerd, again asking for clarification, and requesting an extension to her termination date.

[112] Again Ms McFadgen received no response at all to this email. Despite a telephone call following this email, and an assurance from Ms Elvidge that she would read Ms McFadgen's email, there was no constructive response from Ms Elvidge to Ms Elvidge. Having received no response, Ms McFadgen again called Ms Elvidge on 22 October 2010 and left a message.

[113] Having received no response, Ms McFadgen emailed Ms Elvidge, Mr Morris, and Mr Van Der Weerd later that same day, 22 October 2010, but again received no response.

[114] On 26 October 2010 Ms Elvidge finally replied to Ms McFadgen, confirmed the termination of her employment, and refusing to extend Ms McFadgen's termination date.

[115] The parties to an employment relationship are under a duty to deal with each other in good faith pursuant to s 4 of the Act. This duty<sup>4</sup> :

*Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*

[116] I find that Ms Elvidge, Mr Morris and Mr Van Der Weerd failed in this duty of good faith towards Ms McFadgen.

[117] I determine that Auckland Council breached the duty of good faith which it owed to Ms McFadgen.

### **Remedies**

[118] Ms McFadgen has been unjustifiably disadvantaged in her employment and is entitled to remedies.

#### *Compensation under s 123 of the Act*

[119] Ms McFadgen was deprived of the redundancy compensation amount she had been promised by Mr Morris, which she had found to be distressing and upsetting. Ms

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<sup>4</sup> S 4(1A)(b) Employment Relations Act 2000

McFadgen's distress was further compounded by the sustained refusal of Ms Elvidge, Mr Morris and Mr Van Der Weerd to respond to her requests for clarification.

[120] I order Auckland Council to pay Ms McFadgen \$15,000.00 as compensation in respect to humiliation, loss of dignity, and injury to feelings, pursuant to s 123(1) (c) (i).

[121] I order Auckland Council to pay the sum of \$15,000.00 to Ms McFadgen as compensation in respect of the loss of the amount of redundancy compensation which Ms McFadgen reasonably expected to obtain, pursuant to s 123(1) (c) (ii).

#### *Penalty*

[122] I have found that Auckland Council breached the duty of good faith which it owed to Ms McFadgen. Auckland Council is ordered to pay a penalty of \$5,000.00 pursuant to s 135(2)(b) of the Act. I direct that \$3,000.00 of that is paid by Auckland Council to Ms McFadgen, pursuant to s 136 (2) of the Act.

#### **Costs**

[123] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**