

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 502
5440177

BETWEEN VICKI McLEAN
 Applicant

AND BARKERS PARK LIMITED
 First Respondent

AND SUNG HO PARK
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Penny Swarbrick, Counsel for Applicant
 Brian Foote, Counsel for Respondents

Investigation Meeting: 20 and 21 October 2014 at Rotorua

Submissions Received: 10 November 2014, from the Applicant
 13 November 2014, from the Respondents
 13 November 2014, from Applicant

Determination: 05 December 2014

DETERMINATION OF THE AUTHORITY

- A. Ms McLean’s various specific claims that Barkers Park Limited (Barkers Park) breached her employment agreement do not succeed so the issue of penalties does not arise.**
- B. Ms McLean’s specific claims that Barkers Park breached its statutory good faith obligations to her do not succeed so the issue of penalties does not arise.**
- C. Ms McLean’s aiding and abetting claim against Mr Stanley Park does not succeed so the issue of penalties does not arise.**
- D. Barkers Park unjustifiably disadvantaged Ms McLean in her employment by failing to adequately consult her over the proposed**

restructuring and by failing to consider redeployment opportunities for her before she was made redundant.

E. Barker Park’s dismissal of Ms McLean was substantively and procedurally unjustified.

F. Barkers Park Limited is ordered to pay Ms McLean:

(a) \$11,038.95 lost remuneration;

(b) \$7,000 distress compensation.

Employment relationship problem

[1] Barkers Park operates a Dog Grooming Saloon, a Dog Retail Centre and a Dog Daycare Centre. Ms Vicki McLean was employed by Barkers Park from 01 January 2012 until she was made redundant on 14 November 2013.

[2] Ms McLean was initially employed as the Retail Assistant Manager. However immediately before Barkers Park opened for business its Retail Manager decided not to accept the position so Ms McLean was offered a position as “*Retail Manager & 2IC*”. This was formalised in an update to her employment agreement signed on 25 February 2013.

[3] Ms McLean’s life partner, Mr Robert Kent, was the Chief Executive Officer of Barkers Park until his employment ended on 11 October 2013.¹ Mr Stanley Park is Barkers Park’s sole director and shareholder. Decisions about the business were made by “the Parks” (being Mr Stanley Park, his sister Jacqui Park and his business advisor Mr Ian Park). All references to “Mr Park” in this determination refer to Mr Stanley Park (the second respondent).

[4] Mr Park says he was not aware that Ms McLean had been appointed as “2IC” or that she was in fact acting as a 2IC to Mr Kent. Mr Kent says he obtained authority before appointing Ms McLean to the position she held at the time of her redundancy. I accept Mr Kent’s evidence about that because I am satisfied that Mr Park had seen Ms McLean’s employment agreement and had not raised any issue about her job title.

¹ Mr Kent has also brought proceedings in the Authority against the first and second respondents.

[5] Mr Park was required on an ongoing basis to put funds into the business to keep it going. In July and August 2013 Mr Park expressed concern to Mr Kent about the viability of the Barkers Park operation and indicated that he intended to close it down.

[6] As a result of this indication Mr Kent subsequently put a number of options to the Parks to consider. One option included a proposal from Mr Kent, Ms McLean and another then employee, Ms Nicky Hammond (who at that time was the Grooming Salon Supervisor) to purchase Barkers Park. This offer was declined.

[7] Another option that Mr Kent put to Mr Park to consider was disestablishing the CEO position which would reduce fixed outgoings significantly. Mr Kent suggested that Barkers Park could be kept operating with minimal financial input if his CEO salary was no longer required. Other options were also put to Mr Park but they are not material to the issues to be determined so there is no need to discuss them.

[8] In light of concerns about whether or not his employment would continue Mr Kent decided to run for Mayor or a Councillor position in the Rotorua District Council local body elections which occurred on 12 October 2013. Mr Kent says one of the reasons he did that was to ensure he and Ms McLean had some alternative income in case Barkers Park was closed and they both lost their jobs which were their sole source of income.

[9] Ms McLean says that during September and early October 2013 Mr Kent trained her on many of the administrative functions that he had carried out and on processing staff wages in anticipation that he would not be required as a full time employee after the local authority election results were known on 12 October 2013.²

[10] Around this same time Mr Kent discussed with Ms Hammond extending her responsibilities for the Grooming Salon and Dog Training parts of the business to include the Dog Daycare Division. Up until then Ms McLean had been responsible for the Dog Daycare part of the business.

[11] Mr Kent was elected a Councillor and on 14 October 2013 he posted a notice on the staff noticeboard which announced that following his election to the Council he

² Mr Kent succeeded in being appointed a councillor.

expected to work only one day per week. He said Barkers Park would be managed by Ms McLean and Ms Hammond in his absence.

[12] Mr Kent's notice stated that all staff were to report to Ms McLean for "*all retail, administration grounds and maintenance, cleaning, purchasing etc*" and to Ms Hammond for "*all salon, daycare, training and associated matters.*"

[13] On Friday 18 October 2013 (while Mr Kent was in Auckland), Mr Park met with staff. Mr Park announced to staff that Mr Kent had resigned so Mr Park would be managing Barkers Park from then on. Mr Park told staff there would be another staff meeting on Monday 21 October 2013. The staff were expecting to speak to Mr Park about the direction and future of the business when they next met with him on 21 October.

[14] After Mr Park left the premises Ms McLean became aware that he had left a letter (unenclosed) from his solicitors and a trespass notice on Mr Kent's desk which trespassed Mr Kent from the Barkers Park premises for two years. Ms McLean immediately phoned Mr Kent who instructed her to bring the documents home for him to view.

[15] On 19 October Ms Hammond showed Ms McLean a letter she had written to Mr Park which claimed the Dog Salon had achieved in excess of \$200,000 sales to date. Ms McLean knew that that was incorrect so on Monday, 21 October 2013 she showed Ms Hammond a financial summary which Mr Kent had discussed (with Ms McLean) and which outlined the sales for the year to date. This showed that the Dog Salon had only achieved sales slightly in excess of \$30,000 turnover in the relevant period.

[16] Ms McLean gave Ms Hammond a copy of the financial summary document in the expectation that Ms Hammond would discuss that with Mr Park. However it appears that information was not discussed between Ms Hammond and Mr Park.

[17] On Monday, 21 October Ms McLean attended a staff meeting called by Mr Park in which he announced there would be a restructuring of the Barkers Park and that Ms Hammond was appointed Manager so was the go-between the staff and Mr Park in Mr Kent's absence. Mr Park said he was going to try to develop the whole Complex (meaning the land Barkers Park was situated on) to attract tourists and was going to reduce the floor size of the retail shop.

[18] Ms McLean claims this announcement was a public demotion of her which took place without any prior consultation. Ms McLean says she found this situation particularly humiliating because it was announced in front of all staff, occurring on top of the events concerning the trespass notice and the lawyer's letter which had been left on Mr Kent's desk the previous Friday.

[19] Mr Park says this was not a demotion of Ms McLean. He says he saw Ms McLean and Ms Hammond as equals but he needed one person to co-ordinate and communicate with him given he was hardly ever on the business premises and was also often away from New Zealand.

[20] The following day, 22 October Ms McLean saw a notice posted on the staff noticeboard which stated:

*Nicki [sic] is appointed as manager of Barkers Park Limited as today.
She will be in charge of both retail shop and salon areas.*

[21] Ms McLean says that was the first and only notification she was given that not only had she been demoted from her contractual 2IC position but that she was also no longer in charge of the Retail Division. Mr Park claims he was not aware that Ms McLean was Retail Manager & 2IC. I do not accept that evidence because he had been given a copy of Ms McLean's employment agreement which clearly recorded this information.

[22] Ms McLean claims she asked Ms Hammond later that day (22 October) whether Mr Park wanted to get rid of her (Ms McLean) and that Ms Hammond replied "yes". Ms Hammond disputes that. I prefer Ms Hammond's evidence as I consider Ms McLean was emotional and upset at the time of this conversation and that her view of events had been coloured by Mr Kent's situation. Ms Hammond had no personal involvement so I consider her evidence to be more objective.

[23] Ms McLean says that from 21 October onwards she was required to seek Ms Hammond's approval before ordering any retail stock and before carrying out any of her previous managerial responsibilities. Ms McLean says that was humiliating for her because Ms Hammond had previously been her subordinate (she had interviewed and managed Ms Hammond).

[24] Ms McLean further says she was required to show Ms Hammond how to carry out her (Ms McLean's) former duties such as using the ACE payroll system, the

Aralco employee control system, and the other ordering systems that Ms McLean used which she says added to her upset and humiliation.

[25] Later that week Ms McLean became aware that Mr Park had given Ms Hammond a pay increase of \$1.50 per hour and the maintenance man, Mr Graham Klitscher, had received a \$3.50 per hour pay rise. Ms McLean told Mr Kent about these pay rises on 25 October.

[26] Ms McLean claims that subsequent to Mr Kent's acrimonious departure from the business Mr Park was rude to her. I am satisfied on the balance of probabilities that the situations Ms McLean referred to are in fact miscommunications rather than rudeness. I find the communications between Ms McLean and Mr Park were affected by language difficulties (Mr Park required a translator for the Authority's investigation meeting) and the sensitivities that arose from the circumstances of Mr Kent's departure.

[27] On Friday, 8 November Mr Park gave Ms McLean a sealed envelope and told her not to open it until she had left the premises. This contained an undated letter advising that it was time to downsize and that he anticipated that Ms McLean's and Ms Hammond's positions would be reduced down to one full time position which would cover both roles. No other information was provided.

[28] A meeting was scheduled for Tuesday to discuss this proposal which Ms McLean was advised could result in her redundancy. Ms McLean was told she could bring a support person to the meeting as long as it was not Mr Kent.

[29] The letter also accused Ms McLean of breaching confidentiality by disclosing to Mr Kent the pay rises that Mr Park had given Ms Hammond and Mr Klitscher. Mr Park directed Ms McLean to provide a written explanation for her actions and she was advised that any repeat (of the alleged breach of confidentiality) could result in her summary dismissal.

[30] At Ms McLean's request the meeting was deferred to 14 November and was held at Mr Park's solicitor's office so that Mr Kent (who was subject to a trespass order at Barkers Park) could attend as her support person.

[31] The meeting on 12 November lasted approximately ten minutes to cover both the proposed restructure and the alleged breach of confidentiality concern. Mr Park

was present with his lawyer, Mr Foote and Ms McLean attended with Mr Kent. Ms McLean says Mr Foote told her that either her or Ms Hammond had to go and asked who it should be.

[32] Ms McLean's response was that she was unable to groom dogs so would not be of use in the Grooming Salon. Ms McLean also said it was impossible for one person to do both jobs simultaneously. She identified that the Grooming Salon needed to groom ten dogs a day just to cover the wages of Ms Hammond and the part time dog washer. Ms McLean's view was that what was being proposed was not only unworkable but also not financially viable.

[33] The ten minute meeting also discussed Mr Park's view that Ms McLean had breached confidentiality by telling Mr Kent that two staff had been given pay rises. Ms McLean's response was that she was entitled to share that information with Mr Kent as she did not consider the pay rises confidential because they were common knowledge amongst staff and had been discussed openly in the staff room.

[34] After meeting with Ms McLean Mr Park and Mr Foote also met with Ms Hammond. Different matters were discussed with Ms Hammond than Ms McLean. For example Ms Hammond was given an opportunity to explain her experience and expertise while Ms McLean was not. Ms Hammond was also given more information about the proposed changes than Ms McLean was.

[35] Three hours after her consultation meeting Ms McLean received an email from Mr Foote stating that she had been made redundant and was not required to return to work. When Ms McLean arrived at work the following day to return her uniform and collect her personal effects she was surprised to discover that a casual employee had been called in to work what had been Ms McLean's normal rostered day of work.

[36] Ms McLean claims her dismissal was substantively and procedurally unjustified.

[37] Ms McLean is also pursuing seven unjustified disadvantage claims against Barkers Park for:

- (a) Reducing her role by promoting Ms Hammond;
- (b) Announcing Ms Hammond's promotion publicly;

- (c) Conducting itself in a manner that indicated an intention to terminate Ms McLean's employment;
- (d) Denying Ms McLean's choice of representative causing her to have to assert her rights to choose her representative;
- (e) Failing to properly consult over the purported redundancy;
- (f) Failing to seek redeployment opportunities;
- (g) Imposing a final warning for the breach of confidentiality allegation.

[38] Ms McLean further claims that Barkers Park breached clause 8.1(i) of her employment agreement which required it to act in good faith towards her by:

- (a) Failing to consult with her over Ms Hammond's promotion;
- (b) The manner in which Ms Hammond's promotion was carried out;
- (c) Predetermination of Ms Mclean's dismissal;
- (d) Subjecting Ms McLean to humiliating treatment by demoting her and by:
 - (i) Ignoring her reasonable suggestions regarding the plans for a new retail venture;
 - (ii) Failing to address or investigate staff issues;
 - (iii) Advising of a desire to "*get rid*" of Ms McLean;
 - (iv) The manner in which she was advised of the purported redundancy;
 - (v) The manner in which she was dealt with over the breach of confidentiality allegation;
 - (vi) The attempt to prevent her being represented by Mr Kent.

[39] Ms McLean claims that in addition to breaches of her employment agreement each of the above matters also amount to a breach of good faith and each of them also warrant separate penalties being imposed under s.4A of the Act.

[40] Ms McLean also claims that Mr Park aided and/or abetted Barkers Park's breaches of her employment agreement and that penalties should be imposed on him, some or all of which should be paid to her instead of the Crown.

[41] Barkers Park says that Ms McLean's redundancy was genuine and was carried out in a procedurally fair manner. It denies breaching her employment agreement or its statutory and/or contractual duty of good faith.

[42] Barkers Park claims that the business had been losing money for a considerable period of time and it got to the stage where those losses needed to be reduced substantially and because Ms McLean could not groom dogs Ms Hammond was the employee who was retained.

[43] Barkers Park denies promoting Ms Hammond or demoting Ms McLean. It says it was not aware that Ms McLean was 2IC or that Ms Hammond was in a subordinate role to Ms McLean. It says that the announcement regarding Ms Hammond was to provide one point of contact for Mr Park who was often out of New Zealand so that there was one person onsite who could convey his instructions to staff on his behalf in his absence.

[44] Barkers Park denies that Ms McLean was disadvantaged or alternatively (if disadvantage is established) that any disadvantage that may have occurred was justified.

[45] Mr Park denies aiding and/or abetting any breaches of Ms McLean's employment agreement. He says English is a second language and he obtained legal advice around the proposed changes to the business. Mr Park claims he was reliant on legal advice in terms of how the restructuring process was handled. His lawyer wrote the consultation and outcome letters and ran the consultation meetings.

Issues

[46] The following issues are to be determined:

- (a) Did Barkers Park breach the good faith obligation in clause 8.1(i) of Ms McLean's employment agreement by:

- (i) Failing to consult with her over the alleged promotion of Ms Hammond and the alleged consequential demotion of Ms McLean;
- (ii) The manner in which the alleged promotion/demotion was carried out;
- (iii) Predetermining Ms McLean's redundancy;
- (iv) By subjecting Ms McLean to humiliating treatment by:
 - (A) Ignoring her suggestions regarding a new retail venue;
 - (B) Failing to address or investigate staff issues;
 - (C) Advising Ms McLean of its desire to "*get rid*" of her;
 - (D) The manner in which she was advised of her purported redundancy (this refers to the commencement of the consultation process);
 - (E) The manner in which it dealt with her over the alleged breach of confidentiality; and
 - (F) The attempt to prevent her from being represented by the person of her choice.
- (b) If so, should penalties be imposed for any breaches of Ms McLean's employment agreement that may have occurred?
- (c) Do any of the alleged breaches of Ms McLean's employment agreement also involve breaches of Barkers Park's statutory good faith obligations under s.4 of the Act?
- (d) If so, should penalties be imposed?
- (e) If so, should some or all of any penalties imposed be paid to Ms McLean instead of the Crown?
- (f) Did Mr Park aid and/or abet any alleged breaches by Barkers Park of Ms McLean's employment agreement?

- (g) If so, should a penalty/penalties be imposed on Mr Park;
- (h) Was Ms McLean unjustifiably disadvantaged in her employment by:
 - (i) The alleged promotion of Ms Hammond;
 - (ii) The announcement of Ms Hammond's alleged promotion and the applicant's alleged consequential demotion publicly and without consultation with Ms McLean;
 - (iii) Barkers Park conducting itself in a manner that indicated an intention to terminate her employment;
 - (iv) not being allowed the support of her chosen representative;
 - (v) Barkers Park failing to properly consult her over the purported redundancy including the failure to provide information;
 - (vi) Barkers Park's failure to seek redeployment opportunities for her; and
 - (vii) the imposition of the final warning for the alleged breach of confidentiality.
- (i) Was Ms McLean's dismissal justified?
- (j) If not, what if any remedies should be awarded?
- (k) What if any costs should be awarded?

Did Barkers Park breach the good faith obligations in clause 8.1(i) of Ms McLean's employment agreement?

Did Barkers Park fail to consult Ms McLean over the alleged promotion of Ms Hammond and the alleged consequential demotion of Ms McLean?

[47] I find that Barkers Park was not required to consult with Ms McLean over Ms Hammond's 'promotion'. Whilst I consider it questionable about whether it was in fact a promotion (Mr Park says he just identified Ms Hammond as his point of contact in the same way Mr Kent had previously been) even if it was it did not amount to a breach of Ms McLean's employment agreement.

[48] Ms McLean's employment agreement was not changed. She still managed the Retail business and she was still 2IC, notwithstanding it was to Ms Hammond not Mr Kent.

[49] The fact that Ms Hammond may have been promoted did not necessarily mean that Ms McLean must have been demoted. I find Ms McLean's terms and conditions of employment remained unchanged. Ms Hammond merely undertook some of the responsibilities Mr Kent had previously done.

[50] The fact that Mr Park had designated Ms Hammond as his contact person (after Mr Kent left) did not adversely impact on Ms McLean. I also consider that the designation of Ms Hammond as Manager was just a stopgap measure and had no practical adverse effect on Ms McLean other than the fact that she had to discuss purchasing requirements with Ms Hammond instead of Mr Kent (or immediately after Mr Kent's departure with Mr Park) as she had previously done.

[51] I consider Ms McLean's role was not adversely affected because she was still 2IC in the sense that there was someone other than her who had direct communications with Mr Park. Before Mr Kent's departure, that was Mr Kent. After Mr Kent's departure, that was Ms Hammond. This claim does not succeed.

The manner in which the alleged promotion/demotion was carried out

[52] Whilst I recognise that Mr Park could and should have handled the announcement that Ms Hammond was going to be his main point of contact more sensitively, I do not consider that this amounts to a breach of Ms McLean's employment agreement.

[53] This claim does not succeed. Barkers Park was entitled to make whatever arrangements it wished to in order to cover Mr Kent's former responsibilities. Its announcement to staff of the arrangements it had implemented did not breach Ms McLean's employment agreement.

Predetermination of Ms McLean's dismissal

[54] I consider that the issues that Ms McLean has raised about predetermination are more appropriately considered as part of her unjustified dismissal claim rather than as separate alleged breaches of her employment agreement. I consider this claim

is a duplication of the unjustified dismissal claim so I will deal with it under that heading.

Did Barkers Park subject Ms McLean to humiliating treatment?

[55] Ms McLean raises six matters which she claims amount to humiliating treatment of her by Barkers Park which breached her employment agreement:

- (a) Ignoring her suggestions about the new retail venture;
- (b) Not investigating a staff issue;
- (c) Advising the applicant of a desire to “*get rid*” of her;
- (d) The manner in which she was advised of the purported redundancy (this refers to the presentation of the consultation letter to her);
- (e) The manner in which she was dealt with over the alleged breach of confidentiality;
- (f) The attempt to prevent her being represented by Mr Kent.

(a) Ignoring Ms McLean’s suggestions about the new retail venture

[56] I find it was not a breach of Ms McLean’s employment agreement for Barkers Park not to act on Ms McLean’s views/comments/feedback on its plans for a new retail venture. It was up to Barkers Park to decide how it wished to run its business operations. It was not contractually obliged to implement Ms McLean’s suggestions.

(b) Not investigating a staff issue

[57] This claim does not succeed. I find the staff issue did not involve Ms McLean so it cannot have had been a breach of her employment agreement. I find the situation Ms McLean refers to in support of this claim had nothing to do with her.

[58] Ms McLean heard about an issue that had arisen during an informal discussion with the young staff member involved. What had or had not occurred was between that staff member the other employee involved and Barkers Park. I note that no formal complaint was made by the staff member concerned. These matters did not affect Ms McLean’s employment agreement.

(c) Advising Ms McLean of its desire to “get rid” of her

[59] The evidence did not support this allegation. I accept Ms McLean believed that Mr Park wished to “get rid” of her because of her close relationship to Mr Kent (who at that point had filed personal grievance proceedings and other claims against Barkers Park and Mr Park). However the evidence did not establish to the required standard that Ms Hammond “made it clear” that Mr Park wanted to “get rid” of Ms McLean.

[60] I find that Ms McLean and Ms Hammond were both concerned about their jobs. They were friends and in that context were having a friendly discussion during which Ms McLean expressed concern that her relationship with Ms Kent had affected Mr Park’s view of her. Ms Hammond may have impliedly agreed with Ms McLean’s suggestion about that but I find she did not expressly state the words Ms McLean attributes to her.

[61] Ms Hammond impressed me as a genuine witness. She was summonsed to the Authority and I found her evidence candid on a number of points including wishing to amend her witness statement (which had been prepared by Mr Foote) where she did not consider it accurately reflected her view of matters. I accept her evidence that Mr Park had not expressed any adverse views about Ms McLean to her (Ms Hammond) and that she had not lead Ms McLean to believe he had done so.

[62] Contrasted with this, Ms McLean was very emotionally involved in Mr Kent’s issues and admits she had been adversely affected by the manner in which Mr Kent’s employment had ended. I consider it likely that these emotional influences have impacted on her view of events.

[63] Whatever was said between Ms McLean and Ms Hammond during their mutually supportive and friendly conversation did not constitute a breach of Ms McLean’s’ employment agreement. This claim does not succeed.

(d) The manner in which Ms McLean was advised of her purported redundancy (which is said to refer to the consultation letter)

[64] Mr Park handed Ms Mclean a sealed envelope containing a letter which set out the restructuring proposal and asked her not to open it until she had finished work. I

do not accept this amounts to a breach of Ms McLean's employment agreement so this claim does not succeed.

(e) Manner in which Barkers Park dealt with Ms McLean over the allegation of breach of confidentiality

[65] It was unwise and undesirable for Barkers Park to have raised its concerns about the alleged breach of confidentiality in the proposed restructuring letter it sent to Ms McLean. However, I do not find that amounts to a breach of her employment agreement.

[66] Barkers Park was flagging its concerns with Ms McLean and had asked for a written response from her. Ms McLean was not disciplined or subjected to a disciplinary process. She was merely asked for an explanation to Barkers Park's concern that she had breached confidentiality. I find this request (whilst ill-advised in the context of a proposed restructuring letter) was not a breach of her employment agreement. This claim does not succeed.

(f) Attempt to prevent Ms McLean being represented by Mr Kent

[67] Ms McLean was initially told that she was not to have Mr Kent as her support person. At the time that advice was given to her relations between Mr Kent and Mr Park had deteriorated. Litigation had been foreshadowed and Mr Kent had been trespassed from Barkers Park. Mr Park's initial reluctance to have Mr Kent involved in Ms McLean's consultation process was perhaps understandable in the circumstances.

[68] I am not satisfied Ms McLean's employment agreement was breached. Mr Kent challenged Barkers Park's attempt to prevent his attendance at Ms McLean's consultation meeting and it backed down. Ms McLean was not in fact prevented from being represented and supported by Mr Kent. He obtained an adjournment of the consultation meeting, he secured a change in venue and he attended the consultation meeting with Ms McLean. This claim does not succeed.

Should penalties be imposed for any breaches of Ms McLean's employment agreement?

[69] I am not satisfied that Barkers Park breached Ms McLean's employment agreement so the issue of penalties therefore does not arise.

Do any of the alleged breaches of Ms McLean's employment agreement also amount to statutory breaches of good faith?

[70] I am not satisfied that Ms McLean's employment agreement was breached. I am also not satisfied that any of the matters Ms McLean identified as breaches of her employment agreement amount to statutory breaches of good faith. The issue of penalties in respect of such claims does not arise.

Did Mr Park aid and/or abet Barkers Park to breach Ms McLean's employment agreement?

[71] I have not found in favour of any of Ms McLean's claims regarding alleged breaches of her employment agreement. It therefore follows that Ms McLean is unable to establish that Mr Park aided and/or abetted breaches of her employment agreement. This claim does not succeed so the issue of penalties does not arise.

Was Ms McLean unjustifiably disadvantaged in her employment?

[72] Ms McLean claims she was unjustifiably disadvantaged in her employment by:

- (i) The alleged promotion of Ms Hammond;
 - (ii) The announcement of Ms Hammond's alleged promotion and her (Ms McLean's) alleged consequential demotion publicly and without consultation with Ms McLean;
 - (iii) Barkers Park conducting itself in a manner that indicated an intention to terminate Ms McLean's employment;
 - (iv) not being allowed the support of her chosen representative;
 - (v) Barkers Park failure to properly consult her over the purported redundancy and failure to provide information;
 - (vi) Barkers Park's failure to seek redeployment opportunities for Ms McLean; and
 - (vii) the imposition of the final warning for the alleged breach of confidentiality.
- (i) Alleged promotion of Ms Hammond

[73] I do not consider that Ms Hammond's purported 'promotion' disadvantaged Ms McLean. Even if it did then I consider any such disadvantage would have been justified. Mr Park was entitled to appoint one person as his point of contact at Barkers Park and one person whom staff could go to for decisions in his absence.

- (ii) Announcement of Ms Hammond's alleged promotion and the applicant's alleged consequential demotion publicly and without consultation with Ms McLean

[74] Whilst I accept Ms McLean was unhappy with these events something more than that is legally required to establish she has a disadvantage grievance. Whilst it would have been good practice for Barkers Park to have consulted with Ms McLean about the arrangements to be put in place for running the business after Mr Kent's departure there was no legal requirement for it to do so given her role was not adversely impacted. I do not accept Ms McLean's claim that she was demoted. This claim does not succeed.

- (iii) Barkers Park conducting itself in a manner that indicated an intention to terminate Ms McLean's employment

[75] The evidence did not establish that Barkers Park had conducted itself in a manner which indicated an intention to terminate Ms McLean's employment. The matters Ms McLean relied on did not support her view of events which I consider was adversely affected by Mr Kent's situation. This claim does not succeed.

- (iv) Not being allowed the support of her chosen representative

[76] This claim does not succeed. Ms McLean had the support of her chosen representative (Mr Kent) at all times. She was never actually deprived of her choice of support person/representative. Mr Kent was actively involved in all aspects of the consultation process. I find that Ms McLean was not disadvantaged by Barkers Park's initial advice that she was not to use Mr Kent as her support person because it did not in fact affect her. She continued to be supported and represented by Mr Kent as she wished to. This claim does not succeed.

- (v) Barkers Park's failure to properly consult Ms McLean over the purported redundancy and its failure to provide information

[77] I find Barkers Park disadvantaged Ms McLean by failing to adequately consult her over its proposed restructuring and by failing to provide her with information relevant to its proposed restructure. I find that Barkers Park is unable to justify this disadvantage because its actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances, contrary to the justification test in s.103A(2) of the Act. This unjustified disadvantage claim succeeds.

(vi) Barkers Park's failure to seek redeployment opportunities for her

[78] I find Ms McLean was unjustifiably disadvantaged in her employment because Barkers Park failed to investigate redeployment opportunities for her before it made her redundant. This unjustified disadvantage claim succeeds.

(vii) Imposition of the final warning for the alleged breach of confidentiality

[79] This claim does not succeed because Ms McLean was not actually given a final warning for the alleged breach of confidentiality. She was merely asked to explain her actions which I find did not disadvantage her.

Was Ms McLean's dismissal justified?

Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Barkers Park's actions and how Barkers Park acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms McLean was made redundant.³

[80] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith requirements in s.4(1A) and the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to undermine an employer's ability to justify a dismissal (or action).

[81] I find that Barkers Park is unable to discharge its onus of establishing that its actions and how it acted was justified. I find there were a number of deficiencies which were serious and which resulted in substantial unfairness to Ms McLean.

[82] Barkers Park failed to comply with its good faith obligations under s.4(1A) of the Act to provide Ms McLean with information relevant to its restructuring proposal and an opportunity to comment on that information before she was made redundant.

³ Section 103A(2) of the Act

This was not one of Ms McLean's separate specific breach of good faith claims but I have nevertheless considered compliance with s.4(1A) of the Act when assessing justification.

[83] I conclude that Barkers Park has fallen far short of what is required of a fair and reasonable employer. Barkers Park failed to provide Ms McLean with any relevant information. All she was told was that Barkers Park was thinking about combining her position and Ms Hammond's position into one position which would cover both roles. No job description, personal specification or draft proposed new employment agreement was provided to Ms McLean.

[84] It was not clear on what basis Barkers Park wished to restructure its operations. Although there were suggestions that Barkers Park wished to save money that was not communicated to Ms McLean. She had no idea what savings were required or what saving the proposal hoped to achieve or how and why savings would occur. There was no evidence produced to the Authority to support the submission that Barkers Park had genuinely investigated ways to reduce its costs.

[85] Ms McLean was never told what was proposed other than either she or Ms Hammond were likely to be made redundant. There was no selection criteria or benchmark of cost savings that Barkers Park wished to achieve. She was not given any financial information or indeed any information at all. The consultation meeting lasted 10 minutes only and that included discussion on the alleged breach of confidentiality concern. I consider the lack of any information and brevity of the meeting tend to indicate predetermination.

[86] The manner in which consultation occurred with Ms McLean and Ms Hammond differed. Ms Hammond was given an opportunity to explain what skills she had that could be retained whilst Ms McLean was never asked the same question. Mr Park also proceeded on a mistaken understanding about what Ms McLean's experience and skill set was because (surprisingly) he never asked Ms McLean about that.

[87] It is also of concern that in the proposed restructure letter Mr Park indicated his view that Ms McLean had breached confidentiality (i.e. he had reached a concluded view about that). That was obviously a major concern to Mr Park as he raised it again during the consultation meeting. I consider it was unfair of Mr Park to

have reached such strong views on this issue without having discussed the concern with Ms McLean and she had not been subject to a disciplinary process over it.

[88] I also consider this shows that Mr Park was likely unfairly prejudiced against Ms McLean at the time he was considering who to retain and who to make redundant. I also consider it tends to show predetermination of an outcome adverse to Ms McLean.

[89] Mr Foote suggested that because Mr Kent had access to financial information in his former role as CEO and because he was Ms McLean's partner that somehow complied with Barkers Park's s.4(1A) obligations. I reject that submission which is contrary to established case law from the Employment Court. The obligation in s.4(1A) of the Act is clearly on the employer to provide all relevant information to a potentially affected employee. That did not occur in this case.

[90] Ms McLean was entitled to be given the information upon which Barkers Park (and Mr Park) was relying to support the proposed restructure. Not only was she given no information about the proposed restructure she was given no information as to how the selection process would occur between her and Ms Hammond. I am satisfied that Mr Park took irrelevant matters into account⁴ and failed to take relevant matters⁵ into account.

[91] There is no explanation from Barkers Park as to why the information Ms McLean requested regarding the plans for Barkers Park going forward was not provided. Ms McLean specifically asked for that information during the consultation meeting and was told it would be provided. It never was. Instead of being given the information she had requested Ms McLean received notice of termination.

[92] Nor was there any satisfactory explanation about why Ms McLean was summarily removed from her employment if this was a genuine commercial restructuring and her normal rostered hours (which she could have worked during her notice period) given to a casual employee the day after she was advised of her redundancy. This undermines Barkers Park's claim that it was focused on reducing costs as it resulted in an unnecessary duplication of wages.

⁴ The alleged breach of confidentiality.

⁵ Ms McLean's experience and expertise.

[93] Barkers Park also failed to consider redeployment. I am satisfied that it engaged part time and casual staff who did not have any fixed or set hours of work. Accordingly, there was work that could and should have been made available to Ms McLean who was a permanent employee. I find Barkers Park did not even investigate that obvious possibility. This is another factor which suggests pre-determination.

[94] I find that Barkers Park failed to look at any redeployment options for Ms McLean which could have included casual employment, reduced hours or part time or even (with her agreement) moving to contract work. Failure to consider possible alternatives to redundancy was unfair and unreasonable and fundamentally undermines Barkers Park's ability to justify Ms McLean's dismissal.

[95] I find that Barkers Park did not conduct a full or proper assessment of the situation before embarking on the proposed restructure which resulted in Ms McLean's redundancy. It failed to ascertain what its true financial position was.⁶ It failed to identify what savings it was required to make or why. It failed to investigate whether there were other or different ways of achieving such savings (for example reducing stock, eliminating the grooming side of the business, reducing staff numbers, removing part time and casual employees and taking other commercial steps).

[96] Barkers Park also failed to discuss with the employees potentially affected by the restructuring proposal what they did on a day-to-day basis and it failed to ascertain the terms and conditions of their employment as per their employment agreements. I find that the failure to provide Ms McLean with all relevant information meant she was not in a position to be able to genuinely comment on the proposed restructure so Barkers Park did not have the benefit of her input before it made a final decision to terminate her employment.

[97] I find that the process followed was fundamentally flawed. Barkers Park did not comply with any one of the four procedural fairness tests in s.103A(3) of the Act and is therefore unable to justify Ms McLean's dismissal.

[98] The significant process flaws undermine Barkers Park's ability to establish that Ms McLean's redundancy was substantively justified. It embarked on a rushed

⁶ It had mixed the costs of another of Mr Park's legal entities with its outgoings.

process based on one option which was unsupported (at that time) by evidence or analysis. I consider that all appropriate options were not explored at all much less fully or properly considered by Barkers Park.

[99] There was no genuine consultation and the outcome of Ms McLean's redundancy appears to have been predetermined. I accept Ms Swarbrick's submission that the reality was that Ms Hammond's role was always going to remain in place and that Mr Park never considered any other outcome.

[100] I find that Ms McLean's dismissal was substantively and procedurally unjustified.

What remedies should be awarded?

Unjustified disadvantage

[101] The two unjustified disadvantage claims that Ms McLean succeeded on form part of the unjustified dismissal claim so I consider it appropriate to award one overall remedy for distress compensation. I find the evidence also does not support a separate award of distress compensation because Ms McLean dealt with her overall distress, but did not provide separate evidence of how the two disadvantage grievances affected her.

Mitigation

[102] Ms McLean has a legal duty to mitigate her loss. In the three months following Ms McLean's redundancy she applied for two positions. Ms McLean says that was due to the very limited employment opportunities available in the area.

[103] Ms McLean says she checked Trademe and Seek websites daily, and registered to receive job alerts from them. She also checked the local newspaper (Rotorua Daily Post) daily and the websites of major Rotorua employers such as Lakes District Health Board.

[104] In the six months before the Authority's investigation meeting Ms McLean says she lodged CVs with five large employers and supermarkets and applied for three advertised jobs. During the eleven or so months following her dismissal Ms McLean applied for five advertised jobs in total.

Lost remuneration

[105] Ms McLean claims lost remuneration of \$41,124.34 from the date of dismissal to date of Authority's investigation (just over 11 months). I consider the evidence does not support an award of lost remuneration of more than three months.

[106] I consider lost remuneration of three months is appropriate on the basis that any losses after that period are more likely than not to be due to a failure to adequately mitigate rather than the dismissal. I note that Ms McLean did not send out CVs until towards the end of three months post her dismissal.

[107] Barkers Park is ordered to pay Ms McLean \$11,038.95 (being \$10,221.25 lost remuneration under s.128(2) of the Act together with \$817.70 holiday pay).

Distress compensation

[108] Ms McLean seeks \$12,500 distress compensation in respect of her unjustified dismissal claim.

[109] I accept Ms McLean was humiliated, distressed and embarrassed as a result of her dismissal. However, I consider that some of the feelings she described arose from her views about how Mr Kent had been treated and that his views about his own situation were likely to have increased her distress.

[110] It is not appropriate for Ms McLean to be compensated for Mr Kent's situation. Her distress compensation is limited to the evidence that she provided about the impact of her unjustified dismissal on her.

[111] I also consider that some of Ms McLean's distress related to her view that she had been publicly demoted and thereby humiliated which are claims that I have not upheld. I also put to one side her distress over having to clear out Mr Kent's private belongings as that does not relate to her dismissal.

[112] I do accept that it would have been stressful for Ms McLean to have found herself out of work at the same time that Mr Kent was out of work. Ms McLean gave evidence of an inability to sleep and of suffering migraines which she attributed to her dismissal.

[113] I take into account Ms McLean's evidence that she had 40 years' of unblemished career history both as an employer and an employee and that to be treated in the way that she was weighed on her heavily and caused her depression, anxiety, ill health and a loss of confidence in her own abilities. I accept her evidence about those matters.

[114] Ms McLean says that she found her dismissal "*absolutely devastating*", did not want to get out of bed in the mornings and suffered from insomnia and frequent bouts of tears. She was also embarrassed by being asked by people in the community why she was no longer at Barkers Park.

[115] I consider an award of \$7,000 is appropriate. Accordingly, Barkers Park is ordered to pay Ms McLean \$7,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

What if any costs should be awarded?

[116] Ms McLean as the predominantly successful party is entitled to a contribution towards her costs. The parties are encouraged to resolve costs by agreement. If that is not possible, Ms McLean has 14 days within which to file a costs memorandum, Barkers Park has 14 days thereafter with Ms McLean having a further three working days within which to file any response.

[117] To assist the parties in resolving costs by agreement the Authority can indicate it is likely to adopt its usual notional daily tariff based approach to costs. The parties are therefore invited to specifically identify any factors which they say should result in the current notional daily tariff of \$3,500 being adjusted.

Rachel Larmer
Member of the Employment Relations Authority