

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 204  
5560004

BETWEEN      PATRICK MAURICE O’SULLIVAN  
Applicant

A N D            SOUTHLAND YMCA EDUCATION  
LIMITED  
Respondent

Member of Authority:      Helen Doyle

Representatives:            Applicant in person  
Mary-Jane Thomas, Counsel for the Respondent

Investigation Meeting:      18 and 19 November 2015 at Invercargill

Submissions Received:      3 and 14 December 2015 from the Applicant  
11 December 2015 from the Respondent

Date of Determination:      22 December 2015

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**DETERMINATION OF THE AUTHORITY**

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**A      Patrick O’Sullivan was unjustifiably dismissed from his  
employment with Southland YMCA Education Limited.**

**B      Southland YMCA Education Limited is ordered to pay to Patrick  
O’Sullivan the following:**

**(a)      Lost wages in the sum of \$2,304 gross for a four week  
period.**

**(b)      Compensation in the sum of \$7000 without deduction.**

**C I reserve leave for Ms Thomas to return to the Authority about any earnings issue over the four week period.**

**D I have reserved costs and set a timetable for an exchange.**

### **Prohibition from publication**

[1] I prohibit from publication under clause 10 (1) of the second schedule to the Employment Relations Act 2000 (the Act) any information whatsoever about issue A.

### **Employment relationship problem**

[2] Patrick O’Sullivan was employed on 1 July 2008 by Southland YMCA Education Limited (YMCA) as a Literary Tutor for 20 hours per week Monday to Friday at \$17.50 per hour. He was party with the YMCA to a written individual employment agreement (the employment agreement).

[3] In 2010 there was a variation to the employment agreement. It was agreed that Mr O’Sullivan would work five days a fortnight at the YMCA as its Leven Street, Invercargill premises and one day from home on a flexible basis for a minimum of 24 hours per week. His hourly rate was increased to \$24 per hour and his position was described as Literary Specialist and Internal Moderator. The requirements of the position were set out as follows:<sup>1</sup>

*Requirements of position: This to add specificity to the tasks:*

- *Act as literary specialist to train and guide tutors as well as students;*
- *Interpret and provide feed-back on Unit standards; achievement standards and the technical requirements of the progressions standards, NZQA exemplars, and other guidelines to tutors and management.*
- *Provide training as and when required on literacy and technical requirements of the Progressions.*
- *Mentor tutors in the technical requirements of literacy and in the interpretation of numeracy assessments where required.*

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<sup>1</sup> Page 28 of the applicant’s bundle of documents

- *Develop and manage a moderation process that reflects and meets the quality and compliance requirements of NZQA.*
- *Manage the moderation process from an educative as well as quality and compliance perspective.*
- *Work alongside Tutors to assist in technical delivery especially where technical complexities require simplification to make delivery effective.*
- *Liaise where necessary with the National Education Manager on Moderation process and practice.*
- *Liaise where necessary with outside moderators of ITO's and other organisations where necessary.*

[4] The Chief Executive Officer (CEO) of the YMCA, Ivan Hodgetts, by letter dated 26 March 2015 advised Mr O'Sullivan of proposed changes to the organisational structure of the YMCA and the role of staff in the Education Services. The central reason for the proposed changes was stated in the letter to be that the YMCA was facing a significant financial deficit and it was the second year that such a deficit had been faced. Further, the proposal was driven by a need to re-orientate the organisation to more effectively deliver the services.

[5] There was a proposal attached to the letter. It provided materially under Education and Youth Services for the disestablishment of six roles including two Literacy Aid Tutor roles. One of the Literacy Aid tutor roles referred to was Mr O'Sullivan's although Literacy Aid tutor was not the correct name of his role. There was to be established a Youth Justice and Education Services Manager role and a revised full-time Literacy Aid tutor/Student Support role. Mr O'Sullivan was advised in the letter that as an affected staff member he would have an opportunity to apply for that role, which was to be a full-time position. Subsequently Mr O'Sullivan was advised it would not be appropriate to consider him for redeployment to that position,

[6] There was an opportunity in the proposal for feedback. Mr O'Sullivan provided six submissions to Mr Hodgetts and attended meetings on 21 and 22 April 2015. Mr O'Sullivan attended both of these meetings alone. At the first of those meetings the focus was on Mr O'Sullivan's appraisal and Mr Hodgetts attended that meeting with the Education Manager Shelly Davis. The second meeting was a

consultation/feedback meeting and Mr O'Sullivan attended. Mr Hodgetts was present with YMCA's then lawyer Helen Young.

[7] By letter dated 24 April 2015 Mr O'Sullivan was advised that following the disestablishment of his position his employment would be terminated on notice. Mr Hodgetts advised that he only required Mr O'Sullivan to work one day of that notice, although Mr O'Sullivan unsuccessfully requested to work out his notice period. He was not permitted to do so.

[8] Mr O'Sullivan says that he was unjustifiably disadvantaged during the restructuring by the actions of YMCA and unjustifiably dismissed by letter dated 24 April 2015. He says that the actions of YMCA were not in accordance with good faith obligations.

[9] This matter was originally the subject of an application for interim reinstatement. That application was unsuccessful. Mr O'Sullivan no longer seeks reinstatement as a remedy. His remedies were disclosed in submissions as follows:

- compensation in the sum of \$15,000;
- lost earnings from 3 June 2015 less \$1,500 income received for six months;
- lost benefits in respect of the incurrence of credit card debt;
- interest.

[10] YMCA say that the decision to restructure and to terminate Mr O'Sullivan's employment by reason of redundancy was genuine and procedurally fair and in accordance with good faith obligations.

### **The issues**

[11] The Authority in this case needs to determine the following issues:

- (a) Was the dismissal for reason of genuine redundancy?
- (b) Did YMCA follow a fair process in making Mr O'Sullivan redundant and in particular:

- (i) Was the consultation adequate?
- (ii) If the new role was not substantially similar to Mr O'Sullivan's role should he have been provided with a position description for that role and an opportunity to apply for the role?
- (c) Was the notice requirement in the employment agreement adhered to?
- (d) If the Authority finds that Mr O'Sullivan was unjustifiably disadvantaged and/or that his dismissal was unjustified, then what remedies is he entitled to and are there issues of contribution and mitigation.

### **Mr O'Sullivan's employment agreement**

[12] In the event of a redundancy situation clause 11 of Mr O'Sullivan's employment agreement which was headed *Redundancy* provided as follows:

*11.1 Where the Employee's position of employment is terminated as being surplus to the Employer's requirement, six weeks notice of termination shall be provided. No payment by the way of redundancy compensation will be provided.*

### **Business reason advanced by YMCA for the restructuring**

[13] Mr Hodgetts was contracted by the YMCA Charitable Trust (the Trust) to act as an interim Chief Executive Officer (CEO) in January 2015. The previous CEO, Isabel Murray, had resigned from her position but worked until the end of January 2015 giving Mr Hodgetts time for handover and general discussions.

[14] Mr Hodgetts spent time reaching some understanding about how the YMCA operated as an organisation. Mr Hodgetts was aware that there were major challenges ahead particularly in respect of changes to government policy in areas such as Youth Guarantee and the funding of social services that had potential to impact the YMCA's funding.

[15] The focus for my investigation into Mr O'Sullivan's employment is on Education and Youth Services, now Youth Justice and Education, but the Trust also operates in two other main areas in Invercargill; the Recreation Service and the YMCA Early Learning Centre.

[16] Mr Hodgetts said that he observed the lack of coherent record keeping systems and rundown nature of the buildings and equipment and he had some concerns about human resource systems and records. He was given approval to extend his organisation review and ensure that the YMCA was well placed for future opportunity.

[17] In March 2015 Mr Hodgetts said that it had become clear that numbers were very low in the youth guarantee programme. Following discussions with the accountant and managers he understood that the YMCA would be unlikely to gain more than 40 equivalent full time students (EFTs) by the end of 2015 as compared with the allocation of 72 EFTs. This would therefore result in a significant loss in education.

[18] The recreation services and early learning centre were also projected to make a loss.

[19] Mr Hodgetts said that the loss across all of YMCA's entities was projected to be \$286,543 for the 2015 year which was on top of the \$308,000 refund due to the Tertiary Education Commission (TEC) for the 2014 year which exceeded original expectations by approximately \$58,000. That refund was because the actual EFTs were considerably less than funded/allocated for.

[20] Mr Hodgetts was then given a mandate by the Board to undertake a formal restructure of the organisation to reduce the deficit. As part of that mandate, he reviewed all of the YMCA's entities resulting in a proposal that included restructuring across all the entities with redundancies in both education and recreation.

[21] Mr Hodgetts said that projections have been revised and YMCA are now budgeting for a loss of \$151,552.00 for the 2015 year as opposed to \$286,543 which is based on reduced costs in recreation and an EFTs projection for education of 47 EFTs.

[22] The evidence that I heard supported that those who worked in Education including Mr O'Sullivan were very aware of the low student numbers. One of the tutors Stacy Hughes who is the Connect Tutor at the YMCA said he was surprised that another tutoring role was not disestablished based on the EFTs numbers.

[23] I find that there were justifiable financial reasons for the restructuring established from the evidence and a genuine basis for wanting a more effective operation in a changed/changing funding environment.

[24] I'll turn now to the process that followed the announcement of the restructuring.

### **The process**

[25] The proposed changes affected staff in Recreation and Education and Youth Services. Within Education and Youth Services it was proposed to disestablish six roles which included two Literacy Tutor roles and two tutor roles. The other roles to be disestablished were the Education Manager's and the Youth Services Manager's. It was proposed to establish one combined Youth Justice and Education Services Manager role and a full-time Literacy Aid Tutor/Student support role.

[26] There was a time frame for feedback and consultation. Mr Hodgetts was persuaded by some of the feedback and made some changes to the original proposal.

[27] Mr O'Sullivan provided six feedback documents. He made it clear from the time of his first submission on 10 April 2015 that his role was not that of literacy aid tutor. In para.14 of his feedback he stated:

*For instance, two LAT positions are identified where there is only one. I return to that in respect of my personal response to this. Suffice to say here, there was only one LAT/student support position and that person had already resigned before this proposal was tabled. The other literacy position is the one I hold and that is superior, by definition and practice, to a LAT position. There are no job descriptions for the new positions. There is no disclosure of how the new positions differ from the old.*

[28] The employee Mr O'Sullivan was referring to as having resigned was Kristy-Anne Scott. Ms Scott's role was Literacy Aid Tutor/Pastoral Care and was 0.8 of a full time equivalent (FTE) position.

[29] Mr O'Sullivan put forward a proposal that the intended new role be divided into two roles being the Student Support role and the Literacy Moderation and Training role.

[30] Mr Hodgetts responded to Mr O'Sullivan's written feedback provided on 10 and 12 April and some emails by letter given to Mr O'Sullivan on 14 April 2015.

*Letter dated 14 April 2015*

[31] In his letter of 14 April Mr Hodgetts noted that Mr O'Sullivan in his written feedback had challenged the genuineness of the restructuring and had alluded to some tensions and conflicts that predated his engagement as CEO. Mr Hodgetts wrote that the proposed restructuring was based on his assessment of the financial viability of the programmes and courses currently on offer and he rejected the inference that the restructuring was, to use Mr O'Sullivan's words, *a charade or a vindictive response to previous events*.

[32] He recorded Mr O'Sullivan's advice that his roles were those of Internal Moderator, Literacy Specialist and Staff Trainer which was senior to that of a literacy aid tutor. He had some questions around each of those components of the role and further, made it clear in relation to the rationale for the restructuring that the proposed restructuring was not targeted at Mr O'Sullivan or motivated by previous events, and neither was it based on his performance.

[33] Mr Hodgetts set out some of the financial information as it pertained to education and, in particular, that the equivalent full-time student numbers had not been achieved in 2014 resulting in a refund needing to be made. Materially in relation to redeployment opportunities, Mr Hodgetts wrote that *Given that you consider your existing role is not that of a literacy aid tutor, it would not be appropriate to look at redeploying you to the proposed LAT role (regardless of whether it involves a student support component)*.

[34] Mr Hodgetts also referred to the position of Youth Justice and Education Manager and wrote that it seemed to him the real issue was whether a specialist role such as his could be sustained under the proposed restructuring. He noted that that was not because moderation, quality assurance and staff training was unimportant, but because the new Youth Justice in Education Manager position would be more focused on leadership and proactive management than the existing Youth Services Manager and Education Manager positions. He wrote that he envisaged that this new position will oversee moderation, quality assurance and be directly responsible for staff professional development. Mr Hodgetts stated in the letter that he had spent a lot of

time considering whether the new position could be an option for Mr O'Sullivan but his current leaning was that no existing staff member had an automatic right of redeployment to the position which would be publically advertised and he included a copy of the job description for Mr O'Sullivan to consider.

[35] Mr Hodgetts proposed a further meeting on 17 April to have a full and frank discussion about the restructuring implications for Mr O'Sullivan's employment.

*Advice of the raising of a personal grievance*

[36] After receipt of that letter, Mr O'Sullivan advised that he was raising a personal grievance about disadvantage including over the failure to complete his appraisal before decision making. Further feedback documents were provided (three and four) both on 16 April 2014.

[37] In his third feedback letter Mr O'Sullivan agreed to attend a meeting with Mr Hodgetts and his manager Ms Davis for an appraisal. He described how he saw an appraisal *as an opportunity to explore the dynamic that seems to elude your thinking so far as to the functional and practical nature of the quality assurance process and as to why my contract was so framed and the practice so conducted over the past 5 years.*

[38] In the fourth feedback submission Mr O'Sullivan drew a distinction between his role as a specialist and tutors who were generalists. He wrote that there were two different skill sets and each is dependent on the other. Mr O'Sullivan provided further feedback about the quality assurance model and appraisal on 19 April 2015.

*21 April 2015 appraisal meeting*

[39] There was an appraisal meeting held on 21 April 2015 with Mr O'Sullivan, Mr Hodgetts and Shelly Davis, the then Education Manager. There was a discussion around the nature of Mr O'Sullivan's role and the relevance of that in relation to the restructuring process.

*22 April 2015*

[40] The purpose of the meeting on 22 April 2015 was to discuss the proposed restructuring and the potential impact on Mr O'Sullivan with Mr O'Sullivan, Mr Hodgetts and the YMCA's legal representative, Helen Young. That meeting was

a discussion about the rationale for the restructuring, the selection of Mr O'Sullivan's role for possible redundancy and the reason, from the YMCA's perspective, that Mr O'Sullivan had not been considered for selection to the LAT/Student Support role.

[41] Mr O'Sullivan provided further feedback by letter dated 23 April 2015 (feedback submission 6) to Mr Hodgetts.

[42] On 24 April 2015 Mr O'Sullivan was handed a letter confirming the disestablishment of his position and his termination. Initially that was incorrectly stated to be on one month's notice, which was not in accordance with clause 11.1 of Mr O'Sullivan's employment agreement, but was subsequently paid out at the six weeks. He was not permitted to work out his notice.

[43] The outcome of the restructure was that there were three redundancies at the YMCA which included Mr O'Sullivan's position. The incumbents of two other affected positions had resigned prior to the restructure.

#### **Was the redundancy genuine?**

[44] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake*<sup>2</sup> confirmed that the clear words of the justification test in s 103A now require the Employment Court [and Authority] to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done.<sup>3</sup> The test that the Authority applies in this case is whether the employer's actions and how it acted were what a fair and reasonable employer **could** have done.

[45] The Court of Appeal in *Grace Team* confirmed that it was not helpful to focus on pre-s 103A case law when interpreting and applying s 103A. The importance of addressing the genuineness of a redundancy was emphasised by the Court of Appeal. At [85] of the judgment and following on from the statements about pre-s 103A case law when applying and interpreting s 103A the Court of Appeal stated:

*Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not*

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<sup>2</sup> [2014] NZCA 541

<sup>3</sup> At [84]

*necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.*

[46] A fair and reasonable employer could be expected to comply with statutory and contractual obligations. I have set out the relevant clause in Mr O'Sullivan's employment agreement earlier. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and includes consultation and making employees redundant. Parties to an employment agreement must not mislead or deceive each other or do anything likely to mislead or deceive each other. S 4 (1A)(c) of the Act requires that an employer who is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of an employee to provide to the employees affected access to information relevant to the continuation of the employees' employment, about the decision and give an opportunity for comment on that information.

[47] There should not be pedantic scrutiny of the process but an emphasis on substantial fairness and reasonableness. The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and actively consult before making a final decision. – *Stevens v Hapag-Lloyd (NZ) Ltd.*<sup>4</sup>

*Was the new position of Literacy Aid Tutor/Student Support substantially similar to Mr O'Sullivan's role?*

[48] If the new position established of Literacy Aid Tutor/Student Support was substantially similar to that held by Mr O'Sullivan with a new name then his position would not be surplus under clause 11 of the employment agreement.

[49] I have, however, reached a clear view from the evidence that the new position was different and not substantially the same as Mr O'Sullivan's. In so concluding I accept there were components of his literacy role in the job description for the new role. Mr O'Sullivan was not provided with a copy of the job description for the new role until after the decision was made to redeploy Ms Bethune into the role. I will

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<sup>4</sup> [2015] NZEmpC28 at [60]

come to the fairness of that in this determination but mention that here because many of Mr O'Sullivan's arguments that the new job was his role are based on the words in the job description and not on what the role actually was in reality.

[50] Primarily the reason I find that it is a different role from that undertaken by Mr O'Sullivan is that its focus is different. I accept the submission of Ms Thomas that Mr Hodgetts wanted to focus or re-focus the YMCA on engaging and retaining students where funding provisions depended on outcomes.

[51] The Authority heard from the current incumbent of the position, Ms Bethune, about the role. Ms Bethune had been the Computer Studies/Food Tutor but after Ms Scott resigned from her role as Literacy Aid tutor she was seconded into the role of Literacy Aid Tutor/Pastoral Care for two or three months before being redeployed into the new role.

[52] Ms Bethune said that 90% of the time in the role of Literacy Aid Tutor/Student Support is taken up doing inductions with the young people at the time they are enrolled. This involves her screening the young people with an assessment tool, identifying gaps with numeracy and literacy and feeding back. They are then placed appropriately in courses with knowledge of any issues with literacy and numeracy. Before Ms Bethune took responsibility for assessments they were undertaken by the tutors. As I understand the evidence these were not always consistently undertaken previously but Ms Bethune has streamlined this with the effect of identifying issues about learning and special needs for all students from the outset. Ms Bethune also undertakes some relief tutoring and about 10% of her role is student support. She described this as a range of matters such as a student having no lunch, being homeless, pregnant, no money for new shoes or bullying.

[53] Ms Bethune said a tutor, Amelia, provides an intensive literacy/numeracy programme now for two to three months for those she identifies as needing that sort of assistance. A new issue was raised by Mr O'Sullivan about that programme for the first time in final submissions and for reasons of fairness and natural justice I do not include that in my determination.

[54] The focus that I identified from the evidence and documents for the new role is on the young people, working with them directly by undertaking an assessment and

identifying their needs including gaps in literacy and numeracy, helping them with day to day concerns and undertaking relief tutoring when required.

[55] I turn now to the role that Mr O’Sullivan held. There were three components to the role as previously set out. Mr O’Sullivan described his role in submissions to Mr Hodgetts at the material time as senior to a Literacy Aid tutor and more of a specialist role. Indeed that was reflected in the name of the role. In his 12 April 2015 submission on page 108 of the bundle he suggested that he be moved to an office – *For my part, the physical relocation would give me the private space I need to mentor/train and guide tutors and to liaise with outside organisations...on compliance issues.*

[56] He did not emphasise in any of his submissions to Mr Hodgetts direct contact and tutoring of students. He has subsequently been at pains to emphasise the level of his student interaction. I accept that it was not until after the decision had been made not to allow him to contest the new position that he became aware of the reasons why this was so. Nevertheless I am surprised the student interaction that is a significant focus of the new role as the name would suggest was not really referred to in the extensive written submissions provided by Mr O’Sullivan at the time. Mr O’Sullivan did refer to student interaction at the appraisal meeting on 21 April although I am not satisfied from the notes of the 22 April meeting that it was a matter discussed at the time.

[57] I had some difficulty in establishing with any degree of accuracy the level of student contact Mr O’Sullivan had. I accept that there was some contact but Ms Bethune who had been a tutor at the YMCA since 17 June 2013 said that Mr O’Sullivan had not had interaction with students when she was tutoring them except on one occasion for one student with whom she was having difficulty. She had sent that student to Mr O’Sullivan and he had worked with that student. Mr O’Sullivan said that he worked with students more in mechanics and I accept that may well have been the case.

[58] There is a further issue. Mr O’Sullivan wrote to the Board in January 2015<sup>5</sup> and said at [19] of his letter:

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<sup>5</sup> Respondent’s bundle of document page 69 – document 6.

*In practice, since my contract was varied to reflect my changing role, I have very little direct contact with students in any event. I am more engaged with tutors ...*

At [22] he said *I do not primarily, if at all, work alongside young people.*

[59] Mr O’Sullivan explained when I asked him about this that it was written in the context of another group of young people at the YMCA. The balance of the page of the letter is completely redacted and is the only page I have although the letter does seem to be more than one page. I cannot consider that explanation in context therefore with the balance of the letter. I do conclude however that Mr O’Sullivan’s explanation is very unlikely in respect of the contents of [19] which is written about the variation to the employment agreement and changing role and students in that context.

[60] Mr O’Sullivan was a tutor but his role was that of a specialist. He was different to the other more generalist tutors. Mr O’Sullivan recognised this in one of his feedback submissions dated 16 April 2015 in which he stated at [31] <sup>6</sup>

*I am a specialist. The tutors are generalists and thank God for that. Two different skill sets and each is dependent on the other. It is a folly to seek to find that combination in 6 tutors.....*

[61] Mr O’Sullivan further explained the tutors in the same submission in [22] as

*Tutors are employed for their empathetic capabilities with a very distinctive class of student. They do wonders. My job is at the higher level of ensuring what they do academically meets the NZQA standard by melding the academic need to the practical, real-life pathway on the ground to making that objective achievable to a student bewildered by high blown phrasing and assumptions of academe. I communicate with a tutor or a student class in an entirely different way than I do with you. Audience and purpose determine the mode.*

[62] I accept Mr O’Sullivan had some contact with students. The extent of that I find when considering all the evidence objectively was reasonably limited. The new role is student focused and has direct student contact.

[63] I do not find in conclusion on this issue that the new role was substantially the same as Mr O’Sullivan’s.

[64] I find that the redundancy was for genuine reasons rather than for an ulterior motive. I do not find the evidence supports that issue A was a reason for the proposed

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<sup>6</sup> Page 132 of the applicant bundle

changes and disestablishment of Mr O'Sullivan's position. Mr Hodgetts confirmed that when questioned about the issue. I'll refer more to the matter when I consider redeployment. Although Mr O'Sullivan suggested other ulterior motives such as the fact he provided advocacy in employment issues for the previous CEO of the YMCA I do not find the evidence supported there were ulterior motives.

[65] Objectively viewed as a result of financial and operational issues the YMCA concluded that it could not sustain a specialist 0.6 tutor position which had limited student contact. There had been a significant reduction in EFTs to about 40 EFTs as opposed to an allocation of 72 and that situation was not seen as improving for 2015. Mr O'Sullivan's role was not seen as viable.

[66] The moderation part of Mr O'Sullivan's role it was concluded could be undertaken by staff and co-ordinated by a tutor, Stacy Hughes, who has an interest in this aspect. I heard from Mr Hughes and he gave evidence about what steps he has taken in the moderation area and his view that staff are capable of peer-reviewing and critiquing each other's work with support and training. Mr O'Sullivan suggested in evidence that his moderation and quality assurance role was required by either legislation or contract. I accept that there must be quality assurance and moderation functions carried out however I am not persuaded that the YMCA is not meeting or in breach of its statutory or contractual requirements because of the change in how moderation is undertaken. I accept Mr Hodgetts evidence that moderation is not about a position or job title, it is a function.

[67] Mr Hodgetts concluded about the training aspect of Mr O'Sullivan's role that the YMCA did not need a dedicated in-house trainer. That is now overseen by the new Youth Justice and Education services manager Samantha Munroe who I also heard evidence from. Ms Monroe said that she has now put in place operational management systems to ensure accountability of staff and information recording that enables young people to achieve their goals. She accepted that she had overall responsibility for overseeing moderation and training but said that she would not hesitate to ask for assistance or advice for others if there was some issue outside of her expertise. There is also assistance for training provided nationally.

[68] I find that the redundancy was for genuine reasons and that the focus for the Authority as to whether there were any failings on the part of the YMCA should be on the process and any redeployment options.

### **Redeployment and issue A**

[69] Mr O'Sullivan initially wanted to be reinstated to his position on an interim basis. He did not disclose issue A to the Authority and neither did the YMCA. I do note the duty of a party to disclose all relevant matters at an interim hearing whether or not that party considers it is relevant.

[70] When the statements of evidence were lodged issue A was not clearly set out by Mr O'Sullivan and the YMCA did not therefore deal with it in its written statements of evidence. Mr O'Sullivan did make reference to an underlying motive for his redundancy and provided heavily redacted documents in the bundle of documents.

[71] Mr O'Sullivan said in his submission that Mr Hodgetts conceded that issue A was a factor in not offering redeployment in answer to a question from the Authority. Mr Hodgetts was not cross-examined by Mr O'Sullivan about this so I will need to consider my notes carefully.

[72] By way of background to my questioning this matter had been withheld from the Authority initially and there was nothing in writing about it in the statements of evidence. Even at the investigation meeting I was to a significant extent, and I accept there may be very good reason for this, without any specific detail. Mr O'Sullivan largely controlled disclosure. The absence of any detail therefore is the starting point.

[73] I did not know and asked Mr Hodgetts whether he was aware of issue A at the time of the restructuring. Mr Hodgetts confirmed he was. He confirmed that issue A was not the purpose of the proposed changes but it had been a factor in Mr O'Sullivan's employment and he gave an example of a day of management training and discussion with Mr O'Sullivan.

[74] He did not, and I am clear about this, in his answer concede issue A was a factor in the decision not to allow Mr O'Sullivan to contest the new role. That was not the nature of the question.

[75] I had before turning to this line of questioning about issue A specifically asked Mr Hodgetts why he had made a decision not to allow Mr O'Sullivan to contest the new role. His answer was that initially he did see the potential for contesting the position and indeed that is reflected in the change proposal. Mr O'Sullivan's subsequent representation of his role as a specialist role he said changed his view. He did not make any reference to issue A having been a factor in his consideration of a decision not to redeploy Mr O'Sullivan.

[76] Mr O'Sullivan placed emphasis on the reference in the 14 April letter<sup>7</sup> under redeployment opportunities to support that issue A or something else was a factor. I find that paragraph when read is consistent with the evidence Mr Hodgetts gave that Mr O'Sullivan was a specialist and therefore not a literacy aid tutor. The material part provided as follows:

*Given that you consider your existing role is not that of a literacy aid tutor, it would not be appropriate to look at redeploying you to the proposed LAT role (regardless of whether it includes a student support component).*

[77] I do find however that as a matter of common sense issue A was a factor which, had Mr O'Sullivan been permitted to contest the new role as he wanted to do, would have needed to be discussed. It was an ongoing matter. What I was permitted to see of communication from the Board made it clear it did not rule out future review.

### **Consultation**

[78] Consultation about the proposal was initially adequate and I find sufficient financial information was provided. I have set out earlier that the new role was different to Mr O'Sullivan's role. He could not simply be confirmed into the new role. The change proposal however advised him he could apply for the new role.

[79] The YMCA's failings in good faith and fair process were firstly that it did not, when asked, provide a job description for the new role to Mr O'Sullivan. Without a job description Mr O'Sullivan had no basis on which to properly assess the functions of the new role in relation to his role.

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<sup>7</sup> Page 113 of the applicant's bundle at 5

[80] Further there was an absence of consultation with Mr O'Sullivan before a decision was made that the new role was not an appropriate redeployment opportunity particularly in circumstances where Mr O'Sullivan had been advised he could apply for the role. Much of the evidence the Authority has heard about the similarities/difference in the job could and should have been the subject of consultation. This consultation should have taken place before Ms Bethune was redeployed to the new role. I am not satisfied that the new role was such that it could have been said to be substantially similar to Ms Bethune's. Ms Bethune said when I asked her that she did not think that her role as Literacy Aid tutor/Student Support had previously existed at the YMCA. Mr O'Sullivan also raised concerns that he was not provided with a selection criteria for the new role. Matters did not proceed to that stage.

[81] Had there been such consultation then Mr O'Sullivan may have been able to persuade Mr Hodgetts that he could contest the role. If, as is now submitted by Ms Thomas, Mr O'Sullivan could never have been successful because he was not qualified to undertake the inductions, because of issue A and because the position was full time in good faith there should have been consultation about that.

### **Notice**

[82] Clause 11.1 provides for six weeks' notice of termination. There was no provision for payment in lieu and Mr O'Sullivan wanted to work out his notice period but was required to leave almost immediately.

### *Conclusion*

[83] I have found there was a failure to provide a job description for the new role. There was changed advice to Mr O'Sullivan of a decision that it would not now be appropriate to look at a redeployment option without consultation and a failure to consult with Mr O'Sullivan about not permitting him to work out his notice period.

[84] These matters were not I find what a fair and reasonable employer objectively assessed could have done in all the circumstances at the time the dismissal occurred. The test for justification is not met because of these aspects notwithstanding the redundancy was genuine and there was some procedural fairness.

[85] Mr O'Sullivan has a personal grievance that he was unjustifiably dismissed which grievance subsumes his claims of unjustified action causing disadvantage.

## **Remedies**

### *Lost Wages*

[86] Mr O'Sullivan claims six months under this head. Section 123 (1) (b) of the Act provides for the reimbursement of a sum equal to the whole or part of the wages lost by the employee. I have found the redundancy was genuine.

[87] I do think it appropriate to make an assessment as to the likelihood of Mr O'Sullivan's employment continuing if there had been procedural fairness and adherence to good faith obligations.

[88] Ms Bethune was very suitable for and enthusiastic about the new role and the student support aspect. She had a known interest in learning difficulties. Mr O'Sullivan's preference in answer to a question from Ms Thomas was for a focus in the new role on literacy rather than a combined student support role. He said he would have tried to persuade Mr Hodgetts to his way of thinking. There was also issue A which I find would have had to have been addressed. Mr O'Sullivan said that the basis for concerns about issue A were without foundation. The YMCA did have concerns about that and I could not conclude there was no basis or reason for their concerns. I could not be satisfied that even with a fair process Mr O'Sullivan would have been redeployed to the new role.

[89] With proper consultation though Mr O'Sullivan would in all likelihood have remained employed for more time and I find a proper award under this head would be reimbursement of lost wages to reflect that but limited to a period of four weeks.

[90] Subject to any issues of contribution that would be the sum of \$2304.00 gross being 24 hours per week multiplied by \$24 per hour for four weeks. I do not understand there to be an issue of earnings over that period but I do reserve the right for Ms Thomas to return to the Authority if that is not the position.

### *Interest*

[91] I am not minded to award interest on lost wages in all the circumstances.

*Compensation*

[92] Mr O'Sullivan claims \$15,000 under this head but any award must reflect that it is not for the loss of his job but for the unfairness in the process and not being permitted to work out notice. The financial effects of the dismissal were clearly significant but cannot feature in an award.

[93] I accept that Mr O'Sullivan suffered humiliation, loss of dignity and injury to his feelings because of the procedural unfairness. The only chance for Mr O'Sullivan to retain a role with the YMCA was to be redeployed into the new role. There was a level of humiliation at not being provided with information in the form of a job description for the new role and by simply being told that it was not appropriate to redeploy him into it. Mr O'Sullivan I observed is a person who likes to put down in some detail his views and attempt to persuade others to them. The impact on him of these failures was I find more significant than it may have been for another employee. Mr O'Sullivan wanted to work out his notice period and I have had regard to what he stated to Mr Hodgetts at the time. In a letter dated 27 April 2015 he wrote at [21] that it was a forced and undignified exit that was both distressing and humiliating and that others could work out their notice and in a later email dated 3 May 2015 that [not being able to work out his notice] made him look incompetent in the job.

[94] Subject to contribution I find that an appropriate compensatory award in all the circumstances is \$7000.

*Lost benefits*

[95] I do not make an award under this head. The redundancy was genuine and I could not be satisfied that redeployment into a new role was likely.

*Contribution*

[96] Ms Thomas says that Mr O'Sullivan contributed to his dismissal. She relies on submissions made at the application for interim reinstatement. Those submissions were of course directed towards opposing reinstatement. Mr O'Sullivan was critical and distrusting of Mr Hodgetts and somewhat confrontational. That is unfortunate. Mr O'Sullivan did not contribute to the procedural failings I have set out and although there may have been some difficulties for Mr Hodgetts in Mr O'Sullivan working out his notice I could not be satisfied that it would be unworkable.

[97] Mr O'Sullivan's dismissal was through no fault of his own and I do not reduce the awards indicated above.

### **Orders**

[98] I make the following orders:

- a. I order Southland YMCA Education Limited to pay to Patrick O'Sullivan the sum of \$2304 being four weeks lost wages under s 123 (1) (b) of the Act.
- b. I order Southland YMCA Education Limited to pay to Patrick O'Sullivan the sum of \$7000 without deduction being compensation under s 123 (1) (c) (i) of the Act.

### **Costs**

[99] I reserve the issue of costs. Mr O'Sullivan was not represented but did ask to make a submission if he was successful. If he wants to make a submission then he has until 21 January 2016 to lodge and serve a submission as to costs taking into account the holiday period and Ms Thomas has until 11 February 2016 to lodge and serve a response.

Helen Doyle  
Member of the Employment Relations Authority