IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 99
3020556

	BETWEEN	SONYA SMITH Applicant
	AND	MEARES WILLIAMS Respondent

Member of Authority:	Christine Hickey
Representatives:	Carlyle Gibson, Counsel for the Applicant Tim McGinn, Counsel for the Respondent
Investigation meeting:	27 March and 3 May 2018
Submissions received:	At the investigation meeting
Determination:	10 July 2018

DETERMINATION OF THE AUTHORITY

A. Meares Williams unjustifiably dismissed Sonya Smith.

B. Meares Williams must pay Sonya Smith:

(i) $194.10 in lost wages, and

(ii) $15,000 in compensation for humiliation, loss of dignity and injury to her feelings.

C. I have reserved the issue of costs and set a timetable for submissions on costs if the parties cannot reach agreement.

Employment relationship problem

[1] Mrs Smith claims that she was unjustifiably dismissed from her role of part-time legal personal assistant at Meares Williams (the firm) by way of redundancy. She claims lost wages of $194.10 and compensation of $35,000 for humiliation, loss of dignity and injury to her feelings.

[2] The firm says that it disestablished Mrs Smith's position, after following a fair process and her employment came to an end as the result of a genuine redundancy. She was given notice on 9 June 2017 that her role had been disestablished. Her last day of work was 10 July 2017.

The investigation meeting

[3] I heard affirmed or sworn evidence from Mrs Smith, Des Smith, her husband and Allison Kerr, her mother. For the firm I heard from two partners, Gerard Richardson and Julian Moran, Cushla Joblin, the then general manager of the firm, Anita Molloy-Roberts, a legal executive who had been in Mrs Smith's team and Gillian Kennedy. Ms Kennedy was the other personal assistant in the team Mrs Smith worked in. All of those witnesses had prepared written evidence in advance.

[4] I also heard sworn evidence from Roger Brown, a former partner in the firm, who was summoned by Mrs Smith to give evidence.

[5] All of the witnesses answered questions from me and from counsel.

[6] I have not referred to all the evidence or submissions in this determination although I have considered all the evidence and all the submissions in reaching my conclusions.

Issues

[7] To determine this matter I need to examine the following issues:

(i) Was the firm's decision to disestablish the part-time personal/legal assistant's role filled by Mrs Smith and offer her the new full-time role a decision a fair and reasonable employer could have made in all the circumstances? As part of

that enquiry, I will examine whether there were mixed motives for the restructure of Mrs Smith's role into a full-time one, or whether the need for two full-time personal assistants was the main reason, as the firm contends.

(ii) Did the firm comply with its duty of good faith, particularly its duty under s 4(1A) (c) of the Employment Relations Act 2000 (the Act)?

(iii) If not, what remedies should be awarded to Mrs Smith?

Background facts

[8] Mrs Smith began work at the firm in July 2012 as a part-time legal secretary. She originally worked 25 hours per week. In about February 2014, she changed roles in order to "trial" as a replacement for a senior legal assistant who had retired. The "trial" was never formally assessed as to its success or otherwise. By the time of her dismissal, Mrs Smith worked 31.25 hours a week. She was the only legal/personal assistant who worked part-time.

[9] In July 2013, Cushla Joblin, the general manager of the firm completed a review of support staff. Her view of Mrs Smith, who worked 25 hours per week at that stage, was:

> Sonya is always keen, enthusiastic, even tempered and does extra hours when she can to help out. She is an excellent receptionist and a capable "copy" typist and also handles dictation and simple bills in a satisfactory manner. Her development is limited due to the part-time hours she works and her ability to grasp anything that is a bit out of the ordinary.

[10] Mrs Smith's evidence is that in about October 2013, Ms Joblin told Mrs Smith that if she had been "in charge" when she was employed she would not have got the job with the hours that she worked. Ms Joblin denies that but Mr Smith and Mr Brown remember that Mrs Smith was upset about the comment and reported it to them at the time.

[11] From time to time since mid-2015, Ms Joblin asked Mrs Smith if she would be prepared to extend her hours to work full-time. Mrs Smith repeatedly told her that she did not wish to work full-time, as she wanted to spend time with her children after school on at least some days of the week. However, from time to time Mrs Smith did extend her hours to assist the firm on a short-term basis. Mrs Smith made it clear that she did so for the benefit of the firm, but her preference was not to extend her hours, for most days, until her children were somewhat older. At that point, Mrs Smith worked from 8.45 am to 2.45 pm every day.

[12] As early as May 2015, Mrs Smith had the impression from Ms Joblin that the firm wanted another fulltime secretary upstairs, where she worked. However, she indicated that she was happy with her hours as they were and did not want to work extended hours. She also had the impression that if she did work longer hours there was "a problem about my salary being too high".

[13] On 20 May 2015, Ms Joblin confirmed the firm supported Mrs Smith's preference to work her current hours. She wrote:

> In time, if you wish to increase your hours, we would need to renegotiate your employment agreement.

[14] On 22 May 2015, Ms Joblin recorded that Mrs Smith had agreed to work until 4.30 pm on Thursdays and her hourly rate would remain the same:

> As previously discussed, when you are in a position to take on extra hours or full-time employment, we will sit down and renegotiate your employment agreement to bring remuneration in line with other Legal PA's.

The firm first considers restructuring Mrs Smith's role

[15] On 19 July 2016, Ms Joblin prepared a file note "Sonya Smith – Training, Development and Restructure of Position." She sent the note to Gerard Richardson and Julian Moran, two partners of the firm. At the time, Mrs Smith worked as Mr Richardson's PA/legal assistant and supported other members of the team.

[16] Ms Joblin wrote that in May 2015 she asked Mrs Smith if she could work full-time hours as "the position she held, now required a full-time employee". Mrs Smith did not wish to work full-time, but increased her hours on Tuesdays and Thursdays.

[17] Ms Joblin noted that Mrs Smith was aware that her hourly rate is "paid at a premium and well above standard. However, [Mrs Smith] was not prepared to negotiate her hourly rate or her employment agreement".

[18] Ms Joblin wrote:

> Sonya is always willing to held but the assistance she can provide … is limited by her skill set and hours of work.
> The position which Sonya currently holds has now changed significantly and requires a full-time employee with more highly developed skills.

> …after [Y's] retirement, [X] did the majority of this herself as, other than bills, the work she could confidently delegate to Sonya was limited, due to accuracy and Sonya not taking the time to "listen" to instructions.
> Additional to Gerard's PA arrangements we now have [A] and [B] in Estates and [C], Graduate Solicitor who also require full-time skilled administrative support. We want to encourage these fee earners to delegate all non-chargeable administration work to a PA.
> We also require full-time skilled and competent back-up PA support for Richard Gray, Anita and Gill.
>
> **Summary**
> On Friday 15th July, prior to Sonya going on annual leave, I discussed the changing requirements of her current role and the additional support that would need to be provided to other fee-earners.
> …
>
> **At an Equity Partners meeting on Tuesday 19th July, it was agreed by all that Sonya's position was now requiring a full-time employee. It was agreed that Cushla would speak to Julian as to how we go about this restructure.**
>
> Julian advised the following:
> …
> - The position would have to be discussed and offered to Sonya, prior to any consideration being given to advertising either internally or externally.
> - A consideration with regard to offering the position to Sonya or advertising externally is whether, objectively, the difference between Sonya's current skills and those for the new position differ. Julian's advice is that if we can reasonably expect Sonya to acquire any new skills and she is prepared to attempt this, we would be at risk of a P.G. by advertising externally.
> - If Sonya were to accept the position, her Employment Agreement would be re-negotiated to a full-time salary based on skills and experience rather than an hourly rate premium. This would not necessarily be more than she is receiving at present.

[emphasis added]

[19] Ms Joblin's evidence was that she had asked Mrs Smith to think over the possibility of up-skilling while she was on holiday in July 2016 and talk with her after her holiday. She says the follow-up discussion never occurred because she had the impression Mrs Smith was avoiding the topic.

[20] Mrs Smith says she does not remember being asked to consider up-skilling. Mrs Smith says that she did avoid one-on-one conversations with Ms Joblin because she was "scared of" Ms Joblin.

[21] On 20 July 2016, Ms Joblin emailed Mr Richardson and Mr Moran that she had asked the relevant fee-earners to give her a detailed list of skills and experience:

> … essential to providing the support required in the Estates and Commercial areas. … We need to keep moving on this, as I don't want the Estates team and [W] to get into the habit of doing their own admin work.

[22] On 21 July 2016, Ms Joblin recorded in a file note a discussion she and Mr Richardson had with Ms Molloy-Roberts, who told her:

- It was not helpful if Sonya notified other team members she would be absent from the office to suit her personal circumstances without consulting team members first;
- Sonya struggles with e-dealing and requires training in this area;
- Sonya used some work time for personal matters; and
- The role of PA in the team requires Sonya to upskill so she can assist beyond simple tasks and copy typing.

The second partners' decision to restructure the role

[23] Ms Joblin also wrote that Sonya wanted to keep her hours although Ms Joblin had suggested she did not need to work them as Mr Richardson was on holiday and she was not necessarily required to work.

[24] At the partner's Meeting of 9 August 2016, the agenda included:

> Estates Team and Admin support: Sonya's role needs to be restructured to a full time role to provide adequate [partner] backup.

[25] As I understand it, the partners agreed to proceed with the proposed restructuring.

[26] Also on 9 August, Ms Joblin wrote in a file note that the needs of the firm had changed, necessitating the need for "fulltime admin support highly skilled and/or keen to develop in a number of areas." She also wrote:

> It is proposed to offer this full-time position to Sonya on a salary of $54,000 pa. This salary is offered, based on Sonya's level of experience and expertise and the 2016 ALPMA NZ Salary Survey Report. If Sonya is to accept this full-time role, Meares Williams are fully committed to providing training and development in the areas required to meet the skill level required.

[27] On 10 August 2016, Ms Joblin wrote a further file note recording Ms Molloy-Roberts' frustrations with Mrs Smith's inability to follow clear written instructions:

> [She] believes the time and frustration spent trying to upskill Sonya is a waste of time and effort.
>
> …
>
> NB: I have also experienced the same issue while Gerard was away. I gave Sonya very simple and clear instructions relating to a large project I wanted her to work on. She did not follow the instructions, raced ahead and the work she has done … is a waste of time and will need to be started again.

The draft restructuring letter

[28] Ms Joblin drafted a letter to Mrs Smith outlining the proposed restructure. It is dated 10 August 2016. The letter advised that the new role would require further skills that would suit a legal assistant who had, or was keen to develop, a range of skills. The letter proposed that the new position's salary for full-time work would be less per hour than Mrs Smith was currently earning. That is, a lower salary than Mrs Smith would earn if the firm had simply increased her hours. The letter also outlined that if the proposal for a full-time role proceeded, and she did not wish to accept that role, her role may be declared redundant.

Mr Brown proposes an alternative to restructuring Mrs Smith's role

[29] Either at the end of the day on 9 August, or on 10 August, certainly after the 9 August partners' meeting, Roger Brown, a partner in the firm who Mrs Smith had previously worked for, initiated a discussion with Ms Joblin and Mr Moran. He was concerned that the restructuring proposal would be highly likely to result in Mrs Smith's redundancy. He believed he had an alternative to making Mrs Smith's part-time role redundant. He offered to "swap" secretaries and for Mrs Smith to work for him while remaining on her part-time hours.

[30] Mr Brown says that Ms Joblin did not agree with his proposal and said words to the effect that would only be "kicking the can down the road". Ms Joblin denies using that term. However, I consider documents she prepared after that meeting support the tone of the reaction attributed to her by Mr Brown, if not the exact words.

Ms Joblin's email and Mrs Smith's complaint about Ms Joblin

[31] On 11 August 2016, Mrs Smith emailed her team and Ms Joblin that she would be in at 9 am, instead of her usual start time of 8.45 am as one of her daughters was ill.

[32] Ms Joblin responded to Mrs Smith. She sent a copy of her email response to Mr Richardson, Mr Gray and Ms Molloy-Roberts.

[33] Ms Joblin's email noted that recently, a number of times, Mrs Smith had advised her team of the fact that she was running late because of her children's or personal activities or appointments. Ms Joblin wrote that there were four staff with dependent children in Mrs Smith's team and it would not work if late starts and rearranged hours became normal practice. She also wrote:

> I encourage all staff to leave a bit earlier if they have drop offs/personal tasks etc. to carry out prior to starting work.

[34] Ms Joblin's email upset Mrs Smith. On about 15 August 2016, Mrs Smith made a formal written complaint about Ms Joblin to the firm's managing partner, Richard Gray[1]. She wrote that she suffered constant nit-picking and harassment from Ms Joblin. She said that Ms Joblin had a prejudice against her as a working mother and discriminated against her.

[35] Mrs Smith asked that she not be required to have any further one-on-one meetings with Ms Joblin and instead suggested either Mr Richardson or Mr Gray be present.

[36] She wrote that she felt victimised by Ms Joblin, whose behaviour towards her "is border[ing] on bullying". She also signalled that she wished to remain working at the firm but that she did not think she:

> … should have to suffer this harassment from the office manager in order to carry on working at the firm.

Ms Joblin created further documents to support her view Mrs Smith's role needed to be restructured

[37] On 15 August 2016, Ms Joblin created two documents. I find that both documents were created after Ms Joblin had rejected Mr Brown's suggestion that Mrs Smith be swapped with his current secretary, with a view to bolstering the decision to restructure Mrs Smith's role.

[38] One document was a staffing review, which focussed on Mrs Smith's team and her capability:

> … it has been proved many times in the past that Sonya's part-time hours do not work for Roger. He has also acknowledged on a number of occasions

[1] The complaint is undated. Around 15 August is the best date I could assess using all the surrounding evidence.

> that he does not have confidence in her ability to complete his senior level work.
>
> The reshuffle of Sonya to another position is moving a problem full circle to where it began. It is a patchwork option and will very quickly create another one.
>
> If Sonya's role is to be restructured to a full-time position (recommended), I am advised by Julian we would need to offer her the role. If she was to accept we need to be committed to her training and development ….
>
> Training is a time consuming and non-productive exercise but I consistently encourage staff "no pain, no gain". Feedback I have received suggests a real effort has been made over the past six months to train and upskill Sonya and the result is "lots of pain and no gain"!!!
>
> In fairness to the staff who would be responsible for training Sonya, this feedback must be taken into consideration if she is to be offered a full-time PA role.
>
> The need for a competent full-time Legal PA to meet the requirements of the firm has been compromised for too long in order to be an accommodating employer.
>
> If we are to … provide adequate support for current and future fee-earners the situation must be resolved.
>
> It requires some difficult and awkward business decisions to be made with the best interests of the firm and productivity being paramount.

[39] The second document was a file note addressed to the partners from Ms Joblin headed "Re: Legal PA Position - Sonya":

> I complete this lengthy and comprehensive reporting exercise, as a standard procedure to reassure myself and the partners that no employee is being singled out or picked on. The exercise is valuable and worthwhile.
>
> In my view, MW has worked very hard and gone out of our way to reshuffle positions in an effort to find a position to keep Sonya employed despite being well aware of the limitations. Over time it has become a "hospital" pass situation.
>
> The reality is her part-time hours, coupled with her ability and working/learning style have not suited the firm since early 2014.
>
> With the exception of Simon, every partner, most fee-earners and a number of support staff are well aware of her skill set and the frustrations associated with trying to train and develop her into a modern Legal Office PA. In most instances authors just stopped giving her work.
>
> The reluctance of MW to address these performance issues is a typical example of our tendency to be "people pleasers" rather than making unpleasantly tough but fair business decisions in the best interest and needs

> of the firm. This situation is not isolated and it is becoming increasingly frustrating to manage.
>
> We transfer the problems which limits performances and productivity and leaves us/me open to perceptions of favoritism and making exceptions. Confronting the issues results in incorrect personal accusations of being bullied and picked on and we back down.
> …
> I have been advised by [Mr Gray] and [Mr Richardson] that Sonya's position needs to be reviewed. I have provided my view on the needs of the firm, but this may not be the view of the Partners.

The firm's response to Mrs Smith's complaint

[40] On 29 August 2016, Mr Richardson wrote a response to Mrs Smith's complaint. He recorded that the firm agreed that Ms Joblin probably should not have sent the reply email the way she did and that "with the benefit of hindsight" Ms Joblin also recognised that.

[41] However, Ms Joblin denied that she discriminated against Mrs Smith because she was a working mother. The firm did not agree Ms Joblin discriminated against her for that reason because there were other mothers working in the firm.

[42] Mr Richardson wrote that the preferred process in relation to lateness was to telephone Ms Joblin rather than sending an email.

[43] The firm agreed if there were to be any other conversations with Mrs Smith about performance issues that either Mr Richardson or Mr Gray would be present with Ms Joblin.

First decision to delay restructuring Mrs Smith's position

[44] Mr Richardson, Mr Moran and Ms Joblin's evidence is that because of Mrs Smith's complaint against Ms Joblin the firm decided to delay putting its proposal to her to change her role to a full-time one requiring more advanced skills. The reason was to avoid any suspicion that the firm, particularly Ms Joblin, was trying to get rid of Mrs Smith.

Mr Brown's resignation – second decision to delay restructuring Mrs Smith's position

[45] Before it came time for the firm to again consider putting the restructuring proposal to Mrs Smith, Mr Brown resigned from the firm on 15 September 2016.

[46] The evidence for the firm is that Mr Brown's resignation meant that the urgency to restructure Mrs Smith's position abated as without Mr Brown's work there was more capacity amongst the support staff, including his former PA.

First notification of Mrs Smith's breast cancer

[47] Less than two weeks later, on 27 September 2016, Mrs Smith sent Ms Joblin an email letting her know that she had to have time off for a breast scan because she had found a lump in her breast and had been referred for scanning by her doctor. She offered to stay on longer to make up her hours. She let Ms Joblin know she was able to work longer because it was school holidays.

Ms Molloy-Roberts' assessment of Mrs Smith's work

[48] On 15 November 2016, Ms Joblin asked Ms Molloy-Roberts to give her a list of work she gave Mrs Smith regularly and an estimate of how much time Mrs Smith spent on that work. Ms Molloy-Roberts replied that she gave Mrs Smith all the secretarial work she had on Mr Richardson's files. She wrote that Mrs Smith turns work around quickly, except for e-dealing, because Mrs Smith was not busy. She said that the busier she was the more work she gave Mrs Smith and Ms Kennedy. She said she did not give Ms Kennedy any harder tasks but that for Ms Kennedy the explanations tended to be shorter and tasks came back exactly as she asked. She also wrote "It would be interesting to see how many hours of actual work Sonya does."

Further information about Ms Smith's breast cancer

[49] On 24 January 2017, Mrs Smith let Ms Joblin know that she had a consultation with a surgeon for a "minor" breast operation that she needed. In fact, she had a cancerous lump removed.

Performance reviews

[50] In February and March 2017, Ms Joblin and Mr Richardson conducted annual performance reviews for four of the staff in Mr Richardson and Mr Gray's team. However, no performance review was conducted with Mrs Smith.

[51] On 15 March 2017, after conducting the reviews, Ms Joblin prepared a file note. Her conclusion was that there was a definite and increasing need for two full-time PAs,

particularly since a new graduate solicitor was to start in June 2017. It was her view that the ideal support staff to full-time fee earner ratio was 1:3. At that stage they had a ratio of 1.8 to 6 fee earners and when the new graduate started they would have a ratio of 1.8 PAs to 7 fee earners:

> … which is not acceptable if we are encouraging fee-earners to delegate admin work and expect them to meet budgets.

[52] On 22 March 2017, Ms Joblin redrafted the letter to Mrs Smith advising her of a proposed re-structure of her part-time PA/Legal Assistant role. She wrote that the partners' view was that a legal assistant with full-time hours was now required with the position to "also take on some additional aspects of support work". She attached a job description for the proposed new position.

[53] The letter advised Mrs Smith that if she wished to accept the new position she would need to extend her hours to full-time and:

> [become] familiar with the management of estate files, the preparation of related documents, e-dealing transactions etc. We would provide you with training and support with regard to these additional areas.
>
> As this would be a new position, it is proposed that the salary would be set at a level that reflects the skills required, but which is also consistent with salaries paid in comparable positions to Christchurch and within the firm.

[54] The salary proposed was $55,000, inclusive of Kiwisaver, as opposed to the $63,082.50 it would have been if Mrs Smith's current role and hourly rate were retained but the hours extended to full-time. Mrs Smith earned $52,568.75 per annum in her 31.25 hours per week role.

[55] Mrs Smith was advised that if she did not accept the proposed new role her current position may be declared redundant.

[56] She was asked to give feedback on the proposal by Wednesday, 5 April 2017.

Mrs Smith gives an update on her breast cancer

[57] However, Mrs Joblin did not give the letter to Mrs Smith on 22 March because Mrs Smith advised the firm that she had to have further investigations due to cancer in her right breast.

[58] On 24 March 2017, Mrs Smith advised Mr Richardson and Ms Joblin she had an appointment on 27 March to get the results of an MRI she had undergone that day.

[59] On 28 March 2017, Mrs Smith emailed Mr Richardson and Ms Joblin advising that she would have surgery to take out lymph nodes to be sure no cancer was in them, although the MRI had not shown any. She also advised she would have a mastectomy and reconstruction of her right breast. She indicated that the lymph node removal would likely to be day surgery followed by the more extensive mastectomy and reconstruction surgery.

The restructuring proposal is put to Mrs Smith

[60] On 31 March 2017, apparently understanding that Mrs Smith's email meant that her mastectomy was "elective and intended to eliminate the risk of the cancer returning", Ms Joblin and Mr Richardson met with Mrs Smith and gave her the proposal letter. It remained dated 22 March 2017 and the same date for feedback was retained; being 5 April 2017.

[61] Ms Joblin's evidence was that she and the partners did not see the proposed restructure as "involving a very significant change." Mr Richardson's evidence was that he thought Mrs Smith may come back to them with "a variation on the hours to consider and the level of remuneration offered for the role."

[62] However, Mrs Smith became very upset at the news her role may be restructured and that if she did not accept the full-time role she may be made redundant.

Mrs Smith and the firm's communication post-proposal

[63] On 3 April 2017, Mrs Smith informed Ms Joblin and Mr Richardson that she had a date for her surgery. On 4 April 2017, the firm extended the date for Mrs Smith to give feedback to 1 May 2017.

[64] Mrs Smith went off work for her surgery.

[65] During her post-surgical period, the firm's staff, including Ms Joblin, and partners provided support for Mrs Smith by way of food and moral support and good wishes generally. Mrs Smith expressed gratitude for that support.

[66] On 30 April 2016, Mrs Smith emailed Ms Joblin asking for a later date to give her feedback on the proposal. She said that since her surgery she had had considerable stress and angst about the proposal, which meant she had not been able to properly adjust to the emotional and physical consequences of her cancer and surgery. She asked for additional information to help her consider the proposal, being her employment file and all information the firm held in relation the proposed restructure of the role and why her role was identified.

[67] On 1 May 2017, Ms Joblin responded that she was welcome to have a copy of her file:

> at any time, but we are not sure why you might need this. The partners have been concerned for some time that the upstairs teams need more PA support and we are about to have another lawyer join the firm, so the situation won't improve. Therefore, changing your position to a full time role was seen as the obvious solution. This also answers your query about selection – yours is the only part time PA position in the firm and is in the area that needs more support.
> We appreciate that becoming full time may raise issues with regard to after school care of the girls. However, the proposed restructure is "up" not "down", so we would like to think that you can work around any practical issues for you and accept the offer.

[68] On 3 May 2017, Ms Joblin replied enclosing Mrs Smith's employment file and some information related to the proposed restructure, including her 9 August 2016 file note. She also wrote:

> … the issue has been the subject of consideration from time to time since mid-2015. Otherwise, there is no information, as such. The position is simply that the partners consider that a second full time legal assistant is required to adequately support the upstairs teams and with that person to also undertake aspects of work in addition to what you are doing at present.

[69] Ms Joblin asked Mrs Smith to respond to the proposal letter by 8 May, either in writing or by arranging a meeting.

Mrs Smith returns to work after her mastectomy

[70] Once Mrs Smith came back to work, on 3 May 2017, she asked if Ms Joblin could divert the phones over the lunch hour as she had some work to do that she could not complete at reception. Ms Joblin said that for security reasons the firm needed someone at reception.

[71] Later, Mrs Smith asked for cover for reception the following day because she felt with covering reception for one hour and then having an hour's lunch break she did not think it was fair as it meant she was unable to do a lot of her own work for two hours.

[72] On 4 May 2017, Mrs Smith emailed to ask if Ms Joblin could arrange a roster to share the reception work.

[73] Mr Richardson asked Mrs Smith if she would discuss her request about reception cover with him and Ms Joblin. Mrs Smith said she would not, and asked the firm to reply in writing.

[74] Ms Joblin responded by email that the arrangement would not "be varied at short notice simply because you ask." She asked Mrs Smith to email her reasons so the partners could consider it when they met the following week.

[75] Mrs Smith continued to be unhappy about having to cover reception. However, she did not put her reasons into writing for the partners to consider.

Ms Gibson's initial contact with the firm

[76] On 8 May 2017, Ms Gibson wrote that Mrs Smith had instructed her in relation to the "employment dispute" with the firm. She asked for a further extension of time to respond as she was unable to do so that day. She offered to provide a response within 14 days.

[77] Mr Moran responded on 8 May 2017 and asked for a response within seven days instead. He also wrote that the firm had not been aware it had an employment "dispute" with Mrs Smith.

Mrs Smith's response to the proposal

[78] On 16 May 2017, Ms Gibson responded to the proposal on Mrs Smith's behalf. She wrote that Mrs Smith had always stated she wished to remain as a part-time employee and that prior to the proposal there had been no approach to Mrs Smith asking her to increase her hours. Mrs Smith did not agree to increase her hours from 31.5[2] to 37.5 hours of work. Mrs Smith's current hours allow her to "be available to her children before and after school"

[2] Actually 31.25 per week.

and that if she accepted the increase in hours she would have to fund child care. In addition, because of her recent health she would prefer to work part-time to allow her to focus on her recovery.

[79] Ms Gibson wrote that Mrs Smith did not believe the restructure proposal was the best option available to the firm because an extra six hours of support would not be sufficient for the firm's stated position given that Ms Molloy-Roberts and Kate now required full-time assistance and that the firm was to hire at least one, possibly two, further solicitors.

[80] Instead, Mrs Smith suggested that she continue on her current part-time hours and the firm hire another part-time or full-time legal assistant. Ms Gibson made it clear Mrs Smith wished to remain in her current part-time role.

The process after Mrs Smith's feedback

[81] Mr Moran replied on the same day informing Ms Gibson the partners would meet the following day. He wrote that he:

> … did not know what the outcome will be, but that the suggestion that we take on the cost [of] an additional PA's salary is likely to be of concern. Does Sonya appreciate that there is a possibility that the decision will be to declare her part time role redundant?

[82] Ms Gibson responded by thanking him for the information that the decision would be made the following day. She also forwarded him Ms Joblin's email of 1 May 2017, in case he had not seen that.

Attempts to meet with Mrs Smith about the proposal

[83] On 17 May, Mr Moran emailed Ms Gibson, after trying to get hold of her by phone, to ask for a meeting with her and Mrs Smith on 19 May at 4 pm.

[84] On 18 May, Mr Moran and Mr Richardson had a meeting with Mrs Smith related to a further email from her to Ms Joblin asking Ms Joblin to make another reception cover change. Mr Moran had responded to that by instructing Ms Joblin to ask Mrs Smith to stop making reception change requests.

[85] At the meeting, Mr Moran said that if it turned out to be the case that her role was better suited to a full-time, rather than a part time role and Mrs Smith accepted the position that the lunchtime reception role would be shared by all the PAs.

[86] Ms Gibson was busy and not able to attend the proposed meeting on 19 May 2017. On 24 May, Mr Moran emailed her and asked whether she could confirm a meeting at noon for Friday, 26 May.

[87] On 25 May 2017, Ms Gibson replied that if the purpose of the meeting was:

> related to the matters contained within your letter dated 22 March 2017 then frankly we do not see the point in attending the same. You requested an urgent reply to your letter dated 22 March 2017 and we have provided you with our client's response in our letter dated 16 May 2017.
> We are currently awaiting to hear back from you in this regard and a meeting is not required.

[88] Mr Moran replied in a letter dated 8 May 2017, although at the investigation meeting he said he actually wrote it on 25 May 2017 after he had received Ms Gibson's email. Mr Moran says the reason it is dated 8 May is that he overwrote his earlier letter dated 8 May as for privacy reasons he did not want another PA typing the letter. He responded that the partners were satisfied they needed a full-time personal assistant in the place of Mrs Smith's current position, for the reasons already given.

[89] He advised that their decision was supported by Mrs Smith's recent requests not to cover reception at lunchtime due to workload pressures.

[90] He wrote that the partners did not consider it "realistic" to retain Mrs Smith's position in conjunction with a part-time personal assistant.

[91] In addition, it was "not commercially realistic" to incur the costs of a full-time personal assistant in light of the relatively minor adjustment in Mrs Smith's working hours the firm proposed.

[92] At the investigation meeting Mr Moran said that there would not have been enough work for a further full-time assistant and that the firm considered it would have been difficult to get a suitably qualified and experienced PA for the few and specific hours the firm needed one.

[93] His letter to Ms Gibson asked that Mrs Smith respond by 2 June 2017 as to whether she wished to accept the new position:

> We hope that this will be the case. However, if she does not, we will give notice terminating her position on the basis of redundancy.

[94] Also on 25 May 2017, Mrs Smith emailed Ms Joblin asking to have leave for Christmas approved because of a family holiday. Ms Joblin responded that before she discussed Mrs Smith's request with the partners Mrs Smith should contact Ms Gibson, because Mrs Smith's "position in response" to Mr Moran's latest letter would have a bearing on the leave request.

Meeting with Mrs Smith without Ms Gibson about the restructuring proposal

[95] On 6 June 2017, the Tuesday after Queen's Birthday weekend, Mr Moran and Mr Richardson were concerned they not had a response from Ms Gibson by 2 June as requested. They tried to telephone Ms Gibson from Mr Richardson's office. Her receptionist told them Ms Gibson was unavailable and could not say when she would become available.

[96] Mr Moran and Mr Richardson decided to call Mrs Smith into the office. They showed her Mr Moran's last letter and stated they were concerned not to have had a response by the previous Friday. They asked Mrs Smith to ensure Ms Gibson got back to them urgently with her response.

[97] I accept Mrs Smith's evidence that Mr Moran told her that because she was struggling to do reception cover as well as her own work she needed to work longer hours.

[98] Mrs Smith's evidence is that Mr Moran told her that the firm was entitled to change her role to fulltime if they wanted and that a new solicitor was starting that day. Mr Moran denies that he would have said that the firm was entitled to change her role to full-time if it wanted but concedes he may have told her there was some urgency because the new solicitor began that day.

[99] Ultimately, because Mrs Smith did not accept the restructured role she was made redundant. She was given a month's notice and during that time found another role. She was only out of work for one working day.

Law on redundancy

[100] A redundancy is a "no fault" dismissal; that is, an employee loses their job usually through no fault of their own when they are made redundant. However, an employee whose role is made redundant may still suffer the same disadvantageous consequences from the dismissal, as if she had been in some serious breach of her employment agreement.[3]

[101] Because a redundancy is a dismissal, an employer needs to comply with the tests set out in s 103 and 103A(3) of the Act, insofar as the procedural tests can be applied to a redundancy process.

[102] Essentially, the employer must prove that the dismissal by way of redundancy was a decision a fair and reasonable employer could have made in all the circumstances at the time after a process that a fair and reasonable employer could have used.

[103] An employer is entitled to have a working plan in mind for its business when it puts a proposal to the employee for consultation. However, such a plan must be based on more than a "gut feeling" that a role needs to be disestablished. For example, if an employer decides to propose that a role is to be disestablished because it needs to save money it must have accurately assessed how much it needs to save and be satisfied, by evidence, that disestablishing the position will actually save that amount of money.

[104] In the Court of Appeal decision in *Grace Team Accounting Limited v Brake*[4] the Court decided:

> 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 … could do. … In the end the focus of the Employment Court has to be on the objective standard of 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 [could] have done in the circumstances.[5]

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[3] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825, at [37]-[38]
[4] [2014] ERNZ 129, Court of Appeal.
[5] At [85].

[105] So, the disestablishment of the role must not be carried out for another hidden purpose, such as getting rid of an underperforming employee. That is, a genuine reason for restructuring leading to the redundancy must have been the predominant motive. The Court and the Authority are entitled to look into the merits of an employer's decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.

[106] An employer must carry out consultation with an affected employee about the proposal with an open mind. It must be true consultation where the employer listens to the employee's feedback, considers it fairly and is open to changing its view on the proposal.

[107] A fair and reasonable employer will act in good faith. There are specific additional duties of good faith for an employer who proposes to disestablish a position by way of redundancy. Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide:

- the affected employee with access to information relating to the continuation of the employee's employment, and
- an opportunity to comment on that information before the employer makes its decision.

Discussion

Did the firm act as a fair and reasonable employer could have acted in all the circumstances at the time?

[108] Ms Gibson submitted that the firm's decision had been pre-determined prior to the consultation process being completed, and that the need for two personal assistants to work upstairs until 5 pm was not the predominant purpose of the redundancy. Instead, the firm was dissatisfied with Mrs Smith's ability and the level of pay.

[109] As far back as 2013, Ms Joblin's view of Mrs Smith's ability to deal with complex work and her part-time hours was an unfavourable one. From time to time, after forming that opinion, Ms Joblin asked Mrs Smith to extend her hours. Mrs Smith had always been willing to do so, so long as it did not affect the time she prioritised with her children or negatively

affect her income. For example, she worked longer hours in school holidays when the children were already in alternate care, when they were away overseas with their father and for a period when the firm was willing to pay her child-care expenses.

[110] Ms Joblin was clear that Mr Brown's solution, which would not result in Mrs Smith's redundancy, would not work and was a "hospital pass" because she, and some other members of Mrs Smith's team, considered Mrs Smith was not performing adequately and was unable to be adequately trained. If the primary purpose, or even the predominant purpose, of the restructuring of Mrs Smith's position was merely to meet the need for two full-time personal assistants upstairs then Mr Brown's solution proffered on about 9 August 2016 is likely to have been accepted, even if just as a trial. I acknowledge that his resignation may have led to other issues about support staff, but the stated problem for the upstairs team could have been solved before he resigned.

[111] The partners and Ms Joblin knew that if the firm made Mrs Smith's role a full-time one it was highly likely that she would not accept that role. Despite telling Mrs Smith that they hoped she would accept the role, I consider it more likely than not that the prevailing hope was that the hours would not suit Mrs Smith and that she would not accept it. That would allow the firm, guided by Ms Joblin, to hire an employee she considered more capable than Mrs Smith for more hours and for little extra expense.

Timing of initial decision to restructure Mrs Smith's role and evidence supporting the decision

[112] Ms Joblin set out to create supporting documentation of the kind I would have expected her to have put before the partners to inform their decision only on the same days or shortly after two decisions to restructure Mrs Smith's role had been made at partners' meetings in July and August 2016.

[113] I find that the documents created after the partners' decision on 9 August were created to bolster that decision and as a justification for not trialling Mr Brown's suggestion that he take on Mrs Smith as his PA.

[114] I consider that the "Re: Legal PA position – Sonya" document dated 15 August 2016 was created by Ms Joblin once she knew that Mrs Smith had complained of being picked on

or bullied. That document clearly states that the part-time hours are not the whole picture but that Mrs Smith's "performance issues" have been known about since 2014 and "in most instances authors just stopped giving her work." However, there was no specific evidence before me that the authors Mrs Smith worked for at the relevant time had stopped giving her work, certainly Mr Richardson and Ms Molloy-Roberts gave her work.

[115] In November 2016, Ms Joblin asked Ms Molloy-Roberts to assess Mrs Smith's workload from work she gave Mrs Smith. Ms Molloy-Roberts also gave feedback on the quality of Mrs Smith's work. Why was that assessment not carried out before the partners were asked to decide whether to restructure Mrs Smith's role?

Significance of the 2017 performance reviews

[116] I consider that the firm deliberately decided not to carry out a performance review with Mrs Smith in February and March 2017 when it reviewed other staff Mrs Smith worked with. Mr Moran's evidence in that investigation meeting was that usually Mrs Smith should have had an annual review:

> but [in 2017] it would have been almost duplicitous in the circumstances when considering a revision of her role.

[117] Given that the status of the proposal to review the structure of Mrs Smith's role was in abeyance, I consider it would have been a fair and reasonable decision to hold a performance review with Mrs Smith, especially when there were performance concerns about her.

[118] As part of their own reviews, other staff were asked to give their views on Mrs Smith's work and ability. However, she was not given the opportunity to receive feedback or give her views about that.

[119] That may also have been an opportune time to set out for Mrs Smith the expectations of further development in e-dealing and estates work that the firm desired and to discuss a potential extension of hours.

[120] I have assessed the resources available to Meares Williams in its consideration of concerns it had about Mrs Smith's suitability for her role. I consider that it was suitably resourced to raise those issues with Mrs Smith and to work through a performance management process with her. However, it elected not to do that.

[121] I consider a significant issue motivating the decision to disestablish Mrs Smith's role was that her performance was a problem for the firm, at least as much as her part-time hours were. However, the firm did not consider implementing any performance improvement process. It also appears that Mrs Smith was unaware of the significant concerns the firm, and members of her team, held about her performance and her ability to learn new skills.

[122] The firm's evidence during the investigation was that its only motivation was to have two legal assistants present until 5 pm each day, and did not arise principally from a wish to save money. I accept that money was not the principal motivator, but it was part of the motivation.

[123] Mr Brown said that he recalled the fact that Mrs Smith's pay was above market rates had been discussed at more than one partners' meeting. Mr Richardson said he always had an interest as a partner in keeping an eye on costs. He said he was aware that Mrs Smith was paid at a premium compared to other legal assistants, although he relied on Ms Joblin to suggest the level of salary for the new role. I find that another ongoing concern for the firm was its view Mrs Smith was paid at a premium and above standard for her kind of role. That was clear from communications between Ms Joblin and Mrs Smith dating back to May 2015. Therefore, the new role was proposed to be paid at a lower rate.

[124] It was clear to the firm that, if Mrs Smith accepted the new proposed role, she was effectively going to be financially disadvantaged by having to work longer hours necessitating childcare costs, yet the amount of pay left, once she paid those costs, would have been reduced when compared to her part-time annual income.

What kind of consideration did the firm give to other alternatives to making the role full-time and then Mrs Smith redundant?

[125] According to Ms Kennedy's evidence for the investigation meeting, Ms Molloy-Roberts finished work early on Tuesdays and Thursdays and Ms Kennedy was therefore left with settlements to complete and client queries on those days, which added to work pressure on her.

[126] Ms Molloy-Roberts had told Ms Joblin that it would be helpful to have another legal assistant on Friday until the end of the working day, as it was usually a busy day for conveyancing settlements. It is unclear how those factors were taken into account in deciding that Mrs Smith's role was the one that needed to be working until 5 pm on every day, rather than just on Tuesdays, Thursdays and Fridays, for example.

[127] The initial proposal that in order to meet the team demand for legal assistance until the end of the working day that Mrs Smith's role was the one that needed to be restructured was raised in July 2016. At that stage, it seemed to have been based on a "gut feeling", exemplified by Ms Joblin's response that since Mrs Smith's role was the only part-time legal assistant's role it was "the obvious solution". The documentation supporting the proposal is dated from 19 July 2016; the same day as the first partners' decision that Mrs Smith's position now required a full-time employee.

[128] There seems to have been no consideration given to asking Mrs Smith for longer hours on other days than Thursdays, but perhaps not every day.

[129] Prior to Mrs Smith suggesting it, no consideration, seems to have been given to engaging a new part-time legal assistant, for example, for afternoons only before the decision was made that her role needed to be full-time.

[130] Even after Mrs Smith made her suggestion of a further part-time assistant the firm's only response was that her suggestion was not realistic. There was no evidence given of why the firm considered it was not realistic. However, it appears, from oral evidence given at the investigation meeting, that the firm considered that it would not be possible to find a suitably experienced personal assistant to work for only the (further) few hours it wanted Mrs Smith to work.

[131] That reasoning was not fed back to Mrs Smith during the consultation process to allow her to give feedback to the partners.

[132] Her suggestion of another full-time assistant was not "commercially realistic", which presumably meant that it would cost too much, for a full-time assistant in addition to Mrs Smith. In addition, at the investigation meeting it became clear the firm considered there would not be enough work for Mrs Smith and another full-time personal assistant.

The firm's criticisms of Mrs Smith's post-proposal behaviour

[133] There was a suggestion that Mrs Smith did not give feedback on the proposal. However, she specifically suggested, via Ms Gibson's letter, that in her view the firm should hire another part-time PA and retain her role, or retain her role and hire another full-time PA. Although Mrs Smith's feedback had not yet gone to the partners' meeting Mr Moran signalled immediately that the idea of a further full-time PA's position was not likely to win favour.

[134] In the way the firm ran its case in the Authority, there was evidence that Mr Moran and Mr Richardson expected Mrs Smith's feedback to its proposal to include negotiation about increasing the pay offered and/or about her agreeing to work longer on some days, but perhaps not all days. Some of that came out in cross-examination when Mr McGinn suggested that because in her new role Mrs Smith worked longer hours she was clearly willing to do so and so should have offered to do that at Meares Williams.

[135] However, that criticism overlooks two important factors. First, the firm itself did not indicate that it was open to less than a full-time role for Mrs Smith's position and that the salary was negotiable. That contrasted with what had happened prior the proposal when on a number of occasions the firm asked Mrs Smith if she was willing to increase her hours.

[136] In addition, previously Ms Joblin had indicated to Mrs Smith that if they agreed to extend her hours in the future the firm would seek to renegotiate Mrs Smith's employment agreement in relation to the pay for the extended hours role. Yet, that was not the route the firm decided to take in 2017. Mrs Smith cannot be criticised for not entering into negotiation about hours and pay when the firm did not make it clear it was open to such discussions, but instead proposed her role became a full-time one.

[137] Secondly, when Mrs Smith obtained her current role she had already been made redundant from a role in which the hours suited her and her family commitments. She accepted the new role with some longer hours and higher pay per hour than she would have received if she had accepted the firm's restructured position. She would not have needed to move to another role and take on some further hours had she not been made redundant.

Issues of good faith

[138] Mr McGinn submitted that Mrs Smith breached her duty of good faith under s 4 of the Act by not participating in constructive communication over the proposal. I do not accept that. Mrs Smith conveyed her upset about the proposal and gave written feedback suggesting two options to making her role full-time resulting in her redundancy. She had very little information from the firm about why it chose that proposal as a way of obtaining late afternoon PA cover, apart from Ms Joblin's assertion that extending her hours as she was the only part-time PA was the "obvious solution", that would allow her to comment on its reasoning[6].

[139] I accept that communication between the firm and Mrs Smith and her lawyer became strained when the firm sought face-to-face meetings. However, it is not clear that the firm's reasons for the meeting/s would have necessarily resulted in an amended proposal allowing Mrs Smith to retain her job and meet her wish to spend what she considered an optimum amount of time with her children, concentrate on her recovery and to continue to earn what she was earning per hour.

[140] Mrs Smith's view was that the firm had pre-determined what the outcome would be. I do not consider her failure to tell the firm that at the time amounted to a breach of her duty of good faith. Although not always justified, the feeling that the employer "has decided to get rid of me" and that they have been personally targeted is a feeling common to a number of employees facing redundancy. In addition, I do not consider Mrs Smith's refusals to meet to discuss the proposal after 31 March 2017 amounted to a breach of her duty of good faith given that she had given written feedback via Ms Gibson's letter/s.

[141] I turn now to examine the firm's compliance with its duty of good faith. Section 4(1A)(c) of the Act provides that an employee is entitled to access to information the employer has that is relevant to the continuation of her employment, and have an opportunity to comment on it before the employer makes its decision. The reasons for that are:

> When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key

[6] I acknowledge Ms Joblin sent her file note of 9 August 2016 on 3 May 2017.

> to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.
>
> … The obligations imposed by s 4(1A)(c) amplify that general requirement in the specific circumstance in which it applies. It follows that the obligation to provide access to "information, relevant to the continuation of the employees' employment" must be discharged in a manner which is active, constructive, responsive and communicative.[7]

[142] Not all of the documents, created by Ms Joblin to support her argument for the proposal and potential redundancy, were provided to Mrs Smith or Ms Gibson before the decision to proceed with the proposal was made. Those documents were clearly information relevant to the continuation of Mrs Smith's employment. None of that information appears to fall into any of the three categories of exception under s 4(1B) of the Act. The documents more clearly explain why Mrs Smith's role was the one proposed for redundancy, and contain reasons other than that hers was the only part-time PA role. Mrs Smith had no opportunity to comment on the views set out in those documents before the firm reached a final decision.

[143] In withholding from Mrs Smith a number of the documents created by Ms Joblin that sought to justify the proposal until these proceedings were underway, the firm breached its specific duty of good faith under s 4(1A)(c) of the Act

[144] A fair and reasonable employer would not breach its duty of good faith in the way the firm did.

Conclusion on dismissal

[145] I have no doubt that having two personal assistants present upstairs until 5 pm Monday to Friday, particularly on Fridays the traditionally busy conveyancing day, was desirable for the firm. However, I consider the firm's decision about Mrs Smith's role was not predominantly because of that requirement.

[146] Meares Williams' decision to make Mrs Smith redundant, and the way it reached that decision, was not a decision a fair and reasonable employer could have made in all the circumstances at the time. Mrs Smith was unjustifiably dismissed.

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

Remedies

Lost wages

[147] Mrs Smith was out of work for one day after her notice expired. She seeks one day's wages of $194.10, which appears to be her hourly rate of $32.35 x 6 hours gross. Meares Williams must pay Mrs Smith the amount of her gross wages for that day.

Compensation

[148] Mrs Smith claims $35,000 in compensation for humiliation, loss of dignity and injury to her feelings. Mrs Smith's evidence is that getting the redundancy proposal presented to her within days after she found out the lump in her breast had been malignant and that she needed lymph nodes removed and a mastectomy and breast reconstruction left her "dumbstruck and completely numb". She said she immediately started to cry and asked to be excused from the meeting. She says she was in complete shock when she got home.

[149] She asked for and was granted an extension until after her operation and recovery period at home to give the proposal consideration.

[150] Mrs Smith says that the whole time she was in hospital and recuperating at home she felt very stressed about the proposal and about being expected to make a decision while she was so unwell and recovering from major surgery.

[151] Mrs Smith says that she became very tearful and depressed immediately after the operation date and puts a large amount of the blame for that on what was happening at work for her.

[152] She says when she got back to work after her time off for surgery she felt "sick in the stomach".

[153] Mrs Smith says that it was a very hard time to start a new job, especially while she was still dealing with recovery from her cancer.

[154] Mr Smith described the impact on Mrs Smith of the proposal, particularly given the timing, as her being in shock and:

> at her time of need, the rug had well and truly pulled been out from underneath her. The timing was … at best completely incompetent.

[155] Mr Smith's evidence was that the impact on Mrs Smith of the proposal letter was greater because it was signed by Ms Joblin, who Mrs Smith had laid a bullying complaint against. Mrs Smith felt as if the proposal was "brutal retaliation" by Ms Joblin and caused Mrs Smith to have an "overwhelming feelings of hopelessness."

[156] Mr Smith's evidence was that the redundancy also negatively affected Mrs Smith's previously high level of confidence and self-esteem to the extent that she would not even ask her new employer for an afternoon off to go to her step-sister's wedding.

[157] Mrs Smith's oral evidence was that she sought medical help from her GP partly because of her ongoing tearfulness but also because she felt anger towards the firm.

[158] Mrs Smith sought her GP's assistance in September 2017. The notes record the two reasons Mrs Smith gave her doctor for her low mood, anxiety and trouble coping as recent breast cancer and losing her job around the time of the cancer diagnosis. The doctor notes that Mrs Smith "worries a lot about the cancer".

[159] Ms Gibson's submissions are that the firm had to take Mrs Smith as it found her. In other words, the personality of the employee is relevant to how they are affected in terms of compensation, but the most important factor is how the employer treated the employee leading up to the dismissal.

[160] Ms Gibson submits that, apart from the lack of substantive justification for the proposal, the firm treated Mrs Smith poorly in terms of the timing of the proposal, which showed a lack of compassion. She submits that if the situation was handled with more compassion and sensitivity the consequences on Mrs Smith may have been less. I agree that the timing of the proposal amplified the negative effects on Mrs Smith.

[161] Ms Gibson submitted that the cases of *Grace Team Accounting Ltd v Brake*[8] and *Stormont v Peddle Thorp Aitken Ltd*[9] were relevant cases for me to consider in deciding on the level of compensation that should be paid to Mrs Smith.

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[8] [2014] NZERA 129, [2014] NZCA 541

[162] In the *Brake* case, Ms Brake had recently disclosed her leukaemia to her employer when the redundancy proposal was put to her. The Court of Appeal found that in setting the level of compensation for the unjustified dismissal the Employment Court was able to take into account Ms Brake's reasonable belief that her health had influenced her employer to decide to make her redundant.

[163] I do not consider the *Grace Team Accounting* case to be on all fours factually with Mrs Smith's case. However, I do consider it relevant in setting the level of compensation to take into account the timing of the redundancy proposal relative to Mrs Smith's breast cancer diagnosis.

[164] In the *Stormont* case, in referring to levels of compensation Chief Judge Inglis took into account that recent cases had reflected a rise in the quantum of awards of compensation. Ms Stormont sought $40,000 by way of compensation and was awarded $25,000.

[165] Mrs Smith acknowledged that some of her emotional distress at the time of the proposal and redundancy was related to her cancer, but said it was also from the timing of the proposal in relation to her cancer diagnosis. She also acknowledged that some of her later diagnosed depression was due to the fact she had been diagnosed with cancer.

[166] I am satisfied that Mrs Smith suffered some emotional and personal harm associated with the redundancy. However, I need to assess how much of that damage was from the redundancy and how much was from her cancer diagnosis and treatment. I need to be satisfied that I am awarding compensation for damage caused by the unjustified dismissal, taking into account the timing of the redundancy proposal and process so closely linked to Mrs Smith's diagnosis and treatment. On the other hand, Meares Williams bears no responsibility for any emotional harm directly caused by the diagnosis and treatment. I need to separate out as far as I can the harm that anyone would suffer with such a diagnosis from the harm related to the dismissal.

[167] In Mrs Smith's case, I consider the personal and emotional harm she suffered from the unjustified dismissal was exacerbated by the timing of the proposal. It is not clear why the firm decided that it was a good time to make the proposal before Mrs Smith's surgeries.

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[9] [2017] NZEmpC 71

Facing uncertainty over her job at such a time was part of the emotional harm she suffered related to the redundancy. However, the ongoing worries she had about cancer some months after she had started her new job are not attributable to Meares Williams.

[168] I consider that Mrs Smith suffered moderate harm from the unjustified dismissal. I assess the compensation that Meares Williams must pay to compensate for that to be $15,000.

Contribution

[169] Section 128 of the Act requires me to consider whether Mrs Smith contributed to the situation leading to her redundancy, and if she did so in a blameworthy enough way, I need to consider whether to reduce her remedies accordingly.

[170] Mr McGinn conceded that in redundancy cases there are not normally issues of contribution. In this case, he submitted that perhaps Mrs Smith's "shutting down the consultation" in relation to the proposal may have been a factor contributing to her dismissal by way of redundancy. However, I do not agree. I do not consider that Mrs Smith contributed to her dismissal in any way that can be considered blameworthy.

Costs

[171] I reserve the issue of costs. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[172] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff for the first day is $4,500 and for subsequent days is $3,500. The investigation meeting lasted two days.

[173] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has

14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority