



Employment Court of New Zealand

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Wang v Hamilton Multicultural Services Trust [2010] NZEmpC 142; (2011) 9 NZELC 93,670 (27 October 2010)

Last Updated: 22 October 2011

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 142](#)

ARC 1/10

ARC 9/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN NING (NEIL) WANG Plaintiff

AND HAMILTON MULTICULTURAL SERVICES TRUST

Defendant

Hearing: 31 May, 1 and 2 June 2010 (Heard at Hamilton)

Appearances: Mr N Wang in Person

Ms E Wilkinson, Representative for the Defendant

Judgment: 27 October 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff Mr Wang commenced employment with the defendant, the Hamilton Multicultural Services Trust (the Trust) in February 2003. During the time of his employment he occupied a number of positions. At the time of termination of his employment with the defendant he held the position of financial administrator.

[2] His employment was terminated on 13 July 2009 following four weeks'

notice, although he finished work on 6 July 2009 without working out the full

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period. The ground for terminating his employment was that his position became surplus to the requirements of the Trust due to restructuring.

[3] The restructuring carried out by its directors created a new position managing the Trust's financial affairs; finance manager. The defendant advertised the new position publicly. The plaintiff was invited to apply for the new position of finance manager but he decided not to do so on the grounds that it might jeopardise his claim.

[4] Mr Wang raised a personal grievance on 10 September 2009. The grievance was not resolved and Mr Wang referred the

matter as an employment relationship problem to the Employment Relations Authority for resolution. An investigation meeting was conducted on 19 November 2009.^[1] A determination was issued on 14

December 2009. The Authority held that the Trust had generally acted appropriately

in the way it dealt with Mr Wang's redundancy and that it was genuine. However, in one respect, namely the failure to supply Mr Wang with a copy of the original Treasurer's Review Report, which preceded the redundancy, the Trust was held to be deficient and Mr Wang received an award of \$1,000. That has been paid to him.

[5] On 8 January 2010, Mr Wang filed a challenge in this Court relating to the whole of the determination and seeking a hearing de novo.

[6] In May 2009, prior to the termination of his employment, Mr Wang had lodged in the Authority another employment relationship problem for determination. This alleged that he had been discriminated against in his employment. Mr Wang had commenced contemporaneous proceedings by way of complaint to the Human Rights Commission. Those proceedings were unresolved at mediation. On

20 November 2009, the Employment Court ruled that despite the unresolved proceedings before the Commission, Mr Wang was entitled to pursue his personal grievance before the Authority.^[2] The matter was set down for an investigation meeting but did not proceed as events were overtaken by the termination of employment for redundancy. Accordingly, the Authority by consent issued a further

determination on 8 February 2010 transferring the proceedings, based on the allegation of discrimination, to the Court so that they could be heard along with the challenge.^[3]

[7] Mr Wang has filed a separate statement of claim in respect of each proceeding.

The pleadings

[8] In many ways the sequence of events giving rise to the allegations of discrimination were a pre-cursor to the decision to restructure the management roles within the Trust. This included the plaintiff's position as financial administrator. This is confirmed in the form of pleadings filed, particularly the statement of claim commencing the challenge in respect of the termination of employment. The issue of discrimination on the basis of ethnicity is raised in that claim as well as the claim based on allegations of unjustified disadvantage.

[9] In respect of the disadvantage claim, Mr Wang alleges that the sole director of the defendant discriminated against him in his employment on the basis that he is Chinese. He claims that the director expressed hostility towards him and harassed him repeatedly in an offensive and detrimental manner and she treated him in a way, which was inconsistent with her treatment of other employees of different ethnic groups. He enunciates a series of incidents, which occurred between April 2008 and May 2009. The complaints consist of allegations of verbal abuse by the director, altering Mr Wang's areas of responsibility without consent, imposing unreasonable demands upon him for completion of work responsibilities, using profane language in his presence, refusing to allow him payments of overtime for working extra hours to complete tasks requested by her, unjustifiably issuing a formal verbal warning to him, and indicating that she intended to restructure his position. Of course this latter point leads to the steps subsequently taken to restructure the management roles. Those in turn led to the termination of employment.

[10] In his statement of claim Mr Wang mentions the fact that he complained to the Board of Trustees (the Board) who then supported the director. He seeks remedies that the defendant both revokes the warning issued to him and pays him compensation of \$10,000 for humiliation, loss of dignity and injury to feelings. He also seeks costs.

[11] So far as the statement of claim in respect of the termination of employment is concerned there is again an allegation of harassment and discrimination on the basis of his ethnicity, although it appears that may simply be a repetition and transposing of the allegations in respect of the earlier claim. His allegation is that there was no genuine redundancy and that in any event proper procedures were not followed in the way that he was treated. He also alleges that he was not properly consulted as a result of the decision to restructure the management positions including his own and that he was not offered any redeployment. He refers to the fact that the new position of finance manager was publicly advertised; that his experience and qualifications meant that he could fulfil the new role and should have been redeployed to it. He did not apply for the new position when advertised because he did not wish it to appear that he agreed with what the defendant was doing. The remedies that he seeks are reinstatement to his former position or a new position that is at least as advantageous to him as his former position. He also seeks compensation for loss of income for the period following his dismissal together with compensation for the loss of employer subsidised contribution towards his Kiwisaver scheme. He also claims compensation of \$20,000 for humiliation, loss of dignity, injury to feelings and mental anguish suffered as a result of the dismissal. Finally, he seeks an order for costs.

Factual discussion

[12] Mr Wang called Mr David Vincent as a witness in support of his claim. Mr Vincent presently works as a network facilitator. From 2002 until 2007 he was the manager of the Trust and was responsible to the Board for all of its operations. He confirmed that during the time he held this position Mr Wang was employed in various roles, which developed in complexity as the organisation grew. He stated that because of the small size of the organisation, staff had to approach their work in

a flexible and co-operative manner not often found in larger organisations where the role clarity is more rigid.

[13] Mr Vincent confirmed in evidence that for a period of three weeks while he was abroad Mr Wang stood in for him as acting manager. This required him to have an increased financial delegation for that period. He confirmed that between 2003 and 2007 Mr Wang contributed to the preparation of the annual Trust budget. The primary role was to provide Mr Vincent with financial data regarding expenditure and income to date. This information was important as a background to operational and financial planning. Mr Vincent confirmed that he consulted Mr Wang on a regular basis and valued his opinion in matters of financial forecasting. He confirmed that Mr Wang was not responsible for the operational or financial performance of individual business units of the Trust nor for the financial performance of the organisation overall.

[14] When Mr Vincent retired from the position his role was taken over by Ms Rebecca Fraser. She had previously been employed with the Trust and subsequently became its director.

[15] Ms Fraser along with other witnesses confirmed that until about mid 2008 the relationship between Mr Wang, Ms Fraser and other employees was a friendly and pleasant one. However, as the work of the Trust expanded strains became apparent particularly in the relationship between Mr Wang and Ms Fraser.

[16] Mr Wang in his evidence referred to the period at the end of Mr Vincent's employment when his responsibilities kept changing as did the title of his position. He stated that the changes included transferring the responsibilities of invoicing for the interpreting service and centre venue hiring to two related co-ordinators as well as changes in other areas. He indicated that the changes occurring were not reflected accurately in his job descriptions in a timely manner. Mr Wang stated that before Mr Vincent left the Trust in May 2007 he had passed to Mr Wang the authorisation of daily financial management. Mr Wang claimed that he actually fulfilled the financial management duty and some operational duties in May and June 2007. He reported to the Board directly regarding financial management issues. During that

time he said he was responsible for authorising daily expenditure of the Trust operation and other financial decisions. He fulfilled the duty of reviewing receipts and payments and authorising payments in dealing with account issues. He also fulfilled various duties beyond finance including seeking solutions in information technology and the PABX telephone system. He also referred during the evidence to his function of reporting to the Board finance committee. This appears to have become a bone of contention when at a later date Ms Fraser took this responsibility from him. It was also clear during the evidence that Mr Wang had the primary responsibility of ensuring that accurate base documents were available for the auditors when the periodic audit took place.

[17] Mr Wang indicated in his evidence that after Ms Fraser took over the position of director of the Trust, while his relationship with her was initially amicable he began to feel concerns following what he perceived to be the forced resignation of two senior employees.

[18] Mr Wang in his evidence then refers to a sequence of events in which he had disagreements with Ms Fraser and which form the basis of his allegation that he was discriminated against on the grounds of ethnicity. In April 2008 he stated that he was asked by Ms Fraser to collect evidence in a clandestine manner regarding the over-claiming of working hours by the finance assistant who was also Chinese. He stated that he felt uncomfortable about being asked to do this and the inference that I draw is that he regarded it as inappropriate. The fact that he and the finance assistant were both Chinese became significant in his perception that there was some racial basis for him being requested to do it.

[19] He next referred to an incident in July 2008 when Ms Fraser spoke sharply to him while they were investigating a difficulty that had arisen at a local high school. Ms Fraser later apologised to Mr Wang for this incident.

[20] The next incident related to the resignation of Ms Shirong (Candy) Tang. She was the finance assistant. Mr Wang was asked to collate information concerning her performance and he stated that she was forced to resign. Ms Tang was called as a witness for Mr Wang but rather than showing that Ms Tang was forced to resign I

find the position was that her fixed term contract had come to an end. She did perform some other duties following the end of the fixed-term contract but this appears to have been work offered to her by the defendant so that she had some tiding-over for a period before leaving the workplace. Mr Wang stated in evidence that he took over her workload and this added to his stress levels.

[21] In the period between January 2008 and October 2008, Mr Wang and Ms Fraser shared an office. Mr Wang reported on a series of incidents resulting in disharmony. Mr Wang approached the Board to intervene but was told that the matter had to be resolved at management level between himself and Ms Fraser. It is clear that stress levels were high for both Mr Wang

and Ms Fraser at this time. The requirements of their positions were obviously increasing as the business of the Trust expanded. On one occasion Ms Fraser issued a formal verbal warning to Mr Wang for his perceived deficiencies in overseeing a staff member in preparation of an invoice. The warning was subsequently withdrawn by Ms Fraser when she realised that there had been a genuine misapprehension by Mr Wang as to his duties in this respect. In the proceedings based on alleged discrimination, Mr Wang seeks an order that the defendant revokes the warning but in view of the fact that the withdrawal of the warning is confirmed by Ms Fraser in her evidence it is difficult to understand why Mr Wang is seeking this remedy.

[22] Both Mr Wang and Ms Fraser in their evidence itemised incidents, which occurred during this period and later led up to the restructuring of Mr Wang's position. In evidence both indicated incidents of disagreement and sharpness in their dealings with each other. Matters came to a head when Ms Fraser endeavoured, at several meetings with Mr Wang, to negotiate changes and to finalise his job description. By this stage it is clear that Mr Wang was not willing to perform tasks outside what he perceived to be his set duties. On the other hand Ms Fraser clearly wanted to reach agreement with Mr Wang as to his job description so that duties, which needed to be performed by the financial administrator, could be settled and resolved.

[23] It is not well articulated in the statement of claim or Mr Wang's evidence but

I infer that he puts the disagreements between himself and Ms Fraser down to

discrimination on the basis of his ethnicity. In his evidence he accused the Trust of not taking whatever steps were practicable to prevent a repetition of "such harassing and discriminative behaviour after I laid a complaint to Ms Fraser on

02 [March] 2009 and a personal grievance on 19 May 2009".

[24] Apart from the connection Mr Wang makes to Ms Fraser's dealings with Ms Tang and his allegation as to the way she dealt with him, there is very little else put forward to corroborate his allegations of discrimination on the grounds of ethnicity. Ms Tang, when giving evidence in his support, alleged discrimination also but again it was unsubstantiated. Clearly, she had employment related issues, but I found her evidence somewhat unconvincing on this point. Whereas she claimed to be forced out of employment, she had to concede in evidence that her work came to an end when her fixed-term contract expired.

[25] There is of course some irony in Mr Wang alleging that he was discriminated against in this way when the entity he was accusing is a trust set up and dedicated to assisting new immigrants to assimilate and obtain employment. Ms Fraser was considerably hurt by the accusations and had this to say in the opening passage of her evidence:

I have never been accused of racism until these issues arose with Neil [Mr Wang] and have spent my career thus far working against racism and striving to build better engagement between migrant and receiving communities in New Zealand. Since these accusations I have resigned from my position and have experienced deep sorrow, loss and depression relating to my identity as a social justice activist and advocate.

[26] So far as the alleged issue with Ms Tang is concerned she had this to say in her evidence:

The staff member who left her position claimed that I had bullied her and discriminated against her because she was Chinese. She made these claims widely and in retrospect I have no doubt that Mr Wang was affected by them but at the time our friendship and employment relationship seemed to remain unaffected.

[27] Obviously serious difficulties arose in the relationship between Mr Wang and Ms Fraser. Ms Fraser in her evidence stated that she noticed that in early 2009 when Mr Wang had returned from a holiday in China he began to target her and claimed

bullying and harassment. This related even to incidents where there were witnesses present who have given evidence that did not confirm Mr Wang's version of events.

[28] Ms Fraser in her evidence itemised several events she regarded as difficult and bizarre. Whilst she found his animosity towards her at times shocking, she benevolently put it down to a combination of the stress he was under as a result of work pressure and some domestic circumstances and personal grief. She came to the view that if his position were changed so that he was under less stress Mr Wang's behaviour would return to the pleasant, friendly and helpful way it was prior to July

2008. It was for this reason she stated that she endeavoured to reach agreement with Mr Wang and negotiate changes to his job description. My perception of the evidence as to these attempts to change Mr Wang's job description is that they foundered on the basis that the relationship had reached a point where neither of them could communicate with each other and Mr Wang adopting a negative and suspicious stance.

[29] The end result was that Ms Fraser could not get Mr Wang to agree either on a current job description describing what he presently did or negotiate any changes. She then realised that in order to provide for the need for accurate financial reporting and financial management of the Trust, a restructure would be necessary. Ms Fraser stated in her evidence that Mr

Wang agreed that she should do that. In April 2009 the treasurer of the Board was asked to carry out a review and he presented his report to the Board on 23 April 2009. The Board and Ms Fraser used this to prepare a proposal for restructure. Unfortunately, as part of the process in dealing with Mr Wang as to the restructuring, the treasurer's report was not disclosed to him and as he confirmed in his evidence he did not receive it until two days before the Authority's investigation meeting.

[30] The rationale for the restructuring and the eventual decision to disestablish the role of financial administrator and replace it with that of finance manager is set out in the evidence of Ms Fraser and Ms de Lisle, Chair of the Trust. In her evidence Ms Fraser stated as follows:

After some time of trying to negotiate changes with Mr Wang, changes were becoming critical as I needed accurate financial reporting in order to make

decisions. I suggested that I could restructure and Mr Wang agreed that I should do so. Based on the Treasurer's review and my own observations of what was needed in the organisation I prepared a restructure proposal for the Board and the Board agreed that this should go out for consultation. The Trust met with our lawyer and got advice to ensure we followed the correct processes for restructuring. The proposed restructure included a significant overhaul of our financial processes and specified a new position of Finance Manager with significantly more financial responsibility than any previous financial position in the Trust, both in the defunct job description and the role Mr Wang had been doing but had not been agreed. It also changed all project managers' job descriptions to include some financial responsibility. It was essentially a process of devolution because of the size of the organisation. This proposal was put out for consultation with staff and responses to it were largely very favourable, with the exception of Mr Wang. However, Mr Wang did not engage with the elements of the proposal but wrote that the position described was the one that he was doing. It clearly was not. I presented all the feedback to the Board, and my own recommendation, and the Board decided to approve the restructure. Mr Wang's position became redundant under the new structure as some of the duties were devolved to project managers and the Finance Manager role carried significantly more responsibility for training, oversight and decision making.

[31] This is also corroborated by Ms de Lisle in her evidence. She stated as follows:

The Board began to be worried that this job was too big for one person. The activities of the Trust had grown very quickly and were continuing to grow, it was clear to the Board that the role of Financial administrator would have to be broadened. For the smooth running of operations, given the increased number of staff employed by the Trust, it was essential that the person in charge of finances also monitored staff who were preparing invoices. This is one of the key functions that has changed in the expanded Financial Manager position. The Board felt strongly that the size and scope of the job required a more overarching role than simply an administrator working on a micro level. This is why the Board accepted Rebecca's proposal to restructure in June 2009; it had nothing to do with discrimination of any kind.... Neil was offered the opportunity to apply for the position but did not do so. The Board felt fully informed and was satisfied that all requirements of the [Employment Relations Act 2000](#) were complied with at all stages of the restructuring.... Changes to the roles of other staff members were unrelated to the restructure and are in fact a further reflection of the way the Trust's operations have been continuing to expand and change as new funding sources have become available in response to identified community need....

[32] In his evidence Mr Wang went to some lengths in setting out what his duties were and why he believed that the duties of the finance manager had in fact been fulfilled by him in the role of financial administrator. There is also some irony in this because of the difficulties Ms Fraser experienced in trying to pin Mr Wang down

to a new job description. Presumably, if he had co-operated fully in that process Ms Fraser would not have felt compelled to enter into a restructuring. However, to be fair to Mr Wang, in view of Ms de Lisle's evidence, it is likely that the Board would have in the end been compelled to restructure those positions, which included the financial administrator's position.

[33] There does not appear to be any dispute that Mr Wang was consulted once the proposals for restructure were announced. Unfortunately, the Board adopted the position that Mr Wang would not be simply redeployed into the finance manager's role, which Ms de Lisle conceded, as did Ms Fraser, that he was qualified to do. They decided instead to advertise the position and encourage Mr Wang to apply for it. For some reason Mr Wang decided not to do that. He explained the stand that he took, in his evidence, as follows:

I did not apply for the position of Finance Manager after Ms Fraser's encouragement to do so because I felt that if I did, then it would be taken as an indicator that I accepted the disestablishment and redundancy as genuine and legitimate, which I did not accept and follow. I believe the two positions (Financial Administrator and Finance Manager) were only different in title, I did not want to appear as if I agreed with what Ms Fraser was doing. I felt it was a dilemma or trap to me – I could only choose either to apply for it so acquiesce Ms Fraser's conduct, or to lose my employment. (sic)

[34] Both Ms Fraser and Ms de Lisle in their evidence confirmed that the finance manager role carried significantly more responsibility for training, supervision and decision making than the financial administrator job, a position which Mr Wang performed. The finance manager role involved devolution of day to day budgeting issues to the leaders of the particular projects and co-ordinators under supervision by the finance manager. This would include the reconciliations and preparations for the audit along with far greater staff management. It is true that Mr Wang did perform some of these duties

previously but it is clear that it was not to the extent contemplated under the new role. It appears that there was no issue that Mr Wang could perform the duties of the new role following some further training and that is why both Ms Fraser and Ms de Lisle encouraged him to apply for the position. Another significant feature which appears to have been overlooked by Mr Wang is

that the new role involved nearly a 50 per cent increase in salary in recognition of the increased responsibilities and duties.

[35] The Board found that no suitable applicant would apply for the position once it was advertised. Ms Tania Pointon, who gave evidence, carried out various accounting assignments on a contract basis for the Trust for a period following termination of Mr Wang. In her evidence Ms Pointon stated that she was totally unaware of the finance manager's position being advertised until she had completed the temporary assignments. She states that it was only after having some experience in the role that she realised she could add some value to the organisation and accordingly applied for the position. She was appointed. It is significant that in the first three months of her taking up the role she improved the financial accounting systems of the organisation and implemented various reporting processes. It is significant also that following Ms Pointon's appointment and as a result of further input from her there has been a further restructuring within the Trust. This includes not only the finance manager's position but also the position of director formerly held by Ms Fraser, and one other management position. These have all now evolved into part-time roles.

[36] It is also clear from the evidence that once it was known that Mr Wang's position of financial administrator would be disestablished in the restructuring the Board endeavoured to ascertain whether there might be some other role which Mr Wang could perform. Obviously the Board wished him to apply for the new finance manager's position. Other opportunities within the Translation Unit were considered but held not to be suitable in view of Mr Wang's perceived inadequacy with English. While Mr Wang is clearly proficient with the English language the Board decided it was not to the standard that would be required for a translator.

[37] In any event once the decisions had been made and the consultation process completed Mr Wang's employment was terminated by the giving of notice. As I have indicated earlier he left his employment before the notice period had expired.

Conclusions

[38] I agree with the determination of the Authority that the redundancy was genuine. Unfortunately the need for restructuring was in the first place precipitated by Mr Wang's recalcitrance in co-operating with Ms Fraser to negotiate performance of the duties required for the financial administration of the Trust. This required the setting of a job description, which accurately reflected what the Board required of Mr Wang. The Authority's determination refers to Mr Wang's resistance to changing. The evidence before me confirms that. I further agree with the determination that the Board should have given Mr Wang a copy of the Treasurer's Review Report as part of the consultative process. Indeed if it had done that it is possible that Mr Wang may have seen that there was a genuine need for him to agree to a review of the duties and overall position. This in turn may have led to him simply being redeployed. There were, however, other positions, which were subject to the review, although they did not result in any redundancies.

[39] Accordingly, I agree that Mr Wang was entitled to the compensation awarded by the Authority in its determination for this failure in the process adopted.

[40] Where I consider that the defendant Trust has failed in its obligations under the redundancy process with Mr Wang relates to the issue of redeployment. The obligation was on the Trust to consider other alternatives to making Mr Wang redundant. In this case, surprisingly, both Ms Fraser and Ms de Lisle concede that Mr Wang was well able to perform the duties of the new position of finance manager and indeed encouraged him to apply for the position when it was advertised. With the attitude of suspicion that Mr Wang held he somewhat misguidedly refused to apply for the position. In the circumstances which had led to that point, I nevertheless regard his attitude in that respect understandable even though most unfortunate. In view of what Ms Fraser and Ms de Lisle have said, he should have been offered the position by way of redeployment rather than having his previous position terminated and requiring him to apply for the new position when it was advertised. Ms de Lisle expressed some doubt that Mr Wang could take up the position immediately which confirmed Ms Fraser's evidence that some up-skilling

would be required. However, neither of them indicated that that would have posed any difficulty.

[41] This issue of deployment has been discussed in the recent decision of the Court in *Jinkinson v Oceania Gold (NZ) Ltd*.^[4] In that decision Judge Couch, considering the broad issue as to whether the employee's dismissal was justifiable, confirmed that the matter must be determined according to the test set out in [s 103A](#) of the [Employment Relations Act 2000](#) (the Act). The fact that that is now the test for justification led him to reconsider the decision of the Court of Appeal in *New Zealand Fasteners Stainless Ltd v Thwaites*,^[5] a decision decided under the now repealed [Employment Contracts Act 1991](#). He set the position out as follows:

[35] For the defendant, Ms Brook accepted that Ms Jinkinson was entitled to challenge the genuineness of the decision to disestablish her position. As to the second step, Ms Brook relied on the decision in *New Zealand Fasteners Stainless Ltd v*

Thwaites.^[6] She submitted that, in the absence of a specific contractual right, “a redundant employee has no entitlement to be redeployed to a different position, i.e. a position that is not substantially similar to that previously held by the employee.” This submission largely reflected paragraph [25] of the Court of Appeal’s decision:

[25] In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment.

[36] Referring to paragraph [22] of the decision in *Thwaites*, Ms Brook accepted that Ms Jkinson was entitled to be considered for redeployment to a mine technician position but submitted that she was not entitled to be appointed to that position. On this basis, Ms Brook submitted that it was not open to the Court to consider the merits of the decision by Oceana Gold not to appoint Ms Jkinson to a mine technician position and that the scope for review of the process for appointment was limited. She submitted, “It is enough for the Defendant to genuinely consider the Plaintiff for redeployment.”

[37] The decision in *Thwaites* was made in the context of the [Employment Contracts Act 1991](#) and the jurisprudence relating to personal grievances as it was in early 2000. The subsequent enactment of the [Employment Relations Act](#) later in 2000 and, in particular, the amendments made to it in 2004 have substantially altered the law in this area.

[38] The most significant change has been the enactment of [s103A](#) set out above. As the full Court made clear in *Air New Zealand v V*:^[7] “In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss.” In this case, a critical step in deciding to dismiss Ms Jkinson was the decision that she would not be appointed to one of the mine technician positions. Put another way, had Ms Jkinson been appointed to one of the mine technician positions, she would not have been dismissed. Thus, the selection process and its outcome must form part of the employer’s conduct to be reviewed in deciding whether the dismissal was justified.

[42] In the present case similar considerations apply. Objectively reviewing all of the actions of the employer up to and including the decision to terminate Mr Wang’s employment, the critical step was the decision not to appoint him to the position of finance manager, a position which the witnesses conceded he was capable of performing. Not only this, the witnesses went further to state that while the decision had been made to advertise the new position publicly, it was hoped that Mr Wang would apply, and it must be inferred that if a more suitable candidate did not apply, then Mr Wang would have been appointed. Applying the reasoning adopted by Judge Couch in *Jkinson*, the failure to consider redeployment in the context of the test of justification under [s 103A](#) of the Act leads to the conclusion that in this case the employer failed to act in a way that a fair and reasonable employer, judged objectively, would have done in all the circumstances at the time the dismissal occurred.

[43] For this reason I do not agree with the Authority determination that the Board acted properly in taking the view that it should advertise the new position. There is no evidential basis for the statement in the determination that it would not have been a responsible exercise of its discretion to simply offer a new role at substantially higher salary to a staff member who was originally employed to do a different role. It is clear from Mr Wang’s evidence that the majority of the day to day accounting functions were well within his capabilities and it is clear from the defendant’s own evidence that this was so. Mr Wang had also performed higher management

functions in a relieving capacity and both Ms Fraser and Ms de Lisle accepted that with up-skilling Mr Wang would easily be able to perform the new role. This happens regularly in commercial enterprises by way of the normal process of promotion. For this reason the Trust failed in this respect even though the redundancy was genuine and in other respects the Trust had complied with the legal requirements of consultation and other requirements necessary when a redundancy occurs.

[44] The difficult issue which arises is that Mr Wang seeks reinstatement. There are two main reasons why reinstatement would be inappropriate in this case. The first relates to his grievance giving rise to his allegations of discrimination based on racial and ethnic grounds. I have indicated the great stress and grief which this allegation caused to Ms Fraser. Her reaction was understandable. Such an allegation when unfounded would provide extreme difficulties in Mr Wang resuming employment with an entity of the kind that this Trust is. His allegations have potentially undermined the culture of the Trust. Having regard to the nature of the work which the Trust performs an allegation of racial discrimination or discrimination on ethnic grounds is quite absurd. Employee witnesses of varying ethnicities gave evidence in support of the defendant to confirm this conclusion. It will be clear therefore that I regard the second proceedings based on a disadvantage grievance as quite unfounded. There is simply no evidence upon which Mr Wang can allege that there was discrimination against him on the basis of his race and ethnic background. That proceeding is simply dismissed. Reinstatement against the background of that proceeding would clearly provide considerable relationship difficulties between Mr Wang and remaining employees. Ms Fraser remains in employment although she now performs a different role.

[45] The proceedings by Mr Wang, based on his allegations of racial/ethnic discrimination, were already on foot when the difficulties with restructuring arose. It might be said that the Trust was prepared to have him in the new role at the time his employment was terminated so why should this issue stop him being reinstated now? At that stage the earlier proceedings were going through mediation processes. It seems likely that if the allegations had been resolved amicably then there would have been scope for Mr Wang to be re-integrated and the previous friendly atmosphere to

have been revived. Obviously, he would have needed to satisfy his employers that he would desist from the belief and continued allegations that he was being discriminated against on this basis. Now, however, the position is really incapable of remediation in that way. The earlier proceedings have been forced to conclusion by him. The allegations he made have been subject to considerable evidence at trial and with continued tenseness between the parties. Mr Wang chose at trial to embark upon lengthy, aggressive and uncompromising cross-examination of Ms Fraser and other witnesses called by the Trust, some of whom also remain in employment. The position, now, therefore, is quite different.

[46] Of greater substance, however, is the second issue arising in respect of reinstatement. Since Ms Pointon's appointment to the position of finance manager, at her instigation there has been a further substantial restructuring in the organisation so that the three main management roles are now carried out as part-time positions and on a job sharing basis. Mr Wang being reappointed in a full-time position as finance manager simply would not be appropriate in the now restructured management hierarchy. This was confirmed by Ms de Lisle. This further restructuring had as its catalyst Ms Fraser resigning from the position of director as a result of the distress she suffered from her dealings with Mr Wang and the allegations he made against her.

[47] For these reasons I am not prepared to accede to Mr Wang's claim to reinstatement. The failure of the Trust to provide him with a treasurer's report has already been dealt with by the award of compensation by the Authority in its determination and there is no need to disturb that. Mr Wang has received payment for that award.

[48] The issue that remains is whether there should be a further award of compensation for the failure of the Trust to redeploy Mr Wang to the finance manager position. This is to be considered in circumstances where the defendant concedes that Mr Wang was well able to perform the functions of the new job albeit with some up-skilling and where it actively encouraged him to apply for the position and wanted him to do so. In deciding that the redundancy was genuine the procedure nevertheless was defective in this respect. The question is whether Mr Wang, in

view of the fact that I am not prepared to reinstate him, is entitled to reimbursement for wages or other money lost as a result of the grievance and compensation for humiliation, loss of dignity and injury to feelings.

[49] So far as mitigation is concerned, Mr Wang in his evidence has indicated that he has been unable to obtain other employment and remains unemployed. Obviously that would be a significant matter in view of the fact that he is married and has a family to support. Amongst the documents which he produced are a substantial number of documents confirming his attempts to obtain alternative employment without success. There is probably some point to his allegation that his ethnic background and some deficiencies with the English language have militated against him being accepted by potential employers.

[50] I consider the issue of contributory behaviour under [s 124](#) of the Act. In this case I find that Mr Wang was unreasonable in the way that he dealt with Ms Fraser in her attempts to negotiate with him as to the duties that he would perform and to establish a job description, which accurately set out those duties. For some reason Mr Wang adopted a belligerent attitude towards Ms Fraser. It could have been as a result of the emotional difficulties arising from his personal circumstances adverted to in the evidence or it could have been from the stress all of them were under. Nevertheless, as a result of Mr Wang's refusal to deal sensibly with Ms Fraser she was left with no alternative but to consider restructuring. It may have been the ultimate result in any event. Certainly the actions of Mr Wang contributed to quite a degree towards the situation that gave rise to the personal grievance relating to the termination of his employment on the grounds of redundancy. While the allegations of discrimination have been raised in separate proceedings the way the matter is pleaded shows that in any event those attitudes, unjustifiably held on his part, also contributed substantially to the intolerable position which arose. His behaviour placed the Trust in a very difficult position and his unreasonable intransigence led to the unfortunate sequence of events which followed.

[51] In dealing with mitigation and contributory behaviour, there is also the issue of his failure to apply for the new position when it was advertised. That was an unfortunate decision on his part occurring, though, in a context after the employer's decision to terminate his employment. His decision, I am sure, would have been different if he had obtained sensible legal advice at the time. Using hindsight, it appears he would have been successful although there would remain the need for careful counselling as to his attitudes on the allegations of racial discrimination. On balance, I do not regard his failure to apply as breach of his obligation to mitigate. Nor do I categorise it as contributory behaviour.

[52] In conclusion, therefore, I consider that as a result of the extent to which Mr Wang is successful in his claim to a personal grievance there should be some reimbursement of lost wages or salary, corresponding compensation for the loss of Kiwisaver employer contributions and compensation for humiliation, loss of dignity and injury to his feelings obviously

arising from the termination of his employment. Nevertheless, the remedies should be considerably reduced to take account of his contributing behaviour. I have therefore reduced the remedies I would otherwise have awarded by 50 per cent.

[53] As a final comment, I mention there was evidence confirmed by witnesses for the defendant that Mr Wang behaved in an odd way at the time of the redundancy. I put this down to humiliation, loss of face and embarrassment. He was the only employee actually having his employment terminated as a result of the restructuring process and his actions in front of fellow employees which witnesses described were quite understandable in the circumstances.

Disposition

[54] Having regard to all of these factors the following remedies are granted:

(a) That the defendant reimburses Mr Wang for a sum equal to six months'

salary based on the salary he was earning at the time of his dismissal;

(b) that the defendant reimburses him for a sum equating to the equivalent contributions, which he would have had made to his Kiwisaver scheme during that six month period; and

(c) that the defendant pays him the sum of \$5,000 by way of compensation pursuant to [s 123\(1\)\(c\)](#) of the Act.

[55] I note that Mr Wang claims costs. He was not legally represented. I am presuming that the same situation applied before the Authority and that no costs award has been made there. While I am not prepared to award any costs in respect of these proceedings I am prepared to consider a reasonable reimbursement towards disbursements incurred by Mr Wang in respect of these proceedings. I imagine that the majority of the disbursements he incurred will relate to photocopying. If he wishes to claim disbursements then he should set these out in a memorandum to be filed within 14 days. I will then allow the defendant a further 14 days to make representations by way of memorandum in respect of the claim to disbursements.

M E Perkins

Judge

Judgment signed at 9 am on Wednesday 27 October 2010

[1] [AA449/09](#).

[2] [\[2009\] ERNZ 322](#).

[3] [AA49/10](#).

[4] [\[2010\] NZEmpC 102](#) at [38].

[5] [\[2000\] NZCA 52](#); [\[2000\] 1 ERNZ 739](#); [\[2000\] 2 NZLR 565 \(CA\)](#).

[6] [\[2000\] NZLR 565 \(CA\)](#).

[7] [\[2009\] ERNZ 185](#) at paragraph [37].