

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 12/10
5159378

BETWEEN DAVID LLOYD-BARKER
 Applicant

AND THE SOCIETY FOR THE
 PREVENTION OF CRUELTY
 TO ANIMALS AUCKLAND
 INCORPORATED
 Respondent

Member of Authority: K J Anderson

Representatives: M Ryan, Counsel for Applicant
 P Wicks, Counsel for Respondent

Investigation Meeting: 10 September 2009 at Auckland

Submissions received: 13 November from Applicant
 24 November from Respondent

Determination: 18 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Lloyd-Barker, presents three claims of unjustified actions by his employer causing a disadvantage in his employment pursuant to s.103(1)(b) of the Employment Relations Act 2000:

- (i) That he was unjustifiably disadvantaged in regard to being considered for the role of Chief Executive Officer for the respondent;¹
- (ii) That he was unjustifiably disadvantaged in that the respondent commenced a course of conduct designed to remove him from his employment; and

¹ This matter was not been addressed in submissions for the applicant but it was confirmed at the investigation meeting as a claim (and associated remedy) being pursued.

(iii) That the two warnings he received were unjustified as the respondent failed to carry out a full and fair investigation into the related circumstances.

[2] Mr Lloyd-Barker also claims that the termination of his employment on the ground of redundancy was an unjustified dismissal and that the redundancy of his position was a sham. Finally, Mr Lloyd-Barker says that the actions of his employer constitute a breach of the good faith provisions of s.4 of the Employment Relations Act 2000 (“the Act”). He seeks an order that a penalty be imposed.² Mr Lloyd-Barker asks the Authority to uphold his grievances and award him various remedies. He no longer seeks the remedy of reinstatement to his previous position.

[3] The respondent, The Society for the Prevention of Cruelty to Animals Auckland Incorporated (“the SPCA”) denies that Mr Lloyd-Barker suffered any unjustified disadvantage in his employment. The SPCA also denies that the Mr Lloyd-Barker was unjustifiably dismissed and says that the redundancy of his position was genuine, due to the role no longer being necessary.

[4] The Authority heard evidence from Mr Lloyd-Barker and Mr John Winter. For the SPCA, there is evidence from Mr Gordon Trainer, Chairman of the SPCA Board of Directors, and Mr Garth Halliday, Chief Executive Officer. The parties have provided a comprehensive agreed bundle of documents along with closing submissions. All of the available evidence has been closely considered, albeit it is not all specifically identified or referred to in this determination.

Background Facts and Evidence

[5] At the time of the termination of his employment (30th June 2009), Mr Lloyd-Barker was employed by the Auckland SPCA as the General Manager having been initially employed in April 2006 in the role of Inspectorate Manager. He assumed the role of General Manager (“GM”) in September 2007 but continued to also hold the Inspectorate Manager position.

² This matter also was not addressed in submissions for the applicant but it was confirmed at the investigation meeting as a claim (and associated remedy) being pursued.

[6] It appears that the employment of Mr Lloyd-Barker was without incident and he maintained good working relationships whilst carrying out his role within the SPCA, until later into his term.

[7] The Chief Executive Officer of the SPCA was Mr Bob Kerridge. In March 2008, the Board of the SPCA (“the Board”) established a sub-committee. Its purpose was to establish a process to recruit a Chief Executive Officer (“CEO”) to replace Mr Kerridge. Upon the appointment of a new CEO, Mr Kerridge was to move into the newly created role of Executive Director. The intention being that, the SPCA would retain the services of Mr Kerridge, the 25 years’ of experience and the high profile he had created; qualities which were considered by the Board to be an asset to the SPCA and its ability to attract funding.

[8] In September 2008, the SPCA engaged a recruitment firm to search for a new CEO.

[9] On 24th November 2008, Mr Lloyd-Barker had, what he termed, his; “*Jerry Maguire moment.*” He sent an email to three members of the SPCA Board. The thrust of the content of the email was that Mr Lloyd-Barker questioned the financial wisdom of the decision to appoint a new CEO, in addition to employing Mr Kerridge as the Executive Director. Mr Lloyd-Barker proposed a solution: “*Would it not be a better option to amalgamate the CEO and GM roles, or indeed dissolve the CEO role completely?*” Mr Lloyd-Barker estimated that these options would result in a cost saving to the SPCA of more than \$100,000 per annum.

[10] On 19th December 2008, Mr Lloyd-Barker sent another email to members of the Board asking: “*Is it a good look for a charity to employ when commercial companies are shedding? Just a thought about our public image.*” It does not appear that Mr Lloyd-Barker received a direct response to either of the emails.

[11] Albeit it seems that Mr Lloyd-Barker was aware that he could have indicated an interest in the position of CEO some months prior, he sent an email to Mr Trainer on 17th January 2009. The germane content is:

“ ... it would have been shall we say more flattering to be asked but I genuinely feel that unless I do the Society will suffer so without further delay I

would like to formally submit my interest in the CEO role which if offered would be combined with my current role as GM SPCA Auckland.”

[12] Mr Trainer replied on 19th January. He conveyed that Mr Lloyd-Barker would have been aware that a recruitment firm had been engaged by the SPCA some four or five months ago and that: *“If you wish to apply for the role then you should contact Signium with your CV so that they may consider you alongside other candidates.”* To which Mr Lloyd-Barker responded on 26th January: *“If I do this it will cost the Society more money. Don’t worry about it I get the message.”*

[13] On 20th February 2009, Mr Lloyd-Barker was interviewed for the role of CEO. His evidence is that because one of the interview panel, Mr Ellis, was not present for the interview, he took this as an indication that the SPCA Board was; *“simply going through the motions and in fact had no intention of appointing me.”* The evidence of Mr Trainer is that he, along with Mr Agee, interviewed Mr Lloyd-Barker. Mr Trainer says that while it was intended that Mr Ellis would be on the interview panel, a conflict in his diary arose on 19th February, resulting in his unavailability for the interview with Mr Lloyd-Barker.

[14] Mr Trainer advised Mr Lloyd-Barker on 27th February that because he did not meet a sufficient number of the criteria for the role of CEO, his application would not be progressed further. I suspect that this would not have come as a surprise to Mr Lloyd-Barker as he had earlier been alerted by the previous Chairman of the Board that he probably didn’t have an adequate financial background.

[15] While it now seems that Mr Lloyd-Barker may not be strongly pursuing the claim of unjustified disadvantage in his employment, as it pertains to this issue, I conclude in any event, that there is no sound basis for this claim. This is because there is no evidence of an unjustified action on the part of the SPCA that affected the employment of Mr Lloyd-Barker to his disadvantage. While it is understandable that Mr Lloyd-Barker may feel aggrieved that he was effectively passed over for the role of CEO, the evidence is that a transparent process was implemented pertaining to the selection and appointment of the successful candidate. As a result of that process, the selection panel concluded that Mr Lloyd-Barker did not meet the essential criteria. It follows that given that there was never any undertaking or agreement, implied or

otherwise, on the part of the SPCA, that Mr Lloyd-Barker would be appointed to the role of CEO, this unjustified disadvantage claim must fail.

[16] Albeit Mr Lloyd-Barker applied for the role of CEO and participated in the selection process, it seems he remained unconvinced that the position was necessary, as on 13th March 2009, he sent an email to the Board, and to Mr Kerridge, as the incumbent CEO, questioning the financial wisdom of appointing a new CEO in the current economic climate. Mr Lloyd-Barker made reference to other expenses facing the SPCA, to staff reductions with some people now carrying out dual roles, and to staff not receiving pay increases in 2009. Mr Lloyd-Barker also expressed the view that:

... notwithstanding what spin we, as a management team, put on any new senior appointment we will be met with a severe backlash business wise with staff fallout due to dissatisfaction and then the associated costs of training and recruitment to replace if this is permitted. At the very least you will have a demoralised and underperforming staff. In addition, how in these tough times do we justify to our donor base this extra expense using their money which is intended to care for the animals? Are you happy to justify this at the next AGM?

Mr Lloyd-Barker advocated putting the appointment of the new CEO “*on the back burner*” until economic circumstances improved.

[17] When Mr Trainer became the Chairman of the Board in late February 2009, he implemented some changes in regard who should attend Board meetings. Prior to Mr Trainer becoming the Chairman, Mr Lloyd-Barker had attended Board meetings in his role as GM and/or as a member of the finance and legal sub-committee. On 13th March 2009, Mr Trainer explained the change to Mr Lloyd-Barker, in that the new CEO would be accountable to the Board, with other staff, including Mr Lloyd-Barker, attending Board meetings on an as required basis when matters to be discussed warranted it.

[18] The evidence of Mr Trainer is that on 19th March 2009, Mr Kerridge received a telephone enquiry from a New Zealand Herald (“the Herald”) reporter. Apparently the reporter posed some questions that “*related directly*” to the matters which Mr Lloyd-Barker had raised in his email to the Board of 13th March 2009. Mr Trainer says that the reporter appeared to have “*intimate knowledge*” of the Society’s financial information. Matters raised by the reporter included:

- (a) *Questioning the wisdom of the appointment of a Chief Executive in these economic times;*
- (b) *Why, it has been decided to impose a wage freeze when an additional and expensive person was being employed;*
- (c) *What staff redundancies were likely;*
- (d) *... the suggested salary level of the new Chief Executive; and*
- (e) *... the affect the appointment would likely have on staff and donors to the Society.*

[19] The further evidence of Mr Trainer is that the similarity between the Herald reporter's questions and the email received from Mr Lloyd-Barker on 13th March 2009, was striking. Mr Trainer says that it became "*immediately apparent*" to the SPCA that it ought to be concerned that Mr Lloyd-Barker may have passed on confidential information to the reporter, or to other third parties, whom had passed it on to the reporter. The Board's concerns were heightened when on 19th March 2009, a member of the Board received an email from a barrister whom the SPCA engaged for its animal cruelty prosecutions. The barrister informed that she had been told by a reporter that the SPCA would be hiring a Chief Executive on a substantial salary. She expressed her concern about the timing of this in the current economic climate and the damaging effect upon the SPCA, should this become public knowledge.

[20] On Thursday, 19th March, the Board discussed Mr Lloyd-Barker's email of 13th March but were unanimous that a new CEO should be appointed. This view was conveyed to Mr Lloyd-Barker by Mr Kerridge the same day. It appears that it was also conveyed that a wage freeze is not being implemented and that Mr Lloyd-Barker should make recommendations in regard to staff that deserved a wage increase, by 5:00p.m. Monday, 23rd March. In response to receiving this information, Mr Lloyd-Barker sent an email to Mr Trainer informing that, due to other work commitments he would not have the time to comply with; "*... this ridiculous timeframe.*" And that; "*Perhaps you might want to ask your new CEO to do it assuming of course that they have any staff left to manage?*"

[21] Mr Lloyd-Barker presented evidence relating to various matters which he saw as being changes to his role. On 23rd March, in a somewhat tetchy email to Mr Trainer, Mr Lloyd-Barker asked a number of questions regarding his role as GM. Relevant to Mr Lloyd-Barker's claims before the Authority is the following content:

Has my role as GM changed in recent weeks? If so please advise why you and/or the CEO/ED [Executive Director] have not informed me of this formally at any point as required to do so by law. And:

Are you intending to remove further responsibility from me in the near or foreseeable future as has been done with the attendance at Board meetings, the handling of the Puppy Q project and now it seems the budgets are being done by staff or rather selected members of same. I am assuming that BK [Bob Kerridge] is acting under instructions from the Board in removing these duties? If not can I advise you that in doing so my employment is being altered and this is contrary to both best practice and law.

I am more than happy to continue in my role as GM SPCA Auckland but would appreciate the simple professional courtesy in these matters. As it stands it looks like the powers that be do not like being questioned with regards to certain decisions and that I am now being penalised for this action.”

[22] Mr Trainer responded via an email the same day. He informed Mr Lloyd-Barker that the clarification sought should have been referred to the CEO but also conveyed that he didn't believe Mr Lloyd-Barker's role had changed in the last few weeks, or at all. Mr Trainer reiterated that Mr Lloyd-Barker should communicate with the CEO in regard to operational issues and matters pertaining to the employment relationship.

[23] The SPCA had concerns arising from the questions raised by the Herald reporter. Mr Kerridge wrote to Mr Lloyd-Barker on 2nd April 2009. The letter opens: *The Society is concerned at what appears to be a breach of confidence that it wishes to discuss with you.* Mr Lloyd-Barker is informed of the content of his email of 13th March 2009 and the subject matter of the conversation that Mr Kerridge had with the Herald reporter. Mr Lloyd-Barker is also informed of the email of 19th March received from the SPCA barrister and the concerns of the SPCA that Mr Lloyd-Barker may have passed information regarding the operation of the organisation to the reporter. And:

If our concerns have foundation, such actions may be in breach of various obligations you owe to the Society, including those of confidentiality, fidelity and good faith. Disclosure of such information would seriously undermine the trust and confidence that the Society must have in the General Manager.

[24] Mr Lloyd-Barker is invited to a meeting on 6th April 2009; an opportunity to present his response to the allegation. He replied to Mr Kerridge via an email on 3rd April. The relevant content being:

Subsequent to these allegations you are advised that should the Society intend to continue on this path, I will issue personal grievance proceedings against the Society for constructive dismissal. I will also be taking advice with regards to a possible claim for defamation.

[25] Mr Lloyd-Barker informs further:

It appears that it is not policy to question our new Chairman and as such this letter shows a certain amount of victimisation. The intended appointment of the new CEO has been in the public domain for months and all the allegations contained in your letter can be attributed to any member of staff. Indeed, the same can be said for salary levels et al.

[26] On the same day, at 1:49p.m, Mr Lloyd-Barker also left a voice message on Mr Trainer's telephone as follows (verbatim):

Gordon, David, got Bob's letter. Hopefully you have got my email. I hope you can prove these allegations Gordon because there is a thing called defamation which is exactly where I'm going to talk to a lawyer now. Thank you, well done Gordon, you've really picked the wrong fight with the wrong person mate.

[27] There then followed an exchange of emails between Mr Lloyd-Barker and Mr Kerridge. On 16th April 2009, Mr Lloyd-Barker proposed to Mr Kerridge that a "solution" would be for the SPCA to retract all of the allegations, make a formal apology and provide him with a reference for his personal file, after which: "*I can move on and continue to do my job once I have closure on this rather unpleasant incident.*"

Allegations against Mr Kerridge

[28] In the meantime, on 17th April, an issue arose regarding a purported substantial donation to the SPCA from an estate.³ The evidence of Mr Lloyd-Barker is that this matter was brought to his attention by the SPCA Operations Manager, Ms Dunn. Apparently a question had arisen about what the legacy in question had been used for. Mr Lloyd-Barker says he was informed by Ms Dunn that, a friend of Mr X had engaged in a discussion with Mr Kerridge three or four years ago. The friend understood that one of the building projects under way at the time, would be named after Mr X, but this had not happened. The friend of Mr X had now contacted the SPCA expressing concern that it was unknown what the legacy had been used for and/or how the donation made by Mr X had been recognised by the SPCA.

³ In order to protect the identity of estate owner, he is referred to as "Mr X."

[29] Mr Lloyd-Barker emailed Mr Kerridge on 17th April 2009:

Does the estate of [Mr X] ring any bells? Also have you had at any time sheep on a property owned by you that there was an issue with?

Mr Kerridge replied later that day:

In answer to your questions – The estate of [Mr X] rings no bells. I have no sheep issues. ‘Digging for dirt’ I would strongly advise against as it will undoubtedly rebound against you, ten fold.

Mr Lloyd-Barker says that he took Mr Kerridge’s email as “a direct threat” and subsequently undertook an investigation into the two matters. On 25th April, Mr Lloyd-Barker wrote to Mr Trainer, on a private and confidential basis, pertaining to an allegation relating to the welfare of sheep (or lambs) on Mr Kerridge’s property. Mr Lloyd-Barker says that Mr Trainer failed to undertake any investigation of this particular allegation. But, Mr Trainer says that he ascertained that the time of the alleged incident would have been 14-15 years earlier (as well as seeking other advice) and he advised Mr Lloyd-Barker of this. This is confirmed by the emails produced to the Authority and confirmed also by a letter from Mr Trainer to Mr Lloyd-Barker dated 30th April 2009. The relevance of this particular evidence to the investigation of the Authority, is that Mr Lloyd-Barker alleges that as a result of him raising the alleged stock welfare matter, Mr Kerridge used his influence within the SPCA to have Mr Lloyd-Barker’s employment terminated via a sham redundancy process.

Meeting on 28th April 2009

[30] On 28th April 2009, Mr Lloyd-Barker (supported by Mr Winter) attended a meeting with Mr Trainer and Mr Kerridge. Mr Winter took notes of the proceedings and these have been produced in his statement of evidence. Mr Winter says that only he took notes at the meeting. I find this is not so. I accept that Mr Trainer also made notes which too have been produced as evidence. While the evidence of Mr Trainer and Mr Winter is at odds as to its length, by either version, it was clearly a very short meeting (4 to 7 minutes).

[31] The evidence of Mr Lloyd-Barker is that at the meeting:

I was subjected to shouted questions and overbearing conduct which was witnessed and noted by Mr Winter. It became clear to me at this point that following my letters to the Board the senior management were intent on a path of removing me from my employ [sic].

The evidence of Mr Winter is that the questioning of Mr Lloyd-Barker by Mr Kerridge and Mr Trainer was “*oppressive*” and “*overbearing*” but not threatening. On the other hand, the evidence of Mr Trainer is that Mr Lloyd-Barker; “...*would not engage and respond to questions asked of him other than to state that he had previously rebutted the allegations in writing and provided solutions.*”

Mr Trainer says that after he had sought answers to two questions from Mr Lloyd-Barker, the latter; “... *changed his tone of voice, leaned forward and made a threatening remark to me that we were getting ‘dangerously close to overstepping the mark.*”

[32] On the overall evidence and given the short length of the meeting, it is difficult to come to any tangible conclusions about whether any participant acted unreasonably but it is accepted that there was probably an atmosphere of some tension which led to an early conclusion of the meeting.

[33] On 6th May 2009, Mr Kerridge, in his role of Executive Director, wrote to Mr Lloyd-Barker. The germane content of the letter being:

Taking into account all of the circumstances, including the content and nature of your response in the meeting, we have concluded that it is more likely than not that you did speak to [the Herald reporter] and that you did provide him with confidential information as set out in our letter dated 2nd April 2009. Such conduct is unacceptable.

Attention was drawn to Mr Lloyd-Barker’s obligations of confidentiality under clause 12 of his employment agreement and that:

While we appreciate that you may have personal views on the SPCA’s governance, it is not appropriate for you to share these outside of the SPCA with third parties and especially with the media. In these circumstances, while we are of the view that such action could justify a final written warning or even dismissal our preliminary view is that in this instance the appropriate action is a written warning. We wish to make it clear that this kind of behaviour will not be tolerated by the SPCA.

[34] Mr Lloyd-Barker was given the opportunity to make any comment or to provide, in writing, by 8th May, any information which he may wish the SPCA to consider before it finalised its preliminary view regarding the issuing of a written warning. He responded to the letter via an email the same day (6:12p.m.), suggesting that Mr Kerridge should ask the reporter from the Herald, and the two other third parties, that it was alleged he had communicated confidential information to, before

“*making assumptions.*” Mr Lloyd-Barker sent a further email to Mr Kerridge that day (6:32p.m.) making the point that Mr Kerridge was making assumptions about whether Mr Lloyd-Barker had spoken to the media or the other third parties. He asked if Mr Kerridge had contacted the parties involved. Mr Lloyd-Barker suggested an alternative course of action would be to treat him in same manner as another employee (Ms Kennard) had been over a similar issue and simply issue him with a letter reminding him of his contractual responsibilities.

The first written warning

[35] Mr Trainer went overseas on the evening of 6th May. He says that due to a “*communication breakdown*” he didn’t see the emails sent by Mr Lloyd-Barker, prior to the first written warning (dated 15th May 2009) being issued by the Vice Chairman of the Board on behalf of Mr Trainer.⁴ However, it appears that despite the absence of Mr Trainer, the lines of communication were working in regard to other matters, as on 15th May, along with the warning letter, Mr Lloyd-Barker also received a letter dated 14th May 2009. Mr Lloyd-Barker was instructed to attend a disciplinary meeting on 26th May 2009 to:

.... discuss some concerns which the Society has arising from recent conduct by you in connection with the way you handled a potential issue involving Bob Kerridge.

[36] There then followed a summary of Mr Lloyd-Barker’s actions pertaining to the alleged incident regarding the welfare of sheep or lambs on Mr Kerridge’s property about “*a decade and a half ago.*” Mr Lloyd-Barker was instructed to immediately provide the information he gave to the Police, inform Mr Trainer as to when he involved the Police, and provide Mr Trainer with evidence and names of potential witnesses. Mr Lloyd-Barker was instructed to provide this information by email and also provide a hardcopy to Mr Halliday, the new CEO. Mr Lloyd-Barker was informed that:

The Society is concerned that you appear to have:

- *Failed to comply with my reasonable and lawful instruction to “take no further action”;*
- *Communicated sensitive information, which you had received in your capacity as a SPCA employee, and which is potentially damaging to*

⁴ Mr Trainer sent a letter to Mr Lloyd-Barker on 26th May 2009 apologising for missing Mr Lloyd-Barker’s emails of 6th May but confirming that the warning remained appropriate.

the organisation, outside the organisation without first giving the Board a chance to deal with the issue;

- *Deliberately attempted to undermine the Board;*
- *Deliberately attempted to undermine Bob Kerridge;*
- *Potentially undermined the Society's reputation;*
- *Breached your contractual confidentiality obligations.*

[37] Mr Lloyd-Barker replied on 15th May 2009. He responded to the allegations contained in the above letter and the written warning of 15th May. In regard to the warning, Mr Lloyd-Barker reiterated that the SPCA had not produced proof of the allegations leading to the warning; hence, they were “*unsubstantiated.*” As far as the later allegations were concerned, Mr Lloyd-Barker relied upon the Protected Disclosures Act 2000 in regard to his complaint to the Police. The SPCA rejected this reliance in a letter to Mr Lloyd-Barker dated 21st May 2009.

The second written warning

[38] On 26th May 2009, Mr Lloyd-Barker (with Mr Winter in support) attended a meeting with Mr Trainer and another member of the SPCA Board, Mr Palmer. The Authority has viewed the comprehensive transcript of the meeting which lasted 50 minutes. The substance of the time was taken up with a discussion about Mr Lloyd-Barker placing certain information with the Police and his reasons for doing so. The outcome was that Mr Lloyd-Barker received a comprehensive letter from Mr Trainer dated 9th June 2009. The letter informed Mr Lloyd-Barker that the explanations he gave at the meeting on 26th May:

... are unsatisfactory and seriously call into question your motivation and judgement.

[39] In summary, the letter further informed Mr Lloyd-Barker that:

You raised the sheep issue with Mr Kerridge 34 minutes after he told you he rejected the remedies you were seeking for your personal grievance claim and intended to proceed with the disciplinary process he was running against you. In these circumstances we do not accept that it was reasonable or appropriate for you to make inquiries into a potential issue involving Mr Kerridge, who at that time was CEO and is now Executive Director. If you had a genuine concern, you should have brought that to the CEO's attention, or in the event that you considered it inappropriate to raise with the CEO, then to the Board's attention to investigate.

Mr Lloyd-Barker was reminded that the alleged incident pertaining to Mr Kerridge occurred some 14-15 years ago, of the limits of the information Mr Lloyd-Barker has seen fit to act on, and that there was no legitimate basis at the time for going outside the SPCA with his concerns:

*You are again expressly reminded of your confidentiality obligations. You are not to disclose any information that you receive as a SPCA employee about the organisation, its affairs, other staff, or board members, with [sic] prior written authority to do so. You are not to take your current concerns about Mr Kerridge any further on the basis that the police have reviewed your information and concluded that there is no evidence of any offence having been committed.*⁵

[40] Mr Lloyd-Barker was informed that because the matters under investigation first arose before he received the warning dated 15th May 2009; the SPCA had concluded that a further “*First Written Warning*” was appropriate.

Redundancy proposal

[41] On 8th June 2009, Mr Halliday had a meeting with all SPCA staff. The purpose of the meeting was for Mr Halliday to inform that since commencing in the role of CEO on 4th May 2009, he now had a chance to undertake a review of the organisation. Mr Halliday informed that: “... *there may be some changes in our structure and I will be discussing this possibility with members of the team.*” The evidence of Mr Halliday is that following this meeting, he approached Mr Lloyd-Barker, and other staff, to request individual meetings. He arranged to meet Mr Lloyd-Barker at 2:00p.m. the next day.

[42] Mr Halliday emailed Mr Lloyd-Barker early (8:14a.m.) on 9th June informing that he had forgot to mention the day before that Christine would be taking notes at the meeting later that day. Mr Lloyd-Barker responded enquiring if the meeting set for 2:00p.m. was going to be a disciplinary meeting. The evidence of Mr Halliday is that he believed that Mr Lloyd-Barker would, or should have, been aware of the purpose of the meeting, given that it was arranged immediately after the full staff meeting. Nonetheless, via a return email, Mr Halliday confirmed to Mr Lloyd-Barker that the meeting was to discuss a proposal, which if implemented, may affect his employment. At 8:45a.m, Mr Lloyd-Barker emailed Mr Trainer informing that he was awaiting a

⁵ The evidence of Mr Trainer is that the Police advised Mr Kerridge that they would not be pursuing the allegations made by Mr Lloyd-Barker as there was no supportive evidence provided by him, and that the Police considered the complaint to be malicious.

decision regarding the outcome of the meeting on 26th May.⁶ Mr Lloyd-Barker informed Mr Trainer that:

This wait is causing extreme stress and I feel that it is all part of a plan to remove me from my role as per the email from Garth concerning changes that may affect my employment. This is in my opinion a thinly constructed ruse and as such any redundancy or similar will be false and subject to a further claim against Auckland SPCA with the ERA.

[43] Via an email sent at 9:06a.m, Mr Lloyd-Barker informed Mr Halliday that he would not be attending the meeting later that day but would be consulting his lawyer and his doctor, as he was under; “*considerable stress.*”⁷ Mr Lloyd-Barker also informed that:

I am seriously considering going to the press which is something I have been accused of but have not done yet however the appalling way in which I have been treated by the Society since I sent the 4th May email to the Board may drive me to this course.

Mr Lloyd-Barker also left a voice message on Mr Trainer’s phone at 2:13p.m. that day. The substance being:

Gordon, David, just checking what investigation you’ve done, to my knowledge you’ve done absolutely nothing, as suspected and again it’s another cover up, but then again these things have a tendency of getting out in the public domain, so hope you’re ready, because trying to make me redundant, best of luck mate, gloves are coming off, have a good day.

[44] In the meantime, Mr Halliday provided Mr Lloyd-Barker with a memorandum which set out information regarding the review of the SPCA and an examination of how the organisation could cut costs. Mr Halliday informed that:

As a result of that review of the structure of the organisation, the organisation proposes to disestablish the role of General Manager, and as a consequence your employment may be terminated on the grounds of redundancy. It is proposed that all of the duties associated with your role, including the inspectorate manager and the managing of the various divisions would be delegated to the CEO. The organisation’s rationale for the proposal is to maximise efficiencies within the organisation, and to cut costs. To this end, the organisation would like to receive your feedback on the proposal.

Mr Lloyd-Barker was informed that he would have an opportunity to respond to the proposal and discuss any alternatives at a further meeting.

⁶ It seems that it was some time later on 9th June that Mr Lloyd-Barker received the second warning letter.

⁷ Mr Lloyd-Barker was subsequently certified by his Doctor as unfit for work until 24th June 2009.

[45] Mr Lloyd-Barker provided some written feedback on 15th June 2009. He was critical of the actions and intentions of the SPCA but went on to suggest other avenues of cost saving, including making Mr Kerridge redundant and/or reducing Mr Halliday's salary, among other things. Mr Lloyd-Barker concluded that:

In summary you will, I have no doubt, make me redundant as previously stated that is as predictable as the sun rising in the morning however I will state that this is a false and cynical action against an employee who has dedicated over 3 years to the Society and who has outperformed all expectations and who is now being penalised for having an opinion.

[46] A meeting took place between Mr Lloyd-Barker and Mr Halliday on 24th June. Also present was Mrs Lloyd-Barker and a legal advisor for the SPCA. There was a general discussion about the changes which were being proposed by Mr Halliday and also the events which had gone before. Mr Lloyd-Barker gave some further feedback as to what was being proposed, but he also made it clear that he believed his proposed redundancy was "false" and "a witch hunt." Nothing appears to have been agreed except that a further meeting would take place on 30th June.

[47] Mr Halliday wrote to Mr Lloyd-Barker on 26th June 2009. The salient content of the letter is:

*As a result of your feedback I have concluded that the SPCA needs to provide you with further information regarding how it intends to operate in the Inspectorate area, in the event that your role is disestablished. That is the intention of this letter. To be clear, the SPCA is proposing the disestablishment of your existing role as General Manager/Inspectorate Manager. It is proposed that the General Manager duties will be absorbed primarily by the CEO. In respect of the Inspectorate Manager duties, the SPCA proposes to create a new job role: Inspector and Inspectorate Team Leader. A copy of this job description is **attached**.*

Mr Lloyd-Barker was also informed that:

Given the fact that the proposed role involves the performance of field duties as approximately 50% of the role, and the requirement that the role has a Certificate in Animal Management, at this stage I do not consider that the role would be an appropriate re-deployment option for you, in the event that the proposal is finalised and adopted by the SPCA (which of course, has not been concluded). However, I am happy to receive your feedback on that.

[48] Mr Lloyd-Barker responded by email the same day informing Mr Halliday that he considered; “*this was a false redundancy*” and that he would be placing matters in the hands of his barrister for redress via the Authority, but also confirmed that he would attend the meeting on 30th June 2009.

[49] The evidence of Mr Halliday is that on the morning of 29th June, he became aware that Mr Lloyd-Barker had set up an out-of-office auto-reply on his email which advised that, effective from 30th June 2009, Mr Lloyd-Barker would no longer be working for the SPCA. Mr Halliday says that in the light of a final decision not yet having been finally made about Mr Lloyd-Barker’s role, he emailed him to enquire as whether he had resigned. Mr Halliday also attested that on the same morning, Mr Lloyd-Barker had emailed all staff and advised that effective from 30 June, the CEO and the SPCA Board had decided to make both of the positions held by Mr Lloyd-Barker redundant and that the redundancy was false.

[50] A meeting took place with Mr Lloyd-Barker on 30th June. He made it clear that his view was that there was a false redundancy and that it would be challenged. Mr Halliday confirmed that a decision had now been made to make both of the roles held by Mr Lloyd-Barker redundant, with immediate effect and payment in lieu of notice. The details as to the implementation were also discussed. Mr Lloyd-Barker subsequently received a letter of the same date confirming the redundancy of his positions. Among other things, the letter conveyed that:

As noted above, you have, to date, declined to provide feedback on the proposed new role of Inspector and Inspectorate Team Leader. Despite this, the SPCA has taken the liberty of considering you for redeployment to the newly created role of Inspector and Inspectorate Manager. However, as you do not have a Certificate in Animal Management, which is a necessary requirement to perform Inspector duties, we do not consider that you are suitable for redeployment to that role. In addition we note that the role is at a lower level than your existing role. We also confirm that we have considered you for other redeployment opportunities and that we have not been able to identify any suitable alternatives at this time. Please note that despite your out of office email reply, which you added from 29 June 2009, advising that the SPCA was making you redundant with effect from 30 June 2009, this letter is the SPCA’s first confirmation of the decision to make your positions redundant. This is in line with the fact that this decision was made yesterday evening, 29 June 2009, following the expiry of the timeframe for you to provide feedback.

Analysis and Conclusions

[51] In regard to Mr Lloyd-Barker's claims of unjustified actions by his employer affecting his employment to his disadvantage, and also his claim of unjustified dismissal, the test that the Authority must apply is the same. It is provided by s.103A of the Employment Relations Act 2000. The Authority must objectively consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time that the respective actions occurred.

The unjustified disadvantage claims

[52] While Mr Lloyd-Barker has raised three claims of unjustified disadvantage, I conclude that the second of these claims, as set out in paragraph 1, (ii) of this determination, is effectively subsumed into his claim of unjustified dismissal in that it is alleged that the overall conduct of the SPCA was designed to remove him from his employment, hence the redundancy was not genuine. In regard to Mr Lloyd-Barker's claim that he was unjustifiably disadvantaged pertaining to being considered for the role of CEO, for the reasons set out in paragraph 15 of this determination, I have concluded that there is no sound basis for this claim and it must fail accordingly.

[53] This leaves the claims of unjustified disadvantage regarding the two warnings issued to Mr Lloyd-Barker on 15th May and 9th June 2009.

(a) The warning dated 15th May 2009

[54] It is contended by Mr Lloyd-Barker that this warning is substantively unjustified and that the SPCA failed to carry out a fair process in regard to its implementation. Mr Lloyd-Barker also submits that the SPCA failed to carry out a full and fair investigation pertaining to the allegations that led to the warning and that the outcome was predetermined. On the other hand, the SPCA submits that following a proper process, involving Mr Lloyd-Barker, which included an appropriate investigation, it properly concluded, on the basis of the information available at that time, that it was more likely than not that Mr Lloyd-Barker had spoken to the Herald reporter and provided confidential information.

[55] Having closely considered the evidence available, I conclude that while the SPCA adopted a fair and reasonable process in regard to its consideration of the media report and putting its conclusions to Mr Lloyd-Barker for his response, it failed to conduct a full and fair investigation into how the newspaper obtained the information reported. I conclude that a full and fair investigation would have involved the SPCA contacting the Herald reporter and asking relevant questions pertaining to the source of his information. While I accept that the media will usually be protective of its sources, there is no evidence that the SPCA made any attempt to contact the reporter to elicit even a “neither confirm or deny” response as to whether Mr Lloyd-Barker provided the information in question. Furthermore, it is clear that others, including the barrister who wrote to the Board on 19th March 2009, had also received the same (or similar) information to that provided to the reporter. There is no evidence that the investigation conducted by the SPCA involved contact with or an enquiry of, any of these parties. It was revealed at the investigation meeting (by Mr Trainer) that it is now accepted that it was not Mr Lloyd-Barker who provided the information in question to the Herald reporter.⁸ While the response of Mr Lloyd-Barker to the allegation of providing confidential information was less than helpful, this does not excuse the failure of the SPCA to conduct a full and fair investigation. Given the failure to do so, I must conclude that the warning issued to Mr Lloyd-Barker was unfair and hence unjustified.

[56] The requirements of s.103(1)(b) of Act are twofold: an unjustified action on the part of the employer; and the employment must be affected to the employee’s disadvantage. This principle was considered by the Court of Appeal in *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 at 997. While this case was decided under the jurisdiction of the Employment Contracts Act 1991, the Employment Relations Act 2000 provisions have been carried over from the previous regime. In *Matthes*, upon a finding of an unjustifiable action in relation to procedural fairness, the Court held that:

The only other question for the Employment Court’s decision under para (b) was whether the particular employee’s employment or a condition of the employment was affected to the employee’s disadvantage by that action. In the words of the paragraph it is whether “the employment ... is ... affected to the employee’s disadvantage by some unjustifiable action”. That necessarily involves focusing on the present employment, considering the changes that have occurred, and assessing their impact on the employee.

⁸ My understanding is that this revelation came about shortly before the day of the investigation meeting and was reluctantly provided by the reporter involved.

[57] Applying the above test to the circumstances faced by Mr Lloyd-Barker, the change that occurred was that he had a formal warning imposed upon his employment record where none existed before. Had a full investigation been conducted it is possible a warning may not have eventuated. In assessing the impact of the warning upon Mr Lloyd-Barker and whether the remedy of compensation under s.123(1)(c)(i) is appropriate, I take into account that this is not a situation where a final warning was issued and hence the employee's employment became tenuous.⁹ I have also considered whether there is any disparity in regard to how the SPCA reacted pertaining to the circumstances that existed concerning another employee, Ms Kennard, as compared with Mr Lloyd-Barker. I conclude that the circumstances were quite different and hence there is no disparity. While it has been submitted for Mr Lloyd-Barker that the combination of the two warnings he received caused him "significant anxiety and embarrassment," little evidence in support of this was presented by him. Furthermore, I have found that the warning of 9th June 2009 was justified. I also observed that Mr Lloyd-Barker has a very robust and tenacious personality. This observation is further reinforced by the evidence of his initial response to the allegation regarding the release of information to the Herald.¹⁰ While I accept that for any employee, having an unjustified warning on one's employment record will have some affect, in Mr Lloyd-Barker's case, I assess the affect as minimal and award him compensation of \$500.00.

(b) The warning dated 9th June 2009

[58] This warning related to Mr Lloyd-Barker's crusade against Mr Kerridge which ended with Mr Lloyd-Barker making a complaint to the Police. Via a letter dated 30th April 2009, Mr Lloyd-Barker was advised and instructed by Mr Trainer that:

I advise from this juncture I will take full responsibility for the matter and you are to take no further action other than passing to me any file you have on the matter together with details of the 3 other witnesses to the alleged incident. I would appreciate if this could be made available to me on Tuesday 5 May 2009.

[59] Mr Lloyd-Barker chose to ignore this advice and instruction and informed Mr Trainer on 3rd May 2009 that:

⁹ *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IUOW* (1989) ERNZ Sel Cas 575 (CA).

¹⁰ The email dated 3rd April 2009 and the telephone message left for Mr Trainer on the same day. [At paragraphs 24 to 26 of this determination.]

I note your comments, however with all due respect, you are not a trained investigator or trained in chain of evidence and I have a genuine concern that this matter will, like previous matters involving Bob be swept under the carpet. I site [sic] the PR company and Bob's supposed authorship of articles he plainly did not write and the cat carriers both of which he received no censure for. Therefore, pursuant to the Protected Disclosures Act 2000 and bearing in mind that the allegation is one of attempting to pervert the course of justice in that evidence was allegedly destroyed I have forwarded all evidence so far acquired to the Police complete with relevant contacts.

[60] Following an investigation, including a reasonably lengthy interview with Mr Lloyd-Barker, the SPCA concluded that he had:

- a. Failed to comply with a reasonable and lawful instruction;
- b. Communicated sensitive information, which he had received in his capacity as a SPCA employee and which was potentially damaging to the organisation, outside the organisation without first giving the Board the chance to deal with the matter;
- c. Deliberately attempted to undermine the Board;
- d. Deliberately attempted to undermine Mr Kerridge;
- e. Potentially undermined the Society's good reputation;
- f. Breached his contractual confidentiality obligations; and
- g. Ignored instructions to supply Mr Trainer with the names of witnesses.

[61] The SPCA concluded that the Protected Disclosures Act did not afford Mr Lloyd-Barker any protection in regard to his actions. I agree with this conclusion. I also find that a fair and reasonable process was adopted by the SPCA in regard to its investigation of the matters which led to the warning being issued, and the procedures which were adopted. I find that the warning issued to Mr Lloyd-Barker was justified in all respects. Indeed, given the conduct of Mr Lloyd-Barker, the SPCA acted most fairly and reasonably and possibly with some restraint.

(c) **The claim of unjustified dismissal**

[62] Mr Lloyd-Barker says that the termination of his employment was unjustified and that the redundancy of his two roles was a sham. The substance of Mr Lloyd-Barker's claim is that because he questioned the prudence of the decisions of the SPCA Board in regard to the appointment of Mr Kerridge as Executive Director, as well as appointing a new CEO, when the organisation was faced with difficult economic times, the SPCA then pursued an agenda to be rid of him. Mr Lloyd-Barker

also says that because he raised some concerns relating to alleged conduct on the part of Mr Kerridge, this was a further reason for the SPCA to embark upon a course of action designed to terminate his employment on the grounds of a “*false redundancy*.”

[63] Unfortunately, the evidence is overwhelmingly clear that Mr Lloyd-Barker set himself firmly on a course of conduct that was inevitably going to bring him into conflict with the senior management of the SPCA. While the initial raising of his concerns appears to have been genuine, and he had some support from others within the SPCA community, it seems that Mr Lloyd-Barker subsequently moved from a position of raising genuine concerns relating to the financial welfare of the SPCA as an organisation, to what can only be seen as an erroneous personal crusade against senior SPCA officers, namely Mr Trainer and more particularly, Mr Kerridge. Accordingly, his conduct left the management of the SPCA with no choice but to implement disciplinary action against Mr Lloyd-Barker. But, I find that this must be seen in a different context to the organisational review conducted by Mr Halliday shortly after his appointment as the new CEO. Ironically, Mr Halliday quite quickly arrived at a similar conclusion to that reached by Mr Lloyd-Barker on 24th November 2008, when he proposed that: “*Would it not be a better option to amalgamate the CEO and GM roles, or indeed dissolve the CEO role completely?*” - with the prediction that a saving of more than \$100,000 would be achieved. As we have seen, Mr Halliday reached the conclusion that the removal of the roles held by Mr Lloyd-Barker would result in similar efficiencies and savings.

[64] Given the totality and timing of the circumstances that existed at the time when Mr Halliday made his decision, one can understand why Mr Lloyd-Barker might believe that his removal on the grounds of redundancy was engineered. However, I find that the disciplinary action imposed upon Mr Lloyd-Barker and his redundancy were, more probably than not, two quite distinct and separate courses of action adopted by the SPCA. I find that the redundancy of Mr Lloyd-Barker was fair and reasonable and an action that the SPCA was entitled to take. As was held by the Employment Court in *Simpsons Farms Ltd v Aberhart* [2006] 825:

So long as the employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant, is for the employer to make and not for the Authority or the Court, even under s103A.

[65] Mr Lloyd-Barker believes that his employer did act “out of ulterior motives.” He points to the fact that despite the SPCA engaging in a reorganisation, his positions were the only roles to be made redundant. Counter to this, the SPCA submits that other staff were also affected by the reorganisation but they were prepared to accept a changed position, hence avoiding redundancy. I have also been referred to the affidavit of Ms Julia Thomas that was provided after the investigation meeting. But, as the parties appeared to accept at the time, in the absence of evidence of a first hand and/or more substantial nature, I am not able to give any weight to the content of the affidavit.

[66] In the round, I find that the redundancy of Mr Lloyd-Barker was genuine. I also find that the process adopted, including appropriate consultation with Mr Lloyd-Barker and seeking his input and feedback, was fair and reasonable. It follows that I also find that there has not been a breach of the good faith provisions of s.4 of the Act.

[67] There is one final matter. This is whether Mr Lloyd-Barker could have or should have been redeployed into the role of Inspector and Inspectorate Team Leader. While Mr Lloyd-Barker does not appear to be pursuing with any real commitment that this was an option that should have been made available to him, in any event, I conclude that apart from Mr Lloyd-Barker not having a Certificate in Animal Management, the role is infinitely of a lesser status in comparison to the previous posts held by him. Furthermore, I cannot help but conclude that given how Mr Lloyd-Barker had so vigorously set himself against the management of the SPCA, it would most probably have been impossible for him to be absorbed back into any other role within the organisation without further conflict and detriment to all concerned.

Determination

[68] In summary, for the reasons set out above, my findings are as follows:

1. Mr Lloyd-Barker does not have a personal grievance relating to his unsuccessful application for the position of CEO with the SPCA.
2. Mr Lloyd-Barker has a personal grievance in regard to the warning dated 15th May 2009. This is because the SPCA failed to conduct a full and fair investigation into the circumstances pertaining to the

given reasons for issuing the warning, hence the warning is unjustified. Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, the SPCA is ordered to pay to Mr Lloyd-Barker the sum of \$500.00 as compensation.

3. Mr Lloyd-Barker does not have a personal grievance in relation to the warning issued to him on 9th June 2009.
4. The dismissal of Mr Lloyd-Barker on the ground of redundancy was justified, being an action that was fair and reasonable in the circumstances. Mr Lloyd-Barker does not have a personal grievance.

Costs

[69] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority