

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 21
5445331

BETWEEN JANET ANDERSON
 Applicant

A N D THE BOARD OF TRUSTEES OF
 HALSWELL RESIDENTIAL
 COLLEGE
 Respondent

Member of Authority: David Appleton

Representatives: Joe Tonner, Advocate for Applicant
 Penny Shaw, Counsel for Respondent

Investigation Meeting: 27 and 28 November 2014 and 19 February 2015 at
 Christchurch

Submissions Received: 19 February 2015 from Applicant and Respondent

Date of Determination: 23 February 2015

DETERMINATION OF THE AUTHORITY

- A. The Applicant's dismissal for redundancy was substantively justified but aspects of the procedure adopted were unjustified, which caused Ms Anderson an unjustified disadvantage in her employment.**
- B. The Applicant is awarded remedies under s123(1)(c)(i) of the Employment Relations Act 2000 in relation to that disadvantage.**
- C. Costs are reserved.**

Prohibition from publication order

[1] During the course of the proceedings, documents were produced and written and oral evidence adduced which named, or otherwise identified a number of the students attending the respondent College at the material time. For reasons of confidentiality, I prohibit from publication any information that may identify these students.

[2] Evidence was also given in relation to a number of staff members who were appointed to positions in the new structure. These staff members were not present during the investigation meeting and took no part in the proceedings and it is not necessary for their identities to be published. I therefore prohibit from publication any information that may lead to the identity of these staff members.

[3] Finally, written evidence was also provided by Ms Anderson's medical practitioner which, apart from the information set out in this determination, is also subject to this prohibition from publication.

Employment relationship problem

[4] Ms Anderson raises a personal grievance that she was unjustifiably dismissed with effect from 28 July 2013 and that the respondent breached the terms of the collective employment agreement under which she was employed by failing to follow the restructuring and surplus staffing provisions set out in that agreement.

[5] The respondent denies that Ms Anderson was unjustifiably dismissed and that it breached the terms of the collective employment agreement.

Background and brief account of the events leading to the dismissal

[6] Janine Harrington, the Principal of the college which is the subject of Ms Anderson's claims (the College), stated in her evidence that the College provides special education in a residential setting (provided in villas) for *students who need significant curriculum adaptation due to an underlying intellectual impairment and whose educational, social and emotion needs, including behaviour, cannot be met in their home environment*. The majority of the students are boys, and at the material time, the College catered solely for boys.

[7] Ms Anderson was employed as an Assistant Residential Social Worker (ARSW) for seven of her nine years of employment with the respondent. She was employed pursuant to the terms of the Special Residential Schools' Collective Agreement (the collective agreement) between the Secretary for Education and the New Zealand Public Service Association Inc (the PSA).

[8] Prior to the restructuring which led to Ms Anderson's dismissal, the student roll at the College was, at its peak, around 90 boys, and had dropped to around 60 boys shortly before Ms Anderson's dismissal. Ms Harrington gave evidence that, in May 2012, the Ministry of Education (the Ministry) proposed to close New Zealand's four residential special schools, which included the College. Instead of residential schools the Ministry proposed an Intensive Wraparound Service (IWS) where students were to stay in their communities and mainstream schools but supported by specialist staff.

[9] Following submissions on the proposal, in August 2012, the Ministry decided to close two of the four residential special schools and to reduce the funding to the remaining two, one of which was the College. The Ministry provided the College with funding calculated at a set amount per student based on a notional roll. The Ministry's IWS was also to replace the College's national outreach service and its learning and behaviour support programme.

[10] In January 2013 the Ministry advised the College that, given the change in focus reflected by the IWS the actual roll for 2013 would not exceed 32. As a result, the College's funding was to be cut by around two-thirds.

[11] In February 2013 the College set up a number of focus groups with stakeholders, including staff and unions to explore ideas of how it could meet the challenges the College was facing. The College entered into a contract with a specialist adviser to assist it to accommodate the changes that the College was facing. That adviser, in turn, recommended the appointment of an HR specialist, Leanne Crozier. Ms Crozier attended the group meetings as a facilitator.

[12] Ms Harrington's evidence was that the Board of Trustees of the College, in responding to the IWS model, proposed to enhance the learning available to students attending the College by offering a more extensive life skills education programme with more formalised programmes of self-care, social skills and living skills. In order

to achieve this, Ms Harrington and her advisers, under the guidance of the chairman of the Board of Trustees, developed a proposed new structure for the College, including a new approach in the residential area.

[13] In April 2013 a proposal was put to all the staff, including Ms Anderson, to prepare them for the significant changes that were anticipated needed to be made. In relation to the residential area, where Ms Anderson worked, this included a proposal to change significantly the way that residential care was delivered.

[14] The Authority saw a copy of the letter that Ms Harrington sent to Ms Anderson dated 4 April 2013, which included a detailed document setting out all of the proposed changes that were to take place.

[15] The document proposed that all residential social workers and all assistant residential social workers positions would be disestablished and that, amongst other positions, six Independent Education Plan (IEP) coordinators and six Youth Worker positions would be created.

[16] Consultation took place between the College and the staff, including the PSA, in relation to the proposals contained in the proposal document and, in respect of the residential area, the proposed changes were confirmed in May 2013. The Authority saw a copy of a letter from Ms Harrington to Ms Anderson dated 6 May 2013 which confirmed the disestablishment of the ARSW role. The letter went on to say that Ms Harrington wished to meet with Ms Anderson to discuss her options under the new structure. It stated that the options were as follows:

If you are interested, you will be considered for the new roles of IEP Co-ordinator and/or Youth Worker (copies of the position descriptions are attached to this letter – please note there have been slight amendments made to these documents as a result of the consultation process).

If you do not want to be considered for these new roles or are not successful in your application for either of these roles, you will be entitled to severance compensation in accordance with your Collective Employment Agreement.

[17] Ms Anderson had already emailed Ms Harrington on 15 April 2013 indicating that she wanted to work with youth/young people and that she would hopefully be successful in gaining a position, such as youth worker. She also stated that, if for

whatever reason she was unsuccessful, she would like the school to consider her in the role of a Residential Assistant.

[18] As part of the consultation process, the PSA were invited to give their views on the selection criteria that were to be used for selecting, amongst other things, the candidates for the six new Youth Worker roles.

[19] The respondent eventually decided on five equally weighted criteria to assess candidates by way of interview for the six Youth Worker roles. These criteria were as follows:

*Physical restraints;
Effectively de-escalate a situation;
Substantial experience or a relevant tertiary qualification;
Planning and implementation of recreational activities; and
Written language skills.*

[20] Each candidate had to score a minimum of 6 out of 10 in each criterion in order to be eligible for the role. This requirement was made clear to the PSA by the respondent prior to the interviews taking place. Due to the number of voluntary redundancies, the College had more vacancies than internal candidates available to fill them by the time the interviews commenced.

[21] Ms Anderson was interviewed for the position on 13 June 2013. She chose not to have a support person with her. The interview panel consisted of Ms Crozier, Jon Purdue, Associate Principal Residential (at the time of the interview, Villa Manager) and Timoti Christensen (the Kaiwhakahaere). The Authority saw typed written notes of this interview made by Ms Crozier.

[22] Amongst other questions, Ms Anderson was asked to talk the panel through a time when she had struggled to manage the behaviour of one of the students, to give an example of how she had effectively de-escalated a situation with a student in accordance with Safe Crisis Management procedures, and to give examples of how she had planned and implemented recreational activities for individual students or student groups that benefited their learning and development goals.

[23] As a result of this interview Ms Crozier, Mr Purdue and Mr Christensen scored Ms Anderson 6 out of 10 for physical restraints and substantial experience, and 7 out of 10 for her written language skills. However, she was scored 5 out of 10 for

effectively de-escalating a situation and 4.5 out of 10 for planning and implementation of recreational activities.

[24] As to how they reached the specific scores of 5 and 4.5 out of 10 for de-escalation and planning of activities respectively, Ms Crozier said that she believed that each panel member had had a score in mind but that they had discussed whether or not Ms Anderson had succeeded or fell short of each criterion and, if they decided that she fell short, they would then discuss by how much. She believed that, with respect to the planning of activities, Ms Anderson's answers had indicated a significant deficit.

[25] It was the evidence of Ms Harrington that, although she was not at the interview of Ms Anderson, she accepted the advice of Ms Crozier that being scored below 6 out of 10 in respect of any criterion was regarded by the interview panel as that person being *untrainable* in respect of that criterion.

[26] Ms Anderson was given feedback about her scores by Ms Crozier and was invited to attend a second interview, on 25 June 2013. She was asked specifically to give further examples of de-escalation and of activities that she had planned. The notes of the interview of 25 June 2013 state the following:

De escalation

Escalation situation in the weekend – stress and shouted and swore at a student. Had the day off after this because recognised that was too stressed and unwell to be effective.

Reflection on escalation of situation with autistic biter

Activities

Hasn't had the opportunity to be involved in planning and implementation of activities. Was acting up as a RSW but was not supported so did not feel that was confident enough to develop in the role.

[27] It was Ms Anderson's evidence that she had spent two evenings preparing for this second interview but, on the day of the interview, she had left her notes at home. She says that she told the panel this but they did not offer to give her the opportunity to go back and retrieve them. She said that, again, she did not have a support person with her as a matter of choice.

[28] Ms Anderson also said in evidence that, when she was talking about her experience of activity planning, she believed that the panel was talking about what are

called Level 3 activities. She explained that a Level 3 activity would be taking students away from the College overnight, possibly for several nights, and doing significant activities such as camping. In other words, Level 3 activities required significant planning and risk management assessment. She accepted that she had never been involved in such planning.

[29] Ms Anderson's evidence was that she believed that she was being asked about Level 3 activity planning because the job description of the Youth Worker role was, to her, essentially the same as the role she had been carrying out as ARSW. She believed that the interviewers should have known that she had been involved in planning Level 1 and Level 2 activities as part of that ARSW role and so could have only been asking about Level 3 activities, which presumably would have been rarer.

[30] With respect to the example that she gave of swearing at a boy, this had happened on 22 June 2013, after the first interview but before the second interview. Essentially, Ms Anderson had been dealing with a student with a very troubled background who had a history of absconding. She said that he was being troublesome and that she was worried that, in the mood that he was in, the planned trip to go swimming would result in him being difficult and absconding again.

[31] Therefore, Ms Anderson chose to swear at the boy (saying *get in the f***ing car* and *I am sick of your f***ing bullsh*t*). She said that she did this because she believed that speaking *his language* would get through to him. She said that it did work and that it caused a de-escalation of the situation. Unfortunately, another boy who was present took objection to Ms Anderson swearing and he instead chose not to take part in the swimming trip.

[32] Ms Anderson says that she gave this as an example of a successful de-escalation. Ms Harrington's evidence, however, was that swearing at a student is never acceptable and that in the particular case that Ms Anderson gave, it proved to escalate (or worsen) the situation because of the second student taking offence and refusing to take part in the activity. Ms Harrington said that, by the time this incident came to her attention, on 26 June 2013, it had already been decided that Ms Anderson was not suitable for the Youth Worker role, and that she would therefore be leaving by way of redundancy. If that had not been the case, she would have instituted a disciplinary investigation into the event.

[33] Evidence was given by both Ms Anderson and her husband, David Anderson, who had also worked in the College as an ARSW until he had left on voluntary redundancy, that virtually every staff member occasionally swore at boys, sometimes accidentally out of frustration, and sometimes deliberately in order to *speaK their own language*. On this particular point, I accept the evidence of Ms Harrington and Mr Purdue that staff swearing at boys used to occur in the past, and was not taken seriously, but that the practice was no longer regarded as acceptable by June 2013.

[34] Mr Anderson was advised that her application had been unsuccessful on 26 June 2013. She was paid up to 28 July 2013, part of which was taken as annual leave. She was also paid a redundancy compensation payment in the gross sum of \$19,414.19. Ms Anderson raised concerns about her dismissal and the process followed by email within 24 hours of the outcome being communicated to her. I accept that Ms Anderson raised a valid personal grievance with her employer within the statutory timeframe.

The issues

[35] Ms Anderson does not argue that it was not necessary for the respondent to implement a major restructure of the College following the government's introduction of the IWS and major changes to its funding. She also does not argue that there was insufficient consultation about the proposals. It appears that she also does not argue that it was unnecessary to disestablish the ARSW roles.

[36] However, Ms Anderson asserts that she should have been appointed as a Youth Worker because her ARSW role was substantially similar to the Youth Worker role, and that she had the skills and experience to carry out that role. She also asserts that the terms of the collective agreement required the respondent to confirm her in the new Youth Worker role. It is therefore necessary to consider:

- a. Whether the ARSW role and the Youth Worker role were substantially similar;
- b. If they were substantially similar, whether the respondent breached the terms of the collective agreement by failing to reconfirm Ms Anderson in the role; and

- c. Whether the respondent breached other terms of the restructuring and surplus staffing provisions of the collective agreement.

[37] Even if the ARSW role and the Youth Worker role were not substantially similar, Ms Anderson also argues that the consultation and assessment process was significantly flawed. This requires the Authority to address the following issues:

- a. Whether the five selection criteria for the Youth Worker role were appropriate;
- b. Whether the respondent was correct to assess Ms Anderson as falling short of the minimum criteria in respect of her de-escalation skills and her ability to plan activities;
- c. Whether another staff member had been given preferential treatment by being coached by Mr Purdue;
- d. Whether the respondent failed to properly consider Ms Anderson's job performance as part of the selection process;
- e. Whether the respondent should have allowed or encouraged Ms Anderson to retrieve her forgotten notes;
- f. Whether Ms Anderson should have been told her specific scores; and
- g. Whether the respondent failing to consider whether Ms Anderson could have been trained to address her perceived shortcomings rendered the dismissal unjustified.

[38] Finally, if the dismissal was unjustified, what remedies should be awarded?

The principal law

[39] In determining whether Ms Anderson's dismissal was justified, it is necessary to take into apply two key provisions of the Employment Relations Act 2000 (the Act). These are ss 4 and 103A, which provide as follows;

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

- (a) must deal with each other in good faith; and*
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) to mislead or deceive each other; or*
 - (ii) that is likely to mislead or deceive each other.*

(1A) The duty of good faith in subsection (1)—

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) an opportunity to comment on the information to their employer before the decision is made.*

(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

*(1C) For the purpose of subsection (1B), **good reason** includes—*

- (a) complying with statutory requirements to maintain confidentiality;*
- (b) protecting the privacy of natural persons;*
- (c) protecting the commercial position of an employer from being unreasonably prejudiced*

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

Were the ARSW and the Youth Worker roles substantially similar?

[40] Evidence was heard from Maree Preston, who used to be an ARSW but who applied for both Youth Worker and IEP Co-ordinator roles. She was successful in both processes and decided to take on the IEP Co-Ordinator role.

[41] With respect to the Youth Worker role, Ms Preston believed that it was necessary to have specific recreational experience in activities such as canoeing and abseiling. She said that, in her role as ARSW, the planning of activities had been part of her role but that the Residential Social Worker (RSW) generally directed that activity. With respect to de-escalation, she accepted that it was necessary for ARSWs to be able to de-escalate situations but that, in the old structure, there was more reliance on RSWs.

[42] Evidence was heard from Mr Timothy Richardson, who is now a Villa Manager, but who had previously worked as an IEP Coordinator, a RSW and an ARSW. His evidence was that, although the College roll had reduced significantly, the College now had significantly more students displaying very challenging or complex behavioural issues. Whilst there may have been one such student per villa (out of a total of four villas) under the old structure, there were now four or five times as many.

[43] Mr Richardson said that, under the old structure, whereas an ARSW could have relied on other staff to have supported them, there were now fewer staff and more children with high needs. Therefore, it was much more likely now that staff

would have to handle more than one student at a time behaving in a very challenging manner without support from another staff member.

[44] Mr Richardson said that the two ARSWs who were appointed to Youth Worker roles have had a steeper learning curve and a higher challenge to meet and they need to be very adaptable and open to change. When asked whether they had been trained to meet these extra needs, Mr Richardson said that he believed that they had a skill set that made them more likely to learn on the job. Mr Richardson also explained that the new Youth Worker role was much more self-directed than the ARSW role, and that only a small part of the Youth Worker's job was directed by the IEP Coordinator.

[45] The evidence of Ms Harrington was that the two roles were significantly different because of the greater importance that the Youth Worker role played in developing activities that linked with the particular needs of each student. It was not just about recreation and entertainment, as had been the case prior to the restructure.

[46] Mr Kenneth Joblin, a residential curriculum co-ordinator and villa manager, who has worked for the College since 1987, also gave evidence that the roles were significantly different, primarily in terms of the requirements upon Youth Workers to be able to deal with a greater incidence of volatility and reactive behaviour from the students.

[47] In addition to the evidence of these witnesses, the Authority also had before it copies of position descriptions for the ARSW role and for the Youth Worker role. The ARSW position description refers to one of the key responsibilities as

To assist in the planning and implementation of stimulating, varied and positive individual and group recreational programmes as appropriate to the students' needs.

[48] A key responsibility of the Youth Worker role was expressed as follows:

In alignment with the broader residential curriculum developed by the Villa manager/Residential Curriculum Coordinator, develops a comprehensive term by term plan for all recreational activities (including the resources required to deliver these activities and the goals to be achieved) for review by the Villa Manager/Residential Curriculum Coordinator. This plan will provide a variety of recreational activities and options that all students will be able to participate in and will encourage their own development in accordance with the overriding principles and values of HRC.

[49] I believe that the evidence of Ms Harrington, Mr Richardson and Mr Joblin about how the two roles compare is more persuasive than that of Ms Anderson, as she has never worked in the Youth Worker role. It is also more persuasive than that presented by comparing the two position descriptions, as the ARSW position description is less detailed than that for the Youth Worker role, is drafted quite differently and is also, it appears, somewhat out of date.

[50] Taking into account the evidence of Ms Harrington and Mr Richardson, I am satisfied that the role of ARSW is sufficiently different from the role of Youth Worker to justify treating them as distinct roles. This is because, primarily, of the key focus in the Youth Worker role on proactively designing activities which addressed the specific goals set down for each student. This was not the key focus of the ARSW role. In addition, the ARSW role required much less stand-alone responsibility, and was specifically an assistant role to the RSW role. Even though the salaries of the ARSW and Youth Worker roles are the same, I am satisfied that the Youth Worker role is significantly more demanding.

Did the respondent breach the terms of the collective agreement by failing to reconfirm Ms Anderson in the role?

[51] Clauses 7.1 to 7.1.5 of the collective agreement provide as follows:

7.1 Restructuring and Surplus Staffing Provisions

The parties recognise the serious consequences that the loss of permanent employment can have on employees and propose to minimise this as far as possible by using the provisions of this agreement to keep as many employees as possible in suitable employment.

7.1.1 Prior to the formal commencement of any review which may affect PSA members in a School, the School will advise the PSA of the review and will provide the PSA with the opportunity to be involved in the review. The aim of this process is to explore all options before any final decisions are made by the School.

7.1.2 When, as a result of the review, the School requires a reduction in the number of employees, or employees can no longer be employed in their current position, the process for managing the change(s) follows:

*7.1.3 In consultation with the PSA and affected members, **reconfirmation** may be offered, subject to the following criteria:*

- (a) *The new job description is the same, or very nearly the same as the employee's current job description;*
- (b) *The salary for the new position is the same;*
- (c) *The new position has terms and conditions of employment, including career prospects, which are no less favourable;*
- (d) *The new position is in the same location, or within reasonable commuting distance.*

Where the above criteria are met and there is only one clear candidate for reconfirmation, that employee is to be reconfirmed. Where there is more than one clear candidate, the School will consult with the PSA to reach agreement regarding options for filling the available positions.

Where there are employees who meet the criteria for reconfirmation, those employees shall not have access to other options in this section (except for leave without pay) until all positions available for reconfirmation are filled.

*7.1.4 Following reconfirmation, the School may, in consultation with the PSA and individual employees, offer **reassignment** to employees who have not been reconfirmed. Reassignment means placement in a position similar to that previously occupied, which the employee is prepared to accept. Where a reassignment is to a job with a lower salary, the employee's salary can be preserved by paying a lump sum based on the loss of basic salary over the next two years.*

7.1.5 Any affected staff who have not been reconfirmed or reassigned into a position will be declared surplus. The School will advise the PSA of the names of surplus employees and the date by which the surplus needs to be discharged.

The School will consult with the PSA and individual employees to see if options other than severance are appropriate; these might include leave without pay, retraining or redeployment elsewhere in the state sector.

[52] Addressing clause 7.1.3, it is clear that all of the criteria at sub clauses (a) to (d) need to be met before reconfirmation may be offered. This is because of the words that immediately follow sub clause (d). Whilst sub clause (b), (c) and (d) are satisfied, sub clause (a) is not, as the job description for the Youth Worker role is not

the same, or very nearly the same as Ms Anderson's ARSW job description. In comparing the two, I believe that it is not sufficient to compare the two documents comprising the position descriptions, but that an enquiry into the content of the actual roles is necessary.

[53] In light of this, I do not believe that the terms of clause 7.1.3 of the collective agreement, which dealt with reconfirmation, are relevant to this particular situation faced by Ms Anderson. Therefore, I do not accept that the respondent breached the terms of clause 7.1.3 of the collective agreement.

Did the respondent breach other terms of the restructuring and surplus staffing provisions of the collective agreement?

[54] It is accepted law that an employer who is contemplating the disestablishment of an employee's post must consider redeployment as part of a fair process before dismissing that employee. This requirement is essentially enshrined into the collective agreement by way of clause 7.1.4. I accept the evidence of the respondent, which was not challenged by Ms Anderson, that there were no other positions available at the time of her dismissal into which Ms Anderson could have been redeployed. Specifically, there were no Residential Assistant positions which Ms Anderson said that she would be interested in if she was not successful in her application for a Youth Worker role. Furthermore, as I find below, redeployment into the Youth Worker role was not appropriate.

[55] I address below, under a separate heading, the issue of retraining. I do not believe that leave without pay would have been relevant for Ms Anderson's situation, as this option appears to be appropriate when a position may arise in the future, which was not the case at the time of Ms Anderson's dismissal.

Were the five selection criteria for the Youth Worker role appropriate?

[56] Having heard the evidence of Ms Harrington and Ms Crozier, I accept that the five criteria against which Ms Anderson was assessed were appropriate. None were inherently unfair and each reflected a specific requirement of the Youth Worker role. I also accept that the weighting given to each criterion (20%) was appropriate, as each criterion was equally important.

Was the respondent correct to assess Ms Anderson as falling short of the minimum criteria in respect of her de-escalation skills and her ability to plan activities?

De-escalation skills

[57] The respondent accepts that all staff who had contact with students prior to the restructure had to have de-escalation skills, because the students were unpredictable in their behaviour, some particularly so. However, the evidence of most of the witnesses for the respondent was in agreement; namely, that the respondent knew at the time of the restructure that there was going to be a greater concentration of students with particularly complex and challenging behaviours, and that there would be fewer staff to assist if a problem arose. More than one witness said that the College would be accommodating some of the most difficult children in New Zealand.

[58] When asked how the panel had decided on the scores for Ms Anderson in relation to de-escalation, Ms Crozier said that Ms Anderson had given examples that had demonstrated that she had actually caused behaviours which needed de-escalating. Ms Crozier could not recall the exact examples given and her notes of that part of the interview did not assist her in explaining why the examples led the panel to believe that Ms Anderson had caused the behaviours that needed de-escalating. Mr Purdue's evidence was essentially the same. However, I note that the interview notes state *reflection of escalation of situation with autistic biter*. Mr Joblin's evidence referred to this incident, and he attributed the outcome (in which Ms Anderson was bitten) as being due to Ms Anderson escalating a situation with a challenging student.

[59] It is my finding that, on the basis of the information which Ms Anderson provided in the interviews, the respondent's conclusion that Ms Anderson did not have a requisite level of skill to be relied upon to deescalate difficult situations without assistance, was not unreasonable.

[60] In addition, although I find below that the respondent deprived itself of material information that was available to it by not seeking the detailed input of Ms Anderson's line managers prior to the interviews taking place, if it had done so, it would reasonably have reached the same conclusion; namely that Ms Anderson's

level of skills in de-escalation were not sufficiently developed to have enabled her to have safely undertaken the new Youth Worker role. I expand on this finding below.

Ability to plan activities

[61] It is of particular concern that Ms Anderson fundamentally misunderstood the nature of the question being asked of her, when she believed that she was being asked about the planning of level 3 activities only. When asked why Ms Anderson may have believed that she was being asked to comment on Level 3 activities, Ms Crozier said that she did not know because she herself had never heard of the different levels of activity, and the interview panel had certainly not spoken in those terms. Mr Purdue and Ms Crozier both confirmed that each candidate had been asked the same questions in the same way. Ms Crozier also pointed out that, although the candidates were not given the exact wording of the questions in advance, the questions were very closely based upon information given to each candidate in advance of the interviews. This I can confirm from the documentary evidence put before the Authority. This information made no mention of level 3 activities and could not reasonably be taken to be referring solely to that level of activity.

[62] Therefore, I believe that Ms Anderson was labouring under a misapprehension which arose out of certain assumptions she was making, but which were not objectively justified. The respondent's conduct of the interviews cannot be blamed for this error on the part of Ms Anderson.

[63] With respect to the examples that Ms Anderson gave during the interviews in relation to the planning of recreational activities, Ms Crozier said that Ms Anderson spoke of having taken students on activities but was not able to show how she had planned them and specifically linked the activities to the particular goals that had been set for the particular student. Mr Purdue echoed this view of Ms Anderson's answers.

[64] Mr Purdue said that he had been surprised at the answers given by Ms Anderson with respect to activity planning as he had believed that she would have had a better grasp of what the panel was looking for in terms of planning activities that met the specific needs of the students. He had been surprised that Ms Anderson had not taken advantage of the second interview to give better examples. One of the other candidates who had subsequently been appointed as Youth Worker had taken

advantage of the second interview to convince the panel that she had the skills to carry out the Youth Worker role.

[65] Again, I am satisfied that the panel were not objectively unreasonable in assessing Ms Anderson's capability as falling short in respect of activity planning, on the basis of her answers given at interview. However, I find below that the respondent did not avail itself of all available evidence of Ms Anderson's capabilities and experience, because it failed to interview her managers, and it over relied upon Ms Anderson's interview answers. Had it not done so, Ms Anderson's misapprehension about what was being asked of her regarding the planning of activities may not have disadvantaged her so much.

Did another staff member receive preferential treatment by being coached by Mr Purdue?

[66] This allegation arose from evidence of Mr Anderson who says that he witnessed Ms Preston meet with Mr Purdue before the interviews, and that Ms Preston had said afterwards that she felt much better about the forthcoming interviews. Ms Preston said in evidence that she could not remember getting coaching from Mr Purdue, although she did remember having a meeting with him. Mr Purdue also said he could not recall meeting with Ms Preston to give her coaching.

[67] I accept Mr Anderson's evidence (which was detailed and convincing) that he witnessed the meeting between Ms Preston and Mr Purdue and that Ms Preston later said she had found it helpful in relation to preparation for her interviews. However, I do not accept that this was evidence that Ms Preston was given preferential treatment which was not available to Ms Anderson. I believe that this was simply a matter of Ms Preston asking for help in her preparation for the interview, and that, if Ms Anderson had asked for the same, she would have received it.

Did the respondent fail to properly consider Ms Anderson's job performance as part of the selection process?

[68] Ms Crozier's evidence was that, when they were working with the PSA in consultation in relation to setting the selection criteria, they initially proposed to have more criteria, including assessing past performance during employment. However, when it became clear that the process would not be a competitive one (in the sense that staff would not be competing with one another for fewer roles) they decided that

it was no longer necessary to take into account previous performance. Ms Crozier said that the reason for this was that they made the assumption that all the staff being interviewed for the new roles met a basic level of competence in their current roles.

[69] Ms Crozier said that, despite this, after completing the first interview, the panel met with Ms Anderson's direct line manager at the time, Mr Stowers, and Mr Joblin, who held the role of the senior social worker at the time. However, Ms Crozier could not recall the details of the meeting, although she said that neither Mr Stowers nor Mr Joblin said anything that changed their view of Ms Anderson's suitability for the Youth Worker role. In other words, she said, they agreed with the panel's findings.

[70] Ms Crozier also said that the panel looked at Ms Anderson's personnel file as part of the assessment process, although she could not remember exactly what was reviewed. In particular, she could not recall whether the panel had specifically looked at copies of performance reviews on the file although she imagined that they would have done. It is to be noted that very few documents recording Ms Anderson's performance reviews were able to be located by the respondent for the purposes of the Authority's investigation. This suggests that few were available on Ms Anderson's file for the panel to peruse.

[71] Evidence was also heard from Mr Purdue, who had worked closely with Ms Anderson and other ARSWs when he was a shift and villa manager. Mr Purdue said that, when he sat on the interview panel, he tried to base his decisions on the interview answers rather than on any *preconceived ideas* he might have had from working with Ms Anderson in the past. Mr Purdue also could not recall any detail about the meeting that the panel had after Ms Anderson's interview with Mr Stowers and Mr Joblin (which he believed had happened after the second interview). He recalls that they got feedback from them and that it supported their decision that Ms Anderson was not suitable to be appointed to the Youth Worker role.

[72] I also heard evidence from Mr Stowers and Mr Joblin during the reconvened investigation meeting on 19 February 2015. Mr Stowers could not recall much detail about the meeting he had with Ms Crozier and Mr Purdue, but said that he did not know why he had been asked to attend it, or what his role had been in the meeting, and that he was not asked any questions or did not give any answers. He said in

evidence, about the meeting, *they said, Jan would not be selected for the Youth Worker role. That was that.*

[73] Mr Joblin's memory of the meeting was a little better. He said that there were two reasons for his attendance. The first was a matter of courtesy, so he would know who he would be working with and who he would not be working with, in the new structure. The second was that he was being asked to validate, as a manager, who would be appointed and who would not. He also said that a number of staff members were mentioned in the meeting, but that they did not talk about these staff members in any detail. He said he had not been surprised to hear that Ms Anderson had not scored well on de-escalation, although he had no knowledge of her experience of planning programmes for the students.

[74] The process adopted by the respondent in assessing Ms Anderson's suitability for the Youth Worker role placed a strong emphasis on her performance at the interviews as opposed to taking into account her work performance in her previous role and getting detailed feedback from her managers and supervisors as to their views on her suitability of the Youth Worker role. Whilst I accept that the interview panel spoke to Ms Anderson's managers after either the first or the second interview (the evidence is not consistent on this point), it very much appears that this was not an in-depth assessment but a somewhat cursory exercise. No notes were taken of the meeting, save for the following summary provided in Ms Crozier's interview notes:

Following the first interview on 13 June, the interview panel considered that Jan had not provided sufficient evidence of her capability in de-escalating situations and in her experience in planning and implementing activities to support the learning and development goals of the students. The Interview Panel considered Jan's personnel file and consulted with her managers, Sammy Stowers and Ken Joblin for their thoughts on these two areas of concern.

The feedback from the managers and the personnel file supported what Jan had discussed during her interview and the thoughts of the interview panel. No information was provided that had not already been discussed with Jan in the context of her work.

[75] This summary appears to be a post-hoc account.

[76] The duty of good faith in s.4(1A) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things,

responsive and communicative. However, there is no cogent evidence to suggest that the respondent seriously explored ways of enabling Ms Anderson to retain her employment by carrying out a thorough assessment with her line managers of her skill set.

[77] The approach taken by the respondent meant that significant weight was placed on Ms Anderson's performance at interview, with only a cursory review of her day to day performance during her employment. While this approach is appropriate when one is interviewing external candidates for a position in a traditional recruitment exercise, the respondent had available to it a wealth of information based on nine years of employment in respect of Ms Anderson's skill set which it effectively ignored.

[78] If a thorough review of Ms Anderson's relevant day to day performance had occurred before the interviews had been held, it is likely to have provided the panel with much more information than Ms Anderson was able to give during her interviews, which in turn would have assisted it in its assessment of her for the Youth Worker role. This exercise would also have given the panel much more specific material with which to question Ms Anderson, and so would have put less weight on Ms Anderson's interview performance and memory, where she was asked to provide examples of her own performance, and capacity to understand the questions, whilst under stress.

[79] In my view, failing to explore in detail with Ms Anderson's managers her relevant skills and attributes and potential suitability for the Youth worker role prior to any interviews took place was not the action that a fair and reasonable employer could have taken in all the circumstances at the time the restructure was taking place. I find that this failing caused Ms Anderson a disadvantage in her employment and that it was unjustified.

Should the respondent have allowed or encouraged Ms Anderson to retrieve her forgotten notes?

[80] Ms Crozier said she was not sure why she had not given Ms Anderson the opportunity to go home and retrieve her notes. This failure added to the difficulty created for Ms Anderson. Given that this second interview was effectively Ms Anderson's last chance to redeem her performance at the first interview, and save

herself from being dismissed, I believe that the failure to allow or encourage Ms Anderson to retrieve her notes was not the act that a fair and reasonable employer could have done in all the circumstances. I find that this failing caused Ms Anderson a disadvantage in her employment and that it was unjustified.

Should Ms Anderson been told her specific scores?

[81] Ms Anderson was not told what scores she had achieved before the second interview. Ms Crozier said that 4.5 out of 10 for planning of activities demonstrated a significant deficit, yet she did not advise Ms Anderson of this score. If Ms Anderson had been advised of this score, she may have realised how serious her position was, and brought a support person with her, or insisted on retrieving her notes. In any event, the score was a significant piece of relevant information which Ms Anderson was entitled to know prior to the second interview. Failing to give her this information was not the action that a fair and reasonable employer could have done in all the circumstances at the time. I find that this failing caused Ms Anderson a disadvantage in her employment and that it was unjustified.

Did the respondent failing to consider whether Ms Anderson could have been trained to address her perceived shortcomings render the dismissal unjustified?

[82] It was the evidence of Ms Crozier and Mr Purdue that the panel did not give thought to whether the short comings that they perceived in Ms Anderson's skill set could have been remedied by training, prior to deciding to reject her for a Youth Worker role. This was because anyone scoring below 6/10 in any of the criteria was deemed to be *untrainable* (to use Ms Harrington's word).

[83] When asked why the panel had set 6 out of 10 as a minimum score that needed to be achieved in each criterion, Ms Crozier said that she took into account the fact that the environment in which the staff would be working was going to be changing, so that there would be more demanding students behaviourally but with less resource. She also took into account the fact that the changing philosophy of the College was to create an atmosphere of 24/7 learning. Therefore, the roles needed a higher level of capability and setting a minimum score of 6 out of 10 seemed to be right as it was not overly onerous but reflected the increased capability needs.

[84] When asked why staff who scored less than 6 out of 10 in any one criterion was deemed not to be trainable, Ms Crozier said that the panel were taking into

account the fact that there was a requirement for the newly appointed staff to be able to *hit the ground running*. Ms Crozier was not able, however, to give any detail as to what the pressure specifically was on the College to ensure that staff were able to *hit the ground running*, so as to make extra training inappropriate.

[85] Ms Harrington was therefore recalled to give evidence about why it was necessary for the staff to *hit the ground running* in their new positions. She said that the new positions came into force from the beginning of the third term of 2013, a few weeks after the interviews. At the end of the second term the school's roll had dropped to 11 students. However, the IWS had been implemented by then and special selection panels were already beginning to assess students to decide who the most needy were in terms of requiring a residential element to the *wraparound* that was being designed for them. The College was given to understand that a wave of new students would be coming in during the next two terms (term 3 and term 4) which could take them up to their full complement of 32 students quite quickly. The funding was already in place for these students and many staff had already left through voluntary redundancies.

[86] It is for this reason that Ms Harrington believes that it was not possible to accommodate the training of staff members who fell below a minimum standard and why it was necessary to *hit the ground running*. Ms Harrington also said that she did not believe it was fair on the students to have contact with staff members who were not materially competent and who needed significant training.

[87] Mr Joblin gave some very helpful evidence about the skill set needed to be able to deal with volatile students without escalating situations. Effectively, some people have the skills already, and they are viewed as being very valuable. If they do not, it may need an extensive level of supervision (in effect, counselling) to examine why a staff member finds it difficult to de-escalate and to then help them change their mind set. In Ms Anderson's case, (and I paraphrase Mr Joblin's evidence) he felt that she struggled to depersonalise comments from students, because she expected them to reciprocate to her positive approaches to them in ways which were unrealistic given their level of cognitive and behavioural dysfunctionality. That confounding of her expectation then caused Ms Anderson to react emotionally to negative behaviour, which could escalate the situation. This meant, Mr Joblin said, that Ms Anderson

would have found it very hard to have coped in the environment that the Youth Worker would have had to have operated in.

[88] I accept the respondent's rationale for deciding that staff who were scored below 6/10 could not be trained in time to take on their new roles and meet the enhanced requirements of those roles (although I believe that the term *untrainable* is an unfortunate choice of word). In the context of the situation faced by the College and, in the specific context of the Panel's assessment of Ms Anderson's skill set in the two relevant criteria, I accept that, having assessed her as falling below the minimum requirements, it was reasonable for them to have concluded that training her to up-skill her to an acceptable standard could have taken too long.

[89] I also accept the evidence of Mr Joblin and Mr Stowers that Ms Anderson would not have been suitable for the more difficult environment in which Youth Workers would have had to have operated because of the increased pressure on staff caused by a greater proportion of very challenging students and the consequential need to be able to deescalate potentially dangerous behaviours. I reach this conclusion not on the basis of the two particular examples cited (the swearing incident and another cited by Mr Joblin in which an autistic student bit Ms Anderson) but on the fact that Mr Stowers and Mr Joblin had both known Ms Anderson for several years and both had expressed clear views that her escalation skills were not sufficiently developed for the new environment.

[90] However, it cannot be accepted without question that the Panel's assessment of Ms Anderson's short falls in relation to the planning of activities was reliable given the failure to consult properly with Ms Anderson's line managers prior to the interviews. The Panel came up with a very precise score in relation to that criterion. However, this score may not have been accurate as it was based only on the answers given by Ms Anderson during the interviews. Ms Crozier admitted that Ms Anderson had been very nervous during both interviews. She also did not have a support person with her on either occasion and had forgotten her notes on the second occasion. It is quite possible that, had the panel thoroughly discussed with Ms Anderson's line managers her skill set and attributes, they may have assessed her suitability against this criterion as much more acceptable.

[91] I note that one of the other ARSWs who had been successfully interviewed for a Youth Worker position had been noted as having *the capability to deliver on the*

requirements with some support in relation to the criterion of planning and implementation of recreational activities. She had been scored 6 out of 10, the minimum acceptable score. This comment recognised that this individual needed support in the new role. It is quite possible that Ms Anderson could have similarly been scored 6 out of 10, needing some support, had a more thorough assessment of her capabilities been carried out.

[92] In conclusion, because of the failure to take into account her line managers' views of her abilities in planning activities, it is not possible to assess accurately whether Ms Anderson was unable to be trained in that skill.

Conclusion

[93] All in all, I consider that there was clearly a need for a restructure and that included a need to disestablish the ARSW role that was carried out by Ms Anderson. I also find that the Youth Worker role was significantly different from the ARSW role and therefore the respondent was justified in carrying out an assessment exercise, to assess whether Ms Anderson was suitable for that new role. I agree with Ms Shaw that *Wang v Hamilton Multicultural Services Trust*¹ can be distinguished.

[94] However, I find that the selection process adopted was not one that a fair and reasonable employer could have carried out in all the circumstances as the respondent did not avail itself of a potentially significant amount of relevant information in relation to Ms Anderson's attributes and capabilities by consulting in any significant way with Ms Anderson's line managers prior to the interview process.

[95] In addition, Ms Anderson was potentially prejudiced when she was not told what her scores were after the first interview, and when she was not able to return home to retrieve her forgotten notes at the start of the second interview.

[96] These flaws mean that Ms Anderson suffered unjustified disadvantage in her employment. Whilst unjustified disadvantage was not specifically included in Ms Anderson's statement of problem, s.122 of the Act makes clear that the Authority is not prevented from a finding that a personal grievance is of a type other than that alleged.

¹ [2010] ERNZ 468

[97] In *Aoraki Corp Ltd v McGavin*² at 294, 619 the Court of Appeal stated:

*Sixth, it is not entirely clear from the statute whether, where the dismissal is substantively justifiable, procedural unfairness in implementing that decision is better described as "unjustifiable dismissal" within s 27(1)(a) or "unjustifiable action" within s 27(1)(b). Reported redundancy cases have tended to proceed on the assumption that the personal grievance in that respect can be classified as unjustifiable dismissal. But in *Brighthouse Richardson J* referred to both unjustifiable dismissal and unjustifiable action and *Gault J* expressed a preference for categorising procedural deficiencies as unjustifiable action. On one view it is contradictory to hold that the employment has been justifiably terminated and then go on to conclude that the dismissal was unjustifiable. Another view is that unjustifiable dismissal can be either dismissal which lacks its purported foundation (eg redundancy) or a dismissal which is implemented in a way which breaches the employer's obligation of fair dealing; and it may be said that the structure of s 27(1) draws that distinction between terminating employment (para (a) and continuing employment (para (b)). A further possibility is that in some circumstances there may be an overlap between (a) and (b).*

However, it is unnecessary to reach a concluded view on that classification point because the test of unjustifiability is the same whether viewed under (a) or (b). What is crucial, however, is to recognise that the remedy can relate only to the particular wrong, to what has been lost or suffered as a result of the particular breach or failure. In this case the personal grievance is not that the employment was terminated, but that the manner of implementation of the decision to terminate was procedurally unfair.

In terms of s 40(1)(a) and (c) and s 41(1) the relevant remedies are "reimbursement" of wages or other money "lost by the employee as a result of the grievance" (s 40(1)(a)), "compensation ... including compensation for ... loss of any benefit ... which the worker might reasonably have been expected to obtain if the personal grievance had not arisen" (s 40(1)(c)(ii)), and compensation for "lost remuneration" where the employee has "lost remuneration as a result of the personal grievance" (s 41). Where the grievance concerns the manner in which a substantively justifiable dismissal was carried out, that is the wrong to which remedies may be directed, and there is no power under the statute to make an award for the loss of the job.

[98] Whilst the statutory references in the above passage are to the Contract Terms Act 1991, the material terms are the same as the equivalent sections in the Act. In accordance with the principle expressed in *Aoraki*, I find that, even if a fair process had been followed, Ms Anderson's dismissal by reason of redundancy would still have occurred because I find that the respondent's assessment that she did not have sufficiently developed de-escalation skills to undertake the Youth Worker role safely

² [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

was one that a fair and reasonable employer could have made in all the circumstances. Therefore, as the dismissal by reason of redundancy was substantially justified it was not rendered unjustified overall solely by the procedural flaws I have identified.

Remedies

[99] In her statement of problem, Ms Anderson initially sought reinstatement. However, her advocate withdrew that request on her behalf during his submissions.

[100] Sections 123 and 128 of the Act provide as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[101] I have found that Ms Anderson's dismissal was justified, but the process adopted caused her an unjustified disadvantage in her employment. I must therefore first assess whether Ms Anderson lost any wages or other money as a result of that unjustified disadvantage grievance (s123(1)(b)). However, I am satisfied that, even if

Ms Anderson's managers had been properly consulted about her suitability for the Youth Worker role, and if the other flaws I have identified had not happened, it is not likely that the overall process would have lasted longer than it actually did. Therefore, it is not likely that Ms Anderson's employment would have been extended by the adoption of a fair process, and she is not likely to have earned any more wages, and so I decline to award anything under s. 123(1)(b).

[102] Turning to compensation for humiliation, loss of dignity and injury to her feelings, Ms Anderson states that being told that she had not been successful in being appointed to the role created such feelings of anguish, distress and humiliation that it took her several months to recover from the depression it caused her. Ms Anderson produced a letter from her GP who stated that her redundancy resulted in a significant deterioration in her mood, and that she was referred to counselling.

[103] However, I understand that this evidence relates to the effect of the dismissal and, as I have determined that the dismissal was justified, I cannot award any compensation in respect of it. However, I do accept that the flawed process itself caused Ms Anderson distress. It is certainly probable that the assessment process she underwent would have been less stressful if she had been able to discuss specific examples given to the interview panel by her managers, rather than she having to come up with examples herself. Allowing her to have retrieved her notes would also have assisted her stress levels.

[104] I did not hear evidence about the effects on her of these specific issues causing her disadvantage, but it is reasonable to assess the effects as being greater than negligible. I assess that compensation in the sum of \$5,000 is appropriate.

[105] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[106] I cannot find that there was any blameworthy conduct by Ms Anderson that contributed to the flaws that caused her unjustified disadvantage in her employment. Therefore, I do not reduce the remedies that I have awarded to Ms Anderson.

Order

[107] I order the respondent to pay to Ms Anderson the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[108] Costs are reserved. The parties are to seek to agree how costs are to be dealt with, but if they are unable to reach agreement by Friday 27 March 2015 Mr Tonner may serve and lodge a memorandum on behalf of Ms Anderson within a further 14 days of that date, and Ms Shaw may serve and lodge a memorandum of counsel in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority