

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 52
5623932

BETWEEN JACQUELINE PEPPER
 Applicant

A N D AMCOR FLEXIBLES (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anna Oberndorfer, Advocate for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 21 February 2017 at Christchurch

Submissions Received: 21 February 2017, from the Applicant
 21 February 2017, from the Respondent

Date of Oral Indication: 21 February 2017

Date of Determination: 7 April 2017

DETERMINATION OF THE AUTHORITY

- A. Amcor Flexibles (New Zealand) Limited did not unjustifiably dismiss Mrs Pepper.**
- B. In the course of consulting over a proposed restructuring, Amcor Flexibles (New Zealand) Limited acted in an unjustifiable manner that caused disadvantage to Mrs Pepper's conditions of employment.**
- C. In satisfaction of Mrs Pepper's personal grievance for unjustified action causing disadvantage, Amcor Flexibles (New Zealand) Limited must pay:**

- (a) **\$1,580.00 (gross) for reimbursement pursuant to s 123(1)(b) of the Employment Relations Act 2000; and**
- (b) **\$17,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000**

D. There is no basis to award a penalty for any breach of good faith by Amcor.

E. Costs are reserved with a timetable for submissions if required.

Employment relationship problem

[1] Mrs Pepper worked at Amcor Flexibles (New Zealand) Limited (Amcor) as a receptionist. In February 2016 Amcor decided to disestablish Mrs Pepper's role and consequently served notice of termination on her. Mrs Pepper resigned before her notice period was completed.

[2] Mrs Pepper claims that Amcor:

- (a) Unjustifiably dismissed her when it served the notice of redundancy on her.
- (b) Acted in an unjustifiable manner that caused disadvantage to terms and conditions of her employment when it unilaterally imposed an extension to her notice period and failed to consider redeployment opportunities for her.
- (c) Breached the duty of good faith during its consultation over the proposed restructuring, seeking not to maintain the employment relationship rather, focusing on ending it and attempting to justify its position.

[3] Amcor denies that it acted in an unjustifiable manner giving rise to the alleged personal grievances. It says that it carried out a fair process in relation to the proposed restructuring of Mrs Pepper's role with it and its decision to give notice of redundancy because of the disestablishment of her role was substantively sound. It denies that its actions amounted to a breach of the duty of good faith.

Facts

[4] Amcor first employed Mrs Pepper in 1977. Since then Mrs Pepper has held various roles within Amcor and also had some time away from the working environment. More recently, Amcor employed Mrs Pepper as a receptionist in a full time role governed by terms set out in an individual employment agreement dated 10 May 2004.

[5] Mrs Pepper worked as a receptionist at the Amcor factory in Carmen Road. Her role covered three main areas of work:

- (a) Manning reception including dealing with visitors and couriers, answering the telephone, processing mail and other practical tasks such as cleaning the staff room.
- (b) Data input including timesheet entry for workers.
- (c) Scanning and copying work job packs from the factory in order to meet traceability requirements for ISO standards.

[6] Mrs Pepper's role was part of the finance department and she reported to Aran Hunter the Commercial Manager responsible for various financial aspects of the Amcor organisation including in two sites, Branston Street and Carmen Road.

[7] In June 2016 Mr Hunter was appointed the project manager for Project Avanti. Project Avanti was a review of the systems at the Branston Street and Carmen Road factories in order to address cost saving requirements. The purpose of Project Avanti was to identify systems of work that would produce optimal finance organisational structure for the two sites. The project's statement included a directive that the efficiencies as approved under Avanti cost savings would be achieved, which included a head count reduction of 3.1.

[8] It is not clear to me whether the project statement was a pre-determined outcome or whether it was simply an indication of what might be achieved or just pre-authorisation for action up to and including a head count reduction of 3.1. In any event, it was apparent that in June 2015 Amcor had in mind that it needed to look at and improve its work systems to create efficiencies that would enable the structure of the finance team to be reorganised to reduce costs.

[9] Mr Hunter completed his review under Project Avanti and concluded that the optimal finance organisational structure included the disestablishment of the two receptionist roles, one at Branston Street and the other, Mrs Pepper's role at Carmen Road.

[10] This conclusion appeared to be mainly based upon the introduction of MORE factory software, a suite of programs that would automate many functions on the factory floor and reduce manual operations such as time sheet entry. MORE was to be introduced into the Branston Street and Carmen Road sites in 2016.

[11] Mr Hunter decided to proceed with pursuing his optimal finance team structure by commencing consultation over a proposed restructure of the finance team, reflecting that optimal structure. On 26 January 2016 Mrs Pepper received an email inviting her to attend a meeting on 27 January 2016 to discuss the proposed restructure.

[12] Mrs Pepper attended the meeting on 27 January 2016 with her husband, Bruce Pepper, in support. Mr Pepper worked at Amcor as the Project and Q & A Manager.

[13] Mr Hunter attended on behalf of Amcor together with Marc Fisk, the National Human Resources Manager for Amcor.

[14] At the 27 January 2016 meeting Mr Hunter outlined the proposed restructure that would disestablish Mrs Pepper's role. This was summarised in a letter dated 27 January 2016 that was given to Mrs Pepper at that meeting. That letter included the following:

As discussed today, we would like to begin formal consultation with you over a proposed restructure that could see your current role made surplus to requirements.

As you will be aware Amcor is looking at reducing costs and as part of this ongoing review it has been identified that much of the work you currently perform could be restructured to reduce headcount.

The business is looking to introduce more automation that would reduce the workload around timesheet entry and scanning and copying.

Should the proposed structure outlined in this letter be implemented, your current role would no longer be required. The effective date for such a proposed new structure would be the 29th February 2016.

We would like you to think about the changes proposed in this letter and to provide us with your feedback, in writing, by 5pm Wednesday the 3rd February 2016. We will then meet again on Thursday the 4th February, to discuss your feedback. If you feel that you would like more time to consider and provide your feedback just let me know.

[15] Attached to the letter was a finance structure chart. It included all the finance roles at the various sites in Amcor and had simply identified Mrs Pepper's receptionist role at Carmen Road as being restructured. There was no further supporting material or information provided to Mrs Pepper in the 27 January meeting or subsequently.

[16] Mrs Pepper then spent considerable time with Mr Pepper putting together her feedback for the proposed restructure. Much of this was based on their own personal knowledge of the operations within Carmen Road and some limited knowledge of other wider operations of Amcor. However, they did not have information regarding Project Avanti, the proposed automation through MORE, or the cost savings that Amcor sought to achieve.

[17] Despite limitations with the information that they had regarding the proposed restructure Mrs Pepper's feedback was comprehensive and practical. It addressed in particular detail the role carried out by Mrs Pepper identifying what she did on a day-to-day basis. It then questioned whether the proposed automation would cover much of this or create the efficiencies suggested. It also outlined many aspects of the role that would need to continue despite any proposed automation and queried whether that could be done.

[18] Mrs Pepper had a pre-booked holiday planned for 5 February 2016 to 24 February 2016. Just prior to Mrs Pepper going on that leave, on 3 February 2016 Amcor advised her that it would require more time to consider her feedback before a decision would be given. Therefore, Amcor advised her that it was delaying a final decision until she returned from her holiday.

[19] Amcor then undertook a review of the feedback from Mrs Pepper including obtaining feedback on her feedback from other people. Mr Fisk's evidence was that Mrs Pepper's feedback and the subsequent discussions caused a reassessment of the original proposal. There was an acceptance by Amcor that there might be problems with the implementation of MORE and there was a need to consider what tasks would

still need to be undertaken either indefinitely or at least for a phased period of integration and by whom.

[20] The result was that Amcor decided that the receptionist position would still be disestablished but that would not occur until June 2016. This would enable Amcor to introduce MORE and deal with any implementation issues before Mrs Pepper's role was disestablished. It also decided that other tasks that were not covered by automation would need to be reassigned or would be ceased as part of the operation of the business. However, there was no clarity around this. It appeared to me, from the evidence that I heard, that the reassignment of tasks or cessation of other tasks still needed to be determined and the delay in implementing the proposed restructure would enable this to occur.

[21] When Mrs Pepper returned from her holiday on 26 February 2016 Mr Hunter and Jackie Maihi (the Manufacturing Manager), met and discussed the outcome of the consultation. Mr Hunter advised Mrs Pepper that Amcor made the decision that it was going to progress with the proposed restructuring and disestablish Mrs Pepper's receptionist role. She was advised the effective date for that disestablishment would now be 3 June 2016. Mr Hunter gave Mrs Pepper a letter confirming this.

[22] By 29 February 2016, it was very evident that Mrs Pepper was struggling to continue with her role given the decision made by Amcor. Mrs Pepper asked Ms Maihi if she could reduce her hours to a minimum and work late afternoon to avoid interacting with too many people. Amcor agreed to this and undertook to review the position to see how she was coping as the work progressed.

[23] A few days later, however, Mrs Pepper took some time off work on sick leave. In the end Mrs Pepper took the view that she was unable to continue to work and Mr Pepper approached Amcor and asked if her employment could terminate early. As a result, Mrs Pepper resigned from Amcor on 4 March 2016.

The issues

[24] The issues that arise for a personal grievance of unjustified dismissal include:

- (a) Was there a dismissal?

- (b) If there is a dismissal, the onus then falls to the employer to show that the dismissal was justified, considering in particular the statutory test for justification.

[25] The issues that arise for a personal grievance of unjustified action causing disadvantage include:

- (a) Did the employer act in a manner that caused disadvantage to an employee's terms and conditions?
- (b) If so, was that action justified, considering the statutory test for justification?

Unjustified dismissal

Was there a dismissal?

[26] Amcor served notice of termination on Mrs Pepper based on it implementing a restructure that would disestablish her role. However, subsequent to receiving that notice of termination and before the notice period had expired Mrs Pepper resigned, pre-empting any termination that might have arisen because of the restructure and disestablishment of her role.

[27] In *Christchurch Golf Incorporated v Edna Wood*¹ Judge Shaw held, in similar circumstances, that there was no termination. The decision to resign from a company before a notice of redundancy had run its full course meant that an employee had simply pre-empted any termination that might have arisen because of her position becoming superfluous. In that case, there was no dismissal of the employee.

[28] Amcor did not dismiss Mrs Pepper.

Constructive dismissal

[29] As an alternative construction of the unjustified dismissal claim, Mrs Pepper's resignation might amount to a constructive dismissal.

[30] In the case of constructive dismissal, there is no actual dismissal but a resignation by an employee in response to the employer's action. The Court of

¹ CEC59/98

Appeal summarised this in *Auckland Shop Employees etc IUOW v Woolworths (NZ) Ltd*² where it held that constructive dismissal includes but is not limited to resignations where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (c) A breach of duty by the employer causes an employee to resign.

[31] In this case, the third limb is relevant.

[32] Applying the third limb, in *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[33] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*⁴. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[34] Therefore, in order to determine if Amcor has constructively dismissed Mrs Pepper I must consider:

² [1985] 2NZLR 372 (CA) at 374-375

³ [1983] ACJ 965

⁴ [1994] 2 NZLR 415 (CA)

- (a) Was there a breach of duty by Amcor that was dismissive or repudiatory, which caused Mrs Pepper to resign?
- (b) Was that breach of duty sufficiently serious that it was reasonably foreseeable that Mrs Pepper would not tolerate it and there was a substantial risk of her resigning?

Was there a breach of duty by Amcor that was repudiatory or dismissive?

[35] When I asked Mrs Pepper why she resigned her response was that once she was served with notice of termination she could not cope, she could not sleep and she was angry and in disbelief. However, this reaction to the notice came not because of Amcor's decision to dismiss but rather because of the way in which Amcor went about reaching that decision. Mrs Pepper complained that the process could have been better, the decision came unexpectedly and was a big shock; she said, Amcor should have talked to me first and pre-warned me.

[36] So, the alleged breach of duty complained of is a failure to consult appropriately over the proposed restructuring and the potential termination of Mrs Pepper's employment.

[37] I accept Amcor did not follow a fair process in consulting over the proposed restructure. And this is a breach of duty.

[38] The first issue for me is the lack of information provided at the commencement of consultation. The proposed restructure came from Mr Hunter's work on Project Avanti and his directive to implement efficient systems of work that would allow optimal finance organisational structure, which would achieve cost savings. Yet, in the meeting of 27 January 2016 neither Mr Hunter nor Mr Fisk explained Project Avanti, the efficient systems of work that Amcor would implement or the cost savings that Amcor would achieve. I am not satisfied that they even explained the optimal finance organisational structure properly.

[39] It appears in fact that Mr Hunter gave Mrs Pepper the letter of 27 January 2016, which she and Mr Pepper read. Mr Pepper then asked some questions about who had been consulted and how the date for implementation had been arrived at and there was general discussion around the job scanning and time sheet entry components of Mrs Pepper's role.

[40] The 27 January letter did not mention Project Avanti nor did it explain the MORE factory software implementation. It did not identify what parts of Mrs Pepper's role would be replaced by automation and what remaining parts would be either discontinued or assigned to others.

[41] The letter simply identified three reasons for the proposed restructure – Amcor was looking to reduce costs, Amcor had identified that much of Mrs Pepper's work could be restructured to reduce headcount and Amcor was looking to introduce more automation that would reduce workload around timesheet entry and scanning.

[42] Amcor did not provide any further information on each of these points. This may not have been required on the question of cost saving as the proposed restructure was informed by the findings of Project Avanti around identifying and implementing efficient work systems and creating, as a result, an optimal structure for the finance team. Costs saving may have informed Project Avanti but other cost saving initiatives would most likely not have displaced the analysis and conclusions regarding work systems, that is the implementation of the MORE factory software and the consequent reorganisation of the finance team.

[43] It was the output from Project Avanti that impacted on Mrs Pepper's role and therefore it was information about Project Avanti and the proposed automation that was relevant to the continuation of Mrs Pepper's role and should have been disclosed to her pursuant to s 4(1A) of the Employment Relations Act 2000.

[44] The failure to provide full information in the original consultation meeting and initial documentation, including the underlying material which might support a decision to proceed with a restructure such as the proposed automation, the implementation of that automation and the proposed reallocation of remaining tasks was a clear failing by Amcor.

[45] The second issue with consultation arises out of Amcor's treatment of Mrs Pepper's feedback. Amcor did consider this feedback fully and, as a result, it sought further information on its proposed restructure from various employees and stakeholders. Amcor then considered that information and made decisions about the proposed restructure.

[46] However, Amcor failed to provide the further information it obtained, which informed its decision on the proposed restructure, to Mrs Pepper for her to consider

and provide further feedback to it. So, for example, it engaged with Ms Maihi over points made in Mrs Pepper's feedback and then it made a decision about that based on Ms Maihi's response without getting any information from Mrs Pepper.

[47] The third issue then arises out of the amended proposed restructure. Having considered the responses received from others on Mrs Pepper's feedback Amcor decided to change the proposed restructure by extending the implementation date out to June 2017. Amcor did not give Mrs Pepper the opportunity to provide feedback on the changed proposal, it simply advised her of its decision.

[48] The three sets of failings by Amcor means it did not meet the requirements of s 103A or s 4(1A) of the Act in carrying out the consultation with Mrs Pepper and it breached the duties that it owed to her. And this was repudiatory.

Was Mrs Pepper's resignation, in response to the breach, reasonably foreseeable?

[49] There have been cases where the Employment Court has queried the requirement of foreseeability for constructive dismissal⁵ but in *Nilson-Reid v Attorney General in respect of the Director-General of the Department of Conservation*⁶ Judge Travis was clear that the foreseeability test set by the Court of Appeal in *Auckland Electric Power Board* is applicable. That test as set out in paragraph [174] of the Court's decision, is:

... whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach

[50] Therefore, in this case, I think the question of reasonable foreseeability is:

“Was Amcor's failure to consult in good faith or justifiably, or Amcor's unilateral decision to amend the proposed restructure, sufficiently serious that it was reasonably foreseeable that Mrs Pepper *would* not be prepared to continue to work for Amcor in those circumstances, giving rise to a substantial risk of her resigning”?

⁵ *Matheson (executrix) v Transmission and Diesels Ltd* [2001] 1 ERNZ 1 and *Taranaki Healthcare Ltd v Lloyd* [2001] 1 ERNZ 546.

⁶ [2005] 1 ERNZ 951 BC200570158

[51] I place emphasis on the use of the word “would” because that imposes a high threshold on the foreseeability requirement. As the Court of Appeal expressed it, the foreseeability is of “a substantial risk of resignation”. This is not simply a chance or even a possibility; it requires a high degree of likelihood.

[52] I am not satisfied that it was reasonably foreseeable that a failure to consult appropriately would create a substantial risk of resignation. In the circumstances, it is foreseeable that an employee might possibly attempt to engage in consultation anyway by providing additional feedback, or they might complain including raising a grievance.

[53] In the particular circumstances, where Mrs Pepper had engaged fully in the consultation and Amcor was responding to her feedback by implementing changes that it perceived addressed the issues raised and benefitted her by at least extending her employment, a substantial risk of resignation was not reasonably foreseeable.

[54] Also, I am not satisfied that it was reasonably foreseeable that a unilateral decision to amend the proposed restructure would create a substantial risk of resignation. Particularly where the amended proposal provided for an extended period of employment and where Amcor implemented it immediately by giving notice. The more foreseeable reaction would that Mrs Pepper would work out her notice period, explore redeployment and then if that failed raise a grievance for unjustified dismissal.

[55] In these circumstances as it was not reasonably foreseeable the breaches of duty by Amcor would create a substantial risk of Mrs Pepper resigning, Mrs Pepper cannot succeed in her constructive dismissal claim.

Unjustified disadvantage

Was there an action by Amcor that caused disadvantage to Mrs Pepper’s terms and conditions of employment?

[56] In the statement of problem, Mrs Pepper claims that the unjustified action causing disadvantage grievance arises out of the unilateral extension to the notice period and failure to consider redeployment.

[57] In the letter, raising her personal grievance Mrs Pepper raised grievances in respect of the termination of her employment on a number of broad bases. These

included complaints about the lack of a fair and correct process for consultation over the proposed restructure, an allegation of predetermination and that the decision to implement the restructure and disestablishment of Mrs Pepper's role was not substantively justifiable.

[58] On this basis, I think Mrs Pepper's personal grievance for unjustified action causing disadvantage includes the alleged unjustified process of consultation and the alleged unjustified decision to disestablish Mrs Pepper's role and give notice of termination based on the restructuring.

[59] So there are four actions complained of:

- (a) The consultation over the proposed restructure.
- (b) The unilateral decision to change the proposed restructure.
- (c) The substantive decision to proceed with the amended restructure.
- (d) The failure to consider redeployment options for Mrs Pepper.

[60] I am satisfied that all four actions caused disadvantage to the terms and conditions of Mrs Pepper's employment because it made her employment less secure and in fact made the termination of her employment highly likely.

Were Amcor's actions justified?

[61] I have already addressed the failure to follow a fair process in consultation over the restructure and the unilateral decision to change the proposed restructure; both were unjustified.

[62] The substantive decision to implement the amended restructure and the consequent disestablishment of the receptionist role was justified. The question here is the genuineness of the decision to implement the proposed restructure⁷. It is not my place to substitute my business judgment for Amcor's and decide if the restructure was appropriate⁸. Rather I should consider whether the decision to proceed with the restructure was one that a fair and reasonable employer could have made in the circumstances that Amcor faced. That is, based on the information Amcor had about

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541

⁸ *Scarborough v Micron Securities Products Ltd* [2015] NZEmpC 39

the need to reduce costs, the proposed automation, the conclusions about optimal structure for the finance team, the reallocation or cessation of the receptionist tasks and the various feedback it had, was the decision to proceed with the restructure one that a fair and reasonable employer could have made? The answer is yes.

[63] The failure to consider redeployment was justified. This is simply because the obligation for Amcor to consider redeployment was no longer required when Mrs Pepper resigned. It cannot be criticised for not looking for redeployment options in circumstances where an employee resigned.

[64] Therefore in conclusion I am satisfied that the failing by Amcor to carry out a fair consultation process in respect of the proposed restructure amounts to an unjustified action which caused disadvantage as was the unilateral decision to amend the proposed restructure. As a result, Mrs Pepper has a personal grievance against Amcor and is entitled to remedies.

Remedies

[65] The remedies that Mrs Pepper is entitled to must flow from her grievance⁹. In this case, the remedies that she is entitled to must arise out of the flawed consultation process and the unilateral decision to change the proposed restructure.

[66] Turning first to lost remuneration, in a situation where there is a flawed consultation process but the substantive outcome is justified the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right¹⁰.

[67] In this case, I estimate that that would take two weeks for Amcor to complete the consultation correctly by giving Mrs Pepper the opportunity to respond the additional information obtained in response to her feedback and the proposed extension of time for implementing the restructure.

[68] Therefore Mrs Pepper is entitled to two weeks lost remuneration pursuant to s123(1)(b) of the Act. I calculate this to be \$1,580.00 (gross).

⁹ *Waterford Holdings Limited v Morunga* [2015] NZEmpC 13

¹⁰ *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA), see also *Hemopo v CareNZ (est 1954) Ltd* [2011] NZERA Christchurch 43

[69] Next, in terms of compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act I am satisfied Mrs Pepper is entitled to an award. Mrs Pepper suffered as a result of the unjustified action by Amcor in the following way:

- (a) She felt betrayed by Amcor after many years of service and questioned whether her age had counted against her.
- (b) She could not cope with attending work, bursting into tears most days. She was shocked, angry, disappointed, confused and hurt by Amcor's treatment.
- (c) Mr Pepper described Mrs Pepper as having sleepless nights and being depressed, withdrawing from him and often snapping at minor things.
- (d) Mrs Pepper lost her confidence and self-esteem. She became depressed and anxious. She was prescribed anti-depressants, sleeping medication and medication for anxiety. And she attended counselling to cope with the effects on her.
- (e) The resultant stress also caused her psoriasis to flare up badly.

[70] In the circumstances I am satisfied that the suffering by Mrs Pepper as a result of the grievance is above the normal range of suffering. She was devastated by the way she was treated particularly given her years of service to Amcor. This had a significant effect on her mental and emotional wellbeing such that medical intervention and counselling was required. These effects also lasted over a reasonable period.

[71] I award Mrs Pepper \$17,000.00 pursuant to s123(1)(c)(i) of the Act.

[72] Having awarded remedies I am obliged to consider whether there is any contributory behaviour such that reduce the remedies¹¹. I am satisfied that during consultation Mrs Pepper did not act in a way that was causative of, or contributed to, her grievance let alone that any of her actions were culpable or blameworthy. Therefore, in the circumstances I do not find that there is any contribution.

¹¹ Section 124 of the Act

Penalty

[73] In order to impose a penalty for a breach of the duty of good faith I must be satisfied that the failure by Amcor to comply with the duty of good faith, in the course of consultation, was “deliberate, serious and sustained” or intended to undermine the employment agreement.¹²

[74] The word “deliberate” requires proof of intention; proof that, in the course of consulting with Mrs Pepper, Amcor intentionally failed to comply with the duty of good faith.

[75] Alternatively, I need to be satisfied that, in the course of consulting with Mrs Pepper, Amcor intentionally undermined the employment agreement with Mrs Pepper.

[76] On the evidence I heard from Mr Fisk I am not satisfied that Amcor intended to breach the duty of good faith; the breach is not deliberate and there is no basis to impose a penalty¹³. In addition, I am satisfied that Amcor did not intend to undermine the employment agreement and there is no basis to impose a penalty¹⁴.

Determination

[77] Amcor did not unjustifiably dismiss Mrs Pepper.

[78] Amcor did act in an unjustifiable manner causing disadvantage to Mrs Pepper through its flawed consultation over the proposed restructure.

[79] In satisfaction of the personal grievance for an unjustified action causing disadvantage Amcor must pay:

- (a) \$1,580.00 (gross) pursuant to s 123(1)(b) of the Act.
- (b) \$17,000.00 pursuant to s 123(1)(c)(i) of the Act.

[80] There is no basis to award a penalty for any breach of good faith by Amcor.

¹² Section 4A of the Act

¹³ See for example *Bourne v Real Journeys Limited* [2011] NZEmpC 97

¹⁴ See for example *Gilbert v Transfield Services (New Zealand) Limited* [2013] NZEmpC 71

Costs

[81] Costs are reserved. The parties are encouraged to resolve any issue of cost between themselves.

[82] If the parties are not able to resolve costs between them and a determination on costs is required Mrs Pepper may lodge and serve a Memorandum of Costs within 28 days of this determination. Amcor will then have 14 days from the date of service of that memorandum to lodge and serve any reply to the memorandum.

Peter van Keulen
Member of the Employment Relations Authority