

Attention is drawn to the  
non-publication order  
at paragraph [3]

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 320  
3080572

BETWEEN	HANNA WASHBURN Applicant
AND	KLEENRITE (WELLINGTON) LTD (formerly named TOTAL PROPERTY SERVICES (WELLINGTON) LTD) Respondent

Member of Authority:	Michele Ryan
Representatives:	Barbara Buckett, counsel for the Applicant Mike Gould, counsel for the Respondent
Investigation Meeting:	3 June 2020
Submissions [and further Information] Received:	29 June 2020 from the Applicant 4 June and 13 July 2020 from the Respondent 20 July 2020 "In reply" from the Applicant
Date of Determination:	23 July 2021

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**DETERMINATION OF THE AUTHORITY**

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**Non Publication Order**

[1] Kleenrite Wellington Ltd (Kleenrite) is a commercial cleaning company. It has applied for a non-publication order in respect of various documents relevant to this case which it views as commercially sensitive.

[2] The applicant, Mrs Hanna Washburn, does not challenge Kleenrite’s request for a non-publication order, nor is there an apparent public interest in that information being made accessible to non-parties to this matter.

[3] Accordingly there is a permanent order for non-publication of the following information contained in:

- (a) documents attached to Kleenrite’s Statement of Reply numbered 4(a)(ii), 4(b)(ii), 4(c)(ii), 4(d)(ii), 4(e)(ii) to (viii) inclusive and 4(j)(ii);
- (b) documents in the Applicant’s Bundle of Documents numbered 11, 17, and 19;
- (c) paragraphs 1, 2, and 25 of the brief of evidence of Robyn Garlick.

### **Employment Relationship Problem**

[4] Mrs Washburn commenced her employment with Kleenrite in 1993. In April 2006 she began working as the Night Operations Manager. Terms of employment were recorded in a “*Management Individual Employment Agreement*” (IEA).

[5] A document drafted in 2007 records Mrs Washburn was contracted to work “Sunday to Friday Nights” although Friday work was undertaken only as required. She generally worked 9 p.m. to 6 a.m. Sunday to Thursday plus 5 hours for administration.

[6] The IEA sets out a process requiring Kleenrite to consult with Mrs Washburn if it considered making her redundant and included obligations to discuss the reasons for the proposed redundancy and the reasons for selection for redundancy.<sup>1</sup>

[7] In 2015 Mrs Washburn’s position was retitled “*Client Service Manager*” (CSM). She continued to work nights which suited her as it allowed her to look after her grandchild.

[8] Mrs Washburn says she was dismissed (actual or constructive) following a sham restructuring in 2018. In either instance Mrs Washburn says Kleenrite’s actions were unjustified. Alongside those matters, she further alleges Kleenrite breached express and implied terms of her employment and its obligation to act in good faith.

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<sup>1</sup> At clause 17 of the IEA

[9] At the core of Mrs Washburn's claim is her view that that the decision to make her redundant was predetermined.

[10] Earlier in her employment she says she had a good relationship with its then director, John Garlick. He died in 2010. Over the ensuing years she says she was excluded from meetings about the strategy of the business and allocation of work, and the meetings to which she was invited were unpleasant.<sup>2</sup> Mrs Washburn says she did not have a strong relationship with Robyn Garlick (one of two directors of Kleenrite after 2010). There is no evidence that any of these concerns with raised with Kleenrite, and given she worked nights it says she was not required to attend meetings.

[11] Submissions on Mrs Washburn's behalf allege Kleenrite's conduct over this time, together with several events in early 2018, were followed with the deliberate and dominant purpose of coercing Mrs Washburn to resign.

[12] Mrs Washburn says on 2 February 2018 Ms Garlick told her Kleenrite could not afford to have four CSMs and that because Mrs Washburn was the highest paid, she was redundant.<sup>3</sup> Ms Garlick is said to have offered her an exit package if she agreed to leave immediately.

[13] The next interaction occurred in the second week of March 2018. Mrs Washburn says Ms Garlick informed her that, alongside the other CSMs, she would need to re-apply for her position or Kleenrite would consider she has resigned. Mrs Washburn questioned why she would have to apply for her own job, and when she said she would need to get legal advice, Ms Garlick discouraged her from doing so.<sup>4</sup>

[14] Mrs Washburn says her resistance to Ms Garlick's approaches, coupled with the difficulty Kleenrite would have justifying a failure to reappoint her given her experience, led Kleenrite to devise a restructuring process as pretext on which to terminate her employment.<sup>5</sup>

[15] There is no dispute that correspondence headed "*Review of Operations – Customer Service Management*" was sent to Mrs Washburn on 3 April 2018. That material indicated

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<sup>2</sup> Brief of Evidence of Hanna Washburn dated 5 May 2020 at para.[18]

<sup>3</sup> Brief of Evidence of Hana Washburn dated 5 May 2020 at para.[30].

<sup>4</sup> Above at para. [33].

<sup>5</sup> Submissions for the Applicant, at para [74].

Kleenrite was undertaking an operational review to obtain a greater understanding as to how the CSMs operated, including how work was allocated and delivered.

[16] Towards the end of April 2018 each of CSMs met separately with Chris Begley, the second director, and an HR advisor engaged by Kleenrite to assist with the operational review. In the lead up to the meetings each of the CSMs was provided with a CSM data sheet which provided a breakdown of staff numbers, staff hours, client and revenue per CSM. It is apparent from that information that the number of staff, and clients managed by Mrs Washburn in her role were much lower compared to the other CSMs, and the revenue generated from her role was a quarter to a fifth of that of her colleagues.

[17] Mrs Washburn attended an operational review meeting on 26 April 2018. A follow up meeting was held on 8 May 2018.

[18] On 6 June 2018 the HR advisor invited Mrs Washburn to meet with Kleenrite on 11 June 2018 to provide an outline of changes it proposed to make as a consequence of the review.

[19] The parties met on 11 June 2018. Mrs Washburn was given a letter headed "*Proposed changes – outcome of Operational Review*".

[20] Amongst other things, the correspondence proposed that Mrs Washburn's position be disestablished, and its functions redistributed amongst the remaining CSM roles. The letter further proposed to have a dedicated "Recruitment Administration position". The letter went on to state:

Therefore, to be clear, if this proposal is implemented it can result in your current position of the night operations customer services manager being made redundant with effect on 26 June 2018.

...

The proposed changes will be discussed and consulted on. The business has considered other options such as redeployment for you, however there are no similar or suitable positions available.

New jobs, which may arise from the proposed change, would be internally and externally advertised and employment selection will be made against the job requirements and role specification.

...

[21] The letter emphasized that no decisions had been made regarding the proposals, and that Kleenrite sought Mrs Washburn's view on the matter. To this end, Kleenrite asked to meet again with Mrs Washburn on 19 June 2018 to discuss the matter.

[22] There was a further exchanges between Mrs Washburn and the HR person over the following few days. However Mrs Washburn did not return to work after the meeting of 11 June 2018 nor attend the meeting scheduled for 19 June 2018. On 15 June 2018 she had obtained a medical certificate recording she was unfit for work. She did however raise a personal grievance through her representatives in a letter dated 19 June 2018 for an unjustified dismissal. The grievance alleged Mrs Washburn had been dismissed when Kleenrite had given her notice during the meeting of 11 June 2018 that her employment would end on 26 June 2018.

[23] Through its counsel, Kleenrite responded in writing on 26 June 2018. Amongst other things the letter advised:

[Kleenrite] has not determined to disestablish your client's position and has certainly not given notice of termination of her employment. If Ms Washburn believes otherwise she is mistaken.

...

[24] Mrs Washburn's medical certificate recorded she would be fit to return to work on 9 July 2018 however she did not attend the workplace on that date or communicate with Kleenrite on that matter.

[25] On 11 July 2018 counsel for Kleenrite emailed Mrs Washburn's representatives inquiring as to her whereabouts. He later received correspondence advising Mrs Washburn had relied on the notice given to her, orally and in writing, during the meeting of 11 June 2018 that her position had ended on 26 June 2018.

[26] In a letter dated 23 July 2018 but sent on 25 July 2018, Kleenrite, again through its counsel, contacted Mrs Washburn's representatives, noting Mrs Washburn's medical certificate had expired two weeks previously. The letter acknowledged the contrast in position each party had regarding the status of Mrs Washburn's employment, but went on to advise if she continues to stay away from work and no further communication from her (or you) is received:

... our client may be forced to the conclusion that the employment relationship is at an end. That would be regrettable and our client urges Hanna to reconsider her position.

[27] Nothing further was received from Mrs Washburn or her representatives.

[28] On 9 August 2018 counsel advised that in the absence of communication from, or on behalf of, Mrs Washburn, Kleenrite can only conclude that she did not wish to return to work and the employment relationship is at an end. The letter advised her final pay and holiday pay will be paid. Arrangements for mediation were subsequently made.

[29] On 10 October a further grievance for unjustified dismissal in respect to the 9 August letter was raised.

[30] Kleenrite rejects Mrs Washburn's claims and the parties have been unable to resolve their differences.

### **The Authority's investigation**

[31] Mrs Washburn attended the Authority's investigation meeting and supported by several family members. Ms Garlick and Mr Begley were also present on behalf of Kleenrite. The Authority was provided with written statements from each of the witnesses.

[32] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority has decided exceptional circumstances exist.<sup>6</sup>

[33] As permitted under s 174E of the Act, this determination does not set out all the evidence or information received from the parties. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of Mrs Washburn's claims.

### **What are the matters that the Authority must determine?**

[34] Final submissions furnished on Mrs Washburn's behalf ask the Authority to find Ms Washburn's dismissal was predetermined, and to find Mrs Washburn was unjustifiably dismissed on either; 2 February 2018, during the March 2018 discussion, or during the 11 June 2018 meeting, or by the correspondence of 26 June 2018 or 9 August 2018.

[35] It is useful to briefly set out the accepted definition of a dismissal before returning to Ms Washburn's claims.

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<sup>6</sup> Pursuant to s 174C(4) Employment Relations Act 2000.

[36] A dismissal is defined as a termination of employment – a sending away - at the initiative of the employer. The definition encompasses both actual and constructive dismissals.<sup>7</sup>

[37] An actual dismissal is typically achieved by an unequivocal statement by the employer informing the employee he or she has been sent away.<sup>8</sup>

[38] In circumstances amounting to a constructive dismissal the sending away is accomplished by conduct or actions that may be objectively regarded as tantamount or equivalent to a dismissal.<sup>9</sup> Constructive dismissal cases includes situations where the employee resigns against a background whereby s/he is given a choice to resign or be dismissed, or where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or the employer's breach of a duty leads the employee to resign.<sup>10</sup>

[39] Kleenrite submits that the claims alleging Mrs Washburn was dismissed on 2 February 2018 or in the meeting in the second week of March 2018 were not raised within 90 days of the action occurring.

[40] Mrs Washburn's representatives appear to accept the grievances were not raised according to s 114 of the Employment Relations Act 2000, but say Kleenrite impliedly consented "*to the February and March meetings being part of the grievance raised [in the letter of] 19 June 2018*" where Kleenrite did not protest the inclusion of those matters.

[41] I accept the letter of 19 June 2018 records Mrs Washburn's disappointment with the way Kleenrite's engaged with her over the past, and the more recent exchanges between the parties in February and March 2018 were summarised. Viewed objectively however, these matters all appear to be referenced as background context to the claim that Mrs Washburn was dismissed on 11 June 2018. The letter does not characterise the conduct of the past 7 years and/or the February or March meetings as culminating in a discrete sending away during one or other of these exchanges. Nor does the letter allege that Mrs Washburn considered herself to be sent away during one or other of these conversations.

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<sup>7</sup> *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965

<sup>8</sup> Above, n 7.

<sup>9</sup> Above.

<sup>10</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] ACJ 963

[42] I am unwilling to find Kleenrite waived the time related limitations attached to the raising of a personal grievance when it received the 19 June letter, when the letter did not sufficiently make Kleenrite aware that its conduct over time, coupled with the events of February and March 2018 were matters that Kleenrite needed to address or treat as a dismissal, separate to the allegation that Mrs Washburn was dismissed on 11 June 2018.

[43] My view that a dismissal, said to have occurred in February and/or March 2018, was not raised in the 19 June 2018 letter is reinforced by the letter sent by Mrs Washburn's representatives on 10 October 2018, which states:

You will recall that in our letter of 19 June 2018 we raised a personal grievance for unjustified dismissal on the basis Ms Garlick had advised Ms Washburn she would be made redundant on 26 June 2018 and given two weeks' notice.

Without prejudice to this earlier position that the dismissal in fact occurred in June 2018, to preserve our client's position we raise a personal grievance for unjustified dismissal in respect of the 9 August 2018 letter. ...

[44] There is no suggestion in this correspondence that personal grievances for an unjustified dismissal in respect of the February or March interactions were raised in the 19 June 2019 correspondence. I note also that the statement of problem does not allege Ms Washburn was dismissed during February or March 2018 and those matters were not expressed as claims until final submissions were provided.

[45] Kleenrite does not consent to the personal grievance being raised out of time, nor has leave been sought to raise the grievances out of time.

[46] The Authority has no jurisdiction to determine claims said to have occurred in February and/or March 2018. Even if I am wrong on this matter, for reasons that will become apparent, there is no evidence that Ms Washburn was sent away by the employer's words or actions as a consequence of the February/March discussions in any event.

[47] The issues that arise in this case are as follows:

- (a) Whether the end of Mrs Washburn's employment predetermined:
  - (i) in February and or March 2018;
  - (ii) during the organisational review;
  - (iii) in the meeting and correspondence of 11 July 2018;
  - (iv) by the proposal.

- (b) Was there a dismissal?
- (c) If there was a dismissal, was it justified?
- (d) Was there a breach of express or implied terms of employment?
- (e) Was there a breach of good faith?

[48] There are several conflicts in the evidence between the parties about what was said between them at various junctures.

[49] To resolve those differences I have examined both the written and oral statements given by witnesses and considered whether individual accounts on key interactions have remained consistent or have materially changed. I have also assessed whether subsequent conduct between the parties, including any written material, tends to support or detract from witnesses' accounts regarding those events. Taking all these factors into consideration, the factual disputes between the parties have been determined on the balance of probabilities: what is more likely to have happened than not.

**Are there any actions which demonstrate the end of Mrs Washburn's employment was predetermined by Kleenrite?**

***February and March 2018***

[50] Turning to the parties' discussion on 2 February 2018, it is common ground that Ms Garlick introduced the likelihood of a future change to Kleenrite's management in the coming months.

[51] Ms Garlick says she sought to give Mrs Washburn a head-ups that there would be upcoming meetings with CSMs on this matter and advised of the possibility of a reduction in CSMs. She says Mrs Washburn asked if there was a redundancy pay-out.

[52] Mrs Washburn's account of what was said has evolved over time. In the personal grievance letter of 19 June 2018 it is said she "*was encouraged [by Ms Garlick] to resign/finish and she was advised there was a redundancy package if she finished.*"

[53] In her brief of evidence, drafted almost 2 years later, Ms Washburn says she was told she "*would be provided with a package and if she did not [accept it] she would be restructured*

out”.<sup>11</sup> In final submissions Ms Garlick “*threatened to terminate her employment if she did not agree to the package.*”<sup>12</sup>

[54] I accept Mrs Washburn’s version of events, recorded over various pieces of correspondence drafted on her behalf, may have been altered in its description. However there is a discernible shift in the narrative as to what Ms Garlick said, which leads me to have doubts as to which account is more accurate. This is best illustrated in Mrs Washburn’s oral evidence. When questioned as to who, during the discussion on 2 February 2018, introduced the notion of redundancy Mrs Washburn answered that she “*thought she [Ms Garlick] had already made a decision [before the meeting] to make her redundant*” whereas in her written evidence she said Ms Garlick told her “*a manager will have to be let go and that I was redundant.*”

[55] Whatever was exchanged between the parties on 2 February 2018 it is unlikely that Mrs Washburn was expressly told she was redundant and given a choice to agree to an unspecified financial package then and there, or be dismissed, as is submitted. It is simply not plausible that Mrs Washburn waited, for more than 4 months, to be told when her last day of work might be without seeking clarification on the issue, particularly given her participation in the organisational review process. I am not persuaded the discussion of 2 February 2018 demonstrates a predetermination by Kleenrite to end her employment, nor, as already foreshadowed, do I find Mrs Washburn was constructively dismissed during this event.

[56] Turning to the March discussion, no matter whose construction as to what was conveyed between them should be preferred, neither account establishes a constructive dismissal or predetermination. Overall I do not accept Mrs Washburn was discouraged from seeking legal advice.

[57] Mrs Washburn next says she was unfairly singled out from her colleagues when Ms Garlick had informed her (in February and March 2018) about the possible changes. Under questioning however, she accepted Ms Garlick had informed her at some point over this period that Kleenrite was speaking to all the CSMs about the organisational review. Mrs Washburn says she didn’t know whether to believe Ms Garlick on this issue or not, but was unable to state why she would doubt Ms Garlick’s statement in this regard. Mrs Washburn concedes she did not inquire with any of the other CSMs as to whether they had been similarly approached. I

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<sup>11</sup> Brief of Evidence of Hanna Washburn dated 5 May 2020 at para.[30].

<sup>12</sup> Final submissions received 29 June 2020 on behalf of Mrs Washburn at [12], [50.3] and [66].

am not persuaded Ms Garlick's early advice to Ms Washburn about the organisational review demonstrates predetermination.

[58] Mrs Washburn draws attention to Ms Garlick's comment to Mrs Washburn on 2 February 2018 that there may be a reduction to the number of CSMs, noting this was said before the organisational review had begun, as evidence of a predetermined view. I agree a statement of this nature tends to support a finding that the outcome of the organisational review had already been decided.

[59] In response to this criticism, Ms Garlick says that over the course of 2016/17 the directors had reviewed all aspects of the business and some restructuring had already taken place. For example, two office bases had been consolidated and administration staff had not been replaced. She says by January 2018 both her and Mr Begley held a view that Kleenrite was top heavy in operational management. She says the organisational review was aimed to establish whether that assumption was correct or not. Ms Garlick's evidence on this point was credible and I accept her explanation.

***Information relevant to the organisational review.***

[60] Mrs Washburn says she was not given timely information about the operational review on which she could comment.

[61] Each of the CSMs received written notification that the operational review was about to commence via an email (and accompanying attachment) on 3 April 2018. The attachment detailed the basis for the review and advised of the process going forward. Mrs Washburn may not have been aware of that correspondence at the time it was sent as she went on annual leave from 4 April 2018 for a period of time. But the evidence does not support an allegation that Mrs Washburn was not fully informed about the operational review until 6 June 2018 as is claimed.<sup>13</sup>

[62] Kleenrite produced an email drafted by Mrs Washburn on 18 April 2018 in response to an email sent to her by the HR person on 11 April 2018. The earlier email explicitly referenced the email of 3 April 2018, and advised an agenda and questionnaire were being prepared in readiness for the review meetings. Mrs Washburn's email of 18 April 2018 asked when she is likely to receive the agenda and questionnaire. No mention is made about the 3 April 2018,

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<sup>13</sup> Brief of Evidence of Hanna Washburn dated 5 May 2020 at para.[30].

and I am unwilling to accept Mrs Washburn was unaware of it particularly when she was actively seeking the material referred to in the 11 April 2018 email.<sup>14</sup> My finding is bolstered by a subsequent email that appears to have been sent to Mrs Washburn by the HR person on 19 April 2018 which confirms the date and time of the review meeting.<sup>15</sup> This email had three sets of documents attached; a sheet titled CSM data containing each CSMs individual client numbers, revenue figures, and workload differentiations; as well as a questionnaire and a worksheet.<sup>16</sup> That additional information would have be meaningless to Mrs Washburn had she not read the email of 3 April 2018.

### ***The meeting of 11 June 2018***

[63] Ms Washburn says the meeting of 11 June 2018 was also flawed, because;

- (a) she was not advised of her right to bring a support person to the meeting of 11 June 2018;<sup>17</sup>
- (b) she was prevented from providing a response to the proposal during the meeting of 11 June 2018;

[64] I do not accept Mrs Washburn was not given an opportunity to bring a support person to the meeting of 11 June 2018. The email sent to her on 6 June 2018 to schedule the meeting advised: *“You are welcome to bring a support person/advocate to this meeting with you.”* Mrs Washburn replied within half an hour advising she would be attending. The email goes on to say *“But let me think if I will bring a support person on that day.”*

[65] Turning to the meeting of 11 June 2018, I accept Mrs Washburn was upset by news of the proposal. However there is no requirement that an employee and employer must agree to an employer’s proposal for restructuring.

[66] Mrs Washburn says she was not allowed to respond to the proposal during the meeting, however she was not required to at this juncture. It is clear from the email of 6 June 2018 inviting her to the meeting that the purpose of the meeting was to advise Mrs Washburn of the employer’s proposal and explain the basis for it.

### ***The proposal***

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<sup>14</sup> Respondent’s statement in reply, document 4(g) attached to the Respondent’s statement in reply.

<sup>15</sup> Respondent’s statement in reply, document 4(i) and 4(j) as an email chain.

<sup>16</sup> Above, documents 4(e), 4(l) and 4(k) respectively. With

<sup>17</sup> Brief of Evidence of Hanna Washburn dated 5 May 2020 at para.[50]

[67] I do not understand Mrs Washburn to challenge the basis for the organisational review. Documentation supplied over the course of the organisational review indicates an ongoing decline in sales for Kleenrite from April 2009 going forward. Mrs Washburn points to the financial year to March 2017 which reflects a minor increase to revenue compared to the previous year but overall there is clear evidence of a pattern of declining revenue for Kleenrite.

[68] The focus of Mrs Washburn's concerns ultimately lie with Kleenrite's proposal to disestablish her position. Mrs Washburn says this action again reflects her position that she was singled out and her dismissal predetermined.

[69] Mrs Washburn says her role as a CSM was identical to that of the other three CSMs but was unfairly singled out by Kleenrite. Mrs Washburn says this action demonstrates her dismissal was predetermined.

[70] I am not persuaded by Mrs Washburn's position on this point. Firstly it is clear that her contractual hours of work and when she worked were fundamentally different to those performed by her colleagues.

[71] Next, Mrs Washburn suggests data showing the work load spread differences between the CSMs was disingenuous. It is apparent from the meeting notes taken in the review meeting of 26 April 2018 that Mrs Washburn perceived Kleenrite's approach to the allocation of client contracts was unfair, whereby CSMs would manage clients s/he each brought to the business, allowed for an uneven distribution across the CSMs. Mrs Washburn asked for more client contracts.

[72] Mrs Washburn's allegation that her request was ignored is not a fair appraisal. It is clear that the follow up meeting on 8 May 2018 was scheduled, at least in part, to allow Kleenrite to obtain a better understanding as to whether there was the capacity to transfer additional clients to Mrs Washburn's work schedule role when she was already working 50 hours per week.<sup>18</sup> Over the course of this discussion Mrs Washburn acknowledged that the night-time role was not able to serve Kleenrite's clients in the same way the day-time CSMs were able to. That concession tends to undermine her assertion that the CSM roles were exactly the same. Mrs Washburn further advised that client meetings were not her strength, and that it

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<sup>18</sup> Respondent's statement in reply, email dated 3 May 2018 labelled document 4(n)

remained her preference to not do days as she did not want to give up her child care. Mrs Washburn suggested the possibility of reduced hours.

[73] I am unwilling to accept that the forming of a view by an employer leading to a proposal to make a decision that may or is likely to have an adverse effect on the continuation of employment does not, in and of itself, amount to predetermination.

[74] Whether it was feasible or efficient to transfer clients to Mrs Washburn and maintain her contractual hours may have been up for discussion during the consultation process. But that Kleenrite had not responded to the request for additional clients when it advised Mrs Washburn of its proposal, does not alter my view that it was open to it to seek to begin a consultation process with Mrs Washburn given the information it had obtained about how the role operated at night and corresponding constraints. In these circumstances Kleenrite's proposal to disestablish Ms Washburn's position was a matter on which Kleenrite was entitled to initiate a process of consultation about.

[75] There is no evidence to demonstrate Kleenrite's proposal predetermined or underscored by an improper motive.

[76] Mrs Washburn has not been able to establish Kleenrite's actions in reviewing its operational management structure between February and June 2018 was used as a means to dismiss her or that the end of her employment was predetermined. This aspect of Ms Washburn's claim is dismissed.

### **Was Ms Washburn dismissed?**

[77] Mrs Washburn's claim interprets the letter of 11 June 2018 as providing clear notice that her role would be made redundant on 26 June 2018. But during the Authority's meeting, she accepted the notice advising her position was redundant was conditional on the proposal going ahead. She further agreed she understood that the proposal had not been finalised when the parties met on 11 June 2018. It follows that neither the letter of 11 June 2018 nor the discussion held between the parties can be reasonably construed as giving notice of a termination of employment.

[78] I find the parties relationship remained on foot at least up until 19 June 2018. Mrs Washburn's testimony on this point is further telling. In answer to why she did not attend the

meeting scheduled for that date she said “*I was thinking about going but thought I didn’t trust Ms Garlick or had faith in her because we do not have a strong relationship*”.

[79] Mrs Washburn further told the Authority that “*in my heart of hearts I thought my job was gone no matter what was said*”. I accept Mrs Washburn may have genuinely perceived this to be the case, but her failure to attend the meeting of 19 June 2018 or make alternative arrangements to discuss with Kleenrite its proposal presents significant difficulties to her claim that she was unjustifiably dismissed. Presupposing Mrs Washburn’s redundancy was a distinct possibility, the parties were obliged to consult in accordance with the IEA requirements to canvas that possibility.

[80] Mrs Washburn’s statement, through her representatives, that her employment had been terminated, pre-empted that possibility. Without Mrs Washburn’s involvement in Kleenrite’s consultation process Mrs Washburn’s claims for a breach of the redundancy provisions and the good faith consultation obligations cannot survive in these circumstances. Further, in the absence of consultation there can be no certainty as to whether Kleenrite would have concluded Mrs Washburn’s position was surplus to its needs and if so, whether some other alternative employment arrangement may have emerged from their discussions.

[81] If there was a possibility of Mrs Washburn employment ending due to redundancy, that possibility never crystalized where, as I must find, Mrs Washburn simply left her employment before Kleenrite was able to taken any action (justifiable or otherwise) with its proposal.

[82] Mrs Washburn had not established that her departure from Kleenrite was caused by an unequivocal sending away at her employer’s initiative. The claims that she was unjustifiably dismissed must therefore fail.

### **Costs**

[83] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority