

Attention is drawn to the order
prohibiting publication of certain
information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 100
3084092

BETWEEN

BAI ZAMMIT-ROSS
Applicant

AND

**THE CHIEF EXECUTIVE,
ORANGA TAMARIKI MINISTRY
FOR CHILDREN**
Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, counsel for the Applicant
Nicola Cuervo and Louise Grey, counsel for the Respondent

Investigation Meeting: 4 February 2021 at Christchurch

Submissions Received: On the day
Date of Determination: 12 March 2021

DETERMINATION OF THE AUTHORITY

- A Bai Zammit-Ross's employment with the Chief Executive Oranga Tamariki ended justifiably by way of compulsory medical retirement.**
- B Costs are reserved and failing agreement a timetable set for an exchange of submissions.**

Prohibition from publication

[1] The Authority prohibits from publication the names of the young people who were involved in the incident on 20 May 2017 and any information that may identify them.

Employment Relationship Problem

[2] Bai Zammit-Ross commenced employment with Oranga Tamariki, Ministry for Children, (Oranga Tamariki) as a social worker in February 2010. Her place of work was Te Puna Wai o Tuhinapo (Te Puna Wai). Te Puna Wai is a youth justice facility operated by Oranga Tamariki in Christchurch. It accommodates youth offenders who have been remanded or sentenced into custody.

[3] At the material time Ms Zammit-Ross's work was covered by the collective employment agreement between the Chief Executive of the Ministry of Development and the National Union of Public Employees (NUPE) 2016-2018 (the employment agreement).

[4] On 20 May 2017 Ms Zammit-Ross intervened between two youths who were fighting in the courtyard. Her hand became twisted in one the youth's tops as she was attempting to restrain him. This resulted in her wrist becoming injured. An incident report was provided by another staff member a little over an hour after the incident.

[5] After the incident Ms Zammit-Ross continued working at Te Puna Wai but undertook duties with less contact such as in the kitchen area.

[6] Ms Zammit-Ross experienced worsening pain in her wrist which made driving difficult. On 4 October 2017 she completed a health and safety incident report, advising that since the incident she had been experiencing ongoing wrist pain and had recently been to see a specialist. The following day Ms Zammit-Ross provided Oranga Tamariki with a medical certificate from her doctor that she was only able to undertake light duties.

[7] On 9 October 2019 an ACC medical certificate was received by Oranga Tamariki diagnosing Ms Zammit-Ross with a sprained left wrist ligament arising from the injury.

[8] On 17 October an ACC medical certificate advised that Ms Zammit-Ross was fully unfit for work until 8 November 2017 and she remained fully unfit for work from that date.

[9] On 1 December 2017 the medical certificate provided to Oranga Tamariki, whilst referring to the sprain, additionally said that Ms Zammit-Ross was suffering from Post-Traumatic Stress Disorder (PTSD) secondary to the trauma of the assault.

[10] Her employment ended on 8 February 2019 for reason of compulsory medical retirement.

[11] Ms Zammit-Ross says that she was unjustifiably dismissed from her employment.

[12] Mr McKenzie in an email dated 18 December 2020 advised that a claim for damages for breach of contract arising out of an unsafe working environment was not pursued. He further advised that the claim for reinstatement was no longer being pursued.

[13] Ms Zammit-Ross wants a finding that she was unjustifiably dismissed, compensation and reimbursement of costs.

[14] Oranga Tamariki says that Ms Zammit-Ross was not unjustifiably dismissed and that her employment ended on 8 February 2019 by way of compulsory medical retirement. It says that it acted fairly and reasonably in all the circumstances and in accordance with its medical retirement policy.

The issues

[15] The Authority needs to determine the following issues in this case:

- (a) Was compulsory medical retirement what a fair and reasonable employer could have done in all the circumstances at the time it occurred?
- (b) This will include an assessment of:
 - (i) Can the incident on 20 May 2017, the resulting physical and mental injury and length of recovery be attributed to the actions or inactions of Oranga Tamariki?
 - (ii) If so would that impact on the substantive justification for medical retirement?
 - (iii) What did the medical reports provide?
 - (iv) Was there a reasonable opportunity to recover in the circumstances?

- (v) Was there an adequate and fair inquiry into the likelihood of a return to work?
- (vi) Was the process fair with an ability for Ms Zammit-Ross to respond to any information and have that response considered?
- (vii) Were options to dismissal considered including redeployment to a different role and rehabilitation?

Was compulsory medical retirement what a fair and reasonable employer could have done in all the circumstances at the time it occurred?

The legal framework

[16] The test of justification in s 103A requires the Authority to objectively determine whether the actions of Oranga Tamariki, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[17] It was recognised by the Employment Court that the factors in s 103A of the Act do not sit particularly comfortably with the no-fault based dismissal of medical incapacity.¹ A broad framework was therefore considered for medical incapacity which the Authority will apply in this case.²

Can the incident on 20 May 2017, the resulting wrist injury and PTSD and length of recovery be attributed to the actions or inactions of Oranga Tamariki?

[18] The evidence supports that it was not until early October 2017 that Oranga Tamariki became aware of the wrist injury Ms Zammit-Ross had sustained on 20 May 2017. The medical certificate dated 5 October 2017 referred to a return to work on light duties to enable diagnosis and a rehabilitation plan. From mid-October 2017 Ms Zammit-Ross was fully unfit to return to work.

[19] Russell Caldwell is the Residence Manager of Te Puna Wai and has been in that role for almost six years. He said in his evidence that as far as he was aware the medical certificate of 1 December 2017 was the first time that Oranga Tamariki was aware that there were mental health issues arising from the 20 May 2017 incident.

¹ Above n 1 at [32].

² At [32].

Supervision

[20] Mr McKenzie placed weight in his submission on the limited supervision available to Ms Zammit-Ross during her employment. He submits more supervision would have increased Ms Zammit-Ross's resilience following the incident on 20 May 2017 and improved chances of a return to work. Ms Zammit-Ross said that over the period of her employment from 2010 she only had 11 supervision sessions and should have had 209 sessions.

[21] The relevant policy recommends one hour per fortnight supervision for those social workers with more than 12 months Oranga Tamariki experience. The policy provides that a social worker with professional registration is required to participate in regular supervision in accordance with the Social Work Registration Board policy at least monthly. Ms Zammit-Ross was a qualified but not registered social worker.

[22] Mr Caldwell considered some of the notes from Ms Zammit-Ross's supervision sessions that were able to be retrieved. He said in evidence that Oranga Tamariki was responsive to her needs and there was adequate supervision. Mr Caldwell gave an example of his involvement in approving a secondment opportunity in 2016 when Ms Zammit-Ross expressed that she wanted to try a different direction.

[23] Regular supervision is desirable and no doubt builds resilience in the demanding role that Ms Zammit-Ross carried out. The policy specifically refers to effective supervision supporting practitioners with the impact of trauma and stress. Mr Caldwell and Ben Hannifin who is the General Manager, Youth Justice Residences said in evidence that the point of professional supervision is to discuss work related matters. Any health issues identified during supervision would need to be managed by medical input or counselling and supervision alone would not have assisted Ms Zammit-Ross.

[24] Mr Hannifin referred to the period since he joined Oranga Tamariki and said that Oranga Tamariki has increased its leadership over time for more involvement in supervision. He also said that supervision takes different forms and could be group or one-on-one when the need presents.

[25] I accept that Ms Zammit-Ross was unhappy with the level of supervision during her employment. She considered if appropriate supervision had been available to her she would have been stronger in her practice and recovery.

[26] I would need to be but am not satisfied to the required standard of a causal link between the availability of supervision to Ms Zammit-Ross and the very unfortunate and long lasting impact on her from the incident on 20 May 2017. There was a lack of knowledge by Oranga Tamariki of the physical impact of the 20 May 2017 incident until October 2017 and the mental health impact until 1 December 2017. I do not consider in those circumstances Oranga Tamariki can be criticised for not providing specific support through supervision or otherwise after the incident.

Staffing levels on 20 May 2017

[27] Ms Zammit-Ross had a concern about being on her own in the courtyard with a group of youth on 20 May 2017. She said that it was the first time she had had to respond on her own to an incident and said that there should have been at least two staff in the courtyard.

[28] Mr Caldwell did not in his evidence think it unusual for one staff member to be outside with a group of residents. He referred to the “line of sight policy” that all staff members must remain in the line of sight of at least one other staff member during each shift. Mr Hannifin said that his understanding is that residences do not usually have set staffing ratios.

[29] It is unclear from reading the incident report the exact time between Ms Zammit-Ross restraining one of the young people and other staff members coming out to assist after the alarm was raised. There is no mention in the incident report of a significantly delayed response. The incident is recorded in the report as occurring at 11.05am on 20 May 2017 and the incident report was completed to be sent to the manager at 12.16pm that same day. Neither the writer of the incident report or Ms Zammit-Ross escalated concerns about staffing or any other issues to a more senior person.

[30] I have considered whether the incident itself was enough of an alert that something was amiss. The incident on 20 May 2017 was described by Mr Caldwell and Mr Hannifin in evidence as within the normal range of incidents that could occur at the youth justice residence when a fight is broken up by staff. I cannot conclude that the fact of an incident of fighting was reason by itself for concerns necessitating further investigation.

[31] Ms Zammit-Ross had undertaken regular restraint training for non-violent intervention and potential aggression restraint training in February 2017. There was other

training undertaken as well. Ms Zammit-Ross had also been involved in a number of restraints.

[32] The breach of contract claim for failing to provide a safe workplace on 20 May 2017 was withdrawn. I cannot be satisfied from the more limited evidence I heard that there was fault on the part of Oranga Tamariki with respect to staffing on 20 May 2017.

Recruitment process and information about the role and level of risk

[33] Ms Gemmell is the Secretary of NUPE. She represented Ms Zammit-Ross from in or about January/February 2018. Ms Gemmell was critical of the recruitment process with respect to making any risk to employees clear. Further she said that there was no information that employees with any pre-existing mental conditions may not obtain ACC cover if mental injuries result from a work place injury.

[34] Mr Caldwell and Mr Hannifin did not have direct knowledge of what occurred at the time of Ms Zammit-Ross's appointment as neither was an employee at that time.

[35] Mr Caldwell was able to obtain a copy of Ms Zammit-Ross's employment application form that did include a paragraph about dealing with the experiences that some of the children may have been subjected to and recommending that applicants consult a support person or professional if they had similar experiences. That would have highlighted that the young people may have experiences which may in turn present challenges for employees.

[36] Ms Zammit-Ross did not at the time of her application indicate that she had a medical condition that may be aggravated or contributed to by the work. Mr Caldwell recognised with respect to Ms Zammit-Ross's answer on her application form that mental health issues are unpredictable and could arise unexpectedly and that this was not a dishonest answer per se.

[37] ACC cover is dependent on the facts as they arise with any incident leading to injury. The process involves an assessment of medical information. I am not sure that a statement about that is something that would usually appear on an application form so that an organisation could be criticised for not including it.

[38] It was not established from the evidence that it would have been apparent or within the knowledge Oranga Tamariki held about Ms Zammit-Ross that an incident such as that on 20 May 2017 in breaking up a fight would have had the consequences that it did.

Limited contact during period of absence from the workplace

[39] Ms Zammit-Ross was critical of the contact and support from her employer from October 2017 when it was known she had sustained an injury until at least, December 2017.

[40] She said in her evidence that she only received contact from her employer once in early October 2017 and then not again until 14 December 2017. On 14 December 2017 her manager (team leader) sent her a Facebook message advising that he was keen to catch up at some stage if she was ok to do so and asked if she was “doing OK.”

[41] Ms Zammit-Ross responded to her team leader and noted that she was going to counselling and had an assessment with ACC on 25 January 2018 for PTSD. Further that she needed to take care of herself. There was no response to that.

[42] Ms Zammit-Ross said that the next contact that she received from her employer was a voice message on 8 January 2018 from her team leader advising her that she was on the roster for the afternoon shift and asking her to call him. Ms Zammit-Ross was distressed by the message and instructed NUPE in the matter.³

[43] Oranga Tamariki referred to an interaction on 6 December 2017 when Ms Zammit-Ross spoke to her team leader who I shall refer to as A. A took a record of the conversation.⁴ The record of the conversation states that A advised Ms Zammit-Ross the information discussed would be shared with management. The notes record Ms Zammit-Ross discussing the cause of the PTSD. A review decision to grant ACC cover to Ms Zammit-Ross is currently on appeal to the District Court. Those matters will be explored fully at that time and I need not refer to them here. The notes record that there was an appointment on 25 January 2018 for the PTSD diagnosis and that Ms Zammit-Ross did not know when, or if, she would be able to return to work.

[44] From early January 2018 there was support for Ms Zammit-Ross from NUPE and WellNZ organised an appointment with a psychiatrist Dr F about the PTSD.

³ This communication appeared to be some sort of unfortunate mistake.

⁴ BOD at pg 185.

[45] I accept that Ms Zammit-Ross was distressed by the limited contact with her from October to December 2017 in particular. There was no evidence that this lack of contact was intentional. There was some contact when medical reports were provided by Ms Zammit-Ross and around the WellNZ cover. I accept mainly from Ms Zammit-Ross to Oranga Tamariki rather than the other way around.

[46] I do weigh that for much of the period there was only awareness of the wrist injury and not the mental health issues. Mr Caldwell was sorry that Ms Zammit-Ross felt unsupported and did indicate that there may some changes about contact for employees on medical absences because of the concerns expressed. The amount of contact an employer has with an employee who is unwell is always a balancing act. Some may appreciate more frequent contact and others may not.

Conclusion about fault

[47] The evidence does not enable the Authority to conclude that the actions or inactions of Oranga Tamariki were causative of the physical and mental health consequences that flowed from the 20 May 2018 incident and the length of recovery. It did not enable a conclusion that there was inadequate staffing at the time of the incident on 20 May 2017.

[48] Even if there was fault I am not satisfied that could inform decisions about medical incapacity to the extent that it required employment to continue until Ms Zammit-Ross was well. I accept Ms Cuervo's submission that case law does not go that far. Where there is responsibility by the employer for an employee's condition more emphasis may fall on an obligation to promote rehabilitation. That in turn may inform the reasonableness of any timeframes.⁵

The medical reports

[49] An individual rehabilitation plan was developed in or about November 2017 for the wrist injury and had as a goal and outcome for Ms Zammit-Ross to return to normal activities at work and home.⁶ Ms Zammit-Ross then developed increasing mental health symptoms.

[50] There was no consent to provide the first medical report from Dr F prepared for WellNZ in or about January/February 2018 to Oranga Tamariki. Ms Zammit-Ross said that

⁵ *Jack v Attorney-General* [2004] 1 ERNZ 316

⁶ Common bundle of documents (BOD) pg 178.

it was the view of WellNZ that it contained very personal information and should not be provided for work purposes. She was agreeable to see a specialist that Oranga Tamariki wished to refer her to.

[51] A meeting on a date proposed by Mr Caldwell in a letter dated 12 February 2018 to discuss Ms Zammit-Ross's health situation did not take place. It was delayed to enable Ms Zammit-Ross to see Dr F again for the purposes of assessing how the PTSD may affect her undertaking her role as a social worker. Ms Gemmell was involved by this stage in representing Ms Zammit-Ross

Dr F's report dated 15 April 2018

[52] Dr F's second report confirmed that Ms Zammit-Ross was receiving treatment for PTSD and reported some recent improvement however stated that she remained "highly symptomatic and significantly functionally impaired." The prognosis for a full recovery was stated to take considerable time probably 1-2 years and only a very low likelihood of recovery to full fitness to work in the previous role within 12 months. The report provided that if Ms Zammit-Ross were able to return to work within the next 12 months further traumatic exposure would exacerbate her symptoms and prolong recovery.

[53] The report provided that there is a least a 50% chance that within the next 12 months Ms Zammit-Ross could become fit for part-time, initially 20 hours per week alternative duties that did not involve frontline duties such as administrative or quality audit tasks.

1 May 2018 meeting

[54] On 1 May 2018 a meeting took place to discuss the report with Ms Zammit-Ross. Mr Caldwell attended with a human resource advisor and Ms Zammit-Ross with Ms Gemmell. The notes taken from the meeting confirm that no issue was taken by Ms Zammit-Ross that her health was not good and that she could not go back into the workplace.

[55] The parties had discussions and attended mediation on 13 July 2018.

[56] There are two options available for medical retirement in Oranga Tamariki's policy, voluntary and compulsory medical retirement. It was understood by early August 2018 that Ms Zammit-Ross had decided not to take voluntary medical retirement.

9 August 2018 letter from Mr Caldwell

[57] This letter commenced the start of the compulsory medical retirement process. Mr Caldwell wrote to Ms Zammit-Ross that Oranga Tamariki had decided to commence the process of compulsory medical retirement. The background to the decision was set out in the letter with the date of the incident and wrist injury, the secondary diagnosis, related medical certificates, Dr F's medical report and meetings. A copy of the medical retirement policy was attached. It was noted that the procedure required two medical assessments to be completed. A consent form was attached for that purpose.

[58] Ms Zammit-Ross was able to nominate one of the medical practitioners to complete an assessment and Oranga Tamariki the other. It was stated in the 1 August 2018 letter that Ms Zammit-Ross would remain on paid sick leave while the two medical assessments were completed and until the next meeting.

[59] Ms Zammit-Ross signed the consent form on 17 August 2018 nominating her GP. Oranga Tamariki nominated Dr F.

Medical assessments

Medical assessment one

[60] A medical certificate was obtained from Ms Zammit-Ross's GP on 11 September 2018 who wrote that Ms Zammit-Ross in her opinion "is medically unfit from today and will remain unfit for the foreseeable future."

Medical assessment two - Dr F's report 16 September 2018

[61] Dr F also saw Ms Zammit-Ross on 11 September 2018. He provided a report on 16 September 2018. He confirmed his earlier opinion that it was unlikely Ms Zammit-Ross would recover in the foreseeable future to the point where she could return to her previous role. Even if she did Dr F considered it would be inadvisable for her to attempt to do so as it would re-expose her to trauma and an exacerbation of mental health problems would be very likely.

[62] Dr F did not rule out a possibility of successful rehabilitation into a different role within Oranga Tamariki in the medium to long term, six to twelve months. He referred to

administrative or quality audit work in an office environment not frontline work. Dr F noted that he was unsure if Ms Zammit-Ross “had any desire to attempt a graduated return to work in a different role within Oranga Tamariki even if offered.”

Conclusion about medical reports

[63] The medical reports confirmed that Ms Zammit-Ross was fully unfit to return to her role for the foreseeable future and that even if she did become well enough to do so it would not be medically advisable for her to do so. She could at the earliest after six months to a year be well enough to return in a graduated way to work in a different capacity in an administration type role.

[64] Mr Hannifin said that he was briefed by a Senior Human Resource advisor who I shall call John and there was a review of the material about the incident and Ms Zammit-Ross’s medical assessments.

Time to recover

[65] One of Ms Zammit-Ross’s concerns was that Oranga Tamariki did not give her time to become well before she was required to engage in a medical retirement process. I acknowledge the difficulty for Ms Zammit-Ross of dealing with a process of medical retirement whilst she was so unwell. What is required of the Authority when considering the time given to recover is to balance the interests of Ms Zammit-Ross and the business requirements of Oranga Tamariki. The Authority is also guided by other decisions particularly those from the Employment Court. It must be recognised however that they each turn on their own facts.

[66] By the time of the commencement of the compulsory retirement process on 9 August 2018 Ms Zammit-Ross had been absent from 17 October 2017 which is a period of about 9 months. Within that time frame there had been three medical assessments that supported she was fully unfit to return to work at the time and any return to work on the best case scenario would be to a different role that was not frontline and not before at the earliest six months.

[67] WellNZ had declined cover for PTSD and from in or about February 2018 Ms Zammit-Ross had been in receipt of paid sick/ special leave.

[68] A decision was not made to proceed with compulsory medical retirement until 29 October 2018. On 8 November notice of this was provided to Ms Zammit-Ross. One month's notice took effect from 9 January 2019 and employment ended on 8 February 2019.

[69] I conclude a fair and reasonable employer could have commenced the medical retirement process in August 2018. By way of contrast in a case of medical incapacity also with a large employer the Employment Court held that it was open to the employer to commence an enquiry process after seven months.⁷

Was there an adequate and fair inquiry into the likelihood of a return to work?

[70] On receipt of the September 2018 medical reports Mr Caldwell escalated the issue about compulsory medical retirement to Mr Hannifin. Mr Hannifin had the appropriate managerial delegations to make decisions that could end an employee's employment.

[71] Mr Hannifin accompanied by the Senior Human Resource advisor, who I shall call John, met with Ms Zammit-Ross and Ms Gemmell at the NUPE offices on 25 October 2018.⁸

[72] The medical retirement policy requires a meeting to discuss the medical assessments received and an opportunity for Ms Zammit-Ross and Ms Gemmell to make any submissions before a final decision is made.

[73] In her statement of evidence Ms Gemmell said that the focus for NUPE at that time was for Oranga Tamariki to continue Ms Zammit-Ross's sick leave and promote her recovery. Ms Gemmell said that this was because there were poor staffing levels leading to the injuries, lack of supervision over the course of Ms Zammit-Ross's employment, inadequate follow up when she was on sick leave and no ACC weekly compensation.

[74] Mr Hannifin said that he was shocked at how fragile Ms Zammit-Ross appeared and how clearly unwell she was at the meeting. He recalled the meeting taking about an hour. Ms Zammit-Ross did not want to return to her role as a social worker at Te Puna Wai and Ms Gemmell agreed that Ms Zammit-Ross was unable to do so. There was discussion about financial concerns with medical retirement because WellNZ had declined cover for the PTSD as a work related injury. Mr Hannifin recalls Ms Zammit-Ross asked if it would be possible

⁷ *Lyttelton Port Company Ltd v Arthurs* [2018] NZEmpC 9 at [37].

⁸ To the extent there is any dispute about the date of the meeting I accept it was 25 October rather than 27 October 2018.

for her to undertake another role. He recalled in his written evidence that he advised her it was a large organisation and there would likely be opportunities for her to apply for a role that was suitable to her needs. He said no alternatives were put forward. Ms Gemmell said that Mr Hannifin put forward no alternatives. It was unclear when Ms Zammit-Ross would be well enough to return to work in any capacity.

[75] Following the meeting Mr Hannifin discussed the situation with John and concluded that medical retirement was the right step.

Conclusion about adequate inquiry about ability to return

[76] The medical reports, informed by what was said at the meeting on 25 October 2018, constitute an adequate inquiry about the ability to return. The medical evidence was not in dispute.

Was the process fair and was Ms Zammit-Ross able to respond to any information and have that response considered?

Decision to compulsorily retire in email dated 29 October 2018

[77] After the meeting on 25 October 2018 Mr Hannifin sent an email on 29 October 2018 to Ms Zammit-Ross and Ms Gemmell advising that he had decided to proceed with compulsory medical retirement. He summarised the two options that had been discussed at the meeting in the email. They were that Ms Zammit-Ross could take either her remaining leave entitlements and be issued with notice of medical retirement or receive notice straight away and be paid out her leave entitlements. He asked Ms Zammit-Ross to consider which option she would prefer.

Ms Gemmell's response dated 29 October 2018

[78] Ms Gemmell responded to Mr Hannifin's email on the same date sending her email to him and to John. She set out the reasons outlined in the meeting that Ms Zammit-Ross had not been kept safe by Oranga Tamariki in her employment.⁹ These were focussed on some of the aspects that have been discussed earlier in the determination about supervision, failure to ensure safe staffing and no follow up when Ms Zammit-Ross was on sick leave.

⁹ Meeting on 25 October 2018

Ms Gemmell was also critical of the fact that ACC cover for Ms Zammit-Ross had at that stage ceased.

[79] Ms Gemmell confirmed in her email that NUPE had accepted that Ms Zammit-Ross could not be back on the floor at Te Puna Wai but had suggested that she could be kept employed until she was well and then she could work at Oranga Tamariki in a different capacity. She said that Mr Hannifin's response had been that even with medical retirement Ms Zammit-Ross could apply back to Oranga Tamariki once well. Ms Gemmell wrote that she thought Oranga Tamariki was going to provide a preliminary decision initially and asked for that to be clarified. She stated that she would be in communication about the options and proposal that Ms Zammit-Ross would use her own annual leave until it was exhausted and noted that this proposal was appreciated.

Who responded to Ms Gemmell?

[80] Mr Hannifin could not recall whether he or John responded to Ms Gemmell. John no longer works for Oranga Tamariki. He said that he expected it was John who did so because there is a subsequent email from Ms Gemmell to John dated 30 October 2018 asking for clarification about the financial implications for the two options.

[81] When I asked Ms Gemmell about this she said that she had communicated with John only about the financial aspects of medical retirement.

[82] Ms Zammit-Ross decided to take the option of leave and was then given notice of her medical retirement.

Medical retirement approval form signed off

[83] On 8 November 2018 Mr Hannifin signed the medical retirement approval form that Ms Zammit-Ross would be compulsorily medically retired with her employment ending on 8 February 2019.

Ms Zammit-Ross advised by letter dated 8 November 2018

[84] Mr Hannifin wrote to Ms Zammit-Ross on 8 November 2018. In his letter he used words that could suggest Ms Zammit-Ross agreed to medical retirement. In his evidence he expressed that he was sorry for the miscommunication and that it was not his intention to

cause upset. He understood that Ms Zammit-Ross would have preferred to remain employed by Oranga Tamariki. He said that he meant that the parties were on the same page that it was not an option for a return to work for the foreseeable future.

[85] Mr Hannifin acknowledged in the letter both how difficult the situation was for Ms Zammit-Ross and her more than 8 years' service. He advised the steps she could take if she felt up to a farewell. Finally he noted that taking compulsory medical retirement did not preclude Ms Zammit-Ross for applying for a position in the future with Oranga Tamariki once she was well enough to do so.

[86] A personal grievance for unjustified dismissal was raised on 14 January 2019. No issue was taken about any timeframes presumably because the relationship ended on 8 February 2019 as contemplated.

Conclusions about procedural fairness

[87] Ms Zammit-Ross had the ability to respond to the medical reports and a decision about compulsory medical retirement at the meeting on 25 October 2018.

[88] The policy requires for compulsory medical retirement the employee be offered an opportunity to meet so any submission can be made before a final decision is made. In accordance with that Mr Hannifin arranged the meeting on 25 October 2018. I conclude that there was an opportunity for Ms Zammit-Ross to respond and give feedback in accordance with the policy at the meeting. It was what a fair and reasonable employer could have been expected to have undertaken.

[89] There appeared from Ms Gemmell's email of 29 October 2018 an element of confusion about whether Mr Hannifin's decision was preliminary or final.

[90] That could well have stemmed from Mr Caldwell's letter of 9 August 2018 when he mentioned a decision about medical retirement would not be made until full consideration is provided to the medical reports. Further he wrote a preliminary decision will be provided and then there will be an opportunity to meet and to provide feedback to that preliminary decision. Part of the process was a request for approval from Mr Caldwell to Mr Hannifin to approve the compulsory medical retirement of Ms Zammit-Ross. There is a handover document dated 19 September 2018.

[91] It was clear that the meeting on 25 October 2018 was to talk about compulsory medical retirement on the basis of medical incapacity. Ms Gemmell made some comments in her email of 29 October 2018 sent after the decision about medical retirement had been made. They were matters she refers to as having been discussed at the meeting. I could not be satisfied that they were new matters that she wished to bring to Mr Hannifin's attention rather there was emphasise in the email on what had been said at the meeting.

[92] To the extent that there was some misunderstanding about the fact a final decision would be made after the meeting on 25 October this was in the circumstances a minor defect and it did not result in unfair treatment under s 103A(5) of the Act.

[93] There were two other departures from the medical retirement policy that I see as minor defects as well. The first is that Mr Hannifin did not as required under the policy meet with Ms Zammit-Ross to formally notify her of the outcome and the reasons for the decision but rather sent the outcome by email. Ms Zammit-Ross was very unwell at that time. The requirement for a meeting needs to be weighed with that and the wisdom of delivery of distressing news in person. Ms Gemmell was representing Ms Zammit-Ross.

[94] The second is that I was not able to be satisfied of an instructing letter written by Mr Caldwell to the GP who was nominated by Ms Zammit-Ross. Given the consistency of the two medical assessments and the lack of any dispute about their content I consider that is a minor defect that did not cause unfairness.

[95] Overall I find that there was a fair process and Ms Zammit-Ross was able to respond to the medical information that was relied on and advance reasons that she should be kept on as an employee.

Were options to dismissal considered?

[96] Mr McKenzie referred the Authority to clause 4.8.8 of the collective agreement. Clause 4.8.8 is a sub clause under the sick leave provision. It provides that the Ministry will always do its best to rehabilitate employees back into work after sickness or accident. There was a rehabilitation plan for the wrist sprain however from mid-October 2017 Ms Zammit-Ross was fully unfit to return to work. Thereafter the medical reports did not clear Ms Zammit-Ross to return to work in any capacity.

[97] There was a possibility of a return to non-frontline work in six to twelve months from September 2018. There was no suggestion from the medical reports of rehabilitation and the nature of that. In some medical reports there is reference to graduated introduction back into the work place but in this case there was a level of uncertainty about the time for a return to work in any capacity.

[98] Mr McKenzie additionally in his submission refers to there being no consideration of redeployment before Ms Zammit-Ross was medically retired.

[99] Rehabilitation and consideration of redeployment are important aspects in managing a return to work. There is support from the handover document to Mr Hannifin that options to medical retirement were considered including redeployment and remaining either on full paid sick leave, reduced pay or sick leave without pay until ready to return.

[100] I am satisfied there was an opportunity for Ms Zammit-Ross or Ms Gemmell to suggest options or alternatives at the meeting on 25 October 2018. In circumstances where Ms Zammit-Ross presented as very unwell it was not unreasonable for Mr Hannifin to wait for Ms Zammit-Ross who would have best understood her health needs to advance any alternatives to her previous role. No alternatives were advanced.

[101] Unfortunately Ms Zammit-Ross remains unwell.

Conclusion about rehabilitation and redeployment

[102] Ms Zammit-Ross presented at the meeting on 25 October 2018 as too unwell for rehabilitation or redeployment to be explored at that time. Furthermore rehabilitation was not advanced as an option in the medical assessments.

Conclusion on termination of employment for compulsory medical retirement

[103] Oranga Tamariki is a large organisation. It could carry an absence for longer than a smaller employer could have. Ms Zammit-Ross had worked at Oranga Tamariki since 2010.

[104] Ms Zammit-Ross was fully unfit to work from mid-October 2017. It was not until almost 9 months had elapsed that a process was commenced to consider compulsory medical retirement on 9 August 2018 and employment ended on 8 February 2019. That was over a year from the time that Ms Zammit-Ross was fully unfit to work.

[105] Three medical reports all confirmed that Ms Zammit-Ross was fully unfit to return to her role for the foreseeable future. Two from Dr F provided that it would be medically inadvisable for her to return to her previous role even if fit to do so. There was a possibility of a return to an alternative non-frontline role after six to twelve months from September 2018.

[106] Ms Zammit-Ross wanted to remain employed on sick leave in the interim to enable her to get well. WellNZ had not agreed to cover her for the PTSD and a review date for that decision had not at that time been obtained. There would therefore be an impact on her income after the contractual benefit of compulsory medical retirement of 65 days retiring leave had been exhausted.

[107] The Authority needs to balance with the interests of Ms Zammit-Ross the business needs of Oranga Tamariki and the medical prognosis. Mr Hannifin said in his evidence that continuing to pay Ms Zammit-Ross until she was well enough to resume work in a different area was not sustainable or fiscally responsible from Oranga Tamariki's perspective.

[108] Case law supports that an employer is not bound to hold a job open indefinitely for an employee who is unable to work.¹⁰

[109] I have found that the process was fair and the medical information supported after a year of absence it was unlikely Ms Zammit-Ross could return in any capacity in the short to medium term. It was clear that it was unlikely and inadvisable from a medical perspective that she could ever return to her previous role. In all the circumstances the decision to terminate Ms Zammit-Ross's employment by way of compulsory medical retirement was one that a fair and reasonable employer could have reached in all the circumstances. It was justified.

[110] The personal grievance for unjustified dismissal is not made out.

Costs

[111] I reserve the issue of costs. It may be that agreement about these can be reached.

¹⁰ *Lal v The Warehouse Limited* [2017] NZEmpC 66 at [30] with reference to *Canterbury v Clerical Workers IUOW v Andrews and Beaven Ltd* [1983] ACJ 875 at 877.

[112] If agreement cannot be reached then Ms Cuervo and Ms Grey have until 26 March 2021 to lodge and serve submission as to costs and Mr McKenzie has until 16 April 2021 taking the Easter holiday period into account to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority