

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 343  
3100793, 3144841,  
3144844, 3144862,  
3144864, 3144866,

|         |  |
|---------|--|
| BETWEEN | REBEKAH MATSAS<br>Applicant in 3100793   |
| AND     | JANE SPILMAN<br>Applicant in 3144841     |
| AND     | MICHELLE BABB<br>Applicant in 3144844    |
| AND     | RACHEL ROBBEN<br>Applicant in 3144862    |
| AND     | CHELSEA VAN DUIN<br>Applicant in 3144864 |
| AND     | JODI-ANN HANSEN<br>Applicant in 3144866  |
| AND     | BIRTHING CENTRE LIMITED<br>Respondent    |

Member of Authority: Michael Loftus

Representatives: Simon Mitchell, counsel for the Applicant  
Stephen Langton and Jess Greenheld, counsel for the  
Respondent

Investigation Meeting: 4 and 5 August 2021 at Palmerston North

Submissions Received: At the investigation meeting with further input up to  
10 August 2021

Date of Determination: 25 July 2022

---

**DETERMINATION OF THE AUTHORITY**

---

## **Employment Relationship Problem**

[1] Each applicant claims to have been unjustifiably dismissed. Each also claims to have been unjustifiably disadvantaged though these claims relate to the process which led to the dismissal. That process also leads to claims the respondent has breached the duty of good faith and penalties are sought.

[2] The respondent, Birthing Centre Limited (BCL), accepts the employment of each of the applicants ended and says each “...*was justifiably terminated following the transfer of the respondent’s services to Mid Central District Health Board (MDHB).*”<sup>1</sup>

## **The Authority’s investigation**

[3] The Authority’s investigation was initiated with a Statement of Problem and Statement in Reply with respect to Ms Matsas alone. The respondent was also originally identified as “The Wright Family Foundation” though this was later changed by agreement. Following subsequent applications from the other five applicants, along with amendments to that from Ms Matsas, it was agreed the circumstances and issues were sufficiently comparable that all six applications could be heard simultaneously.

[4] The investigation meeting was preceded with an exchange of written briefs. At the meeting oral evidence was given by all six applicants along with Jill Ovens, the union official who had represented with respect to the events in dispute. BCL’s evidence was primarily given by Chloe Wright, a principle of the Wright Family Foundation which owns BCL, augmented with some oral evidence from Wayne Wright.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of

---

<sup>1</sup> Statement in Reply at 1.4

the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

## **Background**

[7] As already said BCL is owned by a registered trust, The Wright Family Foundation, which was established with a view to effecting change in the care and support of birthing mothers with an emphasis on primary care during the first 1000 days. It provides primary birthing services at various locations around New Zealand. One of those was Te Papaioea Birthing Centre (Te Papaioea) in Palmerston North and it was there the six applicants were employed as midwives. All were also members of the midwives union, MERAS.

[8] Also involved was the MidCentral District Health Board (MDHB) which had a funding agreement with Te Papaioea under which the Birthing Centre operated.

[9] In April 2019 Te Papaioea approached MDHB for an increase in funding as it was then operating at a loss. According to Ms Wright this led to some discussion about workforce sustainability including whether there was a staffing model under which the two could share midwifery services. These discussions did not, however, advance at that time.

[10] Ms Wright says that in August 2019 the issue was again raised by MDHB and the idea of transferring Te Papaioea's services to MDHB was aired. She says that while she was surprised, she could see merit in the suggestion with potential benefits for both mothers and midwives. She advised she was open to further discussion.

[11] Ms Wright says MDHB advised they would do some internal work to see if and how a transfer could work but added MDHB made it clear that in the interim she was required to treat the potential transfer as strictly confidential.

[12] Ms Wright says:

I understood the purpose of this requirement was primarily to protect the MDHB's commercial interests while it considered potential options to implement the transfer of management, progressed the idea into a formal proposal for the Board's approval, and did its due diligence. The confidentiality requirement would allow the MDHB to explore the possibility of a transfer without gossip and speculation, which could impact upon public confidence in the services it offered.

[13] In saying this Ms Wright relies, to some extent, on a subsequent letter from MDHB to BCL's solicitors dated 23 July 2021. She goes on to say that for various reasons confidentiality suited BCL's interests as it would need to divulge confidential information never before provided to a DHB and confidentiality would encourage a flow of information. Ms Wright says that as a result "*we agreed to the MDHB's request.*"

[14] Ms Wright says MDHB then progressed its consideration of the possible merger during which time she had a brief conversation every three weeks or so with one of MDHB's managers. She says the need for confidentiality was reiterated during those conversations though she was also told the requirement would cease once MDHB's Board had voted on the proposed transfer. This would occur around December 2019 with the timing reflecting the fact the current contract between BCL and MDHB was due to expire then.

[15] In September 2019 MDHB's Board received an initial briefing. It outlined various options and recommended the Board *endorse the continued discussions with Te Papaioea Birthing Centre regarding a shared workforce model, considering all options for Primary Birthing across the region.*

[16] Ms Wright says:

Following the September Board meeting, the MDHB settled on a preferred way forward. This was to operate Te Papaioea as a service of the MDHB, and lease the facility from us. Under this option, the Te Papaioea employees would be transferred to the MDHB. We agreed to advancing our discussions on this basis.

[17] In late October 2019 MDHB asked for various pieces of information including BCL's template employment agreement and a request Te Papaioea keep MDHB updated on any new hires. BCL agreed.

[18] On 25 October 2019 a formal proposal was put to MDHB's Board which asked the Board *approve Te Ura Pa Harakeke progressing this model of care and contractual arrangements with the Wright Foundation with a view to an April 2020 start.*<sup>2</sup> It is then explained that the model is an integrated one using a shared Primary Birthing workforce and *Stage one ... involves MDHB extending their services to include Te Papaioea Birthing Centre.*<sup>3</sup>

---

<sup>2</sup> MDHB Board paper dated 25 October 2019 at 'Recommendation'

<sup>3</sup> Above n 1 at [1] headed Purpose

[19] As well as seeking approval of something which has as the first stage of its purpose the subsumption of Te Papaioea, the paper also discussed how this would occur. While some potentially pertinent information has been redacted, as allegedly being commercially sensitive, the paper states under the heading *Human Resources* that:

MDHB has undertaken workforce modelling to determine the optimal staffing levels across both the Centre and current services. A selection process will be held whereby staff at the Centre are invited to express an interest in employment at MDHB. Only suitably skilled and qualified staff will be appointed to roles, having regard to other criteria such as 'fit' with organisational values and team dynamics. It is possible that some staff at the Centre will not be appointed to roles ...

Any appointed staff will commence 'new' employment with MDHB, on MDHB terms and conditions.

[20] Also included in the papers is the following:

Communication and engagement with Centre staff, MDHB staff and Partner Unions is key. Given the sensitive commercial nature of the current negotiations, it is not appropriate at this stage to communicate with staff (at MDHB or the Centre) about the changes and model of care being considered. However, as soon as possible, communication to engage staff across both organizations in the design and development of the future model will be undertaken. Some options that are being considered for communication with staff and unions are:

Early and embargoed discussions with MERAS and NZNO unions to confidentially involve them in the process.

A staff meeting and FAQs document for MDHB staff that provides as much information as possible – to be released in December 2019, coinciding with similar Wright Foundation communications

Workshops in January 2020 ideally involving staff across both organization, to engage and involve them in the planning process and to gather their input for the transition approach.

[21] Suffice to say this sums up the situation at the time for both the applicants and MERAS. Neither then had any idea change was possibly afoot.

[22] On 11 December MDHB and The Wright Foundation entered into a memorandum of understanding. Key therein is paragraph 1.6 which reads:

Accordingly, the Foundation and MDHB have agreed that MDHB will take over the management of and provision of services from the Centre to extend their suite of services. The foundation will cease to operate the Centre and will lease the premises to MDHB

[23] It was envisaged this would occur with effect April 2020.

[24] MDHB and The Wright Foundation then made an announcement about the agreement and it was this that first made staff aware of the proposal. More correctly a reporter from the local newspaper, the Manawatu Standard, approached MERAS asking for comment on the fact the reporter understood The Wright Foundation midwives were to be employed under DHB terms and conditions as well as being required to rotate through DHB facilities.

[25] Meetings were then called to inform staff at both Te Papaioea and MDHB, albeit separately. This occurred on 12 December 2019.

[26] Ms Wright says she told Te Papaioea's employees that an agreement had been reached and MDHB would take over management of the birthing centre which meant midwives could work together across both primary (BCL) and secondary (MDHB) units. Ms Wright says she also advised that MDHB had undertaken to offer positions to Te Papaioea staff and that it would work with them and MERAS regarding terms and conditions.

[27] Ms Wright claims to have been surprised and hurt by what she saw as the announcements negative reception by staff. The applicants accept there was a general reluctance to work for MDHB with those who gave evidence largely putting this down to a desire to avoid working in a secondary environment. They preferred primary care instead.

[28] On 16 December 2019 Ms Wright received an email from Jill Ovens, Co-Leader at MERAS, about the situation. It noted an understanding that terms and conditions would change and asked there be consultation on the issue. The e-mail also noted an understanding there was to be a meeting at which staff would be briefed by MDHB representatives that day and indicated MERAS wished to be involved. A chain of e-mails followed with the prime issue being Ms Wright's objection to MERAS attending the meeting and ultimately that did not occur.

[29] The meeting between the MDHB and Te Papaioea staff went ahead that morning with WDHB explaining it would offer terms based on the national MECA between MERAS and all DHB's to which it was a party.

[30] The next day, on 17 December 2019, Ms Ovens e-mailed Ms Wright. She advised that she planned to meet MERAS members the next day regarding some concerns that had arisen following the staff meeting with MDHB and the two could discuss these when they met in the new year.

[31] There then followed a number of interactions between MDHB, MERAS and employees of BCL though Ms Wright did not take an active part saying in her brief she understood this

occurred. Indeed the evidence is Ms Wright now distanced herself from what was occurring instead leaving issues regarding terms and condition upon transfer to WDHB.

[32] That said, there was still interaction between Ms Wright and both Ms Ovens and BCL staff though they disagree about the effectiveness of this. Ms Ovens says she was disappointed BCL made no effort to protect any of its employees terms and conditions while Ms Wright takes exception to that accusation. She says she made considerable overtures to MDHB having sought input from BCL staff as to what they disliked about the transfer and her desire to “*protect Te Papaioea’s philosophy.*” That said virtually all of Ms Wright’s evidence about her involvement at this stage relates to attempts to influence the content of the employment agreements MDHB would offer her staff and particularly work rostering.

[33] This was an issue as MDHB proposed a rotating roster with staff working across both Te Papaioea and the hospital. This was an issue for BCL staff who had a clear preference to avoid the hospital’s secondary care unit. The other burning issue was that BCL operated 12 hours shifts and its staff clearly preferred these. While the hospital offered a 12 hour option its operation primarily operated 8 hour shifts and proposed implementing these at Te Papaioea.

[34] MDHB issued a consultation paper about these issues but while it commented on a number of issues such as those above it is predicated on the fact the transfer of BCL’s operation to the DHB was a fait accompli. It was also relied on a view that as it was party to a national MECA the terms there-of would apply.

[35] The Consultation Paper noted that there was a further opportunity to provide feedback on the proposals open until 23 February 2020. A decision would then be communicated to employees on 27 February 2021.

[36] On 20 February Ms Spilman wrote to Ms Wright advising her resignation. The e-mail attributed it to having been “*offered an amazing opportunity outside of midwifery that fits with my sons need at this time, this is not something I have felt reassured will be the case moving forward with the MDHB takeover...*”

[37] On or around 9 March 2020 the majority of BCL’s employees at Te Papaioea received a pack from MDHB containing an offer of employment. The pack also contained a letter from BCL which, Ms Wright says:

*...confirm[ed] that their employment with the Birthing Centre would terminate on 31 March 2020, either because they had accepted employment with the MDHB, or, if they did not accept employment, because the Birthing Centre*

*would no longer be operating a midwifery service as a result of the transfer, and therefore no longer had a role for them. This operated as the notice of termination of employment.*

[38] Ms Spilman did not receive a pack on the grounds she had earlier indicated she was resigning to take up an external role and others are said to not have done so as a result of their advising MDHB directly that they had no wish to work for the later.

[39] Of the applicants five then accepted employment with WDHB while Ms Spilman went elsewhere.

[40] BCL's employees received a further communication on 26 March 2020 thanking them for their support and commitment and advising their final pay would be made on 15 April unless they requested an earlier option of 3 April.

[41] No redundancy or notice was paid with Ms Wright attributing this to the fact staff had been *"...offered terms and conditions of employment which we considered were generally no less favourable than those enjoyed at Te Papaioea (including similar rates of pay), under an arrangement that honoured the Birthing Centre philosophy."*

[42] That position relies on a clause in the applicant's employment agreements which says:

In the event that your employment is terminated for redundancy, you will be given 4-weeks notice or pay in lieu of such notice and you will not be entitled to any compensation for redundancy.

In the event of a merger, amalgamation, or reconstruction, of all or part of the Company's business such that your employment is terminated and you are offered employment with the purchaser or any other party to the merger, amalgamation, or reconstruction on terms and conditions which are generally no less favorable than your existing terms and conditions, the Company will be under no obligation to provide you with any form of notice of redundancy or other compensation.

[43] There is also a general clause requiring either party give 4 weeks notice of termination which will be worked unless BCL chooses to waive that requirement.

## **Discussion**

[44] The applicants claim they were unjustifiably dismissed and while BCL appears to be trying to avoid the use of that label, dismissal is what occurred.

[45] BCL ceased to operate in Palmerston North and, as a result, no longer needed its employees. Indeed it had no positions for them and, to use its words in the Statement in Reply,

*“justifiably terminated”* their employment. Termination at the employer’s initiative, as this was, is a dismissal. The issue is whether or not it can be justified.

[46] As BCL succinctly summarises in its submission the applicants are claiming the answer is no – the dismissal cannot be justified for two reasons. The first is that BCL failed to comply with the duty of good faith both before and after the announcement of its decision to transfer management and operation of its services to MDHB. The second was that it failed to comply with the provisions of the employment agreement.<sup>4</sup>

[47] It is BCL’s position that while it did not consult before the decision was announced it was not required to do so as “...in this transaction, where the MDHB had approached it to look to negotiate a transfer, it was not *“an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of 1 or more of his or her employees”*.”<sup>5</sup>

[48] In the event this is not accepted it is argued BCL can justify its approach as it was not required to consult by reason of confidentiality (s 4(1B) of the Employment Relations Act 2000 (the Act)).

[49] BCL’s position is that after the December announcement it took account of the concerns raised by MERAS and its employees and approached MDHB with these so they could be addressed before further steps were taken to progress the transfer of services.<sup>6</sup>

[50] BCL denies breaching the employment agreement saying the terminations were *“essentially by way of redundancy”* with the word “essentially” incorporated to reflect the fact at least one employee left of her own volition to accept alternate employment with another employer and the employment agreement negates a need to pay notice where, as it believes happened here, the employees were transferred to the new provider on similar terms and conditions.

[51] For the following reasons BCL’s approach is not one I can accept.

---

<sup>4</sup> Respondent’s written submission at [1](a) and (b)

<sup>5</sup> Above n 4 at [2]

<sup>6</sup> Statement in Reply at [3.4](b)

[52] Section 4(1A) of the Act clearly “...requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected —

- a. access to information, relevant to the continuation of the employees’ employment, about the decision; and
- b. an opportunity to comment on the information to their employer before the decision is made.”

[53] In support of its argument this requirement was not triggered BCL cited *NZ PSA v Auckland City Council*<sup>7</sup> saying the Court found that for the purposes of s 4 of the Act a proposal did not include a consultant’s proposal or recommendation for an employer to consider. “*It was only once the employer had adopted and pursued formally and publicly the consultant’s recommendation, these then became proposals.*”<sup>8</sup> In essence the argument is MDHB’s approach is akin to a consultant’s recommendation and till BCL accepted there was no proposal to which s 4 applied.

[54] The difficulty BCL faces with this approach is that by the time its employees and their representatives became aware of this it had moved far beyond a “consultant’s” (read MDHB) recommendation or proposal. It had, as Ms Wright conceded when answering questions, become a *fait accompli*. Not only that it was the press release which led to MERAS, and subsequently its members, becoming aware of the transfer and by then the memorandum of understanding had been agreed and the matter was in the public arena.

[55] The proposal could not have progressed to this point without active participation and agreement from BCL with Ms Wright’s evidence confirming this to be so. It is also clear from the evidence that the arrangement had the potential to have an adverse effect on the employees. As Mr Wright again conceded the applicant’s employment with BCL was, as of the December announcement, going to end and the functions they had previously undertaken performed by MDHB and its employees. The questions that now remained related to whether or not BCL’s employees would be offered a chance to transfer to MDHB and on what terms. There was no possibility of redeployment within BCL and the evidence is clear that there were various

---

<sup>7</sup> *New Zealand Public Service Association Inc v Auckland City Council* [2003] 1 ERNZ 57

<sup>8</sup> Above n 4 at [13] annotated by recognising that while aspects of this decision were reversed by the Court of Appeal this was not.

aspects of a potential transfer that many of the applicants considered disadvantageous and adverse.

[56] There are, for example, differences with respect to rosters, hours of work and when they would be performed. These are, in my view, significant enough and there was another which the applicants considered important. That was the difference between primary and secondary care. While it may be argued this last point of difference is irrelevant as all duties fell within a Midwives' scope of practice these claims were not actively disputed. That is probably because BCL existed to promote primary care and was reluctant to suggest this was the same as secondary care.

[57] The evidence satisfies me there are differences and that the requirement to perform secondary functions would significantly reduce job satisfaction for the affected employees. Indeed, some of them had opted to work for BCL so they could concentrate on providing primary care, the provision of which was BCL's very reason for being.

[58] There are also issues of potential loss of autonomy with the introduction of Doctors and to lesser extent nurses into the workplace.

[59] I conclude the requirement to consult had been triggered before the announcement of 12 December but as BCL concedes it did not do so.

[60] That then raises the argument BCL could not comply, and was given the ability not to do so, by reason of s 4(1B) of the Act.

[61] Section 4(1B) provides the employer need not give its employees access to information required by s 4(1A) that is confidential and about an identifiable individual (other than the affected employee(s)) and/or subject to a statutory requirement confidentiality be maintained and/or "*where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).*"

[62] There is nothing in the evidence to suggest either of the first two apply and the argument being run is the later point. Here, however, BCL faces two obstacles. The first is that the evidence is clear that the primary consideration in this regard was MDHB's demand that confidentiality be maintained and that is not a ground under the Act. Section 4(1B)(c) mentions

the employers commercial position – MDHB was not the employer but in any event the evidence, such as it is, is that “*the purpose of the confidentiality requirement was primarily to protect the MDHB’s commercial interests ... [and] would allow the MDHB to explore the possibility of a transfer without gossip and speculation, which could impact upon public confidence in the services it offered.*”<sup>9</sup>

[63] No evidence was offered about what those commercial interests might be and I do not accept suppressing possible gossip about how a public, and publicly funded, body provides its service comes remotely close to being a reason which justifies depriving BCL’s staff of what is in the first instance a statutory right and, once again, MDHB was not the employer.

[64] With respect to BCL the evidence was just as sparse with Ms Wright saying:

We considered that confidentiality would also protect eth Birthing Centre’s interests during the discussions. For example, we would need to share confidential information such as the rent value of the TPBC, which had never been disclosed to a DHB. It would also encourage the flow of information between us, so that the opportunity could be genuinely be explored.<sup>10</sup>

[65] Again that is far from an adequate ground for depriving staff of a statutory right. The only specific mentioned was the rent but aside from the fact there is no indication WDHB would not be told (indeed the way the evidence was given implies it would), there is nothing to say why this information is so sensitive.

[66] For these reasons I conclude the exemption on giving information did not apply. That means BCL was under a duty to consult with its staff when considering whether or not it should enter into an arrangement under which MDHB assumed responsibility for the operation and management of Te Papaioea.

[67] I now turn to the definition of redundancy given BCL’s concession, with which I agree, that this is essentially what has occurred here. While there is no statutory definition it is well accepted a redundancy situation arises when there is first a decision that the position occupied by an employee is surplus to the needs of the employer and then, as a result, the employment is terminated.

---

<sup>9</sup> Ms Wright’s brief of evidence at [17]

<sup>10</sup> Above n 9 at [18]

[68] I have already concluded BCL failed to adhere to statutory minima with respect to consulting on the first of those two decisions which means the resulting terminations, which became a *fait accompli* at that point, are unjustified. In turn that means consideration of what then happened need not be detailed at least with respect to the dismissals. It does, however, have a bearing on the claim the applicant's employment agreements were breached.

[69] Essentially the applicants claim consultation after the announcement about what would then happen to them was inadequate while BCL has an opposing view. On this, and putting aside the fact consultation does not, as submitted on BCL's behalf, require agreement I again find for the applicant's.

[70] The evidence is clear that after 12 December the issue was not whether or not the applicants employment with BCL would end but about the terms they would be offered to transfer to MDHB (or indeed whether an offer would be forthcoming).

[71] The situation is perhaps succinctly summarised in the Statement in Reply where it was said:

The respondent could not "transfer" the applicant's employment to MDHB. Any "transfer" of employment had to be effected by the respondent terminating the applicant's employment, and an offer of new employment with MDHB being made and accepted.

[72] The evidence is also clear that while Ms Wright may have lobbied on behalf of BCL's staff the real consultation was, by this point, taking place between MERAS, the employees and MDHB. BCL was no longer a decision maker and effectively abrogated its duty to consult with its staff by passing responsibility to MDHB.

[73] Again this failure confirms the earlier conclusion these dismissal were, with one possible exception, unjustified. The exception is Ms Spilman and arises from the fact she resigned while the process was then incomplete.

[74] Here a further issue needs to be discussed and it is one that also affects the claim the employment agreement was not complied with and notice must still be paid. As already said the applicant's employment agreements contain a termination clause requiring four weeks written notice. BCL, however, never gave formal notice and that it accepts.<sup>11</sup> Furthermore the

---

<sup>11</sup> Respondent's closing submission at [8]

letters which were sent and which confirmed the employment would end at the end of March were sent within four weeks of the event occurring so even if these could be considered notice there was, once again, a lack of compliance with the agreements requirements.

[75] BCL's reply to this accusation is that, at least with respect to those who accepted MDHB's offer, cessation was by mutual agreement. That I cannot accept. There is no evidence the employees agreed to their cessation and in any event they were not given a choice as their positions were no longer going to exist. They accepted employment with MDHB having been told by BCL their tenure there had ended.

[76] Finally there is the argument notice was not required as the employment agreement states this is not necessary in the event of a transfer of all or part of BCL's business to a new provider that offers employment on terms and conditions which are generally no less favorable than those existing with BCL. As already said the evidence satisfies me the terms are not sufficiently similar that they can be considered no less favorable (paragraphs [56] to [59] above).

[77] Returning to Ms Spilman. Notwithstanding BCL never gave proper notice, the fact is it did not yet have to when Ms Spilman advised her resignation in mid February. It had till the end of February. Furthermore, Ms Spilman attributes her resignation to having got an "*amazing opportunity*" which suited her then current needs which was not something she was reassured would occur with MDHB. While the evidence would suggest she was probably right, and MDHB's offer would not suit her, she did not know that to be a fact when she proffered her resignation. Consultation was ongoing, the offer packs were yet to come though she did not ultimately get one perhaps as a result of having already tendered her resignation and their exact content remained unknown.

[78] In other words I must conclude Ms Spilman's resignation, which took effect on 19 March and before her position with BCL ceased, was pre-emptive. It was perhaps wise given her situation but the circumstances are such I can not accept, as I am being urged to, that the resignation constituted a constructive dismissal and she was left with no option but to resign. That is because when she did so she was still lacked pertinent and complete information about the impending situation and could not be sure the suspicions that led her to resign were actual. Her claim therefore fails.

[79] The final point is there was a claim for a penalty for breach of good faith proffered on behalf of each applicant. While such a breach has been established this is not a situation in which I consider a penalty appropriate. I have already found five of the applicants were unjustifiably dismissed and remedies will be awarded for that. Their success was almost wholly attributable to BCL's failure to comply with the duty of good faith.

[80] In my view it is not appropriate to then award penalties in respect of the same conduct noting the court has found this type of "*doubling up*" may be unusual, if not wrong in principle, where a remedy has already been sought and granted in respect of a personal grievance.<sup>12</sup>

### **Remedies**

[81] The conclusion five of the applicants were unjustifiably dismissed raises the issue of remedies. Wages lost as a result of the grievance and an unspecified amount as compensation were sought on behalf of each applicant.

[82] With respect to wages s 128(2) of the Act requires the payment of three months wages or the actual loss and compensation depends on the evidence offered. There is, with respect to wages, a discretion to increase the award but in this instance the applicants did not pursue an argument this occur. It follows the statutory limit of three months will be applied to any award of lost wages in this determination.

[83] In addition to any award that may be made to each applicant for lost wages and compensation my earlier conclusion the exemption to giving notice does not apply means each of the successful applicants (except for Ms Hansen who was then on unpaid leave) is due four weeks wages to compensate for the failure to give notice.

### ***Ms Matsas***

[84] Ms Matsas transferred to MDHB and did not claim, in her brief, that she had lost any income. Orally she evidenced "a very similar rate of pay." In other words there is no evidence of lost wages.

[85] Turning to compensation. Ms Matsas' evidence in this respect was relatively weak. She spoke more of annoyance generated by BCL's failure to consult and the resulting "anxiety

---

<sup>12</sup> See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49 at [124].

and worry.” While she evidenced considerable angst at the time there was little evidence of ongoing harm. Having balanced her evidence against current trends in both the Court and Authority I have to conclude her evidence warrants a conservative award. I consider \$5,000 appropriate.

***Ms Babb***

[86] With respect to lost wages I note Ms Babb transferred to MDHB and her Statement of Problem does not identify a loss of wages. No loss was subsequently identified in either her brief or oral evidence. There shall not, therefore, be an award in this respect.

[87] With respect to hurt and humiliation her evidence was again weak. She spoke of a feeling of betrayal, and being worthless and undervalued as a result of being abandoned by BCL. That I accept, given the failure to properly consult, but again there was no evidence of ongoing hurt. Again having regard to current awards, I once again consider \$5,000 appropriate.

***Ms Robben***

[88] Ms Robben accepted subsequent employment with MDHB and there is no mention of lost wages in her brief. Similarly there was no claim proffered in oral evidence. There shall not, therefore, be an award.

[89] Turning to hurt and humiliation. Again the evidence related to the process prior to transfer with no evidence of a residual effect. The evidence and its weight was similar to that of both Ms Matsas and Ms Babb. I consider a similar award appropriate.

***Ms Van Duin***

[90] In her statement of problem Ms Van Duin makes the contradictory comments that “she was able to negotiate a matching pay rate and was on .10 less per hour.” In her brief of evidence she evidenced an average fortnightly loss of \$526.39 though this was largely the result of working reduced hours though it would appear, from her evidence, a factor in this was the fact MDHB would only offer 8 hour shifts as opposed to the 12 she had previously worked and enjoyed.

[91] That said there is also evidence she was offered additional casual hours so I consider, given a lack of contrary evidence, this acts a quid pro to the shorter shifts. As already said the

quantified compensatable loss is \$3,421.54 (the fortnightly loss for 13 weeks). This is, I conclude, is payable.

[92] Ms Van Duin's evidence regarding hurt and humiliation was not dissimilar to that of her colleagues. She evidenced hurt at what she considered the contemptuous way she was dealt with at the time but there was no evidence of an ongoing effect. Again, and having considered the evidence and tables of current awards, I consider an award similar to that already awarded her colleagues appropriate.

***Ms Hansen***

[93] Ms Hansen was, at the time of these events, on parental leave and subsequently found employment with MDHB. She failed to quantify a wage loss in her statement of problem. Similarly there was no such claim in her brief or oral evidence and, in any event, she was not then in paid employment which means she was incapable of losing wages.

[94] Her evidence concerning hurt differed from her colleagues given the fact she was on parental leave and not present in the workplace at the time. The evidence supports a conclusion her situation was worse in that the feeling of desertion was aggravated by the lack of collegial support. She was deprived of the information her colleagues received and, the evidence suggests, suffered additional angst as a result. That said I must also consider her evidence that some of the stain resulted from uncertainty attributable to her new family. That is not something BCL can be held accountable for.

[95] Considering the evidence and award tables I conclude Ms Hansen warrants an award higher than her colleagues - \$8,000.

[96] Finally the conclusion there are valid personal grievances and remedies accrue means I must consider whether or not those remedies should be reduced by reasons of contributory conduct.<sup>13</sup> As already said these dismissals were essentially redundancies. Redundancy is a no-fault situation so it follows there is no contributory conduct.

---

<sup>13</sup> Section 124 of the Employment Relations Act 2000

## Conclusion and Orders

[97] For the above reasons I conclude Ms Matsas, Ms Babb, Ms Robben, Ms Van Duin and Ms Hansen each has a personal grievance in that she was unjustifiably dismissed. I also accept four of them should be paid their contractual notice period.

[98] As a result I order the respondent, Birthing Centre Limited, make the following payments:

- a. To Rebekah Matsas, applicant in 3100793;
  - i. \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
  - ii. A further four weeks wages being the unpaid notice period.
- b. To Michelle Babb, applicant in 3144844;
  - i. \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
  - ii. A further four weeks wages being the unpaid notice period.
- c. To Rachel Robben, applicant in 3144862;
  - i. \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
  - ii. A further four weeks wages being the unpaid notice period.
- d. To Chelsea Van Duin, applicant in 3144864;
  - i. \$3,421.54 (three thousand, four hundred and twenty one dollars and fifty four cents) gross as recompense for wages lost as a result of the dismissal; and

- ii. \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
- iii. A further four weeks wages being the unpaid notice period.
- e. To Jodi-Ann Hansen, applicant in 3144866, \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[99] Ms Spilman's claim has not succeeded and nor has the application for penalties.

[100] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed MERAS may, having successfully represented the applicants, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Birthing Centre Limited will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.<sup>14</sup>

**Michael Loftus**  
**Member of the Employment Relations Authority**

---

<sup>14</sup> [www.era.govt.nz/assets/Uploads/practice-note-2.pdf](http://www.era.govt.nz/assets/Uploads/practice-note-2.pdf)