

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 652  
3129535

BETWEEN

PAMELA MARGARET  
STENTIFORD  
Applicant

AND

MARSHALL & HEAPHY LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Ramses Hunt, counsel for the Applicant  
Shaun Brooks as counsel and Ella Hawkey-D'Aeth as  
advocate, for the Respondent

Investigation Meeting: 26 & 27 July and 15 August 2022 at Greymouth

Submissions Received: 15 August and 2 September 2022 from the Applicant  
15 August and 9 September 2022 from the Respondent

Date of Determination: 9 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Marshall & Heaphy Limited is a firm of accountants located in Greymouth. Suzanne Merriman and Fergal O’Gara were the company directors at relevant times.

[2] Pamela Stentiford worked for Marshall & Heaphy Limited (MHL) from March 2010 until she was dismissed on notice. The employment ended on 10 July 2020. Mrs Stentiford says she was unjustifiably dismissed and that her employment was affected to her disadvantage by MHL's unjustified actions before it announced the decision to dismiss her. Breaches of good faith by MHL are relied on. Compensation for humiliation, loss of dignity and injury to feelings is sought as a remedy.

[3] By her statement of problem, Mrs Stentiford also claimed damages and penalties against MHL for breaches of the statutory good faith duty, together with penalties against Ms Merriman and Mr O'Gara for aiding and abetting alleged breaches by MHL of Mrs Stentiford's employment agreement. The damages and penalty claims against MHL and aiding and abetting penalty claims against the two directors were discontinued after a case management conference. What remains for investigation and determination are the personal grievance claims (including reference to good faith duties) that arise from MHL's actions.

[4] MHL says it carried out a restructuring process which it considered necessary due to the Covid-19 impact on the economy and its business, following which Mrs Stentiford's role was disestablished and her employment was terminated by way of redundancy. It says its actions and how it acted were justified.

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

[5] Matters were not resolved by mediation.

[6] At the case management conference, I directed that the factual basis for Mrs Stentiford's claims for damages and penalties should be clearly set out in an amended statement of problem, unless they were withdrawn. Counsel later confirmed they were withdrawn.

[7] I heard evidence in person from Mrs Stentiford and several supporting witnesses, from the original two directors and from two others who are now also directors. Witnesses were questioned. Counsel made helpful submissions

[8] I sought and received from MHL information about its application for a Covid-19 wage subsidy. Counsel also provided further submissions on that point.

[9] I need not set out a record of all the evidence I heard or summarise all the submissions made. I will state the relevant facts, state and explain findings on legal issues, express my conclusions on issues necessary to dispose of the matter and specify any orders in response to the substantive claims made.

[10] However, it will be helpful to set out more details and make some findings about the context for the personal grievance claims, before considering justification.

### **Context for the claims**

[11] Materially, the employment agreement defines redundancy as including the situation where the employer requires a reduction in its permanent workforce. Other limbs of the definition need not be considered.

[12] Under the employment agreement, where the employer proposes to implement a redundancy, the employer shall where practicable consult with the employees affected or likely to be affected. If the employee's position is declared redundant after consultation, the employer will give notice of termination of employment and may elect to pay salary in lieu of the notice being worked. MHL accepts that it was practicable for it to consult with Mrs Stentiford and others.

[13] In 2019 MHL created a new position of Business Manager. Julie McGeady was appointed in August 2019. Ms McGeady became a shareholder in and a director of MHL in November 2020, after events outlined below. In evidence now are powerpoint slides dated August 2019 presenting to staff the change to MHL's management structure that resulted in

Ms McGeady's August 2019 appointment. The slides indicate that the directors' decision to create the position and appoint Ms McGeady was intended to free up their time and improve the management of the business.

[14] Mrs Stentiford came to think that the appointment of the Business Manager was a step by MHL "slowly pushing" her out of her role. I accept that Mrs Stentiford genuinely held that concern. It caused her to consider resigning. Mrs Stentiford raised the matter with Ms Merriman and Mr O'Gara. There was a meeting between them in November 2019. It is common ground that the directors reassured Mrs Stentiford and convinced her not to resign. However, the concern lingered for Mrs Stentiford.

[15] Part of Mrs Stentiford's case now is that the July 2020 redundancy was the end of a long running plan to re-allocate her work to the Business Manager. In evidence, Mrs Stentiford outlined the work she did before Ms McGeady's appointment. However, I prefer the evidence of Ms McGeady, Ms Merriman and Mr O'Gara when they say that Mrs Stentiford's outline overstates her responsibilities at the time. I also accept Ms McGeady's evidence that the tasks reassigned to her from Ms Stentiford formed a small part of her overall responsibilities. It is not probable that the owners of a business would incur the additional cost over many months of engaging a manager, just to reallocate the functions previously performed by a senior administrator. The greater seniority of Ms McGeady's role is also apparent in the August 2019 presentation and in her later appointment as a director and her purchase of an equity stake in the business.

[16] If MHL's plan had been to reallocate Mrs Stentiford's work to Ms McGeady and replace her, it is likely that Ms Merriman and Mr O'Gara would have simply accepted Mrs Stentiford's proposed resignation in November 2019, rather than convince her not to resign.

[17] I find that Ms McGeady's appointment was motivated by MHL's plans for business development and growth, not by an intention to replace Mrs Stentiford.

[18] Mrs Stentiford's daughter is a chartered accountant and also worked at MHL until her resignation in May 2020. Mrs Stentiford considered that there was an "unmistakeable coldness" in her interactions with Ms Merriman and Mr O'Gara, following her daughter's departure in late May 2020. However, there is no specific evidence to support the view that the June 2020 restructuring was connected to that resignation.

[19] MHL's business was affected by the Covid-19 pandemic and the New Zealand Government measures adopted to manage its effect. A Level 4 lockdown applied from 11.59pm on Wednesday 25 March 2020. Other restrictions had applied before then.

[20] MHL applied for a Covid-19 Wage Subsidy. Ms Merriman's recollection is that the application was made prior to the first Level 4 lockdown. Payment was received on 2 April 2020. The subsidy covered a 12-week period, to 25 June 2020. As part of its application for the subsidy, MHL made a declaration. I will return to this point.

[21] Shirlene McMillan worked for MHL as its Management Accountant. Prior to the Level 4 lockdown, Ms Merriman and Mr O'Gara allocated the task of preparing MHL staff wages to Ms McMillan. Hitherto, the task had been done by Mrs Stentiford. The task was not reassigned to Mrs Stentiford after MHL staff returned to work. I will return to this point later.

[22] Leading up to the start of the lockdown, Mrs Stentiford was told by colleagues not to complete some of usual duties. Her evidence is that she received no guidance about what her team would do regarding clients' wages. Mrs Stentiford had to tell clients that someone would get back to them. Mrs Stentiford's evidence is that the lack of direction for her team and her resulting inability to manage them made her feel worthless.

[23] Given the impending lockdown, Mrs Stentiford approached Ms Merriman and Mr O'Gara to ask what was happening. Their response was for her not to worry, they would deal with it and would contact clients. This did not answer Mrs Stentiford's concerns, so later

she pressed again. There were exchanges between Mrs Stentiford, Mr O’Gara and Ms Merriman. I will return to the exchanges later.

[24] MHL was not enabled for staff to work remotely during the Covid-19 Level 3 restrictions and the Level 4 lockdown. For the most part, staff did not work over that time. Staff returned to work later, as allowed by changes to alert level settings.

[25] Ms Merriman and Mr O’Gara convened a staff meeting on 2 June 2020. Its purpose was not foreshadowed. At the start, Ms Merriman announced that MHL would be restructured. There is a document in evidence titled “MHL Restructuring Consultation”. It is common ground that Ms Merriman and Mr O’Gara read out the text of the document at the meeting. It is not necessary to set out the contents here, however subheadings include “The case for change”, “Outcomes”, “Potential Options”, “Restructuring Proposal” and “Next Steps”. Six “Potential Options” are set out, with comment about negatives and positives for each. The “Outcome” to be achieved was a reduction of \$200,000 - \$250,000 in salary costs, support for the “Client Centric Strategy” and preservation of talent for when the “inevitable recovery occurs”. There is some dispute about aspects of this meeting, to which I will return.

[26] Mrs Stentiford was part of the team of five employees called the “Business Services Team”. The text of the document makes it apparent that “Downsizing” this team was the preferred option. I accept the evidence of Mrs Stentiford that she was “blindsided” by the announcement and “embarrassed” by the Business Services Team being identified as “the lowest billable team”.

[27] The meeting ended with Ms Merriman and Mr O’Gara saying they would talk separately with the affected employees. Mrs Stentiford was the first of those. Ms Merriman and Mr O’Gara gave Mrs Stentiford a copy of the consultation document and the 2 June 2020 letter addressed to her confirming that the “Business Services Team” will be disestablished and her position as “Senior Business Administrator” has been identified as being made redundant, if the proposed restructure is implemented in its present form. A further meeting

was scheduled. There is a dispute about an exchange between Mrs Stentiford and Ms Merriman during the meeting, to which I will return.

[28] Mrs Stentiford left the meeting and returned to her desk crying. Philip Dittmer at the time was a Senior Accountant with MHL, but his pending appointment as a director had been foreshadowed. Mr Dittmer approached Mrs Stentiford. Mrs Stentiford's evidence is that Mr Dittmer apologised, told her how hard the decision was and asked if she was okay. Mrs Stentiford's evidence supports the view that MHL had already made the decision to dismiss her. Mr Dittmer's evidence is that he said "sorry Pam, it's a horrible situation", to console her. It is more likely that a person in Mr Dittmer's position would try to comfort an employee, rather than disclose to the employee at the start of a consultation process that a decision had already been made. I prefer Mr Dittmer's recollection of the exchange.

[29] Shortly after the exchange with Mr Dittmer, Mrs Stentiford phoned her daughter, who came and picked her up from work. Mrs Stentiford's evidence is that she was told she was "no longer required" to attend work during the consultation process. The "instruction" made the feeling that Mrs Stentiford was not wanted by MHL even more "pronounced". Ms Merriman's evidence is that the potentially affected employees were all offered special paid leave from 2 June 2020.

[30] Mrs Stentiford met with Ms Merriman and Mr O'Gara on 4 June 2020, as proposed by the 2 June 2020 letter. Mrs Stentiford was accompanied by a support person (Wendy Tomasi). Ms Tomasi's evidence is that the meeting was "short, sharp and kept very professional". Mr O'Gara read through a document headed "Pam Stentiford Restructure Proposal". Mr O'Gara provided a copy of what he had read through, together with a printed form headed "FEEDBACK FORM" that set out issues with boxes alongside for Mrs Stentiford's comments. Mrs Stentiford was asked to return any comments by 9 June 2020. Mrs Stentiford's evidence is that she was "cut ... off" by Ms Merriman when she said how humiliated she had been by the earlier meeting and attempted to give some feedback. Ms Tomasi's evidence is that MHL did not want any feedback at this meeting. Mrs Stentiford

said that MHL was “ticking the boxes” by these meetings. Mr O’Gara said “it is tough times”. The meeting ended. I accept that both Mrs Stentiford and Ms Tomasi felt that decisions had already been made.

[31] Mrs Stentiford attended a further meeting on 8 June 2020, supported by Ms Tomasi. Ms Tomasi read through the responses Mrs Stentiford had noted down on the “FEEDBACK FORM”. Mrs Stentiford also prepared a further two-page response. Copies were given to Ms Merriman and Mr O’Gara.

[32] On 10 June 2020 Ms Merriman and Mr O’Gara sent an email to Mrs Stentiford. They acknowledged comments by Mrs Stentiford about “the emotions and stress”, said that no decisions had yet been made and advised that they were extending the consultation process until Friday 12 June 2022 to consider staff feedback, while noting that Mrs Stentiford had indicated that she had no feedback regarding the proposal.

[33] Mrs Stentiford responded by email on 10 June 2020. Mrs Stentiford referred to her exchange with Mrs Merriman on 2 June 2020, explained why she had not proposed any alternatives and repeated her view about the lack of respect shown towards her. Mrs Stentiford suggested meeting off-site on Friday 12 June 2020 “to be formally advised of your decision”.

[34] Ms Merriman and Mr O’Gara sent an email on 12 June 2020. It confirmed they had reached a conclusion and proposed a meeting on 15 June 2020 so they could respond to Mrs Stentiford’s feedback, discuss “general feedback themes” and advise their final decision.

[35] The final meeting was on 15 June 2020. Mrs Stentiford was supported by Ms Tomasi. Mrs Stentiford was given a letter of that date. The letter confirmed that MHL had decided to implement the restructuring proposal in its original form. Mrs Stentiford’s position would be disestablished. Redeployment and other alternatives were not available. Mrs Stentiford was given four weeks’ notice, with 10 July 2020 as the last day of employment. Mrs Stentiford

was not required to work during the notice period. Mrs Stentiford was invited to apply for a new position created as part of the restructuring.

[36] Through her lawyer, Mrs Stentiford raised personal grievances in a letter dated 30 July 2020.

### **Justification for the dismissal**

[37] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether MHL's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether MHL sufficiently investigated the matter considering available resources; whether MHL raised its concerns with Mrs Stentiford before deciding to dismiss her; whether MHL gave Mrs Stentiford a reasonable opportunity to respond to the concerns before dismissing her; and whether MHL genuinely considered Mrs Stentiford's responses before deciding to dismiss her.

[38] I may consider other factors, if appropriate.

[39] A fair and reasonable employer will comply with its statutory duties and contractual obligations. Good faith requires an employer, who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment, is to provide the employee with access to relevant information and an opportunity to comment before the decision is made.

[40] The statutory test described above applies to dismissal for redundancy.<sup>1</sup>

[41] MHL also owed Mrs Stentiford a contractual duty to consult with her prior to implementing the redundancy.

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<sup>1</sup> *Grace Team Accounting v Brake* [2014] NZCA 541.

[42] Whether required by contract or by statutory duty, the elements of consultation are similar. To paraphrase: it is more than mere prior notification, sufficient time is required and it is never to be treated perfunctorily; a proposal must not be acted on until after consultation and employees must know what is proposed before they can be expected to give their view; sufficient precise information must be given together with a reasonable opportunity to respond; genuine efforts must be made to accommodate employee views to at least seek consensus; the employer, while entitled to have a working plan in mind, must have an open mind and be ready to change or start anew.<sup>2</sup>

***Did MHL sufficiently investigate?***

[43] An aspect of assessing the sufficiency of an employer's investigation is the resources available to that employer. MHL would have understood the importance for a business to seek appropriate advice as part of its business planning, given its work involved business advisory services in another discipline. Here, MHL had access to business planning, HR and legal advice to assist it to meet the statutory and contractual obligations it owed to Mrs Stentiford. There is evidence that MHL received advice.

[44] There is a submission that the standard for MHL was that of a "small business" in uncertain financial times. However, MHL provides professional services and had access to resources including advice. The point about financial uncertainty supports the business case for restructuring, but there is no evidence that the situation was urgent. MHL was required to fully and fairly investigate matters, prior to the decision to restructure and to dismiss Mrs Stentiford.

[45] On 14 April 2020, contingency planning advice received by MHL from a business advisory service included mention that redundancies needed to take account of Covid-19 wage subsidy commitments and payments. There were then emails between Mr O'Gara and a business advisor on 19 May 2020 that included draft documents that relate to Mrs Stentiford

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<sup>2</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 at [62].

and to restructuring more generally. It was followed by an email from the advisor to Ms Merriman and Mr O’Gara on 28 May 2020. The latter email included a proposed timeline for MHL to follow.

[46] As set out above, MHL presented its restructuring proposal on 2 June 2020, met individually with Mrs Stentiford the same day and followed up with other exchanges with Mrs Stentiford before it gave notice to Mrs Stentiford by letter of 15 June 2020 that her employment would end on 10 July 2020 by reason of redundancy.

[47] Limited time was allowed by MHL for the consultation process with affected staff, despite the absence of an external reason for urgency. The truncated timeline includes a sense of the consultation being a mere formality. However, on its own, the truncated timeline would not cause me to conclude that the dismissal lacked justification.

***Did MHL give access to relevant information before its decision?***

[48] Good faith required MHL to provide access to relevant information. Mrs Stentiford says that MHL failed to do this, and that it failed to raise its concerns before its decision to dismiss her.

[49] MHL set out its “case for change” in the 2 June 2020 consultation document. I need only paraphrase it. In recent years the business had increased staff levels in anticipation of continued growth. Growth would have ensured the business achieved the “wage percentage returning to a sustainable level”. The effect of the Covid-19 pandemic and the anticipated financial crisis was a forecasted reduction in revenue. Short term measures had assisted, but in the medium term MHL needed to reduce staff to a “normal industry standard wage percentage”. MHL needed to reduce its annual salary cost up to \$250,000.

[50] Mrs Stentiford says she should have been provided the specifics of the decisions in previous years that caused the increased staff levels. However, I do not accept that the “specifics” of the resourcing decisions in earlier years was relevant information for the

purpose of the potential restructuring. Those earlier decisions just resulted in the June 2020 staff level, which in general terms was known to Mrs Stentiford. The relevant information which was not provided were the “wage percentages” before and after those resourcing decisions, the current wage percentage and the wage percentage that MHL regarded as the “normal industry standard”. The required salary saving of \$250,000 was set by reference to these figures, but they were not provided.

[51] Mrs Stentiford says that the projected financial impact, the revised 2021 forecast and the predicted reduction in revenue was information that was not provided. I accept that MHL needed to provide some information to support these statements, as they were the basis of its expressed “need” to achieve the targeted salary saving mentioned in the restructuring proposal.

[52] The Business Service Team was described as the “lowest billable team”, but no data was provided. The statement is a comparative one. MHL should have provided some measure so that affected employees could assess the magnitude of the difference, as part of considering whether other options were available.

[53] There are other points made about the lack of specific information. It is not necessary to detail them. However, the findings above mean that the actions of MHL fell short of how a fair and reasonable employer could have acted at the time.

[54] MHL received some feedback from other affected employees but did not provide it to Mrs Stentiford. Assuming MHL had an obligation to disclose it to Mrs Stentiford, I agree with counsel that this on its own could be classified as a minor defect in procedure that did not result in any unfairness to Mrs Stentiford. The earlier points about lack of information were not minor so are not affected by s 103A(5) of the Employment Relations Act 2000.

[55] Mrs Stentiford did not request additional information. However, the primary responsibility was on MHL to provide sufficient information to allow Mrs Stentiford to

understand the reasons for the directors' preference to disestablish the Business Service Team and the need to reduce its salary cost to bring it back to normal industry standards.

***Opportunity for and consideration of any response before the decision - predetermination?***

[56] Mrs Stentiford's concern about predetermination is related to her contention that the dismissal was the end of a long running plan to re-allocate her work following the 2019 appointment of Ms McGeady. I accept that Mrs Stentiford genuinely held that view, but for the reasons given earlier, I find that the dismissal in 2020 was not related to those earlier events. Nonetheless, I still need to consider whether MHL pre-determined the 2020 decision about restructuring and Mrs Stentiford's dismissal. There are a number of matters that should be mentioned.

[57] Mrs Stentiford gave evidence of a "heated" conversation with Mr O'Gara when he "started shouting", just before the Level 4 lockdown. Mr O'Gara does not recall the conversation in that manner and Ms Merriman says she did not hear such a conversation. There is no reason to doubt Mrs Stentiford's evidence about Mr O'Gara's manner. It led on to Mrs Stentiford asking Ms Merriman if her job was safe. Ms Merriman confirmed that it was safe and that MHL would be looking at her role so she could have a clear indication of what was required. These exchanges predated the proposed restructuring. Mr O'Gara's manner indicates stress at the time, rather than an existing plan to dismiss Mrs Stentiford. Ms Merriman's response indicated MHL's intentions at the time.

[58] Shirlene McMillan is a long serving employee at MHL. Ms McMillan had been working in the evenings, after other staff had left for the day. At the office on the evening that the level 4 lockdown was to start, Ms McMillan was spoken to by Ms Merriman and Mr O'Gara. They asked Ms McMillan to work (remotely) during the lockdown to process MHL staff wages and do any necessary client work. Ms McMillan was instructed not to tell other staff, as they did not want others to know that she was working since it was not an option for anyone else. Staff were told by the directors shortly before the end of the Level 4

lockdown that Ms McMillan would process staff wages. That confirmed that Mrs Stentiford no longer was tasked with the staff wages processing.

[59] Mrs Stentiford gave evidence about an exchange with Mr O’Gara about the staff wages, where she said his response was “bullshit”. I do not accept that the exchange indicates a plan at the time to dismiss Mrs Stentiford.

[60] The evidence for MHL is that the work was assigned to Ms McMillan in late March 2020 because she was able to work remotely and had the skills required. Ms Merriman’s evidence is that the task was kept by Ms McMillan, as her skills made her “best suited”. It was later assigned to Ms McGeady.

[61] I accept that the assignment of the staff wages work to Ms McMillan in late March 2020 was because she was able to work remotely. Others were not enabled to work remotely. The assignment in late March 2020 does not indicate that MHL had already decided that Mrs Stentiford would be dismissed as redundant. I also accept that Ms McMillan’s continued responsibility for that work following the Level 4 lockdown was not because MHL had already decided to make Mrs Stentiford redundant. There is no reason to doubt Ms Merriman’s evidence on that point. It is also consistent with the timing of the proposal, which was formulated only a few weeks before the 2 June 2020 staff meeting.

[62] Caroline Galbraith worked for MHL for many years until she resigned in September 2021. There is no reason to doubt Ms Galbraith’s evidence that Ms Merriman spoke to her just before the 2 June 2020 meeting. Ms Galbraith was not able to be present at the meeting. Ms Merriman told Ms Galbraith that they would have to disestablish the administration team. Ms Galbraith asked what would happen to Mrs Stentiford and was told that there was a consultation process they had to go through.

[63] Ms McMillan was present at the 2 June 2020 staff meeting. There is no reason to doubt Ms McMillan’s evidence about the presentation. After advising assembled staff of the need to save \$250,000 in wages in the coming year, Mr O’Gara and Ms Merriman went

through the options set out in the consultation document. Ms McMillan's evidence is that the directors told the staff why the option was not viable, until they referred to the option of disestablishing the Business Services Team. They advised that this was the option they would move forward with after a consultation period. Ms McGeady's evidence is that she does not recall this. However, the consultation document includes the statement that the proposal "at this stage" is to dis-establish the Business Services Team. Ms McMillan's evidence reflects that statement.

[64] I take from the foregoing evidence about the 2 June 2020 presentation that the directors conveyed a sense of pre-determination about the restructuring.

[65] During her individual meeting, Mrs Stentiford asked Ms Merriman and Mr O'Gara "so what does this mean – are you making me redundant?" Ms Merriman answered "Yes". There is no dispute in the evidence about the use of these words. However, Ms Merriman's evidence is that, understood in context, her answer meant that Mrs Stentiford's role would be disestablished if the proposal went ahead in its current form.

[66] Mrs Stentiford did not understand the simple answer "Yes" as meaning she would be redundant only if the proposal went ahead in its present form (my emphasis). Rather, it confirmed for her that MHL intended to dismiss her. That was consistent with the directors' presentation to the wider staff meeting, MHL's decision to consult only with business services team members, the limited information provided and the speed at which MHL intended to proceed. Those were all factors within MHL's control. MHL must bear responsibility for creating Mrs Stentiford's sense that the restructuring and her dismissal had been pre-determined. MHL's subsequent attempts to assure Mrs Stentiford that it was still consulting about the proposal were hollow.

[67] Viewed objectively, MHL indicated pre-determination of its adoption of the restructuring and Mrs Stentiford's dismissal. Its actions fell short of what a fair and reasonable employer could have done in the circumstances at the time.

***Did MHL genuinely consider Mrs Stentiford's responses?***

[68] There is a submission that the consultation process was a charade, with MHL seeking to rid itself of the “broken” employment relationship with Mrs Stentiford and to avoid performance management processes with other employees in the Business Service Team. In effect, the argument is that redundancy was a sham or a disguise. There is little evidence to support the point about performance management processes and the point about Mrs Stentiford is answered by the events of November 2019. I also accept the evidence that MHL’s changed structure still applies and the staffing levels are still reduced. The restructuring/redundancy was not a sham or a disguise. The case cited that involved sham redundancies have no bearing on this determination.

[69] The notes of the 4 June 2020 meeting and the text of the subsequent communications from MHL are evidence that the directors genuinely considered and replied to Mrs Stentiford’s comments, prior to giving her notice of dismissal.

***Other issues - representation***

[70] Mrs Stentiford says that MHL failed to properly alert her to her right to be represented throughout the process that led to the termination of her employment. Attention is drawn to the 2 June 2020 letter that refers to Mrs Stentiford’s right to bring a “representative” to the 4 June 2020 meeting and subsequent communications which only mention her being entitled to bring a “support person”. I am referred to the objects of the Act that include acknowledging and addressing the inherent inequality of power in the employment relationship and the case of *Bula v Mount Cook Alpine Village Ltd*.<sup>3</sup>

[71] The determination in *Bula* offers little guidance in this case. The Authority expressly stated at [80] that the argument that an employer “in certain cases” should have regard to whether a representative is “appropriately qualified”, was not relevant in that case. There, the dismissal was based on an allegation of serious misconduct.

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<sup>3</sup> *Bula v Mount Cook Alpine Village Ltd* [2018] NZERA Christchurch 65.

[72] In the present case, nothing of significance can be read into the change in language following the 2 June 2020 letter. Mrs Stentiford was properly advised at the outset that she could be represented. Mrs Stentiford continued to be accompanied by Ms Tomasi at her election. The change in language in the communications to arrange meetings had no bearing on that. MHL's actions in this respect were what a fair and reasonable employer could have done at the time.

***Other issues - selection***

[73] There is a submission that Ms Merriman applied an "informal selection criteria" without disclosing the criteria. A tainted selection process can give rise to a personal grievance, even in a genuine redundancy situation. The submission is based on the continued employment of one of the Business Service Team members.

[74] I accept Ms Merriman's evidence that the person had indicated an intention to retire in 2020. As a result, the employee was not made redundant in June 2020. In August 2020 that person instead of retiring reduced her hours from four to two days per week. An additional person was employed part-time between January and April 2021, and was then replaced by another employee. These later appointments reflect changing business circumstances and are not relevant for present purposes.

[75] The personal circumstances specific to the retained employee meant she was not made redundant. However, redundancy is determined in relation to the position, not the person. The argument is that if personal circumstances led to the retention of one employee, personal circumstances must have motivated the dismissal of Mrs Stentiford and the others.

[76] The argument overlooks the disestablishment of the Business Services Team, the reduced staffing and the reassignment of the team's work to other teams within MHL. These changes were driven by an expected business downturn caused by the pandemic rather than continued growth as had been previously experienced. The positions in the Business Services Team were superfluous as a result of MHL's business decision. It was not a case of retaining

the current structure but reducing staff numbers in one team, so needing to use a selection process. I do not accept that Ms Merriman applied an “informal selection process”, that there was a “tainted” selection process or that the dismissal of Mrs Stentiford was motivated by personal circumstances.

[77] Mrs Stentiford says there is evidence of “non-essential” spending by MHL despite the restructuring. There were substantial work demands post lockdown. Client numbers did not reduce and MHL did not suffer a decline in revenue for it to qualify for subsequent covid-19 wage subsidies. These factors are said to undermine the genuineness of any business case driving the restructuring, but I disagree. The “non-essential” spending was recognition by MHL for its employees’ efforts in difficult circumstances. Work demands after the lockdown were unsurprising, given the disruption in MHL’s business and for clients. MHL’s business did not decline sufficiently to entitle MHL to later subsidies, but the business concerns in June 2020 were nonetheless genuine.

[78] MHL received a Covid-19 Wage Subsidy. A slightly different form of declaration accompanied the application, depending on when it was lodged. Under the first form, MHL was required to undertake that it would, using best endeavours, retain employees named in the subsidy application in employment on at least 80 percent of their regular income, for the period of the subsidy. Under the second form, MHL was required to undertake that it would retain the named employees as its employees for the period for which it received the subsidy. I take from Ms Merriman’s evidence that the subsidy application was made at a time when the first mentioned form of declaration was required.

[79] The period of the subsidy ended on 25 June 2020. MHL initiated the restructuring process and later gave notice of dismissal during the subsidy period. Mrs Stentiford’s employment then ended, about two weeks after the end of the subsidy period.

[80] There is a submission that the declaration is contractually enforceable by Mrs Stentiford, in reliance on ss 12 and 17 of the Contract and Commercial Law Act 2017. It is not necessary to reach a conclusion on that point. MHL’s declaration was one of the

circumstances at the time it initiated the restructuring process and then gave notice to Mrs Stentiford. MHL has not explained why it initiated the restructuring consultation process and ended it, during the period when it had declared that it would use “best endeavours” to retain Mrs Stentiford in its employment.

### **Unjustified dismissal**

[81] MHL did not provide Mrs Stentiford with access to relevant information. MHL truncated the time for Mrs Stentiford to consider and respond. MHL had pre-determined its adoption of the restructuring it proposed and conveyed that in its presentation to staff and to Mrs Stentiford. MHL took these steps during the time when it had committed to using best endeavours to retain Mrs Stentiford in its employment on at least 80% of her regular income.

[82] These actions and how MHL acted were not what a fair and reasonable employer could have done in all the circumstances at the time.

[83] Mrs Stentiford was unjustifiably dismissed by MHL.

[84] There is an alternative argument that aspects of events in 2020 around the dismissal gave rise to unjustified disadvantage personal grievances. Given the finding of an unjustified dismissal, it is not necessary to consider the alternative claims.

### **Remedies**

[85] Mrs Stentiford discontinued the claim for lost remuneration. Mrs Stentiford obtained new employment shortly after the dismissal, so did not incur any loss. The claim is for compensation of \$20,000.00 as a remedy for the hurt, humiliation and injured feelings felt by Mrs Stentiford as a result of the personal grievance.

[86] I am referred to *Waikato District Health Board v Archibald* and *Richora Group Ltd v Cheng* by both counsel.<sup>4</sup> I accept that these judgments give guidance as to a principled approach to assessing compensation.

[87] I accept Mrs Stentiford's evidence that she "wholeheartedly enjoyed" working at MHL until 2019. That statement is supported by detail, but the detail is captured by the statement sufficiently for present purposes. Mrs Stentiford contrasts that time with how she felt about the employment relationship after August 2019. Mrs Stentiford says that it felt like she was living through a "slow-motion car crash" after then, with her career, role and responsibilities being "stripped away". These feelings were reflected in Mrs Stentiford's intention to resign. Although Mrs Stentiford was persuaded not to resign, those feelings were not assuaged. However, the hurt, humiliation and injured feelings experienced by Mrs Stentiford are not compensable as MHL did not breach any obligation owed to her.

[88] Regarding the restructure, Mrs Stentiford felt she was "along for the ride". Mrs Stentiford had the impression that the directors did not want to engage with her. It made her feel "so small and insignificant – like a discarded piece of trash". It felt like a "gut punch". Mrs Stentiford was kept awake crying and, following the announcement that her team was to be dis-established, wanted to make herself "invisible" as all her colleagues were looking at her. At the work farewell, Mrs Stentiford broke down crying and hid. Mrs Stentiford was embarrassed as her dismissal became known outside the workplace. Mrs Stentiford felt betrayed by the dismissal. There is evidence from Ms Galbraith, Ms Tomasi and Mr Stentiford to support these effects.

[89] MHL says that Mrs Stentiford is not entitled to compensation. The submission is that the hurt and humiliation suffered was the result of unrelated factors and from MHL's decision to restructure and the loss of the job. I have endeavoured to separate out the unrelated factors,

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<sup>4</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

as set out above. However, Mrs Stentiford is entitled to compensation for harm resulting from the unjustified dismissal that resulted from the restructuring proposal and its implementation.

[90] Having regard to that evidence, I assess the harm to Mrs Stentiford as falling within the midrange. The effects suffered by Mrs Stentiford are less significant than the harm to the grievant in the *Waikato District Health Board* case. The extent of harm in the present case is closer to that in *Innovative Landscapes (2015) Ltd v Popkin*.<sup>5</sup> I fix \$15,000.00 as the compensation required to remedy the proven harm.

[91] MHL submits that there were actions by Mrs Stentiford that contributed in a blameworthy manner to the situation giving rise to the personal grievance.

[92] I am referred to two cases.<sup>6</sup> Here, there is a finding of pre-determination. That was Mrs Stentiford's view and it informed her limited engagement from 2 June 2020. I do not accept that Mrs Stentiford's limited engagement amounts to blameworthy conduct on her part in these circumstances. Mrs Stentiford did not put forward any alternative proposal and did not seek any specific information. Again, I do not accept that these (in)actions were blameworthy conduct on Mrs Stentiford's part that contributed to the situation. Mrs Stentiford did not suggest alternatives because of her view of pre-determination. MHL should have provided supporting information at the outset. It could also have provided supporting information as an answer to Mrs Stentiford's communications asserting pre-determination.

[93] I find that there is no basis to reduce compensation under s 125 of the Employment Relations Act 2000.

## **Summary**

[94] Mrs Stentiford was unjustifiably dismissed and has a personal grievance.

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<sup>5</sup> *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40; *Zhang v Telso Asset Management* [2019] NZEmpC 151.

<sup>6</sup> *Holmes v Ken Rintoul Cartage* [2002] 2 ERNZ 130

[95] To settle that grievance, Marshall & Heaphy Limited is to pay Pamela Margaret Stentiford \$15,000.00 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, within 28 days of this determination.

[96] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, taking account of those submissions in the context of the Authority's approach to costs.

Philip Cheyne  
Member of the Employment Relations Authority