

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 228
3127114

BETWEEN	JANE SHERARD Applicant
AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Shelley Kopu, counsel for the applicant Simon Lapthorne, counsel for the respondent
Investigation Meeting:	1 and 2 November 2022 in person 22 November 2022 by audio-visual link
Submissions (and other information) received:	17 and 22 November 2022 and 21 January 2023 from applicant 17, 22 and 23 November 2022 and 31 January 2023 from respondent
Determination:	5 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jane Sherard was a duty supervisor for NZ Bus, based at the Glenfield depot on Auckland's North Shore.

[2] March 2020 was a crazy time in the world of Ms Sherard and many other people. Covid-19 hit and New Zealand locked-down. From Ms Sherard's perspective several events which happened around the same time have become intertwined. There was a staff member who acted aggressively towards her, two Covid-related situations and her employer's restructuring and appointments process. She was concerned that the earlier

incidents fed into her employer's decision not to appoint her to a redeployment role when her job was disestablished. She claims she was unjustifiably dismissed.

[3] Her employer downplays the incidents having any part in the appointment decision although recognising that matters may not have been dealt with as well as they would have in a pre-Covid world. It says there was a larger restructuring process which it undertook fairly.

The Authority's investigation

[4] The claim was originally lodged with the employer identified as New Zealand Bus Limited. Transportation Auckland Corporation Limited (TACL or the company) identified itself as the employer, lodging a statement in reply. It operates with a trading name of NZ Bus. TACL is a large organisation running bus services in several parts of Aotearoa New Zealand.

[5] At the investigation meeting Ms Sherard had no objection to the name being amended. Under s 221 of the Employment Relations Act 2000 (the Act) I amend the identification of respondent to TACL. I refer to Ms Sherard's employer in this determination by its trading name NZ Bus.

[6] For the Authority's investigation written witness statements were lodged from Ms Sherard and her husband (also a NZ Bus employee), along with NZ Bus's managers Scott Wilson and Andrew Gillanders. At the meeting witnesses answered questions under oath or affirmation from the Authority and the parties' representatives.

[7] Written submissions were received and the investigation meeting continued by audio-visual link for the presentation of submissions. The Authority sought additional documents at the close of the meeting. The provision of the documents generated further submissions from the parties.

[8] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Act was applicable.

[9] As permitted by s 174E of 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.

The issues

[10] The issues for investigation are grouped here into types of claims although the discussion below will focus on events:

- (a) Did NZ Bus breach its duty of good faith by failing to:
 - (i) address Ms Sherard's complaint about aggressive behaviour;
 - (ii) provide support for her following that behaviour;
 - (iii) address valid concerns about Covid which she raised as health and safety duty supervisor champion; and
 - (iv) provide career counselling or outplacement services?
- (b) If good faith was breached should a penalty be imposed, with some or all going to Ms Sherard?
- (c) Was Ms Sherard disadvantaged by any unjustified action of NZ Bus failing to:
 - (i) create and apply appropriate selection criteria for new positions of service delivery manager; and
 - (ii) ensure an objective panel considered her application for that new position?
- (d) Was Ms Sherard unjustifiably dismissed by NZ Bus, including consideration of failure to:
 - (i) automatically redeploy her to a service delivery manager role; and
 - (ii) select her for appointment to that role when she was the most experienced candidate?
- (e) If a grievance is established what remedies (if any) should Ms Sherard receive, including consideration of lost wages, compensation for humiliation, loss of dignity and injury to feelings and contribution?
- (f) Should either party contribute to the costs of representation of the other party?

[11] The statement of problem identified Ms Sherard seeking resolution of whether NZ Bus met its obligations under the Health and Safety at Work Act 2015. This covered investigation of and support for the incident of aggressive behaviour and Covid-19

concerns. No specific remedies were sought. At the start of the investigation meeting her representative clarified that these were now seen as part of the good faith matter.

Ms Sherard's background

[12] Ms Sherard came to NZ Bus in 2012 with considerable managerial experience. Her most recent role had been as Chief Executive of Ngāti Whātua o Kaipara, a post Te Titiri o Waitangi settlement organisation. She had also been an Ethics Committee Member of the New Zealand Health Research Council.

[13] In her time with NZ Bus Ms Sherard undertook a number of roles. She began as a driver operator (bus driver), later being promoted to a leading operator then a duty supervisor (North) Shore. This involved managing a team of about 50 drivers. Since 2015 she had also been the health and safety duty supervisor champion for the Glenfield and Orewa depots.

[14] In 2017 Ms Sherard was asked by her then manager Mr Gillanders to train two new duty supervisors at the City depot. This involved her acting as interim lead supervisor at that depot.

[15] In 2018 Ms Sherard was diagnosed with cancer and required oncology treatment. The following year she was seconded to the Orewa depot to address concerns there. In summary Ms Sherard describes herself as having taken on many responsibilities during her time with the business which were over and above the normal role of duty supervisor.

First Covid concern

[16] March 2020 was an uncertain time for all and very stressful for those in the public transport industry. As an essential service, operations continued, particularly to enable essential workers to get to work. There was uncertainty about what schedules would operate and thus what work be available. New rules were imposed, including for when drivers presented with Covid-like symptoms.

[17] At this point Ms Sherard reported to operations manager Mr Wilson. Mr Gillanders was the more senior operations manager who Ms Wilson reported to.

[18] The first full day the country was in level 4 lockdown, 26 March 2020, a driver on duty reported Covid-like symptoms. Ms Sherard and others became involved in

dealing with him and his bus. Later that shift the driver sought to continue working. Ms Sherard asked if he had medical clearance with him replying the 0800 hotline nurse said he did not have the symptoms. Ms Sherard took a cautious approach. She checked in with NZ Bus's national health and safety manager who indicated she expected a medical clearance but was going to seek more information. There may have been some variation in understandings about what "medical clearance" meant.

[19] The following day Mr Wilson sent Ms Sherard an email which he excluded others from. It suggested the application of some common sense and not being too restrictive with people who have taken time off feeling unwell. Mr Wilson did not see this as particularly negative but Ms Sherard felt surprised and undermined by that message. Under different circumstances a verbal discussion may well have been preferable but given the timing I make no finding of a breach of good faith. Ms Sherard's concern that this issue was taken into account in her non-appointment is discussed below.

Second Covid concern

[20] Another driver was out of Auckland and requested Ms Sherard's approval for leave before returning. The driver was staying in the same motel as people who had arrived from Europe. She also wanted assistance for her return to Auckland. Ms Sherard advised that she understood travel required a chief executive's travel authority letter but anyway only covered local travel from home to work and back.

[21] Ms Sherard went to Mr Wilson. Her impression was that he was asking her to sign a letter giving this driver travel authority. She did not feel comfortable about that being within the rules.

[22] Mr Scott on the other hand had the impression Ms Sherard wanted to sign the letter.

[23] Ms Sherard felt she was being treated coldly in both Covid situations. I appreciate that Ms Sherard was disturbed by this travel authority letter situation, but it was a misunderstanding between Mr Wilson and Ms Sherard under very trying circumstances.

Incident with W

[24] On 25 March 2020 Ms Sherard was confronted by another staff member I identify as W.

[25] Both Ms Sherard and her husband were aware of earlier incidents involving W being volatile and using abusive language towards staff. However, this was the worst Ms Sherard had seen from him. Mr Gillanders refers to W expressing his views strongly on occasions in his role as a union delegate.

[26] In this instance Ms Sherard describes W approaching her about the weekend duty roster, yelling “you can put it up your arsehole and the company can do the same”. She recalls W advancing towards her and slamming the roster down on the desk in front of her. Ms Sherard moved backwards as W shouted. She left the room, shaking and almost tearful.

[27] Ms Sherard went to look for a generic incident form on the intranet but could not find one. Instead she emailed Mr Wilson to inform him about W’s behaviour, beginning with the statement that she was “making a formal complaint”. Ms Sherard wanted to be factual in the email, attempting to regain her mana while still exercising her duty supervisor responsibilities. There is little if anything in the email explaining how she was affected by the event.

[28] Another staff member also emailed all the duty supervisors about the incident, copying Mr Wilson in. About half an hour later W phoned and asked to be handed over to Ms Sherard. W indicated he would like to apologise but went on to say that while his behaviour might seem inappropriate it was understandable. Ms Sherard responded that unless she received an apology for his outburst she would refer him to his duty supervisor. W replied that he would not be apologising to anyone, including her.

[29] W’s duty supervisor spoke to him and arranged for W’s rostering to avoid interactions with Ms Sherard. She was aware of this.

[30] Mr Wilson intended to follow up with Ms Sherard about her email but given what was happening did not do so. I am not persuaded by any focus on Ms Sherard not using the proper form, as she did refer to making a formal complaint. Mr Gillanders accepted that he did not know where the correct form was. If Mr Wilson thought it was important to have the right form he should have told Ms Sherard that or sent her a copy.

[31] Mr Wilson told the Authority that he had checked in with some people involved. and concluded that the matter was under control. I accept some steps were taken although there was still a lack of prompt follow up with Ms Sherard.

[32] By 1 April Ms Sherard had not received a response to her email to Mr Wilson about W. She had been told that she was unsuccessful in her application for the new role, referred to in more detail below. Ms Sherard saw Mr Wilson, asking if they could talk later. He said he was busy and they should talk now. Mr Wilson did not indicate that he had undertaken an investigation already. He said he would or was thinking about talking to the union about W, asking them to talk to W. He thought that might be an effective way of dealing with the situation. Mr Wilson told the Authority he did not see that being the whole solution, although that message was not conveyed to Ms Sherard. He did not end up talking to the union.

[33] Ms Sherard found the nature and content of this discussion unsatisfactory. I accept that Mr Wilson was busy and did not mean to be flippant. However, he did not enquire sufficiently about the incident to discover how Ms Sherard felt about it. Such a discussion in passing was not an ideal opportunity for her to convey the impact.

[34] A week later, as she had received no further response, on 8 April Ms Sherard complained to the regional human resources manager, including her earlier email to Mr Wilson. She was still unable to identify what the right form so used a Informal Reporting of Undesirable Behaviour form discovered on the intranet.

[35] In the form Ms Sherard described the situation, indicating she felt physically threatened as W was moving towards her holding a folder, as well as being upset at his words and intent. Ms Sherard asked for a full and proper investigation, with the company managing W. Receipt was acknowledged.

[36] Having not heard anything further, Ms Sherard followed up with HR on 14 April. The next day Mr Wilson informed her he had asked the new service delivery manager to investigate and she would soon receive a meeting invite. She had no such contact.

[37] No one seems to have regarded it as their responsibility to follow up with Ms Sherard about her complaint at the time she finished employment or afterwards.

[38] Attempts to follow up after Ms Sherard finished with NZ Bus did not result in any information being provided. When Ms Sherard met with Mr Gillanders a few months later, he told her if her complaint had not been investigated and she had not heard anything, that was not good enough. He was to find out what had happened.

[39] As at the date of the Authority's investigation meeting Ms Sherard was unaware of NZ Bus having completed an investigation. What she expected was a letter telling her the incident had been investigated and the matter was now resolved, not necessarily specifics of the outcome.

[40] The Authority's direction that information be provided about any investigation resulted Ms Sherard receiving documents. She discovered that on 15 April 2020 the service delivery manager had emailed some of those present, with responses received on 15 and 17 April, confirming Ms Sherard's recounting of events. This contact was made whilst Ms Sherard was still employed. This was followed by material being received from W on 20 April and he interviewed it seems on 1 May 2020 by that manager and Mr Wilson. By this time Ms Sherard had finished work.

Conclusion on the W incident

[41] Under Ms Sherard's employment agreement NZ Bus was obliged to take all practicable steps to ensure her safety and particularly to accurately report, record and investigate workplace incidents.¹

[42] NZ Bus also had guidelines in place entitled "How to identify and manage Bullying, Harassment and other Disrespectful Behaviour". Ms Sherard accept this was an incident of disrespectful behaviour rather than coming into the other categories.

[43] The guidelines set out a five-step process, beginning with staff raising their concerns with their people leader first and filling out a report form on the intranet. The people leader is to make sure they take the concern seriously and they are in charge of making sure the process is followed. The intervention that will be used is agreed and action taken. There is no requirement to investigate in every instance.

¹ Individual employment agreement, clauses 26.2 and 26.5(c).

[44] Ms Sherard's original notification was not explicit about the effect of the behaviour on her. Mr Wilson did not see it as a complaint as such and having been aware that some action had been taken on the floor, did not see further steps as required.

[45] I am not persuaded that the steps taken by NZ Bus after the initial notification were enough in the circumstances. Ms Sherard's email shortly after the incident referred in the first line to her making a formal complaint. The incident is described as totally unacceptable, including details of aggressive shouting, swearing and slamming down of a folder. Another staff member also took to email describing the behaviour towards Ms Sherard and the company as "really bad".

[46] Mr Wilson correctly points to the original notification email not referring to W advancing towards Ms Sherard or that she personally felt physically threatened, bullied or harassed. Whilst this is true he did not sufficiently take into account the important references in the email set out in the paragraph above. Recognising that Mr Wilson was under pressure at this time, he jumped to the conclusion that W's shouting, swearing and slamming was not physically threatening. He failed to ask Ms Sherard about the impact on her.

[47] I was surprised at Mr Wilson's suggestion that Ms Sherard could (or should) herself have commenced an investigation and taken disciplinary action against W about this incident, as she had a managerial role. It is not reasonable in an organisation where there are others capable of undertaking such investigation and action to expect the person who had been the subject of behaviour to take those steps. NZ Bus's process required that people raise the matter with their manager to address.

[48] Mr Wilson accepts there were some delays due to the Covid situation but said the outcome would have been the same. This ignores Ms Sherard's interests in knowing her complaint was investigated with an outcome achieved.

[49] Having seemingly decided that it did not need to investigate, NZ Bus then decided that it would. Its communication of these various decisions to Ms Sherard was inadequate. There was little evidence of HR taking any role once Ms Sherard contacted them. An offer of support would have been appropriate.

[50] I accept that a notification of outcome to Ms Sherard would more likely have occurred had she still been employed. However, knowing that she was being made

redundant, NZ Bus should at the least have communicated on her departure where things were up to with the process and what its future intentions were.

[51] Any steps after that point are less readily captured by obligations which the Authority can enforce although as a matter of best practice letting a complainant at least know there has been an outcome is important.

[52] I find that while Ms Sherard was employed NZ Bus did not meet its employment agreement obligations to sufficiently promptly follow up on and investigate this incident and its good faith obligations to let Ms Sherard know what was going on. She believed it impacted on her non-appointment. It contributed to her rejection of another NZ Bus role, discussed below. She worried that her husband was going into work and having to come across W, when her complaint against W as far as she knew was unresolved. NZ Bus's actions were to her disadvantage.

[53] Ms Sherard had wanted to put on a brave face and show that she was able to handle being a woman working in a male dominated environment which Mr Gillanders described as robust. This no doubt impacted on her dealings with Mr Wilson about the incident, where she did not emphasise her distress. She was however, quite seriously affected by it, including after she was made redundant. Ms Sherard's husband gave compelling evidence of the changes in her behaviour in the days following the W incident. Ms Sherard describes seeing W in the supermarket some months after the event, feeling anxious and having to leave.

[54] Compensation here is awarded regarding this event, attempting to carve off the effects of being made redundant around the same time, which are dealt with later. Within 28 days of the date of this determination, NZ Bus is ordered to pay Ms Sherard the sum of \$3,000 compensation under s 123(1)(c)(i) of the Act for its unjustified actions regarding the W incident.

NZ Bus's restructuring process

[55] At the start of 2020 NZ Bus undertook an operational review to determine the structure required ahead. It aimed to remain financially competitive.

[56] The proposal consulted on involved a restructure to ensure the supervision and management of drivers was efficient, effective and accountable. The new structure aimed to address a gap in the career pathway from the leading operator/duty supervisor

to the regional operations manager. The duty supervisor and another role were to be disestablished. Several new roles would be created, including a new role of service delivery manager at larger depots including Glenfield. Proposed position descriptions were generated for the new roles.

[57] On 22 February 2020 Ms Sherard had a reaction to medication and was hospitalised for about a week.

[58] While she was there, Mr Wilson contacted her to advise of a proposed restructure meeting on 26 February with the senior leadership team. They agreed that he could email the proposal documents to Ms Sherard.

[59] On 26 February NZ Bus emailed a power point presentation from the meeting which outlined the restructuring proposal. The deadline for feedback was set for 4pm on Tuesday 3 March. Ms Sherard was not set to return to work until Monday 2 March.

[60] Awaiting on her return to the depot were two letters of 24 and 26 February. The first advised of the meeting and the second discussed the proposal and process. There were some inaccuracies with the 26 February letter – it thanked Ms Sherard for attending the meeting which she did not attend and identified the proposal as meaning no need for the revenue administrator role with her position disestablished. Staff with the skill set were welcome to apply for the new roles.

[61] In any event Ms Sherard did understand that under the proposal her duty supervisor role would be disestablished. Having compared position descriptions, Ms Sherard saw the new service delivery manager role as encompassing 60% to 70% of the duty supervisor tasks. Prior to the restructure there were three duty supervisors at Glenfield, with one service delivery manager there in the proposed structure.

[62] As she had been away there was an offer for her to ask questions about the proposal but she did not feel the need to do so. She did not seek additional time to provide her response.

[63] On 3 March 2020 Ms Sherard provided her written feedback which generally supported the restructure. She mentioned one issue about drivers.

[64] It appears the time for NZ Bus's response to feedback was lengthened due to Covid events. Some staff were feeling anxious so Ms Sherard emailed Mr Wilson asking for an update.

[65] On 17 March NZ Bus wrote to staff, calling them to a 19 March meeting to provide a response to everyone's feedback.

[66] At that meeting NZ Bus advised that they were changing one aspect, which did not directly impact Ms Sherard. The remainder of the proposal was adopted without change. Although some steps in the timeline of the process were pushed out, the Go Live date remained the same as in the proposal.

The 19 March outcome letter

[67] This letter informed Ms Sherard that her role would be disestablished on 21 March, two days later, although her notice period for redundancy would be from 22 March to 18 April 2020.

[68] The available vacancies were to be advertised from the next day, 20 March. The letter told Ms Sherard she could apply for any roles in the new structure, providing job descriptions. There was no advice about how NZ Bus would select the successful candidates other than a reference to interviews. The roles were open to everyone in the business not just those whose current jobs were being disestablished.

[69] Outplacement assistance and counselling were to be available through an external provider staff could contact directly. NZ Bus also offered to provide references (to staff who needed them).

[70] The outcome meeting presentation states that if staff are unsuccessful in an application "we will work with you as to your options around other roles and redundancy".

Ms Sherard's job application

[71] Ms Sherard applied for the service delivery manager role at Glenfield, a role seen by NZ Bus as more senior to her duty supervisor one. In addition to already undertaking aspects of the role which were the same as her current role she saw herself as having significant relevant experience for the remaining aspects. Most other duty supervisors applied for multiple roles at several locations.

[72] On Friday 27 March 2020 Ms Sherard was interviewed by the COO, regional human resources manager, regional operations manager, Mr Gillanders and Mr Wilson. More details regarding the interview are discussed under the consideration of redeployment below. At the time Ms Sherard felt she had interviewed reasonably well, as she was given feedback from the person questioning that she had answered some questions well so did not have to answer additional questions. However, Mr Gillanders and Mr Wilson did not have a favourable impression.

[73] During a question about managing a risk situation, Ms Sherard used the example of the driver with Covid-related symptoms, referred to above. When she returned to the office on Monday 30 March she saw Mr Wilson's email referring to common sense. She felt devastated at having used the example in the interview and viewed it as disadvantaging her there.

[74] On 1 April Mr Wilson let Ms Sherard know her application as not successful. She felt absolutely dismayed. She asked Mr Wilson why she was not appointed and he said the other applicant had more experience than her.

[75] Mr Wilson then asked if she was interested in the role of service delivery supervisor for the Swanson depot. This was similar to the role she had undertaken at Orewa. It was a sole charge role with remote supervision from the New Lynn depot. Ms Sherard was concerned that the Swanson depot had a higher proportion of more problematic drivers and W had reason to visit the Swanson depot on occasions.

[76] Ms Sherard felt Mr Wilson was pressing her for an answer straight away. She asked him to confirm the offer in writing by email and she would think about it overnight. She did not receive an email.

[77] Next morning however Mr Wilson asked her about the Swanson role again. Ms Sherard made comment about the problematic drivers and needing to look after her own health. There may also have been reference to the longer travel time.

[78] On balance I conclude that Ms Sherard did not specifically mention W's visits to the Swanson depot but took Mr Wilson to be aware of that and the fact her issues with W had not been resolved yet. He told the Authority that having spent significant time there he was unaware of W visiting other than once for a large meeting.

[79] Mr Wilson told Ms Sherard that her contract contained no redundancy compensation and her last day would be 17 April. She describes him as rushing to another meeting.

The end of Ms Sherard's employment

[80] A letter of 16 April confirmed termination of employment by way of redundancy. NZ Bus offered outplacement and counselling services. Ms Sherard's last day of work was 18 April 2020.

Steps post-employment

[81] Ms Sherard's attempts to access outplacement or career counselling services were unsuccessful. She phoned the provider but was told NZ Bus had not yet approved for her to be provided with those services. The provider said they would come back to her when they had approval but never did.

[82] Ms Sherard wrote to NZ Bus on 9 June 2020 to ask for a meeting. She needed to be followed up before hearing from Mr Gillanders who indicated he would have a response when they met.

[83] On 2 July 2020 Ms Sherard and her representative met with Mr Gillanders. He did not have a copy of her 9 June letter and was not able to provide an immediate response.

[84] Mr Gillanders did say he was not happy if the W issue had not been addressed and it was "not good enough". Ms Sherard referred to the stress caused to her husband who also worked at NZ Bus and came in contact with W regularly.

[85] Ms Sherard mentioned not being able to access the employment assistance, with Mr Gillanders responding that he would look into it.

[86] A further meeting was held on 9 July 2020. Ms Sherard's view NZ Bus did not address her concerns. She was left disappointed, feeling the W and career counselling matters were unresolved. In September 2020 she requested information from NZ Bus. What she received contained nothing about any investigation into the complaint, her application for the service delivery manager role or the career counselling services.

Unjustified dismissal test

[87] I first consider if Ms Sherard was unjustifiably dismissed. The test under s 103A of the Act is whether NZ Bus's actions and how it acted were what a reasonable employer could have done in all the circumstances at the time.

[88] The following aspects must be examined objectively:

- (a) whether the decision to make Ms Sherard redundant was a genuine decision which a fair and reasonable employer could have made; and
- (b) whether NZ Bus carried out the process fairly, taking into account its good faith obligations under s 4A of the Act.

[89] Those good faith obligations include NZ Bus:

- (a) being responsive and communicative; and
- (b) as there was a decision likely to have an adverse effect on Ms Sherard's continued employment, giving her access to information relevant to the continuation of her employment and a chance to comment on it.

[90] It was perhaps surprising that NZ Bus drove on with its restructuring process in the first few weeks of the pandemic impacting New Zealand when the restructuring was unrelated to the pandemic. Staff were working but this was a difficult time. There was no evidence of any urgent financial pressure requiring immediate action. Whilst Ms Sherard makes no particular criticism of that approach, the fact that events were occurring in this context put pressure on everyone.

This was a genuine redundancy

[91] This was not a decision aimed primarily at cost cutting although the business did want to ensure that it remained competitive. The supervision and management of operations were changed, introducing new layers of management to fill a gap in the previous career pathway, with one point of contract responsible for each depot and the regional operations manager focusing on strategic activities. With one exception, Ms Sherard approved of the new structure.

[92] I conclude that NZ Bus was genuinely attempting to improve its operations. It acted as a just and fair employer could have done in deciding to disestablish the duty supervisor roles, including that of Ms Sherard.

Procedural requirements

[93] I now move on to look at the requirements of a fair process, including consultation and consideration of redeployment.

[94] The latter is of particular importance in this case. A proactive approach to redeployment is required, taking into account the duty of good faith.² A fair and reasonable employer should consult with its employees and explore reasonable redeployment opportunities for those affected by a restructuring.

Ms Sherard not concerned about consultation on new structure

[95] Although being in hospital at the time the proposal came out was unfortunate, Ms Sherard soldiered on when released, completing her feedback on the proposal in the time allowed.

[96] Submissions for Ms Sherard argue that she did not have sufficient time to consider the proposal. This argument is understandable in light of the short period allowed for feedback and Ms Sherard's hospitalisation. However, she spoke of being able to complete her feedback in time. No request for an extension was made. The outcome letter thanked her for providing such in depth comments in her feedback. In the absence of evidence of the timeframe causing difficulty I make no finding about the unfairness of the consultation period.

No obligation to directly redeploy

[97] It was suggested for Ms Sherard that she should have been directly redeployed into the new service delivery manager role.

[98] Across the Auckland business 18 duty supervisor roles were disestablishment with only four service delivery manager roles established. Staff were permitted to apply for roles at depots other than their own. Eight of the 18 applied for one or more of the four service delivery manager roles. On the information before me, I do not see NZ

² *Jinksinson v Oceania Gold (NZ) Limited (No 2)* (2010) 7 NZELR 677 and *Gatiatullina v Propellerhead Limited* [2021] NZEmpC 146.

Bus as acting unreasonably by dealing with the process across the region rather than on a depot by depot basis.

[99] Even if Glenfield is considered by itself, there was only one service delivery manager role and three existing duty supervisors. As it turned out one later chose to retire and the other accepted a service delivery supervisor role, a step down in the new structure. But that was not known to NZ Bus at the time it was setting up the process.

[100] There were also differences between the old and new roles. The new one was at a higher managerial level and had a higher salary. In any event, even on Ms Sherard's evidence (which is not accepted by NZ Bus) there was an up to 40% difference between her current job and the new role.

[101] One additional question which could be contemplated is whether it was fair to allow all staff members to apply, rather than just those whose positions had been made redundant but given that the successful applicant was a duty supervisor who was losing his role, I make no further comment on that.

Selection process

[102] Failure to inform employees about the selection criteria for new roles may amount to a breach of good faith.³ Likewise a failure to inform an employee about adverse views held about them before an interview.⁴

[103] NZ Bus had already decided when it put out the proposal that it was going to be advertising the roles. Applications were welcomed from those who thought they had the skill set or were suitably qualified. The outcome letter refers to Ms Sherard being "welcome to apply in competition for these roles" and any other roles she feels she had the skills and knowledge for.

[104] The service delivery manager position description had a list of seven knowledge, skills and experience points. These included such things as strong interpersonal, analytical and reporting skills, along with excellent communication and relationship building skills. The position descriptions were available for consultation.

³ *Jinksinson v Oceania Gold (NZ) Limited*, above at n 2 at [51].

⁴ *Jinksinson v Oceania Gold (NZ) Limited*, above at n 2 at [52].

[105] Ms Sherard did not know that the service delivery manager was seen as being at a higher managerial grade and salary than her current role. The pay rate was not in the position description. She was on a salary of a little over \$61,000 whereas the service delivery manager roles were in the \$65,000 to \$80,000 range. The information may have been passed on at the consultation meeting but Ms Sherard was not there as she was hospitalised.

Problems with interview and appointment process

[106] NZ Bus decided the fairest way to assess suitability and select candidates for the new roles was to interview applicants. There are several objections to the process NZ Bus used.

Objective panel

[107] Ms Sherard argues that NZ Bus did not ensure an objective assessment panel was provided for her application.

[108] Although there was a panel of five, one person lead the interview. This was deliberately not a person who had previously been in a reporting relationship with that applicant. The remainder of the panel observed. As Mr Gillanders and Mr Wilson had both been in reporting relationships with Ms Sherard, another panel member lead her interview.

[109] With internal applications there are likely to often be people who know the applicant on the panel. Appointment criteria are particularly important in such cases.

Notes of interview

[110] The lead interviewer wrote very little on the interview template summarising Ms Sherard's answers. This widens the room for argument that other information was taken into account, as discussed below.

[111] There is also a question about the accuracy of what was recorded. Applicants had to rate themselves out of 5 in knowledge of health and safety and of disciplinary processes. Ms Sherard scored herself highly at 4-5 and close to 5 respectively but the interviewer has recorded 1-2 and 1. Mr Wilson suggested the lead interviewer may have scored downwards, with 1 being the highest, rather than 5.

Basis for selection

[112] There was a lack of transparency about the basis on which people would be chosen at interviews. Ms Sherard understood that her experience would be taken into account. However, the evidence from Mr Gillanders and Mr Wilson stressed that the interview was what determined who got the role. That message was not passed on to Ms Sherard.

What was considered

[113] Despite the assertion that it was all about the interview, there was actually wider information considered by the panel. In the panel discussion before the applicant came in, panel members who talked about where s/he worked and what s/he was like.

[114] Mr Wilson expressed negative views about Ms Sherard to the panel before her interview on several topics, some of which may not have been apparent from the interview:

- (a) Commitment to the job – by agreement Ms Sherard had been taking a day off each month to focus on her iwi commitments outside work. Mr Wilson incorrectly thought she was now asking for a day a week off for this work;
- (b) communication style – verbal and written; and
- (c) working relationships with staff – Ms Sherard was seen as not having good working relationships with staff who would report to the new service delivery manager. Some had earlier communicated their concerns to management but these had not been discussed with Ms Sherard. “I never really delved into it” Mr Wilson says.

[115] Ms Sherard did not know about these views and certainly did not know they were being discussed by the panel. That had an impact on her chances of success.

What was not considered

[116] What could be seen as more objective material in the form of previous performance appraisals were not considered by the panel.

[117] The fact that Ms Sherard had been subject to an incident involving aggression at work two days before the interview was not taken into account.

[118] I am not satisfied that the two Covid related concerns had any impact on Mr Wilson or the wider panel's consideration of Ms Sherard's application. They were minor matters appropriately placed in the context of the difficult circumstances occurring at the time.

Panel's conclusions

[119] Mr Gillanders describes Ms Sherard as one of the candidates the panel thought potentially could do well in the new role but unfortunately she did not interview well. He found some of her answers vague. Her interview was considerably longer than others.

[120] The successful applicant was a duty supervisor from another depot whose role was also affected by the restructuring. Although he had not been with the business as long as Ms Sherard, his depot was considerably bigger than Glenfield. Mr Gillanders describes this as giving greater experience of working in a high-pressured environment. He sees the successful applicant as having driven several initiatives of his own, whereas Ms Sherard was seen as implementing other people's ideas.

[121] Mr Wilson describes the other candidate as having more initiative and drive. His subsequent promotion to a higher position within the organisation is emphasised.

Identification of reason for non-appointment

[122] The reason relied upon by Mr Wilson and Mr Gillanders at the investigation meeting was that Ms Sherard did not interview well. This was not the reason given to her when she sought an explanation from Mr Wilson. She was told the other candidate was more experienced.

[123] The successful applicant had not been a duty supervisor for nearly as long as Ms Sherard. Ms Sherard saw the identification to her of the successful applicant as being more experienced to be untrue. She felt she had not been given the real reason and assumed one of those reasons must be her complaint about W and the Covid issues. Subsequent attempts to obtain the reasons did not provide an answer.

[124] The successful candidate may have had extensive relevant experience prior to working for NZ Bus but the explanation to Ms Sherard was lacking.

Problems with Swanson role

[125] I assessed Mr Gillanders' description of NZ Bus seeing Ms Sherard as a valuable employee it wished to retain as genuine.

[126] NZ Bus had indicated to staff in the consultation and outcome packs that it would work with those who were unsuccessful with their application as to their options around any other roles and redundancy.

[127] Mr Wilson asked Ms Sherard if she was interested in the Swanson service delivery supervisor role. It was not as senior as the role she applied for but was one with autonomy, as the highest placed person at that depot. Mr Gillanders saw it as the next step towards becoming a service delivery manager. Unfortunately that was not spelled out to Ms Sherard despite awareness that she had applied for the manager role.

[128] NZ Bus gave Ms Sherard one night to make a decision. She had concern about contact with W at the quieter, therefore less safe, Swanson depot, particularly with her complaint about W not being resolved. A more thorough discussion with her could well have resulted in this being raised. Her other concerns such as about the drivers, should have been explored as Mr Wilson told the Authority he had a different view.

[129] There was a failure to properly explore with Ms Sherard the nature of the role, and her concerns, giving her sufficient time to consider the situation.

Other concerns

[130] Ms Sherard also complains about NZ Bus's failure to provide a reference and career counselling. NZ Bus offered in writing to provide references for Ms Sherard, presumably along with others. She may have been expecting a written reference to be sent to her. However, the offer was there.

[131] The career counselling situation is somewhat mysterious. NZ Bus indicated it was willing to fund the counselling. Ms Sherard's initial attempt to access services was unsuccessful. This issue was also raised with Mr Gillanders who was going to follow up. Ms Sherard could have done more but NZ Bus had made the offer of careers advice and should have ensured that it was readily available. Some of this inaction may have

occurred after Ms Sherard's employment so is not so readily incorporated in a personal grievance claim.

There was an unjustifiable dismissal

[132] In light of the finding that NZ Bus genuinely decided to make Ms Sherrard redundant, I have examined whether the failings regarding good faith and procedure discussed above might more appropriately be described as unjustified actions giving Ms Sherard a disadvantage claim, rather than unjustified dismissal.

[133] The decisions in *Innovative Landscapes (2015) Limited v Popkin* and *Gafiatullina v Propellerhead Limited* are relevant.⁵ In Ms Sherard's case the failings are not minor and did cause unfairness to her. They include questions about two redeployment possibilities. If either had come about, she would not have been made redundant.

[134] NZ Bus chose to proceed with a restructuring that was not Covid motivated when the business was trying to deal with the immediate impacts of the pandemic on the public transport sector. The Go Live date did not change despite dates in the timetable being pushed back.

[135] NZ Bus's communications with Ms Sherard were rushed and inadequate.

[136] The company chose to use an interview process for new roles but did not convey to Ms Sherard that (at least in theory) it was all about the interview. In reality knowledge of Ms Sherard's work and situation was discussed by the panel, including concerns not put to her previously. These related to communication and work relationship issues which were identified as needing strong or excellent skills in the position description.

[137] I accept Ms Sherard's evidence that had she been told the Swanson role was seen as a pipeline to a service delivery manager role she would have taken that opportunity. Rather she was rushed into a decision without adequate information or exploration of her concerns.

[138] I conclude that Ms Sherard was unjustifiably dismissed by NZ Bus.

⁵ *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40 and *Gafiatullina v Propellerhead Limited* [2021] NZEmpC 146.

Remedies are awarded

[139] In her statement of problem Ms Sherard sought six month's salary as lost wages. She still had not been able to find substantial paid work by the time of the investigation meeting.

[140] This is not a situation where the discretion to allow greater than three months' lost wages should be exercised. Admittedly the early pandemic days were not the easiest time to find work and I accept Ms Sherard was impacted by her redundancy. However, she made only modest efforts to mitigate her loss, mainly by taking on additional governance roles which had some small honorarium.

[141] According to information provided at the investigation meeting, Ms Sherard was on a salary of \$61,139. Three months' salary is thus worth \$15,284.75

[142] Ms Sherard seeks \$35,000 compensation under s 123(1)(c)(i) of the Act. She has been significantly impacted by her dismissal. Ms Sherard was saddened to find herself in this position after many years of diligent and loyal service to NZ Bus. She felt tossed aside. The manner of communications with her left her uncertain.

[143] Ms Sherard's confidence was seriously affected by NZ Bus's conduct. Her husband observed signs of being shaky, teary and trying to avoid contact. He described her as not the same woman he had married.

[144] There are some factors which increased Ms Sherard's feelings of distress but which should not be taken into account. These include the reference situation and her belief about the Covid and W incidents being taken into account in her non-appointment. I have found that they were not.

[145] I assess \$18,000 as a suitable amount of compensation in this case.

[146] I have considered whether a deduction should be made for blameworthy and causative behaviour by Ms Sherard which contributed to the situation leading to her dismissal. NZ Bus suggested her failure to accept the Swanson role should be taken into account here. I do not agree. Ms Sherard had genuine concerns which even if somewhat unfounded, the company made little attempt to explore with her. It put time pressure on for acceptance. I make no deduction for contribution.

[147] As there is no deduction for contribution NZ Bus is ordered to pay Ms Sherard within 28 days of the date of this determination \$15,284.75 gross lost wages and \$18,000 compensation.

No need to consider unjustified action further

[148] Having found that Ms Sherard was unjustifiably dismissed, I do not further consider her unjustified action claims which relate to the dismissal process.

No penalty for breach of good faith

[149] NZ Bus's non-compliance with its good faith obligation played a substantial role in the finding that Ms Sherard was unjustifiably dismissed. The test for a penalty for breach of good faith is high and in any event, to award one in these circumstances could be seen as double-dipping on Ms Sherard's part. No penalty is awarded.

Summary of orders

[150] Within 28 days of the date of this determination, NZ Bus is ordered to pay Ms Sherard:

- (a) \$3,000 compensation under s 123(1)(c)(i) of the Act for unjustified action regarding the W incident; and
- (b) \$15,284.75 gross as lost wages and \$18,000 as compensation under s 123(1)(c)(i) of the Act.

Costs

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

[152] If they are not able to do so and an Authority determination on costs is needed Ms Sherard may lodge and serve a memorandum on costs within 14 days of the date of this determination. NZ Bus would then 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.

[153] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁶

Nicola Craig
Member of the Employment Relations Authority

⁶ See www.era.govt.nz/determinations/awarding-costs-remedies.