

**NOTE: This determination  
contains an order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 399  
3185740

BETWEEN

LNF  
Applicant

AND

THE DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Natasha Szeto

Representatives: Ashleigh Fechney, counsel for the Applicant  
Ruvín Pattiaratchi, counsel for the Respondent

Investigation Meeting: 18 – 19 April 2023 at Wellington

Submissions and further  
information received: 4 May 2023 from Respondent  
9 May 2023 from Applicant

Date of Determination: 27 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant LNF claims that she was unjustifiably disadvantaged and unjustifiably dismissed from her employment as a Business Services Advisor with the Department of Corrections (Corrections), and that Corrections breached its obligation of good faith. She seeks lost wages and compensation.

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

[2] An investigation meeting was held on 18 and 19 April 2023 in Wellington. Written witness statements were lodged from the Applicant LNF and two witnesses on emotional impact. Corrections lodged witness statements from four managers and a former colleague of LNF's. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[3] As permitted by s174E 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 the orders made. This determination does not record all evidence and submissions received, but all material provided has been considered.

### **Issues**

[4] The issues that the Authority was asked to resolve are:

- (a) Whether LNF was unjustifiably disadvantaged in her employment based on Corrections' failure to provide role clarity / certainty, and failure to take action to resolve the employment relationship problem.
- (b) Whether LNF was unjustifiably dismissed on the basis of a restructure or redundancy because Corrections did not have substantive justification for the redundancy and/or failed to follow a fair process.
- (c) Whether there was a breach of good faith.

[5] An additional issue that arose at the investigation meeting was whether the personal grievance for unjustifiable disadvantage was raised in time. Corrections accepts that the unjustifiable dismissal claim was raised in time.

### **Background to the employment relationship**

[6] In December 2018, LNF applied for a Business Services Advisor (BSA) role at Corrections. The BSA role was an existing vacancy in the Regional Administration team, under Regional Administration Manager, Nicholas McIntyre.

[7] Some seven months prior in May 2018, the Regional Finance, Property and Technology Manager James Brough had put forward a role proposal to the Regional Commissioner for more support in his team, but the proposal was declined. The Regional Commissioner advised Mr McIntyre to use the vacant BSA role in his team to fill the position for Mr Brough, as the BSA role was considered the best fit based on salary.

[8] When it started recruiting for a BSA, Corrections' intention was:

- (a) 80 percent of the BSA's role would be in Operational Procurement under Mr Brough, carrying out work related to managing contracts.
- (b) 20 percent of the BSA's role would be in Programme Procurement under the Contracts Manager Interventions (CMI) Michaela Heron, carrying out support tasks related to the Community Interventions Programmes (CIP).
- (c) The BSA would undertake administrative work in both areas, but the successful candidate would be more qualified than an Administration Officer (AO).

[9] The job description Corrections used to advertise the BSA role was dated December 2007. It did not reflect the tasks and duties that Corrections wanted of the BSA, but it was difficult to create new roles in Corrections' organisational structure or amend job descriptions that were already established. Mr Brough felt that "full disclosure" to the successful candidate would address any concerns about the role not matching the job description and Corrections would need to communicate with the successful candidate that the job was not as advertised.

[10] In December 2018, LNF was interviewed by a panel of Corrections managers consisting of Mr McIntyre, Mr Brough and Ms Heron. At the start of the interview, the panel introduced themselves by saying who they were, what their role was, what they did, and their area of business. LNF described the interview as a "standard" interview consisting of behavioural-type questions. The panel told LNF that they had not expected someone with her skills to apply for the role, but LNF did not leave the interview with a sense that the role was different to the job description.

[11] Although Mr McIntyre recalled telling LNF that Mr Brough and Ms Heron would be the reporting managers for the successful candidate, Mr Brough could not recall whether the work split and reporting lines were discussed at the interview.

[12] That night, Ms Heron and Mr Brough discussed that LNF was far and above the other candidates and that LNF should have a coffee to meet Gail Aldridge, a Business Finance Advisor (BFA) in Mr Brough's team, as LNF would be working closely with Ms Aldridge if she took the role. LNF met with Ms Aldridge and Ms Heron for a coffee. There may have been some discussion about work and the role, but the main purpose of the coffee meeting was for LNF and Ms Aldridge to meet and connect.

[13] LNF signed an individual employment agreement with Corrections on 19 December 2018 and started in the BSA role on 22 January 2019. Ms Aldridge met LNF in the regional office on her first day as Mr McIntyre and Mr Brough were both based in Wellington. LNF had an induction through the national induction programme Ara Tika, but no specific role induction.

[14] It took LNF a while to figure out the structure at Corrections. In terms of Corrections' hierarchy, the BSA was between Ms Aldridge's BFA role and an AO. When LNF started, there was one other BSA in Mr McIntyre's team in Hawkes' Bay who was seconded into the role from her substantive administration role. The Hawkes' Bay BSA's tasks tended to be more administrative in nature, such as completing system set up, invoicing, and writing very simple contracts.

[15] Around the beginning of February 2019, Mr McIntyre called LNF to ask her how the Ara Tika induction went. In this conversation, Mr McIntyre told LNF that Mr Brough would be her "day to day" manager. Even though LNF would remain a direct report to Mr McIntyre, he would really only be her manager for the purposes of approving leave.

[16] In the early weeks of her employment, LNF sat next to Ms Aldridge to learn the Contracts Procurement work. LNF got the sense from Ms Aldridge that she was not supposed to contact Mr Brough directly, and that contact would go through Ms Aldridge. Ms Aldridge gave LNF work and LNF did not really question it. LNF saw Ms Aldridge as a buddy, rather than someone that she reported to.

[17] LNF found her first couple of weeks working for Corrections confusing. She had multiple people allocating work to her, and no context. It soon became apparent to LNF, that there was a split in her role between Operational Procurement for Mr Brough, and Programme Procurement work for the CMI, Ms Heron, but LNF was not clear about how this was to be managed. Mr McIntyre's view was that management of the work split was up to Mr Brough and Ms Heron but he was clear that LNF did not report to Ms Aldridge. Mr Brough's understanding was that LNF's role was predominantly to support Ms Aldridge and the CMI on "non business as usual" contracts, and provision of services. This accords with Ms Aldridge's understanding that she would allocate work to LNF and would oversee LNF's work as the strategic procurement / contracts lead. Ms Aldridge's understanding was that 80 percent of LNF's time would be for her, and 20 percent would be for Ms Heron.

[18] Ms Heron described the CMI work she had for LNF as "convoluted and tricky". It involved providing administrative support to run funding allocations and Ms Heron had chosen not to give administrators that work in the past because they generally lacked the required writing skills.

[19] LNF remained confused about her role when viewed against her job description. Being an external hire for Corrections, LNF felt that she did not understand what was required and had no-one to talk to. She did not understand how Corrections operated and the situation became "messy" within weeks. From February 2019, LNF started raising issues with Mr McIntyre about her role, including asking where she fit within the team structure.

[20] Early on, LNF's role became a source of conflict between LNF and Ms Aldridge. LNF felt like she was being "told off" and that she had gotten "caught up really early in a cross-fire". From Ms Aldridge's perspective, LNF was completing tasks outside the scope of her role, was creating confusion in the regions about who was dealing with various aspects of procurement and was overstepping into Ms Aldridge's role.

[21] Mr Brough saw the situation as a personality conflict between Ms Aldridge and LNF. At one stage, Mr Brough tested with LNF whether her role should be formally moved into his team (rather than Mr McIntyre's), but LNF was not persuaded that a move into Mr Brough's team would improve the situation.

[22] On 7 March 2019 a procurement meeting was scheduled in the regional office with Mr Brough, Ms Aldridge and LNF. Mr Brough called LNF into a meeting and said that Ms Aldridge had raised concerns about LNF, and Mr Brough wanted to hear what LNF had to say. LNF told Mr Brough it was inappropriate to raise concerns in this way, when she had not had an opportunity to form a response. Mr Brough later told Mr McIntyre about Ms Aldridge's concerns that LNF was 'overstepping' in her role. On 14 March LNF emailed Mr McIntyre raising concerns about her job description not matching the work that she was doing.

[23] Matters came to a head on 3 April 2019 when there was an altercation between Ms Aldridge and LNF. LNF left the office and emailed Mr McIntyre the next day to advise him that she had moved out of her usual desk.

[24] Mr Brough was keeping Mr McIntyre informed about the situation between LNF and Ms Aldridge which he referred to as a breakdown on a professional level. Mr McIntyre never got to the bottom of the issues between LNF and Ms Aldridge, although he believed that the underlying concern was the way in which Ms Aldridge was directing LNF's work.

[25] The parties recall that mediation may have been proposed by Corrections around this time as a way to resolve issues between LNF and Ms Aldridge. LNF, however, was not prepared to go to mediation as she continued to feel intimidated by Ms Aldridge and felt that mediation would have been an escalation.

[26] As a result of the conflict between LNF and Ms Aldridge, Mr McIntyre decided to remove LNF from the Operational Procurement team. She would no longer be working with Ms Aldridge, and she would not be managed by Mr Brough. Although Mr McIntyre believed that all parties were content with this arrangement, LNF continued to have an issue with the lack of role clarity and her view was that Corrections' attempts to clarify her role were disingenuous and self-serving.

[27] Mr Brough did not want to lose the 0.8 FTE that LNF had been doing for his team. Ms Heron cannot recall being part of these discussions.

[28] Around this time, Mr McIntyre tried to define what LNF had been (and would be) doing and to find meaningful fulltime work for LNF. LNF started to look for other work at Corrections because she felt like she was still getting caught in the cross fires.

[29] By mid-April 2019, Ms Heron had started a handover process with Lisa Holgate who was taking over the CMI role. Between April and August 2019, Mr McIntyre said that he attempted to meet with LNF to try to find a resolution to her concerns, but the meetings did not happen for various reasons and LNF was difficult to engage with.

[30] In late May 2019, LNF tried to log into the contracts procurement database, and found that she had lost access to folders for her region. LNF found this unfair, as she had made a genuine offer to finish three contracts that she was working on when she left Operational Procurement.

[31] Also in May 2019, Ms Heron called Mr McIntyre about the issues between LNF and Ms Aldridge which LNF had given Ms Heron permission to raise with Mr McIntyre. Mr McIntyre followed up with the local human resources team and his response was to arrange for LNF to work out of a different office for a period until she felt safe to return to the regional office.

[32] Through April and May 2019, Mr McIntyre found tasks for LNF to do. He picked up the conversation about 'how do we fill your day' as an adjunct to discussions about the BSA job description. Mr McIntyre wanted to re-scope LNF's role based on tasks that had a business need and offer LNF a job description that was consistent with the work that she was doing.

[33] LNF felt that there had not been meaningful engagement on her role. LNF had expressed concerns weeks into her employment about role clarity but no-one from Corrections had sat down with LNF and gone through her job tasks. LNF did, on some occasions, refuse to do some work that seemed to her to be too administrative. After Ms Holgate started in the CMI role, Mr McIntyre discussed the work that she required from LNF. From Mr McIntyre's perspective, once LNF was no longer doing work for Mr Brough, there was a "big massive 80 percent hole in LNF's day", which needed to be filled because of salary expectations.

[34] Ms Holgate had been told prior to starting in the CMI role, she would have 20% of LNF's time because she did not have her own team and the regional administrative support structure was there to support the CMI. Shortly after Ms Holgate started as a CMI, LNF helped Ms Holgate with a specific contracting task and Ms Holgate found LNF fantastic: very willing and very capable. Ms Holgate never saw herself as LNF's manager, and she did not have transparency over the other parts of LNF's role. LNF

did limited work for CMI and with little oversight from Ms Holgate. LNF saw the tasks coming from CMI as “diary management and daily tasks” and not within the scope of what LNF thought a BSA was supposed to do.

[35] LNF had done more work for Mr McIntyre after she was removed from the Operational Procurement team, but she felt like she was being treated like an AO. She continued to openly request a review of her role. Mr McIntyre knew “in general terms” what work LNF was doing but did not believe that the tasks warranted 40 hours of work per week. Mr McIntyre also had a concern that LNF was undertaking work that should have been done by others – an understanding he had primarily obtained from Ms Holgate. He could not recall any specific meetings with LNF to understand what she was doing.

[36] By July or August 2019, Ms Holgate was still theoretically getting 20% of LNF’s time, but felt like she was not getting the support that she needed from LNF. Ms Holgate did not really understand what LNF was supposed to be working on for her and did not feel in a position to demand work from her. At the start of their working relationship, Ms Holgate found LNF to be enthusiastic and a great source of knowledge, but over time Ms Holgate questioned whether she was making unreasonable requests and she eventually gave up asking LNF for assistance.

[37] On 8 August 2019, Mr McIntyre gave LNF a letter entitled “Variation to Terms and Conditions of Employment” along with a task list called “Confirmation of duties for BSA role in (Regional Office) – [LNF]” which set out duties Mr McIntyre considered more accurately reflected LNF’s role. The letter outlined the majority of LNF’s time would be supporting the CMI (75-80 percent) together with some other administrative tasks to make up the full-time role. The letter offered LNF a variation to the terms and conditions of her current employment agreement, namely confirmation of duties she will undertake in her role as BSA based in the regional office. The letter concluded with:

Should you agree with the duties outlined, please sign and return a copy of this letter as your acknowledgment and acceptance of the variation to your terms and conditions of employment.

[38] LNF did not agree. She contacted her union, the PSA to attempt to resolve her job description again. LNF asked for a review of her role with a focus on what she was

doing as she felt like she was facing criticism over what she was not doing, but no-one was looking at the work that she was actually doing.

[39] On 15 August 2019 Mr McIntyre met with LNF and the PSA to discuss the draft task list. A new proposed position description was offered but not accepted. Mr McIntyre presented LNF with draft task lists through August 2019, which she declined because they did not recognise what LNF was doing and what she was employed to do.

[40] In November 2019, Mr McIntyre told Ms Holgate he would be meeting with LNF and the PSA again on 11 November 2019, and would be presenting the same offer he had in August. Ms Holgate suggested some amendments to the list, including adding 'Assist with procurement tasks to support CMI as and when needed' because she considered a statement was needed as to what could be done to support the CMI with their procurement activities.

[41] On 11 November 2019, Mr McIntyre met with LNF and the PSA to discuss the ongoing concerns around LNF's role, and the amended job description. On 22 November 2019, Mr McIntyre provided LNF with a further draft amended job description, ahead of a meeting scheduled for 26 November 2019.

[42] At the meeting on 26 November 2019, LNF declined the job description on the basis that it was another variation of duties with little to no change, consisting of lower-level administrator duties. She reiterated she wanted an advisory role. Mr McIntyre said that he had no need for an advisor, that there were very few advisors in his region, and that he could not create such a role. Mr McIntyre accepted that the job description for the BSA role was not valid for the job that LNF was employed for, with the proviso that some tasks within the job description were done by BSAs around the country.

[43] Also in November 2019, LNF received a pay rise. LNF never had a performance discussion with Mr McIntyre. Mr McIntyre said that because LNF did not have a job description, it would have been churlish to say that LNF had 'not achieved' expectations. There had been no performance issues raised because there was no job description to measure performance against.

[44] In December 2019, the parties started discussing mediation. Mr McIntyre followed up with LNF through the PSA on 19 December 2019, 28 January 2020, and

28 February 2020. LNF says she again requested a formal review of her role, but Mr McIntyre has no recollection of this.

[45] On 28 February 2020 Corrections wrote to LNF to repeat a request to attend mediation. The letter stated:

As you are aware, the Department has been attempting to work with you to find tasks that you considered suitable, since April 2019, after your decision to no longer undertake the work that was discussed with you both at your interview and in your induction.

[46] Again, LNF did not agree with this statement.

[47] From March to May 2020 New Zealand was in Covid-19 Lockdown. Most Corrections staff were required to work from home over that time, although LNF said that she did not have IT access during the 2020 Covid-19 lockdown. Ms Holgate said that LNF did little to no work for her during the lockdowns, because the work that Ms Holgate needed had little crossover into the procurement work that LNF was assisting with.

[48] Mr McIntyre had asked the regional office managers to either direct LNF's work through him, or to copy him in when giving LNF work so that he would be able to monitor her workload. LNF said that this caused her confusion and anxiety.

[49] On 26 August 2020, Ms Holgate raised with Mr McIntyre that she felt confused about what to expect from LNF and did not know how LNF could support her in her CMI role. Mr McIntyre responded that he was in ongoing discussions to establish LNF's role. Ms Holgate escalated the issue to her manager, saying that she did not have LNF's assistance with preparing / reviewing contracts and that she felt Mr McIntyre was "not being proactive on this front". Ms Holgate wanted to make it very clear to the Regional Leadership Team that she was not adequately resourced for her role.

[50] Throughout the Covid-19 period of 2020-2021, no resolution to LNF's role or tasks was discussed or progressed. Mr McIntyre had general work discussions with LNF from May to October 2020, but he had limited capacity for his Regional Administration Manager role as he had taken on COVID-19 response work for Corrections. Through September and October 2020, LNF was trying to obtain secondments and other work at Corrections, but she was not successful.

[51] In March 2021, LNF was again going around the regions looking for work, because of her unresolved role and tasks, which she described as “a mess”. LNF did some work for Ms Holgate during parts of 2021, but Ms Holgate said she could not rely on the consistency of the work. From May to December 2021, Ms Holgate was on secondment in a different team and did not work with LNF at all.

*April 2021 – proposal to disestablish*

[52] LNF requested another meeting with Mr McIntyre in early 2021 through the PSA. A meeting was mutually agreed for 22 April 2021 which then had to be postponed to 27 May 2021, due to LNF taking periods of medical and bereavement leave.

[53] In early April 2021, Mr McIntyre began to consider disestablishing the BSA role on the basis that the support needed in the region was more administrative than advisory. He said for some time it had been difficult to find and sustain an established workflow for the BSA role. In his mind, there was a general recognition that the BSA roles did not exist and it was “cleaner” from an administration perspective to remove the role from the organisation. Mr McIntyre would be the decision maker for the final decision but the approval for any disestablishment would ultimately come from the National Commissioner and Director of Human Resources.

[54] Mr McIntyre sought input from Ms Holgate about the number of hours work there was in the CMI support role. Ms Holgate estimated that the workload for a BSA would have been about 7.5 hours per week on average by this time.

[55] Following discussion with Mr McIntyre, the Hawkes’ Bay BSA had returned to her substantive administration role, meaning LNF was the only incumbent affected by the proposed restructure. This was a regional disestablishment, so other BSA roles around the country were not considered. Corrections did not require a formal change proposal document for one affected incumbent, so Mr McIntyre created an Internal Memorandum which was a proposal to disestablish the Business Services Adviser position, dated 30 April 2021.

[56] The recommendation was to disestablish the two BSA roles in Mr McIntyre’s team and replace them with two AO roles. The Internal Memorandum stated:

The Business Services Adviser role has a current job description that does not reflect the duties that are required in this position. It is a very generic job description where historically individuals appointed to the

role would undertake a range of duties often not aligned to the job description...

The current proposal is to disestablish the two further roles. The Hawkes Bay incumbent will return to her substantive role as Administration Officer and the minimal duties that are being undertaken by her as part of the BSA role will be redistributed elsewhere.

The [regional office] role has a current permanent incumbent, however the majority of the work that is required in [regional office] is at an Administration Officer level and the current incumbent has indicated that they are not willing to undertake those duties.

The role in [regional office] that the incumbent was appointed to initially was to provide support to the Business Finance Advisor for [region] based in [regional office]. This did not work out as the work provided was different to what the incumbent had understood they would be doing. Significant attempts have been made to find permanent, ongoing, meaningful work for the incumbent at the BSA level, however there is not enough work to keep her busy and as such individual pieces of work have been allocated but there is nothing permanent or ongoing that is required.

[57] The rationale for the proposed change was:

- (a) The Regional Administration team will be better positioned to meet the administrative requirements of the region.
- (b) The job description of a BSA refers to tasks that are no longer the responsibility of the Regional Administration team.
- (c) Corrections are unable to provide meaningful work for the one permanent incumbent within the Regional Administration team at the level associated with the role.
- (d) The replacement of the remaining two BSA roles with two AO roles will enable the Regional Administration team to provide support to a number of other managers across the region at the level they require support.
- (e) The Regional Administration team will be better positioned to provide internal backup to tasks to cover staff absences.

[58] There were costs implications including “severance cost exposure” of \$50,000 and ongoing costs savings of between \$25,980 and \$57,990. The Regional Commissioner did not make any changes to Mr McIntyre’s recommendation document and approved the proposal.

[59] On 24 May 2021, Mr McIntyre called LNF to advise her of the proposal. LNF was really alarmed when Mr McIntyre informed her about the proposal to disestablish her role. LNF did not understand why Corrections decided to propose disestablishing the role at this time, with a meeting between LNF, the PSA and Mr McIntyre scheduled to happen only two days later. LNF was also still doing work directly for Mr McIntyre at that point and LNF felt that she was being told a line “There’s no work for you”.

[60] Mr McIntyre thought there had been agreement that the meeting with PSA was not proceeding on 28 May 2021 as it was not sufficient time for LNF to provide feedback. Mr McIntyre said there was no reason to postpone the planned meeting with LNF and the PSA until there was an actual proposal to disestablish, as the proposal could have been rejected. He was aware that LNF would be upset about the proposed disestablishment.

[61] After Mr McIntyre advised LNF of the proposed disestablishment, she made an information request. In particular, LNF queried a statement by Corrections about a review of functions, as she had not been part of any review.

[62] On 3 June 2021, Mr McIntyre received approval to proceed with consultation on the proposal to disestablish the BSA role. The consultation recorded the impact on staff as being:

- (a) A change management process for the permanent incumbent.
- (b) No change in current reporting lines on the Regional Administration org chart.
- (c) No impact to the Regional Administration; Team Leaders, Administration Officers and Administration Support Officers.

[63] On 4 June Mr McIntyre wrote to LNF in response to her information requests. In relation to the review, he wrote:

I did not undertake a specific review of the Business Services Adviser role within [Region]. Part of my role as Regional Administration Manager is to regularly review the work we do within the team to ensure that it best meets the needs of the Region...

In relation to the role in [regional office], as you are aware, we have been working with you and your representative for some time to try and find ongoing meaningful work for you in [regional office] at the level commensurate with the Business Services Adviser. We have not been able to do this and as a result, there have been pieces of work

and/or tasks picked up by you or allocated to you but they have not resulted in fulltime ongoing work as a Business Services Adviser in [regional office].

[64] On 11 June 2021, LNF's advocate responded to Mr McIntyre, seeking further information and clarification on the nature of the proposed changes. From that point, communications were between LNF's advocate and Corrections.

[65] Corrections responded in a letter dated 22 June 2021. The letter relevantly said:

- (a) At this stage, this is a proposal only and Corrections has made no final decision on it.
- (b) The change proposal rationale is detailed in [Mr McIntyre's] memorandum dated 30 April 2021 to the Regional Commissioner and Deputy Chief Executive.
- (c) These factors have led to the proposal to disestablish the role as the indication is that the business need in the region is at the level of administrative support.
- (d) Corrections have been engaging with [LNF] and her PSA representative regarding finding her ongoing meaningful work. To date, we have not been able to find her fulltime work at the level that [LNF] is prepared to undertake.
- (e) As a result, LNF has been doing 'ad hoc' pieces of work, however, this is not full time and there is not the ongoing regular need for this work.
- (f) In attempting to find work within the [regional office] area for [LNF] to do work in a full-time capacity, it has appeared to identify that there is not the requirement for work at the level [LNF] was employed at and that she also wishes to operate.

[66] On 19 July 2021, LNF provided feedback on the proposed restructure through her advocate. LNF advised the current state was that the Business Services Adviser role does not exist and that LNF is worked in an undefined role reporting to Mr McIntyre. Further, there remains an unresolved issue regarding LNF's role which Mr McIntyre has failed to actively and constructively address and remedy, despite having two years to do so.

[67] LNF raised concerns with the process being undertaken including that LNF was not provided with a summary of other feedback received during the process, and the scope of consultation. LNF said that the restructure proposal had been specifically drafted to remove LNF from the organisation which effectively made the proposal a termination of LNF's employment.

[68] On 6 August 2021, Corrections responded in a letter. Mr McIntyre said that he considered the feedback carefully but did not agree with the points that LNF had raised. He said that the Department had a significantly different view of the work undertaken by LNF and the level that she operated at. The letter responds point by point to the issues raised by LNF's advocate, and then concludes with:

If LNF genuinely believes that she is meaningfully employed for 40 hours per week and can continue to be so with work that is both required by the Department and not part of other peoples role's [sic], as opposed to work that [LNF] believes is necessary or wishes to undertake, I am interested to discuss this.

[69] The parties attended mediation on 11 August 2021. LNF took two months to provide feedback on the proposal to disestablish her role because she wanted the response to her information request to make sense of what was being disestablished – whether it was the role title and job description, or the role she was actually undertaking.

[70] Corrections' Human Resources team advised Mr McIntyre on the scope of consultation including that he should consult with Service Managers, District Managers, and Team Leaders. Mr Brough was consulted. Ms Holgate was also on the list although she was on secondment and leave and does not recall seeing the consultation email. LNF described the consultation as "bizarre". LNF had nothing to do with the Administration Managers for the prisons, and the District Managers did not realise it was LNF's position that was being disestablished.

[71] On 1 November 2021, Mr McIntyre wrote to LNF advising that Corrections was progressing with the change management process for the proposal to disestablish the two BSA positions in the region.

[72] On 16 November 2021 Mr McIntyre sent the final decision by email to LNF, with a letter attached dated 11 November but effective 15 November 2021. The proposal to disestablish the BSA roles was confirmed. The letter stated Corrections wanted to work with LNF to determine what this meant for her, including considering

whether there were any vacancies that may be suitable for redeployment, reassignment or reconfirmation.

[73] From November 2021 to January 2022, Mr McIntyre was unable to contact LNF. He was fielding questions from the regional office about what had happened to LNF, and from staff letting him know that LNF was not turning up to work. LNF was on leave or working from home for a lot of the time until the end of 2021.

[74] Although LNF's position had been disestablished, she was still employed by Corrections. She described this period as "a limbo". Mr McIntyre's team knew that LNF had been disestablished at the time, but there were no communications about it more widely at Corrections.

[75] There was no discussion with LNF about redeployment within Corrections, partly due to there being no agreement about her tasks. Neither party took steps to end LNF's employment and from November 2021 to February 2022, she was still employed and still continued to work for Corrections, including reviewing funding proposals.

[76] In December 2021, LNF was asked by Corrections for a summary of her skills and experience. This resulted in her being asked to consider two fixed-term roles based out of her region, working for other government agencies. LNF did not consider these suitable.

[77] Mr McIntyre retired from Corrections in January 2022. LNF received a formal notice of severance via letter on 3 February 2022, effective 8 February 2022. LNF was advised that her last day of employment with Corrections would be 8 February 2022 and she would not be required to work out her notice but would be paid four weeks' salary in lieu.

**Was the personal grievance for unjustifiable disadvantage raised in time?**

[78] A preliminary matter for determination is whether the personal grievance for disadvantage was raised in accordance with s 114 of the Act, including whether it is time-barred by the operation of s 114(6) of the Act.

[79] Personal grievances must be raised with the employer within a 90 day period that the action alleged to give rise to the grievance occurred or came to the notice of the

employee.<sup>1</sup> A personal grievance can only be raised outside that time with the employer's consent, or with the leave of the Authority which can only be granted in exceptional circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.<sup>2</sup>

[80] LNF's last day of employment was 28 February 2022, and personal grievances for unjustified dismissal, unjustified disadvantage and corresponding breaches of the employment agreement in relation to the unresolved employment relationship problem relating to the nature of her role within the Department of Corrections were raised with Corrections by way of letter dated 26 April 2022.

[81] LNF's unjustifiable disadvantage claim is advanced on two grounds:

- (a) Failure to provide certainty as to the nature of the Applicant's role within the organisation, also amounting to a breach of the terms and conditions of employment.
- (b) Failure to take action to resolve the employment relationship problem, also in breach of the clauses contained within the IEA relating to disputes and personal grievances.

[82] LNF says that the personal grievance for unjustifiable disadvantage was raised in 2019 and because no issues have been raised by the Respondent, the personal grievance has been raised within time by consent.<sup>3</sup> Alternatively, LNF says that the unjustifiable disadvantage relating to the failure to take steps to resolve the employment relationship problem was an ongoing disadvantage which extended from March 2019 until her employment was terminated on 8 February 2022.

[83] Corrections accepts an unjustified dismissal personal grievance was raised in time but disputes the unjustified disadvantage personal grievance was raised in time. Corrections says LNF did not raise a personal grievance in 2019. A personal grievance was formally raised in April 2022, but the specifics of the unjustified disadvantage claim were only clarified on 29 August 2022 when the Applicant's Statement of Problem was lodged. Corrections does not consent to a personal grievance being raised out of time.

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<sup>1</sup> Section 114(1) and (2) of the Employment Relations Act 2000.

<sup>2</sup> Section 114(6) of the Employment Relations Act 2000.

<sup>3</sup> *Turner v Talley's Ground Limited* [2013] NZEmpC31, at [82] - [83].

[84] If I accepted that LNF had raised a personal grievance claim for unjustified disadvantage with Corrections in March 2019, the Authority would now be barred from considering it because LNF's Statement of Problem was lodged in August 2022, and s 114(6) of the Act does not allow any action to be commenced in the Authority more than 3 years after the date on which the personal grievance was raised in accordance with the section.

[85] However, based on the information before the Authority, I find that LNF did not raise a personal grievance with Corrections in March 2019. She formally raised an employment relationship problem with Corrections on 11 June 2021, but the personal grievance for unjustifiable disadvantage was raised with Corrections on 26 April 2022. Irrespective of when the actions underpinning LNF's disadvantage claim commenced, once there was a proposal to disestablish LNF's position in April 2021, the actions became context for LNF's dismissal grievance. LNF did not raise a personal grievance for unjustifiable disadvantage within 90 days of April 2021, and therefore the personal grievance for unjustifiable disadvantage was raised outside the 90-day period and is out of time. Corrections does not consent to the grievance being raised out of time, and no exceptional circumstances have been raised.

[86] As I have noted, the actions LNF has claimed as disadvantages were relevant context to Corrections' decision to dismiss her, and I therefore consider these circumstances part of the context of LNF's claim of unjustifiable dismissal.

**Was the Applicant unjustifiably dismissed on the basis of a restructure or redundancy because the employer did not have substantive justification for the redundancy and/or failed to follow a fair process?**

[87] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and notice and consultation requirements have been met, the s 103A test may well be satisfied. The Authority is not to substitute its business judgment for that of the employer.

[88] It is also not for the Authority to re-run the case and decide what it thinks the outcome should have been, based on matters that have been properly and thoroughly investigated or discovered by others after the employment has ended.

[89] The duty of good faith in s 4 of the Act requires the parties to an employment relationship to deal with each other in good faith, as well as be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal because a fair and reasonable employer will comply with the law.

*Was the dismissal substantively justified?*

[90] Consideration of whether LNF's dismissal was justified distils down to the narrow, but critical, issue of whether the redundancy was genuine (whether it was for genuine business requirements and not used as a pretext for dismissal<sup>4</sup>) or whether, as LNF submits, the redundancy was of the person and not the role.

[91] The Authority may inquire into the merits of a redundancy business decision, but its decision should be directed at ensuring that the termination decision and how it was reached were what a fair and reasonable employer could have done in the relevant circumstances.<sup>5</sup> Redundancy is determined in relation to the position, not the incumbent. The absence of steps such as consultation or consideration of redeployment (or other options to avoid redundancy) may indicate an absence of genuineness in the decision to dismiss.<sup>6</sup>

[92] Corrections says that the restructure which led to the disestablishment of LNF's role was substantively justified and was conducted for genuine business reasons. Although Corrections admits that from the beginning of LNF's employment, the BSA job description did not align with the role, it says there was ultimately insufficient workflow for the BSA role including that the work to support Community Interventions Programmes could be carried out by AOs at a lower level than the BSAs. Corrections

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<sup>4</sup> *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276 (CA) at 85.

<sup>5</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at 85.

<sup>6</sup> *New Zealand Fasteners Ltd v Thwaites* [2000] 2 NZLR 565.

points to the rationale for the change being to disestablish two BSA roles, and replace them with two AO roles, saving Corrections between \$25,980 - \$57,790 per annum in salary costs. It says that the redundancy of the two BSA positions achieved the strategic objectives of the organisation, as well as cost efficiencies.

[93] LNF's view is that Corrections used a restructure process to terminate her employment, following a long-lasting and unresolved employment relationship problem.

[94] Based on the evidence before the Authority I find that the redundancy was not genuine and was used to attempt to justify LNF's dismissal. I set out my reasons for this below.

[95] Corrections knew before it employed LNF that the BSA job description did not accurately represent the role and tasks that it was recruiting for. Corrections said that job descriptions often do not reflect the actual role and tasks of the job – especially administrative roles. Based on the evidence before the Authority, I am not persuaded that amending the job description prior to LNF's employment was an option that Corrections properly explored. LNF referred to her employment as a “workaround: to hire a Procurement Support Officer (administrative role) instead of a Business Services Advisor (advisory role) and I agree with her categorisation.

[96] Corrections managers thought it would be sufficient to be clear with the successful candidate about what their role was, and how the job description differed from the role in practice. It failed to provide this role clarity for LNF. Based on the evidence before the Authority, I find that there was no role for a BSA in the region that was in line with the job description, prior to LNF's employment. The existing BSA vacancy was utilised as a salary vacancy, rather than a role vacancy.

[97] LNF's feeling that she was the only person in the region that did what she did is justified. Some BSA positions in the country had been absorbed into finance roles, but all regions evolved differently. At the time that she was employed, LNF was the only BSA working alongside CMI. The role that LNF was employed for was a construct developed by the hiring managers to meet a business need of supporting the Operational Procurement team and CMI. Although there may have been opportunities for a BSA to provide more specialised advice, the support needed was more administrative than advisory and this was never communicated to LNF.

[98] The split role expectation was also not properly communicated to LNF until after she started in the role. Based on the evidence before the Authority, I find that LNF's feeling that she had been "palmed off" to another manager shortly after her employment is again justified. Although Corrections managers told me that they recalled discussing the managerial reporting lines and the "split role" at LNF's interview, it was also properly acknowledged that a candidate would not necessarily be expected to recall that level of detail in an interview situation.

[99] The lack of clarity in reporting lines and task allocation inevitably became the source of the conflict between LNF and Ms Aldridge. Corrections' expectation was that LNF was employed primarily to support Ms Aldridge in her BFA role although again this was never communicated to LNF. I find this because the BSA vacancy had been utilised after Mr Brough's proposal for more support for the Operational Procurement team had been declined, and also because LNF's day to day manager was based out of the region. Corrections' response to the conflict was to remove 80 per cent of LNF's role. This exacerbated the employment relationship problem. The fact that the conflict was dismissed as a "personality conflict" was a missed opportunity for Corrections to have fully investigated and potentially resolved the employment relationship problems at this stage.

[100] By April 2019, LNF's role was significantly different to the job description, and significantly different to the role that Corrections had intended her to carry out when it employed her.

[101] At this stage, Corrections attempted to increase LNF's CMI support work and assign her ad hoc administrative tasks. Corrections knew that LNF was employed for more than an administration role, and that she was unwilling to be part of the support staff. Corrections acknowledged the difference between an advisor and an administrator but remained adamant that there was no advisor role available in Mr McIntyre's team.

[102] There were attempts made by both parties over the ensuing two years to define LNF's role, and to find more work to engage LNF "meaningfully" in 40 hours of fulltime work per week. However, these attempts fell short. Corrections says that LNF did not request a formal review of her role under the Job Evaluation Guidance, and even if she had, it would not have met the criteria for mandatory review because the role was

not new or significantly changed. However, Corrections could have initiated a review of its own volition given the ongoing disagreements about BSA role scope and tasks. Provided that the review findings were taken into account in the process that followed, conducting a review would have supported Corrections' position that a redundancy was for genuine business reasons.

[103] By the time that Corrections initiated the change proposal process leading to disestablishment of the BSA roles, LNF had been working without 80 percent of her originally intended role for close to two years. The work supporting the CMI role and the Community Programme work had also significantly reduced over time.

[104] Corrections' justification for initiating the change proposal process in April 2021 remains unclear. Corrections said that it was "cleaner" from an administration perspective to remove the BSA roles and focus on the administrative needs of the business. But based on the evidence before the Authority, the BSA role had not been functioning in the organisational chart from 2019, before LNF was even employed. Corrections had the option to consider the role for redundancy at that time when there was no affected incumbent.

[105] LNF had been working in a state of employment limbo with an uncertain role and reporting lines for a period of over two years at the time that it was proposed to disestablish her role. Attempts had been made to vary LNF's reporting lines and tasks throughout her employment, often unilaterally and without adequate consultation.

[106] I accept that Corrections had some business reasons to disestablish the BSA role. In particular, Corrections' business needs in the region were primarily administrative rather than advisory and could be better met by employing AOs. But those reasons did not amount to substantive justification. Corrections repeatedly said that LNF was not engaged in meaningful fulltime work which was a situation that it had created. It nevertheless continued to employ her, she continued to work, and even after her position was disestablished in November 2021, LNF was still being sent funding allocation work to complete. Of itself, this fact undermines the Respondent's claims that the redundancy was genuine.

[107] In terms of alternatives to redundancy, Corrections determined that there was no role suitable for LNF in terms of reconfirmation, and no suitable vacancies in Senior Advisor roles for reassignment. Corrections asked LNF to consider two roles for her

potential redeployment, but they were fixed term (not permanent), based in a different region, and for other Government agencies. These roles were, understandably in my assessment, not acceptable to the Applicant. I find that Corrections did not fully consider redeployment (or other options) which indicates an absence of genuineness in the decision to dismiss.

[108] Problems with lack of role clarity arose very early in LNF's employment. The situation was exacerbated by the removal of 80 percent of LNF's role in April 2019. The genuineness of the decision to terminate LNF's employment in February 2022 on the basis of redundancy was therefore tainted from the beginning of her employment. Proper alternatives to redundancy were not fully considered. The redundancy was not for genuine business reasons and in this case was of the person, and not of the role. The substantive decision to dismiss LNF on the basis of redundancy was therefore unjustifiable.

*Was the dismissal procedurally fair?*

[109] To assess procedural fairness in a redundancy context, the employer must be able to show that notice and consultation requirements have been met.

[110] Based on the evidence before the Authority, the process followed by Corrections was procedurally flawed. There are factors that point to the decision to disestablish the BSA roles in the Regional Administration team being predetermined at the outset of the change proposal process. One such factor is that the Hawkes' Bay BSA was returned to her substantive administration role prior to Corrections initiating the change proposal process. I was not persuaded there was an explanation for this timing, other than to construct a situation where LNF was the only affected incumbent in a BSA role.

[111] The timing of the change proposal process was also incompatible with what a fair and reasonable employer could do given that the parties had just renewed their attempts to resolve the employment relationship problem relating to role clarity.

[112] LNF had also not been provided with relevant information on which the Respondent proposed to base its decision – in particular the Internal Memorandum which contained the rationale for the proposed change - until after she made an information request. Corrections did give LNF ample time to provide feedback from 24 May 2021 (when the matter was raised) until 19 July 2021, but because Corrections

had not undertaken detailed role analysis, I accept that the lack of clarity meant LNF was unable to provide feedback in relation to the genuineness of any proposal to disestablish her role and re-distribute her tasks and duties. A procedural step that a fair and reasonable employer could have taken, was to carry out a formal role review of the BSA role before considering whether it should be disestablished.

[113] Another technical deficiency in Corrections' process is that the final decision in relation to LNF's redundancy took effect before the decision was even sent to LNF. It then took almost three months for Corrections to give LNF formal notice of her severance.

[114] LNF says that she was also prevented from engaging with Corrections in relation to alternatives to redundancy – in particular, reconfirmation (into a position with the same or similar duties, in the same location and with the same salary); or reassignment (into a role with different – but not significant – changes in duties) because of the persisting lack of role clarity. Redeployment options were only raised with LNF in December, weeks after her role had been disestablished in November. Based on the evidence before the Authority, I find that Corrections' attempts to engage with LNF about alternatives to redundancy were perfunctory and belated, by which stage LNF had stopped engaging with Corrections on the issue.

[115] Overall, the redundancy process undertaken by Corrections was procedurally flawed in that it lacked transparency and robustness. Based on the above, I find that the procedure followed by Corrections was not fair or reasonable.

### ***Breach of good faith***

[116] LNF has asked the Authority to make a finding of breach of good faith. She does not seek penalties. The duty of good faith in section 4 of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. The Act also requires an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of the employment, to provide access to information and an opportunity to comment before a decision is made.<sup>7</sup>

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<sup>7</sup> Section 4(1A)(c) of the Employment Relations Act 2000.

[117] LNF says that the Respondent has breached its obligation of good faith, in that it failed to be active and constructive in maintaining the employment relationship. In particular, she alleges a lack of good faith based on the Respondent's hiring practices, the unilateral changes of reporting line, and the failure to acknowledge the employment relationship problem raised by the Applicant.

[118] Corrections says it acted in good faith and in a fair and reasonable manner towards LNF throughout her employment. It says that it engaged with her in an active and constructive manner to resolve concerns about her job description, proposed mediation, allowed her considerable time to provide feedback on the change proposal, and provided LNF with access to all information.

[119] Based on the evidence before the Authority, I find that Corrections was not active or responsive to LNF's concerns from the beginning of her employment. Corrections has now said that it employed LNF into a role that technically did not exist in the organisational structure, but this was only admitted as part of the Authority's investigation process. The way that Corrections chose to mitigate this risk was to 'fully disclose' the nature of the employment at the outset. It failed to do so. LNF did not have a role-specific induction, and Corrections did not set clear expectations for LNF about what her work was, and how it was to be managed. Corrections acknowledged to the Authority that it was responsible for engaging LNF in meaningful fulltime work, but in practice it placed responsibility for this onto LNF by removing work from her, and by not allocating her tasks at the BSA level. An active and constructive way to resolve this may have been through a formal role review conducted when LNF first raised role clarity issues.

[120] Based on the above, I find that Corrections was not active and constructive in establishing a productive employment relationship. I therefore find that there has been a breach of good faith.

**If Corrections is found to have unjustifiably dismissed LNF what remedies should be awarded to her?**

[121] I have found LNF's dismissal to be unjustifiable, and therefore she is entitled to an assessment of remedies.

*Lost wages*

[122] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies that reimbursement will normally be limited to "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration". However, s128(3) allows that the Authority "in its discretion" may award a greater sum where appropriate.

[123] When deciding whether to apply my discretion and award more than three months ordinary time remuneration my starting point is that there is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind the actual loss merely represents the upper award) this should be assessed based on to the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.<sup>8</sup> I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis).<sup>9</sup>

[124] LNF seeks reimbursement of a sum of lost wages equivalent to 12 months wages. LNF has the onus of showing that she has lost income as a result of the personal grievance, which is subject to a duty to mitigate her loss. LNF says that any amount of reimbursement should not be offset by the amount of the contractual severance payment she received from Corrections.

[125] LNF says that does not feel that she is able to engage in meaningful employment until her health and wellbeing has been restored due to the gravity of the Corrections' conduct and the impact this has had. In support of this, LNF has provided a medical certificate. LNF says that in the 12 months since her employment ended, she has had approximately 4 months' income from a short-term contract which she undertook in

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<sup>8</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

<sup>9</sup> *Telecom New Zealand Ltd v Nutter* [2004] NZCA 127/03, 2 NZLR 83 at 73.

September to earn money to attend her son's wedding. LNF has provided an income summary which shows her earnings from 1 March 2022 to 22 February 2023.

[126] Corrections submits that if the Authority should find the redundancy was not substantively justified, the starting point is three months' ordinary time remuneration, and greater sums – although awarded at the Authority's discretion – should be moderate. Corrections says that moderation ought to be shown in recognition that LNF's termination was due to a restructure which was carried out for genuine business reasons. Corrections also says that the severance payment is a relevant factor whether voluntary or due to an express obligation.

[127] In considering the extent to which LNF's losses should be remunerated, I observe that it was by no means certain that she would have been dismissed irrespective of the flawed redundancy process undertaken by Corrections. In light of the severity of the breaches that underpinned the process from the beginning, it is not possible to conclude whether LNF may or may not have been dismissed in any event.

[128] I accept that LNF's lost wages arose as a result of the personal grievance and I accept that LNF's reasons for not returning to paid work for 6 months were justifiable and genuine. This is an appropriate case in which to exercise my discretion to award more than three months' wages. LNF had a duty to mitigate her loss, which she fulfilled when she obtained the fixed-term contract. The period of March 2022 to September 2022 when she was without income due to the personal grievance represents her actual loss, and she should be compensated for this six-month period.

[129] The redundancy compensation payment does not offset LNF's claim for loss of earnings for unjustified dismissal, because as the redundancy remains, a contractual agreement to compensation must remain good.<sup>10</sup>

[130] Stepping back to look at the matter overall, and assessing the loss as best I can, I consider that an appropriate figure for reimbursement of lost wages as a result of the personal grievance is six months' wages which amounts to \$36,500.

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<sup>10</sup> *Muru v Coal Corp of NZ Ltd* EmpC Auckland AEC 19/97, 12 March 1997.

*Compensation under s123(1)(c)(i) of the Act*

[131] LNF seeks compensation of \$35,000 on the basis that she has suffered loss under all three heads of section 123(1)(c)(i) of the Act – being humiliation, loss of dignity and injury to feelings.

[132] Based on the information before the Authority, I find that the impact on LNF was significant. LNF said that she had three years' employment at Corrections that she could not acknowledge and could not move forward from. She was humiliated and embarrassed about how her employment with Corrections ended. Her colleagues were not told about what had happened to her, and LNF felt like she had to ask management how to respond to the business about her own redundancy. LNF felt that the situation impacted her professional integrity, and that work was being taken off her even before a decision had formally been made to disestablish her role.

[133] I have found that Corrections' actions leading up to LNF's dismissal were relevant context for the dismissal, even if the separate disadvantage claim was out of time. LNF has provided evidence of the severe impacts that the employment stresses had on her medically and psychologically, for which she has obtained treatment. LNF refers to this period as traumatising and says it has had an "all-consuming emotional toll" on her.

[134] At the Authority, two witnesses gave evidence of the emotional impact on LNF. LNF's best friend described that LNF dropped out of her life for a time because the rug was pulled out from under LNF and professionally LNF questioned who she was and what she had to offer. In her assessment, LNF is not ready to go back to work. LNF's role at Corrections had been aligned to her inner mana and strength and her desire to make a difference in her mahi. On countless occasions LNF told her that she would still work for Corrections, had these events not transpired.

[135] LNF was also embarrassed and humiliated within her professional networks and has struggled with job applications. This has impacted her ability to obtain other employment.

[136] Considering the humiliation, distress, and loss of dignity experienced by LNF, and the general range of awards in other cases, I consider that an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$23,000.

**If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by LNF that contributed to the situation giving rise to her grievance?**

*Contributing conduct*

[137] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which LNF may have acted in a way that contributed to the situation that gave rise to her grievance.

[138] The Employment Court has summarised key principles relating to contribution as follows:<sup>11</sup>

- (i) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (ii) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (iii) Third, what is a fair assessment of the extent of the contribution?
- (iv) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[139] Corrections has not raised any issues of contribution with the Authority. In this case, I find no evidence of contribution by LNF.

**Non-publication**

[140] The Applicant seeks a permanent non-publication order over her identity, certain facts relating to her psychological history, and the medical information provided as part of this process. The Respondent did not oppose the interim non-publication orders and abides the Authority's final determination on this issue.

[141] The Authority has the power to order that all or part of evidence, pleadings or the name of any party or witness is not to be published.<sup>12</sup>

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<sup>11</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

<sup>12</sup> Clause 10, Schedule 2 of the Employment Relations Act 2000.

[142] An application for non-publication must demonstrate there is a material risk of adverse consequences which would justify departing from the fundamental rule of open justice.<sup>13</sup>

[143] LNF has provided the Authority with medical and psychological evidence. It was necessary for her to do so to demonstrate the level of hurt, humiliation and loss of dignity, and the extent to which Corrections' actions adversely impacted her. LNF has provided evidence and submission to the Authority and Corrections about a specific concern she has in relation to publication of her circumstances.

[144] For the sake of completeness, I do not take into account that the Applicant also says publication of her name would expose her to greater risks of adverse treatment during employment and/or may create a barrier to future employment. This is a concern of many parties appearing before the Authority, but there is no evidence that there is a material risk of this adverse consequence eventuating in this case.

[145] Based on the information before the Authority I am satisfied it is appropriate for the interim non-publication orders made at the investigation meeting to now be made permanent on the basis sought by LNF.

### **Orders**

[146] LNF's claim that she was unjustifiably dismissed from her employment with Corrections has been successful and remedies are appropriate.

[147] I order that:

- (a) The Department of Corrections is to reimburse LNF for lost wages for a period of six months following her dismissal under s123(1)(b) of the Act in the amount of \$36,500.
- (b) The Department of Corrections is to pay LNF compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$23,000.

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<sup>13</sup> *JKL v Stirling Andersen Limited* [2022] NZEmpC 107

[148] I order that pursuant to clause 10 of Schedule 2 of the Act, there is a permanent non-publication order over the Applicant's name and any information that may tend to identify her, as well as her medical and psychological history, and medical information.

### **Costs**

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

[150] If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will 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.

[151] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>14</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>14</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).