IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 132
EMPC 34/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WAIKATO DISTRICT HEALTH BOARD Plaintiff
AND	KATHLEEN ANN ARCHIBALD Defendant

Hearing:	2-3 August 2017, and by further memorandum dated 11 August 2017 (Heard at Hamilton)
Appearances:	G Peploe and N Griffin, advocates for plaintiff P Cranney and C Mayston, counsel for defendant
Judgment:	31 October 2017

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mrs Archibald was nearing the end of a lengthy working life when her employment was terminated by the Waikato District Health Board (WDHB) following a restructuring exercise. She had declined to take up a position which would have involved her travelling for two hours and 45 minutes per working day for a period of up to nine months.

[2] Mrs Archibald was 67 years old at the time, was in a fragile physical state, and had advised the WDHB that the extent of the travel associated with the new position filled her "with dread", that she physically could not do it, and that the travel would "destroy" her.

[3] Rather than take steps to inquire into the concerns which had been raised, and what lay behind them, the WDHB presented Mrs Archibald with the stark option of either taking up the position or having her employment terminated. Mrs Archibald elected the second option, because she could not face the first. The WDHB rejected any suggestion that she was entitled to a severance payment under the applicable collective employment agreement (the MECA). Mrs Archibald's employment with the WDHB accordingly came to an unceremonious end.

[4] Mrs Archibald pursued a claim against the WDHB in the Employment Relations Authority, which found in her favour. The Authority concluded that Mrs Archibald had been unjustifiably dismissed; was entitled to a severance payment; and that she was entitled to compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[5] The WDHB challenged the Authority's determination on a de novo basis. There were three principle threads to its case:

- first, that the entitlement to a severance payment had not been triggered in the particular circumstances;

- second, that the entitlement to any severance payment would be based on a dispute as to the interpretation of the MECA and the personal grievance procedures were unavailable, including access to relief under s 123(1)(c)(i); and

- third, that even if the Court could order compensation for non-pecuniary loss, the quantum of award sought by the defendant was substantially in excess of what was appropriate.

[6] The Authority was critical of the way in which Mrs Archibald's situation had been handled by the WDHB. I have reached the same overarching conclusion, for similar reasons. While it was plain that the proposed new way of working would have implications for affected staff, including Mrs Archibald, the degree of impact remained unclear until a late stage. That undermined Mrs Archibald's ability to

substantively engage in the consultative process. Further, it is apparent that a firm view was formed early on that it was perfectly reasonable to expect someone in Mrs Archibald's position to travel nearly three hours a day to attend team meetings in Hamilton. While accepting that the position would likely have been different had this been a permanent requirement, Mr Peploe (advocate for the WDHB) submitted that there were two features of the arrangement which made it reasonable:

- that the nearly three hours per day of travel time was to take place during work hours and so would not have impinged on Mrs Archibald's private time; and

- that the arrangement would be for a limited period of time, namely up to nine months.

[7] While the WDHB agreed that Mrs Archibald had raised concerns about the travel component of the new role, and had been in tears during a meeting at which she talked about the likely impact of it on her mental and physical health, it advanced the suggestion that she ought to have agreed to it and then raised any health and safety issues as and when they subsequently arose. Such an approach fell well short of the applicable employment standards and the WDHB's obligations under the MECA. Sufficient detail of the proposal was not provided in a timely manner, to enable Mrs Archibald to assess what it might mean for her in terms of likely travel and to substantively engage in the consultative process. And the WDHB's staunch approach in pre-emptorily forming the view that redeployment was the appropriate option and, if rejected, would not trigger the severance payment provision in the MECA, meant that the WDHB exposed itself to the legal liability it now faces.

Background facts

[8] Mrs Archibald began her long nursing career within the public health sector over 52 years ago. Her first job was with the plaintiff, the WDHB. Mrs Archibald subsequently became a public health and district health nurse in the South Island, before returning to the WDHB in 1995. She has been with the WDHB continuously

since then and has evidently been a valued employee and popular member of the staff.

[9] From 2003 Mrs Archibald was a Health Promoter, based in Thames and covering the Thames-Coromandel and Hauraki Districts. A number of other people held such a role, each working in their own geographical locations. The Health Promoter position required a degree of travel, including for occasional management and training meetings in Hamilton, Tokoroa and Te Kuiti. Such meetings tended to take place on an infrequent basis, and no more than monthly. Mrs Archibald was also required to travel for other reasons connected with her work. In total her work-related travel within the Thames-Coromandel and Hauraki Districts varied from 30 minutes to three hours per week. She was required to travel outside these districts only once or twice per month.

[10] The WDHB was concerned to ensure that health promotion services were being delivered in a cohesive and efficient manner. A review was undertaken by Mrs Archibald's manager, Mrs Penjueli. It was proposed that these services be restructured, with a move towards a 'health setting focus'. Staff, including Mrs Archibald, were called to a meeting in March 2016 and were advised of the proposal. The proposal, and what underlay it, was set out in a consultation document which was given to affected staff. Mrs Penjueli spoke at the meeting. She advised staff that their current roles as health promoters would be disestablished and that a number of changes would be made to the role.

[11] The consultation document articulated the proposals, insofar as they related to the existing health promotion positions, as follows:

> - All health promoter positions in place are disestablished and redefined as health improvement advisors allocated to teams.
> …
> - The teams/units as well as the associated health improvement advisor positions are centrally located to the Hamilton office, except for one office that will be retained in Thames/Coromandel due to the site being an access point to our most difficult to reach geographical district and second largest population outside of Hamilton City. …

[12] The proposal document said nothing about the potential impact on travel requirements other than what could be inferred from the statement that the Thames

office would remain open but that the role would be centrally located in Hamilton. Staff were invited to make submissions on the proposal, and were given until 17 April 2016 to do so. The final decision was to be made during the following week.

[13] The wider Health Promotion Team prepared and presented a submission, reflecting the input of staff from the broader district, including those based in Te Kuiti, Tokoroa and Te Awamutu. The feedback included reference to the proposed location of jobs/bases and a recognition that implementation of the proposals would impact on the level of travel involved in their work. In this regard, it was stated that:

> Having staff close to these areas, although with a willingness to travel to other areas and to Hamilton for training and to support work, has the potential to lessen the costs of travel into many of the hard-to-reach communities in the Waikato.
>
> It is recognised by the team that they are making a significant change in moving to a settings-based approach in their work. Allocation to a settings team will allow for a clear focus; *however they are aware that travel will be a necessity.*
>
> (emphasis added)

[14] The perceived strengths and weaknesses of the proposal to centralise in Hamilton with a Thames office were set out. One of the identified weaknesses was the increased travel requirement for staff to attend training and meetings. The feedback also identified the need for comprehensive training to enable staff to transition to a settings-based approach, and that staff would need to be "supported, coached and encouraged." I pause to note that Mr Peploe put weight on this aspect of the feedback from staff. In essence he submitted that the subsequent requirement for staff such as Mrs Archibald to travel the return journey to Hamilton from Thames each day to bed in the new way of working could not be complained about, as staff had effectively got what they had asked for. I return to this submission later.

[15] The Thames-based staff (Mrs Archibald, Ms Dargaville and Ms West) affected by the proposal also put in a separate submission. The submission was relatively brief. Amongst other things it stated that:

> The Thames base recommends having three Health Improvement Advisors, each one attached to a Health Improvement Team, to work on a district wide basis, but mainly covering the Thames/Coromandel, Hauraki and Matamata-

> Piako territorial authorities. We are keen to widen our reach across these localities especially in those rural … settings …

[16] It was put to Mrs Archibald in cross-examination that this feedback reflected that she was well aware that the role would require a considerable amount of travel. Her response was that there was nothing in the proposal document which alerted her to how much additional travel would be required or that there would be a need to travel to and from Hamilton for several months to undertake training. That observation was correct.

[17] The Public Service Association (PSA) was involved in the restructuring proposal, although it appears that they did not receive notice of the initial meeting at which the proposal was presented within sufficient time to attend. As Mr Gatenby, the local PSA representative, explained, the usual approach was for him to intervene when requested to do so by staff. While he had some involvement in the preparation of the feedback documents he did not draft them and did not attend meetings at which the proposal was discussed, unless specifically asked to do so. Mr Gatenby was, however, kept in the loop by Mrs Penjueli and Ms McKeany who copied him in to emails and who had various discussions with him during the course of the process. One such discussion occurred on 19 April 2016, to review the feedback which had been received. A further meeting occurred a week later, on 26 April. It appears that travel requirements consequent on an implementation of the proposal insofar as the Thames-based staff members were concerned was not raised as a potential issue. In cross-examination Mr Gatenby said he did not take umbrage with the idea that the Thames people would need to travel. There was, at this stage, no clarity around the nature and extent of the travel that might be required.

[18] The Chief Executive of the WDHB approved the proposed new structure in May 2016. All health promoter positions were to be disestablished and redefined as health improvement advisors allocated to teams. These positions would be centrally located in the Hamilton office, except for the Thames office which was to be retained. A summary of staff feedback was provided, including feedback that parts of the proposal had been difficult for staff to comment on "due to the lack of detail contained in the document."

[19] Mrs Archibald received a letter dated 23 May 2016 setting out the decisions that had been made, and their potential impact on her. Mrs Archibald was advised that her position would be disestablished and that this would not occur until such time as notice was given. She was advised that new health improvement advisor positions would be established and that she would be able to express an interest in such a role. The letter did not refer to where the new roles would be located or what an appointment to them might entail, in either the short or long term.

[20] Mrs Archibald was given a second letter on the same day, offering her redeployment. This offer was said to be extended under cl 31 of the MECA, and having regard to Mrs Archibald's skills, abilities and employment history. In this regard the letter, signed by Mrs Penjueli, advised:

> …
>
> The Waikato DHB believes that you have directly transferable skills, knowledge and experience relevant to the newly created position of **Health Improvement Advisor** and believe this to be a reasonable offer of redeployment.
>
> This position forms part of the newly created Health Improvement Service which is located in Hamilton. The decision has been made to retain an office at Thames hospital as noted in the Decision document.
>
> Initially this would require you to travel to the Hamilton base on a daily basis during normal work hours, utilising a Waikato DHB vehicle. Once the setting based teams have been established your need to travel to Hamilton so frequently will be determined according to the requirements and planned activities of the position and by the direction of the Team Leader.
>
> Your current salary and contracted full time equivalent will remain unchanged.
>
> **Accepting the position**
>
> This offer is subject to you accepting the position by signing and returning the attached form and signed position description. Please return the completed form by **Friday, 10 June 2016** …

[21] A meeting was held two days later at the Thames hospital. At the meeting Mrs Penjueli reiterated the need for initial travel to and from the Hamilton base. Because there were three staff located in Thames it was anticipated that they could travel as a group and share the driving.

[22] Mrs Archibald did not sign and return the form accepting the offered position. Rather she wrote to Mrs Penjueli, through the PSA, on 10 June 2016 requesting a meeting. The letter identified the nub of the problem from her perspective, namely that:

> According to your email to me dated 27 May 2016 the position offered contains a requirement that the incumbent travel daily to Hamilton and then on an ongoing basis travel to other regions outside of Thames. The considerably increased travel component is a significant change to [Mrs Archibald's] current terms and capacity of employment and as such [she] does not accept the offer of redeployment.
>
> In accordance with clause 31.4.2 of the Allied MECA [Mrs Archibald] and I wish to meet with you in an attempt to *agree on the options appropriate to the circumstances* that are outlined at 31.4.4.
>
> (original emphasis)

[23] Mrs Penjueli responded to the issues raised in Mrs Archibald's letter on 13 June 2016 by confirming the decision to disestablish her current role, and giving her notice that disestablishment would be effective from 22 July 2016. Mrs Penjueli reiterated what she had said at the 25 May meeting, namely that while the service would be located in Hamilton the Thames office would remain open and that travel to Hamilton would be required initially. She went on to advise that:

> The Waikato DHB considers the offer of redeployment to be reasonable and suitable as the Waikato DHB believes you have directly transferable skills, knowledge and experience relevant to the Health Improvement Advisor position.
> …
> At present unless you choose to withdraw the decision to decline the offer of redeployment into the Health Improvement Advisor position and notice is withdrawn; on **Friday 22 July 2016** your employment will cease with the Waikato DHB. *No severance will be paid*.
>
> (emphasis added)

[24] A further meeting was scheduled for 30 June 2016. The travel component formed the central plank for discussion. Mrs Penjueli made the point that she could not give an accurate timeframe for the length of time that might be required for travel to and from Hamilton as much would depend on how long it took each particular team to settle into the new way of working. As Mrs Archibald had declined the offer of redeployment and had not identified a preference for which of the three newly established teams she would have joined, it was said to be difficult to

estimate the likely timeframe involved. However, no steps were taken to do a calculation based on each of the three options. It remained unclear why not, given the centrality of the travel requirement from Mrs Archibald's perspective.

[25] Ms McKeany attended the meeting and took notes. The following salient points emerge from her record of the meeting:

> [Mrs Penjueli]: any other concerns?
>
> [Mrs Archibald]: when you told me of the decision, I felt excited with the new way of working, settings approach. *When you said Thames staff needed to travel 3 to 6 months to Hamilton my heart filled with dread. I can't do that. I physically can't do that. 12 hours a week. I accessed EAP. I can't do it. It would not be good for me.*
>
> [Mrs Penjueli]: it has always been a requirement for you to travel in the Health Promoter position. You would be a passenger in the car rather than being the driver. Thames staff can travel together.
>
> [Mr Gatenby]: there is a considerable amount of travel. *12 hours out of 32 hours. 30% travel a week. Whether a driver or passenger that travel is excessive.*
>
> [Mrs Penjueli]: it is a means to an end. Offer them opportunity as part of the vision; team building; …
> …
> [Mrs Penjueli]: … Your hours of work have not been extended. You would be at work and required to work anyway. You will be able to communicate in the car with your colleagues. During working hours it is expected that you be in Hamilton about 0930/1000 and leave about 1500 hours to return to Thames.
> …
> [Mrs Penjueli]: the role has always been district wide. …
>
> [Mr Gatenby]: last 13 years whether a requirement, [Mrs Archibald] *over the last 13 years has not travelled frequently for work reasons outside the Thames Coromandel area.*
> …
> [Mr Gatenby]: … *Not healthy* for [Mrs Archibald].
> …
> [Mrs Archibald]: *I know travelling for three hours will be physically concentrating and exhausting.* Travel to Hamilton two days a week is exhausting. *H & S issue.*
>
> [Mr Gatenby]: it is the level of travel. Almost like whether passenger or driver a third of the job. Job is not driving or being a passenger. Not like a courier we are talking here.
>
> [Mrs Penjueli]: always [been] part of the role. Unusual comparison.
> …

> [Mr Gatenby]: [Mrs Archibald] has *not had substantial part of her role as travel. Very small part of her role. Substantially expanded.*
> …
> [Mr Gatenby]: 22 July dismissed.
>
> [Mrs Penjueli]: not us. [Mrs Archibald] has declined [the] offer of redeployment.
> …
> we have not dismissed [Mrs Archibald].
>
> [Mr Gatenby]: dismiss for redundancy.
>
> [Ms McKeany]: noted clause re redeployment disestablishment of position. Clause 31.4.9(i). also noted 31.3.4 and 31.3.5 consultation.
>
> [Mrs Archibald]: considered Waikato DHB was a good employer. Period of being unwell. I was incredibly well supported. Clinical/management and colleagues and felt blessed and felt gratitude. I am well now.
> I am gutted it has come to this. Full of sadness and grief. But I have to stand strong. That *it is the travel that will destroy.*
>
> (emphasis added)

[26] The meeting concluded with the parties at odds. The WDHB did not accept that the requirement for travel impacted on its legal obligations to Mrs Archibald, and it did not take steps to inquire into or explore the health and safety concerns she raised during the course of the meeting. Shortly afterwards the PSA advised that it would be filing a claim in the Authority.

[27] On 18 July 2016 Mrs Penjueli wrote to Mrs Archibald confirming the date of the disestablishment of her position as Health Promoter, from 22 July 2016.

[28] While Mrs Archibald had decided against taking up the offer of redeployment, her co-workers in the Thames office (Ms Dargaville and Ms West) did accept it. They gave evidence about the impact of the travel they were required to do for what turned out to be the six-month period following the implementation of the proposal (although there has been an ongoing travel component to the new role). Ms West gave evidence that in the 299 working days from 1 June 2015 to 22 July 2016 (so just prior to the restructuring taking effect) she travelled to Hamilton a total of 26 days. In the 130 working days following the change she had travelled to Hamilton 84 days. Of that she drove solo more than half of the time (namely 47.5 days).

[29] As I have already observed, it was submitted that Mrs Archibald ought to have taken on the role and then raised any health and safety issues as and when they arose, to enable them to be considered and dealt with at that time. Somewhat ironically, while Ms West gave compelling evidence as to the negative impact that the significant upswing in travel has had on her, echoing previous evidence she said she gave some time ago in the Authority, it remained unclear what (if any) steps had been taken by the WDHB to explore these issues with her or otherwise address matters.

Grievance procedures excluded by s 103(3)?

[30] It is convenient to deal with a preliminary argument advanced by the plaintiff at this point, namely that the question as to Mrs Archibald's entitlement to a severance payment is based on a dispute as to the interpretation of the MECA and does not give rise to a claim for compensation under s 123(1)(c)(i). This argument centres on the reach of s 103(3) of the Act.

[31] Section 103 relevantly provides that:

> **103 Personal grievance**
>
> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> (a) that the employee has been unjustifiably dismissed; or
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;
>
> …
>
> (3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[32] The scope of s 103(3) has not received much judicial attention. The purpose of s 103(3) is evidently to exclude from the definition of personal grievance, and accordingly the grievance procedures, actions which derive solely from the interpretation, application, or operation, or disputed interpretation, application, or

operation, of any provision of any employment agreement. But it is equally evident that claims of unjustified dismissal are not affected by s 103(3), given that it is expressed to relate to the sort of unjustified actions referred to in s 103(1)(b) (disadvantages), not s 103(1)(a) (dismissals). Section 103(3) is further limited in terms of scope by use of the word "solely". Accordingly, where an unjustifiable disadvantage does not derive *solely* from the interpretation and application of relevant provisions of the employment agreement, s 103(3) does not operate to close the door to pursuit of parallel claims, by way of a dispute and a personal grievance.[1]

[33] Mrs Archibald claims that she was unjustifiably dismissed. Section 103(3) is not an impediment to the Court's inquiry, or its ability to order relief under s 123(1)(c)(i).

What was required under the agreement?

[34] The MECA provided that:

> 31.4 Staff Surplus
>
> 31.4.1 When as a result of the substantial restructuring of the whole, or any parts, of the employer's operations; either due to the re-organisation, review of work method, change in plant (or like cause), the employer requires a reduction in the number of employees, or, employees can no longer be employed in their current position, at their current grade or work location (i.e. the terms of appointment to their present position), then the options in sub-clause 31.4.4 below shall be invoked and decided on a case by case basis in accordance with this clause.
>
> 31.4.2 Notification of a staffing surplus shall be advised to the affected employees and their Union at least one month prior to the date of giving notice of severance to any affected employee. This date may be varied by agreement between the parties. During this period, the employer and employee, who can elect to involve their Union Representative, will meet to agree on the options appropriate to the circumstances. Where employees are to be relocated, at least three months' notice shall be given to employees provided that in any situation, a lesser period of notice may be mutually agreed between

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[1] See, for example, *Red Beach School Board of Trustees v The New Zealand Education Institute (Inc)* AC13/07, 20 March 2007, at [113] where it was observed that: "Secondly, s103(3) only relates to actions of an employer deriving "solely" from the interpretation, application or operation of an employment agreement. Thus, if any of the teacher aides could establish by evidence that Red Beach School was motivated in its grading decisions by any other factor, there may be scope to pursue a personal grievance notwithstanding s103(3)." See too *Clarkson v Department of Child Youth and Family Services* CC9/04, 5 May 2004 at 14.

the employee and the employer where the circumstances warrant it (and agreement shall not be unreasonably withheld).

…

31.4.4 Options

The following are the options to be applied in staff surplus situations:

a) Reconfirmed in position
b) Attrition
c) Redeployment
d) Retraining
e) Severance

… The aim will be to minimise the use of severance. When severance is included, the provisions in subclause 31.4.9 will be applied as a package.

…

31.4.7 Redeployment

a) Employees may be redeployed to an alternative position for which they are appropriately trained (or training may be provided). Any transfer provisions will be negotiated on an actual and reasonable basis.

…

31.4.9 Severance

Payment will be made in accordance with the following [method of calculation]:

…

i) Nothing in this agreement shall require the employer to pay compensation for redundancy where as a result of restructuring, and following consultation, the employee's position is disestablished and the employee declines an offer of employment that is on terms that are:

- the same as, or no less favourable, than the employee's conditions of employment; and
- in the same capacity as that in which the employee was employed by the employer, or
- in any capacity in which the employee is willing to accept.

[35] The disestablishment of Mrs Archibald's position followed a reassessment of a major work stream within the WDHB, and a desire to approach service delivery in a different way. The restructuring process required the WDHB to actively engage with affected staff, including Mrs Archibald. It also required the WDHB to provide relevant information to enable staff to substantively participate in the consultation process, including by providing sufficiently precise information as to the likely implications of what was proposed.

[36] Under the new structure Mrs Archibald's position would no longer exist. While there is no doubt that the decision to disestablish Mrs Archibald's position was based on genuine grounds, there were difficulties with the approach adopted by the WDHB in getting to that point and what then followed. The WDHB advised Mrs Archibald of its view that a staffing surplus situation had arisen and gave her one month's notice. Clause 31.4.2 required that during the notice period the employer and employee would meet to agree on the options appropriate. Clause 31.4.4 set out the five possible options (reconfirmation; attrition; redeployment; retraining; severance). The clearly stated aim under the agreement was to minimise the use of option number five (severance).

[37] In the present case the WDHB moved straight to option number three as being appropriate to the circumstances of Mrs Archibald's case. While it is true that this option appears to confer a broad discretion on the WDHB to redeploy in circumstances where the employee is appropriately trained (or training may be provided) for the new role, it is clear from the wording of cl 31.4.9(i) that the offer of redeployment to an alternative position must be on terms which are the same as, or no less favourable than, the employee's current conditions of employment and in the same capacity as that in which the employee was employed by the employer or in any capacity which the employee is willing to accept.

[38] The firm view WDHB had about the applicability of option three impacted on the way in which things unfolded. WDHB considered that because a reasonable redeployment opportunity was available[2] no severance would be payable. The PSA considered that this was wrong, and that the travel component of the new role constituted a significant change to Mrs Archibald's terms and conditions of employment. The offer of redeployment was accordingly rejected on 10 June 2016, and the PSA sought a meeting to attempt to agree on the appropriate options (invoking the process provided for in cl 31.4.2). While a meeting was subsequently convened (on 30 June 2016), by that time the WDHB had given Mrs Archibald formal notice of the disestablishment of her position, had advised her that a staff surplus situation had arisen and confirmed that unless she withdrew her decision to decline the offer of redeployment her employment with the WDHB would cease on

[2] As described in the second letter of 23 May 2016.

22 July 2016 and that no severance would be paid. Such an approach was not in accordance with the sequential, consultative, process provided for in the MECA.

Offer of redeployment on no less favourable terms?

[39] Was employment offered on less favourable terms? Mrs Archibald considered it was; WDHB considered it was not. I approach the issue on the following basis. Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment?[3] Each case is fact dependent. That means that only limited assistance can be gained from reference to earlier cases.[4]

[40] As the plaintiff submitted, numerous features of the new role remained substantially unchanged, including as to salary, skill level and responsibility. However, the new role indisputably required significantly more travel – 202 km per working day.[5] The corollary of this was that Mrs Archibald would have been required to spend two hours and 45 minutes in a car each day she was working each week. That would represent approximately one-third of her working day. The particular circumstances involved Mrs Archibald's personal capacity to undertake the increased travel which the new role necessitated. She was concerned, on reasonable grounds, that her health was not sufficiently robust to deal with it. She made it clear to the WDHB that she had significant issues with her ability to cope with the travel component of the new role. It was unreasonable for the WDHB to adopt a 'suck it and see' approach. Nor am I drawn to the submission that the WDHB was only obliged to consult at the time of the proposal, not later, and that Mrs Archibald effectively left her run too late.

[41] The fact that other employees were prepared to undertake the new role does not assist the WDHB's position. First, because the assessment is fact-specific to Mrs Archibald's circumstances. Second, because the difficulties the increased travel

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3 *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984, 995.

4 See, for example, *Westpac Banking Corporation v Money* [2004] 1 ERNZ 576 (CA).

5 So significantly more than the 74 kilometres at issue in *Money*, a case which involved a claim by the employee (rather than the employer) that the new role was no less favourable, despite the increased commuting distance.

would likely have presented to Mrs Archibald were reinforced by the two colleagues who gave evidence about the impact that such travel had on them.

[42] It is not enough to say, as the advocate for the WDHB did, that a number of people drive for hours and hours a day as part of their work (referencing taxi drivers and truck drivers). The simple point is that Mrs Archibald was not employed as a professional driver; she was employed as a health professional. Driving constituted a small part of her role prior to the restructuring. She was being asked to spend a significantly greater part of her working day either driving or as a passenger for an indeterminate period of time as part of the new role.

[43] I note at this juncture that the WDHB submitted that Mrs Archibald did not do enough to raise her health concerns in relation to the impact of the travel requirements of the new role to enable them to be considered. I disagree. Mrs Archibald made it very clear during the course of the meeting with her manager that she perceived serious implications associated with the new role. She was in tears, said that it was a health and safety issue, that she would not cope with the travel, and that it would destroy her. I do not accept that it behoved her to specifically raise the fact that she had had a kidney transplant and was required, for this reason, to take particular care of her health. The WDHB's submission in this regard overlooks the fact that Mrs Archibald made it abundantly plain that the nature and the extent of the travel would be too much for her. The kidney transplant was hardly a secret and I have no doubt that details of it would have emerged had the WDHB paused long enough to ask Mrs Archibald for further information about the concerns she had articulated.

[44] Having raised the point with sufficient clarity, reiterated by her representative, the WDHB should have asked further questions or sought further information if it doubted what Mrs Archibald had to say or considered that it needed further information. Doing nothing was not an option, as underscored by the detailed requirements set out in the MECA (under the heading "Consultation, Co-operation and Management of Change").

The relevance of age?

[45] While Mr Cranney, counsel for the defendant, made much of the fact that it should have been obvious to the WDHB that a woman of Mrs Archibald's age would struggle with driving nearly three hours per day, four days a week, such an approach appears to me to run the risk of making dangerous assumptions about what people can and cannot do, and what they will and will not struggle with because of their age.

[46] There is a growing volume of academic literature about the impact of ageism in the workplace and the perils associated with applying preconceived stereotypes.[6] And while in this case the point is being relied on by the defendant, it could just as easily be used against an employee if taken to its logical conclusion. I put the argument to one side.

[47] In the final analysis, the correct approach must be that assumptions are dangerous but the overall context and individual circumstances of an employee must be considered. Mrs Archibald clearly flagged that the proposed extent of travel would present significant difficulties for her – the WDHB was put on notice of the issue and should have made further inquiries before reaching a concluded view.

Summary – severance payment

[48] WDHB failed to follow the steps provided for in the MECA. It did not adequately engage with Mrs Archibald before firm decisions were made. The request to meet to discuss the available options was met with confirmation of termination of employment, unless the rejection of the offer of redeployment was withdrawn. When a meeting did take place there was a failure to inquire into, and adequately consider, Mrs Archibald's concerns about the newly established role and what it entailed. This effectively meant that the WDHB failed to appreciate that the severance provision was engaged in the particular circumstances.

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6 See, for example, L McLeod and T Bentley "Managing an Ageing Workforce: A Future of Work Programme Report in Conjunction with the Equal Employment Opportunities Trust" (2015, New Zealand Work Research Institute, AUT, Auckland).

[49] The fact that some other employees were prepared to take on the travel without demur did not provide a platform for the way in which Mrs Archibald's position was to be assessed, in anything other than a general way. Nor do I accept the submission that Mrs Archibald ought to have raised her concerns sooner, and that the earlier feedback provided (which did not strongly emphasise the sort of concerns later expressed) supported a perception that she simply wanted to engineer a severance payment.

[50] The extensive nature of the travel component of the new role was not sufficiently ameliorated by its limited duration (namely up to nine months); that it would be conducted within work hours and in a WDHB vehicle; and that the driving could on occasion be shared. While WDHB correctly identified that Mrs Archibald had directly transferable skills, knowledge and experience, the enhanced travel component associated with the offer of redeployment to a new role made it one which was plainly on less favourable terms for the purposes of cl 31.4.9, one she was entitled to reject, and one which gave rise to a severance payment under the agreement.

[51] The WDHB is accordingly ordered to pay Mrs Archibald the appropriate severance payment in accordance with cl 31.4.9 of the MECA, such payment to be made within 15 working days of the date of this judgment.

Unjustified dismissal

[52] The WDHB terminated Mrs Archibald's employment for redundancy. As is well established, the Court must assess whether WDHB's actions and the way it acted was what a fair and reasonable employer could have done in all of the circumstances at the time of the dismissal.[7] Section 4 requires parties to an employment relationship to deal with each other in good faith. This includes the requirement for employers to provide employees with access to information relevant to the continuation of their employment and an opportunity to comment on the information before the decision to terminate is made. The obligations of active

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7 Employment Relations Act 2000, s 103A.

consultation and co-operation are reflected in the MECA. Those obligations are ongoing.

[53] While the redundancy was genuine, there was a failure to comply with relevant contractual and statutory requirements. There was, as the Authority pointed out, a paucity of information provided in respect of the nature and extent of the travel component of the new role, which undermined the ability to provide feedback on the proposal. It was not until late May that Mrs Archibald actually became aware that she would be expected to travel to and from Hamilton each day for up to nine months. No assessment was made of the travel requirements of Mrs Archibald's present role, to enable a comparison to be made with the new one. The increase in travel was an important feature of the new role and it ought to have been made clear to Mrs Archibald during the consultative process to enable her to substantively engage on it.

[54] Further, the WDHB breached its obligations under the agreement to meet and agree on appropriate options (under cl 31.4.4). Rather it prematurely resorted to an assertion that redeployment into the new role would apply (under cl 31.4.7), bunny-hopping over the consultation processes set out in cl 31.4.2.

[55] Mr Cranney advanced a supplementary argument in support of the claim that the WDHB had fallen below the required standards. The submission (which was not fully developed) was focussed on a contention that, as a public sector organisation, the WDHB was to be held to a more exacting standard than would otherwise apply. It is not necessary to express a concluded view on the merits of what might be described as the good-employer-sliding-scale argument because I am satisfied that the WDHB fell below the required standards in any event.[8] Mrs Archibald was unjustifiably dismissed.

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[8] The argument raises a number of interesting issues, although the weight of authority currently appears to be against it. See, for example, *National Union of Public Employees (Inc) v ASURE New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC) at [38] and *Matthes v New Zealand Post Ltd (No3)* [1992] 3 ERNZ 853 (EmpC) at 890.

Compensation

[56] Mr Peploe submitted that there was an absence of evidence supporting a claim for compensation under s 123(1)(c)(i). It is true that a claim for non-pecuniary loss must be supported by evidence. That reflects the fact that the Court must be satisfied that a claimant has suffered loss as a result of a compensatable harm.

[57] Higher awards generally tend to be supported by evidence from third parties who have had the opportunity to observe the impact on the claimant, or (for example) medical records reflecting the physical manifestations of the loss sustained. However, there is no immutable rule that such evidence is required. Deeply personal and emotional harm such as a sense of humiliation, loss of dignity and injury to feelings may not give rise to medical intervention for a variety of reasons, but may nevertheless be keenly felt and have a profound effect on the individual concerned.

[58] I am satisfied, after hearing from Mrs Archibald, that quite apart from the feelings which would inevitably have accompanied the loss of employment, Mrs Archibald also experienced a deep sense of hurt that she had not been listened to and that her concerns had been unceremoniously brushed to one side. She felt cornered by the actions of the WDHB and became very upset and anxious. She also experienced stress and worry. Mrs Archibald was a well-respected, loyal and long-serving member of staff, who had devoted her working life to serving the public. It is clear that although her employment came to an end some time ago, the WDHB's actions have had a lingering negative impact on her. That is hardly surprising given the circumstances.

[59] Mr Cranney submitted that the amount ordered by way of compensation under s 123(1)(c)(i) should be increased to reflect the time it has taken to resolve matters, the plaintiff's challenge having effectively extended the period of financial stress and worry suffered by the defendant. No authority was cited for this proposition.

[60] The key requirement is the need to establish a causal connection between the unjustified actions of the employer and the injury to feelings, loss of dignity and/or humiliation suffered. While I do not discount the possibility that there may be some cases in which the necessary causal link can be maintained and extended in the way Mr Cranney suggests, I am not satisfied that the evidence sufficiently supports the submission advanced on Mrs Archibald's behalf in this case. Accordingly I decline to increase the quantum of compensation I would otherwise have ordered.

[61] Mr Cranney submitted that an award in excess of the $10,000 ordered by the Authority was appropriate in this case. He suggested that an award of between $30,000 to $50,000 was warranted. I do not agree, based on the evidence before the Court.

[62] Assessing compensation is an inexact science. This can cause difficulties in terms of ensuring a degree of consistency across like cases, while reflecting the individual circumstances of the particular case before the Court. In arriving at an appropriate figure I have considered the extent of the injury suffered by Mrs Archibald and where it sits in the spectrum of cases routinely coming before the Court. In this regard, I have found it helpful in this particular case to consider the challenging task of assessing compensation in terms of a broad analytical framework of three bands:

- band 1 involving low level loss/damage;
- band 2 involving mid-range loss/damage; and
- band 3 involving high level loss/damage.[9]

[63] I assess the injury suffered by Mrs Archibald as a consequence of WDHB's unjustified actions as falling around the middle of band 2.

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[9] The notion of applying a "bands" approach has been raised in C Inglis and L Coats "Compensation for Non-Monetary Loss – fickle or flexible" (paper presented to the Employment Law Conference, Auckland, October 2016) at 389-391.

[64] A review of judgments involving compensation under s 123(1)(c)(i) reveals a broad range of awards.[10] While this case involves a particular category of claim (unjustified dismissal for redundancy), the central issue in terms of the quantification process must be the same – namely the extent of the injury or loss sustained by the employee as a result of the employer's unjustified action. That means that in cases involving a substantively justified but procedurally flawed dismissal for redundancy, the injury or loss which would likely have followed in any event must be put to one side.

[65] I respectfully agree with Chief Judge Colgan's recent description in *Wikaira v Chief Executive of the Department of Corrections* of an award of $20,000 as representing "a moderate amount of monetary compensation for s 123(1)(c)(i) consequences". He went on to observe that in setting the amount he had:[11]

> … had regard to recent levels of awards made by this Court and reflecting the desirability that these awards should be, although not over-generous, nevertheless fair, realistic and not miserly.

[66] Having regard to the particular circumstances of this case, I consider that an award of $20,000 under s 123(1)(c)(i) is appropriate. The WDHB is accordingly ordered to pay Mrs Archibald the sum of $20,000. This is to be paid to Mrs Archibald within 15 working days of the date of this judgment.

[67] Contribution has not been argued, and I am not otherwise satisfied that a reduction in remedies is appropriate.[12]

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10 By way of example, see *Higgs v Monro Ltd* [2015] NZEmpC 202, upholding an award of $4,000 for unjustified dismissal in the Employment Relations Authority in circumstances where the evidence established that the employee had felt "embarrassed"; $6,000 in relation to unjustified action in *H v A Ltd* [2016] NZEmpC 54 at [153] (little evidence produced in support of the s 123(1)(c)(i) claim, at [150]). In *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648 (CA) at 652, the Court of Appeal described the award of $50,000 in *Ogilvy & Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641 (CA) as the "high water mark" for cases of its kind. It was followed ten years later in the Employment Court by an award of $50,000 in *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 at [142] (EmpC). Note that adjusting the "high water mark" in *Ogilvy & Mather* for inflation would result in a high water mark of around $80,000 in 2017. For a detailed analysis of s 123(1)(c)(i) awards across a range of cases in both the Court and the Authority see "Compensation for Non-Monetary Loss – fickle or flexible", above n 9.

11 *Wikaira v Chief Executive of Department of Corrections* [2016] NZEmpC 175 at [237]; see too *Nelson v Katavich* [2016] NZEmpC 48 at [117], compensation of $30,000, described as "relatively modest" given the circumstances; *Banks v Hockey Manawatu Inc* [2016] NZEmpC 23 at [97], compensation of $20,000.

12 Employment Relations Act 2000, s 124.

Conclusion

[68] In summary:

1. Mrs Archibald's is entitled, under the terms of the MECA, to a severance payment.

2. The WDHB is ordered to pay Mrs Archibald severance calculated in accordance with the MECA. Such payment is to be made within 15 working days of the date of this judgment.

3. Mrs Archibald was unjustifiably dismissed from her employment.

4. The WDHB is ordered to pay Mrs Archibald the sum of $20,000 by way of compensation under s 123(1)(c)(i) of the Act. Such payment to be made within 15 working days of the date of this judgment.

[69] The defendant is entitled to costs, the quantum of which is reserved at the request of the parties.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 31 October 2017