IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 162
EMPC 285/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BIRTHING CENTRE LIMITED Plaintiff
AND	REBEKAH MATSAS First Defendant
AND	CHELSEA VAN DUIN Second Defendant
AND	JODI-ANN HANSEN Third Defendant
AND	RACHEL ROBBEN Fourth Defendant
AND	MICHELLE BABB Fifth Defendant

Hearing:	4–5 July 2023 (Heard at Wellington)
Appearances:	S Langton and J Greenheld, counsel for plaintiff S Mitchell KC, counsel for defendants
Judgment:	27 September 2023

JUDGMENT OF JUDGE B A CORKILL

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[1] Five midwives were employed by Birthing Centre Ltd (BCL) at a Palmerston North facility known as Te Papaioea Birthing Centre (Te Papaioea or the Centre). Te Papaioea ceased operations on 31 March 2020. The five midwives, who were

defendants in the proceedings, then commenced employment with the MidCentral District Health Board (MDHB or the DHB).

[2] There are several issues regarding the employment arrangements of the midwives in the runup to the end of their employment with Te Papaioea. After the Employment Relations Authority issued a determination about those issues, BCL raised a non-de novo challenge.[1] Only four of several findings made by the Authority have been challenged, namely:

(a) whether the midwives were dismissed by BCL;

(b) whether BCL was required to provide the midwives with notices of termination in circumstances where they went on to work for MDHB;

(c) if there was a failure to provide the contractual notice, whether the remedy for not providing notice is payment of the notice period; and

(d) if there were dismissals, whether they were unjustified because of a breach of s 4(1A) of the Employment Relations Act 2000 (the Act), which deals with access to information and an opportunity to comment on information where an employer is proposing to make a decision that will have an adverse effect on the continuation of employment, or whether s 4(1B)(c) of the Act applied, which relieves an employer from providing access to confidential information for the purposes of giving an employee an opportunity to comment.

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1 *Matsas v Birthing Centre Ltd* [2022] NZERA 343 (Member Loftus).

The facts

[3] In this section I summarise the findings made by the Authority, since the challenge focuses on whether it erred in fact or in law. For convenience, I also refer to some of the extensive evidence placed before the Court.

[4] For the purposes of its analysis, the Authority noted that BCL is owned by the Wright Family Foundation, a trust which was established with a view to effecting change in the care and support of birthing mothers, with an emphasis on primary care during the first 1,000 days. It was noted that BCL provides primary birthing services at various locations around New Zealand, one of which was Te Papaioea where the present defendants were employed as midwives.[2] That facility was operated in Palmerston North opposite the main DHB hospital in that city.

[5] The Authority recorded that in April 2019, Te Papaioea approached its funder, MDHB, for an increase in funding, since it was operating at a loss. A representative of BCL, Chloe Wright, gave evidence. She told the Authority that when discussions took place in April 2019, one of the topics was whether a staffing model under which the two organisations could share midwifery services might be adopted. These discussions did not proceed further at the time.[3]

[6] Ms Wright went on to tell the Authority that in August 2019, the issue was again raised by MDHB when the idea of transferring Te Papaioea's services to MDHB was aired. The Authority discussed elements of those discussions, including that MDHB required any potential transfer to be treated as strictly confidential. Ms Wright understood this was to protect MDHB's commercial interests whilst consideration was given to potential options to implement the transfer of management, and to progress the idea to a formal proposal for Board approval and the undertaking of due diligence. This was to allow these steps to be taken "without gossip and speculation" which could impact on public confidence in its services.[4]

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2 At [7].
3 At [9].
4 At [10]–[12].

[7] Ms Wright told the Authority that for various reasons, confidentiality also suited BCL's interests as it would need to divulge confidential information not previously provided to a DHB. Such protection would encourage the flow of information.[5]

[8] Ms Wright said that a possible merger was progressed, with her having brief conversations with MDHB managers every three weeks or so. The need for confidentiality was reiterated during those conversations, although she was also told this requirement would cease once the Board had voted on a proposed transfer which would occur around December 2019. This date coincided with the expiry date of an existing contract between BCL and MDHB.[6]

[9] In September 2019, the Board of MDHB received an initial briefing which outlined various options and recommended continued discussions regarding a shared workforce model in light of all options for primary birthing across the region. She said that following this meeting, the Board settled on a preferred way forward, which was to operate Te Papaioea as a service of MDHB, and to be granted a lease of its facility. Te Papaioea's employees would be "transferred" to MDHB. Discussions would be advanced on this basis.[7]

[10] In late October 2019, MDHB asked for various items of information including BCL's template employment agreement and made a request that Te Papaioea keep MDHB updated on any new hires. This was agreed.[8]

[11] On 25 October 2019, a formal proposal was placed before the MDHB Board. It was asked to approve the progressing of the model of care which had been outlined previously, as well as contractual arrangements with the Wright Foundation, which was a reference to an intended lease of the premises from that organisation.

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5 At [13].
6 At [14].
7 At [15]–[16].
8 At [17].

[12] The proposal explained that the model was an integrated one using a shared primary birthing workforce. Stage one would involve MDHB extending its services to include the Te Papaioea Birthing Centre.[9]

[13] The Authority recorded that as well as seeking approval for a "subsumption" of Te Papaioea, the Board paper outlined how this would occur. Under the heading "Human Resources", it was noted that MDHB had undertaken workforce modelling to determine optimal staffing levels across both the Centre and its current services. A selection process would be held whereby staff at the Centre would be invited to express an interest in employment at MDHB. Only suitably skilled and qualified staff would be appointed to roles, having regard to other criteria such as fitting in with organisational values and team dynamics. It was possible that some staff at the Centre would not be appointed to roles. Any appointed staff would commence new employment with MDHB on its terms and conditions.[10]

[14] The Authority then recorded the following passage from the Board paper:[11]

> Communication and engagement with Centre staff, MDHB staff and Partner Unions is key. Given the sensitive commercial nature of the current negotiations, it is not appropriate at this stage to communicate with staff (at MDHB or the Centre) about the changes and model of care being considered. However, as soon as possible, communication to engage staff across both organisations in the design and development of the future model will be undertaken. Some options that are being considered for communication with staff and unions are:
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> - Early and embargoed discussions with MERAS and NZNO unions to confidentially involve them in the process.
>
> - A staff meeting and FAQs document for MDHB staff that provides as much information as possible – to be released in December 2019, coinciding with similar Wright Foundation communications
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> - Workshops in January 2020 ideally involving staff across both organisations, to engage and involve them in the planning process and to gather their input for the transition approach.

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9 At [18].
10 At [19].
11 At [20].

[15] The Authority noted that neither the present defendants nor the Midwifery Employee Representation and Advisory Service (MERAS), the union of which they were members, had any idea that change was possibly afoot.[12]

[16] Then the Authority noted that on 11 December 2019, MDHB and the Wright Foundation entered into a Memorandum of Understanding (MoU), a key paragraph of which read:[13]

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

[17] It was envisaged that this would occur with effect from April 2020.[14]

[18] MDHB and the Wright Foundation then made an announcement about the agreement. A reporter from a local newspaper approached MERAS for comment on the fact that, as the reporter understood it, midwives would be employed under DHB terms and conditions as well as being required to rotate through DHB facilities. This was when the staff became aware of the proposal.[15]

[19] Meetings were then called to inform staff at both Te Papaioea and MDHB, albeit separately, on 12 December 2019.[16]

[20] Ms Wright told the Authority that she informed BCL employees that an agreement had been reached and that MDHB would take over management of BCL which meant that midwives could work together across both primary (BCL) and secondary (MDHB) units. She said she also advised them that MDHB had undertaken to offer positions to Te Papaioea staff and that it would work with them and MERAS regarding terms and conditions.[17]

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12 At [21].
13 At [22].
14 At [23].
15 At [24].
16 At [25].
17 At [26].

[21] The Authority recorded that Ms Wright claimed to have been surprised and hurt by what she saw as the announcement's negative reception by staff. The Authority said the applicants accepted there was a general reluctance to work for MDHB, with those who gave evidence largely putting this down to a desire to avoid working in a secondary environment; they preferred primary care instead.[18]

[22] On 16 December 2019, Ms Wright received an email from Jill Ovens, co-leader of MERAS, about the situation. It noted an understanding had been reached that terms and conditions could change; she asked for consultation. Ms Ovens also said she understood there was to be a meeting at which staff would be briefed by MDHB representatives that day. She indicated MERAS wished to be involved. The Authority said that a chain of emails followed, with the prime issue being Ms Wright's objection to MERAS attending the meeting. Ultimately, Ms Wright did not attend the meeting.[19]

[23] The Authority found that the meeting between MDHB and Te Papaioea staff went ahead that morning, with MDHB explaining it would offer terms based on the national multi-employer collective agreement (MECA) between MERAS and the DHBs, to which it was a party.[20]

[24] On the following day, 17 December 2019, Ms Ovens emailed Ms Wright. She advised that she planned to meet MERAS members on the following day regarding concerns that had arisen following the staff meeting with MDHB and that the two could discuss these concerns when they met in the new year.[21]

[25] The Authority then recorded a number of interactions between MDHB, MERAS and employees of BCL, though it was observed Ms Wright did not participate in these actively, saying in her brief of evidence that she understood these events occurred. The Authority said that she distanced herself from what was occurring, leaving issues regarding terms and conditions upon transfer to be dealt with by

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18 At [27].
19 At [28].
20 At [29].
21 At [30].

MDHB.[22] However, interactions between Ms Wright and both Ms Ovens and BCL staff occurred, though they disagreed about the effectiveness of these.[23]

[26] The Authority recorded that Ms Ovens said she was disappointed that BCL made no effort to protect any of its employees' terms and conditions, while Ms Wright had taken exception to that accusation. Ms Wright said she had made a number of overtures to MDHB, having sought input from BCL staff as to what they disliked about the transfer and in light of her desire to protect Te Papaioea's philosophy. The Authority said that virtually all of Ms Wright's evidence about her involvement at that stage related to attempts to influence the content of the employment agreements MDHB would offer her staff and particularly work rostering.[24] I interpolate that this was the effect of the parallel evidence given by Ms Wright to the Court.

[27] It noted this was an issue because MDHB was proposing a rotating roster with staff working across both Te Papaioea and the hospital. As noted, BCL staff had a clear preference to avoid the hospital secondary care unit. The other burning issue was that BCL operated 12-hour shifts and its staff clearly preferred these. MDHB did offer a 12-hour option, but it primarily operated eight-hour shifts and proposed implementing these at Te Papaioea.[25]

[28] MDHB issued a consultation paper about these matters. While it commented on a number of issues such as those just referred to, the transfer of BCL's operation to the DHB was a fait accompli. The Authority noted that MDHB was party to a national MECA and that it considered that those terms would apply.[26] The consultation paper noted there was a further opportunity to provide feedback on these proposals until 23 February 2020, with a decision then being communicated to employees on 27 February 2020.[27]

[29] On 20 February 2020, Ms Jane Spilman, Midwife Manager at Te Papaioea, wrote a letter of resignation to Ms Wright. The letter stated that she was resigning

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22 At [31].
23 At [32].
24 At [32].
25 At [33].
26 At [34].
27 At [35].

because she had been offered an "amazing opportunity outside of midwifery that fits …". This was not something, she said, which she felt reassured would be the case under MDHB.[28]

[30] The Authority found that on or around 9 March 2020, the majority of BCL's employees at Te Papaioea received a pack from MDHB containing "an offer of employment". The Authority said the pack contained a letter from BCL in which Ms Wright said that employment with BCL would terminate on 31 March 2020, either because staff had accepted employment with MDHB or, if they did not do so, because the Centre would no longer be operating a midwifery service. Ms Wright said the letter operated as notice of termination of employment.[29]

[31] Ms Spilman did not receive a pack because she had indicated she was resigning to take up an external role. Also, others did not receive packs where they did not wish to work for MDHB.[30] The Authority found that the five present defendants accepted employment with MDHB, whilst Ms Spilman accepted employment elsewhere.[31]

[32] BCL employees received a further communication on 26 March 2020, thanking them for their support and commitment and advising their final pay would be made on 15 April 2020, unless they requested an earlier option of 3 April 2020.[32]

[33] No redundancy compensation or payment in lieu of notice was paid. Ms Wright attributed this to the fact that staff had been offered terms and conditions that were considered generally no less favourable than those enjoyed at Te Papaioea, including similar rates of pay, and under an arrangement that honoured the BCL philosophy. The Authority said BCL relied for this approach on a particular clause in the defendants' employment agreements, to which I will come later.[33]

[34] The Authority went on to consider whether the midwives were unjustifiably dismissed. It stated that BCL had ceased to operate in Palmerston North and

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28 At [36].
29 At [37].
30 At [38].
31 At [39].
32 At [40].
33 At [41]–[42].

accordingly no longer needed its employees. It had no positions for them. It found that termination at the employer's initiative, as this was, was a dismissal. The issue was whether it could be justified.[34]

[35] The Authority went on to consider good faith issues, and whether there was a breach of the employment agreement.

[36] First, it addressed s 4(1A) of the Act, which requires an employer proposing to make a decision that will or is likely to have an adverse effect on the continuation of an employee's employment to provide to affected employees access to information, and an opportunity to comment on the information before the decision was made.

[37] After referring to a relevant decision, the Authority found that by the time BCL's employees and their representatives became aware of the circumstances, the matter had moved beyond being a recommendation or proposal.[35] It was, as Ms Wright had conceded, a fait accompli. There had been a press release which led to MERAS and its members becoming aware of the transfer, so that the matter was in the public arena, and there was also an MoU which had been agreed.[36]

[38] The Authority found that the proposal could not have progressed to this point without active participation and agreement from BCL, which Ms Wright had confirmed. It was clear from the evidence that the arrangement had the potential to have an adverse effect on the employees. By the time of the December 2019 announcement, it had been agreed BCL would end its operation, including the functions previously performed by the midwives. The remaining question related to whether or not they should be offered an opportunity to transfer to MDHB, and on what terms. There was no possibility of redeployment within BCL.

[39] There were aspects of a potential transfer that many of the employees considered disadvantageous and adverse.[37] These were outlined.[38] The evidence

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34 At [45].
35 *New Zealand Public Service Assoc Inc v Auckland City Council* [2003] 1 ERNZ 57 (EmpC).
36 *Matsas v Birthing Centre Ltd*, above n 1, at [54].
37 At [55].
38 At [56].

satisfied the Authority that there were differences in the roles within the two organisations. In particular, it concluded that the requirement to perform secondary work would significantly reduce job satisfaction for the affected employees. Some of them had opted to work for BCL so they could concentrate on providing primary care, which was BCL's approach.[39] There were also issues of potential loss of autonomy with the introduction of doctors and, to a lesser extent, nurses into the workplace.[40] Accordingly, the requirement to consult had been triggered before the announcement of 12 December 2019, but this had not occurred.[41]

[40] The Authority then turned to an argument raised by the company that it did not need to comply with s 4(1A) of the Act because s 4(1B) applied. That is, there was a good reason to maintain the confidentiality of the information, for example to avoid unreasonable prejudice to the employer's commercial position.[42]

[41] The Authority did not think the section applied because it was MDHB's demand that confidentiality be maintained. MDHB was not the employer, and the evidence was that the purpose of the confidentiality requirement was primarily to protect its commercial interests so it could explore the possibility of a transfer without gossip and speculation which could impact upon public confidence in its services.[43]

[42] The Authority found that no evidence had been offered about what those commercial interests might be and did not accept that suppressing possible gossip about how a public, and publicly funded, body provides its services could justify depriving BCL's staff of what was in the first instance a statutory right.[44]

[43] The evidence with respect to BCL was just as sparse. Ms Wright had said that the company would need to share confidential information such as the rent value of the Centre, which had never been disclosed to a DHB. It would also encourage the flow of information between the parties. The Authority found that was far from being an adequate ground for depriving staff of a statutory right. With regard to the point

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39 At [57].
40 At [58].
41 At [59].
42 At [61].
43 At [62].
44 At [63].

relating to the amount of rent payable, it was not explained why the information was so sensitive.[45] Consequently, the exemption on giving information did not apply. Thus, BCL was under a duty to consult with staff when considering whether or not to enter into an arrangement with MDHB.[46]

[44] The Authority then turned to the definition of redundancy, which BCL had conceded was what had occurred. Whilst there is no statutory definition of the term, it was noted that a redundancy situation arises when there is, first, a decision that the position occupied by an employee is surplus to the needs of the employer, and then, as a result, the employment is terminated.[47]

[45] The Authority then went on to consider the question of whether there was a breach of the following provisions of the employment agreements of the employees, which stated:[48]

> In the event that your employment is terminated for redundancy, you will be given 4-weeks' notice or pay in-lieu of such notice and you will not be entitled to any compensation for redundancy.
>
> In the event of a merger, amalgamation, or reconstruction of all or part of the Company's business such that your employment is terminated and you are offered employment with the purchaser or any other party to the merger, amalgamation, or reconstruction on terms and conditions which are generally no less favourable than your existing terms and conditions, the Company will be under no obligation to provide you with any form of notice of redundancy or other compensation.

[46] The Authority then considered several points arising from the agreement. First, it found that the evidence was clear that after 12 December 2019, the issue was not whether or not the midwives' employment with BCL would end, but about terms they would be offered to transfer to MDHB, or indeed whether an offer would be forthcoming. The Authority found that the situation was summarised in BCL's statement in reply where it was noted it could not "transfer" the midwives' employment, and that any "transfer" of employment had to be effected by BCL

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45 At [65].
46 At [66].
47 At [67].
48 At [42].

terminating their employment, or an offer of new employment with MDHB being made and accepted.[49]

[47] Although Ms Wright may have lobbied on behalf of BCL's staff, the real consultation was, by this point, taking place between MERAS, the employees and MDHB. BCL was no longer a decision maker and effectively abrogated its duty to consult with its staff by passing responsibility to MERAS.[50]

[48] This failure confirmed the earlier conclusion that dismissals were, with one possible exception, unjustified. That exception was Ms Spilman and arose from the fact that she resigned while the process was incomplete.[51]

[49] Then the issue of notice was addressed. As it accepted, BCL had not given formal notice. Furthermore, the letters sent to the employees, which confirmed that employment would cease at the end of March 2020, were forwarded within four weeks of the event occurring, so even if they could be considered notice, there was lack of compliance with the requirements of the employment agreements.[52] The Authority could not accept that termination occurred by mutual agreement at least with respect to those who accepted MDHB's offer. There was no evidence that the midwives had agreed to cessation. They were not given a choice as their positions would no longer exist. They accepted employment with MDHB, having been told by BCL that their tenure there had ended.[53]

[50] Finally, there was an argument that notice was not required as the employment agreements stated it was not necessary in the event of a transfer of all or part of BCL's business to a new provider, where employment was on terms and conditions which are generally no less favourable than those existing with BCL. The Authority confirmed the evidence satisfied it that the terms were not sufficiently similar so that they could be considered no less favourable.[54]

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49 At [70]–[71].
50 At [72].
51 At [73].
52 At [74].
53 At [75].
54 At [76].

[51] There was then discussion as to Ms Spilman's position, with the Authority concluding that her resignation, which took effect on 19 March 2020 and before her position with BCL ceased, was pre-emptive. It did not accept that the resignation amounted to a constructive dismissal in the circumstances because she had no option but to resign. Accordingly, her claim failed.[55]

[52] A claim made by all the midwives for a penalty for breach of good faith also failed. Whilst breach was established, the Authority did not consider a penalty to be appropriate.[56]

[53] The Authority then went on to consider remedies. As these are not in issue in the challenge, I do not need to refer in any depth to the reasoning which was adopted.

[54] The Authority concluded that Ms Matsas, Ms Babb, Ms Robben, Ms van Duin and Ms Hansen each had a personal grievance that they had been unjustifiably dismissed, and that four of them should be paid their contractual notice period. Thus, each of Ms Matsas, Ms Babb, Ms Robben and Ms van Duin was ordered to be paid $5,000 as compensation for humiliation, loss of dignity and injury to feelings, together with four weeks' wages. Ms Hansen was awarded compensation for humiliation, loss of dignity and injury to feelings of $8,000. As noted, Ms Spilman's claim had not succeeded, and neither had the application for penalties. Costs were reserved.[57]

Issue 1: Application of s 4(1A)(c)

[55] It is convenient to consider each of the issues raised by the challenge, as set out earlier,[58] chronologically.

[56] Section 4(1A)(c) of the Act provides:

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55 At [77]–[78].
56 At [79]–[80].
57 At [97]–[100].
58 See above at [2].

(1A) The duty of good faith in subsection (1)—

…

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[57] Mr Langton, counsel for the plaintiff, submitted in essence that the obligations under the subsection could not apply in respect of a transfer to MDHB, as there was no "proposal" within the meaning of the section, "either before the split second it said it would transfer the Centre, or before the MOU was agreed". Mr Langton submitted that a commercial transaction would not fall within the terms of the subsection and that context was critical to the application of the test.

[58] Mr Mitchell KC, counsel for the defendants, said that by 10 September 2019 when the Board considered a paper which had been prepared for it containing a suggestion that involved MDBH employing the midwives rather than BCL, the employer had an obligation under the subsection to obtain feedback from the midwives as to that proposal. He said there was "a real likelihood" that a decision would be made terminating their employment.

[59] The Authority and Mr Langton referred to *New Zealand Public Service Assoc Inc v Auckland City Council* in their reasoning.[59] In that case, a question arose as to whether a particular report, which had been commissioned by a local authority and contained recommendations on future expenditure issues, was a "proposal" under s 4 of the Act in its then form.

[60] Section 4(4) stated that the "duty of good faith" – referred to earlier in s 4(1) – applied to a range of matters including "a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business."

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59 *New Zealand Public Service Assoc Inc v Auckland City Council*, above n 35.

[61] A full Court concluded that whilst it was accepted that the consultant's report plainly addressed changing the employer's business, it did not of itself effect any changes, nor could it be described as a "proposal" on the part of the Council. The interaction between Council officers and the consultant's team was purely for information purposes, with no obligation on the Council to act on the resulting options identified through the process. The Court said, however, that "proposals" were developed by the Council after the receipt of the report.[60] The Court added that the Council's stance that it would not disclose anything until it had been "decided upon" by the Council kept the relevant union in the dark and significantly affected its ability to engage in effective consultation.[61]

[62] In summary, the Court held:[62]

> A "proposal" for the purposes of s 4(4)(d) of the Act does not include a consultant's proposal or recommendation for an employer to consider but, if adopted or pursued by the employing Council, is a proposal for the purposes of that section.

[63] The case proceeded on appeal before a full Court of the Court of Appeal. The appeal was allowed, but the status of the consultant's report was not in issue.[63]

[64] Speaking generally as regards the obligation of good faith, the Court of Appeal said this regarding s 4 obligations in the form which then existed:[64]

> There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.

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60 At [86].
61 At [90].
62 At [101].
63 *Auckland City Council v New Zealand Public Service Assoc Inc* [2004] 2 NZLR 10 (CA)
64 At [24].

[65] It is to be noted that the subsection considered by the two Courts was subsequently amended. For ease of reference, I attach the various iterations of s 4 since it was introduced in 2000 as a schedule to this judgment.

[66] The current provisions of s 4(1A) amplify the core duty of good faith, as described in s 4(1). For present purposes, it is to be noted that the duty of good faith 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. Then, s 4(1A)(c) goes on to state that without limiting subs (b), an employer who is proposing to make a decision that "will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees", has duties which arise as to the provision of information.

[67] The term "proposing" thus arises in the context of the expansive definition relating to the duty of good faith. The terminology adopted by Parliament does not, in my view, lead to a conclusion that there must be a settled position between the parties. The concept of "proposing" may mean that the circumstances have not yet reached the point of being a concluded contract, since the whole point of consultation is to hear what the affected employees may wish to advance by way of comment before a concluded view as to the way forward is reached. In short, something that is proposed may involve content that is yet to reach finality.

[68] It is not necessarily helpful to analyse the concepts in contractual terms since the subsection does not refer to a contract or agreement having been concluded. That said, if a contractual arrangement is on foot, but affected employees have yet to exercise their statutory rights, a contractual condition which provides for proper consultation with employees might be appropriate.

[69] The dicta from the Court of Appeal judgment in *New Zealand Public Service Assoc Inc* must now be considered in light of the current statutory framework in s 4. I consider that the Court's point as to flexibility of timing of consultation about a proposal, in the context of the enhanced obligations contained in s 4(1A) and, if

appropriate, s 4(1B) and s 4(1C), remains valid notwithstanding the subsequent amendments.

[70] As noted, Mr Mitchell referred to a point in time, 19 September 2019, when the MDHB Board accepted a recommendation endorsing continued discussions with BCL "regarding a shared workforce model, considering all options for primary birthing across the region". However, a later and more developed stage of the negotiations was reported to the Board on 25 October 2019, which resulted in it accepting a recommendation that MDHB progress "… this model of care and contractual arrangements with the Wright Foundation with a view to an April 2020 start".

[71] As recorded by the Authority, express reference was made in the paper to the selection process of staff at the Centre, with several options being considered for communication. One of these was the possibility of "early and embargoed discussions with MERAS and NZNO unions to confidentially involve them in the process." This criterion was not actioned. It was, however, an express recognition of the interests of the midwives.

[72] In my view, there was a proposal that the midwives would become employees of MDHB under the model which had been developed. It is plain that the circumstances fell squarely within s 4(1A)(c) by that stage. The Authority did not err in reaching this conclusion.

Issue 2: Application of s 4(1B) and s 4(1C)

[73] Section 4(1B) and s 4(1C) of the Act currently provide:

> (1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—
>
> (a) that is about an identifiable individual other than the affected employee if providing access to that information would involve the unwarranted disclosure of the affairs of that other individual:
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> (b) that is subject to a statutory requirement to maintain confidentiality:
>
> (c) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid

unreasonable prejudice to the employer's commercial position).

(1C) To avoid doubt,—

(a) subsection (1B) does not affect an employer's obligations under—

(i) the Official Information Act 1982 (despite section 52(3) of that Act); or

(ii) the Privacy Act 2020 (despite section 24(1) of that Act):

(b) an employer must not refuse to provide access to information under subsection (1A)(c) merely because the information is contained in a document that includes confidential information.

[74] Mr Langton submitted that were the Court to conclude there was a qualifying proposal under s 4(1A), the exemptions of s 4(1B) and s 4(1C) apply. This was because there was good reason to maintain confidentiality of the DHB's commercial information. Additionally, it was appropriate for the employer to agree to the requested confidentiality. He also relied on further considerations which BCL itself had for requiring confidentiality.

[75] These statutory provisions were considered in depth by a full Court in *Vice-Chancellor of Massey University v Wrigley.*[65] Mr Langton submitted this Court has not directly considered the exemptions since legislative changes were made in 2014, which post-dated *Wrigley*. He submitted that the Court should now reconsider the appropriate test as to what would constitute a good reason under the current provisions in light of these developments.

[76] He argued that the test to be applied is what he described as a hybrid one. The first step was whether the employer genuinely believed there was a good reason for it needing to withhold information (which he said was a subjective test for which the Authority and Court could not substitute a decision). The second step was whether there were reasonable grounds for doing so (an objective test that considers the basis for the employer's genuine belief, including whether the employer's reasons are lawful). He said if, by such an analysis, there is a good reason for withholding, the exemptions would apply.

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[65] *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138.

[77] It is necessary to review the legislative history with regard to the scope of good faith duties in considering commercial factors.

[78] In the original form of s 4, which took effect on 2 October 2000, s 4(4) provided that the core duty of good faith applied to a range of matters, including "a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business."[66]

[79] This provision applied until 30 November 2004, when s 4(1A)–(1C) were inserted.[67] Section 4(1A)(c) required the employer to give employees an opportunity to comment before a relevant decision was made. This was subject to the exception in s 4(1B), by which the employer was not required to provide access to "confidential information if there is good reason to maintain the confidentiality of the information." Section 4(1C) explained that a good reason under s 4(1B) included "protecting the commercial position of an employer from being unreasonably prejudiced."

[80] In the second reading of the Bill giving rise to this provision, the Minister of Labour mentioned that employers "will not have to provide information where that would unreasonably prejudice their commercial position – a clearly sensible recommendation".[68]

[81] The full Court considered the 2004 version of the applicable subsection in *Wrigley*. It discussed the issue of "good reason" in some detail. Then it said:[69]

> We conclude that the only meaning to be given to the opening words of s 4(1C) which is consistent with its purpose is that what follows in subparas (a) to (c) are examples of the types of consideration which may constitute "good reason". If confidentiality of any particular relevant information is to be maintained, there must be sufficiently good reason to do so. In any particular case, whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and those of maintaining confidentiality. How serious those effects are likely to be and how likely they are to occur, will be important. Equally, the employer must consider means of reducing possible adverse effects and restrict access to information only to the extent necessary to reduce the adverse effects of sharing that information to a

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66 Employment Relations Act 2000, s 4(4)(d). See attached schedule.
67 Employment Relations Amendment Act (No 2) 2004, s 5(1). See attached schedule.
68 (5 October 2004) 620 NZPD 15820.
69 *Vice-Chancellor of Massey University v Wrigley*, above n 65, at [81].

> level which no longer constitutes a sufficiently good reason to maintain confidentiality of the remaining information. …

[82] Later in its judgment, the Court touched briefly on the exception relating to the protection of the commercial position of an employer. It noted that this was not relied on by the parties and the Court had not received submissions as to its scope. The only observation it made was that this exception was qualified by the requirement that information about the commercial position of an employer needed to be at risk of unreasonable prejudice before it could be withheld. It said this exception was most likely to be relevant where an employer was considering dismissing staff for economic reasons.[70]

[83] In that instance, the Court was concerned with the interaction with these provisions with the statutory mandates contained in the Privacy Act 1993 and the Official Information Act 1982, as well as the need to protect the privacy of natural persons. The Court found that the information which was before it was either not confidential information or was not captured by the s 4 exemption.[71]

[84] It was this issue that was then considered by Parliament, and which resulted in the Employment Relations Amendment Bill 2013. The explanatory note of the Bill and the amendments which were introduced made it clear that material would be exempt from disclosure if the information was:[72]

- about an identifiable individual other than the affected employee:
- evaluative or opinion material compiled for the purpose of making a decision that may affect an employee's continued employment:
- about the identity of the person who supplied the evaluative or opinion material.

[85] In short, the focus of the amendments was not on the concept of "good reason", but on issues raised in the statutes as considered by the full Court in *Wrigley*. Section 4(1B) and s 4(1C) were amended accordingly.[73]

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70 At [113].
71 At [134].
72 Employment Relations Amendment Bill (105-1) (explanatory note) at 6.
73 Employment Relations Amendment Act 2014, s 4.

[86] In these circumstances, I consider that the full Court's discussion of "good reason" was unaffected by these amendments. What it said as to the opening words of s 4(1C) was intended to be of general application; included in its ambit was the provision relating to the commercial position of an employer.

[87] Under the version of s 4(1C) that was before the full Court, "good reason" included "protecting the commercial position of an employer from being unreasonably prejudiced." Under the current provision, an employer is not required to provide access to confidential information "where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position)."

[88] In summary, the concept of good reason has been maintained, as has the concept of confidentiality of an employer's commercial position being maintained to avoid unreasonable prejudice.

[89] In the circumstances, I consider that the dicta of the full Court as to what an analysis of good reason entails stands.

[90] The test suggested by Mr Langton[74] appears to have been derived from a passing observation made by Judge Couch in *Harris v Charter Trucks Ltd*. In that case, an employer genuinely believed information was confidential and did not need to be disclosed. However, Judge Couch held the statutory test did not involve the subjective belief of the employer. Rather, the test was whether the commercial position of the employer could have been unreasonably prejudiced by the disclosure, which was an objective test.[75] This finding was made in 2007 under the same provisions as were considered by the full Court.

[91] I respectfully conclude that the Judge was correct to reject an approach which allowed the employer's genuine subjective belief to be determinative. In a case such as the present, the evaluation to be carried out by the Court must be informed by s 103A which provides the test of justification. What I must therefore consider is

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74 See above at [76].
75 *Harris v Charter Trucks Ltd* EmpC Christchurch CC 16/07, 11 September 2007 at [74].

whether a fair and reasonable employer could have concluded that disclosure of the subject information would cause unreasonable prejudice to the employer's commercial position. From that perspective, was there a "good reason" for the non-disclosure? I proceed accordingly.

[92] Mr Langton urged the Court to find that here the employer genuinely believed it was in its interest to agree to the DHB's requirement for confidentiality. This was in light of the commercial concerns which had been expressed by the DHB and in light of the employer's own concerns about its financial position. An aspect of the latter was that BCL also faced funding and resourcing issues at other centres and wished to protect its negotiating position with other DHBs while the negotiations were taking place. He also said that BCL's position was that the transfer to MDHB would help achieve its primary objective of increasing the accessibility of primary birthing services in New Zealand. He asserted that had confidentiality been breached, MDHB could have pursued it for a breach of confidentiality or withdrawn its funding of BCL, which would have caused further operational losses.

[93] The starting point for assessment must be the good faith duties owed by employer and employee to each other, as set out in s 4. Under s 4(1A)(c), there is a presumption of disclosure of information that is likely to have an adverse effect on the continuation of employment. The issue is whether there was any good reason which would have justified the employer in not even considering whether to communicate the proposal to the employees.

[94] It is not entirely clear that there were discussions with Ms Wright about the various issues outlined in the paper considered by the Board on 25 October 2019, including the option of "early and embargoed discussions with MERAS and NZNO unions to confidentially involve them in the process".

[95] In my view, a fair and reasonable employer could in the circumstances have considered options for exploring whether it could maintain the integrity of BCL's commercial position as well as the DHB's commercial position, while informing its employees of the proposal in a confidential way.

[96] No doubt there are several mechanisms by which this could have been achieved. One was the particular possibility identified in the Board paper that the relevant unions, on behalf of their members, be involved in considering the options on an embargoed basis.

[97] Although there was a concern that "gossip" might occur and/or that negotiations in other centres could be affected, professional union officials who may agree to embargoed arrangements can, under their good faith duties, be expected to comply with the terms of that agreement.

[98] A fair and reasonable employer could, as another possibility, have considered an offer to take over the business operation subject to a condition that staff be consulted on a confidential basis and that their views be considered before the contract could become unconditional. Again, employees engaging in such a confidential consultation process would have good faith obligations to maintain the confidentiality. The issue of leaks by employees would have to be assessed in light of evidence they would not meet their obligations even if an acknowledgement of these was obtained from them.

[99] The short point is that there was no consideration by BCL of any such option. I am not satisfied that it was entitled to proceed without exploring these possibilities, which were steps that a fair and reasonable employer could be expected to have taken in all the circumstances.

Issue 3: Was there a dismissal?

[100] Mr Langton noted that dismissal has been construed as meaning "a permanent and terminal sending away of an employee by an employer".[76]

[101] He said that in practical terms, the transfer of employment to a new employer can be achieved in a variety of ways which may not necessarily amount to a termination.

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[76] *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC) at 418.

[102] Two particular examples he cited were where an employee may accept new employment with a transferee of a business, with the vendor then releasing the employee from their employment. The first was by way of waiver, and the second was by way of a mutual termination. He said the effect of either analysis was that the redundancy provision of the IEAs would not apply.

Waiver?

[103] Mr Langton submitted that four of the midwives accepted employment with MDHB and that upon accepting new employment, they were under an obligation to provide notice to BCL. It was also argued that BCL waived that requirement.

[104] The Authority found that the evidence was clear that after 12 December 2019, the issue was not whether the employees' employment with BCL would end, but rather, the issue had become what terms they would be offered to "transfer" to MDHB, or indeed whether an offer to transfer would be forthcoming.[77]

[105] The Authority was right to note that employment with MDHB was not automatic. MDHB's position was that it hoped it could provide opportunities for all BCL staff, but this was not guaranteed. As the Board paper of 25 October 2019 noted, a selection process would be followed, expressions of interest would have to be advanced, and "only suitably skilled and qualified staff" would be appointed to roles having regard to other criteria such as "fit" with organisational values and team dynamics. The document recorded it was possible some staff at the Centre would not be appointed, at which point a wider recruitment process would be commenced. Staff would be employed on MDHB terms and conditions, and not necessarily those which had applied previously.

[106] The midwives who did obtain work with MDHB described the process they undertook to obtain employment. MDHB provided envelopes which contained application forms. BCL did not provide these to the midwives. They obtained them in various ways from MDHB.

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[77] *Matsas v Birthing Centre Ltd*, above n 1, at [70].

[107] Ms Wright said, in a letter which she had understood MDHB would provide to the midwives, that they would be "offered" employment. This was not in fact correct.

[108] Rather, the midwives were required to formally apply for employment with the DHB and to attend an interview. Employment with MDHB was not a fait accompli. It was subject to the process outlined in the 25 October 2019 paper and the process which was then adopted.

[109] While employment was on similar pay when ultimately offered, the terms were contained in a collective agreement between MERAS and the DHB. Further, the employment which was eventually obtained was not confined to primary midwifery as had been the case at BCL, which was important for the midwives. Nor were roster patterns as favourable as had been the case previously. The midwives did not consider their DHB terms and conditions were as satisfactory as the ones with BCL were.

[110] Moreover, the midwives' evidence was that their employment at BCL ended on 31 March 2020 because no work was available for them thereafter, and not because they had obtained work with the DHB and wished to terminate their employment with BCL so as to take up an employment opportunity with the DHB.

[111] In summary, whilst most obtained employment with the DHB from 1 April 2020, it is plain that they could not continue to work for BCL. They could only apply to MDHB for differing terms and conditions; those applications may or may not have been accepted and were in any event regarded as being less favourable.

[112] The midwives were not required to work out a period of notice. That was because no work was available.

[113] As I shall explain later, no formal notice of termination was given, and the midwives were not required to work out a period of notice. The essence of Mr Langton's submission was that BCL provided a waiver because the midwives were leaving the company without providing notice and that BCL did not object to this occurring. I am not persuaded that the circumstances can be regarded as amounting to a waiver by BCL. The midwives did not resign. BCL was unable to comply with

its obligation to provide work to its employees from and after 1 April 2021. In those circumstances, BCL was not in a position to waive anything because it was required to provide notice or make a payment in lieu, as I shall explain shortly.[78]

Mutual termination?

[114] I turn next to Mr Langton's alternative submission that the situation could be understood as being one of mutual termination. He submitted the parties agreed on a transfer date being the date on which the employees' employment with the vendor would end and their employment with the "transferee" would commence.

[115] In *Ellish v Network Service Providers Ltd*, Chief Judge Inglis noted there are a number of ways in which employment relationships may come to an end, ranging from a decision that is fully the employee's to one that is fully the employer's.[79] Thus, at one end of the spectrum there are cases which may be recognised as (employer) dismissal; at the other end of the spectrum (employee) resignation. She also said there is a shady area around the middle of the spectrum. Cases referred to as "mutual consent to terminate" sit at the epicentre. Terminations which occur at that point of equilibrium may carry a degree of risk for both parties.[80] I consider this case is at the point of equilibrium.

[116] In such a case, there is a distinction between the issue of mutual consent and the issue of whether the employee has simply signified assent to what is, in effect, a fait accompli.

[117] This approach is exemplified by the decision in *Hellyer Brothers Ltd v Atkinson*, where a review of many authorities of this kind were considered.[81] It is evident from such cases that the focus must be on the reality of a situation rather than its form.

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78 Each IEA contained a clause providing for waiver of notice in a non-redundancy termination, but it was not submitted this clause applied.
79 *Ellish v Network Service Providers Ltd* [2021] NZEmpC 175, [2021] ERNZ 950.
80 At [16].
81 *Hellyer Brothers Ltd v Atkinson* [1992] IRLR 540 (EAT).

[118] One of those realities is that there is an inherent imbalance of power between employer and employee. In assessing whether there was a mutual termination, this is a relevant matter of context.

[119] The possibility of the midwives working for the DHB was one which was imposed on them following the decision which was announced on 12 December 2019. As noted, midwives could apply to work for the DHB, but this was not guaranteed. They were presented with a decision that had already been made: that their employment with BCL would end. These are not the circumstances of a mutual termination.

Which provision of the IEAs applied?

[120] It follows from the foregoing that neither a waiver nor mutual termination analysis applies, and that the applicable redundancy provision of the IEA was applicable.

[121] However, there was a debate between counsel as to which provisions of the IEA applied.

[122] Mr Mitchell submitted that the clause relied on by the Authority was the provision I set out earlier, and which was premised on the employee becoming redundant.[82]

[123] Mr Langton suggested that the next clause was applicable, which related to a restructuring as defined under the Act.[83] That clause provided that if a third party acquired or undertook the employing party's business and offered employment on terms and conditions which were generally no less favourable than existing terms and conditions, the employee would not be entitled to notice or any redundancy compensation from the original entity.

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82 See above at [45].

83 The clause in each IEA referred to a restructure "as defined in s 69L" of the Act. The correct provision is s 69B of that Act.

[124] I am not persuaded that the circumstances fall within the statutory definition of "restructure" since the related circumstances of "contracting out", "contracting in", "subsequent contracting" or "selling or transferring an employer's business or part of it to another person" did not exist. Nor were the midwives offered terms and conditions that were the same or no less favourable than their existing terms and conditions. Accordingly, the present case falls within the terms of the redundancy provision, since each employee was in fact made redundant.

[125] I find that the Authority did not err by its reference to the redundancy provision, or in finding that the midwives were not offered employment on similar terms and conditions.

[126] The Authority went on to conclude that BCL did not adhere to the statutory minima under s 4(1A) of the Act with regard to effective consultation prior to the relevant decision being made on 19 December 2019. Rather, the midwives were presented with a fait accompli, as I have noted.

[127] The consultation which followed the making of the decision that their employment would end on 31 March 2020 was inadequate for a second reason. The Authority held this was because discussions as to terms and conditions which would apply to a midwife who succeeded in obtaining employment with MDHB were undertaken with that entity, and not with BCL.

[128] The Authority determined that BCL had in effect abrogated its duty to consult on the issue of whether redundancy would occur. In light of the extensive evidence I heard on this topic, I agree.

[129] I find the Authority did not err in reaching these conclusions which led to the finding that the midwives were unjustifiably dismissed.

Issue 4: Breach of employment agreements

[130] The final issue relates to whether, in the circumstances, the defendants were entitled to notice, or payment in lieu.

[131] Mr Langton's primary submission was that there was either a waiver or a mutual agreement to terminate so that this obligation no longer stood. I have concluded that this is not a correct analysis.

[132] Then he submitted that the Authority erred because the midwives who were employed by MDHB did so on terms and conditions that were no less favourable, so that under the terms of the IEAs, BCL was relieved of any obligation to provide notice. Again, I have not accepted that the terms and conditions were sufficiently similar, so the requirement to give four weeks' notice or payment in lieu stood.

[133] Finally, he submitted that if a breach of the employment agreement occurred, the midwives mitigated their losses by gaining new employment immediately. As a result, they did not suffer any loss as a result of the notice period not being paid. He submitted the appropriate remedy of damages needed to be measured against the midwives' actual losses, and as they did not suffer any losses, no compensatory damages needed to be paid.[84]

[134] On this point, Mr Mitchell submitted that the amount awarded by the Authority was not a damages award. He argued that it was a compensatory award under s 123(1)(c)(ii) of the Act and that it was compensation for the lack of a notice period. He suggested the contractual provision requiring notice was a "penal-type" provision so that the issue of mitigation did not arise.

[135] Section 123(1)(c)(ii) provides for the payment of compensation for "loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen".

[136] Four of the employees were awarded a sum of "four weeks wages being the unpaid notice period". The Authority stated that this order was intended "to compensate for the failure to give notice".

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[84] Reliance was placed on *Hamer v Transport Commercial (Auckland) Ltd* [1998] 1 ERNZ 509 (EmpC) at 520, a case involving a claim for damages, and not for remedies arising from a personal grievance. More recently, the Court has concluded that there is a distinction to be drawn, for mitigation purposes, between these two categories of claim: *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 at [57].

[137] This finding requires consideration of the language used in the redundancy provision.[85] Under the provision, where there was a termination for redundancy, the employee would be given four weeks' notice, or pay in lieu of such notice. In those circumstances, the employee would not be entitled to any compensation for redundancy.

[138] Before discussing how the provision for payment in lieu was intended to operate under the IEAs, I refer to the question as to whether notice of termination was in fact given. The Authority found that this was not the case and that BCL accepted this fact. In this Court, Ms Wright said that the letter to which I referred earlier[86] confirmed that the midwives' employment with BCL would terminate on 31 March 2020. She said the letter was intended to be included in an MDHB information pack, sent on or about 9 March 2020. However, only some of the midwives saw the letter, and those who did so, saw it "very late". On any view, four weeks' notice was not given. The Authority's understanding of the position is not shown to be incorrect.

[139] Since the contracted period of notice was not given, the payment in lieu obligation falls for consideration.

[140] In *GFW Agri-Products Ltd v Gibson*, the Court of Appeal noted that it is a mixed question of fact and law as to when a contract of employment comes to an end; further, the phrase "payment in lieu of notice" is equivocal.[87] The Court cited the House of Lords decision of *Delaney v Staples* in support of this proposition.[88] In *Delaney*, Brown-Wilkinson LJ made the point that the phrase is not a term of art. He said it is commonly used to describe many types of payment the legal analysis of which differs. He outlined four categories. The first three involved situations where an entitlement to payment in lieu arose under a contractual obligation on the employer to make the payment, rather than as damages for breach of contract. The fourth category, however, was one where the payment might be regarded as damages for breach of contract.

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85 See above at [45].
86 See above at [107].
87 *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 329.
88 *Delaney v Staples (t/a De Montfort Recruitment)* [1992] 1 AC 687 (HL) at 692. This judgment is discussed in detail in *Marshall v Market Gardeners Ltd* EmpC Auckland AC6/01, 14 February 2001.

[141] I refer to *Atwill v Tanners Timberworld Ltd*, which is of assistance since it is, as in these proceedings, one which involved a personal grievance claim brought after an employee had been dismissed on the grounds of redundancy.[89]

[142] The Employment Tribunal had concluded that whilst the employer might have been entitled to terminate the employment in all of the circumstances, it did so unfairly and therefore unjustifiably. The relevant issue considered on appeal was whether the employee should have been entitled to a sum in lieu of notice since he was dismissed summarily. The Court found that three months would have been a reasonable period of notice of the intention to terminate. Then there was an issue as to mitigation since the employee was able to obtain an alternative job within two weeks. The employer had elected not to give notice but to, in effect, summarily dismiss the employee and to make a payment in lieu of the notice period. The employer assumed a payment of one month's salary in lieu of notice would be appropriate.

[143] The Court found that the obligation to pay one month's salary in lieu of notice crystallised at the time of dismissal. Put another way, the company, having elected to pay rather than to give notice, was obliged to pay a sum in lieu of notice to the employee at the time of his dismissal. It went on to conclude that in these circumstances, there was no obligation on the employee to mitigate his loss. Any liability to mitigate should not be determined after the event by reference to whether the employee had been fortuitous in obtaining employment. There was no question of the employee being obliged to mitigate the loss of a fixed sum to which he was entitled.[90]

[144] The same analysis is apt under the redundancy provision that applies here. Properly interpreted, the provision which applied to the midwives provided for a benefit which became payable if the employees were not required to work out a notice period. The obligation to make such a payment crystallised on the date when their employment ceased, there being no formal advice of four weeks' notice of termination. Accordingly, the benefit provided for under each IEA for payment in lieu became payable. No issue of mitigation arose in light of the contractual entitlement. It should

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89 *Atwill v Tanners Timberworld Ltd* [1994] 1 ERNZ 321 (EmpC).
90 At 324–325.

not be characterised as an award which is akin to damages for breach of contract in respect of which the mitigation principle might apply.

[145] It follows that the Authority did not err in awarding the sums involved to the four midwives who were entitled to receive them.

[146] Mr Langton accepted in his oral submissions that the remedies ordered by the Authority would remain if his submissions in relation to the notice period were not accepted. Therefore, the Court is not required to revisit the basis of the calculations that were made.

Result

[147] The challenge is dismissed.

[148] The sums awarded by the Authority to each of the defendants are payable to them by BCL.

[149] I will receive memoranda as to costs if need be. Any application should be filed within 21 days of the date of this judgment.

B A Corkill
Judge

Judgment signed at 4.45 pm on 27 September 2023

SCHEDULE OF STATUTORY PROVISIONS

4 Parties to employment relationship to deal with each other in good faith

Applies from 2 October 2000 to 30 November 2004

2000 No 24

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(2) The employment relationships are those between—

(a) an employer and an employee employed by the employer:

(b) a union and an employer:

(c) a union and a member of the union:

(d) a union and another union that are parties bargaining for the same collective agreement:

(e) a union and another union that are parties to the same collective agreement:

(f) a union and a member of another union where both unions are bargaining for the same collective agreement:

(g) a union and a member of another union where both unions are parties to the same collective agreement:

(h) an employer and another employer where both employers are bargaining for the same collective agreement.

(3) Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

(4) The duty of good faith in subsection (1) applies to the following matters:

(a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:

(b) any matter arising under or in relation to a collective agreement while the agreement is in force:

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective

employment interests, including the effect on employees of changes to the employer's business:

(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:

(e) making employees redundant:

(f) access to a workplace by a representative of a union:

(g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.

(5) The matters specified in subsection (4) are examples and do not limit subsection (1).

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4 Parties to employment relationship to deal with each other in good faith

Applies from 1 December 2004 to 5 March 2015

2000 No 23

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

[(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) 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; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.]

[(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.]

[(1C) For the purpose of subsection (1B), good reason includes—

(a) complying with statutory requirements to maintain confidentiality:

(b) protecting the privacy of natural persons:

(c) protecting the commercial position of an employer from being unreasonably prejudiced.]

(2) The employment relationships are those between—

(a) an employer and an employee employed by the employer:

(b) a union and an employer:

(c) a union and a member of the union:

(d) a union and another union that are parties bargaining for the same collective agreement:

(e) a union and another union that are parties to the same collective agreement:

(f) a union and a member of another union where both unions are bargaining for the same collective agreement:

(g) a union and a member of another union where both unions are parties to the same collective agreement:

(h) an employer and another employer where both employers are bargaining for the same collective agreement.

(3) Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

(4) The duty of good faith in subsection (1) applies to the following matters:

(a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:

(b) any matter arising under or in relation to a collective agreement while the agreement is in force:

[(ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:]

[(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:]

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:

(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out

work otherwise done by the employees or to sell or transfer all or part of the employer's business:

(e) making employees redundant:

(f) access to a workplace by a representative of a union:

(g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.

(5) The matters specified in subsection (4) are examples and do not limit subsection (1).

[(6) It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee—

(a) not to be involved in bargaining for a collective agreement; or

(b) not to be covered by a collective agreement.]

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4 Parties to employment relationship to deal with each other in good faith

Applies from 6 March 2015

2000 No 24

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

[(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) 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; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.]

[(1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—

(a) that is about an identifiable individual other than the affected employee if providing access to that information would involve the unwarranted disclosure of the affairs of that other individual:

(b) that is subject to a statutory requirement to maintain confidentiality:

(c) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).]

[(1C) To avoid doubt,—

(a) subsection (1B) does not affect an employer's obligations under—

(i) the Official Information Act 1982 (despite section 52(3) of that Act); or

(ii) the Privacy Act 1993 (despite section 7(2) of that Act):

(b) an employer must not refuse to provide access to information under subsection (1A)(c) merely because the information is contained in a document that includes confidential information.]

[(1D) For the purposes of subsections (1B) and (1C), confidential information means information that is provided in circumstances where there is a mutual understanding (whether express or implied) of secrecy.]

(2) The employment relationships are those between—

(a) an employer and an employee employed by the employer:

(b) a union and an employer:

(c) a union and a member of the union:

(d) a union and another union that are parties bargaining for the same collective agreement:

(e) a union and another union that are parties to the same collective agreement:

(f) a union and a member of another union where both unions are bargaining for the same collective agreement:

(g) a union and a member of another union where both unions are parties to the same collective agreement:

(h) an employer and another employer where both employers are bargaining for the same collective agreement.

(3) Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.

(4) The duty of good faith in subsection (1) applies to the following matters:

(a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:

(b) any matter arising under or in relation to a collective agreement while the agreement is in force:

[(ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:]

[(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:]

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:

(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:

(e) making employees redundant:

(f) access to a workplace by a representative of a union:

(g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.

(5) The matters specified in subsection (4) are examples and do not limit subsection (1).

[(6) It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee—

(a) not to be involved in bargaining for a collective agreement; or

(b) not to be covered by a collective agreement.]