

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**Attention is drawn to the
order prohibiting
publication of certain
information in this
determination**

[2016] NZERA Auckland 7
5440640

BETWEEN KATIE FRANICH
 Applicant

AND VODAFONE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
 Kate Ashcroft for Respondent

Investigation Meeting: 19 August 2015 and 20 August 2015

Submissions Received: 25 August 2015 from Applicant
 28 August 2015 from Respondent

Determination: 7 January 2016

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Ms Franich’s employment was not affected to her disadvantage by an unjustifiable action of Vodafone with respect to its investigation of the bullying allegations.**
- B. One or more conditions of Ms Franich’s employment was affected to her disadvantage by unjustifiable actions of Vodafone with respect to its restructuring of the sales team in 2013.**

- C. Vodafone is ordered to reinstate Ms Franich into a position no less advantageous than her previous position and pay her compensation of \$7,000 for injury to her feelings within 28 days of the date of this determination.**

- D. Each of the claims for lost benefit and additional compensation is declined.**

- E. Vodafone has breached its statutory obligations of good faith and is ordered to pay a penalty of \$5,000 within 28 days of the date of this determination.**

- F. Costs are reserved.**

Non publication Orders

[1] In a preliminary determination dated 20 August 2015¹ I issued Non-Publication orders in respect to this matter. This determination is subject to those orders which continue in force.

Employment relationship problem

[2] Ms Katie Franich claims one or more conditions of her employment have been affected to her disadvantage by unjustifiable actions of Vodafone New Zealand Limited (Vodafone). Further Ms Franich claims Vodafone breached its statutory obligations of good faith toward her and breached terms of her employment agreement. Vodafone denies the claims.

[3] The employment relationship between Ms Franich and Vodafone is an ongoing relationship.

[4] I regret that the issuing of this determination was delayed due to the demands of other Authority matters and acknowledge the parties' patience.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms

¹ [2015] NZERA 251.

Franich and Vodafone but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[6] Ms Franich commenced employment with Vodafone as a Business Account Manager on 26 April 2011. The terms and conditions of Ms Franich's employment were set out in an individual employment agreement.

[7] On 7 December 2011 Ms Franich was appointed to the position of Business Relationship Manager. At the same time her reporting line changed to Mr Murphy Su'a, Team Manager, Business Relationship Managers. Prior to her appointment Mr Su'a had expressed concerns about Ms Franich's appointment and her ability to drive key KPI's for sales. Despite those reservations Ms Franich was appointed and began reporting to Mr Su'a.

[8] On 28 September 2012 Ms Franich met with Mr Su'a's manager, Mr Ian Pringle, and advised him of concerns she held about Mr Su'a's behaviour. In particular Ms Franich complained about Mr Su'a's moods, that he undermined her dealings with clients and she sensed that Mr Su'a did not want her in his team.

[9] In late 2012 Vodafone and TelstraClear merged.

[10] On 1 July 2013 Vodafone commenced a restructuring process to consolidate the sales positions between the two merged companies.

[11] On 4 July 2013 Ms Franich together with two other members of Mr Su'a's team met with Mr Pringle and requested that she be moved from Mr Su'a's team. Ms Franich explained to Mr Pringle that Mr Su'a was not communicative, undermined her dealings with clients and was inconsistent in his dealings with the team. Mr Mehta explained that while all were managed poorly, Ms Franich wore the brunt of the behaviour.

[12] Ms Franich was advised of the outcome of the restructuring process on 9 July 2013. Ms Franich was advised that she would be confirmed into the role of Desk Based Account Manager. Ms Franich viewed her appointment to a desk based sales role as a demotion from her previous position which was a face to face sales role. Ms

Franich signed a written employment agreement on 19 July 2013 and as part of that change no longer reported to Mr Su'a.

[13] On or about 20 July 2013 Ms Franich was advised of comments made by Mr Su'a to Ms Franich's personal trainer about Ms Franich's weight.

[14] On 22 August 2013 Ms Franich raised a personal grievance. In the letter raising her grievance Ms Franich points to the complaints she had previously made about Mr Su' a in September 2012 and during the restructuring process in July 2013 as having contributed to her appointment to a desk based sales role.

[15] In September 2013 Vodafone began investigating Ms Franich's complaints. Ms Franich provided the names of six witnesses she wished to have interviewed as part of the investigation process. The investigation was undertaken by Ms Emily McConnell, an internal HR Consultant employed by Vodafone.

[16] Ms McConnell met with Ms Franich and her lawyer on 20 September 2013 where Ms McConnell sought further information about the specific incidents Ms Franich had set out in writing and which Ms Franich complained was a course of conduct amounting to bullying of her in the workplace. Following the meeting Ms Franich recalled one further incident which she says had a direct impact on her revenue figures and therefore her achievement of KPI's. Ms Franich provided information about this incident to Ms McConnell.

[17] On 1 October 2013 Ms McConnell completed her investigation and provided a copy of her report to Ms Franich. In summary Ms McConnell found the allegations of bullying had not been substantiated but identified a number of areas around Mr Su'a's management and communication style which required improvement. Ms McConnell advised Ms Franich that Vodafone considered the issue closed.

[18] On 17 October 2013 Ms Franich wrote to Vodafone expressing her concerns about the outcome of the investigation and some of its findings. Ms Franich also requested copies of all information on which Vodafone relied in making its decision to redeploy her into the desk based role. In particular she requested to see the assessments made of her and how she ranked compared to other members of the sales team.

[19] The parties attended mediation but it was unsuccessful in resolving the employment relationship problems between them.

Issues

[20] The issues for this determination are whether:

- a) One or more conditions of Ms Franich's employment were affected to her disadvantage by an unjustifiable action of Vodafone and if so, what if any, remedies should be awarded?
- b) Vodafone breached its statutory obligations of good faith and if so, what if any, penalty should be awarded?
- c) Vodafone breached the express or implied terms of the employment agreement and if so, what if any, penalty should be awarded?

Code of Conduct

[21] Vodafone has a documented Code of Conduct ("the Code") which all employees are expected to read, understand and adhere to. In particular the Code encourages employees to "speak up" if they see behaviour at work which they feel may be a breach of the Code or seems illegal or unethical. The Code sets out three ways to "speak up":

- a) report it to the line manager;
- b) report it to the local HR team; or
- c) report it confidentially to Expolink (Expolink is an external reporting mechanism).

[22] The Code states that if Vodafone decides to proceed to an investigation, it will use a qualified expert and will keep the person who raised the concern informed throughout the process.

[23] The Code defines workplace bullying in the following terms:

Workplace bullying is another form of harassment, where **repeated** and unwanted negative actions and behaviours are directed at an individual or group of individuals with the desire to gain power or exert influence. These actions or behaviours may be deliberate or subconscious, and can cause humiliation, offence and distress.

Behaviours associated with workplace bullying often fall into the following categories (this is not an exhaustive list):

- Personal insults (e.g. personal criticism, ridiculing or humiliating others about their work)
- Intimidation (e.g. misuse of power or position, threats of physical violence)
- Work-related harassment (e.g. withholding information important to an individuals' job; having responsibilities removed)
- Social exclusion (e.g. isolating; victimisation).

The Code sets out the following examples of harassment:

- Insulting someone, particularly on the grounds of his or her age, race, sex, disability, sexual orientation or religion
- Making fun of someone or putting them down
- Excluding or isolating someone from work or social activities
- Picking on someone because they have made a previous complaint of harassment
- Unwelcome flirtation or sexual advances
- Touching or standing too close when not invited to
- Displaying or circulating offensive materials (rude, racist or sexual pictures or cartoons)
- Making decisions on the basis of sexual favours being accepted or rejected
- Making inappropriate jokes or comments
- Bullying, misuse of power or a position of authority

[24] The Code contains a question and answer section which asks the question “*what do we mean by ‘harassment and bullying’?*” The answer is stated as:

We define harassment and bullying as unwanted behaviour from another person which is intimidating, malicious, offensive, insulting, humiliating or degrading. It may be related but not limited to age, gender, sexual orientation, race, disability, religion, or belief and can be either repeated or a one-off incident. It can be verbal, non-verbal, physical and isn't always face to face.

[25] Vodafone considers the issues of Harassment and Bullying as important and states in its policy guide that “*Harassment has no place at Vodafone*” and “*Vodafone will not tolerate any form of harassment (including bullying or discrimination) in the workplace.*”

Disadvantage

[26] There are two limbs to Ms Franich's claim under this heading:

- a) The first relates to her manager's treatment of her and the way in which Vodafone dealt with her complaint about that; and

b) The restructuring.

[27] The test for determining whether an employer's actions were justifiable is that set out in section 103A(2) of the Employment Relations Act 2000, namely whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. That issue must be determined on an objective basis² and, in applying the test, the Authority must consider the factors listed in subsection (3) and any other factors it thinks appropriate.

[28] Section 103A(5) requires the Authority not to determine an action to be unjustified solely because the employer followed a defective process if the defects were minor and did not result in the employee being treated unfairly.

[29] In *Angus v Ports of Auckland Ltd (No 2)*,³ the full Court held that the test means that there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome.⁴ The Authority's function is to determine whether an action taken by an employer or the way it acted falls within the band of reasonable responses available and not to substitute its view for that of the employer.

The Treatment of Ms Franich by her Manager

[30] Ms Franich claims Vodafone's investigation of her complaints about Mr Su'a was flawed because:

- a) the investigator incorrectly applied the Code as it relates to bullying and harassment;
- b) the procedure used to investigate the allegations was unfair and unreasonable;
- c) the findings from the investigation were not open to a fair and reasonable employer.

² Employment Relations Act 2000 section 103A(1).

³ [2011] NZEmpC 160; [2011] ERNZ 466.

⁴ Ibid at [22] and [23].

[31] In September 2012 Mr Pringle met one on one with each of Mr Su'a's seven direct reports when he stepped in to manage the team while Mr Su'a was away on leave.

[32] During his meeting with Ms Franich on or about 28 September 2012 Ms Franich advised Mr Pringle of concerns she had regarding Mr Su'a's management style, in particular that he was moody, he was undermining her dealings with clients and he did not want her in his team since day one and this was reflected in his day to day treatment of her.

[33] Three members of the team also commented negatively on Mr Su'a's management style while three other members of the team gave positive feedback about Mr Su'a.

[34] After Mr Su'a returned to work Mr Pringle met with him and spoke to him about the concerns that had been raised and provided him with coaching to improve his management skills. Mr Pringle moved his workstation to Mr Su'a's team, so that he could observe and monitor the team's interactions. Mr Pringle told the Authority this observation period continued for approximately 18 months.

[35] On 4 July 2013 Ms Franich, together with two other members of the team (Mr Barry Mehta and Ms Nina Rizel) met again with Mr Pringle where they requested that they be moved from Mr Su'a's team. Mr Pringle asked whether they had observed changes in Mr Su'a's behaviour and all three acknowledged that they had, but there had been a couple of recent issues that needed to be addressed.

[36] Examples of the type of conduct being experienced by Ms Franich was explained to Mr Pringle which included inappropriate personal comments being made by Mr Su'a, Mr Su'a inappropriately discussing individuals performance with others and the undermining of them with customers.

[37] At the investigation meeting Mr Mehta explained that he attended the meeting for moral support for Ms Franich. He told me he wanted to be neutral and not take sides. Ms Rizel's evidence to the Authority was that she also attended to support Ms Franich and was not there on her own account. Prior to this meeting, on 1 July 2013, Vodafone had embarked on a restructuring of the sales team roles. All three employees were directly affected by the restructuring as they were all members of the sales team.

[38] Ms Franich learned on 20 July 2013 that Mr Su'a had made personal comments about her weight the day before. Ms Franich raised these comments with Mr Pringle, who expressed his disappointment that Mr Su'a had had such a conversation and that the comments had then been passed onto Ms Franich. Mr Pringle offered to raise the comments with Mr Su'a if she wished, however, Ms Franich was unhappy with Mr Pringle's response and walked away without confirming whether she wished to have Mr Pringle follow up or not. Mr Pringle's evidence is that he did follow up with Mr Su'a but cannot recall Mr Su'a's response.

The investigation in Ms Franich's allegations

[39] Ms Franich raised a personal grievance on 22 August 2013. The personal grievance related to the issues she had with Mr Su'a which she had previously raised with Mr Pringle and which Ms Franich claimed led to her being demoted as a result of the restructuring.

[40] Vodafone met with Ms Franich and advised her that her allegations would be investigated. Ms McConnell undertook the investigation into Ms Franich's allegations. As part of the investigation Ms Franich provided to Ms McConnell an outline of 14 incidents that had occurred and which she alleged constituted a course of conduct which led her to feel bullied by her manager.

[41] Ms Franich claims the investigation undertaken by Vodafone was unfair and unreasonable.

[42] In a recent decision from the Employment Court⁵, the Court has described what it considered to be a textbook example of how an investigation should be carried out. Although the investigation in *Goel* was for a disciplinary process I have referred to the process used in that case to assist me in reviewing the process of investigation used by Vodafone, bearing in mind of course, that Vodafone was not investigating allegations against Ms Franich. The Court stated:⁶

In many ways, the process followed by Mr Firman was a textbook example of how a disciplinary investigation should be carried out. After receiving the terms of reference and finding out what was alleged, Mr Firman proceeded to work out what was required to be determined and who needed to be spoken to. He then constructed a series of open-ended investigation questions that would not bias the investigation. He used his manager to critique his questions and make sure that they were fit for the purpose. He told the Court that after crafting the questions he then made contact with Mr Goel and asked him who else he should talk to. He also ran over the process with Mr Goel and arranged to meet with him on 10

⁵ *Goel v The Director-General for Primary Industries* [2015] NZEmpC 214.

⁶ *Ibid* at [42] – [44].

January 2013 in a neutral area, the Wellington Library Cafe. He confirmed the meeting arrangement with Mr Goel in writing, reminding him that he could bring a support person/representative with him and he recommended that Mr Goel obtain support and assistance that was available to him through the EAP service.

Mr Firman followed the same process for all interviews. He asked the open-ended questions that he had prepared and he recorded the responses "hopefully verbatim" as the interviewees answered. There was nothing said to him that was not recorded in his notes. At the end of each interview he spell checked and then sent the transcript to each person interviewed, including Mr Goel and he had each person verify that the interview was correctly recorded. He then proceeded to draft his investigation report. He attached all of the interview notes to the report and sent a copy of everything to Mr Goel for his response. He had emailed Mr Goel and spoken to him on the telephone informing him that he needed his comments on the draft report prior to it being sent to the decision-maker.

Mr Goel went through the draft report and added his comments to the document through "track changes" which were highlighted in red. Mr Firman said that he carefully considered all of Mr Goel's comments but they did not lead him to change his conclusions or recommendations. He then proceeded to finalise his Formal Investigation Report which was dated 31 January 2013 and sent it through to Mr Bolger. The document Mr Bolger received included Mr Goel's marked-up comments highlighted in red. Mr Firman had no discussion with Mr Bolger about the nature of the disciplinary action (if any) to be taken against Mr Goel.

[43] Ms McConnell spoke to all six of the witnesses identified by Ms Franich. For the most part the interviews followed a structured interview format with prepared open questions. Each interview followed a similar format and responses were recorded in handwriting by Ms McConnell during each interview. Ms McConnell also interviewed Mr Henry Vaeoso who is Ms Franich's personal trainer and is on friendly terms with Mr Su'a. This interview did not follow the standard format as Mr Vaeoso was only interviewed so that he could provide information relating to the discussions he had had with Mr Su'a where Ms Franich had been discussed.

[44] None of those interviewed were provided with a copy of a transcript of their statements. At the Authority's investigation meeting, due to the effluxion of time the interviewees were unable to confirm whether the transcribed statements were an accurate reflection of their interviews.

[45] The report provided by Ms McConnell was a summary of findings in relation to each of the incidents Ms Franich had complained of. The transcripts of the interviews were not attached to the report.

[46] As a result of the findings in the report Mr Su'a was placed on a formal Performance Management Programme.

[47] I have identified a number of failures in the investigation process undertaken by Ms McConnell which may have impacted on the conclusions she reached:

- a) When conducting her investigation Ms McConnell failed to use Vodafone's definition of bullying and instead used a definition which did not elevate bullying or harassment to the level of intolerance identified by Vodafone in the Code.
- b) When interviewing Mr Su'a, Ms McConnell failed to provide to Mr Su'a copies of any of the interview notes, with the exception of the outline of the incidents alleged by Ms Franich. This is surprising given that a number of those witnesses asserted that in their opinion Ms Franich was bullied by Mr Su'a.
- c) Mr Mehta made comments about Mr Su'a being hurtful and making personal comments which could be hurtful. Despite investigating bullying allegations Ms McConnell did not explore these comments further or ask for examples of the type of comments Mr Su'a would make.
- d) Specific examples of the type of behaviour Ms Natalia Pedorina had experienced were provided to Ms McConnell during her interview, but these examples are not referred to in the report. At the Authority's investigation meeting Ms McConnell acknowledged that the type of behaviour experienced by Ms Pedorina could have been similar in nature to the allegations made by Ms Franich.
- e) Ms McConnell failed to follow up information she had received that Mr Su'a had made constant contact with Mr Vaoso to such an extent that he rang Vodafone (as a customer) to lodge a complaint about harassment and Vodafone refused to act on the complaint.
- f) Ms McConnell failed to follow through responses provided by Mr Pringle about whether Mr Su'a had coached Ms Franich to ensure she was dealing with customers correctly.
- g) Ms McConnell concluded inappropriate remarks about Ms Franich's weight did not constitute bullying as it was not repeated. This conclusion is not consistent with Mr Vaoso's statement to her that Mr Su'a discussed Ms Franich's weight at least twice.

[48] I find the conclusion that the allegations of bullying were not substantiated was an unsafe conclusion given all the failings in the investigation process. Ms McConnell appears to have given no credence to the information she received during her interviews.

[49] When drawing conclusions on each of the incidents set out in Ms Franich's initial complaint, Ms McConnell does not appear to have taken into account any of the statements made by those she interviewed other than the statements of Mr Su'a and Ms Franich. By way of example Ms McConnell was told by Ms Pedorina that Mr Su'a made personal comments of a sexual nature and had touched her on her shoulder. One of Ms Franich's complaints related to an incident where she was alone in a car with Mr Su'a and she claims he put his hand on her neck leaving her feeling very uncomfortable.

[50] In her conclusion about the incident as relayed by Ms Franich, Ms McConnell concluded that the incident was not upheld because neither Ms Franich nor Mr Su'a were able to prove that the incident did or did not happen as there were no witnesses. Ms McConnell has made no connection between the conduct complained about by Ms Franich and the similar conduct reported by Ms Pedorina.

[51] Overall, Ms McConnell concluded that Mr Su'a had conducted himself in a way that was unprofessional and lacked good judgment. Ms McConnell recommended action be taken to assist Mr Su'a in achieving significant improvement in his people management skills, in particular his communication skills and his professionalism. Ms McConnell does not address in her report Ms Franich's concerns that it was her raising of her concerns about Mr Su'a in September 2012 and July 2013 that led to her being deployed into the desk based role.

[52] I cannot speculate on whether, if Ms McConnell's investigation been more robust, her conclusions may have been different. Certainly there was evidence in the interview transcripts that could lead to a conclusion that Ms Franich had been subject to unwanted behaviour from another person which she found offensive, insulting, humiliating and degrading.

[53] The Authority is not enquiring into the actions Vodafone took against Mr Su'a. This matter is about Vodafone's actions and how it acted toward Ms Franich. I find the investigation into Ms Franich's allegations, while she was clearly unhappy

with the end result, did not lead Vodafone to act unjustifiably in relation to the allegations of bullying.

[54] Further, at the time Ms Franich made her formal complaint and the investigation process was completed, Ms Franich was no longer in a direct reporting relationship with Mr Su'a or working in his team.

Determination

[55] I am satisfied steps were taken to address Ms Franich's complaints after the initial complaints were made to Mr Pringle in September 2012. Mr Pringle raised the concerns with Mr Su'a and moved his [Mr Pringle's] workstation to allow him to observe the team in its day to day interactions. Members of the team including Ms Franich acknowledged they observed improvements in Mr Su'a's behaviour, albeit for a short period of time.

[56] Vodafone took no direct action following the 4 July 2013 meeting but when Ms Franich raised her concerns in writing on 22 August 2013 Vodafone took immediate steps to investigate her claims.

[57] I have found the conclusions reached by Ms McConnell about Ms Franich's allegations of bullying were unsafe due to a number of failures in the investigation process. However, following the submission of Ms McConnell's report Mr Su'a was placed on a formal Performance Management Plan to ensure the concerns raised in the report about his behaviour were addressed in a formal way.

[58] No action was taken against Ms Franich and she has not established to my satisfaction that one or more conditions of her employment have been affected to her disadvantage as a result of her raising the allegations against Mr Su'a.

July 2013 Restructuring

[59] Ms Franich says the restructuring in July 2013 was flawed because:

- a) There was no consultation about the new sales team structure, only the selection criteria;
- b) The selection criteria was not correctly applied;

- c) The selection criteria was not relevant to the roles and was overly subjective;
- d) Ms Franich was not provided with relevant information on which to comment before the decision to disestablish her role and place her in the desk based role was made;
- e) Ms Franich had no opportunity to understand, comment on, or challenge her managers' assessments of her;
- f) The consultation timeline was too short and was perfunctory;
- g) Ms Franich was not invited to seek legal advice.

[60] In [*Grace Team Accounting Limited v Brake*](#)⁷ the Court of Appeal upheld the earlier Employment Court⁸ decision which confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements. This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[61] The statutory good faith obligations requires parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship and prohibits parties from directly or indirectly misleading or deceiving each other.⁹

[62] Further section 4 of the Act requires employers proposing to make a decision that will or is likely to have an adverse impact on the continuation of the employment of one or more employees to provide access to all information relevant to the decision and an opportunity to comment on the information before a decision is made.¹⁰

[63] The Employment Court has discussed the application of section 103A (as set out earlier in this determination) to restructuring situations and has confirmed that the

⁷ [2014] NZCA 541.

⁸ [2013] NZEmpC 81.

⁹ Employment Relations Act 2000, section 4(1).

¹⁰ Employment Relations Act 2000, section 4(1A) (c).

Authority is obliged to inquire into the merits of an employer's decision to disestablish a role and whether that decision then led to any disadvantage.¹¹

Reasons for the restructure

[64] During 2012 Vodafone and TelstraClear Limited merged. As part of the merger process all positions were reviewed including the sales positions taking into account the requirements of the now merged companies.

[65] In April 2013 a new senior management structure had been implemented. In July 2013 Vodafone turned its attention to the sales team. Vodafone determined the new structure of the sale teams taking into account the size and nature of the market in each identified Region. Rather than having Business Relationship Managers which were all customer facing roles, it was decided to disestablish the Business Relationship Manager roles and establish instead, a mix of Account Managers, Desk Based Account Managers and Business Development Managers.

[66] At the first consultation meeting on 1 July 2013 the sales team employees were advised that because the ratio of roles for each region had been determined by the size and nature of the market in each region there would be no consultation on the number or the split of roles as they would not change.

[67] Given the statutory obligations of good faith Vodafone had towards its sales team I find Vodafone was required to consult with its sales team employees, including Ms Franich, prior to making a decision to disestablish the Business Relationship Roles. That this did not happen is a breach of Vodafone's statutory obligations of good faith.

Consultation

[68] The first consultation meeting about the restructuring of the sales team took place on 1 July 2013. The sales team were advised that the purpose of the consultation was only on how people would be selected into the roles.

[69] The proposed selection criteria included:

- a) % target commission earned in the 12 months to 31 March 2013;
- b) Manager assessment;

¹¹ *Ritson-Thomas t/a Totara Hills Farm v Davison* [2013] NZEmpC 39.

- c) Self-assessment with short written examples of how sales team members have demonstrated the Sales Competencies and the Vodafone Way;
- d) A 30 minute discussion with the employee's manager on a recent customer interaction or win, to demonstrate the employee's sales process and product knowledge.

[70] The sales team were provided with 2 days to provide feedback on the selection criteria to be applied, with a final decision being made on 3 July 2013. Ms Franich acknowledged at the investigation meeting that she did not provide any feedback on the proposed selection criteria. It was common ground that Ms Franich was not advised that she could seek independent advice about the proposed selection criteria.

[71] On 3 July 2013 at 10.00am the selection criteria as advised on 1 July 2013 was confirmed and from 4-8 July 2013 managers and employees undertook the assessments as anticipated in the selection criteria.

[72] I find the timeframes for receiving and considering feedback on the selection criteria to be constrictive. No satisfactory explanation has been provided by Vodafone as to the reasons why it was necessary to have such a short time frame for feedback on the selection criteria.

[73] The constrictive timeframes combined with the lack of any opportunity to seek independent advice about the selection criteria and how it would be applied rendered the consultation process meaningless.

Provision of full information

[74] During the selection period and after the selection criteria had been confirmed, the selection criteria was altered by removing the criteria of the % target commission earned in the 12 months to 31 March 2013. No notification about this change was given to Ms Franich or others affected by the restructuring.

[75] During the consultation period Vodafone did not advise the sales team of the weighting that would be applied to the remaining three criteria. At the investigation meeting Mr Pringle told the Authority that the weighting given to the managers' assessment and the self-assessment/interviews were split 90:10. In Ms Franich's case,

this meant that 90% of her overall assessment was based on Mr Su'a's assessment of her.

[76] Also not explained to the sales team during the consultation period was that the lowest rated employees through the assessment process would be placed in desk based roles while those who rated higher would be placed in face to face roles.

[77] This was because the Account Manager roles would look after bigger higher value strategic customers whose needs are met by potentially more complex solutions. It was therefore important for top performers to service those customers.

[78] Mr Su'a rated Ms Franich very low across the board and did not provide any examples to support his low rating of her. At the investigation meeting Mr Pringle confirmed that no alarm bells rang for him when he saw the assessment from Mr Su'a as he was aware of some issues about Ms Franich's customer service and of complaints that had been received.

[79] Vodafone says Mr Su'a's assessment of Ms Franich was consistent with Ms Franich's March 2013 performance review which resulted in an overall rating of "inconsistent performance" which is the second lowest rating of 5 possible ratings.

[80] Despite being approached by Ms Franich and two other members of the sales team on 4 July 2013 expressing concerns about Mr Su'a's conduct towards Ms Franich, Mr Pringle appears to have accepted, without question, Mr Su'a's low assessment of Ms Franich.

[81] Ms Franich was not provided with a copy of Mr Su'a's assessment of her for comment. This means she was not able to challenge Mr Su'a's assessment prior to a decision being made about whether she would be redeployed into a face to face role or a desked based role.

[82] As already set out, Mr Su'a's assessment of Ms Franich constituted 90% of her final rating and was determinative of where she would be placed on the matrix against all other sales team employees. Given the significance of Mr Su'a's rating of Ms Franich it was incumbent on Vodafone to ensure Ms Franich had access to the information and had a full opportunity to comment on it and constitutes a breach of Vodafone's obligations of good faith.

Deployment into desk based role

[83] On 9 July 2013, and without any further consultation Ms Franich was advised that the outcome of the selection process was that she would be redeployed into the desk based account manager role. This decision was confirmed in writing on 12 July 2013.

[84] I have accepted Ms Franich's evidence that when she signed the new employment agreement on 19 July 2013 she had no choice but to sign it if she wished to remain in employment. When Mr Pringle advised Ms Franich of the outcome of the restructuring he also advised her that she must sign a new employment agreement or she would be considered as giving notice of her resignation.

[85] The letter attaching the employment agreement made it clear Ms Franich had already been confirmed into the desk based role. Further, it seems the employment agreement attached to the letter was not so much an offer of redeployment, but was an updated agreement which included changes to the terms and conditions of employment. The letter sets out Vodafone's explanations of the changes. The letter does not contain any explanation as to what would happen should Ms Franich not wish to accept the amended employment agreement.

Determination

Ms Franich viewed her appointment to a desk based role as a demotion. This is denied by Vodafone which says the roles have the same function with very little difference in remuneration with the exception that the Account Manager roles received a car allowance.

[86] It was common ground that the Account Manager roles are face to face roles with a limited number of high end customers while the Desk Based Account Manager roles were not face to face and had a larger number of smaller customers.

[87] For Ms Franich, being in a desk based role with no opportunity to develop relationships face to face was a significant change for her. As was the change from dealing with large clients to smaller clients whose needs were not as complex. The Authority heard evidence that other Vodafone employees also considered the deployment into a desk based role as a demotion.

[88] As already stated in this determination, I find the process used by Vodafone in implementing its restructuring failed in a number of respects. Firstly, Vodafone failed

to consult about the new structure and the timeframes for feedback on the selection criteria was constrictive and Ms Franich was not advised of her right to seek independent advice or assistance which rendered the consultation process over the selection criteria meaningless. Vodafone failed to provide crucial information to Ms Franich about her manager's assessment of her and failed to consult with her prior to confirming her redeployment into a desk based role.

[89] I find the decision making and consultation process used by Vodafone in respect to the restructuring was flawed and have addressed the breaches of good faith later in this determination.

[90] While Ms Franich accepted the new terms and conditions of employment after being advised of the confirmation into her new role, she did so unhappily and under the threat that her employment would end if it was not signed.

[91] I find the desk based role was significantly different to the business relationship role previously undertaken by Ms Franich but that the Account Manager role was similar or the same. If the roles were the same, as contended by Vodafone, then it would not have mattered which of the sales team employees were deployed into the roles. Instead, Vodafone ranked each of the sales team employees and only deployed the top ranking employees into the Account Manager roles.

[92] While satisfied, having reviewed the income details of Ms Franich during 2013 and 2014, that Ms Franich has not been disadvantaged financially by her redeployment the failures in the consultation process led to one or more conditions of Ms Franich's employment being affected to her disadvantage by Vodafone's unjustified actions. The decision to redeploy Ms Franich into a desk based role was not a decision an employer acting fairly and reasonably could make in all the circumstances of this case.

[93] The defects in the process used by Vodafone were not minor and did result in Ms Franich being treated unfairly.

[94] Ms Franich has succeeded in her claim that she was disadvantaged in her employment by an unjustifiable action of her employer and is entitled to a consideration of remedies.

Remedies

[95] Ms Franich seeks the remedies of reinstatement, compensation of \$15,000 pursuant to section 123(1)(c)(i), lost benefit under section 123(1)(c)(ii) and further compensation under section 123(1)(c) as special damages.

Reinstatement

[96] Ms Franich seeks reinstatement to her former position or placement in a position no less advantageous to her. Vodafone opposes reinstatement to Ms Franich's former position as that position has been disestablished.

[97] The Authority must consider whether in this case, reinstatement is practicable and reasonable. Practicability concerns the prospects for successful reimposition of Ms Franich into her former position or a position no less advantageous to her.¹² Assessing the reasonableness of reinstatement requires a broad enquiry into the equities of the parties' cases and into the prospective effects of an order on not only Ms Franich and Vodafone, but on other employees.¹³

[98] Ms Franich was redeployed in July 2013. The position of Business Relationship Manager was disestablished at that point. I accept Vodafone's submissions that it is neither practicable nor reasonable to reinstate Ms Franich to her former role.

[99] The question then is whether it is practical and reasonable to reinstate Ms Franich to a role no less advantageous to her. It seems to me the most likely role would be an Account Manager role. There is no evidence that Ms Franich is not able to do the Account Manager job and indeed, Vodafone has previously offered Ms Franich an Account Manager position.

[100] In the absence of any evidence to the contrary it is my view that it is practicable and reasonable that Ms Franich be reinstated into a role which is no less advantageous to her which includes face to face sales.

[101] The order of reinstatement may create some difficulties and meetings will be necessary so that the parties can discuss and agree on a suitable role for Ms Franich. At this time of year this may take time to arrange and manage.

¹² *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 286.

¹³ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

[102] The order for reinstatement under section 126 of the Act is made on the following terms:

- a) Ms Franich is to be reinstated to a position no less advantageous to her which will include face to face sales;
- b) Reinstatement is to be undertaken within 28 days of the date of this determination;
- c) During the 28 days Vodafone is to arrange and Ms Franich is to attend meetings and/or mediation to discuss and agree on how and when she will take up the face to face sales role including any necessary changes to the terms and conditions of employment that will apply.

Compensation

[103] Ms Franich claims the sum of \$15,000 under section 123(1)(c)(i). I have found one or more conditions of Ms Franich's employment was affected to her disadvantage by Vodafone's unjustifiable actions. In coming to my conclusion I have been critical of the process carried out by Vodafone during the restructuring of the sales team.

[104] Ms Franich has given compelling evidence as to the affect her deployment into a desk based role had on her personally. Ms Franich's uncontested evidence is that she was tearful at work and at home and felt humiliated and distressed when she had to inform her previous customers of the change in account management. Ms Franich had developed close professional relationships with most clients and found it humiliating to have to advise them she would no longer be managing their accounts. Ms Franich believes she has lost the respect of her colleagues and has been the subject of gossip in the workplace.

[105] Ms Franich is entitled to a modest award for compensation and I set that at \$7,000 subject to my findings on contribution.

Lost benefit

[106] Ms Franich claims compensation for lost benefit on the basis that she earned less as a Desk Based Account Manager than she would have as an Account Manager.

[107] I have undertaken a comparison of the earnings of Ms Franich as well as another Business Relationship Manager who was deployed into the role of Account Manager. The comparison was for two years of earnings. In each of the years the two employees earned different amounts and so I have compared the increased amounts of both employees from their previous positions held in 2013 to their new positions held in 2014. The result of that comparison shows that both employees increased their fixed remuneration at the same percentage while Ms Franich increased her commission earnings at a higher percentage rate than the employee deployed into the Account Manager role.

[108] I find Ms Franich has failed to establish any lost benefit as a result of her deployment into a desk based role and the claim is declined.

Additional Compensation

[109] Counsel for Ms Franich claims compensation under section 123(1)(c) for reimbursement of legal fees she incurred during the investigation of her complaints against Mr Su'a.

[110] This claim is akin to a claim for special damages and amounts to a claim for pre-litigation costs. Such claims have been consistently rejected by both the Employment Court and the Authority.

[111] In the most recent case of *George v Auckland Council*¹⁴ the Court agreed with the approach of the Court in *Harwood v Next Homes Ltd*¹⁵ holding that it was not appropriate to classify costs incurred prior to the filing of a Statement of Problem as special damages.

[112] The claim for compensation for legal fees incurred prior to lodging the statement of problem in the Authority is declined.

Contribution

[113] When determining the extent and nature of the remedies to be awarded, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those

¹⁴ [2013] NZEmpC 179 at [128].

¹⁵ [2003] 2 ERNZ 433 (2003) 1 NZELR 53.

actions so require, reduce the remedies that would otherwise have been awarded accordingly.¹⁶

[114] I find Ms Franich has not contributed to the actions giving rise to her personal grievance and therefore the remedies will not be reduced and Vodafone New Zealand Limited is ordered to pay to Ms Franich compensation of \$7,000 within 28 days of the date of this determination.

Breach of good faith and the employment agreement

[115] Ms Franich claims Vodafone has breached its obligations of good faith and the terms of her employment agreement. Ms Franich submits that the breaches were so significant that they warrant the imposition of a deterrent penalty.

[116] I have found Vodafone breached its obligations of good faith when it failed to consult with Ms Franich about the change in the sales team structure, and its failure to provide all information including the assessment of her manager, which constituted 90% of the final ranking and an opportunity to comment on that information before a final decision to redeploy Ms Franich was made.

[117] However, Ms Franich's claim for a breach of the employment agreement has not been established to my satisfaction.

Penalties

[118] Ms Franich has applied to the Authority for the imposition of penalties for the breaches of good faith, and asks that the recovered penalties be paid to her pursuant to section 136(2).

[119] Section 135 of the Act allows for the recovery of a penalty where a party breaches the Act and the provision which has been breached provides for a penalty. In the case of a company, the maximum penalty is \$20,000.00.

[120] A penalty will apply to breaches of good faith where those breaches were deliberate and sustained or are intended to undermine the individual employment agreement or the employment relationship.

¹⁶ Employment Relations Act 2000, section 124.

[121] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*¹⁷ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

[122] I am satisfied the breaches of good faith by Vodafone were deliberate and sustained over a period of 19 days. Vodafone deliberately denied Ms Franich the opportunity to comment or have any input into the decision to disestablish her role. Further the failure to disclose the assessments and ranking of Ms Franich and the failure to consult her prior to making a decision about redeployment options could not be anything other than a deliberate decision by Vodafone.

[123] There is, however, no evidence that the conduct was intended to undermine the employment relationship between Ms Franich and Vodafone.

[124] I find the breaches are serious enough to warrant a penalty. As set out earlier in this determination Ms Franich has given compelling evidence of the impact on her of the deployment to a desk based rather than a face to face sales role. Vodafone has shown no remorse for its breaches. Breaches of good faith by employers, particularly those the size of Vodafone will not be condoned by the Authority.

[125] I consider a penalty of \$5,000 for the breaches of good faith to be justifiable. Vodafone New Zealand Limited is ordered to pay penalties of \$5,000 into the Authority within 28 days of the date of this determination.

[126] Pursuant to section 136(2) of the Employment Relations Act 2000, 50% of the penalty is to be paid to Ms Franich. The remaining 50% is to be paid to the Crown.

¹⁷ [2014] NZEmpC 65.

Costs

[127] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Franich shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Vodafone shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[128] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority