

**ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF  
CERTAIN INFORMATION (REFER PARAGRAPH [5 - 7])**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 323  
5602823

BETWEEN                      ANDRE NEL  
   Applicant  
  
A N D                              ASB BANK LIMITED  
   Respondent

Member of Authority:            Eleanor Robinson  
  
Representatives:                Catherine Stewart, Counsel for Applicant  
   Simon Dench, Counsel for Respondent  
  
Investigation Meeting:        2, 3 and 5 August 2016 at Auckland  
  
Submissions Received:        8 August 2016 from Applicant and Respondent  
  
Date of Determination:        22 September 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Andre Nel, claims that he was unjustifiably dismissed from his employment with the Respondent ASB Bank Limited (ASB/the Bank) on 6 October 2015.

[2]     Mr Nel also claims that ASB breached its statutory obligations of good faith towards him.

[3]     ASB denies that Mr Nel was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct following a fair and reasonable process, and that the Bank adhered to its obligations of good faith throughout the process.

**The issues**

[4]     The issues for determination by the Authority are whether or not::

(a)     Mr Nel was unjustifiably dismissed by ASB?

- (b) ASB breached its duty of good faith in its dealings with Mr Nel during the disciplinary process?
- (c) There was disparity of treatment in the treatment of Mr Nel such as to render the decision to dismiss him one which was not available to ASB as a fair and reasonable employer?
- (d) If there had been serious misconduct by Mr Nel, was dismissal an appropriate outcome?

### **Prohibition on publication**

[5] **I order that the name of the ASB employee directly affected and involved in this matter is referred to in this determination as Ms A, a letter bearing no relationship to her actual name, and that any information which may lead to her identification is subject to a permanent non-publication order and not to be published.**

[6] **In addition the name of Mr Nel's wife will not be referred to other than by her marital title in the determination.**

[7] **This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000 (the Act).**

### **Background facts**

[8] The ASB Group of companies is one of the largest providers of financial and insurance services in New Zealand.

[9] At the time of his dismissal, Mr Nel had 18 years' service with the Bank and held the position of Senior Commercial Manager reporting to Mr John Twomey, Regional Manager, East and South Auckland, having been appointed to that position in June 2014.

[10] Prior to the termination of his employment in October 2015, Mr Nel had not been subject to any performance or disciplinary processes. He had been a consistently high performing employee and was well regarded within the Bank. At the time of his appointment to the position of Senior Commercial Manager in June 2014, he had been a Commercial Manager for seven years and had worked in the same office since 2011.

[11] The role of Senior Commercial Manager had been created to assist Mr Twomey to manage the East and South Auckland Region. Mr Nel acted as Mr Twomey's delegate as Regional Manager for the Manukau office as Mr Twomey was not based at the Manukau

office and attended it every few weeks. Mr Twomey said he relied on Mr Nel as the most senior manager at the Manukau office to lead and manage that office on his behalf.

[12] Mr Nel's primary role was to manage a team of 11 other employees based at the Manukau office, which comprised four separate teams with their own customer portfolios.

[13] In his position as Senior Commercial Manager, Mr Nel had a Commercial Relationship Manager to assist him with the management of his own customer portfolio and with managing the other teams. His direct reports at Manukau included the Commercial Relationship Manager, the Commercial Managers of the three other teams, and in his own team, a Commercial Account Manager and a Commercial Assistant who reported to the Commercial Relationship Manager.

#### *The Employment Agreement*

[14] On his appointment as Senior Commercial Manager, Mr Nel was provided with an updated individual employment agreement (the Employment Agreement). A covering letter dated 7 April 2014 from Mr Twomey stated that:

*In accordance with the Employment Relations Act you are entitled to a reasonable opportunity to seek independent advice about the terms of your employment. You may wish to do so before you sign your agreement.*

[15] Clauses in the Employment Agreement included:

#### ***Conduct:***

*You are required to comply with the Bank's Code of Conduct, a copy of which is attached and forms part of this Agreement. This Code may change from time to time and notice of changes will be given.*

#### ***Termination***

*The Bank may terminate this Agreement without notice in the event of serious misconduct. Alternatively it may (at its discretion) reassign you under this assignment including demoting you. The Bank may suspend you on full pay while it deals with suspected misconduct.*

#### ***Other terms and conditions:***

*In addition to the terms and conditions set out in this Agreement, you will be bound by and consent to all legislation applicable to the Bank's operations and by the Bank's policies and procedures.*

...

**Agreement**

*This Agreement supersedes all previous agreements, arrangements and practices relating to your employment.*

[16] Mr Nel signed the Employment Agreement on 9 April 2014 acknowledging that he agreed to the terms and conditions of employment it contained, and that he had been advised of his right to seek independent advice and given a reasonable opportunity to do so.

*The Code of Conduct*

[17] The Code of Conduct policy states:

*ASB's values form the foundation of our culture, this code of Conduct will help you to understand the personal and professional standards of caring and integrity that we expect all our staff to display.*

***It is your responsibility to know, understand and observe the standards of conduct that are outlined in the Code. Many of the Code's principles interlink .....***

***Principles***

***As a financial institution our employees are expected to adhere to the high standard of their behaviour.***

*Therefore you must*

- *Be absolutely honest and trustworthy at all times in your work and personal activities.*
- ...
- *Treat all others, including staff and customers courteously, fairly, and with consideration and respect. Consider the impact of your actions on others, and avoid activities such as discrimination, harassment, bullying or offensive behaviour that may unreasonably upset or harm others.*
- *Recognise that the Bank is a professional workplace where some personal activities are inappropriate.*

***In fulfilling the responsibilities of your role with the Bank***

*You must*

- *Know your job responsibilities.*
- *Perform your responsibilities to the level that is expected to the best of your abilities and with reasonable care.*

....

*Where you commit serious misconduct, the Bank may dismiss you summarily (immediately).*

...

*The Bank will investigate suspected breaches of the Code where it considers this appropriate and the Bank will seek your comment before any disciplinary action is taken against you.*

*The consequences of any breach will depend on all the circumstances, including the type of conduct, its seriousness and any previous conduct. ...*

*Where you commit serious misconduct, the Bank may dismiss you summarily ...*

### ***Examples of breaches of the Code of Conduct***

*Some examples of conduct that would breach the Code are outlined below. ...*

...

- *Harassment, discrimination, bullying, offensive behaviour, or unreasonable behaviour that creates workplace disharmony.*

*... In addition to the Code, the Bank has a number of policies that apply to specific areas. These policies supplement the Code and should be complied with in addition to the Code. ...*

[18] The Code of Conduct stated that other ASB policies supplemented the Code of Conduct and listed as a key policy the Harassment, Discrimination, Bullying and Offensive Behaviour Policy. This stated:

### ***Context and purpose***

*1.1 ASB is committed to maintaining a workplace culture where employees treat each other courteously and with consideration and respect. Harassment, discrimination, bullying and offensive behaviour are unacceptable and will be treated seriously.*

...

### ***3. Policy principles***

*3.1 All employees, regardless of their role, are expected to treat each other courteously and with consideration and respect.*

*3.2 Employees must avoid harassment, discrimination, bullying or offensive behaviour that may unreasonably upset or harm others. This behaviour will be treated seriously and may lead to disciplinary action, including dismissal. It may take many different forms:*

*3.2.1 Harassment often consists of unwelcome, uninvited or unreciprocated behaviour which offends, humiliates or*

*intimidates another person. It is usually repeated behaviour but even one instance may be unreasonable.*

...

*3.4 The Bank recognises the impact that harassment, discrimination or bullying can have on the individuals involved.*

*3.7 The person who receives a complaint of harassment, discrimination, bullying or other offensive behaviour must treat the complaint seriously and escalate it appropriately.*

*Visions and Values policy*

[19] The ASB policy 'Our Visions and Values' states:

***Our values: integrity, caring, ambition and passion.***

***Caring respect and support***

*We are like a family: the way we care for each other, our customers and our community sets us apart. We support our people to their best and to be themselves.*

***Integrity***

*Doing the right thing. We are trustworthy, we build strong relationships based on fairness and honesty.*

[20] Mr Nel confirmed he was familiar with the Code of Conduct and ASB's Vision and Values, and although he had not read the Harassment, Discrimination, Bullying and Offensive Behaviour Policy, he accepted it was referred to in the Code of Conduct and was available for him to read on the ASB intranet. When questioned in cross examination on the provisions of the Harassment, Discrimination, Bullying and Offensive Behaviour Policy, he confirmed that he accepted the need to behave in accordance with them.

*Events between Ms A and Mr Nel: 2014*

[21] Ms A joined Mr Nel's team in September 2014 as a Commercial Assistant, reporting to Mr Shane Reilly, the Commercial Relationship Manager. She became a Commercial Account Manager in March 2015 when the incumbent of that position went on maternity leave, and continued reporting to Mr Reilly, although all the members in the Manukau office team interacted closely.

[22] On 7 September 2015 Mr Reilly moved to another team and at this stage Ms A began to report directly to Mr Nel. She said that to this date she and Mr Nel had a good working relationship and she was very comfortable around him.

[23] During August 2014 Mr Nel posted a photograph of himself on a Facebook page in which he, Ms A, and other team employees were friends. The photograph posted was of Mr Nel when he had been much younger and team members had posted various comments on it, including Ms A who had posted a comment saying: “omg Andre? is this you 😊.”

[24] Mr Nel said that Ms A had informed him at the workplace that she had thought he looked “hot” on his Facebook profile.

[25] During a mid-year employee function in 2014, Mr Nel said he and Ms A had been drinking and some risqué conversation ensued. Ms A’s recollection of the conversation differed to that of Mr Nel, and she said that other employees were present at the time.

*Events between Ms A and Mr Nel: late 2015*

[26] During August 2015 Mr Nel said that Ms A confided in him that her marriage was in trouble. He had listened, and offered advice and support. On or about that time he said that the situation had progressed to the point where he had wanted to solve Ms A’s problems for her, protect her and take care of her, and he had misread what he thought were signals from her including the comment about him looking “hot” on his Facebook profile as her having a romantic interest in him. As a result he had developed a romantic interest in her.

[27] Ms A said that she had confided in both Mr Reilly and Mr Nel that it was a difficult time for her family and she might require some leave as a result, which was the reason for her raising the subject with them. She had not informed Mr Nel that she was having marriage difficulties, although she said she might have mentioned it to close friends in the office environment.

[28] During August 2015 Mr Nel and Mr Riley were attending an ASB Commercial Managers’ Conference in Rotorua. Ms A had emailed them to update them on matters at the office and also emailed Mr Nel stating:

*Everything all good 😊 don’t get too wasted ha ha ha but have a tequila or three for me!*

[29] The following day, 14 August 2014, Mr Nel sent Ms A an email which stated:

*Oh shute you are so  
too many gins, very emotional today!!*

[30] The email from Mr Nel had been sent in response to a work query which Ms A had sent to Mr Nel that day. Ms A said she was not certain what Mr Nel meant by the comment

and did not respond to the email.. When Mr Nel returned to the office, he apologised for not completing the message and said:” *What I meant to say was that you are just so f..ing hot*”.

[31] Ms A said she had walked away from Mr Nel’s desk without responding as she was very embarrassed and thought he was still intoxicated. However, the comment had made her feel uncomfortable.

[32] Ms A said Mr Nel had often made personal comments to her, commenting on how her appearance, the clothing she wore, her hair or makeup, and frequently referred to her as ‘*sweetheart*’ or said that she was ‘*stunning*’.

[33] Mr Nel said that he tried to make positive comments about team members including the female members of staff. He had not seen them as inappropriate or considered they would be so regarded by the recipients.

[34] On 21 August 2015 Mr Nel sent Ms A an email stating: “*You look super-hot!!! Good job with the hair. How much time do you have to spend now straightening it?*”

[35] Mr Nel explained the reason for his comment as being that Ms A had been provided with gift vouchers from the bank which she had spent at a hairdresser and which included her having her hair straightened. This had been a source of discussion in the office.

[36] Ms A said she had not been sure how to respond to the email from Mr Nel and had responded: “*Thanks Andre – not much more than before.*” She said she had been uncomfortable with the email and she thought Mr Nel had realised this as he had emailed her in response apologising and saying he did not want to make her feel uncomfortable, to which she responded: “*All good Andre.*”

[37] Shortly afterwards Ms A said an office team member who had recently become single had been discussing with the team members the fact that he had registered with the dating website ‘Tinder’. She had commented during the general office discussion that she would not be able to access ‘Tinder’ without her husband’s assistance, given her limited technical expertise.

[38] Following the discussion she had returned to her desk to find an email from Mr Nel asking if she was downloading ‘Tinder’. Mr Nel explained that he had sent the email because he was aware that Ms A was experiencing some marital difficulties and he was concerned that she might be vulnerable to exchanges on ‘Tinder’.

[39] Ms A said she did not respond to the email and it had made her feel uncomfortable.

[40] Mr Reilly transferred to another position within the Bank on 4 September 2015, from which date Ms A's reporting line was to Mr Nel.

*Facebook messages 4 and 5 September 2015*

[41] In the late evening of Friday 4 September 2015 Mr Nel messaged Ms A on Facebook stating:

*Hey Sxy, just want to get the elephant out of the room. You are very special to me! I'm head over heels for you and have been since the first time I saw you. I'm an old fart who loves you and who just wants the best for you. I know you are going through a massive time in your life but please stay strong! I am so sorry for you and really hope that things will work out!*

*Oh f... this is just crazy but need to get it off of my chest as its been killing me! Sorry for spilling my guts! I know you don't care but at least I can move on now. I did what I never ever thought I would do ever in my LIFE! Don't worry about work! It's off my chest now so I should be okay. I will probably be very ashamed about this tomorrow but I would never regret it. x*

[42] Ms A said she did not see the Facebook message until the following morning when she had opened it. Upon reading the first line she said she had felt very concerned as Mr Nel was her manager, someone she had trusted and she had felt shocked, sickened and repulsed considering that they were both married, Mr Nel's wife also worked at the Bank, and he was significantly older than she was.

[43] After much consideration she had sent a response on Saturday 5 September 2015, carefully drafted in order not to make things difficult for her at work and to be able to ensure that she and Mr Nel could continue to work together. She had taken some considerable time over the message which had read:

*Andre, I am a very straightforward person you know this so I'm just going to be honest with you.*

*I think you are a great boss and have been very supportive of me at work and I see you as a good friend, nothing more.*

*I hope this does not affect our working relationship as if it does I will leave very quickly. The only thing I have at the moment is my work, literally everything else has fallen to pieces and I have a lot to work through at the moment.*

*I have a great deal of respect for you and have learnt a lot from you so I hope we can continue to be friends and have a good, healthy working relationship.*

*I would also appreciate not being called inappropriate names at work or elsewhere as it undermines me and make people think that I may have only got my job based on how I look and not based on my actual ability. I have worked very hard to get to where I am today both personally and professionally. You have no idea what I started with in life and the hardship I have been through.*

*Again, I hope you can understand where I'm coming from. I appreciate your guts and your honesty as it would take a lot for someone to say what you have and I understand how hard this must be for you.*

*I have not been married for as long as you have and I don't know what your personal situation is, and I'm not trying to advise you, but if I may say one thing it would be this – you have a wonderful family and nothing should come in the way of that ...*

*I don't really want to speak about this again so please do not bring it up as it will make me very uncomfortable.*

*If you indeed want the best for me, let us please continue to get along as colleagues and friends and I will support you 100%.*

[44] Mr Nel responded:

*Thanks for this. I can assure it won't ever affect our working relationship, I have an enormous amount of respect for you and you know as well as I do that you have gotten where you are not because of your looks but your ability. I'm sorry if I have offended you by calling you names, never my intention to hurt you and believe me I'm not one calling you names.*

*I am so sorry I'm not here to make life hard as it is and will support you 100%. Sorry again.*

[45] Ms A responded: “Apology accepted. ...” Mr Nel responded saying: *Thanks for being so mature about this!*”

[46] Ms A said when she returned to work after the weekend on Monday 7 September 2015, Mr Nel had moved from his desk to sit at the desk next to her. Mr Nel said that he had taken over some of Mr Reilly's duties which meant that he had to work closer with Ms A on client deals and he felt it made more sense to sit closer together to work more effectively.

[47] Ms A said that although a move had been discussed previously, she had not expected Mr Nel to continue with the proposal in light of their communications over the weekend.

[48] In addition she had not considered that there was any need for Mr Nel to have moved as his previous desk had only been a few metres from where she sat in the office, and communication had been easy in the original seating as had been the case until that time.

[49] Ms A said she had felt intimidated by the move, and considered that Mr Nel ought to have realised that she would feel very uncomfortable at the move.

[50] Ms A said that from this date she adjusted the way in which she communicated with Mr Nel, keeping their conversations and emails on a strictly professional basis.

[51] During the following weeks she and Mr Nel went on client visits together, during which she felt intimidated and very uncomfortable at being alone in the car with him, especially as he was a much larger build than her. She said at one stage while they were in the car Mr Nel had said to her: "*Isn't this uncomfortable?*" and she believed he had realised that the situation was uncomfortable.

[52] Following Mr Reilly's transfer, the Commercial Relationship Manager position he had filled was vacant. On 21 September 2015 Mr Nel emailed Ms A stating that he wanted to encourage her to apply for the vacant position left by the departure of Mr Reilly.

[53] At this stage she had only been a Commercial Account Manager for a little over five months, and considered the position to be a huge step up for her. She had been concerned about Mr Nel's motivation in asking her to apply for a role for which she did not feel she had either the experience or the skills.

[54] Ms A said she had felt very stressed and anxious since the Facebook message from Mr Nel on 4 September 2015 and was feeling very distressed about it, especially as since that time Mr Nel appeared to be brooding and frustrated with her.

[55] Despite her having asked him not refer to the matter again on 5 September 2015, Mr Nel had constantly referred to the matter, apologising several times since the Facebook message. She considered that Mr Nel did not appear to understand the impact of his behaviour on her, and she had been anxious and concerned because she considered that he could completely undermine her position and limit her career prospects. As a result she decided to discuss the matter with Mr Reilly.

#### *Events from 22 September 2015*

[56] She had met Mr Reilly on 22 September 2015 and shown him the Facebook messages that she and Mr Nel had exchanged in early September 2015 and asked his advice concerning

whether or not he believed she was overreacting, or whether she should inform the Bank Human Resources department.

[57] Later in the evening of 22 September 2015 Mr Nel, who said he had been concerned that Ms A was becoming cold in her manner towards him and he had wanted to clear the air between them, sent her a Facebook message stating:

*Hey, can we catch up for a coffee to chat about things, or anywhere else comfortable for you. You have a few misconceptions about me and rightly so; I just want to talk it through. If you are not interested just let me know and we'll move on as is.*

[58] Ms A said the Facebook message on 22 September 2015 had made her realise that Mr Nel could not leave the matter alone despite her request on 5 September 2015 that he not speak about it again.

[59] The following day, 23 September 2015, Mr Kiran Vallabh, the People and Culture Consultant for ASB's corporate, commercial and rural division, said he received a telephone call from Mr Reilly who told him that a female employee had said that a senior male employee had made inappropriate advances towards her.

[60] Mr Reilly had not identified either Ms A or Mr Nel, but said that Ms A was upset, had approached him in confidence, and did not know what to do about the situation. Mr Vallabh said Mr Reilly had been concerned and wanted to ensure that he could provide Ms A with some guidance as to the steps she could take.

[61] Mr Vallabh advised Mr Reilly that it would be preferable for Ms A to talk to him, or to female members of the People and Culture division, if she would be more comfortable discussing the matter with another female. He had assured Mr Reilly that any initial discussion with Ms A would be in confidence and asked him to reassure Ms A that ASB could provide her with support.

[62] Shortly after this, Mr Vallabh received an email from Ms A in which she stated that following her discussion with Mr Reilly, she wanted the situation documented in order that there was a record in case of repetition. She emphasised in the email that her intention was not to create stress or tension in the workplace but that she wanted to be able to attend work without feeling: "*intimidated or uncomfortable*". She stated: "*... I want to stress that everything I say to you must not be passed on to anyone else without my consent*".

[63] Mr Vallabh texted Ms A and arranged to meet her. The meeting took place at a coffee shop close to her office, during which Ms A told him that it was her Manager, Mr Nel,

who had made advances to her. He said that during their meeting she had been tearful and seemed uncomfortable. She had explained that the situation started with Mr Nel sending her some Facebook messages in which he told her he had feelings for her. She had not reciprocated his feelings, and had advised him of that.

[64] Ms A had shown him the Facebook messages on her telephone, and said that following the messages she had started to feel uneasy about the previous communications between them.

[65] Following her Facebook response to Mr Nel, Ms A said he continued to pursue her. Whilst she had continued to respond to his communications, she explained that she had felt obliged to do so because he was her Manager, but she continued to be clear that she did not reciprocate his feelings.

[66] She was concerned that if she reported the matter it would impact upon the way more senior managers in ASB viewed her and it might affect her career aspirations. In addition she was worried that she was likely to be moved to another location, given that Mr Nel was a senior Manager within the Bank and her position was less senior. She had therefore thought it would be better to attempt to counter Mr Nel's advances and try to move on. However the situation had made her feel awkward, intimidated, embarrassed and uncomfortable.

[67] Ms A explained to Vallabh that she had decided to talk to him because she felt that Mr Nel was not going to stop pursuing her, and she did not know what else to do. She had felt intimidated attending client visits with Mr Nel, and was concerned about what would happen once she raised her concerns.

[68] Mr Vallabh said that he would talk to Mr Paul Duncan, to whom Mr Twomey reported, and assured her that the discussions would be kept confidential.

[69] During the meeting on 22 September 2015 Ms A told Mr Vallabh about the email from Mr Nel requesting a meeting, and he had suggested that it might be helpful to meet and try to resolve the situation between them.

[70] Ms A responded to Mr Nel later that day via the work email system rather than replying via Facebook, stating: *“as per your message to me yesterday if you would like to have a talk, that is fine, but it will need to be at work.*

[71] Mr Nel responded on 23 September 2015 stating

*Hey, thanks for responding, but I'm pretty fuc%up emotionally and I just won't be able to keep it together. So to save face and further embarrassment I will just say this below.*

*It's clear that I destroyed our friendship ...*

*Just one thing, I never asked for a relationship or for anything else. I just told you how I felt which now in hindsight was not well thought through. You are probably thinking now "No shit, Sherlock" but that's OK.*

*Anyway, that's it, we still need to work together and I have a great deal of respect for you so I will keep this very professional.*

[72] Ms A said that she understood from the email that Mr Nel no longer wanted to meet and was relieved that a meeting had been avoided. However, the following day, 24 September 2015, Mr Nel had asked her to meet with him, and acting upon the suggestion by Mr Vallabh, she had agreed.

[73] Mr Nel when questioned at the Authority's Investigation Meeting as to why Ms A would believe his assurance in the email dated 23 September 2015 that he would: "*keep this very professional*" during the meeting, he said there was no reason why she should have trusted him. He agreed that there was no need for a meeting to take place after the email he had sent on 23 September 2015

[74] At the start of the meeting on 24 September 2015 which was in a Bank meeting room, Ms A said Mr Nel had made a comment to the effect that he was being '*f...ed up*', and '*a mess*' and throughout the meeting he had been very emotional with tears in his eyes. She said the meeting did not make her feel confident that Mr Nel would behave professionally at work.

[75] Mr Nel said that during the meeting he and Ms A had talked and he had apologised to her, making it clear he was not looking to have a romantic relationship with her and that he would be very professional moving forward. He apologised and recalled Ms A saying it would take time for her to feel comfortable around him. He said Ms A had been upset.

[76] He had felt that matters between them had been cleared up at the meeting, that she had accepted that he had made a silly mistake, and that their professional relationship would not be an issue going forward.

[77] Following the meeting he had emailed Ms A and invited her to take time off or whatever else she required in order that he could make things easier for her. In response, Ms A emailed stating:

*One thing that would make me feel less uncomfortable at work would be if you would go back to your old seating arrangement.*

*As you can imagine, this situation is fairly awkward and I need some time to feel comfortable at work and around you.*

*Please do not feel insulted or hurt by this, I am requesting this in order for me to feel more comfortable and I hope you will understand.*

*You may choose not to change your seat and that will be your decision to make, I am just letting you know how I feel.*

[78] Mr Nel agreed to the request, asking if it would be acceptable to move desks on 28 September 2015, to which she had agreed. Ms A said it had been difficult for her to ask Mr Nel to move and so she had agreed to the delayed desk move date

[79] By reply email Mr Nel stated: “*No worries, just remember I’m not a monster and would like to regain your trust and friendship but I totally understand that you think I was a dick. ....*”

[80] The following day, Friday 25 September 2015, Ms A said that she had received an email message from Mr Nel saying he would be in later that morning: “*returning to my ‘naughty corner’*”. She said she had been offended by this email as she felt in it Mr Nel had trivialised her request.

[81] Ms A said she was in regular contact with Mr Vallabh at this stage and he had wanted to ensure that she was feeling comfortable working in the same space as Mr Nel. Although she said it was uncomfortable, she did not feel it correct that she be moved from her working environment for something that Mr Nel had done and she wanted to remain in the Manukau office.

[82] She informed Mr Vallabh in an email on 25 September 2015 that she had asked Mr Nel to move desks and stated: “*I feel a lot less uncomfortable and stressed so thank you for pushing me to do it yesterday as I was afraid of what would happen if I did ask but it went surprisingly well.*” Attached to the email was the email correspondence between her and Mr Nel.

[83] Mr Vallabh told Ms A that he would be coming to the Manukau office on 29 September 2015 to talk to Mr Nel and it was arranged that she would work from another office whilst he did so.

#### *Mr Vallabh’s involvement*

[84] On the morning of 24 September 2015, Ms A emailed all the information she had regarding Mr Nel’s approaches to her to Mr Vallabh, advised that she was not ready to raise a formal complaint, and that Mr Nel had apologised for his behaviour.

[85] Mr Vallabh said he had felt compelled to achieve a balance between protecting Ms A's health and safety and dealing with an employee who was potentially breaching the ASB values and Code of Conduct.

[86] Prior to this date, Mr Vallabh said that Mr Duncan had approached him to advise that three employees had spoken to him and told him they were uncomfortable with some aspects of their relationship with Mr Nel. He had also received individual calls from the three employees raising the same concerns relating to aggressive behaviour and inappropriate language and comments.

[87] Mr Vallabh considered the complaints and Ms A's concerns. He was aware that if he ran an IT report searching for certain terms, it was likely that the concerns involving Ms A would come to light, and obtaining the information in that way could protect Ms A. Mr Vallabh explained that running an IT report was something that would normally be considered by the Bank in connection with the type of complaints received by Mr Duncan.

[88] On 25 September 2015 Mr Vallabh instructed the ASB investigations team to run a specific report on Mr Nel's emails and their internal messaging system looking for particular words which would inappropriately describe the appearance of a woman.

[89] The IT investigations team returned the search results on 28 September 2015. Mr Vallabh said he did not find much evidence to support the claims made by the three employees of bullying and concluded that there was insufficient information at that stage to raise those complaints against Mr Nel without a more in depth investigation.

[90] The IT report also disclosed the emails that Ms A had already forwarded to him together with six other emails that Mr Nel had sent her. These emails included:

- 14 August 2015: stating: *"Oh shute you are so too many gins, very emotional today!!"*
- 4 September 2015: *"Are you really downloading Tinder?"* in the subject line
- 21 August 2015: *"You look super hot ..."*
- 23 September 2015: *"Hey, thanks for responding, but I'm pretty fuc%up emotionally and I just won't be able to keep it together...."*
- 24 September 2015: *"One thing that would make me feel less uncomfortable at work would be if you would go back to your old seating arrangement. ..."*

- 25 September 2015: “ ... *returning to my 'naughty corner'*”..

[91] Mr Vallabh and Mr Duncan met and discussed Ms A's concerns and the findings of the IT report. Mr Vallabh said Mr Duncan had been concerned, and asked him to speak to Ms A and assure her that she was not to worry about her job security. They agreed that he would speak to Mr Nel informally about the matter to determine whether he (Mr Nel) had an explanation before deciding on whether any action was required.

*Meeting 29 September 2015*

[92] Mr Vallabh met with Mr Nel on 29 September 2015 and advised him that Mr Duncan had received some negative feedback about him and that as a result an IT report had been run on his emails.

[93] Mr Nel said he has asked Mr Vallabh what had occasioned the IT report and had been told that a complaint of offensive language had been made by staff in the office and a search of all email accounts was conducted as a result.

[94] Mr Vallabh said that he had informed Mr Nel that there had been nothing to substantiate the concerns about the negative feedback from the three employees that had been received about him. However, he advised Mr Nel that he had found other information which was concerning, and asked if he knew what that might be, and Mr Nel had responded with Ms A's name. Mr Vallabh said he did not prompt Mr Nel to mention Ms A's name.

[95] Mr Nel explained that he had got “*too close*” to Ms A and acted inappropriately, but that he had apologised to her and everything was now fine.

[96] Mr Vallabh told Mr Nel that Ms A had spoken to him and that it was definitely not fine from her perspective. He said she was quite emotional and found Mr Nel's approaches to be uncomfortable, awkward and embarrassing and it was affecting her ability to work with him. He also informed Mr Nel that upon discovery of the emails they initiated contact with Ms A who agreed to release the Facebook messages.

[97] Mr Vallabh said Mr Nel had told him that Ms A was completely innocent and had not acted in any way to encourage him. He advised Mr Nel that he was very concerned about the way he had behaved towards Ms A, and he would need to talk to Mr Duncan to ascertain how he would like to proceed in the matter, but that it was possible that a formal meeting would be arranged.

[98] Mr Nel said he asked Mr Vallabh whether the Bank had received any complaint from Ms A regarding his approaches and Mr Vallabh had assured him that it had not. Mr Nel said

he repeated the question throughout the disciplinary process that followed and was given the same assurance each time. It had only been when he read the Statement in Reply filed by ASB that he learned for the first time that Ms A had sent emails raising her concerns to ASB.

[99] Mr Nel had said he would discuss the matter with Mr Twomey because Mr Vallabh told him Mr Twomey was not aware of the situation at that point. The meeting concluded and following the meeting, Mr Vallabh had made a file note of it.

#### *The disciplinary process*

[100] Mr Twomey said that Mr Nel emailed him on 29 September 2015 and asked when he was due to arrive in the Manukau office. When he arrived Mr Nel told him that Mr Vallabh had spoken to him and he had done: “*something stupid*”. Mr Nel then told him: “*I have got a bit romantically involved with Ms A*”, but that the situation had been resolved. Mr Twomey said he had the impression from Mr Nel that it was a minor situation and had been resolved.

[101] Mr Nel said that when he met with Mr Twomey he was completely honest and told him about the romantic interest he had developed for Ms A and the fact that his feelings were not reciprocated. In response, Mr Twomey had advised him that the Bank would deal with the matter by moving him to another office within the region.

[102] Mr Twomey denied that he had told Mr Nel he would be moved to another office because at that point he did not have sufficient information on which to make a decision, and moreover, Mr Nel’s position required him to manage the Manukau office.

[103] During their discussion he had received a call from Mr Duncan, and he had broken off his discussion with Mr Nel to take the call. Mr Duncan informed him about the situation regarding Ms A following which he had a discussion with both Mr Duncan and Mr Vallabh, who told him the situation was more complex than as conveyed by Mr Nel.

[104] Mr Vallabh said Ms A had approached him and told him that Mr Nel had declared his feelings for her by way of a Facebook message on 4 September 2015. Mr Vallabh had shown him the message. Mr Vallabh also explained the ongoing issues raised by Ms A.

[105] Mr Twomey said he had been concerned about the communications he had seen and related actions, in particular –

- the email sent on 14 August 2015 because it seemed suggestive and an inappropriate way for a manager to speak to a subordinate and also that Mr Nel appeared to be under the influence of alcohol on the day after the conference which was a work day;

- the email sent on 21 August 2015 in which Mr Nel referred to Ms A as “*super hot*” as his use of language appeared completely inappropriate. He noted that Mr Nel had apologised for his comment, but also that he then sent her a personal Facebook message a few weeks later on 4 September 2015;
- the email sent on 4 September 2015 concerning ‘*downloading Tinder*’ which appeared to be inappropriate and again was followed with the Facebook message on that same date;
- the Facebook message on 4 September 2015 in which he outlined his feelings for Ms A to which she had responded by stating that she did not reciprocate Mr Nel’s feelings and requested that he not raise the matter again. In the same Facebook message, he noted Ms A statement that she would leave very quickly if Mr Nel’s approach interfered with their working relationship.
- the fact that on 7 September 2015 Mr Nel moved his desk so that he was sitting next to Ms A. This surprised him since Mr Nel had already been seated in close proximity to Ms A. Mr Vallabh explained that Ms A had been very uncomfortable talking to Mr Nel about moving because he was her Manager and she was concerned that it might affect her job or future career prospects if she did so;
- Mr Nel having encouraged Ms A on 21 September 2015 to apply for the Commercial Relationship Manager role vacated by Mr Reilly. There were other employees more qualified for the role and he had been concerned that Mr Nel was failing to show objectivity towards others; and
- The further Facebook message sent by Mr Nel to Ms A on 22 September 2015 asking to meet with her. He noted the email response by Ms A the following day when she agreed to meet with Mr Nel during work time at the office, and Mr Nel’s response that he was pretty: “*fuc%ed emotionally*”. He had not been aware at that time that despite his response Mr Nel had then followed through and met with Ms A.

[106] Mr Twomey said that when he spoke to Mr Vallabh, he explained that some complaints had also been made about bullying type behaviour. However he (Mr Twomey) understood that there was little to substantiate the bullying complaints. These had been put to one side and did not form any part of the disciplinary process that occurred.

[107] Mr Twomey said he was quite shocked at what appeared to have happened. He was aware that Mr Vallabh had spoken to Mr Nel who had not denied what had happened. Mr Nel had spoken to him also and said he had done something stupid in relation to Ms A, although he had told that it had been resolved.

[108] He said it was apparent the matter had not been resolved and that Mr Vallabh explained that Ms A was quite distressed. One of the aspects which concerned him was that Mr Nel did not seem to have respected Ms A request that the matter not be referred to after she told him that she did not reciprocate his feelings.

[109] He and Mr Vallabh discussed the matter in light of ASB's values and policies. Mr Twomey said the ASB Code of Conduct outlined the professional standards of integrity that were expected of employees. The one which appeared pertinent in this situation was the requirement that employees treat all others with respect, considered the impact of their actions on other employees, and avoid activities such as harassment or offensive behaviour that might unreasonably upset or harm others.

[110] In addition, the ASB Harassment, Discrimination, Bullying and Offensive Behaviour policy defined harassment as: "... *any unwelcome, uninvited or unreciprocated behaviour, which offends, humiliates or intimidates another person.*" Mr Twomey considered that Mr Nel's behaviour appeared to fit this definition.

[111] In addition to his concerns about Mr Nel's potential breaches of the Code of Conduct and the Vision and Values policies, Mr Nel's role as a Senior Commercial Manager placed him a position of authority and trust, and there was a fundamental requirement that he would model behaviour expected of his subordinates, rather than instigate poor behaviour.

[112] In addition, Mr Nel was in charge of the entire commercial team at Manukau and in his absence Mr Twomey delegated responsibility for his region to him. He was also conscious that because Mr Nel was the most senior member of the Manukau commercial team, Ms A essentially would be unable to convey her concerns to another senior management employee.

[113] Considering all these factors, Mr Twomey regarded Mr Nel's behaviour as potentially very serious.

[114] Mr Twomey said he discussed the matter with Mr Duncan and both believed that he needed to commence a formal disciplinary process. He had taken advice from Mr Vallabh on the steps that were required in a formal disciplinary process; however, he did not start the process immediately as he wanted to consider the matter fully before doing so.

[115] Mr Twomey said it had not been Mr Nel's first approach to Ms A in the Facebook message on 4 September 2015 that had concerned him, but the fact that it appeared Mr Nel had repeatedly approached her after she had made it clear that she did not reciprocate his feelings, and she did not want to speak about the matter.

[116] He was also concerned that Mr Nel had downplayed the situation by telling him that the problem was resolved when, examining the email exchange, that did not appear to be the case at all.

[117] Mr Twomey said he did not have a formal complaint from Ms A, but he considered he could not ignore the matter on that basis and considered it necessary that he address the matter because of its potential seriousness. Mr Nel was a senior manager and the most senior member of the Manukau office. As such he had authority over all the employees and had no regular supervision.

[118] Accordingly, Mr Twomey decided it was necessary to proceed with the disciplinary process and that dismissal could be a potential outcome. Mr Vallabh drafted a letter setting up the disciplinary meeting and it was finalised between them.

[119] Mr Twomey met Mr Nel on 2 October 2015 and gave him the letter inviting him to a disciplinary meeting. He had asked if Mr Nel wanted to go home, but he said he did not need to. He encouraged Mr Nel to utilise EAP services and he did so. During the following week Mr Twomey also spoke to Ms A to make sure that she was coping.

[120] Mr Nel said he received the letter from ASB inviting him to attend a disciplinary meeting in relation to an allegation of inappropriate conduct, including being under the influence of alcohol at work as well as allegations regarding inappropriate and/or unprofessional conduct in relation to his interactions with Ms A.

[121] The letter dated 2 October 2015 set out in detail the email and Facebook messages between him and Ms A, and the concerns which the communications raised for ASB. Towards the conclusion of the letter, Mr Twomey had written

*I am also concerned that your behaviour in these instances may have fallen well short of the Bank's expectations of you as a Senior Manager at ASB. As a Senior Manager you are placed in a position of authority and trust, however, it would appear that you may have abused both of these key responsibilities. It is expected that all Managers lead by example and actively work to prevent this behaviour as alleged, rather than instigate and be responsible for it.*

*Furthermore, I am also concerned that your behaviour may be considered a breach of the Bank's Harassment, Discrimination, Bullying and Offensive Behaviour policy.*

[122] The letter concluded with a summary of the allegations, namely that Mr Nel had failed to:

- comply with the Bank's Code of Conduct;
- comply with the Bank's Harassment, Discrimination, Bullying and Offensive Behaviour policy;
- act consistently in line with the ASB values including its value of integrity;
- meet ASB's expectations of him as a Senior Manager.

[123] The letter concluded with the advice that:

*You should regard this matter as serious. This matter is your opportunity to respond to my concerns and/or to provide further information for my consideration. Your responses will be taken into complete consideration before we reach a decision as to the appropriate outcome and action (if any). That action could include formal disciplinary action, up to and including the termination of your employment.*

[124] Mr Nel said that Ms A had returned to the Manukau office the following day and had worked closely with him on several matters, including attending a client visit, until the time he was dismissed.

#### *Disciplinary meeting 5 October 2015*

[125] Mr Twomey and Mr Vallabh attended the disciplinary meeting on 5 October 2015. Mr Nel attended accompanied by his representative, Mr Danny Gelb.

[126] Mr Twomey said he had opened the meeting and talked to a draft script prepared by himself and Mr Vallabh. He informed Mr Nel and Mr Gelb that the purpose of the meeting was to hear Mr Nel's response to the allegations outlined in the letter dated 2 October 2015, that he had not received a decision as to whether or not the allegations were substantiated or to what action should be taken, but that once the meeting was concluded he would adjourn it for a time to consider Mr Nel's responses.

[127] Mr Nel said he advised Mr Twomey and Mr Vallabh that he had found the transition into a leadership role as a Senior Commercial Manager difficult. He clarified it had not been his intention to cause any offense or discomfort to Ms A and that none of his comments were sexually suggestive. He also denied being under the influence of alcohol at work. He conceded that some of his behaviour had been inappropriate.

[128] Mr Nel said that he, at that stage, was still of the understanding that relocation was a possible outcome of the meeting. Mr Twomey said he had reiterated during the meeting that the allegations were serious, and that although the opportunity had been given to ask questions about the letter or the meeting before it commenced, no question had been raised about the possible outcome.

[129] Each of the allegations had been discussed in detail during the meeting. Mr Twomey said that Mr Nel explained that he had felt protective of Ms A and he had become too close and emotionally attached to her. He asked Mr Nel why he had made repeated approaches and references to the matter after Ms A had said she did not want him to do so and that she would leave the Bank if her working relationship was affected. Mr Nel did not have an explanation.

[130] Mr Twomey said that during the meeting he asked Mr Nel on several occasions: “*How did you feel Ms A felt, or how many times does she have to say no?*” However he did not recall Mr Nel responding to those questions.

[131] Mr Twomey said that Mr Nel accepted that overall his comments to Ms A were inappropriate and unprofessional. He apologised and acknowledged that he could have dealt with matters more professionally and that his behaviour may have made Ms A feel uncomfortable. He said he had apologised to Ms A who had accepted his apology, and that he was surprised this had not been sufficient. He said the situation would not occur again.

[132] Mr Twomey concluded the meeting by asking Mr Nel if he had anything else to add. As he did not, Mr Twomey advised that the meeting would be adjourned overnight and ASB would advise him the following day of its decision.

[133] Mr Nel said at the conclusion of the meeting on 5 October 2015 Mr Gelb requested a preliminary finding. However, this was not provided, rather ASB requested that Mr Nel attend a follow-up meeting on the following day, 6 October 2015.

#### *Discussion regarding outcome*

[134] In light of the seriousness of the allegations, Mr Nel’s senior position and the potential outcome, Mr Twomey said he involved a number of other people in his deliberations. These consisted of Ms Tania Restall, Senior People and Culture Manager, Mr Duncan, and Mr Steve Jurkovich, Executive General Manager Corporate, Commercial and Rural Banking, and Mr Vallabh. He said he was the decision-maker regarding the appropriate outcome and no pressure was put on him to dismiss Mr Nel.

[135] Mr Twomey said he considered each allegation and reached a conclusion on each communication:

- 14 August 2015 email (“*oh shute you are so ... too many gins ....*”) He considered Mr Nel’s response to Ms A’s legitimate work email to have been completely unprofessional and inappropriate. He would have expected Mr Nel to have known what constituted appropriate and professional behaviour, particularly with a direct/indirect report employee.

It also concerned him that whilst Mr Nel said he had made a conscious decision to exclude some text from the email, he had still believed it appropriate to send it if he excluded the text. Although Mr Nel said he had apologised to Ms A, Mr Twomey was extremely disappointed that Mr Nel thought it appropriate at the time to respond to her email in that manner.

- 21 August 2015 email (“*You look super hot*”) He did not accept Mr Nel’s explanation that Ms A had recently had her hair cut and did not normally straighten her hair as the motive behind him sending her the email. His feelings for her had been made clear in his Facebook message a few weeks later. He believed the comment to be completely unprofessional, inappropriate and believed it constituted sexual harassment given the sexually suggestive comments he made about her appearance.
- 4 September 2015 email (“*– are you really downloading Tinder*”) Mr Twomey said he did not accept and was disappointed by Mr Nel’s explanation that he thought sending the email was appropriate because other staff members had joined the Tinder website and he was aware Ms A was having marriage difficulties.

In his view Mr Nel as a Senior Commercial Manager should not have been instigating inappropriate discussions such as this.

He did not accept that Mr Nel was having difficulty transitioning to the senior role, particularly as he had regular meetings with him during this period and Mr Nel had continually told him things were going well and that he did not require any assistance.

- 4 September Facebook message (“*Hey Sxy ...*”) It concerned him that Mr Nel thought that sending the message over Facebook was distinguishable from sending the message via a work email. His conclusion was that Mr Nel had not behaved in a way which ensured professional interactions with staff, particularly a direct/indirect report employee. Additionally, he found the use of profane language and sexual connotation completely unacceptable.
- 7 September desk move: Although Mr Twomey said he accepted that the change in seating arrangement may have been pre-arranged due to the promotion of the

previous Commercial Relationship Manager who had not at that point been replaced, given the trail of inappropriate communications Mr Nel had with Ms A where his feelings were not reciprocated, he should have known better and remained in his existing seat.

In addition, given the proximity of Mr Nel's existing seating arrangement to Ms A, he was concerned that Mr Nel had felt the need to sit even closer to her. He found Mr Nel's behaviour was intimidating and given the content of the Facebook message exchange, and specifically Ms A's unreciprocated feelings, inappropriate.

- *21 September CRM vacancy:* Mr Twomey noted there were seven other Commercial Account Managers in the East Auckland region with far more experience in the Commercial Account Manager role than Ms A who had only been in the role for five months. Mr Nel's admission that he only suggested that Ms A apply for the role led him to believe that he was treating her differently to the others. In addition, he was concerned that Mr Nel was using his seniority to influence a situation and that his motive behind this was not professional.
- *23 September email:* ("I'm pretty f...%ed you act emotionally ...") Mr Twomey said as a Senior Commercial Manager, Mr Nel's communication with Ms A was inappropriate, unprofessional and unacceptable.
- *24 September email:* ("No worries .... I totally understand that you think I was a dick") Mr Twomey found the type of communication with Mr Nel's staff team completely inappropriate and unacceptable. He should have tried to lead by example.
- *25 September email* (".. naughty corner") Mr Twomey found that Mr Nel's communication was inappropriate, unprofessional and found his reference to the *naughty corner* to be in extremely poor taste.

[136] Overall, Mr Twomey noted that Mr Nel had accepted that all the allegations, as outlined in the letter of 2 October 2015, with the exception of the Bank's concern about his motivation for encouraging Ms A to apply for the vacant Commercial Relationship Manager role, were correct. Further that his response to all was that his communications were inappropriate (with the exception of the email encouragement to Ms A to apply for the Customer Relationship Manager position), and in hindsight he should not have sent them.

[137] In regard to the Customer Relationship Manager position, Mr Nel disagreed that his motivation behind suggesting to Ms A that she apply was not professional, but Mr Twomey said he could not agree with this.

[138] Mr Twomey said he carefully considered Mr Nel's responses to the allegations. He did not feel that Mr Nel recognised the impact of his behaviour on Ms A, grasped the severity of his actions, or have any self-awareness of how inappropriate his actions were in light of the fact that Ms A was his subordinate. He was particularly concerned that Mr Nel believed that the situation between him and Ms A had been resolved.

[139] Mr Twomey considered a key consideration to have been that Ms A had told Mr Nel that she did not reciprocate his feelings in her response to his Facebook message on 5 September 2015, and had expressly asked him not to speak about the matter again. In addition she had told him that she would leave very quickly if the matter affected their working relationship.

[140] Despite this, Mr Nel had continued to try and speak with Ms A about the matter, moved his desk seat next to her, and wanted to meet with her to discuss the matter. It concerned him greatly that Mr Nel had not respected Ms A's request not to raise the matter and to have a professional working relationship.

[141] Mr Twomey considered that Mr Nel had seriously breached ASB's values, Code of Conduct and policies and the expectations of him as a senior manager. He had harassed Ms A, abused his position of authority and trust, and exhibited very poor judgement. Consequently he felt there was a serious loss of trust in Mr Nel and that he could not have confidence in Mr Nel not to behave similarly again or that he could trust Mr Nel's judgement if left unsupervised.

[142] Mr Twomey considered whether or not Ms A and Mr Nel could continue to work alongside each other and if there were options available to keep Ms A safe while continuing Mr Nel's employment, but he did not see how they could continue to work together or in proximity.

[143] Mr Twomey said he considered the possibility of relocating Mr Nel to another area. However, Mr Nel was the Manager of the Manukau commercial team and therefore needed to be located where his team was located. There were no other Senior Commercial Manager roles in other teams available and he did not believe it fair to disadvantage any of the other managers to accommodate Mr Nel.

[144] He also considered relocating Ms A, but thought it would be unfair to disadvantage her when it had not been her actions that led to the issue. In addition, relocation would not have solved the issue of his lack of trust and confidence in Mr Nel as a senior manager.

[145] Mr Twomey said he had considered Mr Nel's service with the Bank and the fact that he was a high performer. However while it was difficult for him to consider losing a valuable and strong performer, it was important to him that he looked at Mr Nel's conduct without being influenced by the wish to retain a strong performer. He also felt that he could not excuse what had happened with Ms A because of Mr Nel's past performance.

[146] Mr Twomey said he and Mr Vallabh decided that Mr Twomey provide a preliminary decision which he would reconsider if Mr Nel gave him reason to do so. He decided that dismissal would be an appropriate outcome, given that he regarded Mr Nel's actions amounted to serious misconduct.

[147] Mr Twomey said he also considered whether he might accept Mr Nel's resignation if this was offered, but he felt that this would condone Mr Nel's conduct towards Ms A. He decided that Mr Nel's actions were not in line with ASB values and that he would not be conforming to those values himself if he were to accept Mr Nel's resignation.

*Outcome meeting 6 October 2015*

[148] Mr Nel said he attended the meeting with Mr Twomey and Mr Vallabh on 6 October 2015 accompanied by Mr Gelb. Mr Gelb had asked at the commencement of the meeting for the Bank to provide a preliminary decision as to the outcome in order that Mr Nel could respond.

[149] Mr Nel said the Bank had already prepared a letter which was brought into the meeting and advised of his termination. The letter contents had been read aloud to him and stated at the end that he was dismissed summarily for serious misconduct

[150] However Mr Twomey said he had read from a pre-prepared script made in advance of the meeting and had read from that. He had opened the meeting by confirming that the purpose of the meeting was to advise Mr Nel of his preliminary findings which were that all the concerns listed in its letter of 2 October 2015 were substantiated, informed him he had carefully considered his responses and taken some time to discuss them with Mr Vallabh, Ms Restall, Mr Duncan and Mr Jurkovich.

[151] Mr Twomey advised Mr Nel of his preliminary decision which was that Mr Nel's actions amounted to serious misconduct on the grounds that he had:

- *Failed to comply with the Banks Code of Conduct;*
- *Failed to comply with the Banks Harassment, Discrimination, Bullying and Offensive Behaviour Policy;*

- *Failed to act consistently with the ASB values, specifically our value of integrity;*
- *Failed to meet the Banks expectations of you as a Senior Manager.*

[152] Mr Twomey advised that he proposed ending Mr Nel's employment by way of summary termination.

[153] He had asked if there was any further information that Mr Nel would like to provide for his consideration before he made a final decision. The meeting was adjourned while Mr Nel and Mr Gelb spoke privately.

[154] Mr Nel said he had not believed that dismissal was a potential outcome on the basis that Mr Twomey had told him on 29 September 2015 that he would relocate him to another office within the region, and the decision to dismiss had left him in a state of confusion, shock and disbelief.

[155] Mr Twomey said that a short time after an adjournment, Mr Gelb approached him and Mr Vallabh and proposed that he consider relocating Mr Nel to another office and issuing him with a final warning. Mr Twomey said he rejected this proposal for the reasons already provided.

[156] Mr Gelb returned to speak to Mr Nel and subsequently proposed to Mr Twomey and Mr Vallabh that Mr Nel be granted the opportunity to resign. Mr Twomey said he also rejected this proposal for the reasons he had already considered.

[157] Mr Gelb advised that Mr Nel wanted to discuss the possibility of resignation himself. When he and Mr Vallabh spoke to Mr Nel, Mr Twomey said he advised him that if he accepted his resignation he would be guilty of breaching the same ASB values that he had found Mr Nel had breached and therefore he could not agree to the request.

[158] Mr Twomey said Mr Nel had not provided him with any further information or reason to reconsider his preliminary decision and he therefore confirmed Mr Nel's employment was terminated on the basis of summary dismissal effective immediately. Mr Twomey said that on delivering outcome Mr Nel had said: "*I would have done the same thing.*"

[159] Mr Nel said he had pleaded for Mr Twomey and Mr Vallabh to reconsider the decision. He said he had been in disbelief at what was happening on the basis that he had witnessed several instances in his career with the Bank which were of greater concern with no disciplinary action outcome.

[160] Mr Nel received confirmation of the termination decision in a letter dated 6 October 2015, the contents of which were the same as had been read out to him at the meeting on 6 October 2015. In the letter Mr Twomey stated that as a result of Mr Nel's failure to adhere to the standards of behaviour expected of him by the Bank: "*the trust and confidence that should exist in any employment relationship has been irreparably damaged.*"

[161] On 16 November 2015 a personal grievance was raised on Mr Nel's behalf on the grounds of unjustifiable dismissal.

## **Determination**

### **Was Mr Nel unjustifiably dismissed by ASB?**

[162] Mr Nel was summarily dismissed on 6 October 2015. The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

#### ***103A Test of justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is 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.*

[163] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. ASB must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[164] Mr Nel was dismissed on the basis of serious misconduct. Mr Twomey based his decision to dismiss on the grounds that Mr Nel had exhibited poor judgment of his actions, breached the Banks policies, and failed to meet the Banks expectations of him as a senior manager. As a result the Bank had lost trust and confidence in him.

[165] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*<sup>1</sup>. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:<sup>2</sup>

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<sup>1</sup> [1992] 3 ERNZ 483.

*Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[166] Mr Nel was a senior manager with ASB with 18 years' service at the date of his dismissal. In his position as Senior Commercial Manager he was the most senior management member in the Manukau office and deputised for Mr Twomey who worked from a different location.

[167] Ms A joined Mr Nel's team in the Manukau office in September 2014 as a Commercial Assistant, reporting to Mr Reilly. She was subsequently appointed to the position of Commercial Account Manager in March 2015 and after 7 September 2015 reported to Mr Nel. At all times she was a subordinate employee to Mr Nel, much younger than he was, and inexperienced in her role as Commercial Account Manager.

[168] This is not a case of sexual harassment but focuses on Mr Twomey conclusion that Mr Nel had acted inappropriately and breached ASB's policies in respect of his actions regarding Ms A with the result that due to these actions he lost all trust and confidence in him.

[169] Ms A had advised Mr Nel clearly in the Facebook message dated 5 September 2015 that she did not reciprocate his feelings, asked for it not to affect their professional working relationship as otherwise she would leave, and asked him not to refer to the matter again.

[170] Mr Twomey considered that Mr Nel failed to respect Ms A's request in her 5 September Facebook message. In particular he:

- proceeded with the advised plan to relocate his desk to sit next to her immediately following the weekend;
- continuously referred to the subject by means of reiterated apologies;
- requested a meeting via an emotional email and Facebook message, and failed to behave professionally during the meeting after assuring her he would do so; and
- responded flippantly to her request that he move back to his previous desk position.

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<sup>2</sup> Ibid at p.487

[171] In accordance with s 103A (3) of the Act, Mr Twomey was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

- (a) ... *the employer sufficiently investigated the allegations against the employee ...*
- (b) ... *the employer raised the concerns that the employer had with the employee ...*
- (c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
- (d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[172] Whilst Mr Nel claims the process followed by the Bank was unfair because he was misled by being informed that Ms A had not made a complaint, I note that he was told during the meeting with Mr Vallabh on 29 September 2015 that Ms A had spoken to him and discussed her concerns in respect of Mr Nel's behaviour. He was also told at that meeting that Ms A had agreed to release the Facebook messages.

[173] The disciplinary meeting letter dated 2 October 2015 outlined in detail the communications which were the subject of the disciplinary concerns.

[174] I find that at an early stage in the process Mr Nel had been informed that Ms A had raised her concerns, and he had been fully informed of the communications upon which the Bank was relying in the letter dated 2 October 2015, prior to the disciplinary meeting.

[175] I therefore find that Mr Nel was not treated unfairly in the disciplinary process in that: (i) the Bank investigated the issues, (ii) he was fully informed of the allegations against him and the concerns the Bank had in relation to his conduct and (iii) he had a reasonable opportunity to provide a full explanation in the meeting held on 5 October 2015 at which he was represented by an experienced employment advocate.

[176] Whilst Mr Twomey considered that Mr Nel acted inappropriately in respect of the Facebook messages over the weekend of 4 September 2015, it was his continued behaviour towards Ms A after that date and his lack of insight into the effect his behaviour was having on her that he considered had breached the Banks policies and caused him to suffer the loss of trust and confidence in Mr Nel.

[177] At the time of his dismissal, Mr Nel was a senior manager in the Bank; he had long service and was familiar with the Bank policies. He confirmed that he was aware of the Bank's expectations of him as a member of the management team, and familiar with the Code of Conduct and the Visions and Values policy. Whilst he had not read the Harassment,

Discrimination, Bullying and Offensive Behaviour policy, he was aware from the Code of Conduct that the Bank expected him to be familiar with its expectations and requirements.

[178] Mr Nel has claimed predetermination on the basis that there was no announcement of a preliminary decision prior to the adjournment in the meeting on 5 October 2015.

[179] I accept that this meeting was scripted and the script makes allowance for a break for Mr Nel and Mr Gelb to make further comments should they wish to do so, following which the script states: *“Thank you for that. We can confirm that our final decision is to summarily terminate your employment”*.

[180] Mr Twomey said his preliminary decision had been dismissal; however he might have reconsidered that decision had either Mr Nel or Mr Gelb provided anything further for his consideration. They did not do so

[181] Further, Mr Twomey had reached a decision that dismissal was the appropriate outcome after due consideration. Although Mr Gelb had pressed him for a preliminary decision after the meeting the previous day, he had refused to do so without a full opportunity to consider the issue and the explanations provided by Mr Nel.

[182] I find no pre-determination on the basis of the script used in the meeting on 5 October 2015.

[183] I find that Mr Twomey considered the explanation provided by Mr Nel before reaching the decision to dismiss Mr Nel, however having completed the disciplinary process, taken full consideration of all the information and explanations provided, he had reached the conclusion that Mr Nel had breached the Banks Code of Conduct, Vision and Values and the Harassment, Discrimination, Bullying and Offensive Behaviour policies and his actions constituted serious misconduct.

[184] I find that this to be a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

**Did ASB breach its duty of good faith in its dealings with Mr Nel during the disciplinary process?**

[185] As set out in the preceding paragraphs, I find that ASB did not breach its duty of good faith in its dealings with Mr Nel during the disciplinary process.

**Has there been disparity of treatment in the treatment of Mr Nel such as to render the decision to dismiss him one which was not available to ASB as a fair and reasonable employer?**

[186] Even where grounds for dismissal have been established, the Employment Court has confirmed that it is the prerogative of the employer to decide whether to dismiss or not.<sup>3</sup> However this right must be exercised in accordance with the principles of fairness and reasonableness

[187] The Court of Appeal judgment in *Chief Executive of the Dept of Inland Revenue v Buchanan*<sup>4</sup> (*Buchanan*) outlines three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*<sup>5</sup>

[188] The first issue is the establishment of disparity of treatment. The Employment Court in *Buchanan* accepted that the proposition made in the English case of *Hajioannou* that disparity required: "... *truly parallel circumstances*"<sup>6</sup>. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[189] In *Samu v Air New Zealand*<sup>7</sup> the Court of Appeal stated:

*Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.*

[190] In support of his claim Mr Nel and his wife provided multiple examples of situations which they regarded as relevant to the issue of disparity, these included examples of excessive

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<sup>3</sup> *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

<sup>4</sup> [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

<sup>5</sup> *Ibid* at para [45]

<sup>6</sup> *Buchanan* at [43]

<sup>7</sup> [1995] 1 ERNZ 636 (CA)

alcohol consumption during after-hours social work functions which Mr Twomey said were addressed at the relevant time.

[191] Also there were examples of office romances, however none of the examples provided were such that there was not reciprocity and/or a consensual relationship. After considering the examples put forward I find that none display parallel circumstances to that of Mr Nel and Ms A.

[192] I note that among the examples presented were some within Mr Nel's own team which he said he had escalated to Mr Twomey who had not dealt with them.

[193] As the most senior member of management in that office, Mr Twomey said that it had been Mr Nel's responsibility to address the issues, and he did not accept that he, or the Bank, had not taken the appropriate action when required to do so.

[194] I further observe that the Bank requested more information when Mr Nel presented those examples to them, but this was not provided.

[195] I do not find that the claim of disparity of treatment is established, and consequently determine that there has been no disparity of treatment.

#### **Was dismissal of Mr Nel an appropriate outcome?**

[196] Having found that the Bank's decision that Mr Nel's conduct constituted serious misconduct was justifiable, I turn to examine the Bank's decision that dismissal was appropriate in: "... *all the circumstances at the time the dismissal or action occurred*", noting the observation of the Employment Court in *Air New Zealand v V* that at [36] that:<sup>8</sup>

*The requirement that the assessment of the employer's actions be conducted in the circumstances "at the time the dismissal or action occurred" necessarily includes the dismissal or disadvantageous action itself*

...

[197] In *Angus v Ports of Auckland Limited* the Employment Court observed:<sup>9</sup>

*... The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established ... The Authority and the Court will have to continue to*

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<sup>8</sup> [2009] NZEmpC 45

<sup>9</sup> [2011] NZEmpC 160 at para [24]

*assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.*

[198] Mr Nel was a long-serving Bank employee at the time of his dismissal, with some 18 years' service. He had been to that date a high performing employee and had no history of disciplinary actions.

[199] Once Ms A had informed him that his feelings towards her were not reciprocated, he apologised immediately, and continued to do so thereafter. He believed that she had accepted his apology, which she confirmed in her written evidence.

[200] I consider that whilst Mr Twomey found Mr Nel's behaviour to raise issues of trust and confidence, this did not include Mr Nel not performing his duties diligently, which is demonstrated in that he did not suspend him during the disciplinary process, or take steps to prevent Ms A meeting with him, or attending a client meeting during the period.

[201] I also take into consideration the fact that Mr Nel accepted during the meeting held on 5 October 2015 that his comments to Ms A had been inappropriate and unprofessional, and that Mr Vallabh confirmed in his evidence that: "*Andre said that Ms A was completely innocent in this and had not acted in any way to lead him on*".

[202] Taking into consideration the above factors, I determine that the dismissal of Mr Nel was not an appropriate outcome in all the circumstances at the time the dismissal occurred.

### **Remedies**

[203] Mr Nel has been unjustifiably dismissed and he is entitled to remedies.

#### *Reinstatement*

[204] Mr Nel is seeking reinstatement. Whilst reinstatement is no longer the primary remedy, it is a remedy available to the Authority provided that it is determined as "*reasonable and practical*" pursuant to s 125(2) of the Act.

[205] The Bank's evidence is that reinstatement is not practicable in that there is no Senior Commercial Manager role currently available. Mr Nel is prepared to accept reinstatement in a Commercial Manager position, and these become available more frequently. He is also prepared to work in a different office location.

[206] In *Angus v Ports of Auckland (No 2)*<sup>10</sup> the Employment Court noted the observation of the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of New Zealand Normal Intermediate School* that practicability of reinstatement involved a balancing act between the interests of the parties and the justice of their cases not only regarding the past, but also the future, noting:

*... It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."*

[207] Mr Twomey stated that he had lost all trust and confidence in Mr Nel's ability to act appropriately and in accordance with the professionalism expected of a senior manager.

[208] Following Ms A's request that he not refer to the matter again after the Facebook message on 4 September 2015, Mr Nel was unable to respect that request. Whilst he apologised to her, I accept that he failed to recognise the effect his behaviour was having on her or what constituted professional behaviour by a senior manager whose direct reports included a young woman.

[209] I find reasonable Mr Twomey's concern that Mr Nel could work appropriately in a management position in which he had authority over other employees, and could not be easily supervised to be a reasonable concern.

[210] I further find that Mr Nel's subsequent behaviour following his dismissal to militate against reinstatement.

[211] Mr Twomey stated the Bank did not disclose to employees the reasons for Mr Nel's departure. However on 17 November 2015 Mr Nel sent a Facebook message to a former employee Ms Krysta Goldfinch, who Ms A had replaced as Commercial Account Manager whom. In the email Mr Nel set out the fact that he had been dismissed, and the reason why it had occurred.

[212] Ms Goldfinch was a friend of Ms A's and showed her the message in which Mr Nel had written with reference to Ms A: "*I hope she got the desired result*". Ms A said that she felt that Mr Nel was making her responsible for what had occurred to him and its effect on him and his family. In addition, as a result of disclosures Mr Nel made to Ms Goldfinch and

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<sup>10</sup> [2011] NZEmpC 160 at [63]

other employees, Ms A had been placed in a position of having to defend herself and explain what had occurred. This was very upsetting and distressing for her.

[213] The Bank submits that three employees had raised concerns that they had felt threatened by Mr Nel when he had advised them that they would be compelled to act as witnesses in an Employment Court action should his unjustifiable dismissal claim against the Bank not be successful in the Authority, and could go to prison should they refuse to do so.

[214] I consider that this post-employment behaviour raises a reasonable concern as to whether or not Mr Nel could work with the commensurate respect a management or senior position at ASB should command if re-appointed.

[215] I am not persuaded that reinstatement would be practicable or reasonable, and accordingly I do not award it.

#### *Lost wages*

[216] Mr Nel said he had not been able to obtain alternative permanent employment in the Banking sector following his dismissal. He had commenced working as a financial broker at the end of April 2016, but at the date of the Investigation Meeting he had not secured an income stream.

[217] Mr Nel is entitled to lost wages for the 3 month period following the termination of his employment.

[218] Mr Nel is claiming a bonus element in his claim for lost wages.

[219] The Employment Agreement stated:

*The Bank operates an Incentive Programme and the position offered is currently eligible for participation. ... The Programme is subject to the Bank's Policies and Procedures and may be altered from time to time at the Bank's discretion. All payments are also subject to CEO discretion.*

[220] Mr Twomey's evidence was that he would be required to make a recommendation for each person in the Commercial Team under the Bank's Short Term Incentive (STI) scheme for paying bonuses. His recommendations were invariably accepted by senior management.

[221] The recommendation included a Behaviour and Values Gate, being an expectation that employees will act consistently with the Bank's values and the Code of Conduct at all

times. Mr Twomey stated that failure to meet the Behaviour and Values Gate would affect the affect STI payment irrespective of other performance.

[222] Had Mr Twomey not decided that dismissal was appropriate, Mr Nel would have received a final written warning based upon his behaviour which Mr Twomey found did not: “align to the Bank values, specifically integrity nor does it align to what the Bank would expect of you in terms of your role as a senior Manager”<sup>11</sup>

[223] Mr Twomey stated that his recommendation not to make a STI payment to Mr Nel had been discussed with Mr Duncan who indicated that he would have supported Mr Twomey’s recommendation.

[224] I accept that even if he had not been dismissed by the Bank, Mr Nel would not have received a bonus component in his remuneration for the relevant period in 2015. Accordingly an award of lost wages should be based upon his gross salary excluding bonus.

[225] The Authority may award reimbursement for lost wages at its discretion in excess of the sum set out in s.128(2) of the Act pursuant to s.128(3) which states:

*Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[226] Mr Nel’s evidence was that whilst he is extremely well qualified in the banking sector, he has been unable to obtain alternative employment in that sector once he notifies them of his summary dismissal by the Bank. He has also experienced reluctance of recruitment agencies to recommend him to prospective employees.

[227] Mr Nel advised that he became a mortgage broker at the end of April 2016. He acknowledged at the Investigation Meeting that it is a role in which he can utilise his skills as a commercial manager gained in the banking sector.

[228] I order that the Bank is to pay Mr Nel seven months’ lost wages in the sum of \$95,455.68 (calculated as a gross annual salary of \$163,638.31 including base salary, income protection insurance, life & TPD insurance and Tool of Trade Vehicle x 7 months for the period 6 October 2015 to the end of April 2016) pursuant to s 128 (2) and s 128(3) of the Act.

[229] In the event that Mr Nel has received income protection insurance in the period since his dismissal, that amount is to be deducted from the amount payable to him as lost wages.

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<sup>11</sup> Twomey letter dated 5 October 2015

[230] The parties are encouraged to resolve that matter if necessary. In the event that they are unable to do so, or require a revised order in respect of lost wages, they are to revert back to the Authority.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[231] As a result of the termination of his employment, Mr Nel said that not only had it impacted financially on the family as a whole, but that the termination of his employment had had a profound effect on him, especially having to inform his wife of the reason for his dismissal. He said he had lost his sense of pride and dignity and had considered self-harm.

[232] I observe as relevant to the issue of compensation Mr Twomey's evidence that the Bank informed employees only of the fact that Mr Nel no longer worked for the Bank. Whilst speculation is inevitable, it was Mr Nel's decision to send a Facebook message to Ms Goldfinch and to contact the Bank's employees subsequently, that provided the reasons for his departure.

[233] I accept that the dismissal had a significant adverse effect upon Mr Nel, he had experienced not only financial loss which impacted on his family, but also suffered emotionally.

[234] I order that the Bank pay Mr Nel the sum of \$15,000.00, pursuant to s 123(1) (c) (i) of the Act.

*Contribution*

[235] I am required under s. 124 of the Act to consider the extent to which the actions of Mr Nel contributed towards the situation that gave rise to the personal grievance which may influence the remedies awarded.

[236] The Bank concluded that Mr Nel had committed serious misconduct based upon his inappropriate behaviour towards Ms A. Whilst I have determined that, taking all the circumstances into consideration, a fair and reasonable employer would not have made a decision to dismiss Mr Nel, I nonetheless find that Mr Nel was to a large extent the author of his own misfortune.

[237] I find the actions of Mr Nel to have been blameworthy and causative of the outcome<sup>12</sup>.

[238] I find contributory fault on the part of Mr Nel and reduce the remedies awarded by 90%.

### **Costs**

[239] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[240] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**

**Member of the Employment Relations Authority**

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<sup>12</sup> *Goodfellow v Building Connection Ltd t/a ITM Building Centre* [2010] NZEmpC 82