IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2020] NZEmpC 62
EMPC 196/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DEREK GIBSON-SMITH Plaintiff
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	28, 29 November 2019, and 28 April 2020 (heard at Wellington)
Appearances:	M Quigg and S Hawkins, for the plaintiff P Chemis and L Grey, for the defendant
Judgment:	11 May 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Gibson-Smith has for some 16 years worked in a call centre now operated by the Ministry of Business, Innovation and Employment (MBIE), and prior to its creation, by other government entities.

[2] In 2003, he was employed as a Tenancy Officer to deal primarily with queries raised under the Residential Tenancies Act 1986 (RTA). He says that when he was employed, bond queries were dealt with by Bond Officers.

[3] In 2008, his employer agreed that he would not be required to assume responsibilities for bond queries, notwithstanding that this was the case for some advisors performing tenancy work. This meant his primary focus would continue to be on work generated by the tenancy line.

[4] In early 2018, Mr Gibson-Smith, now a Client Service Advisor, was requested to attend training about bond queries because MBIE wished to merge the tenancy and bond lines. He responded by stating he could not be required to do this, given the long-standing agreement he would not be required to undertake such work.

[5] MBIE says that having regard to the terms of his initial employment and the changing needs of its call centre operation, it was entitled to make this request.

[6] After exchanges between the parties, the issue came before the Employment Relations Authority; it determined that there had been an informal arrangement that Mr Gibson-Smith not undertake bond work, and that flexibility was part and parcel of his current job description. It also found he had not lost his position by redundancy because of a proposal to amalgamate the tenancy and bond lines, so he was not entitled to redundancy compensation. The Authority concluded by finding the process adopted by MBIE requesting him to undertake training on the bond line was not unjustified in the circumstances, and that he therefore had no grounds for a personal grievance for unjustified disadvantage. His claims were dismissed.[1]

[7] Subsequently, Mr Gibson-Smith brought a de novo challenge to all the Authority's findings.

[8] Evidence and submissions were received on 28 and 29 November 2019, although, as I shall elaborate later, the parties were granted leave to file additional affidavit evidence as to the status of a job description considered by a review group in early 2018, of which Mr Gibson-Smith was a member.

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1 *Gibson-Smith v Ministry of Business Innovation and Employment* [2019] NZERA 307 (Chief Member Crichton).

[9] On 4 March 2020, shortly before my judgment was to be delivered, Mr Gibson-Smith applied for and was granted leave to file a further affidavit. The evidence related to advice just given to Mr Gibson-Smith and other Client Service Advisors that MBIE was about to introduce an interactive voice response (IVR) function on the tenancy and bond lines, which would allocate calls to specific advisors based on options selected by callers. Mr Gibson-Smith wished to argue this meant he could be allocated tenancy queries only. I granted leave for evidence to be called on this topic on 10 March 2020; a hearing to consider this evidence took place on 28 April 2020.[2]

Key facts

Client Service Centre prior to 2003

[10] Some early history is necessary. In the 1990s, the Ministry of Housing (the Ministry) operated a small call centre known as the Contact Centre. It dealt mainly with bond queries. Tenancy queries were handled by another part of the Ministry. However, in 1998, a power crisis occurred in Auckland which resulted in the Contact Centre taking over tenancy queries for the Auckland area. It was found that the centre was able to accommodate both roles. Tenancy queries from other major centres were therefore transferred, so that the Contact Centre took over responsibility for tenancy queries nationwide. It is thought that this centralisation occurred sometime between 1999 or 2000.

[11] From then on, some Tenancy Officers dealt with bond queries, some dealt with tenancy queries, and some dealt with both. There was an expectation that in due course relevant advisors at the centre would be trained so that they could deal with queries from both the tenancy line and the bond line.

[12] By 2003, the applicable unit at Porirua was known as the Tenancy Services Centre. On 14 April 2003, Mr Gibson-Smith was offered permanent employment as a Tenancy Officer at the centre. The letter of offer stated that the position was covered by a collective employment agreement (CEA) between the Ministry and the Public

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2 *Gibson-Smith v Ministry of Business, Innovation and Employment* [2020] NZEmpC 26.

Service Association. Mr Gibson-Smith accepted this offer and began work on 28 April 2003.

[13] Soon after, he was provided with what was described as a generic job description, that covered the role of Tenancy Officer in the Tenancy Services Centre, and Tenancy Officer in the Dispute Resolution Offices. Mr Gibson-Smith's role was the former.

[14] The role was described as being "primarily responsible for providing tenancy advice to customers by telephone". One of its stated purposes was "To advise clients on the rights and responsibilities of landlords and tenants as set down in the Residential Tenancies Act."

[15] Amongst the various accountabilities was one relating to tenancy advice. This was described as:

a) providing accurate, constructive and easily understood advice on the RTA to landlords and tenants on their respective rights and responsibilities; and

b) ensuring that wherever possible, disputes would be resolved by the parties themselves; when not possible, the role involved the promotion of mediation as a preferred method of dispute resolution.

[16] Person specifications were described, one of which related to "technical skills"; the employee needed to:

a) be able to understand and interpret legislation and apply this in giving advice to clients with regard to their particular situation;

b) be able to understand bond procedures and share information on appropriate procedures to follow when handling bond inquiries and disputes;

c) be able to understand and explain the dispute resolution process;

d) be able to assist parties to clarify their issues in order to develop their own negotiation strategy where appropriate; and

e) have keyboard familiarity and an awareness of and commitment to accurate data entry standards.

[17] The job description also contained a further person specification which emphasised the need for the employee to be adaptable and versatile, including a willingness to learn new skills and participate in training programmes.

[18] Turning to the CEA, Schedule A of that document described the various roles to which that agreement related. This included a summary of positions under the heading "Bond Centre". Included in that section were two positions relevant for present purposes: Tenancy Advice Officers and Bond Officers. It is common ground that Mr Gibson-Smith's role, described as Tenancy Officer in his letter of offer and job description, was equivalent to that which was described as a Tenancy Advice Officer in the CEA; he was not a Bond Officer.

[19] It is also common ground that at the Tenancy Services Centre, half of the floor on which Mr Gibson-Smith worked was devoted to taking calls for tenancy advice and bond advice; this is where the Tenancy Officers and Bond Officers worked. The other half of the work area was occupied by staff who processed bonds.

[20] Mr Gibson-Smith stated that when his role commenced, he gave tenancy advice by taking phone calls from parties involved in residential tenancy issues, via the tenancy line. He explained that his role was distinct from that of a Bond Officer, who would answer bond inquiries by telephone on the bond line.

[21] He said that Bond Officers' responsibilities were much less complex than those of the Tenancy Officers. These employees accordingly received less training. Their role was to provide transaction advice relating to the payment of bonds, and to deal with refunds.

[22] Initially, 100 per cent of Mr Gibson-Smith's time was devoted solely to providing tenancy advice.

[23] After 2003, other types of work were added to Mr Gibson-Smith's role. In 2004, the Service Centre Manager, Mr Dennis Bloomfield, asked Mr Gibson-Smith whether he would also work on the building line; he agreed to do so. Mr Gibson-Smith said that these would initially have amounted to fewer than two per cent of the calls he dealt with; that increased over time and then diminished; at the time of the hearing, the volume was less than two per cent.

[24] In 2005, a line known as the Licenced Building Practitioners line was added. Again, Mr Gibson-Smith was asked to work on that line, and he agreed to do so. He said that initially the proportion of such calls would have been approximately 20 per cent of the calls he received, but over time this has decreased to about 15 per cent.

[25] In December 2005, Mr Gibson-Smith's then employer, Department of Building and Housing (DBH), wrote informing him of certain changes in the call centre structure and hours. The Tenancy Officer job title was renamed Building and Housing Contact Centre Adviser. The letter stated that the nature of Mr Gibson-Smith's role would essentially be the same. He was also told that his job description had been updated. Mr Gibson-Smith says he cannot recall receiving this document, and a copy cannot now be located. There is accordingly no evidence before the Court to suggest that Mr Gibson-Smith's job description altered in any material way at that point, save for the change to his title. His work responsibilities continued on the same basis as before.

2006

[26] In 2006, DBH settled a CEA which covered Mr Gibson-Smith's role with effect from 2005. By then, approximately 80 per cent of Mr Gibson-Smith's calls were on the tenancy line. There is no evidence that his role changed because a new CEA was entered into. In the same year, team leader positions were introduced, and Ms Coralie Berryman was appointed to one of these roles. From then on, Mr Gibson-Smith reported to her and she reported to Mr Bloomfield.

2007

[27] Mr Gibson-Smith said that in 2007 his workload on the tenancy line continued to be approximately 80 per cent of the calls he received.

[28] In September of that year, he received a letter from Ms Berryman stating that a new framework for the setting of role titles was to be introduced, to ensure that role titles defined and described the role to which they applied. Mr Gibson-Smith's title would become Advisor – Building and Housing Contact Centre. Ms Berryman also stated that there would be no other changes to Mr Gibson-Smith's role description, the remuneration banding of his role or his reporting lines.

2008

[29] In 2008, a new line known as the Weathertight Homes line was introduced. Mr Gibson-Smith said he was asked by Mr Bloomfield whether he would work on that line, and he agreed to do so. Initially, the volume of calls was less than two per cent; he said that at the time of the hearing, they had diminished to less than one per cent.

[30] Mr Gibson-Smith said that at some time during that year, he spoke to Mr Bloomfield about concerns he had as to the possibility of working on the bond line. He had noticed that since 2006, after Ms Berryman became a team leader, some tenancy officers were being trained to undertake bond work, and to take calls on the bond line. He told the Court that he did not wish to do this because:

a) He did not have strong computer skills; he said that working on the bond line required a bond line worker to facilitate the transfer of funds, that he found using the specified computer system to do this confusing, and that he would be unable to carry out the tasks required of him to a satisfactory level.

b) In his view, bond line work was repetitive and not stimulating; however, he was reluctant to raise this objection, because it may have reflected poorly on the people who worked on the bond line.

c) He was concerned that the volume of work on the bond line was heavy and that it would dominate his work and would affect his ability to carry out his other responsibilities, particularly that of tenancy. He also said that undertaking tenancy work was a particular passion.

[31] At the time, however, Mr Gibson-Smith told Mr Bloomfield about the first only of these reasons. He also said that Mr Bloomfield confirmed he would not be asked to undertake bond line work.

[32] For his part, Mr Bloomfield said that although he told Mr Gibson-Smith he did not need to undertake bond line work, it was his view that this was an informal arrangement; thus, he did not consider it necessary to formalise the arrangement in any way, even by email.

2008 to 2018

[33] The evidence is that in this ten-year period, Mr Gibson-Smith was not required by any of his managers to undertake work on the bond line.

[34] That is not to say that the possibility was not raised. Mr Gibson-Smith says he had regular one-on-one meetings with Ms Berryman as his team leader. On some such occasions, she mentioned that she wanted him to be cross-trained so that he could also undertake bond line work.

[35] Ms Berryman said she also raised the issue with Mr Bloomfield on two or three occasions. She told him she did not agree with the arrangement that Mr Gibson-Smith not undertake work on the bond line. However, Mr Bloomfield did not change his view that it was not necessary for Mr Gibson-Smith to undertake training on that line, at that time. He said he continued to be comfortable with the arrangement remaining in place.

[36] Mr Gibson-Smith's position is to be contrasted with that of some of the other advisors, who were required by their various team leaders to work on the bond line.

[37] In 2012, MBIE was established by the merger of the DBH with other public service entities. It became Mr Gibson-Smith's employer; in a letter of 19 October 2012, his role was reconfirmed.

[38] On 3 July 2014, Mr Gibson-Smith received a letter from MBIE stating that his title would be changed to Client Services Advisor. He was also told there would be no change to his existing employment terms and conditions.

[39] On 10 November 2014, Mr Gibson-Smith was advised by MBIE that a new CEA had been settled, which included some new terms and conditions of employment. Mr Gibson-Smith was offered an individual employment agreement (IEA) which mirrored the terms and conditions of the new CEA. A brief explanation was given of key areas where some terms and conditions of the proposed IEA might differ from Mr Gibson-Smith's existing conditions of employment. These did not include his role or job description, which had been recently confirmed as just mentioned.

[40] The letter advising of these changes also referred to a process of grandparenting; it was explained that if Mr Gibson-Smith believed he had an existing term and condition that he wished to grandparent, that should be discussed with MBIE.

[41] Mr Gibson-Smith said that at this time he approached a senior manager, Allan Galloway, so that he could understand what acceptance of the document would mean to himself and other PSA members.

[42] Mr Gibson-Smith says Mr Galloway told him that in accepting the IEA, he would not lose anything, and that he would not be worse off. Mr Galloway does not accept that this conversation occurred.

[43] Mr Gibson-Smith says that he therefore signed an acknowledgment and an acceptance of the new terms and conditions set out in the IEA. An aspect of the acknowledgment was that the offer made by MBIE superseded all previous offers, and terms and conditions whether written or oral; and that by agreeing to be bound by the IEA, Mr Gibson-Smith accepted it would comprise the terms and conditions of his employment.

[44] Following the making of these arrangements, Mr Gibson-Smith's work arrangements continued as before. He was not required to undertake work on the bond line, despite the fact his team leader wanted him to. Other Client Service Advisors were required to do so.

[45] In 2014, a new line known at the Electrical Workers line was introduced. Mr Bloomfield raised the possibility of Mr Gibson-Smith working on that line, and he agreed to do so.

[46] In 2016, a new line known as the Computer Emergency Response Team line was introduced. Mr Bloomfield raised the possibility of working on that line with Mr Gibson-Smith, and he agreed to do so.

2017 to 2018

[47] In December 2017, Maureen Thompson assumed the role of Service Centre Manager – Central, managing the service centre where Mr Gibson-Smith worked. This was the role that had formerly been held by Mr Bloomfield.

[48] On or about 30 January 2018, Ms Thompson informed Mr Gibson-Smith and other affected advisors that MBIE had decided to merge the bond and tenancy lines, and that this would occur in 2019.

[49] Ms Berryman, in her evidence, provided an overview of the reasons for this. She said the purpose of the change was to streamline the advisory process, and to provide an improved service to customers as well as lower costs for MBIE.

[50] She considered the bond and tenancy lines dealt with similar content; both dealt with issues arising under the RTA. She said transfers between the two lines occur in approximately 10 per cent of calls, that is, where customers' issues relate to both tenancy and bond matters.

[51] To illustrate this point, she said Mr Gibson-Smith had accepted 6,739 calls over the period 23 October 2018 to 22 October 2019. Of these calls, 4,328 (or 64.2 per cent) were on the tenancy line. Mr Gibson-Smith had been required to transfer 692 of

these calls (16 per cent) to the bond line. She said these were calls which involved both tenancy and bond issues.

[52] In short, MBIE had decided it was more efficient to operate only one line. This meant it would be necessary to cross-train those advisors who were not currently trained in both streams of work.

[53] After receiving advice of the proposed merger, Mr Gibson-Smith emailed Ms Thompson on 31 January 2018 to alert her to what he described as a "very long-standing agreement ... that I will not be required to take bond calls at all." He said that the agreement had been honoured for a long time, through the various entities involved, and respectfully requested that it continue.

[54] Ms Thompson then met with Mr Gibson-Smith to discuss the issue. Soon after, she recorded the position in a letter of 1 March 2018, in which she stated that the agreement to which Mr Gibson-Smith had referred was not documented. She went on to say he would be required to attend bond line training.

[55] In late April 2018, Mr Gibson-Smith was advised of training dates and times; the first training session was to take place on 1 May 2018.

[56] On 30 April 2018, Mr Gibson-Smith emailed the organiser to say he would not be attending the scheduled training. Later that day he met with Ms Thompson and Ms Berryman. He repeated his position that an agreement which had been concluded in 2008 remained in place, and that it was a term of his employment that he not be required to be trained to work on the bond line. Ms Thompson maintained her position that he was required to do so, and that he should attend the relevant training session the next morning. He did not do so.

[57] Mr Gibson-Smith was asked again to attend bond line training on 2 May 2018; he was also told that if he did not attend that session, there would be a formal meeting involving Human Resources. He declined to attend.

[58] On 2 May 2018, Ms Thompson wrote formally to Mr Gibson-Smith stating he had failed to follow instructions and attend bond line training. She said this may amount to a breach of MBIE's code of conduct in multiple respects and could potentially amount to misconduct or serious misconduct. If substantiated, a possible outcome could be a warning or dismissal. A meeting was proposed for 7 May 2018.

[59] Mr Gibson-Smith then instructed a lawyer who, on 11 May 2018, wrote to Ms Thompson explaining that Mr Gibson-Smith was entitled to rely on the long-standing term and condition of his employment that he not work the bond line. Mediation was proposed.

[60] Ms Thompson responded on 21 May 2018, stating that the contended-for agreement was only ever an informal arrangement. She was, she said, nonetheless willing to discuss the matter further and suggested a meeting for this purpose

[61] Mr Gibson-Smith's lawyer responded on 7 June 2018, stating that Mr Gibson-Smith felt bullied by the way in which the matter was being dealt with. He felt hurt that he had been threatened with dismissal despite there being a clear dispute about the issue. Now it appeared MBIE was trying to force Mr Gibson-Smith to attend a meeting. This, the lawyer said, was not appropriate and was viewed by Mr Gibson-Smith as a form of harassment. Again, mediation was proposed.

[62] After further correspondence, the parties attended mediation on 30 August 2018. However, the issues were not resolved.

[63] Proceedings were lodged in the Authority on 19 November 2018, with the issues being considered at an investigation meeting on 1 May 2019.

[64] As indicated earlier, following a determination which dismissed Mr Gibson-Smith's claims, a challenge was brought to the Court.

[65] On 22 July 2019, Mr Chemis, counsel for MBIE, wrote to Mr Quigg, counsel for Mr Gibson-Smith, offering two possibilities for resolution.

[66] Mr Chemis said that MBIE was comfortable with Mr Gibson-Smith, at his option, either:

a) continuing with the lines he was currently working on, but undertaking bond work as part of the preparation to merge; or

b) not undertaking any work on the combined tenancy and bond lines but continuing with the lines he currently has with additional lines being added to ensure he has an adequate workload.

[67] Mr Chemis went on to explain that Mr Gibson-Smith's terms and conditions would remain unchanged, and he would continue to work at the same location. He said that both offers would meet the requirements for reassignment in the managing change provisions of his IEA. It was suggested that if this Court were to find that Mr Gibson-Smith's role was redundant, he would not be entitled to redundancy compensation because of the offers made. These offers were not accepted.

[68] Throughout the formal processes which began in late 2018 through to the Court hearing, MBIE did not take any further steps with regard to Mr Gibson-Smith's role, a position which I was told would continue until at least the issuing of my judgment.

[69] It is also to be noted that Mr Gibson-Smith is a valued employee, who MBIE wishes to continue to employ. Ms Thompson said MBIE is willing to engage Mr Gibson-Smith in any combination of responsibilities at the call centre. The only exception is that because of the intended merger of the tenancy and bond lines, he would need to work both these lines together. She confirmed that otherwise he could work on a combination of other lines, there now being some 60 lines.

Submissions

Substantive hearing

[70] At the substantive hearing Mr Quigg, for Mr Gibson-Smith, submitted in summary:

a) From 2003, Mr Gibson-Smith's accountabilities were primarily to provide "tenancy advice to customers by telephone".

b) From 2008, it was agreed that he would not be required to work on the bond line. Over the next 10 years, Mr Gibson-Smith continued to primarily provide tenancy advice and he was never required to work on the bond line. This was despite his direct manager, Ms Berryman, querying the 2008 agreement at various times.

c) By January 2018, Mr Gibson-Smith considered that the terms and conditions of his employment were such that he could not be required against his wishes to be trained for work on the bond line, in advance of preparation of working on that line, or to actually work on it. It was as a result of the agreement, and the conduct of the parties in the subsequent years, that this arrangement became a term and condition of employment.

d) The parties are in a special relationship underpinned by good faith. What they say and do is therefore important. It could not be consistent with a good faith relationship for one party to enter into an agreement, consistently honour it for 10 years, and then to unilaterally vary the agreement.

e) The way in which MBIE had gone about this amounted to bullying and amounted to a disadvantage grievance.

f) Mr Gibson-Smith is in effect surplus to requirements, and entitled to redundancy compensation under the change provisions of his IEA.

g) Remedies were sought accordingly.

[71] At the same hearing, Mr Chemis, on behalf of MBIE, submitted in summary:

a) Mr Gibson-Smith's role as a Client Service Advisor had largely remained the same throughout his employment with MBIE. The original job

description was drawn widely, and the better view is that it captured both bond and tenancy work.

b) From the outset adaptability and versatility were emphasised. This was important as the scope of inquiries which advisors were required to undertake increased and diversified. It was emphasised that the evidence shows the call operation had expanded significantly over the years, there now being approximately 115 advisors and 60 lines from which advice is given.

c) As later job descriptions emphasised, the responsibilities of the role changed over time as MBIE responded to changing needs, reinforcing the need for flexibility to adapt and develop as the environment evolved. Mr Gibson-Smith had actively participated in such development and growth, by agreeing to work additional lines.

d) In summary, based on an assessment of the core nature of the advisor's role and the position descriptions, and taking account of how the Client Service Centre and advisors operated in practice, there was no doubt that an advisor was required to service a variety of lines as directed by MBIE, subject to appropriate consultation.

e) The 2008 discussions were not intended to have contractual force, given the circumstances. A condition of employment was agreed, but not a contractual term for the life of the employment relationship, noting this was a distinction which was explained by the Court in *ANZ National Bank Ltd v Doidge*.[3]

f) Other legal arguments pleaded for Mr Gibson-Smith, such as variation or estoppel, could not apply. The parties had agreed only that Mr Gibson-Smith would not have to undertake bond work, and this occurred for many years.

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[3] *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC) at [46] and following.

g) Turning to the question of whether there was a disadvantage grievance, MBIE was entitled to bring the arrangement to an end after appropriate consultation. The steps taken were analysed; it was submitted that an assertion of unreasonable or unfair conduct by MBIE could not be made out. The suggestion that there may have been misconduct or serious misconduct on the part of Mr Gibson-Smith would have been difficult for him, but he brought it upon himself by failing to communicate effectively by explaining properly his reasons for not wishing to undertake bond work. There was very little evidence to establish any unjustified disadvantage, let alone bullying.

h) Regarding Mr Gibson-Smith's claim in respect of redundancy, it was submitted that if the 2008 agreement was not contractual in nature, then no redundancy could possibly arise. Mr Gibson-Smith's position could not change in a fundamental way. In any event, the reassignment provisions would apply because a suitable role was available for Mr Gibson-Smith. In those circumstances, there would be no entitlement to compensation.

i) The claims for remedies were accordingly resisted.

Further hearing

[72] A further hearing was held to consider the further affidavit and submissions of the parties about the IVR issue, and submissions.

[73] Mr Gibson-Smith said he had received emails from Ms Wendy Devlin, National Manager, Service Centres, based in Christchurch, regarding the introduction of an IVR function. He said that the proposed system could be programmed to never allocate to him callers who said they were calling about bonds. He emphasised that this was a significant and surprising development, of which he had no knowledge at the substantive hearing. It meant there was no longer a technological or practical impediment to him continuing to service tenancy, and not bond, calls as had always been the case.

[74] Ms Thompson filed two affidavits. In the first, she emphasised that MBIE and its stakeholders' aims had not changed. Due to the overlap and similarities between tenancy and bond queries, and the inefficiencies resulting from calls being transferred, it had been decided to move to one line and to train advisors so they could address both types of queries. The IVR function would allow MBIE to broadly identify the nature of incoming queries, but would not eliminate the need to transfer calls, or reduce these to nominal levels. She also said that MBIE and its stakeholders may not continue to use this technology.

[75] In her second affidavit which answered queries raised on behalf of Mr Gibson-Smith, she said she personally had not been involved in making decisions as to the IVR system or its implementation. She said she had learned of it shortly before it went live. Nor was she aware of Mr Gibson-Smith having raised the possibility of using this technology, as he had asserted, so he could receive tenancy calls only. She confirmed that the percentage of calls being transferred by Mr Gibson-Smith when the IVR system was in use had fallen from about 16 per cent to about six per cent.

[76] With regard to this evidence, Mr Quigg submitted in summary:

a) Mr Gibson-Smith alleged as an aspect of his disadvantage grievance that the manner in which he was treated was unfair, because he could continue to undertake tenancy work, and not bond work, without difficulty. The IVR function made that possible. It was unfair to alter his longstanding work arrangement when this option existed and had not been the subject of consultation.

b) If MBIE chose not to utilise the IVR option so as to deal with Mr Gibson-Smith's circumstances, it should have consulted with Mr Gibson-Smith, and as a good employer pay him his redundancy entitlements.

[77] Mr Chemis submitted in summary:

a) Mr Gibson-Smith's disadvantage claim had proceeded on the basis of the nature of interactions between the parties, and in relation to MBIE's desire and efforts to have him undertake training on the bond line.

b) A failure to consult on the decision to merge, or any aspect of it, was not pleaded or raised as an aspect of the disadvantage grievance.

c) Nor could it be the case there was a failure to consult in a redundancy context, because with or without the merged line, the essence of Mr Gibson-Smith's role remains intact; there is no change having a "significant impact", as required by the redundancy provision.

d) Even if there was a redundancy situation, there had already been extensive consultation.

Issues

[78] Distilling the submissions of the parties, the issues for resolution are:

a) What is the meaning and status of the various job descriptions, up to and including the one which was developed in 2018?

b) What was the status of the 2008 discussions between Mr Gibson-Smith and Mr Bloomfield? Were the understandings reached in 2008 a condition of employment only, or did they have contractual force?

c) Was there a relevant implication by custom, variation by conduct or estoppel by conduct?

d) In the circumstances, has Mr Gibson-Smith been unjustifiably disadvantaged?

e) Does Mr Gibson-Smith have an entitlement to redundancy compensation?

f) Is Mr Gibson-Smith entitled to a remedy?

Discussion

Preliminary issue

[79] Mr Chemis submitted, in effect, that there was an underlying pleading problem with Mr Gibson-Smith's challenge. Reference was made to aspects of the statement of claim which referred to the fact that, partway through the employment period, the parties had agreed that he would not have to be trained or undertake work on the bond line. Pointing out that this was largely common ground, it was submitted the claim did not expressly state what agreement there was as to the work which Mr Gibson-Smith *would* undertake.

[80] I am not persuaded that the statement of claim can be read down in this way. In an admitted allegation in the statement of claim, it is stated that Mr Gibson-Smith's position of Tenancy Officer required him to be primarily responsible for providing tenancy advice to customers by telephone.[4] Later paragraphs of the pleading make it clear that the relationship problem focuses on MBIE's proposal to alter Mr Gibson-Smith's primary responsibility so that he would work on the merged tenancy/bond lines.

[81] As Mr Quigg summarised the position, Mr Gibson-Smith's claim is that having worked some sixteen and a half years on the tenancy line for at least 70 per cent of his time, he was now being asked to work on the tenancy line on a diminished basis – perhaps 50 per cent – and only if he would also undertake bond line work.

[82] I am satisfied that the pleadings and evidence squarely raise this issue for resolution.

Issue one: content and status of job descriptions

[83] There are several relevant features of the first of the job descriptions, as provided to Mr Gibson-Smith in 2003 shortly after his appointment to the position of

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4 Statement of claim at [5].

Tenancy Officer. Although that document was described as a generic job description covering the role of both Tenancy Officer in the Tenancy Services Centre, and in the Dispute Resolution Office, it is clear that those aspects of the document relating to the former position applied to Mr Gibson-Smith. The document expressly provided that a Tenancy Officer in the call centre was to be primarily responsible for providing tenancy advice to customers by telephone.

[84] The role of a Tenancy Officer was different to that of a Bond Officer, even though both related to the provisions of the RTA. It is also the case that some staff in the relevant section of the services centre were performing only tenancy queries; Mr Gibson-Smith was one of those staff. His responsibilities were different from some other staff who were dealing only with bond queries, or who were dealing with both tenancy and bond queries.

[85] Whilst the responsibilities of the services centre expanded, it is plain from the documentation that it was intended at the time of his employment that Mr Gibson-Smith's responsibilities would be primarily devoted to the giving of advice on the tenancy line.

[86] I do not regard the statement in the original job description which referred to adaptability and versatility as reserving to the employer an ability to impose a significant variation to Mr Gibson-Smith's role. This is for several reasons.

[87] First, these references occurred in a section of the job description dealing with person specifications, not accountabilities. This particular document did not state that the employer reserved itself the right to alter the composition of the role for this reason.

[88] Second, I do not consider that the broadening scale and scope of advice which was being given at the centre meant Mr Gibson-Smith could be required to perform work different from that which it had been agreed at the outset he would undertake. Nor can such a conclusion be drawn from the fact that Mr Gibson-Smith expressly agreed to work on other lines to a modest extent from time to time.

[89] The third point requires a consideration of whether the job description had contractual status and thus whether the provisions of the CEA as to variation applied.

[90] Although the letter of offer and CEA did not expressly refer to the job description, I am satisfied that it is necessary to conclude that it was indeed part of the parties' employment agreement.

[91] In *Employment Law in New Zealand*, the learned authors make the following statement, which is of assistance:[5]

> In practice, few written agreements, even collective agreements, will contain an exhaustive recital of all of the relevant terms and conditions governing the particular employment relationship. In part this is explicable because entering employment may involve a range of documents: advertisements, letters of offer, negotiations by email and a detailed standard form contract. Additionally, some items may be left deliberately vague, either to increase the employer's flexibility, such as aspects of a job description, or because the employer prefers to deal with some matters in more easily modified policy documents governing, for example, drug testing or internet use.
>
> Thus, in ascertaining the terms and conditions upon which an employee is engaged, reference will need to be made to a variety of sources and the contractual status of such sources ascertained.[6]

[92] The relevant interpretation principles are well-known and need not be set out here: *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[7] The context provided by the contract as a whole and any relevant background informs the meaning to be attributed to that contract.

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5 Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at [7.7].

6 This summary is supported by reference to the approach adopted in multiple cases of this Court: *Baron v The Salvation Army Property (New Zealand) Trust Board* EmpC Auckland 39/01, 15 June 2001; *NZ Air Line Pilots Assn IUOW v Air New Zealand Ltd* [1992] 1 ERNZ 880 (EmpC); *House v Northland Area Health Board* [1991] 3 ERNZ 913 (EmpC), compare *Carter Holt Harvey Ltd v Pawson* [1998] 2 ERNZ 1 (EmpC); *BP Sockburn v NZ Amalgamated Engineering etc IUOW* [1990] 1 NZILR 861 (LC); *Swann v ACI NZ Ltd* (1990) ERNZ Sel Cas 909 (LC); *Stimpson v Auckland Health Care Services Ltd (T/A Auckland Health Care)* [1993] 2 ERNZ 614 (EmpC); *Clough v Dunedin City Council* [1992] 2 ERNZ 646 (EmpC); *McCarthy v Owens Project Services Ltd* [1994] 2 ERNZ 572 (EmpC); *Snow v Container Terminals Ltd* [2000] 1 ERNZ 454 (EmpC); *Craig v R & P Fraser Pty Ltd* (1995) 4 NZELC 98,327 (EmpC).

7 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[61]. These principles apply to employment agreements: *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

[93] In this case, neither the letter of offer not the document referred to in that letter, the CEA, referred in any detail to the work to be undertaken by Mr Gibson-Smith. It defined only the title of his role.

[94] That detail was necessarily covered by the job description that was provided to him at the time, and to which both parties worked. I find that from the outset the job description was part and parcel of Mr Gibson-Smith's employment contract.

[95] It follows from this conclusion that were the employer to wish Mr Gibson-Smith to perform a role other than his contracted one, it would have required his consent, having regard to the provisions of the CEA as to variation. In fact, that consent was forthcoming from time to time. Mr Gibson-Smith was asked whether he would be prepared to assume responsibility on additional lines; and on each occasion he did.

[96] Next, it is necessary to consider whether any subsequent job or role description applied to Mr Gibson-Smith because he accepted its terms, and whether this altered his role.

[97] In 2005, when Mr Gibson-Smith's official job title was changed, he was told his job description had been updated. However, the updated document was not produced. There is no basis for concluding that Mr Gibson-Smith's role changed in any material respect. Further name changes occurred in 2007[8] and 2014.[9] The title alterations appear to have arisen in part from changes to the identity of the employer. There is no evidence that these steps altered the content or scope of Mr Gibson-Smith's work responsibilities.

[98] Reference was made to several job descriptions apparently produced in the years 2013 to 2017. The first was dated 5 September 2013 and was labelled as a draft. The second was dated November 2015. It introduced a statement, which had not appeared in the earlier role descriptions, stating that "Responsibilities of this position are expected to change over time as the Ministry responds to changing needs." An

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8 At [28] above.
9 At [38] above.

identical statement was contained in the job description of May 2017 relating to a Client Service Advisor.

[99] However, there is no evidence that Mr Gibson-Smith became bound by any of these documents. Ms Berryman, the relevant team leader at the relevant times agreed that these documents were not "with his records". I infer that this was a reference to his personal file. Nor was there any evidence that Mr Gibson-Smith was asked to agree that his role could now be altered from time to time at the behest of the employer. This confirms Mr Gibson-Smith's evidence that the substance of his role was not altered at any time, except where he specifically agreed to take on additional lines.

[100] I refer briefly to the IEA entered into between Mr Gibson-Smith and MBIE, in November 2014. A covering letter stated that the new document mirrored terms and conditions under the previous CEA. MBIE said that key areas which might differ from existing conditions of employment were outlined, but these did not refer to job descriptions. The possibility of grandparenting was raised, if Mr Gibson-Smith believed there was an existing term and condition that he wished to grandparent. In that instance the issue was to be raised with the employer. However, this provision did not necessarily apply, as there was no statement in the new IEA altering the scope or description of duties which had applied to Mr Gibson-Smith for many years. This agreement also provided for variation of terms, provided these were in writing and approved by the parties: cl 4.

[101] The reality was that Mr Gibson-Smith undertook the same duties thereafter, as he had undertaken for MBIE previously. Accordingly, the various statements in the IEA could not be construed as an agreement between the parties that there would be a material alteration to the content of Mr Gibson-Smith's role as originally agreed in 2003, or how it was to operate in practice.

[102] The position regarding a job description which was negotiated in 2018 is a little more controversial.

[103] At the hearing, Ms Berryman told the Court that Mr Gibson-Smith had been involved in a working group to review the Client Service Advisor position. She said

that his current job description had been created as a result of that review. She referred to a provision in that document which referred to key responsibilities; it stated that these could be expected to change over time as MBIE responded to changing needs, and that the incumbent would need flexibility to adapt and develop as the environment evolved. Notably, this provision was identical to that of the 2015 and 2017 descriptions.

[104] It was agreed that additional evidence would be filed after the hearing as to the status of the document which arose from the review. Ms Thompson filed an affidavit which referred to an email chain between those who participated in the review, including Mr Gibson-Smith; in one of those he indicated that the document was "perfect".

[105] She also said there was no record that the document, completed in April 2018, had been sent out to Client Service Advisors, and in particular, to Mr Gibson-Smith. The document was, however, held in a particular file to which all staff would have access; she said it had been available for viewing since 23 July 2018.

[106] Mr Gibson-Smith filed an affidavit in response acknowledging that he had taken part in the review; however, he also said the completed document had never been sent to him, and he had never obtained access to the applicable service centre file, as he was unable to do so. Moreover, he said the emphasis of the review related to job sizing and remuneration, not the description of particular roles. He said he did not see the draft job description which he reviewed as being relevant for anything other than the job sizing exercise, or that it would impact on his long-term working arrangements in which it had been agreed he would be a Tenancy Officer who was not required to undertaken bond line work.

[107] I am not satisfied that the 2018 job description superseded the original job description of 2003 as to Mr Gibson-Smith's responsibilities. His position had evolved in an unusual way. It could not be the case that the primary responsibilities of the role he had held for 16 years would be altered without that possibly being discussed and agreed.

[108] A final point arises from Ms Berryman's evidence, that from her perspective there had always been an ethos in the service centre of flexibility and versatility, so that as the needs of that centre changed from time to time, employees could be asked to respond by taking on different roles in the call centre; that is, on other lines.

[109] I do not doubt that the applicable employers at various stages did adopt such a practice and considered it appropriate to do so. The later job descriptions refer to such a possibility. But having regard to the way in which Mr Gibson-Smith's particular circumstances evolved, I am not satisfied that either the later job descriptions, or the practice, applied to him in this respect.

Issue two: status of the 2008 discussions between Mr Gibson-Smith and Mr Bloomfield

[110] As indicated earlier, the key question on the second issue is whether the understanding reached in 2008 between Mr Gibson-Smith and Mr Bloomfield was a condition of employment only which could cease to have effect at any time, or whether it had contractual force.

[111] This is an issue which must be resolved against the background I have analysed to this point.

[112] I am satisfied on the basis of the evidence I heard from Mr Gibson-Smith and Mr Bloomfield that a clear understanding was reached between them in 2008 to the effect that he would not be required to perform bond work; this meant he would continue to work primarily on the tenancy line.

[113] At the time, the reason he gave was that he would not be comfortable working on the relevant computer system, which he found confusing. He felt he would not be able to carry out the tasks required of him to a satisfactory level.

[114] Mr Bloomfield considered that reaching this agreement would not impact on the efficient running of the centre; he viewed this as an informal arrangement, such that it was not formalised even by email.

[115] As already noted, when giving evidence, Mr Gibson-Smith advanced several other reasons for not wishing to undertake bond work.[10] These were not outlined in detail to Mr Bloomfield in 2008, but that fact does not lead to a conclusion that the agreement was not particularly significant. That it continued for some 10 years confirms it was. As time went on, it was obviously accepted that the issue was important for Mr Gibson-Smith, and that it would accordingly continue to apply.

[116] Its significance is reinforced by the various discussions on the topic which involved not only Mr Bloomfield but also Ms Berryman as to whether the agreement could and would continue. From the outset, Ms Berryman was opposed to it, but Mr Bloomfield reiterated to her, and it appears to Mr Gibson-Smith, that the arrangement should continue.

[117] Mr Gibson-Smith said that he was told by Mr Bloomfield the arrangement was "permanent". Mr Bloomfield did not accept that he used such a description. When Mr Gibson-Smith was questioned about this in cross-examination, he was unable to pinpoint an occasion when he was told this. However, I find that the longevity of the arrangement reasonably led him to believe that the arrangement was indeed permanent.

[118] There was some evidence as to whether it survived the introduction by MBIE of the new IEA in 2014, having regard to the various statements in it already alluded to. Again, it is necessary to acknowledge the reality that Mr Gibson-Smith continued to perform his duties as before. The arrangement which had been agreed in 2008 continued.

[119] On those facts, I am satisfied that, from an objective standpoint, the arrangement was an aspect of Mr Gibson-Smith's contract, certainly by early 2018. It was binding since, with the express agreement of both parties, it continued to regulate the tasks he had been required to undertake for a long period. I am not persuaded that it should be regarded only as a "workplace arrangement for the time being", or a "condition of employment but not a term of the contract", as submitted by Mr Chemis.

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[10] At [30] above.

The reality was that it had become an acknowledged component of his employment agreement.

Issue three: implication by custom or variation by conduct?

[120] Given the conclusions reached to this point, it is unnecessary to consider the alternative forms of legal analysis advanced for Mr Gibson-Smith as to variation, implication, custom or estoppel.

Issue four: was Mr Gibson-Smith unjustifiably disadvantaged?

[121] It is next necessary to consider how MBIE dealt with the issues which arose from early 2018. Two points are raised. The first relates to the combined acts of MBIE deciding to merge the tenancy and bond lines and then requiring Mr Gibson-Smith to work both if he was to continue to work on the tenancy line.

[122] The focus of the grievance was on the process adopted by MBIE, which Mr Gibson-Smith says was unfair and unreasonable, to the point where he felt bullied and harassed.

[123] It was accepted for Mr Gibson-Smith that MBIE was able manage its business by deciding to merge the tenancy and bond lines. This is a proper concession. I agree MBIE was entitled to make those appropriate business decisions as to its operations.

[124] I do not agree, however, that it is correct to say Mr Gibson-Smith was being required to work both lines. Although he was initially directed to attend training for work on the bond line, MBIE's position was in reality flexible. In due course he was presented with options.

[125] Turning to the procedure which was adopted, Mr Gibson-Smith said he felt bullied and badgered by the pressure that was placed on him to attend training for bond work. He referred to a statement made to him which he did not appreciate, to the effect he did not like failure. This remark has to be assessed in context. At that stage, he had not fully explained his reasons for wishing to adhere to the long-term arrangement. I am not persuaded that in those circumstances a claim of bullying amounting to unjustifiable action is made out.

[126] More significant, however, is Mr Gibson-Smith's assertion that MBIE escalated the matter when it wrote to him on a disciplinary basis. Mr Gibson-Smith was told there may have been misconduct or serious misconduct, and that if either of these were substantiated, a possible outcome could be a disciplinary warning, final warning or dismissal.

[127] When giving her evidence, Ms Thompson explained that the letter which was sent was "templated". She said that in fact a disciplinary approach was not her preferred option, and she wanted to discuss the issue constructively with a view to it being resolved.

[128] The thrust of the letter, however, suggested otherwise. The reference to a disciplinary approach understandably caused Mr Gibson-Smith stress and distress; such an approach could not have been justified in the circumstances.

[129] Soon after, Mr Gibson-Smith instructed counsel. Although the possibility of a meeting between the parties was raised, this did not immediately occur. As mentioned, the parties did attend mediation in due course which was unsuccessful. I infer from these steps that a more constructive, if formal, approach was adopted once counsel became involved. I find that if MBIE had acknowledged and framed the issue as one involving a dispute as to the nature and extent of Mr Gibson-Smith's employment arrangements, rather than as a disciplinary matter, Mr Gibson-Smith would not have suffered an adverse reaction to the extent which he did.

[130] I conclude that the procedural steps just referred to were not those which could have been undertaken by a fair and reasonable employer; and that Mr Gibson-Smith was disadvantaged by them.

[131] Although the point was not raised, the defect in process was not a minor one; and it resulted in unfairness. Section 103A(5) of the Employment Relations Act 2000 (the Act) does not therefore relieve MBIE of liability. The personal grievance is established on the basis of this point.

[132] I am not satisfied that there is a legitimate claim of disadvantage in connection with the introduction of an IVR function. First, contrary to his assertion, there is no evidence before the Court that Mr Gibson-Smith himself referred to the possible use of this technology as being an option which would permit him to focus primarily on tenancy work. Second, an alleged failure to consult on the possible use of the IVR function does not fall within the ambit of the disadvantage claim both as pleaded or as argued. The claim focused on the manner in which the parties interacted. It did not focus on the nature of the management decisions made or on an obligation to consult. If anything, the issue of consultation is relevant to the agreed management of change provisions.

Issue five: redundancy issues

[133] MBIE's position is that if the 2008 arrangement is indeed part and parcel of Mr Gibson-Smith's IEA, it is entitled to proceed under the managing change provisions.

[134] I note the concession made for MBIE that the more generous redundancy provisions which applied to Mr Gibson-Smith prior to the inception of the IEA in 2014 would apply if Mr Gibson-Smith was not reconfirmed or reassigned if made redundant.

[135] Because, to this point, MBIE has not accepted that the arrangement was anything other than informal, or that it was contractual in nature, the preliminary steps under the managing change provisions have not been systematically worked through. These include communication and consultation of any proposed changes, the exploration of alternatives to employment, and subsequent termination of employment if the position were to be found surplus.

[136] As a result, there are several procedural issues. The first is whether the initial threshold of a proposed change having a "significant impact" on an existing role has been met. In his reply submissions, Mr Chemis submitted that the request made by MBIE that Mr Gibson-Smith undertake bond line training could not be regarded as a matter having a significant impact on Mr Gibson-Smith. He said there had been numerous line changes for over 20 years, and that the redundancy provisions had never

previously applied. The parties to the agreement on which the IEA was based had never taken that point. Consequently, such changes had not been regarded as having a "significant impact".

[137] I am not persuaded that this submission acknowledges sufficiently the obligation in cl 68.2 that in determining whether there is a situation which will have a significant impact or not, the parties are required to consider the particular facts of the situation prior to making a decision on that topic. The facts of Mr Gibson-Smith's situation have been outlined comprehensively in this judgment. It is the facts, as found, which the parties would need to consider when considering this threshold issue.

[138] The parties also agreed to an effective communication process.[11] This is part and parcel of the acknowledged obligation to consult when change is contemplated.[12] There will need to be consultation on the various issues relating to MBIE's decision to merge the two lines, which will likely include the issues relating to the use of IVR, having regard to Mr Gibson-Smith's existing job description as discussed in this judgment.

[139] If it is agreed the proposal to merge the two lines is regarded as giving rise to a change which would impact significantly on Mr Gibson-Smith, with or without IVR, MBIE must then meet the following obligation under the IEA:

> 72.3 MBIE will actively explore all reasonable alternatives before a decision is made that may result in a person being made redundant. Some of these alternatives may include:
>
> > flexible work practices (e.g. job-sharing, flexible hours, part-time work)
> >
> > temporary or project work
> >
> > leave without pay
> >
> > natural attrition.

[140] Such a process has not been followed. It would need to be.

[141] Mr Quigg submitted that MBIE had already proceeded down the managing change path and had advanced its offers as if they were reconfirmation or reassignment

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11 Clause 69.
12 Clause 68.1.

possibilities under the IEA: cls 73 and 74. He submitted that it was not now possible for MBIE to go back and undertake the process properly. I disagree. All that has occurred is the making of an offer to resolve the present proceedings, which it is argued could in fact comply with the change provisions of the IEA. That an offer was made in those circumstances does not preclude the parties now proceeding in accordance with the change provisions.

[142] I have concluded that a proper application of the managing change provisions by the parties is necessary. It would be premature to determine whether the offers made for the purposes of this proceeding might amount to a reconfirmation or a reassignment, either of which would mean redundancy compensation would not be payable.

Remedies

[143] Mr Gibson-Smith seeks compensation for humiliation, loss of dignity and injury to feelings for his established disadvantage grievance.

[144] Mr Chemis submitted that no award should be made at all. Otherwise, I received no submissions as to quantum.

[145] I am not persuaded that this case falls into the unusual class of cases where no award of remedies is appropriate. As already indicated, I am satisfied that Mr Gibson-Smith has suffered stress and distress as a result of the process adopted which unnecessarily escalated the issue that required resolution. He was not the author of this misfortune. Nor is there any other very unusual circumstance which would justify a nil award of compensation.

[146] However, I take into account the fact that had a non-disciplinary approach been adopted, Mr Gibson-Smith would likely have still been troubled, and perhaps stressed, by the request that he undertake training on the bond line which would impact on his primary duties to work on the tenancy line.

[147] In *Johnson v Chief of the New Zealand Defence Force*, I reviewed cases where compensation was awarded for a disadvantage grievance.[13] I noted that a survey of determinations issued by the Authority in the period August 2016 to May 2018 suggested that compensation for disadvantage grievances had often been held to fall within a lower range.[14]

[148] Although there are fewer cases where this Court has awarded compensation following a finding of unjustified disadvantage,[15] a review of a sample of those decisions also suggests that disadvantage grievances can fall within a lower range; but as Judge Smith recently emphasised, each case must be decided on its merits, and broad generalisations as to levels of compensation for particular types of grievances are misplaced.[16]

[149] A judgment which is of some assistance is *Tuapawa v AFFCO New Zealand Ltd*, in which the Court was required to fix compensation for inappropriate correspondence sent to an employee.[17] Finding that the employee would have been bereft to receive the two letters which were sent to her requiring her to work overtime in circumstances where such a request was unjustified, the Court awarded compensation of $2,000.

[150] I have concluded this case falls within the lowest of the three Bands, Band 1.[18] Standing back, I consider that an award of $2,000 is appropriate under s 123(1)(c)(i) of the Act.

[151] Mr Chemis submitted that Mr Gibson-Smith's conduct and lack of appropriate engagement were significant contributory factors. I disagree. His reactions to the

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13 *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192.
14 At [148].
15 See for example $8,000 awarded for disadvantage grievance (*Cruickshank v The Chief Executive of Unitec Institute of Technology* [2012] NZEmpC 202 at [252]); $3,000 awarded for disadvantage grievance (*Brocks v Prime Range Meats Ltd* [2014] NZEmpC 70 at [81]); $1,500 awarded for disadvantage grievance (*Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171, [2015] ERNZ 1124 at [250]); and $2,000 awarded for disadvantage grievance (*Spotless Facility Services NZ Ltd v MacKay* [2017] NZEmpC 15, [2017] ERNZ 64 at [69]).
16 *JCE v The Chief Executive of the Department of Corrections* [2020] NZEmpC 46 at [60].
17 *Tuapawa v AFFCO New Zealand Ltd* [2011] NZEmpC 114.
18 The three bands are described in *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62]; and in *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [52]–[54] and [66]–[68].

direction to undertake bond line training were unsurprising in the circumstances. I decline to reduce the compensatory award under s 124 of the Act.

Conclusion

[152] I am satisfied that the agreement entered into between the parties in 2008 that Mr Gibson-Smith's work on the tenancy line would continue to be his primary duty, and that the agreement he was not required to undertake bond line training, became a contractual term.

[153] I am also satisfied that Mr Gibson-Smith has established a disadvantage grievance, and that he is entitled to compensation for humiliation, loss of dignity and injury to feelings of $2,000, with no deduction for contribution.

[154] The parties have not formerly engaged in the managing change provisions of Mr Gibson-Smith's IEA. If MBIE chooses to proceed with its decision to merge the tenancy line and bond line, with or without IVR, the parties will need to consider the application of the managing change provisions of Mr Gibson-Smith's IEA.

[155] Costs are reserved. This issue should be discussed between counsel in the first instance. If it is necessary for the Court to consider an application for costs, it should be filed and served within 21 days, with any response to be filed and served within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 1.10 pm on 11 May 2020