

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 51
3003941

BETWEEN JANELLE CALDER
Applicant
AND HOME DIRECT LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Emily Strom, Counsel for Applicant
Ashley Sharp, Counsel for Respondent
Investigation Meeting: 14 and 15 September 2017
Submissions Received: 4 and 26 October 2017 from the Applicant
18 October 2017 from the Respondent
Determination: 16 February 2018

DETERMINATION OF THE AUTHORITY

- A. Janelle Calder was subject to an unjustified disadvantage by Home Direct Ltd's actions but was not unjustifiably dismissed.**
- B. Home Direct Ltd is ordered to pay Ms Calder the following sums within 28 days of the date of this determination:**
- (a) lost wages of \$19,230.80 gross; and**
 - (b) \$7,000 as compensation for injury to feelings.**
- C. Both parties breached their duty of good faith to the other. No penalties are awarded.**
- D. The application for non-publication is declined.**

E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Janelle Calder began working for Home Direct Ltd (Home Direct or the company) as the General Manager Retail on 28 July 2015. Home Direct sells a variety of consumer goods directly to the public via trucks which go to customers' homes. Most of the sales are conducted through finance which Home Direct arranges. Ms Calder reported to Home Direct's executive chairperson/CEO Michael Wright.

[2] In late November 2016 Ms Calder was informed by Mr Wright, that he was looking at restructuring her position which could lead to her redundancy. Discussion was held about a possible resolution but when that was unsuccessful, Ms Calder was given a letter dated 5 December 2016 which said that her position was redundant. Discussion was sought about possible redeployment options but if that was not successful her work was to finish on 9 December 2016.

[3] Ms Calder went off on sick leave from 5 December 2016, which she says was due to distress and stress caused by the restructuring process. She then objected to the inadequacy of the information provided and thus the consultation process. Home Direct then decided to withdraw its decision to make her position redundant and restart the consultation process with John Roberts, a member of the company's Advisory Board, conducting the process. The parties agreed to go to mediation but the only date offered at very short notice was unsuitable and no other dates were available before Christmas.

[4] Ms Calder remained on sick leave, although payment ceased after a couple of days, as she ran out of her sick leave entitlement. Payment of special leave was sought on Ms Calder's behalf but Home Direct instead offered Ms Calder the prospect of using her annual leave, which she declined.

[5] Mr Roberts wrote to Ms Calder on 12 December 2016 providing financial information and seeking a consultation meeting with Ms Calder. Ms Calder herself, and then through her lawyers, objected to the restarting of the consultation process, considering it to be a sham with the outcome predetermined. Mediation was attended but did not resolve the issue.

[6] Home Direct sought a final consultation meeting on 7 February 2017 or provision of a written submission. Ms Calder did not accept either option but rather provided a medical certificate covering all of February. Home Direct did not accept that the certificate meant that Ms Calder was unable to participate in the consultation process, as she was represented and had attended mediation.

[7] On 14 February 2017 Mr Roberts wrote to Ms Calder advising that a decision had been made to make the General Manager Retail position redundant, with Mr Wright taking on that role's responsibilities. Three redeployment positions were offered, although not as senior as Ms Calder's previous role.

[8] Home Direct then advised that Ms Calder's position would be redundant on 17 February 2017. She was paid six weeks' notice in lieu.

[9] Ms Calder claims that she was subject to unjustified actions by Home Direct to her disadvantage and/or was unjustifiably dismissed. She also claims breach of the duty of good faith by Home Direct. Home Direct says that it did not unjustifiably dismiss Ms Calder and it was her who should be subject to a penalty on the basis of being uncommunicative and unresponsive when attempts were made to consult with her on the restructuring.

[10] An application was made on Ms Calder's behalf to remove this case to the Employment Court. This was opposed by the Respondent. The Authority did not grant removal.¹

[11] An investigation meeting was held on 14 and 15 September 2017. I heard evidence from Ms Calder, Mr Wright, Mr Roberts, Home Direct's finance director Robert Bruce Collins (known as Bruce) and human resources consultant Sylvia Wood. I also heard from Home Direct's merchandising manager who started work while Ms Calder was on sick leave in January 2017. I was much assisted by the thorough submissions received from both parties after the investigation meeting.

[12] This determination has been issued outside the statutory period of three months after receiving the last submissions from the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided that, as

¹ *Calder v Home Direct Ltd* [2017] NZERA Auckland 158

permitted by s 174C(4) of the Employment Relations Act 2000 (the Act), that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in s 174C(3)(a) of the Act.

[13] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[14] The issues for determination are:

- (a) Was Ms Calder subject to an unjustified disadvantage by Home Direct regarding the consultation and/or redundancy process?
- (b) Was Ms Calder unjustifiably dismissed by Home Direct?
- (c) If a personal grievance is established, what remedies (if any) should Ms Calder receive?
- (d) Did either party breach its duty of good faith?
- (e) If so, should penalties be awarded against either party?

[15] I will consider any issues regarding the first process up to 7 December 2016, then whether Home Direct was able to restart, or proceed on to the second process, and whether there were any difficulties with that second process.

Events earlier in 2016

[16] Ms Calder's surprise and dissatisfaction at the decision in late November 2016 to consider a restructure of her role was caused in significant part by events earlier in 2016.

[17] In the first financial quarter of 2016 Home Direct made a change to its business strategy, by the introduction of a new model for the credit scoring of customers and a reduction in the number of trucks which sold products to customers. These factors led initially to a reduction in sales which was obviously a concern to the company.

[18] Ms Calder as the General Manager Retail produced a plan to address the reduction. She says that her plan recognised the tough road ahead but predicted that

the market would start to correct itself after the plan had been in place for a few months. The plan was approved by Mr Wright and then presented to the Advisory Board for the October 2016 board meeting. The report to the board noted that the reduced sales numbers were likely to still be seen in October. The intention was said to be that Home Direct would be well positioned to optimise trade for the Christmas run in November and December 2016.

[19] The board met on about 17 October 2016 and approved the plan. Ms Calder says that Mr Wright stood at the end of her presentation to the board and stated that she had his full support as well as that of the directors.

[20] Mr Wright accepts that the board provided “comfort and support” to Ms Calder to progress the plan.

November flash report and the decision to restructure

[21] About six weeks later on 29 November 2016 Mr Wright received the November flash report which showed an outline of the preliminary financial results for November 2016. The result was a small loss, in contrast with the budgeted substantial profit; a significant variance. Some adjustments were later able to be made so that the final result was a modest profit. Of these, some were one-offs which could not be utilised again.

[22] In the meantime Mr Wright says that having seen the flash result he decided that urgent and substantial cuts in spending were needed. The business rationale underlying Home Direct’s first process (spanning 30 November to around 7 December 2016) was not recorded at the time in any formal correspondence or restructuring consultation document.

Notification to Ms Calder of the restructuring proposal

[23] Ms Calder was notified of the restructuring proposal during a phone call between Mr Wright and Ms Calder on 30 November 2016. At that point she was away in Fiji on business and was due back in Auckland that evening, and at work the next day, albeit at the company’s premises out of Auckland.

[24] A transcript of the call from a recording was made available to the Authority by Home Direct but only after Ms Calder had filed her witness statement. Ms Calder's earlier recollection of the call was, she accepts, not entirely in keeping with the recording. I accept that to receive such news on the phone, in another country, without particular prior warning, was a shock and this may well have affected her recall.

[25] In the phone call Mr Wright referred to the November flash results as having been received and showing a preliminary loss. He expressed his concerns about the possible implications and that he was considering a restructure which involved consolidating his and her roles. Low sales could not be sustained and expense savings were needed. He recognised that rebuilding the sales line was not going to happen overnight.

[26] Mr Wright said that he wanted to sit down (by implication tomorrow) and he would outline his thoughts and hear what Ms Calder's "read" on this was. He mentioned that she could have a support person present. Ms Calder suggested that her input was not going to change the outcome but Mr Wright denied that, and said that he really wanted her feedback. Ms Calder expressed her preference to do it sooner rather than later, suggesting that consultation may not have much effect. A meeting was arranged for the following day.

Meetings on 1 and 5 December 2016

[27] The two met on 1 December. There is a dispute between the parties as to the focus of the meeting. Mr Wright describes it as being the meeting when he would provide the information, and then expected Ms Calder to provide feedback at a later time. Ms Calder's impression was that the decision was already made and so she moved on to talk about what an exit could involve.

[28] Mr Wright's handwritten notes in his diary made shortly after the meeting record that no decision was made but he wanted to save costs within a described range. Further, he records telling Ms Calder that it has been a pleasure to work with her and she has great skills. Ms Calder expressed concern about the timing, being just before Christmas. She said that she was not expecting this and sought an extended payment to cover her time to find other work.

[29] Ms Calder's employment agreement required consultation in restructuring situations but does not give any entitlement to redundancy compensation or additional notice in redundancy situations. Her notice period was six weeks.

[30] Mr Wright then emailed Ms Calder the following day, Friday 2 December 2016, outlining similar information to that in the diary note of the previous day. A November variance figure was mentioned. Six to twelve months were needed to return the business to a trading position in line with the budget. Cost savings of a described range were needed. Disestablishing Ms Calder's position was said to provide an immediate expense reduction of a set figure. Other possible payroll savings in named departments were said to have been identified but not the nature of the savings.

[31] The email invited Ms Calder to a meeting on Monday 5 December 2016 at an external venue, and she was asked to raise any alternative options which might influence the outcome of the proposal.

[32] Ms Calder's email response was to agree that it had been a difficult and unexpected conversation on 1 December and being so close to Christmas provided her with substantial challenges. There was no dispute regarding Mr Wright's description of what had been said at the meeting.

[33] The two met on 5 December 2016 and there was further discussion on what type of exit payment or extended notice period would be acceptable but no agreement could be reached. The meeting ended on the basis that Mr Wright was going to implement the restructure and make Ms Calder's position redundant.

[34] Ms Calder received a letter on the same day confirming that her position was to be made redundant. It stated that Mr Wright wanted to have a discussion about possible redeployment but in the event that Ms Calder was not interested in the redeployment options her last working day was to be 9 December 2016. Her notice period was to be paid in lieu.

Consultation process used with other staff

[35] By way of contrast to the process used with Ms Calder, evidence was provided regarding another restructuring which the company had undertaken in April 2016, where a proposal pack of some 15 pages, including multiple structure diagrams and

proposed timelines, was put out. That format appeared typical of other restructurings Ms Calder had been involved in at Home Direct. In that instance Ms Wood's advice was that having been informed of the proposal, staff should have an adequate time of four to six working days to consider and prepare a response and obtain representation.

Conclusion on the first process

[36] Mr Wright and the Advisory Board reassured Ms Calder in mid-October 2016 that they recognised that improving sales was going to take some time and gave their support to her plan. Then six weeks later, after a preliminary result, a decision was made to put a restructure proposal up which involved her losing her position.

[37] Mr Wright chose to deliver the restructure news to Ms Calder by telephone when Ms Calder was overseas on business, about to return to New Zealand that evening. She was requested to cancel the next day's domestic trip and to meet to learn more and provide "feedback" the following day at 11am, less than 24 hours later.

[38] Home Direct was under a positive obligation to provide correct and accurate financial information to Ms Calder.² I accept that Ms Calder's senior position gave her more insight into Home Direct's financial position than many other employees would have had. However, the information provided was limited and almost entirely verbal.

[39] Mr Wright, possibly in conjunction with Mr Collins, should have provided more explanation in order to allow Ms Calder to provide a meaningful response. She could have asked and did not, but Home Direct as the employer had a positive obligation to provide relevant information under s 4(1A)(c)(i) & (ii) of the Act.³

[40] There was a lack of adequate explanation provided by Home Direct. Mr Wright provided a figure range for the amount which he thought needed to be saved. The range was broad, with the low end being 70% of the top end. Mr Wright described a possible consequence of not saving that much money, but did not explain why that would occur, how it would come about, or what it would actually involve. I accept that Ms Calder's background and involvement at Home Direct did not provide

² *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81

³ *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39

her with sufficient expertise to understand these matters sufficiently without explanation.

[41] I find that Ms Calder was subject to an unjustified action by Home Direct to her disadvantage as regards the decision to start the restructuring process at the point that it was started, and to use the process it used.

Contemporaneous employment of other senior staff

[42] Another aspect of Home Direct's conduct which Ms Calder questions is the appointment of two senior staff around the time of the decision to remove her role.

[43] A new General Manager Credit was appointed on 21 October 2016 although he actually started work on 30 November 2016. His remuneration package was similar to Ms Calder's. Home Direct says that Mr Wright's brother had undertaken that role previously but he left the business and so a decision was made to appoint an employee to fill that role.

[44] The new appointment occurred around the time the Board endorsed Ms Calder's plan to deal with the reduction in sales. I accept that once the parties had signed an employment agreement, if not before, action by the employer to withdraw the offer before the person started exposed the employer to legal risk.

[45] The other appointment which Ms Calder questions is that of the merchandising manager, a role which reported to Ms Calder. The appointee was initially interviewed on 2 November 2016 and had a second interview on 23 November 2016. She was offered the position on the same day, with the written agreement coming through on 24 November. She verbally accepted on 25 November 2016, once some issues were negotiated. The written agreement was not signed off until 5 December 2016 although her first work day was not until 16 January 2017. The merchandising manager's remuneration was somewhat less than Ms Calder's.

[46] It was submitted that either before 5 December 2016 or 16 January 2017 Home Direct had the opportunity to advise the soon to be, or now, appointee that for financial reasons it could not or would not proceed with its offer of employment. Then Ms Calder, as a longer serving employee, could have been offered that position.

[47] There was a verbal agreement with the new appointee from 25 November 2016, some four days before the flash result came out. I accept that Home Direct would have opened itself up to a claim by the appointee if it had told her that she could not start her new job.

[48] While taking into account length of service is a common consideration in redundancy selection criteria, in this case it is suggested that another employee whose role was not proposed to be affected should be removed, or not allowed to start, so as to allow another employee to be moved into that position and that seems a step too far. I do not consider the case relied on by Ms Calder assists.⁴

[49] Although Ms Calder's concern about these appointments, after she knew of the restructuring proposal, is understandable, they do not persuade me that the decision to make Ms Calder's role redundant was therefore not genuine.

Home Direct's response to Ms Calder's concerns

[50] Ms Calder raised an issue in her 6 December 2016 email about not being able to provide feedback due to a lack of information received. She did not seek to have the decision retracted or the consultation process restarted.

[51] On 8 December 2016 Mr Wright send a letter to Ms Calder describing a "major disconnect in our communications", saying he had not realised or been told (prior to the 6 December email) that Ms Calder felt that she could not respond because she did not have the information.

[52] The letter then proposed to rectify the situation by Mr Wight immediately withdrawing the decision to disestablish. He said that he would recuse himself "from the process in this matter as well as any decision making in it" and has asked Mr Roberts to conduct the consultation process and made a recommendation to the Advisory Board, who will make the decision. Further, he would not "participate in any discussions that the Advisory Board makes nor will I exercise any vote in the process". Mr Roberts was to be assisted by Mr Collins and Ms Wood. Mr Wright apologised for any distress.

⁴ *Batistich v Northland District Health Board* (unrep) Employment Relations Authority AA 152/08, 24 April 2008, Member Wilson

Arguments on restarting the process

[53] Ms Calder's position is that Home Direct's attempt to rescind its decision, and start the process again, was too late. The damage had already been done. Ms Calder did not seek that Home Direct restart the process, unlike Ms Rankin in *Rankin v Attorney-General of the State Services Commissioner (No 2)*.⁵

[54] On Ms Calder's behalf it was emphasised that Home Direct requested to commence a new and second redundancy process but it did not accept that it had made a mistake. The second process was based on identical rationale (costs out) and proposed outcome (disestablishment of Ms Calder's role). It was emphasised that this is not a case of an employer reconsidering its position.

[55] Ms Calder was said to be entitled to accept that Home Direct had made its decision and reject being further humiliated by being forced to participate in a process designed to achieve the same outcome.

[56] Home Direct's position was that even if it had repudiated its employment agreement with Ms Calder (which it denied), she had the options of affirming or accepting the cancellation of the agreement, there being no middle ground.⁶ Home Direct submitted that as she did not cancel, the agreement stayed alive and remained subject to the obligations and liabilities in it. Home Direct was thus entitled to start the process again.

Restarting the process

[57] There are some apparent tensions between strands of contract law regarding notice and breach, and requirements in employment relationships to remedy issues arising. The validity of the action needs to be determined first. Once notice of termination is given and accepted it can only be retracted by consent. Thus an employee who gives notice of resignation, which the employer accepts, cannot withdraw it without the employer's agreement. I take that to apply to a valid notice given by either party. Alternatively, if a party repudiates an employment agreement then the other party has a choice whether to affirm the agreement or accept the cancellation of it.⁷

⁵ *Rankin v Attorney-General of the State Services Commissioner (No 2)*[2001] ERNZ 476

⁶ *Paper Reclaim Ltd v Aotearoa International Ltd* [2001] 3 NZLR 169 (SC) at [17]-[21]

⁷ *Malaysia Airline System v BHD (New Zealand) Ltd v Malone* [2003] 1 ERNZ 494

[58] On the other hand the courts have identified that an employer may, and in fact should, act to remedy a situation once it is brought to its attention. So, in *Pacifica Shipping (Christchurch) Ltd v Buckingham*⁸ and *Brown v New Zealand Tourism Board*⁹ the Employment Court indicated that consultation could be started again if it had not been undertaken properly.

[59] However, it is first necessary to distinguish whether a valid notice of termination had been given. Did Home Direct gave notice of termination in early December 2016?

[60] Its letter of Monday 5 December 2016 does contain a decision to make Ms Calder's position redundant:

...I have decided to proceed with the disestablishment of your position effective Friday 9 December 2016.

[61] However, Mr Wright then goes on to say:

I do want to discuss possible redeployment options with you. ... there are positions at Regional Manager and Territory Manager levels. Please let me know if you wish to consider redeployment to one of the available positions as soon as possible so that we can discuss specifics.

If you do not wish to be considered for redeployment your final day of work would be Friday 9 December and your final pay, holiday pay and payment in lieu of notice would be processed on Friday 9 December.

Should redeployment not be an option you wish to consider, your agreement provides six weeks' notice however I would extend that to eight weeks' notice given the proximity to Christmas. In that event your notice would take effect from 12 December.

Ideally if you would advise me by midday Wednesday if you are willing to consider redeployment ...If you are interested, we can sit down and work through possible options.

[62] Ms Calder did not respond on the issue of redeployment. Rather her email of 6 December outlines her concerns about the process and her belief that she had a personal grievance claim. Emails were exchanged about mediation. Then Home Direct sent the letter of 8 December 2016 withdrawing the decision to disestablish Ms Calder's position.

⁸ *Pacifica Shipping (Christchurch) Ltd v Buckingham* [1999] 2 ERNZ 261

⁹ *Brown v New Zealand Tourism Board* [2000] 2 ERNZ 43

[63] In conclusion the letter of 5 December 2016 does announce the decision to disestablish Ms Calder's position but that of itself is not notice of termination. There remained the issue of redeployment, which Home Direct clearly says that it wishes to hear Ms Calder's response on. The letter is at most a conditional notice, the condition being that redeployment still had to be explored. There is no indication that it was explored after the letter was sent.

When did termination occur?

[64] It was at least implied for Ms Calder that her employment terminated on 9 December 2016 on the basis that the 5 December 2016 letter gave notice which expired on 9 December.

[65] However, several events by both parties after 9 December 2016 support the interpretation that the employment did not finish on that day. Ms Calder and her representative sent Home Direct medical certificates dated 12 December 2016, 4 January 2017 and 1 February 2017. She was paid by Home Direct for the statutory holidays over the Christmas and New Year period. Ms Calder was not paid out her salary in lieu of notice or holiday pay until February 2017.

[66] I conclude that the conditional notice never became unconditional. Ms Calder's employment therefore continued after 9 December 2016. I conclude that her employment did not terminate until 17 February 2017.

The second process

[67] Home Direct proceeded to commence a second process, as I have found it was entitled to do. Ms Calder was provided with further information and documents on 12 December 2016 and invited to a consultation meeting. Further attempts were made to arrange a meeting in February 2017 and written responses were sought as an alternative.

[68] Ms Calder was off on unpaid sick leave during this time, other than receiving payment for statutory holidays, until her employment was terminated on 17 February 2017 for redundancy.

Who made the February decision to terminate Ms Calder's employment for redundancy?

[69] Home Direct's position in the 8 December 2016 letter and in its pleadings was that having rescinded the decision to disestablish, Mr Wright stepped away from "any further involvement in the process". The process was then delegated and Mr Wright had no further involvement.

[70] However, the evidence at the investigation meeting was not as clear cut. Mr Wright did delegate the restarting of the consultation process to Mr Roberts and the Advisory Board.

[71] This was not the standard company board of directors, rather it was an advisory board appointed by Mr Wright, and previously also by his brother. The members of the Advisory Board are not employees of Home Direct or directors in the sense of being recorded in the Companies Office Register. Rather they were independent consultants who were paid a monthly fee. Mr Wright is the only director of Home Direct.

[72] Mr Roberts says that he saw himself as involved in the consultation process, to genuinely hear what might be tabled by Ms Calder and then take that back to Mr Wright, Mr Collins and the team, and discuss with them. He did not see himself as being the individual decision maker, although he would have been part of the final discussion. The plan was that he and the other board members would have sat down and have a discussion with Mr Wright and Mr Collins. This was somewhat theoretical as due to Ms Calder not participating with Mr Roberts, there was nothing to discuss.

[73] This suggests that the Advisory Board was not in fact the ultimate decision maker or at most only part of the decision-making group.

[74] Mr Collins' evidence was not entirely clear on this issue. However, I took him to be saying that although the Advisory Board may have had a proposal following the consultation process, ultimately no one was going to be made redundant without the owner and CEO (Mr Wright) signing it off.

[75] I conclude that Mr Wright had the ultimate sign-off, and thus had not effectively recused himself from involvement in the final decision. The information given to Ms Calder at the time about the process was therefore incorrect and misleading, thus not complying with Home Direct's obligations of good faith.

[76] I have considered whether this could be an unjustified action to Ms Calder's disadvantage under s 103(1)(b) of the Act. There is recognition that an action may be unjustified because it is lacking in good faith¹⁰. However, it is difficult to identify any disadvantage to Ms Calder. The Advisory Board, having not received any feedback from Ms Calder, did not come to a different decision to Mr Wright regarding whether to make Ms Calder's position redundant.

[77] The other difficulty is that, had Mr Wright not been involved in the final decision, there was no one else sufficiently senior in the organisation who could make the decision. This links to the next point about the possibility of the power being delegated outside the organisation.

[78] For the sake of completeness, I note that for Ms Calder it was submitted that in the event I decided that the Advisory Board made the decision to dismiss, the board could not have the authority to dismiss. This was based on the submission that the board was advisory rather than a board of directors and that an employer cannot delegate the power to dismiss.¹¹

Conclusion on the second process

[79] Given the two stage nature of the process it is understandable that Ms Calder was concerned about the genuineness of the attempt to re-do the process. However, having found that Home Direct was entitled to restart the process, I now look at whether the second process was one which a fair and reasonable employer could adopt and whether Ms Calder has any grievance claim in relation to it.

[80] The information contained in Mr Robert's letter of 12 December 2016 was considerably more detailed about past financial results, the current and budgeted positions and the rationale and savings behind the projected savings from Ms Calder's role, as well as other roles, than the information provided by Mr Wright in the earlier

¹⁰ *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 at [52]

¹¹ Relying on *Hall v Dionex Pty Ltd* [2015] NZEmpC 29

process. The material is not in a consultation pack as had been used earlier for other redundancies but I see this as a matter of form rather than substance.

[81] A number of documents are also attached. Sufficient information is included in the letter and documents to enable at least the start of adequate consultation. Ms Calder did not engage in the consultation process and so did not ask any questions or provide any response.

[82] Ms Calder was given opportunities to attend consultation meetings and/or put in written material on several occasions spaced between mid-December 2016 and mid-February 2017. It may well be unfair to rush a process through when an employee is off on sick leave. However in this case, even allowing for the Christmas break, a lengthy period of time was allowed by Home Direct. Ms Calder had representation and was offered the opportunity to provide written responses in lieu of attending a meeting. Had Home Direct waited until the end of Ms Calder's last medical certificate expired, it would have been three months after it started the process, which does not seem like a reasonable time to have to wait.

[83] Three possible redeployment positions were offered. They involved a considerable reduction in responsibility, remuneration, and seniority and I do not regard Ms Calder's unwillingness to accept them as unreasonable. However, in the absence of other available positions, Home Direct has satisfied its obligations regarding redeployment.

[84] I find that Ms Calder's dismissal was for a genuine redundancy of her position and the second process was a fair one, with the exception of the issue about what was said regarding who was to make the final decision. I regard that last matter as a minor defect which did not result in unfairness in the particular circumstances of this case. I do not uphold her unjustifiable dismissal claim.

What remedies should Ms Calder receive?

[85] I have found that Ms Calder was subject to an unjustified advantage as the December process was started too soon and not undertaken fairly. However, the errors in the process were effectively cured by the second process. There remains the disadvantage of Home Direct starting the process too soon after the October board

meeting and I now consider what remedies Ms Calder should receive in relation to that.

[86] Regarding her personal grievance claims in total Ms Calder claims reimbursement for lost earnings from 5 December 2016 until she found other employment on 10 April 2017, \$15,000 for her suffering and interest on those figures.

[87] Having found that Home Direct disadvantaged Ms Calder by starting the process having assured her that it would allow time for the sales to improve, I am prepared to consider lost wages for a time related to that period. Had Home Direct allowed that time to expire Ms Calder would have had the prospect of a longer period of employment. Ms Calder's plan indicated an intention that Home Direct would be well positioned to optimise trade for the Christmas run, being November and December 2016.

[88] The December results would have been available around early January 2017 and Home Direct could have started a process then. There was no serious challenge to Ms Calder being off on sick leave, mostly unpaid, due to stress caused by the process. She supplied her medical records in support. Although it is difficult to be precise Ms Calder was likely to have been in paid employment for about a month longer had the process not started until January 2017 and been conducted properly at that point. Four weeks at the rate \$4,807.70 per week is \$19,230.80 gross and I order Home Direct to pay that sum to Ms Calder within 28 days of the date of this determination.

[89] In considering the humiliation, loss of dignity and injury to feelings suffered by Ms Calder it is important to limit the amount awarded to that which is attributable to Home Direct's action of taking steps too soon. Ms Calder was shocked and upset by Home Direct's decision to consider redundancy only six weeks after she had been given comfort and support by the owner and the board. I order Home direct to pay Ms Calder \$7,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[90] I make no deduction for contribution. Interest is not awarded as these amounts are only owing following the Authority's determination, rather than being wage arrears or the like.

Should penalties be awarded?

[91] Both parties sought penalties against the other for breach of the duty of good faith, albeit at a late stage in the Applicant's case. I have found that both parties did not comply with their obligations in this regard.

[92] In the Applicant's closing submissions a penalty of \$10,000 was sought for Home Direct's alleged breach of good faith, regarding misleading and deceptive conduct in telling Ms Calder that Mr Wright had removed himself and not been involved in the second process. The penalty claim was not made in the statement of problem.

[93] I accept that the issue of who made the dismissal decision only really became apparent at the investigation meeting. The Authority makes determinations according to the substantial merits of the case, without regards to technicalities.¹² However, penalties are a serious matter and in this instance I am not prepared to consider the imposition of a penalty which was sought after the investigation meeting was closed.

[94] The Respondent sought a penalty for Ms Calder's failure to be responsive and communicative during the second process. She or her representatives did respond to communications but did not provide feedback regarding the proposal. In considering whether to impose a penalty I take into account that Ms Calder's position following the receipt of Home Direct's 5 December 2016 letter was subject to some uncertainty. I accept that she had a genuinely held belief as to the correctness of her position.¹³

[95] Both parties filed lengthy submissions on whether there had been a repudiation of the employment agreement by Home Direct and whether processes may be restarted. The removal application was made on the basis of important questions of law needing to be determined. In these circumstances I do not consider that a penalty should be awarded.

Should a non-publication order be granted?

[96] Home Direct has sought a non-publication order, with the parties and witnesses (other than Ms Wood) not named, in reliance on the potential damage

¹² S 157(1) of the Act

¹³ *Toll New Zealand Consolidated Ltd v Maritime Union Inc* [2004] 1 ERNZ 392 at [81]

which publication could cause.¹⁴ This was opposed by the Applicant who noted that the determination regarding removal to the Court has already been publicly reported, and other Authority determinations existed to which Home Direct was a party.

[97] I am not satisfied that a non-publication order is necessary to protect Home Direct and consider that Home Direct's interests have been adequately protected in the determination. I decline to make a non-publication order.

Costs

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

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

Nicola Craig

Member of the Employment Relations Authority

¹⁴ *Erceg v Erceg* [2016] NZSC 135