

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 14
5298426

BETWEEN	TANYA COOPER Applicant
A N D	CHRISTCHURCH CASINOS LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Glenn Cooper, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	15 December 2010
Submissions Received:	21 December 2010 from the Applicant 23 December 2010 from the Respondent
Date of Determination:	20 January 2012

DETERMINATION OF THE AUTHORITY

Acknowledgment

[1] I would like to acknowledge the patience of both parties with respect to the delay in the issue of this determination. After the 22 February earthquake the Authority was unable to access its building for several months to retrieve its files and importantly its notes of evidence. I sincerely regret any inconvenience this delay has caused.

Parental Leave complaint/ Employment relationship problem

[2] Tanya Cooper began working at Christchurch Casinos Limited (the Casino) in September 2003 as one of the Casino service staff. She was promoted through a variety of positions in Food and Beverage to a management role. Her previous roles at the Casino included Team Leader, Supervisor and Acting Service Shift Manager.

[3] In October 2007 Ms Cooper was promoted to the role of Service Shift Manager (Shift Manager) in which she assisted the Food and Beverage Services Manager. At the material time she was paid an annual salary of \$40,165. In her spare time Ms Cooper studied towards a Bachelor of Commerce degree which she completed in November 2009. She also completed the Casino's Leadership Programme in 2008. Ms Cooper said her studies were targeted toward a career at the casino.

[4] On 9 February 2009 Ms Cooper applied for, and was granted, parental leave. She was advised that her position as Shift Manager would be kept open for her until the end of her parental leave with her first rostered day back at work being 16 May 2010.

[5] On 15 April 2009 Ms Cooper commenced a period of annual leave. On 30 April 2009 Ms Cooper gave birth to a baby boy.

[6] Her parental leave subsequently commenced on 17 May 2009.

[7] On 8 June 2009 a new Food and Beverage Services Manager was appointed, Blair McIntyre. His first task was to review the structure of management for the Casino's restaurants and bars. After reviewing the management structure for the food and beverage department, Mr McIntyre discussed with the Chief Executive of the Casino, Brett Anderson, a proposal that the department be restructured.

[8] On 20 May 2009 the Casino sent Ms Cooper a letter confirming that her position of Shift Manager would be kept open until the end of her parental leave.

[9] On 23 July 2009 Ms Cooper received an email from Mr McIntyre seeking final input and thoughts on a proposed new food and beverage management structure with new positions. The new structure hierarchy document was attached to the email. Ms Cooper did not open the email on the day it was sent and when she did open it some days later it was after the timeframe for final input.

[10] On 31 July 2009 Ms Cooper met with Mr McIntyre for the first time and was given the job descriptions for the new positions. Ms Cooper applied for and was interviewed for the positions in one interview that covered her application for the new roles.

[11] Ms Cooper was then advised that she had been unsuccessful in all of her applications. At a follow up meeting with the human resource team on 1 September 2009 Ms Cooper was told that she could be a Supervisor of one of the outlets, the Grand Café, and that her current pay rate would be protected for six months but after that it would reduce to the Supervisor pay rate. This position was at a lower level than the position Ms Cooper held prior to commencing her parental leave.

[12] In October 2009 Ms Cooper was told by a friend that the Casino was not entitled to disestablish her position whilst on parental leave. She instructed a lawyer and on 21 October 2009 her then lawyer, Sarah Waggott, raised a personal grievance that the actions around the restructuring amounted to a breach of the duty of good faith and had disadvantaged Ms Cooper. A parental leave complaint was raised at the same time.

[13] On 22 October 2009 by email the Human Resource Manager at the Casino, Phillip Lattimer, responded to that letter. He advised in his email that the Casino was surprised to receive the letter and that all businesses needed to be able to reconfigure themselves in response to changing requirements. He reiterated that the Casino was offering ongoing employment with a role in Food and Beverage and salary protection for six months.

[14] On 23 October 2009 Ms Waggott responded to Mr Lattimer and advised that the decision to restructure was made without consultation prior to the email of 23 July 2009 whilst Ms Cooper was on parental leave and that it was not tenable that Ms Cooper's position was disestablished because the revised roles were substantially similar to the position Ms Cooper held at the commencement of her parental leave.

[15] There was then some further correspondence in December 2009. Ms Cooper's position was then formally put by her then lawyer, Grant Slevin, in his letter of 29 January 2010. He advised, amongst other matters in that letter, that:

We advise that your position on Tanya's redundancy is not accepted. We do not regard the new position of Gallery Manager as substantively different to Tanya's previous role as Service Shift Manager with overall responsibility for the Gallery. Our view is that she should have been appointed to that role or one of the other management-tier roles as part of the restructuring process.

Her position as Service Shift Manager has been disestablished and you have accordingly made her position redundant while she is on maternity leave, despite your undertaking to keep her job open for a

period of 12 months. The issues which led to the restructuring of the Food & Beverage department were present before her leave commenced and cannot afford you a defence to her claim that her redundancy was both procedurally and substantively unjustified.

Tanya will not be accepting the lower-level position you have offered her and has been distressed and disappointed by your failure to respond to her legitimate concerns.

[16] The parties attended mediation in early April 2010. The matter was unable to be resolved. Ms Cooper did not return to the Casino after her period of parental leave ended. A statement of problem was lodged on 25 June 2010 with the Authority stating the problems that Ms Cooper wanted the Authority to resolve as follows:

- That Ms Cooper was dismissed by the Casino as the result of a substantively unjustified and procedurally unfair restructuring process.
- That Ms Cooper was unjustifiably disadvantaged by the action of the Casino.
- That the Casino breached its duty to act in good faith toward Ms Cooper.
- There was a breach of s.41 of the Parental Leave and Employment Protection Act 1987.
- That Ms Cooper was disadvantaged by the actions of the Casino in terms of her rights and benefits in respect of parental leave.

[17] Ms Cooper initially sought reinstatement, but subsequently obtained another position that she commenced on 28 June 2010.

[18] Her claim for dismissal and/or disadvantage under the Parental Leave and Employment Protection Act 1987 (the Parental Leave Act) is expressed in final submissions to be in respect of a breach of s.41 or alternatively s.49 and also in respect of a personal grievance for unjustified dismissal and/or disadvantage under the Employment Relations Act 2000.

[19] Ms Cooper seeks either 66 weeks of lost wages from 14 September 2009 to 15 December 2010 being \$50,978.65 or alternatively 31 weeks from 16 May 2010 to 15 December 2010 being \$23,944.52. Either award is to be reduced by the sum earned in mitigation between 28 June 2010 and 15 December 2010 of \$15,558.46.

[20] Ms Cooper also seeks compensation in the sum of \$20,000 for hurt and humiliation together with an award of costs.

[21] The Casino says in its reply that Ms Cooper's position of Shift Manager was disestablished in August 2009 whilst Ms Cooper was on parental leave as part of a genuine restructure of the food and beverage department. It says that following the disestablishment of Ms Cooper's position she was granted security of employment and the preservation of her pay rate for six months from the date of her resignation. The Casino does not accept that she was dismissed but rather than she resigned from her employment. It does not accept that it breached the provisions of the Parental Leave Act.

The issues

[22] The Authority will need to consider the following issues in its determination:

- The rationale behind the restructuring of the food and beverage department management.
- Was Ms Cooper dismissed from her employment or did she resign and, if she was dismissed then when did that occur.
- Was Ms Cooper's position genuinely redundant to the requirements of the Casino?
- Was the procedure fair and reasonable and in accordance with the statutory obligations of good faith and the obligations, duties and rights under the Parental Leave Act?
- If Ms Cooper has a parental leave complaint under the Parental Leave Act or a grievance under the Employment Relations Act 2000, what remedies should be awarded, are there issues of mitigation and/or contribution, and if there is to be an award of lost wages, from when should that be assessed?

What was the rationale behind the restructuring of the food and beverage department?

[23] Mr Anderson said in his evidence that the food and beverage department had been a poorly performing part of the Casino for some time in terms of turnover, revenue and quality. He said that the successful applicant to the new food and beverage manager position would be required to achieve a turnaround in the department.

[24] Mr McIntyre commenced his role in June 2009 as Food and Beverage Manager with considerable experience in the food and beverage industry. He gave evidence that he identified that the management structure was very different at the Casino to any other structure that he had worked under or was aware of previously. He said that the shift managers were running the shift they were on and dealing with matters as they came up. He described it as a *here and now* role with the longer term focus missing. He said that he worked with Mr Anderson and Mr Lattimer to develop a new structure and consult with staff about it.

[25] Mr McIntyre said that what he recommended in the proposed new structure was the creation of new management roles with overall responsibility for a particular outlet and a more strategic focus on budgeting and developing systems to meet the needs of the individual outlet rather than just implementing them. He proposed that the duty roster would be better covered by having the early part of the day covered by him and the food and beverage co-ordinator with the afternoon and evening covered by the newly created assistant food and beverage manager position with the two new night managers covering through the night and early morning.

[26] The new roles were Assistant Food and Beverage Manager, Night Manager (two positions), Grand Café Manager, Bar Manager and Gallery Manager. There were more roles created than incumbents in the Shift Manager roles.

[27] I am satisfied from the evidence that, given the performance of the food and beverage department, the reasoning behind a review of its management structure was sound. I accept Mr Cooper's submission that a reorganisation in itself does not lead to a superfluous position and/or a conclusion that a redundancy is genuine – *McCulloch v. New Zealand Fire Services Commission* [1998] 2 ERNZ.

Was Ms Cooper dismissed from her employment or did she resign and if she was dismissed then when did that occur?

[28] Counsel accept that it is for the employer to manage its own business including, for genuine reasons, whether an employer should be made redundant – *GN Hale & Son Ltd v. Wellington VTC Caretakers ETC IUOW* (1990) ERNZ SelCas 843.

[29] Ms Cooper was party to an individual employment agreement with the Casino dated October 2007 that she entered into when she was appointed to the role of Service Shift Manager. Aside from an employee protection clause in the event of the business being sold or contracted out in clause 12.6, the only other reference to redundancy was in clause 12.7 and provided:

In the event of the Employee's position becoming redundant to the needs of the Employer, this Agreement is able to be terminated by the provision with not less than four weeks notice or pay in lieu thereof. The Employee shall not be entitled to additional compensation of any kind.

[30] There is within the individual employment agreement no contractual obligation on the Casino to redeploy.

[31] Ms Shaw in her submissions quite properly accepted that there may have been in relation to Ms Cooper's position a redundancy situation, however, did not accept that Ms Cooper's position was terminated during her parental leave but after her parental leave had finished and therefore submitted she was not entitled to the protections under the Parental Leave Act.

[32] I find that Ms Cooper was entitled to the protections under the Parental Leave Act during her parental leave. The Casino had duties and obligations under that Act in the way that it dealt with Ms Cooper when it undertook its restructuring. A parental leave complaint had been raised specifically about the restructuring in October 2009.

[33] Section 41 of the Parental Leave Act provides a presumption that the employee's position can be kept open until the end of the employee's parental leave unless the employer proves that it cannot be kept open because it is either not reasonably practicable due to the key position occupied or because of the occurrence of a redundancy situation. The position Ms Cooper held at the commencement of her parental leave was not kept open for her until the end of her parental leave.

[34] Ms Cooper never received a declaration from the Casino that her position was redundant to the needs of the Casino or indeed notice. The Casino maintains that what actually occurred was that she simply failed to return after her parental leave and resigned.

[35] I do not accept that. The Casino embarked on a restructuring that disestablished Ms Cooper's position and other shift managers' positions in late 2009. The Casino did not accept that the new positions Ms Cooper applied for unsuccessfully were substantially similar to the position Ms Cooper held previously. On 1 September 2009 the Casino offered Ms Cooper a redeployment option to a lower level position to that held by her at the time of the commencement of her parental leave. As it was a different and not substantially similar position to her previous position, she was entitled to, and did, decline that position formally by her counsel's letter dated January 2010. The fact that salary was to be maintained at her pre-parental leave level for a period of six months does not change that conclusion.

[36] From that point on, although clear to both parties that Ms Cooper's position before parental leave was not there for her to return to, the relationship remained on foot to the extent that Ms Cooper stayed on parental leave after January 2010. Mediation was attempted in April 2010 but failed to resolve the issues between the parties. Although I suspect the answer was already very clear to the Casino, the Human Resources Advisor, Angela Townrow, conscious of the impending end of the parental leave wrote to Ms Cooper in a letter dated 30 April 2010 asking her to confirm one way or the other whether she would accept the same supervisor position previously offered and rejected after her parental leave ended. For completeness the letter was apparently sent to the wrong address. Whilst not directly expressed, the letter confirmed Ms Cooper's previous position would not be available for her to return to and neither would one at a similar level. In other words unless Ms Cooper was contractually obliged to accept the Supervisor position, and I have already found she was not, or she agreed to accept the Supervisor position there was no job for her at the Casino. The relationship would therefore be at an end for reason of the Casino's position that her role was redundant.

[37] Mr Slevin responded on Ms Cooper's behalf by letter dated 13 May 2010 before the end of the parental leave, advising again that Ms Cooper's position was that she did not want the supervisor's role. At that point I find that there was an actual

dismissal before the end of the parental leave for redundancy. I do not therefore accept Ms Shaw's argument that the fact that the letter written by Ms Townrow in consultation with Mr Lattimer to Mr Slevin on 18 May 2010 acknowledging his letter and advising, amongst other things, *this confirms we have now taken action to terminate Tanya's employment with her non return from parental leave and process your advice technically as a resignation* means that Ms Cooper was dismissed outside of the period of parental leave.

[38] In conclusion I find that Ms Cooper was dismissed from her employment with the Casino before the end of her parental leave for reason of redundancy.

Was Ms Cooper's position genuinely redundant to the needs of the Casino?

[39] Ms Cooper says that all the new outlet manager roles that she applied for, with the exception of the Assistant Food and Beverage Manager that she accepted was at a higher level, were substantially similar to the role she was undertaking before her parental leave. She described the Gallery Manager role as the closest to the role she had been performing, although would have accepted any of the outlet manager roles at the same level that she had previously worked at.

[40] I accept that although in the position description Shift Manager was used in a generic sense, Ms Cooper in effect managed the Gallery outlet.

[41] The Casino does not accept that the roles were substantially similar to that which Ms Cooper was performing.

[42] I have had regard to the principle in the Employment Court judgment of *McCulloch v. New Zealand Fire Service* [1998] 3 ERNZ 378 at p.392 –

That the issue whether the job is the same with a change of focus/emphasis or a different position is a question of fact and degree determined exclusively and conclusively by the evidence.

[43] I have also had regard to *Carter Holt Harvey Ltd v. Wallis* [1998] 3 ERNZ 984 at p.995 where it was held that the test to be applied in determining whether two positions were substantially similar was an objective one. It was necessary to ask whether a reasonable person would consider there to be a sufficient difference between the two positions to break the continuity of employment having regard to the characteristic of both the positions and the employee.

[44] I focus my objective analysis on a comparison between the Shift Manager role and the Gallery Manager role. In doing so, there did not appear to me to be significant differences between most of the position descriptions for the other roles and that of the Gallery Manager role.

[45] The position description for Shift Managers and the position for the Gallery Manager provided the following objectives:

*To provide support to all food and beverage employees, ensure consistency across the food and beverage outlets and departmental integration. Ensure “across the floor” delivery of excellent service and consistent and seamless management of the operation – **Shift Manager** .*

*The Gallery Manager is responsible for ensuring maximum customer service and satisfaction, by organising with and through the Food and Beverage (F&B) Manager, Assistant F&B Manager, and Gallery Supervisors and Team Leaders, focusing on the consistent production of quality food and high standards of service. In conjunction with the F&B Manager and/or Assistant F&B Manager, coordinate and oversee the needs of the Gallery operations within the Food and Beverage (F&B) Department and monitor the sales of food and beverage items – **Gallery Manager**.*

[46] I do not find the position objectives to be significantly different. Ms Cooper was still required to report to the Food and Beverage Manager and she confirmed in her evidence that she would have the same direct reports in the Gallery Manager position being supervisors and team leaders and the same number of indirect reports as with her Shift Manager role.

[47] The key tasks in specific accountabilities in the position for Shift Manager were as follows:

- Assist the Food and Beverage Services Manager to lead the department in delivery of its strategies.
- Manage and co-ordinate the smooth running of the Food and Beverage front of house operation.
- Assist the Food and Beverage Services Manager in the development and performance evaluation for the Food and Beverage team.

- Financial responsibility including maintaining checks to minimise wastage, breakage and damage to equipment and stock items, ensuring cashiering discrepancies are fully investigated and reported and ensuring wage costs are kept within budgetary requirements at all times.
- Contribute to the productivity and harmony of the food and beverage service teams.
- Ensure ongoing professional development.
- Carry out other tasks and duties as and when required.

[48] Ms Cooper elaborated on some of the matters for which she was responsible in her written statement of evidence in para.7 as follows:

- a. *overseeing Food and Beverage staff performance including co-ordinating staff meetings, addressing and resolving less serious disciplinary issues with human resources as well as general appraisals and pay reviews, reward procedures and recruitment;*
- b. *covering the Duty Manager role when necessary;*
- c. *developing and implementing ideas to increase revenue and decrease costs;*
- d. *ensuring wage costs were kept within budgetary restraints;*
- e. *ensuring the accuracy of the cashiers and product orders;*
- f. *making recommendations and proposals after analysing the Gallery's costs and returns, which led to a change in its operating hours to improve performance; and*
- g. *management of the Gallery which included managing the service staff and supervising the kitchen.*

[49] The Gallery Manager's position set out accountabilities and performance measures that, objectively assessed, were substantially similar to the areas of accountability under the Shift Manager role. They were providing leadership to the food and beverage department, exceeding customer expectations, financial stewardship and profitability, learning and development of food and beverage staff and relationship management.

[50] Mr Lattimer did not dispute that his understanding of Ms Cooper's role was as she had outlined it in para.7 of her evidence. He accepted in a comparison of the old and new positions that the basic objectives of the positions were the same in terms of outlet performance. He said, though, that the objectives with the Shift Manager role were lessened by the requirement for covering the secondary duty manager role that led to the manager often being pulled away from the outlet and therefore not able to spend as much time on the leadership, financial management and planning and development of the outlets.

[51] A comparison of the two positions shows the key competencies are different. For example, the Shift Manager role requires a person with 1 to 3 years experience in food and beverage and a minimum of one year's experience managing people. The Gallery Manager position required at least two years sound results proven experience in a senior restaurant manager position in a food and beverage environment and tertiary qualification.

[52] The other competencies were set out, I accept, in the Gallery position description in a more comprehensive way than in the Shift Manager role. In that respect, though, Ms Cooper was required to complete the Casino's leadership programme in 2008. This programme that took place over a full year included a number of modules such as leadership, financial management and coaching and mentoring and conflict management, which would seem to cover most if not all of the competencies that were set out in the position description for Gallery Manager. Objectively assessed, as it was a requirement for Ms Cooper to undertake the training following her appointment to the Shift Manager role, it must have been recognised that these types of competencies were also required in that role.

[53] There was some dispute about the level of remuneration for the Gallery position apparent from final submissions. I have recorded in my notes of evidence that Mr Lattimer in his evidence in answer to a question from the Authority, gave what he described as the *notional rate for a Gallery manager is \$53,000*. He indicated, though, that this was the rate for somebody employed in that position at a fully competent level. He accepted that this was not the rate that, had Ms Cooper been successful in her application, she would have necessarily been paid. It was clear that remuneration for the position would have required to be negotiated after successful appointment.

[54] Mr Cooper in his submissions referred to the basic salary for the new outlet positions of \$42,000. He appears to have taken this figure from document 11 of the applicant's bundle that lists a number of job titles at the Casino including Food and Beverage Outlet Managers. Alongside each job title is printed, amongst other information, a basic salary for the position.

[55] Mr Lattimer who had previous experience in Hay evaluations, said that he completed a Hay evaluation of the Shift Manager roles in or about August 2009, which appears to be the month in which document 11 was prepared. I think it is more likely document 11 refers to the position of Shift Manager even though it describes the positions as Food and Beverage Outlet Managers. Had the document been referring to the new outlet roles then it would have more likely included the new position of Assistant Food and Beverage Manager.

[56] Mr McIntyre's written evidence in paragraph 30 provided that one of the other Shift Managers who was appointed to one of the new Night Manager roles received, for a period of six months, the same remuneration that he had received in the role of Shift Manager. Even if that new position could be viewed, although on the same level, as a different role to that of Gallery Manager position it does suggest that the new positions did not all, at least initially attract a higher remuneration level.

[57] One of the key differences between the roles, Mr Lattimer said, was that the new roles were bigger jobs in terms of know-how, problem solving and accountability. Mr Lattimer said that he asked Hay to assist him with evaluation of the new positions because he considered them bigger roles that would attract a higher salary. Mr Lattimer had, as previously explained, undertaken a Hay evaluation himself of the Shift Manager position. He scored that position approximately 280 Hay points and Hay gave the new position of Gallery Manager 344 points.

[58] The evaluation for the Gallery management position by Hay reflected that it took into account the following attributes of the position:

- Responsible for operational delivery for the Gallery restaurant, responsible for all outlet staff.
- Accountable for roster maintenance in conjunction with the Assistant F&B Manager and Rostering Administrator (HR).

- Operating to clear targets under direction from the F&B Manager.

[59] Although worded slightly differently and more generally in the Shift Manager's position description, those responsibilities or attributes were required for both positions. As Shift Manager Ms Cooper had responsibility for managing the employees' roster and there were clear targets to achieve under both job descriptions. As already set out, the operational delivery and responsibility for all outlet staff was a requirement in both positions. The Hay sizing does not persuade me that the positions are substantially different positions.

[60] There was a change in focus in the Gallery Manager role because the Duty Manager duties performed as part of the Shift Manager role were to be, if not removed altogether, mostly reassigned to others to perform. I note that the position description of Gallery Manager still had alongside the leadership requirement a performance measure to undertake Duty Manager duties as and when required. Reassignment of the Duty Manager duties would enable the Gallery Manager to concentrate more or less solely on the outlet she or he was responsible for. I had had particular regard to the evidence of John Ulutau who was a Shift Manager before he was reappointed to the new Night Manager role. His evidence is that the roles in the new structure are different although he did accept that there are similarities as well.

[61] Mr Ulutau said in his evidence that there was a considerable amount of pressure in the Shift Manager roles and because of that, and the workload, he could not effectively do the tasks. He said that the new role gives him an opportunity to concentrate and focus whereas before he had to run the two roles with his own department and the Duty Manager duties. In answer to questions he said he is now required to run the Department as a manager as opposed to half heartedly doing two jobs at once. He accepted to a certain extent that the new roles are smaller.

[62] The position description for Shift Managers did not provide that they were also Duty Managers. There was a reassignment of the Duty Manager duties that Shift Managers were previously required to undertake. I accept as Ms Cooper said in her evidence her main focus as Shift Manager was the Gallery outlet previously known as Caesars. If something occurred when she was on shift in another outlet she looked after it [the Duty Manager duty] and then returned to The Gallery. Ms Cooper said that she had had discussions with the previous Food and Beverage Manager about spending more time in The Gallery. I am satisfied that those additional duties did

cause some issues for Shift Managers because they were diverted away from their outlets but I am not satisfied that the removal of them broke the essential continuity of employment. I do not see the reassignment of those duties as being a neat splitting of a role in two, as Ms Shaw submitted was the case in the Authority determination of *Secretary of Justice v. Gibbons* WA96/08, Member Wood where it was held the positions were not substantially similar. I find that case is distinguishable from the matter before me.

[63] Ms Shaw placed emphasis on the fact that neither Ms Cooper nor anyone affected by the restructuring advised the Casino that they regarded the new roles as substantially similar to what they were undertaking during the restructuring. Ms Cooper was only given copies of the job descriptions at the meeting on 31 July 2010 for the first time and said that when she read them in some detail at a later time, she considered that the roles were substantially similar to what she had been doing. She said that she did not want to *make waves* at the time of the restructuring and appointment process. In her evidence Ms Cooper said that she felt if she did say anything that was not positive she would not get the job and *she didn't show how she was feeling inside about the situation*. Ms Cooper was not advised to have a representative or support person with her. After it was clear that Ms Cooper had not been appointed to a new position her solicitor raised with the Casino the positions were substantially similar. Little weight I find can be placed on that matter.

[64] I have also taken into account what happened with the other Shift Managers. One of the four Shift Managers advised Mr McIntyre that she did not wish to apply for any of the new roles. However, the other two Shift Managers applied for the positions as did Ms Cooper. There was one interview held for the roles regardless of the number applied for. Although one of the other Shift Managers had been unsuccessful in his applications for the Bar Manager and Assistant Food and Beverage position, he was offered the Night Manager role, so was therefore appointed to a role at the same level as new outlet manager roles.

[65] The person appointed to the Gallery management role, Anna had held a role previously as a Duty Manager at the Casino. Mr McIntyre agreed under questioning her position was lower than, or not at the level of, a Shift Manager position as previously held by Ms Cooper. Mr McIntyre described the difference between Anna and Ms Cooper that Anna had the ability to clearly articulate the issues and problems

within the food and beverage department, had solutions and a clear passion and drive to implement the required changes. In comparison, he said that Ms Cooper's interview was comparatively poor and that she lacked the passion for change and her answers were often vague and unclear.

[66] Although Mr McIntyre suggests that as a result of the interview he was left with the impression that Ms Cooper would be required to obtain further skills, there was no opportunity for her to be appraised of that prior to the interview process or before appointment decisions were made. I do find that given the person who was appointed to the Gallery Manager position was not at the level Ms Cooper was at in the Casino supports that there was not a sufficient difference between the Shift Manager and Gallery Manager positions to break the continuity of employment in regard to the characteristic of both the positions and Ms Cooper.

[67] Standing back and objectively comparing the two roles, they are both management roles at the same level, managing the same outlet. Both roles reported to the Food and Beverage Manager. Both had similar direct and indirect reports and similar objectives, accountabilities and performance measures. The new role was more focused but I find that much of Ms Cooper's previous role as Shift Manager continued to exist and that compared to the Gallery Manager role, a objective comparison show that whilst the roles were not identical they were substantially similar. I am not satisfied that the redundancy, therefore, was genuine.

[68] Where an employee on parental leave is dismissed, there are special defences available to an employer in s.51 of the Parental Leave Act. Section 51(b) provides that one of the defences is

That the employer terminated the employee's employment on account of a redundancy situation of such nature that there was no prospect of the employer being able to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's parental leave.

[69] That provision was considered in the Employment Court in *Lewis v. Greene* [2004] 2 ERNZ. In that case there was reference to the parental leave legislation imposing a higher standard on a employee in a parental leave redundancy case than in a non parental leave case, and special reference to the language in s.51(b) and the words *no prospect in relation to a sufficiently similar position*.

[70] In this case, as in *Lewis v. Green*, there are three elements to be considered. The first is whether there was a vacant position. It is clear in this case that there was a vacant position. I have found that the position was substantially similar to the position held by Ms Cooper at the beginning of her parental leave.

[71] The final matter I must consider is whether there was no prospect of Ms Cooper being appointed to the position of Gallery Manager. Ms Cooper had held her previous management position for 18 months managing the Gallery outlet. Prior to this she had acted in an acting management role and supervisor team leader type role and had undertaken the Casino's extensive training programme. There was nothing to support that she was other than well regarded at the Casino. She had progressively advanced since first being employed by the Casino.

[72] I am not satisfied that there was no prospect of Ms Cooper being able to be appointed to the position. If there were some skills that the Casino thought Ms Cooper required as a result of the change in focus, then she had certainly risen to the occasion previously and undertaken any training and there was no reason to think that she would not be able to do so on this occasion. I find that there was a real prospect that Ms Cooper could have been appointed to the position of Gallery Manager or indeed any of the other positions at that level.

[73] In conclusion the Casino has not satisfied me as it is required to do so under s. 51(b) of the Parental Leave Act that there was at the Casino a redundancy situation of such nature that there was no prospect Ms Cooper was not able to be appointed to a vacant and substantially similar position following the restructure at the end of her parental leave. There is therefore a breach of s. 41 and s. 49 of the Parental Leave Act.

Was the procedure fair and reasonable and in accordance with the statutory obligations of good faith and the obligations, duties and rights under the Parental Leave Act?

[74] The first notification of the restructuring to Ms Cooper was that email dated Thursday 23 July 2009 from Mr McIntyre. The proposed/intended new Food and Beverage structure diagram was attached to the email but the job descriptions were not at that time available. Final comment and any specific thoughts were asked for ideally by the end of the weekend and Ms Cooper was asked to meet with Mr McIntyre or send an email as soon as possible. Ms Cooper did not see the email

or meet with Mr McIntyre until after the time for responding had ended and the positions had been advertised. Emails support that the new outlet position had also been entered on the Casino payroll system by 30 July 2009. Both Mr McIntyre and Mr Lattimer said that notwithstanding this nothing was set in concrete at that time and the process could have been put on hold. I find though that matters were advanced sufficiently by the time Ms Cooper met with Mr McIntyre and that it was unlikely consultation was able to be meaningful.

[75] The process adopted by the Casino was inadequate and unfair for a vulnerable employee such as Ms Cooper on parental leave. Ms Cooper was not only away from the workplace during the restructuring but there had been a new Food and Beverage Manager appointed who she had never met and he had never had an opportunity to watch her work at the Casino and form views on her ability. For example the last sentence in the email on 23 July 2009 could not have been referring to Ms Cooper when she had been absent from the workplace since April 2009:

*I hope you will see the logic of opening up these position and asking you to compete for these roles. You are all expected to have the **inside running** in terms of knowledge of our business but I am wanting a commitment and passion for these roles, and no illusions that the present standards are going to meet the future expectations. I am also very aware of what has been asked of you especially over the last 5 months and Brett and I are both grateful for the way many of you have stood up to this challenge.*

Objectively assessed it is very likely in my view, although I accept not intentional, Ms Cooper's absence from the workplace when Mr McIntyre commenced counted against her in the appointment and selection process. That there was a risk of this I find occurred to Ms Cooper because at her meeting with Mr McIntyre on 31 July 2009 she asked him this question and he reassured her that her being on parental leave would not count against her.

[76] I find that the notification of the restructuring was inadequate. A fair process would have involved telephone calls to make sure Ms Cooper was aware of the proposed restructure at the same time as other employees. Fairness required advance warning by way of a telephone call that an email was about to be sent and needed to be looked at and an invitation given to bring a representative with her to the meeting. This would have given Ms Cooper adequate time to be consulted and to give feedback. I do not find it was reasonable for the Casino to rely on information in its

internal kiosk email system being read by Ms Cooper whilst she was parental leave. Consultation with Ms Cooper consisted of an informal discussion about the new positions and provision of the job descriptions. I do not find there was proper consultation about whether the positions were different positions and/or any skill issues.

[77] I find in conclusion that the procedure adopted by the Casino was inadequate and therefore unfair.

Determination

[78] I have found that Ms Cooper's employment with the Casino was terminated by reason of redundancy. I am not satisfied that the redundancy was genuine and I was not satisfied that there was no prospect of Ms Cooper being appointed to a position that was substantially similar to the position held by her at the beginning of her parental leave. The process adopted by the Casino was also unfair.

[79] I find that the Parental Leave complaint is made out under s.56 (b) of the Parental Leave and Employment Protection Act 1987.

Remedies

[80] Section 65 of the Parental Leave Act provides for remedies in the case of a breach of any provisions of the Act including reimbursement of lost wages and compensation.

Lost Wages

[81] Ms Cooper gave evidence that she attempted to find other employment from October 2009 and she claims lost wages from when she was originally prepared to return to work on 14 September 2009 until the date of the Authority investigation meeting on 15 December 2010 or alternatively from the end of her parental leave on 16 May 2010 to 15 December 2010. She was I am satisfied attempting to mitigate her loss and was successful in obtaining a position on 28 June 2010.

[82] Ms Shaw submits that Ms Cooper would not have suffered any loss if she had accepted the redeployment opportunity because she would have continued to be paid

her previous salary for six months. The redeployment option was to a lower level position in circumstances where I have not found a genuine redundancy. It would have had her working with those she had previously managed and in some cases been involved with in minor disciplinary matters. I am not satisfied that by not accepting that role Ms Cooper failed to mitigate her loss in the circumstances.

[83] I accept that lost wages should be calculated from the end of parental leave when Ms Cooper was to have returned to work. Although she was willing to return earlier there was no request as such under the Parental Leave Act. I accept between 16 May 2010 and the date of the investigation meeting is a reasonable period over which to assess loss.

[84] Ms Shaw submits that there was no evidence given about the subsequent earnings and the only reference was in final submissions. Mr Cooper did provide the level of earnings at \$15,558.46 in final submissions. The most sensible way forward is for Ms Shaw to be provided with confirmation of earnings for Ms Cooper over the relevant period by way of a certificate from Inland Revenue. Earnings are then to be deducted from the lost wages for the period set out above. If the parties cannot agree on the amount of lost wages leave is reserved for them to return to the Authority.

Compensation

[85] Ms Cooper's mother Barbara provided a statement that was not challenged and no appearance by her was required at the investigation meeting in support of this claim. Ms Cooper and her mother at that time lived in the same house. Barbara Cooper said in her statement that her daughter became stressed and saddened about the changes at the Casino and her daughter cried a number of times with the worry. She said that Ms Cooper was excited about her job with the Casino and had every intention of resuming her career after parental leave. Ms Cooper herself spoke at length about the difficult birth she had had necessitating two weeks in hospital and the humiliation and stress about whether she would have a job as well as looking after a baby. She felt that being offered a demotion was a black mark on her name and that she had put so much effort into her position before the parental leave. She also expressed disappointment and distress at what she saw as delays by the Casino in resolving her concerns.

[86] Ms Cooper is I find entitled to compensation for the humiliation and distress suffered and caused by a redundancy that was not genuine.

[87] In all the circumstance I am of the view that an appropriate amount for compensation is \$12,000 without deduction and I so order.

Costs

[88] I reserve the issue of costs. The applicant has until 17 February 2012 to lodge and serve submissions as to costs and the respondent has until 9 March to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority