

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

I TE RATONGA AHUMANA TAIMAHI ŌTAUTAHI ROHE

[2021] NZERA 403
3059152

Member of Authority: Philip Cheyne

Representatives: DJK, the Applicant
Sarah Townsend, counsel for the Respondent

Investigation Meeting: 10 June 2021

Submissions Received: 16 June 2021 from the Applicant
23 June 2021 from the Respondent

Date of Determination: 14 September 2021

DETERMINATION OF THE AUTHORITY

- A. The claims are dismissed.**

- B. I reserve costs, subject to the set timetable for submissions if required.**

Employment relationship problem

[1] There is a permanent non-publication order covering the applicant, made at an earlier stage of these proceedings.¹ I will also refer to the applicant as DJK.

[2] DJK worked for Ceres New Zealand, LLC as a senior manager for more than two years, until she was dismissed by letter dated 16 January 2019. DJK says that she was unjustifiably dismissed and has a personal grievance. In April 2019 DJK lodged a statement of problem with the Authority, setting out her claim that she had been unjustifiably dismissed by Ceres. DJK's account of the facts that had given rise to the problem also included reference to a formal complaint she had made in March 2018 and subsequent events. DJK claimed remedies for the unjustified dismissal personal grievance as follows: lost wages/salary (3 months); \$25,000.00 compensation for humiliation, lost dignity and injured feelings; and legal costs of \$10,000.00. DJK also claimed \$20,000.00 as bonus payments owed for two years' employment.

[3] In reply, Ceres said that DJK had not raised her personal grievance claim of unjustified dismissal within time. The Employment Court later found that DJK's unjustified dismissal personal grievance claim had been raised within time.² Ceres then lodged an amended statement in reply. Ceres repeated its view that DJK had not been unjustifiably dismissed. Ceres said that DJK had been made redundant, following a full and fair consultation process, due to the company's need to reduce costs to mitigate projected losses.

[4] When DJK lodged her statement of evidence in preparation for the investigation meeting, she also lodged a document setting out the remedies sought. Both in the statement of evidence and the remedies document, DJK referred to personal grievances of unjustified dismissal and unjustified disadvantage. It is not necessary at present to detail the amounts claimed to the extent they differ from the original claims. However, I treat DJK's statement of problem (and attachments) as sufficient to commence action in the Authority in respect of the unjustified disadvantage grievance claims specifically raised with Ceres in correspondence on 12 June and 14 November 2018. In doing this, I am mindful of the role and powers of the Authority. Ceres' response to the facts said to give rise to the unjustified disadvantage grievances was apparent from its statements in reply, documents and evidence.

¹ *Ceres New Zealand LLC v DJK* [2020] NZEmpC 153.

² *Ceres New Zealand LLC v DJK*, above n 1.

[5] Mediation had followed the release of the Employment Court's judgment but matters were not resolved.

[6] I set out later what I need to consider concerning justification for the dismissal and whether unjustified disadvantage grievances are established. I will also consider the claim for recovery of two years' bonus payments. However, it is useful first to set out more detail of the context for these matters. What follows is apparent from a review of the documented exchanges, for the most part.

Context in which the matters arose

[7] David McIntyre is the sole director and shareholder of Ceres. Ceres provides contracting services in construction, disaster recovery, demolition and deconstruction, environmental remediation and materials recycling projects. Mr McIntyre is a USA resident but also a New Zealand permanent resident. At relevant times DJK reported to a manager in New Zealand (Bernie de Vere), but also was required to engage on business matters with another New Zealand manager. These managers in turn reported through to Mr McIntyre.

[8] Before the employment, there was an email exchange between DJK and Mr de Vere on 15 July 2016. DJK commenced work as a Business Development and Marketing Executive on 1 August, then took some pre-arranged leave during September 2016. Mr de Vere sent DJK a letter dated 30 August 2016, enclosing an employment agreement. DJK signed an employment agreement on 4 October 2016.

[9] On 8 May 2018, DJK made a formal complaint that she had been bullied by the other New Zealand manager. The complaint set out various matters since February 2017. The complaint was referred to Mr McIntyre, who sought legal advice. Mr McIntyre decided to appoint an external investigator to investigate and report on the complaint. Meantime, a solicitor acting for DJK wrote to Ceres on 12 June 2018, raising a claim that Ceres had failed to investigate the 8 May complaint, giving rise to a personal grievance. Ceres' solicitor responded on 13 June, with notice that an external investigator had been engaged and with a copy of the draft terms of reference.

[10] After being advised about the complaint and the investigation, the other manager made his own complaint about being bullied by DJK and her manager. The independent investigator's terms of reference were extended to cover this complaint.

[11] The independent investigator finalised her report on 6 September 2018. The investigator upheld neither complaint, but concluded that they were working in an environment which appeared to be divided, impacting on them both and the efficiency of Ceres. She considered that the current organisation structure might be contributing to that and recommended Ceres seek assistance from an organisational development specialist to establish a less divisive and more cohesive staff structure. The investigator recommended revising position descriptions. The investigator also suggested that some form of group facilitation might assist to re-set the methods of communication and operating practices to improve working relationships.

[12] The report lists the steps taken to investigate the complaints between 25 June and 6 September 2018. I accept the list is accurate. The investigation was thorough and was completed in a reasonable time. Steps included providing a draft to DJK for comment. DJK later received the final report. Mr McIntyre's evidence is that there was no response from DJK directly or from her solicitor to the final report. DJK does not dispute that evidence, and explained that other issues took her attention soon after the report. Following the report, Mr McIntyre travelled to New Zealand in September, intending to review the business. In early October, Mr McIntyre was called away from New Zealand to help manage Ceres' response to a hurricane event elsewhere in the world.

[13] There is an email dated 16 October 2018 under the subject line "Regarding the reorganization of Ceres NZ" from Mr McIntyre to a number of employees, including DJK. Attached was a letter setting out a restructuring proposal, a current organisation chart, a proposed organisation chart and revised job descriptions for the new structure. The email included a note that the proposal chart related to the demolition/asbestos side of the New Zealand business. It did not directly affect DJK.

[14] Mr McIntyre then wrote to DJK on 29 October. The letter referred to Mr McIntyre's concerns about the company's financial situation, an apparent lack of transparency to Mr McIntyre regarding business operations, a business downturn, an anticipated loss of about \$400,000, no forecast uplift in current work levels, the lack of new customers since October

2017 and the consultation process involving the demolition/asbestos side of the business. The letter said that Mr McIntyre's review had led him to considering whether Ceres NZ had an ongoing need for a senior Business Development and Marketing Executive. It set out reasons for considering the disestablishment of that position. Mr McIntyre sought feedback on the proposal by 5 November.

[15] The meeting for that purpose was held on 7 November, by agreement. DJK was present and was represented. Mr McIntyre attended remotely and Ceres was also represented.

[16] DJK's lawyer wrote to Ceres' lawyer on 14 November. The letter disputed the substantive reasons advanced as part of the restructuring proposal, as well as raising several process issues. The restructuring exercise was attributed to DJK's earlier bullying complaint.

[17] On 3 December, Ceres' lawyer advised DJK's lawyer that matters remained under consideration, but had been delayed. Pending further contact, DJK was asked to continue her work on a "business as usual" basis.

[18] On 19 December, Mr McIntyre provided a substantive reply to the issues raised on 7 November and in the correspondence. He also set out the comments of DJK's manager, made as part of Mr McIntyre's consultation with him after the 7 November meeting. Mr McIntyre set out his decision to disestablish DJK's position and re-allocate the role's tasks to other existing positions. Although Ceres did not have any current vacancies, Mr McIntyre asked DJK to provide her comments on redeployment opportunities by 21 December. In the absence of a suitable redeployment, Ceres would give notice of termination by reason of redundancy.

[19] DJK's lawyer responded on 21 December. This letter repeated and enlarged on the 14 November correspondence. It included the claim that Ceres undertook the restructuring exercise because of DJK's earlier bullying complaint.

[20] Mr McIntyre wrote again on 16 January 2019, giving notice to DJK of the termination of her employment.

[21] DJK lodged a statement of problem in the Authority on 15 April. It was served on Ceres on 19 April 2019. This was the first written communication between DJK and Ceres

after the dismissal. The Employment Court found that the dismissal was on notice, so DJK's personal grievance claim of unjustified dismissal had been raised with Ceres within time.³

[22] I first consider the personal grievance claims.

Unjustified disadvantage – 12 June 2018

[23] DJK in her statement of problem and in her evidence refers to a letter her lawyer sent to Ceres on 12 June 2018. Ceres says it received the 12 June 2018 letter by email at 3.33pm that day. DJK also included in a bundle of documents a letter dated 29 May 2018 from her lawyer addressed to Ceres. The 29 May 2018 letter appears to be a draft of the letter sent by email to Ceres on 12 June 2018 at 3.33pm. In any event, there were no substantive differences.

[24] The 12 June letter refers to DJK's 8 May 2018 formal complaint of having been bullied. It says that Ceres had breached its duty to investigate the issues at the earliest opportunity, giving rise to an unjustified disadvantage personal grievance.⁴

[25] DJK in her evidence says that on 21 March 2018 she raised her concerns about bullying with Mr McIntyre when he was in New Zealand. Her evidence is that he responded in a raised voice, said it was her fault she was being bullied, got up and said loudly "as far as I'm concerned this conversation is over". A more comprehensive account of the exchange is set out in DJK's 8 May formal complaint. It includes DJK being spoken to the week after by another employee who said she had heard "David [McIntyre] yelling" at DJK.

[26] The matter was canvassed by the investigator, despite DJK agreeing it was not "bullying" by Mr McIntyre as it was the first time "he's really had a go at me". Mr McIntyre told the investigator that he was "quite annoyed" with DJK. The exchange ended with him telling DJK that the meeting was over. Mr McIntyre's evidence is that he did not "shout" at DJK and was not "angry" with her, but was annoyed. He gave some evidence by way of context for that. I find that DJK came away from the 21 March exchange realising from Mr McIntyre's tone and abruptness that he was "annoyed" with her. However, it is not likely that Mr McIntyre was "yelling" at DJK. No personal grievance arises from this exchange.

³ *Ceres New Zealand LLC v DJK*, above n 1.

⁴ *Clear v Waikato District Health Board* [2008] ERNZ 646.

[27] Shortly after the 21 March exchange, DJK's office was shifted on Mr McIntyre's instructions. In her complaint, DJK described this as contributing to her exclusion and said she was not supported by her colleagues as part of moving from one office to another. The lock was removed from DJK's new office, on Mr McIntyre's instructions. The gist of Mr McIntyre's evidence is that the office shift was a response to DJK's complaint to improve her work placement. DJK was moved to the office that Mr McIntyre had been using. The placement of DJK in any specific office was not a condition of DJK's employment. The new office was at least as satisfactory for DJK's employment as the old office. DJK's relocation did not affect her employment or the conditions of her employment to her disadvantage. No personal grievance arises from this.

[28] I accept that Ceres owed an obligation to DJK to investigate her 8 May 2018 formal complaint that she had been bullied by the manager (not her reporting manager), at the earliest opportunity. On 12 June, DJK's lawyer asserted that Ceres had failed to "take steps to address the workplace bullying", giving rise to a personal grievance. The difficulty is that Ceres had already "take[n] steps to address the workplace bullying".

[29] Emails show the 12 June letter was forwarded to Ceres' lawyer at 4.38pm. That indicates Ceres had already engaged a lawyer. Ceres' lawyer replied by email on 13 June. The reply included a letter from Mr McIntyre to DJK dated 12 June, in response to DJK's bullying complaint. In his letter, Mr McIntyre said that Ceres had appointed an independent investigator. Terms of reference were included. The documented terms and the investigator's agreement to them must have pre-dated 12 June. The email states that DJK's manager (Mr de Vere) had acknowledged receipt of the bullying complaint and had already told her that Ceres was taking the matter seriously and was seeking legal advice. Mr McIntyre's evidence is to that effect. It is not disputed by DJK. The complaint was serious and wide ranging. I find that Ceres properly and promptly responded by deciding to appoint an investigator. I find that Ceres through Mr de Vere acknowledged the complaint. Nothing of relevance to the complaint occurred between its receipt and the commencement of the independent investigation. No personal grievance arises as a result of the time taken to commence the investigation.

[30] To summarise, no personal grievance has been established in respect of matters raised by the 12 June 2018 correspondence.

Unjustified disadvantage – 14 November 2018

[31] The investigator's completed report was circulated to DJK in early September 2018. The investigator did not uphold DJK's complaint that she had been bullied. Equally, the complaints by the other manager against DJK were not upheld. Several organisational development recommendations were made.

[32] DJK did not challenge the final report's conclusions or recommendations. Nothing in the evidence before the Authority would lead me to a different conclusion about DJK's complaint than was reported by the investigator.

[33] DJK is critical of the four months taken to initiate and then complete the report. The complaint covered many issues over a substantial time period. The process was complicated by the inclusion of the complaint against DJK. However, there was no reasonable basis to investigate that complaint separately. It was more important to conduct the investigation comprehensively, than to conduct it urgently. DJK suffered no disadvantage due to the time taken.

[34] In large part, the issues raised by DJK's lawyer in his 14 November letter were in respect of the restructuring process then underway affecting DJK's role. I deal with these matters below as part of assessing justification for the dismissal.

[35] The letter did not challenge the findings in the completed report. It did say "Our client has had ongoing difficulties dealing with the toxic working relationship in Ceres", but no details were provided in support of that claim. There is no evidence about events, either after the complaint or after the report, comprising the "toxic working relationship". I treat the assertion about "ongoing difficulties", as an introduction to the settlement proposal contained in the letter, rather than a new claim that DJK's employment or conditions of employment had been affected to her disadvantage by further unjustified actions by Ceres.

[36] No unjustified disadvantage personal grievance has been established in respect of matters in the 14 November 2018 correspondence.

Ceres' decision to dismiss DJK

[37] DJK in her evidence says that Ceres ignored the investigator's recommendations. However, I accept Mr McIntyre's evidence that he decided himself to review the business structures, rather than appoint an organisational development specialist. I also accept Mr McIntyre's evidence that he reviewed roles, introduced new reporting lines and clarified job responsibilities as part of that. He later engaged a dedicated HR manager.

[38] I will precis the 29 October letter by which Ceres initiated the restructuring proposal, prior to dismissing DJK. Mr McIntyre said that his recent review of the business partly resulted from complaints from staff, including DJK. However, a significant reason for the review was the company's financial situation. There had been a significant downturn and losses. The anticipated loss had been earlier communicated to staff. The market had been slow for a year, with no new customers since October 2017. Current forecasts did not suggest an uplift. The company's workflow and customer base had changed from when the Business Development and Marketing Executive role had been established. Mr McIntyre's "preliminary view" was that the "value staying connected with initial contacts and previous customers could be absorbed into sales roles, rather than warranting a fulltime Executive. Disestablishing the Executive role would present a significant saving. Mr McIntyre's recent observations while in New Zealand were that DJK did not have sufficient work to keep her busy. DJK appeared to be engaged on non-work tasks "Many times during the day". His review of sales and marketing over the last 6 months, including DJK's email activity, was "well below" what he would have expected. The investigator's report did not support DJK's view that she had been prevented from properly doing her work by information being withheld and her being excluded by the other manager. This affected the weight Mr McIntyre placed on DJK's view as to whether the business could continue to sustain her Executive role.

[39] For those reasons, Mr McIntyre was proposing to disestablish DJK's role and sought her views. A response was sought by 5 November. DJK was entitled to legal advice and to be supported or represented at any meeting.

[40] There was a meeting on 7 November. In evidence, DJK produced two documents⁵ headed "RESPONSE TO ... RESTRUCTURING PROPOSAL". Neither document was

⁵ Document 4 dated 5 November 2018 and document 6a dated 7 November 2018.

disclosed to Ceres prior to its decision to dismiss DJK. I accept Mr McIntyre's evidence that document 6a mostly reflects what DJK and her representative said during the meeting on 7 November.

[41] I will precis the 14 November letter from DJK's lawyer. It canvassed the reasons given for the restructuring proposal, by reference to the redundancy provision in the employment agreement. Ceres was not closing down. Reallocation of DJK's work meant that the role was not superfluous to requirements. The lack of new clients meant that the business development role was needed, rather than superfluous. Active staff recruitment by Ceres undermined the economic constraints advanced as substantive justification. DJK did not accept that there was a reduction in available work or that she was not fully occupied. Issue was taken with the procedure. No selection criteria had been provided. DJK felt she had been singled out to be removed from the business. The future of the role and the person were being considered simultaneously, with the same decision maker for both. The timing of the proposal and references in it to the complaint linked the two matters. The process was not being undertaken in good faith and the decision was predetermined. The process was window dressing to mask the fact that DJK was being removed because she had made a bullying complaint.

[42] As mentioned above, Mr McIntyre's attention was taken by international events. There was communication between the respective lawyers on 3 December about the delay. No concern about timeliness was raised by DJK's lawyer.

[43] Mr McIntyre responded by letter on 19 December. The letter paraphrased and responded to points raised by and for DJK at the meeting on 7 November. Mr McIntyre accepted that DJK might not have been aware of Ceres' financial position. The purpose of the present process was to provide information about that. He assured DJK that the restructuring was not because of her complaint. He outlined the new staff in the last six months hired to work on existing contracts, none of whom were in a sales or marketing role. Mr McIntyre accepted that no issues had been raised about DJK's work performance. He noted that the proposal was not the result of performance issues. It arose from economic circumstances including the forecast losses. Mr McIntyre repeated that potential work came directly from customers as a result of previous work. He accepted that there was value in continuing customer contact, but said he had to consider whether the business at its current

level could support the Executive role. The work DJK had referred was largely administrative, did not warrant a full-time Executive role and could be re-allocated to other staff. Mr McIntyre set out Mr de Vere's comments about the proposal. To summarise, Mr de Vere thought that a bigger marketing effort was needed as the market slowed.

[44] Mr McIntyre concluded that, while there was value in having a marketing and business development role, Ceres had to reduce its costs and mitigate projected losses. He had decided to disestablish DJK's role. Tasks would be distributed to other existing roles. Mr McIntyre sought DJK's views about redeployment, but noted there were no current vacancies. A response was sought by 21 December. If no redeployment opportunities were identified, DJK would be given notice of the termination of her position.

[45] DJK's lawyer responded by letter dated 21 December. It is sufficient to note that the letter repeated the points made in the 14 November letter, with some added comment or detail. It ended with a settlement proposal.

[46] Mr McIntyre responded by letter dated 16 January 2019. He noted that the 21 December letter had not commented on redeployment options. Mr McIntyre said that the decision to disestablish DJK's role was consistent with the employment agreement and that DJK had been fully consulted throughout. The letter was formal notice of termination of employment by reason of redundancy. It concluded:

Pursuant to the terms of your employment you are entitled to four weeks' notice of termination for redundancy. In the circumstances, we do not require you to work out your notice period and will instead make a payment to you in lieu of notice. Your last day of employment with Ceres New Zealand LLC will therefore be 16 January 2019. We will arrange for your final pay to be calculated and paid to you. Please arrange for the prompt return of any company property in your possession.

I would like to take this opportunity to thank you for your contribution to Ceres New Zealand.

[47] There were interactions between DJK and Ceres over her final pay and the return of property on and shortly after 16 January 2019. I will return to this later.

Justification for the dismissal

[48] For an employer who is proposing to make a decision that will adversely affect the continuation of an employee's employment, good faith requires that employer to provide

access to relevant information and an opportunity to comment on it before any decision.⁶ Ceres must show, considered objectively, that its actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time. I must consider: did Ceres sufficiently investigate its concerns before dismissing DJK having regard to the employer's resources; did Ceres raise its concerns with DJK before deciding to dismiss her; did Ceres give DJK a reasonable opportunity to respond before it dismissed her; did DJK genuinely consider DJK's response before it dismissed her; and whether other factors should be considered.⁷

Did Ceres sufficiently investigated its concerns before dismissing DJK having regard to the employer's resources?

[49] At the time, Ceres was a reasonably substantial business. It had access to professional advice. It must show that it conducted a full and fair process as part of its decision to dismiss DJK.

Did Ceres raise its concerns with DJK before deciding to dismiss her?

[50] By the correspondence dated 29 October, Ceres raised its concerns that led to the proposal that the role of Business Development and Marketing Executive be disestablished.

[51] Ceres has not raised any concern in these proceedings, except those it raised with DJK before it decided to dismiss her.

[52] I find that Ceres did raise its concerns with DJK before deciding to dismiss her.

Did Ceres give DJK a reasonable opportunity to respond before it dismissed her?

[53] The restructuring proposal was raised with DJK in the 29 October correspondence. Ceres advised DJK it had decided to disestablish her role in the correspondence dated 19 December 2018. DJK responded by meeting with Ceres on 7 November and by her lawyer's correspondence on 14 November.

[54] Ceres provided further opportunity to respond about redeployment options after 19 December, ahead of its notice of dismissal dated 16 January 2019. During that period,

⁶ Employment Relations Act 2000, s 4(1A).

⁷ Employment Relations Act 2000, s 103A.

DJK's lawyer wrote to Ceres, without reference to any redeployment possibilities. There is no evidence to suggest that either Ceres or DJK were aware of possibilities but did not raise those.

[55] I find that Ceres gave DJK a reasonable opportunity to respond before it dismissed her.

Did DJK genuinely consider DJK's response before it dismissed her?

[56] DJK's response was provided at the 7 November meeting, in the 14 November letter and repeated in the 21 December letter.

[57] Mr McIntyre's 19 December letter demonstrates that he considered DJK's response. For example, detail of the staff who had been recruited in the last six months was set out. The recruits were mostly replacements for departing staff, to work on existing contracts. They all worked in operational roles unrelated to the marketing and business development part of the business. Similarly, specific responses were given to DJK's comments about her work tasks. Mr McIntyre considered they were tasks which could be performed "at a lower level" and were tasks which could be "absorbed" by the "administrative office". Mr McIntyre acknowledged several of DJK's responses, but said that the savings from disestablishing DJK's role, given Ceres' financial circumstances, meant it was the right decision at that time.

[58] Ceres' genuinely considered DJK's response before it dismissed her.

Were Ceres' actions and how it acted what a fair and reasonable employer could have done at the time?

[59] I will consider other factors raised by DJK as part of assessing whether Ceres' actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time.

[60] The Authority must assess whether Ceres' decision to make DJK redundant was genuine, based on its business requirements, rather than as a pretext for some other reason for the dismissal. If Ceres can show the decision was genuine and that it complied with its notice and consultation obligations, it will have gone a "long way" to showing the dismissal was justified.⁸

⁸ *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].

[61] Clause 13 of the employment applied. It provided:

13 Redundancy

13.1 The Employee shall be regarded as redundant where the position held by the Employee becomes superfluous to the requirements of the Employer or is otherwise disestablished as a result of the closing down of all or part of the Employer's business or a reduction in work available or as a result of any other genuine business decision of the Employer.

...

[62] Relevantly here, the agreement permitted Ceres to disestablish DJK's position due to a "reduction in work available", or as a result of "any other genuine business decision".

[63] Disestablishing DJK's position for the purpose of saving salary and overhead costs, to offset against forecast losses, was a "genuine business decision" based on Ceres' business requirements. Ceres' assessed there had been a reduction in work available, so that DJK was not fully occupied on tasks that Ceres needed to be performed by a marketing and business development executive. Ceres determined that DJK's remaining tasks could be reallocated to other administrative and sales staff.

[64] DJK believes that the restructuring process was a pretext to hide Ceres' decision to dismiss her because of her May 2018 complaint. I do not accept that the process was a pretext. The financial statements for the year ending 31 December 2018 were signed by Mr McIntyre in October 2019. The statements include an independent auditor's report to confirm that the statements fairly record the company's state as at 31 December 2018. The statements show substantial operating loss and net loss figures for the year, as opposed to operating profit and net profit figures for the previous year. The financial statements for the year to 31 December 2019 show an improvement to the operating loss figure and a small net profit (before tax). There is no reason based on evidence to question these statements. The 2018 statements support Mr McIntyre's evidence that there was a need to achieve cost reductions. There is no reason to doubt that this business requirement was the reason for the restructuring process.

[65] DJK says that Mr McIntyre predetermined the outcome of the restructuring process. I am referred to emails from the other manager to Mr McIntyre dated 30 November 2017 and 20 December 2017. The email exchange came to DJK's attention because of the investigation into her complaint. The other manager advocated for his appointment as General Manager

with responsibilities including “Business Development”. However, nothing came of that. DJK says that the emails should have been disclosed to her sooner, so not doing so is a breach of good faith. I do not agree. The good faith obligation is to provide access to relevant information and an opportunity to comment when the employer is proposing to make a decision that will or is likely to adversely affect the employee’s continued employment. The 2017 emails were not relevant to Mr McIntyre’s October 2018 restructuring proposal.

[66] Regarding the 16 October 2018 email that initiated the restructuring of the demolition/asbestos side of Ceres’ New Zealand business, DJK says that it was only sent to a few of the affected employees, there was limited time for a response and the proposed organisation chart was vague as it did not show where her role fitted in. DJK says there was no response to her request for clarification. However, DJK’s position was not affected by the 16 October proposal. Whether or not Ceres complied with its good faith obligations to those who were affected is not relevant to DJK’s claim. Even on the assumption that Ceres did not specifically respond to DJK’s mid-October request for clarification, such default would have no bearing on whether DJK’s dismissal as a result of the 29 October proposal was justified.

[67] DJK says that Mr McIntyre did not speak with her about the business or its operations during the time he was in New Zealand after the investigator’s report reviewing the business. That was in response to Mr McIntyre’s statement at the start of the 29 October letter that he had taken the opportunity when in New Zealand to speak to staff. DJK made the same comment during the 7 November meeting. Mr McIntyre’s evidence is that the main focus of his review was on the financial side of the business. There is no reason to doubt that evidence. As the sole shareholder, he had to personally inject money to keep Ceres trading. Mr McIntyre spent time going through financial records to understand what had been going on. He became aware of financial anomalies and raised those relevant. DJK was not responsible for any of these issues. The lack of communication with DJK by Mr McIntyre during his time in New Zealand from early September does not give rise to a breach of the good faith obligation specified at s 4(1A)(c) of the Act, so as to call into question the subsequent consultation with her prior to her dismissal.

[68] DJK’s concerns include the absence of any selection process and the reallocation of her responsibilities. However, there was no basis for a selection process as part of Ceres’ decision to disestablish the position. No other staff were employed in that or a similar role.

The issue of selection did not arise. Ceres was entitled to reallocate any necessary continuing tasks to administrative and sales staff, as part of its business decision to disestablish DJK's Executive role.

[69] DJK says she did not receive any communication from Mr McIntyre after the 7 November meeting until 19 December. DJK says that the lack of communication was extremely stressful, especially leading up to the Christmas break. DJK also says that she was still experiencing workplace bullying and that she considered that Mr McIntyre was attempting to coerce her into resigning. DJK overlooks the contact between the parties' lawyers on 3 December to acknowledge and explain the delay. I accept that dealing with the matter, especially over Christmas, would have been very stressful for DJK. However, Ceres is only legally liable for the stress if DJK has a personal grievance. No personal grievance arises as a result of the time taken by Ceres over the restructuring proposal.

[70] DJK considers that the dismissal was the result of her May 2018 complaint. DJK says that the timing of the restructuring proposal and direct references in the proposal to the complaint substantiate the "clear links". In the 29 October letter, Mr McIntyre refers to the "work environment complaints" and the investigator's recommendation that they consider a "restructure of the business". The letter then says:

However, a significant reason for a current review of our operations was because of concerns I had about the company's financial situation, and about an apparent lack of transparency for me in the operations of the business.

[71] It is clear from this correspondence that Mr McIntyre considered that the complaints and the investigator's report were part of the context for, but were not the cause of the restructuring proposal. Mr McIntyre later assured DJK that he was not considering disestablishing her position because of her complaint. The evidence of the company's financial situation supports Mr McIntyre's view. I find that the restructuring proposal was not a sham or a mask to cover a dismissal for some other reason.

[72] DJK says that Mr McIntyre breached good faith by not personally advising her of the 16 January 2019 decision or handing the letter to her. She says that it made her feel like her employment had been terminated for serious wrongdoing. Her evidence is that she was not given the opportunity to farewell work colleagues or advise clients. She was required to return company property so she deactivated her cellphone and returned her company car, keys

and laptop to Mr de Vere the same day. Mr de Vere was apparently not aware of the decision. A friend collected her from the workplace. DJK says these actions were in breach of good faith.

[73] As part of the earlier judgment,⁹ the court noted that Mr McIntyre wrote to DJK via her lawyer on 16 January. The lawyer forwarded that letter the same day to DJK. It was appropriate for Mr McIntyre to write to the lawyer, absent any other instruction. The court at [15] found that the dismissal was on notice, that DJK was not required to work out the notice, but her employment continued until the end of the notice period. In the 19 December letter, Mr McIntyre foreshadowed the likelihood of notice of dismissal as provided in the employment agreement, if no redeployment option was identified. The employment agreement expressly entitled Ceres to direct DJK not to report for work during a notice period. That is what happened. DJK suffered no disadvantage or unfairness by reason of Ceres exercising that option. No breach of good faith resulted from these arrangements.

[74] In summary, I find that Ceres' actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time.

Is DJK entitled to bonus payments?

[75] Mr de Vere in an email on 15 July 2016 to DJK summarised his understanding of the terms they had discussed the previous day, in addition to a draft employment agreement. Mr de Vere said he had spoken to Mr McIntyre and advised him of the terms that had been discussed. Included in Mr de Vere's email was:

- 2 Basic salary ...
- 3 An incentive bonus scheme to be put in place to provide additional income based on a performance/profit formula.

[76] As requested, DJK confirmed her agreement.

[77] Later, the signed employment agreement included the "base salary" figure, but as "Total remuneration". It did not include an "incentive bonus scheme". Ceres did not put in place a bonus scheme for DJK or other staff. The signed agreement expressly comprised the "entire agreement" and superseded all previous "representations, negotiations, commitments and communications, whether written or oral, between the parties".

⁹ *Ceres New Zealand LLC v DJK*, above n 1, at [8].

[78] DJK claims \$10,000.00 bonus payments for each completed year of service. Where there has been a default in payment to an employee of wages or other money payable under an employment agreement, the employee can recover the unpaid amount by action in the Authority. However, the present claim by DJK cannot succeed as a claim for arrears because she was not entitled to a bonus scheme under the terms of her employment agreement. Ceres did not default on payments due to DJK under the employment agreement.

[79] This part of the claim must be dismissed.

Summary

[80] The personal grievance claims all fail.

[81] The claim for bonus payments fails.

[82] Costs are reserved. A claim for costs can be made by lodging and serving submission in support, within 28 days. The other party may then lodge and serve and submissions in reply, within 14 days. I will determine costs based on those submissions.

Philip Cheyne
Member of the Employment Relations Authority