IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 1
5364615

	BETWEEN	NATASHA JAMES Applicant
	A N D	LA FAMIA NO. 2 LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Robert Thompson, Advocate for Applicant Angela Smalley, Advocate for Respondent
Investigation Meeting:	11 October 2012 at Christchurch
Date of Determination:	7 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms James) alleges that she was unjustifiably dismissed and suffered an unjustified disadvantage as a consequence of her employment by the respondent (La Famia). La Famia resist both contentions. La Famia say that Ms James' position became surplus to its requirements and that she was, in consequence, made redundant.

[2] Ms James was employed as kitchen manager/head chef on 13 July 2011. There was a written employment agreement which provided amongst other things for an hourly rate of $22 per hour and a procedure is established for dealing with restructuring and redundancy situations. In terms of context, there had been a previous employment relationship between these parties and an employment relationship problem raised by Ms James had been satisfactorily resolved by La Famia on the footing that the same parties entered into a fresh employment agreement.

[3] La Famia say that it was common knowledge that the overall business was losing money and they maintain Ms James knew, or ought to know, about the financial predicament of the business. Ms James' evidence is that she did not know that the business was in difficulty and in any event La Famia had an obligation to tell her and it did not.

[4] On 7 October 2011, Ms James attended at work at the normal time and at about 1.45pm that afternoon, she was called to a meeting with Mr Harmon Wilfred of La Famia. At that meeting, Ms James was "*presented with a letter explaining the restructure and consolidation of the two food service management positions* …" being the kitchen manager position (Ms James' role) and the function manager's position (held by another individual).

[5] La Famia's evidence is that Ms James was told that the consolidated business could not support two food service managers and that the intention was that the positions be amalgamated and the two incumbents (Ms James and the other individual) would have an equal opportunity to apply for the consolidated role.

[6] There is dispute between the parties as to what happened next in the 7 October 2011 meeting. Ms James says that she was taken by surprise by the presentation of the letter (which was dated 5 October 2011) and she "panicked" at the intimation that her position was to be disestablished.

[7] Conversely, La Famia say that once they had confirmed the decision to disestablish the position Ms James occupied, "*Ms James became belligerent and verbally cursed and attacked (Mr Wilfred) … stating that the company was not in financial difficulty and that the entire presentation was a fucking ruse".* Allegedly, Ms James then stomped out of the meeting indicating that she would be taking legal advice on her unjustified dismissal.

[8] Ms James maintains that she returned to the work computer in the kitchen and continued "*undertaking her normal duties*".

[9] Again, that evidence is not accepted by La Famia who say that Ms James phoned Mr Wilfred from the chef's office threatening to resign. Mr Wilfred sought advice from his lawyers who recommended that Ms James be suspended on full pay until a disciplinary meeting could be arranged. According to Mr Wilfred, he then went to meet with Ms James again in the kitchen and as a consequence of her

continued belligerence, foul language, and the possible risk to the business, Mr Wilfred decided to follow his lawyer's advice and suspend Ms James on pay.

[10] Ms James denies that anything that she did in the kitchen that afternoon after the meeting with Mr Wilfred justified suspension. In particular, she denied deleting the employer's files from the computer (as La Famia allege), denies shouting abuse or threatening the employer and indeed denies wrongdoing of any kind.

[11] Having left the workplace as instructed, it is common ground that Ms James then proceeded to make contact with Mr Wilfred over the following weekend, both by telephone and email, in which, in her terms, she sought to have Mr Wilfred explain to her why she had been suspended (or to use the term that Mr Wilfred used "*barred*"). She claims that Mr Wilfred told her that he did not have to explain why she was suspended whereas Ms James' view was that Mr Wilfred was deliberately stonewalling and refusing to engage with her which she claimed elicited "*emotional responses*" from her.

[12] For La Famia, Mr Wilfred maintained that he was harassed by Ms James and was effectively peppered with telephone messages and email contact at his private residence so much so that he eventually issued a Trespass Act notice and at least contemplated the involvement of police.

[13] Following on from these dramatic developments, the parties' representatives endeavoured to reach some understandings but were not successful. The suspension effectively continued until the de facto notice period had expired and La Famia resolved not to complete and/or conclude its disciplinary investigation against Ms James. By the same token, she regarded herself as having been unjustifiably dismissed for redundancy and as having suffered an unjustified suspension.

Issues

[14] It will be convenient if the Authority considers the following questions:

a. Was Ms James unjustifiably dismissed?

b. Did Ms James suffer a disadvantage through an unjustified action of the employer?

Was Ms James unjustifiably dismissed?

[15] The Authority has no hesitation in concluding that Ms James was unjustifiably dismissed. The restructuring which disestablished her role was completely mismanaged by La Famia. The Authority heard evidence that Ms James would have known that the business was in financial difficulty. She denies knowing anything of the kind and her evidence was that La Famia never told her officially or unofficially that the business was in difficulty. Moreover, La Famia, as employer, had an absolute obligation to enter into a robust and genuine process of consultation before determining that the position Ms James occupied was surplus to its requirements. That simply did not happen and in consequence La Famia failed absolutely in their obligations to undertake a fair and just process in accordance with New Zealand law. Even their lawyer accepts that that is the position when he indicated at paragraph 3.1 of the statement in reply:

> *The respondent does concede there are some procedural concerns regarding the redundancy process.*

[16] Not only does the redundancy process followed by La Famia fail to meet the test enunciated by decided cases, but it also fails to meet the process set out in the employment agreement. That agreement, although not signed, is in the Authority's opinion clearly the operative document covering the employment relationship. In clause 12 of the employment agreement, La Famia sets out the process that it will follow in a restructuring. The essence of the process is that it will consult with the employee before substantive decisions are taken.

[17] The difficulty with the process followed by La Famia in the present case is that it had already made its mind up that Ms James' position was gone before they even spoke with her. It is plain on the evidence before the Authority that nobody in a position of responsibility with the authority of the employer spoke to Ms James about the prospect that her job might be disestablished until the meeting of 7 October 2011. That was the very first occasion on which there was any suggestion that her job was at risk and it was perfectly plain to Ms James from that meeting that the decision to disestablish her position had already been taken.

[18] The Authority reaches that conclusion not only from the evidence of Ms James herself, but also from the concessions made by Mr Wilfred in the investigation

meeting that there had been no prior advice to Ms James from him and most particularly by the very clear phraseology in the letter handed to Ms James at the 7 October 2011 meeting. That letter was dated two days before the meeting and it expresses the position in absolutely clear terms when it says in the first paragraph of the 5 October 2011 letter:

> *... the position you hold as head chef under La Famia No. 2 Limited has been made redundant.*

[19] In the second paragraph of the same letter, there is the following statement:

> *... the Board of La Famia has determined that the duel management approach will not be continued under the new Taste Prenzel operation.*

[20] And in the third paragraph, the following statement appears:

> *... the Board of Directors of La Famia No. 1 Limited has determined it necessary to combine the function and restaurant catering operation under one management position. You are hereby offered the opportunity to apply for this new combined position to manage the kitchen and function/catering operation.*

[21] And the final paragraph of the letter reads as follows:

> *In the event that you choose to not apply for the new management position or upon application you are not successful in being appointed, the Board of La Famia No. 2 Limited hereby agrees to provide you with a four week redundancy notice period and payment.*

[22] It is absolutely apparent on an analysis of the 5 October 2011 letter that the restructure was a fait accompli, that the decisions had been taken by the employer prior to Ms James even being aware that her position was in jeopardy. La Famia can protest that Ms James ought to have known that the business was in financial difficulty but there was absolutely no evidence that she did and as employers, La Famia have an absolute obligation to diligently undertake a reflective process of engaging with employees affected by restructure so as to take into account what those employees might propose by way of alternatives to the destruction of their position and to attend to that task with what the Courts have frequently referred to as "*an open mind*". Here, it is plain that at the point at which Ms James first became aware of the situation (at the meeting on 7 October 2011) La Famia had closed its mind to anything

that she might have said and indeed, it is hardly surprising that she flew off the handle and behaved as she did. She saw the situation for what it was, a fait accompli.

[23] It is also plain that the restructuring failed to meet the legal test set out in Section 4 of the Employment Relations Act 2000 (the Act). Aside entirely from the general obligations in the Section mandating good faith behaviour, which is defined to include " *...establishing and maintaining a productive employment relationship...*" there is a particular obligation which relates to restructuring arrangements. It is set out in section 4 (1A)(c) and requires an employer *"...who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1...of his...employees....*" to provide information to the affected employee about that decision and an opportunity to comment on the information before the decision is made.

[24] In the present case, the employer provided no such opportunity to Ms James. The decision was made before she was even told about it so there was no genuine prospect of her commenting on it, even assuming that the employer provided her with information relevant to the decision, which it did not.

[25] As if that is not enough, it is also apparent that La Famia failed to apply the tenets of the law set out in the recent decision of the full Bench of the Employment Court in *Vice-Chancellor of Massey University v. Wrigley & Ors* [2011] NZEmpC 37. In that decision, the Court referred first to the "*inequality of power in employment relationships...*" noting that when a business is restructured, "*...the employer will ....have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues...*" The Court concluded that s 4 (1A)(c) required the employer to give the employee an opportunity to comment before the decision is made and that that opportunity could not be limited by the paucity of material provided by the employer: para. 55.

[26] Not only did La Famia present Ms James with a fait accompli but it also failed to provide her with any material at all in a timely manner which could have provided her with a reasonable opportunity to become involved in the employer's decision making process.

[27] Finally under this head, the Authority must consider whether the dismissal was truly genuine, or not. Plainly, as the foregoing analysis discloses, there were grave deficits in procedure so as to make the process so unfair as to found a personal grievance. The Courts have long held to the view that an employer is allowed to improve the efficiency of his business without having to justify that commercial decision to the Court. But the Court and this Authority, will always be concerned to protect employees from capricious or unjust treatment, even where the restructure is a genuine one. In the present case, the employer maintains this was a restructure brought about for entirely proper commercial reasons. However, there is also evidence that La Famia had some issues with Ms James that for instance, she was disruptive and upset other staff. This mix raises the possibility that the decision of the employer was activated by " mixed " motives. Where that occurs the Authority must be satisfied that the redundancy was both genuine and the predominant motive for the dismissal: *Forest Park (NZ) Ltd v. Adams* (Employment Court, Auckland AC 83/00 per Judge Colgan)

[28] But, of course, what happened here was that as soon as the employer commenced its unsatisfactory process by convening its meeting of 7 October 2011, the employment relationship immediately soured, due entirely to the employer's poor process, and there was never any further opportunity to resolve matters satisfactorily despite the urgent endeavours of Ms James's able advocate. It was in this period after the 7 October 2011 meeting that La Famia started to raise matters they say were of concern to them about Ms James's behaviour, matters which they never raised with her while she was still in the workplace. It will be remembered that during the period in question Ms James was suspended from duty at the behest of the employer, and so was in no position to defend herself. It was only when the notice period imposed on Ms James by the final paragraph of the letter of redundancy, was reaching its end that La Famia decided it would take its disciplinary concerns no further.

[29] It follows that while the genesis of the restructure may well have been genuine, it is difficult to see how Ms James' dismissal itself is not tainted by the concerns La Famia had about her behaviour, complaints which it never took the opportunity of putting to her. The Authority is persuaded that by the time of the termination of the relationship, the predominant motive for its end was not the redundancy at all but the various concerns La Famia had about Ms James's behaviour. The Authority concludes then that, for the reasons just advanced, this was not a

dismissal for genuine redundancy at all but a dismissal for cause where the various concerns of the employer were never put to the employee. In the end, the Authority finds that the employer simply took advantage of the expiry of the notice period as a way of ending a relationship that had become unsatisfactory to it.

Was Ms James subjected to unjustified disadvantage?

[30] The factual matrix discloses that Ms James was suspended from duty effectively because of the negative way in which she responded to the news that her job had gone. No doubt she felt betrayed and, certainly on the evidence provided by La Famia, she spent much of the weekend of 8 and 9 October 2011 trying to get answers from Mr Wilfred about why he had suspended her from duty. It seems common ground that Mr Wilfred offered no explanation during the weekend exchanges except to offer the observation that she would find out in due course but that was hardly satisfactory. It really did not accord with La Famia's good faith obligations to be open and communicative in the employment relationship.

[31] No doubt Ms James can be criticised as well for her apparent determination to get some sense out of Mr Wilfred about what was going on and Ms James can also be criticised for failing in her good faith obligations as well. But it seems to the Authority that the proximate cause of her behaviour over that weekend was the appalling way that she had been treated by La Famia and their cavalier disregard for their obligations as a good and fair employer clearly made Ms James cross and, as she freely conceded during the investigation meeting, resulted in her emotional reactions.

[32] That is not to say that Ms James herself does not have some explaining to do. The employer alleges that she deleted electronic records belonging to the employer before she left the kitchen on 7 October 2011. But that is an allegation which it never put to Ms James and was only raised as a shield during the Authority's investigation. Ms James says in her evidence to the Authority that she did nothing wrong in relation to the employer's electronic property but given that Ms James was never given the opportunity by the employer to respond to that charge at an appropriate time while the employment subsisted, the Authority can only note its relevance in a wider context.

[33] In all the circumstances, while the Authority is absolutely persuaded that Ms James behaved badly in the immediate aftermath of the 7 October 2011 meeting,

that bad behaviour is in the Authority's judgement, absolutely understandable in all the circumstances as being a response to a thoroughly unfair and unjust process.

[34] For the avoidance of doubt, the Authority prefers La Famia's evidence about Ms James' behaviour after the 7 October 2011 meeting. It follows that the Authority thinks that Ms James did stalk out of the 7 October 2011 meeting, did speak disrespectfully to Mr Wilfred afterwards in the kitchen, did swear at him and mutter darkly about taking the matter further. But given what had just happened, the Authority while not wishing to condone such behaviour, thinks it was entirely understandable.

[35] What is more, when, as a consequence of the behaviour just referred to, La Famia suspended Ms James, her behaviour in response to the suspension was driven by frustration that she was unable to get any sensible answers from Mr Wilfred. He, as the employer's representative, proved himself unwilling or unable to engage with her in any meaningful way (as the law requires). No doubt Ms James ought not to have harassed Mr Wilfred over the weekend and the Authority must take that conduct into account in respect to contribution but Mr Wilfred invited an emotional response by refusing to engage with his employee.

Determination

[36] The Authority is absolutely satisfied that the redundancy process adopted by La Famia was so grossly unjust as to call into question the genuineness of the whole process. While it seems to the Authority plain that the business had financial difficulties, the enthusiasm La Famia had for determining the removal of Ms James' position before they had even talked to her, argues for the grossest predetermination. What is more, as the Authority has already noted, the actual dismissal, while initiated as part of a restructure, was actually effected because it was easier for the employer to take no steps than to address its concerns about Ms James with her, as the law would expect.

[37] The Authority must consider contribution. Did Ms James contribute to the circumstances giving rise to her dismissal? The Authority concludes that she did to the tune of a third. This represents the Authority's assessment of the part Ms James's behaviour played in the unwillingness of the employer to engage with her between the meeting and the dismissal. While her response is understandable it cannot be

ignored in setting the quantum of compensation to which she would otherwise be entitled.

[38] That being the Authority's conclusion, Ms James is entitled to compensation in the sum of $5,000 payable to her under section 123(1)(c)(i) of the Employment Relations Act 2000 for the unjustified dismissal, such sum to include any consideration of penalty for breach of the good faith obligation and/or the Wages Protection Act. The award also reflects the Authority's conclusion in respect to contribution.

[39] As to the suspension and Ms James' contention that she was unjustifiably suspended, the Authority takes the view that, on the facts, the suspension was unjustified because it was caused not by Ms James' behaviour but by the egregious breaches of law and practise in the redundancy itself. However, the Authority declines to award any compensatory payment in relation to this second grievance because of Ms James' behaviour over the weekend following the 7 October 2011 meeting. Whatever the circumstances, harassing an employer in his private residence, is always going to be difficult to justify. Ms James should have taken advice from her able advocate and simply insisted on receiving payment during the suspension. For the avoidance of doubt then, the Authority finds that Ms James has suffered a disadvantage because the suspension was, in all the circumstances unjustified, making it impossible for her to engage with the employer and/or return to her duties as might be expected. The subsequent failure of the employer to engage with her in a meaningful way exacerbated the disadvantage. However, by her behaviour over the weekend following the meeting, Ms James's conduct, while understandable was so extreme as to negate her entitlement to be considered for compensation.

[40] Because of the Authority's conclusions in respect to the unjustified dismissal the question of lost wages arises. These fall under two heads. First, La Famia has still not paid Ms James's final pay comprising one months notice and holiday pay. This is inexcusable. The second head is the wages Ms James lost as a consequence of the unjustified dismissal. She has been out of work for six months. This is a case where the Authority ought to direct a contribution greater than the more usual three months wages contribution. The employer has consistently failed to fulfil its obligations as a good and fair employer and in particular has failed to pay Ms James her final month's salary.

[41] Accordingly the Authority makes the following orders in respect to wages:

a) As to the final pay, La Famia are to pay to Ms James the sum of $3935.02 gross

b) As to the lost wages, the sum of $20, 887.92 gross being the total loss for the six months period Ms James was out of work as a consequence of the unjustified dismissal: s 128 (3) of the Act applied.

[42] Given the totality of the awards made, the Authority declines to award interest.

Costs

[43] Costs are reserved.

James Crichton
Member of the Employment Relations Authority