

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 676
3046732

BETWEEN TIMOTHY KEIR
Applicant

AND FONTERRA CO-OPERATIVE
GROUP LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Andrea Twaddle and Jaime Lomas, counsel for Applicant
Laura Scampion and Julia MacGibbon, counsel for
Respondent

Investigation Meeting: 12 and 13 August 2019 in Hamilton

Submissions received: 22 August 2019 from both parties

Date of determination: 25 November 2019

DETERMINATION OF THE AUTHORITY

- A. Timothy Keir was disadvantaged by unjustified action by Fonterra Co-operative Group Ltd.**
- B. Within 28 days of the date of this determination Fonterra Co-operative Group Ltd is to pay Mr Keir the following sums:**
- (i) Two months' salary as a lost benefit; and**
 - (ii) \$25,000 as compensation for humiliation, loss of dignity and injury to feelings.**

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

Employment Relationship Problem

[1] Timothy Keir was employed by Fonterra Co-operative Group Limited (Fonterra or the co-operative) and predecessors from December 1999. From August 2013 he worked as the General Manager Operations South Island for the New Zealand Manufacturing (NZM) division.

[2] NZM was restructured and Mr Keir was informed that his position would be disestablished. Discussion occurred about redeployment opportunities. Mr Keir advised Fonterra that he was declining redeployment and would accept redundancy. Fonterra informed Mr Keir that it would not pay the redundancy compensation set out in the employment agreement as it considered he had resigned in order to accept a position with a competitor.

[3] Mr Keir claims that he should have been paid redundancy compensation, that he was unjustifiably disadvantaged and that the co-operative had breached its duty of good faith. Fonterra does not accept any of those claims.

[4] An investigation meeting was held in Hamilton on 12 and 13 August 2019. I heard from Mr Keir, his wife Julie Keir and Brendhan Greaney (CEO of Mr Keir's current employer Tatua Co-operative Dairy Company Ltd (Tatua)). I also heard from the following Fonterra Global Operations staff; Alan van der Nagel (Fonterra Director of NZM), Adam Sharman (General Manager Human Resources), and Rachael Regan-Paterson (Director, Human Resources).

[5] The parties later filed comprehensive and helpful submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

Issues

[7] The issues for investigation and determination are:

(a) is Mr Keir entitled to be paid was redundancy compensation, as provided for in his employment agreement?

(b) was Mr Keir disadvantaged by unjustified action by Fonterra?

(c) did Fonterra breach its duty of good faith to Mr Keir, and if so, should it be subject to a penalty?

[8] Mr Keir's claims do not focus on the genuineness of the decision to restructure or on the quality of the consultation process.

Mr Keir's involvement with Fonterra

[9] Mr Keir has a long history with Fonterra and its predecessor having worked his way up from being a graduate trainee.

[10] Mr Keir had limited direct exposure to previous restructurings despite largely having management roles since 2003. His own previous roles had never been disestablished. He had been the manager a level above managers who had restructured parts of the business but had not directly lead a restructuring before.

[11] Mr Keir is also a Fonterra share unit holder and through his wife, a Fonterra milk supplier.

GM Operations South Island (GM SI)

[12] In this role Mr Keir was responsible for milk collection through to handing over packed products to Fonterra's Supply Chain Logistics team. He oversaw approximately 1,870 staff with operations, engineering, transport, environmental, transformation and improvement functions. His team was responsible for nearly 40% of Fonterra's milk supply and was the largest operations region. The role sat at Band 16 on Fonterra's system for ranking positions for remuneration purposes.

[13] The role was Christchurch based. However, due to family circumstances Mr Keir put forward a proposal in May 2016 to relocate to the Waikato. This was accepted and Mr Keir lived in the Waikato with frequent trips to the South Island.

[14] Mr van der Nagel took over as the Director of New Zealand Manufacturing in June 2017. Mr Keir reported to him.

Employment agreement and other documents

[15] Mr Keir's most recent employment agreement document with Fonterra comes from 2013. Clause 8.5 provides:

Termination for Redundancy Reasons

- (a) In the event that your employment is terminated for redundancy, you will be given:
- (i) **3 months'** notice or, in lieu of notice, you will be paid **3 months'** base remuneration (which the Company may elect to deal with in the manner set in clause 8.2 above) and;
 - (ii) Redundancy compensation of 3 months' base remuneration.

[16] Under clause 8.2 Fonterra may require Mr Keir not to perform his duties or attend the workplace during the notice period, in which case he remains an employee of the co-operative.

[17] Two Fonterra Redundancy Standard (NZ) policy documents were provided; one from 25 November 2015, the other from 11 February 2016. These provide guidance around minimum requirements and process steps in possible redundancy situations. The documents are relatively short at a little under two pages. Both outline a definition of redundancy and set out a six-point redundancy process summary:

- Advise employees of the restructure proposal
- Invite employees to provide feedback on the proposal
- Properly consider all feedback and reach a decision
- Communicate the decision to employees
- Undertake a selection process (if applicable)
- Discuss redeployment options with employees (if applicable).

Events leading up to the restructuring decision

[18] I now set out the events leading to Mr Keir finishing employment with Fonterra. Due largely to Mr Keir's senior role, the discussions about the restructure overlapped with the discussions about redeployment. Little objection was taken by him or on his behalf to this. This was also a period of significant personal stresses for him. Within a few months Mr Keir, his wife and his child were all in hospital for different reasons. Also, two members of the extended family, including a child, passed away. Mr Keir took periods of leave, including sick and bereavement leave although he largely

remained responsive to contacts and explored redeployment possibilities when on leave.

[19] The restructuring did not come as a surprise to Mr Keir. Mr van der Nagel had commenced in his role in June 2017, having previously worked internationally, including for the past two years for Fonterra based in China. At a team meeting on 23 August 2017 Mr van der Nagel indicated that he had concerns about the performance of some parts of the business. He accepts people would have assumed there would be some changes.

[20] On 15 September 2017 the NZMLT Future 2020 restructure proposal (the Proposal) was provided to Mr Keir for consultation. Under the Proposal his role of GM SI disappeared. He was not present at the meeting to announce the proposal, as he was on leave.

[21] Mr Sharman was assigned as Mr Keir's key contact for any questions and support. He phoned Mr Keir on 15 September 2017 to discuss the proposal. Mr Keir described to Mr Sharman being gutted about his role being disestablished. The two discussed redeployment, with Mr Keir emphasising the need to align a new role with his current role and career aspirations, including the size, scale and diversity of responsibilities and the maintenance of salary package.

[22] In other circumstances Mr Keir's emphasis on career aspirations may have seemed exacting, but Fonterra witnesses agreed that this was something the co-operative understood and accepted.

[23] Mr Keir mentioned to Mr Sharman that he might look for roles outside Fonterra. Later that day Mr Sharman sent Mr Keir an email with the subject being "Opportunity", attaching an external role advertised on LinkedIn.

[24] The Proposal document referred to priority being to redeploy disestablished team members. Feedback was sought by close of business on 25 September 2017, with the new structure to be announced on 2 October 2017 and in place on 17 October 2017. There was no letter or email to Mr Keir at that stage setting out implications for him specifically.

[25] On 18 September 2017 Mr van der Nagel, Ms Regan-Paterson and Mr Keir had a telephone discuss about the restructure and redeployment. A new General Manager

Lower Central North Island (GMLCNI) role in the proposed new structure was identified as a possible alternative role. Mr Keir was also encouraged to himself contact managers responsible for other possibly suitable redeployment roles.

[26] On 22 September 2017 Mr Sharman emailed Mr Keir including:

Following on from our discussion yesterday, I wanted to document and clarify a few points:

1. As per the consultation pack¹, your current role is proposed disestablished. If the proposed structure is confirmed, we are committed to finding a redeployment option for you, aligned to your career aspirations and development.
2. If the proposed structure is confirmed, then we would see the GM LCNI role as a suitable redeployment option for you and we would offer this to you directly.
3. Should you choose to accept the GM LCNI role, you will be automatically redeployed on your current terms of employment.
4. If you choose not to accept the GM LCNI role, we would support you in looking at other opportunities that fit with your career aspirations. These would be on a contestable basis.
5. If you were successful in your application for other roles, you would be employed in that role under the normal terms and conditions of that role.
6. If you were not successful, then the usual redundancy process would apply.

[27] Position descriptions for three roles currently vacant in the organisation were attached to Mr Sharman's email "by way of example". Mr Sharman and Mr Keir had discussion regarding these and other possible roles over the next few weeks.

[28] On 25 September 2017 Mr Keir emailed feedback on the Proposal. This was originally the last day for feedback.

[29] The following day Mr van der Nagel messaged Mr Keir at 9:53pm indicating that his email account had been locked out. Mr van der Nagel indicated that Fonterra was happy to allow Mr Keir time out to consider his options. However:

...it is important for us to complete the consultation process and give certainty to everyone impacted by the proposal.

In terms of a timeframe, we would need for you to give us your preference by close of business on Monday, 2 October.

[30] On 27 September 2017 feedback on the Proposal was shared with staff. Also, Mr van der Nagel emailed Mr Keir repeating the message in the text.

¹ The Proposal

[31] At some point in September Mr Keir discussed a Product Venue Stream role with someone involved.

[32] On 2 October 2017 Mr Keir was on leave but emailed Mr van der Nagel advising that he did not wish to accept GM LCNI role and will be pursuing opportunities outside NZM. Mr Keir did not consider the role as being as advantageous as his current one. The reply was “Thanks Tim”.

[33] On 3 October 2017 Mr Sharman messaged Mr Keir regarding a GM position with Coda, an associated business. There was already a preferred candidate. Mr Keir spoke to someone involved but his sense was they were satisfied with their preferred candidate.

[34] On 4 October 2017 Mr Sharman emailed Mr Keir regarding the GM Sales and Operations and Head of Farm Source, Northland. This was the role Mr Keir was most interested.

[35] On 8 October 2017 Mr Keir emailed Mr van der Nagel advising that his wife has been admitted to hospital. Mr van der Nagel replied that he is sorry to hear that and that Mr Keir’s focus should be on his wife and children.

Events from restructuring decision to the end of employment

[36] The timeline for the restructuring decision had slipped slightly so the decision was not announced until 9 October 2017 when a Confirmation of Structure document was released. Mr Keir’s GM SI position is not included in the new confirmed structure.

[37] The Confirmation of Structure document referred to confirmation letters being sent to employees during the week commencing 9 October 2017. Fonterra committed to moving to the new structure “as soon as possible” with appointments and transition arrangements being confirmed over the next two weeks. Team members whose roles had been disestablished were to provide expressions of interest by 9 October 2017, apparently to roles within the new structure. No mention was made of what then happens to people who do not express an interest or are not offered an appointment.

[38] Mr Keir did not receive the confirmation letter referred to.

[39] On 9 October 2017 Mr Keir spoke to Mr Sharman about the role of GM Sales and Operations Farm Source.

[40] On 10 and 13 October 2017 Mr Keir had discussions with a director about the GM Product Value Streams role.

[41] On 13 October 2017 Mr Keir also contacted his former manager who still worked for Fonterra, to discuss his situation.

[42] On 16 October 2017 Mr Keir and Mr Sharman spoke on the phone, with Mr Keir indicating a lack of progress with finding a suitable redeployment role.

[43] On 19 October 2017 Mr Keir phoned Mr van der Nagel. The latter describes the former as talking very fast and being hard to understand. Mr Keir mentioned going to a job at Tatua. Mr van der Nagel congratulated him, referred to previous dealings with Mr Greaney and concluded that it was a good role. Later that day Mr Keir emailed Mr van der Nagel including:

It is with much deliberation I confirm, as per our discussion today, after the disestablishment of my role...I accept redundancy. ...

I wish to thank Fonterra for the opportunity over the last nearly 18 years ...

I have explored roles within Fonterra but have not found a role with as many challenges, scale, inspiration and excitement as the GM Operations South Island ...

I await your further direction, and am fully aware of the precedence of redundancy and/or restraint of trade for senior managers...

[44] The following day at lunchtime Mr van der Nagel emailed Mr Keir expressing disappointment that he had decided to leave:

...you have referenced accepting redundancy, however, this is not a redundancy situation as you have made the decision to take on the role at Tatua, rather than be redeployed into the GM LCNI role that was offered to you, or to proceed with the other GM roles that had been identified as suitable alternatives. On this basis, you have resigned from your employment with Fonterra. This means that the redundancy provisions of your contract do not apply and no redundancy compensation is payable.

[45] Mr van der Nagel placed Mr Keir on garden leave for the duration of his employment.

[46] Later that afternoon Mr van der Nagel emailed NZM staff informing them that Mr Keir and another employee were finishing their roles due the restructuring. Both were thanked for their service and contribution. Appointments to positions in the new structure were announced. Unfortunately Mr Keir did not receive this email as by this point his email access had been cut off.

[47] There was no contact from senior managers to check on Mr Keir after that.

[48] On 30 November 2017 Mr Keir emailed Mr van der Nagel describing the latter's 20 October email as being at odds with their earlier discussion where Mr Keir understood Mr van der Nagel supported his decision to take the Tatua role. Further Mr Keir stated that he understood from Mr Sharman that he had the option of taking and thus not taking, the GM LCNI role. That role is described as effectively a demotion. Mr Keir expresses a hope that the matter can be resolved.

[49] Mr van der Nagel responds at length on 8 December 2017, confirming Mr Keir had the option of accepting or declining the GM LCNI role but that Fonterra was committed to finding another role for him. Mr Keir is described as accepting the Tatua role before he fully explored further opportunities within Fonterra. Mr van der Nagel asserts that the redundancy clause was not triggered and thus there is no entitlement to redundancy compensation.

[50] Mr Keir's employment with Fonterra ended on 19 January 2018 and on 22 January he began working for Tatua.

Mr Keir's involvement with Tatua

[51] Mr Keir had been on Tatua's previous search firm lists in 2009. When Tatua was searching for a new GM of Operations in 2016, the search firm approached Mr Keir twice; in December 2016 and March 2017. On both occasions Mr Keir declined to be involved saying he was loyal and committed to Fonterra. A further approach was made in late August 2017 by which time Mr Keir had a sense that Mr van der Nagel intended to restructure. Mr Keir decided to meet with Tatua. Mr Keir was known to Mr Greaney through industry contacts.

[52] An informal discussion was held later in August. There were several candidates in the recruitment process and an acting GM in place. During the weekend after the NZM restructure was announced Mr Keir and his wife chanced upon Mr Greaney near their home and had some discussion.

[53] Tatua asked Mr Keir to meet board members and complete a psychometric profile as part of the appointment process, which Mr Keir did.

[54] On 29 September 2017 Mr Greaney met with Mr Keir and presented him with an offer which Mr Greaney signed in front of him. He described this as being to flush Mr Keir out, regarding whether he was really interested in the Tatua role. Mr Keir said to Mr Greaney that he needed to continue to explore the redeployment options as he was reluctant to leave Fonterra. Mr Greaney indicated that this had to be right for both parties and Tatua were happy to wait.

[55] The date for Mr Keir's commencement was set for 22 January 2018, partly based on Tatua's expectation that Fonterra would place him on garden leave. Mr Keir made contact on the evening of 18 October 2017 to say he was going to accept the Tatua role.

[56] Fonterra stresses that Mr Keir was under considerable pressure to resign on 19 October 2017 as he was contractually committed to begin work with Tatua on 22 January 2018. However, Mr Greaney says the start date in the agreement was set by Tatua without discussion with Mr Keir and it was flexible. Mr Greaney's evidence was that start date was flexible.

Redeployment prospects

[57] Before going on to look at Mr Keir's claims, I comment on the redeployment possibilities. Several other general manager roles with the co-operative or associated businesses were raised by Fonterra with Mr Keir. These were not offers of the role as such but alerts to him of positions which he could discuss with those concerned and apply for if he wished.

[58] There were a range of difficulties with these roles from Mr Keir's perspective. One was based in Auckland. One he felt discouraged from applying after a director indicated he may not have had the rights skills or attributes for it. One was a new role with some remaining lack of clarity about what was involved. In addition Mr Keir's perception was that they were all lacking in the scale, diversity and leadership challenges of his current role as well as being lower banded. He understood that most were at band 14.

[59] I accept that Mr Keir actively and genuinely explored possible other roles to redeploy into. I do not consider that I need to assess each one individually as Fonterra did not operate on the basis of requiring Mr Keir to take any one of the roles.

[60] Some Fonterra witnesses downplayed the significance of the banding system. It was suggested that there was a range of bands for some roles although not for others.

[61] The difficulty from Mr Keir's perspective was that he was having to rely on information given to him by those who he contacted about the possible roles. The job and position descriptions did not specify a salary figure or range nor state the banding of the role. However, Mr Keir's experience was that in 2013 when he went from a band 14 to a band 16 job his salary went up by around \$80,000. This is a significant amount. Without other word from Fonterra about salary maintenance Mr Keir was looking at jobs which he understood were on band 14, and thus significantly less well paid and presumably with significantly less responsibility.

Contractual entitlement to redundancy

[62] Mr Keir claims that he is contractually entitled to redundancy compensation. This is submitted to be founded on Fonterra's "usual redundancy process", the phrase used in the 22 September 2017 email, as informed by his employment agreement, the co-operative's policies, the Proposal to restructure including timeframes, the Confirmation document and custom and practice.

[63] I do not agree that that is the case. Fonterra had not made Mr Keir redundant. His role had been disestablished. However, there was still the question of redeployment. The phase of consideration of redeployment, which had overlapped with the consultation regarding the restructuring, was still in operation as far as Fonterra was concerned. There are some similarities to the situation in *New Zealand King Salmon Ltd v Slotemaker*².

[64] Clause 8.5 of Mr Keir's employment agreement provides that in the event his employment is terminated for redundancy he will be given notice and redundancy compensation. Under clause 8.1 notice of termination must be given in writing. Both parties accepted that Fonterra had not yet given written notice of termination of Mr Keir's employment.

[65] On a contractual basis Mr Keir was not yet entitled to that compensation.

² *New Zealand King Salmon Ltd v Slotemaker* [2017] NZEmpC 99

Unjustified action to Mr Keir's disadvantage

[66] My decision on this grievance relies on failures by Fonterra to meet its obligations of good faith; to be active and communicative.³

[67] Before detailing that, I note that Mr Keir was on annual leave from 27 September to 2 October 2017. Then his wife was in hospital from 7 to 14 October 2017. There was less contact with Mr Keir than might well otherwise have been the case, as Fonterra understandably wanted to give him space to deal with his family issues. However, both parties made some contact when Mr Keir was on leave.

Written material

[68] I look firstly at material available to all affected staff.

[69] The Redundancy Standard in place at the time had very limited information about expectations regarding redeployment.

[70] A five page question and answer sheet on redeployment from 2015 was filed. However, this was not provided to Mr Keir and appears to have been more in the nature of information for human resources staff. There was some evidence of discussion about the prospect of having a Q and A sheet for this restructuring but that did not proceed.

[71] The Proposal document had indicated that, if implemented, the new structure would be in place on 17 October 2018.

[72] Fonterra advised Mr Keir, in the 22 September email:

- (i) if his position was disestablished, he would be offered redeployment to the GM LCNI as a suitable redeployment;
- (ii) if he chose not to accept that position, he could seek redeployment to alternative positions on a contestable basis; and
- (iii) if he was not redeployed, the usual redundancy process would apply.

³ Section 4(1A) of the Act

[73] What the phrase “usual redundancy process” referred to was not entirely clear, as Mr Keir’s agreement contained no such process and the Redundancy Standard’s process simply referred to discussing redeployment options. I take it to mean Fonterra would give notice of termination and redundancy compensation would be paid.

[74] The Consultation of Structure document referred to the appointment process for new roles beginning in the week of 9 October 2017 with the new structure being moved to “as soon as possible”. Appointments and transition arrangements were to be confirmed over the next two weeks, presumably by 20 October 2017.

[75] That document indicated that confirmation letters “will be provided”. However, Mr Keir did not get one. It was not evident that this was a deliberate decision.

[76] Mr Keir’s employment agreement had little about redundancy process in it, other than specifying the notice period and amount of redundancy compensation.

[77] The written material provided or available to Mr Keir was rather less than might have been expected in a large organisation with experience of restructurings. Although the Proposal and Confirmation document provided information about the proposed change and then the new structure, they stopped short of providing information about what happens to people who did not seek or were not accepted for a position in the new structure, such as Mr Keir. The information was likely more focused on those who were expected to seek redeployment within the new structure. Effectively Mr Keir was left relying on verbal advice and on what Mr Sharman had emailed him on 22 September 2017.

Verbal material

[78] Ms Regan-Patterson referred to three stages of redeployment; similar roles, broadly comparable roles and interim roles. However, this is not in the Redundancy Standard and it was not evident that those who mostly dealt directly with Mr Keir either knew of those stages or articulated them to Mr Keir.

[79] The messages in the 22 September 2017 email were also reinforced verbally to Mr Keir. Similar references to “follow the process” or “use the process” did not provide sufficient information to allow Mr Keir to make informed decisions. Other than Ms Regan-Paterson, who had very little direct contact with Mr Keir, those dealing with him had limited experience in dealing with restructurings in a Fonterra context.

[80] The verbal exchanges reinforced the absence of any written requirement on Mr Keir to accept any particular redeployment possibility or any indication of the outcome if he did not do so.

Redeployment

[81] At least at Mr Keir's level, the co-operative clearly wanted well-motivated people in roles, which is understandable and so was not insistent about a particular role being taken, at least in this timeframe. It did want to keep Mr Keir within Fonterra. There was also evidence that Mr Keir had some reluctance to leave Fonterra and was open to the prospect of a job with the co-operative or an associated entity. However, he was also very focused on the point at which he was at with his career and his need for a challenging and career expanding role, as well as maintaining his level of income.

Grandparenting

[82] The issue of grandparenting, or retention of previous conditions, particularly salary, was a significant one in this case.

[83] Neither Mr Sharman nor Mr van der Nagel were aware of any practice of grandparenting at Fonterra. Ms Regan-Paterson indicated that 'grandparenting' or 'grandfathering' were not terms used at the co-operative but that arrangements were made which were "personal to holder". This meant that the current holder of role who had moved from another role, such as in restructuring, could retain remuneration level or banding, although that was not the pay or banding for the role itself. Significantly neither Mr van der Nagel nor Mr Sharman referred to that phrase in their evidence.

[84] Rather what information Mr Keir was given was that when he was redeployed the normal terms and conditions of that role would apply. It was clearly only the role within NZM, the GM LCNI, where current terms and conditions would be retained.

[85] Mr Keir had some awareness of others receiving better arrangements in the past but attempts to enquire about whether that would occur for him, did not produce results. He was left with the understanding that the normal terms for the role applied.

[86] More broadly those communicating with Mr Keir did not convey that he would be looked after or not disadvantaged, in a way which would have provided him with some reassurance, or prompted questions from him about what that involved.

[87] He was thus facing the prospect of a pay cut of around \$80,000, in a position which seemed more in keeping with the role he had finished some four years earlier.

Conclusion

[88] I conclude that Fonterra's actions were unjustified. It failed to communicate in a timely manner that:

- (a) the Co-operative would avoid Mr Keir being financially disadvantaged;
- (b) there was the prospect of grandparenting or personal to holder conditions to take into account Mr Keir's current salary; and
- (c) the consideration of redeployment could continue for an extended period, with the prospect of interim arrangements being put in place.

[89] These were very important matters when Mr Keir was considering redeployment options. He was not told of any requirement to accept any redeployment option. Rather he was left in the position that he thought redeployment could well involve a substantial drop in salary. This was to his disadvantage in a situation where he had indicated he was looking at external options and had not been informed that taking an external role would mean he did not get redundancy compensation.

[90] Fonterra may have been intending to indicate those things but left it too late in light of the lead up to appointments in the new structure by 20 October 2017 and "as soon as possible" movement to the new structure. This was in the absence of a confirmation letter to Mr Keir about what was happening to him.

[91] The start date in the offer from Tatura may have put some pressure on Mr Keir but the date matched when Fonterra had indicated the appointments were to be made in the new structure. He did not know how much longer he would have in his current role and understandably wanted to ensure that he had made arrangements for other work.

[92] Once it became clear on 19 October 2017 that Mr Keir understood he had the option of taking the redundancy option, there was no discussion with him about his views that he could accept redundancy, other than the email identifying that he has given notice of resignation and is put on garden leave.

[93] Mr Keir was disadvantaged by unjustifiable action by Fonterra.

Remedies

[94] Mr Keir does not seek lost wages. He went straight from Fonterra to Tatua with no period without salary. He does seek payment of redundancy compensation and compensation under s 123(1)(c)(i) of the Act.

Lost benefit

[95] Under s 123(1)(c)(ii) payment may be ordered of compensation for loss of a benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[96] In *Wills v Goodman Fielder NZ Ltd* Corkill J noted that s 123(1)(c)(i) must be interpreted widely.⁴ His Honour referred to the Court of Appeal's decision in *Telecom South Ltd v Post Office Union (Inc)* that the section is "intended to reach potential future service-related benefits and no doubt to include ...redundancy".⁵

[97] Similarly in *Yukich v Carter Holt Harvey Ltd* redundancy compensation was found to be a lost benefit.⁶ The Court of Appeal dismissed an argument on appeal that the award of redundancy compensation was too remote.⁷

[98] I am satisfied that the loss of a redundancy compensation payment can be compensated under s 123(1)(c)(i) of the Act. As is evident above, I am satisfied that the failure to provide information relevant to decisions about redeployment and the end of employment led directly to Mr Keir expressing his acceptance of redundancy. This was taken as resignation which meant he was not paid redundancy compensation.

[99] For Mr Keir, it was submitted that he should be awarded the entire redundancy compensation payment.

[100] The Court of Appeal in *Yukich* indicated that an all or nothing approach to the redundancy compensation question was inconsistent with the approach normally taken to damages for the loss of a chance to obtain a benefit in the future.⁸

⁴ *Wills v Goodman Fielder NZ Ltd* [2014] NZEmpC 233 at [129].

⁵ *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA) at 284 per Richardson J.

⁶ *Yukich v Carter Holt Harvey Ltd* [2004] ERNZ 78 at [153]

⁷ *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300

⁸ Above at [30].

[101] This is not an easy case to assess loss of a chance. There was some evidence at the investigation meeting about the prospect of other suitable roles being available for Mr Keir, although this was relatively general evidence. Fonterra emphasised the number of positions, up to half a dozen, which Mr Keir had been referred to or looked at. Clearly in an organisation the size of Fonterra and its associates, roles were certainly available frequently. However, Mr Keir was operating at a senior level and was seeking a position in keeping with his career aspirations. He was also seeking jobs based in the Waikato.

[102] There was no evidence of any other roles of a suitable nature arising in the three month period when Mr Keir was on garden leave.

[103] Had Fonterra been clear about an intention not to disadvantage Mr Keir and a willingness to arrange special project work for him until a suitable role did arise, Mr Keir may have been willing to wait for a period until a suitable role arose.

[104] I assess the prospect of a suitable role coming up within a reasonable period of time, which Mr Keir would have accepted had he been offered personal to holder salary protection, as being a third or 33.33%. I therefore award two third of the lost benefit of redundancy compensation to Mr Keir.

[105] I order Fonterra to pay Mr Keir two months' salary for a loss of a chance as redundancy compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination. In the event that the parties are not able to agree on the quantum of that payment, leave is granted for either them to return to the Authority on that issue.

Compensation for non-financial impact

[106] I consider the harm to Mr Keir and the extent of his loss, as well as assessing this case against the spectrum of other cases. The way in which Fonterra dealt with Mr Keir had a significant, detrimental impact on him,

[107] Mr Keir was a long serving employee, who had indicated his loyalty through rejection of previous enquiries to see if he was interested in a Tatua job. The co-operative and its predecessors had been his only employer since he left university. He intended to develop his career through Fonterra, having worked his way up to a senior managerial position. He was keen to pursue his future potential and was well respected by his colleagues.

[108] Mr Keir felt let down by Fonterra, which played a significant role in his life. His connection with the co-operative as an employer was abruptly cut off in circumstances where he thought he was acting in a manner which it was agreeable to. He was disappointed that no contact was made with him, except by way of formal responses to his two emails. He was not aware of the thanks expressed in Mr van der Nagel's email to staff of 20 October due to the severing of his email connection.

[109] Ms Keir gave evidence of the effects on her husband, describing it as being akin to a divorce. He lost over 10 kg of weight following the restructure, he did not sleep well and suffered from anxiety when remembering this period of employment with Fonterra. She saw his mental health, as well as his immune system, resulting in recurring out of the ordinary illnesses in the year following his departure from Fonterra.

[110] Mr Keir's relationship with his family suffered. He became withdrawn from family life and grumpy with his children as his tolerance levels decreased dramatically. He had reduced capacity to act as a father in the way that he had done previously.

[111] No discussion about the prospect of Mr Keir working out a bit (not just going straight onto garden leave) or having a farewell.

[112] These effects, without a dismissal, may be somewhat unusual. But, Mr Keir understandably expected better from Fonterra. The co-operative is committed to ensuring staff were able as much as practicable to pursue their career aspirations within the business or associated entities. That did not eventuate here with a long serving a loyal employee.

[113] In my assessment I also consider the fact that Mr Keir was not without employment, as he was able to go directly to Tatua.

[114] In conclusion there was substantial uncontested evidence from Mr Keir and his wife regarding the significant impact on him of Fonterra's actions. I consider compensation of \$25,000 as appropriate, subject to consideration of contribution.

Awards

[115] I have considered whether Mr Keir can be said to have contributed to the situation giving rise to the dismissal. In order to make a finding of contribution I must be satisfied that his behaviour was both causative of the outcome and blameworthy⁹.

[116] Mr Keir rejected possible roles which some considered suitable for him. However, this was in the context of an organisation which supported managers' career aspirations and was not readily inclined to require them to take up positions which the managers did not see as comparable or matching their aspirations. I do not consider Mr Keir's actions to be blameworthy in this context.

[117] I order Fonterra to pay Mr Keir the following sums within 28 days of the date of this determination:

(i) Two months' salary under s 123(1)(c)(ii) of the Act; and

(ii) \$25,000 as compensation under s 123(1)(c)(i) of the Act.

Good faith

[118] I find that there were breaches of the duty of good faith, as outlined above. A penalty is sought by Mr Keir for breach of this duty. The threshold for a penalty for the breach of this duty is a high one.

[119] I look now at whether a penalty is appropriate, considering *Xu v McIntosh*.¹⁰ I have found that there were difficulties with Fonterra's communications with Mr Keir. Those difficulties are largely the basis of Mr Keir's disadvantage grievance. I have already awarded Mr Keir compensation for the distress he suffered, as well as ordering that a loss benefit regarding the chance of receiving redundancy compensation be paid to him.

[120] Turning to Fonterra's culpability, I do not characterise its actions as flagrant and deliberate. They stem rather from a lack of understanding and expression of Fonterra's approach and lack of effective interactions between those involved. I do not have a

⁹ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

¹⁰ *Xu v McIntosh* [2004] 2 ERNZ 448

sense that Fonterra needs to have its default brought home to it. In conclusion, I do not consider that a penalty is warranted in these circumstances.

Costs

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

[122] The parties can expect the Authority to use the notional daily tariff as the starting point, with possible adjustments upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority