

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 10
5409022**

BETWEEN

KATHERINE LEDGER
Applicant

AND

DELMINE FINE FOODS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Chris Eggleston, Counsel for Applicant
Paul Wicks, Advocate/Counsel for Respondent

Investigation Meeting: 27 November & 2 December at Auckland

Submissions received: 6 & 12 December 2013 from Applicant
6 & 8 December from Respondent

Determination: 14 January 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Katherine Ledger, claims that she has been unjustifiably dismissed by the Respondent, Delmaine Fine Foods Limited (Delmaine) as a result of the termination of her employment by reason of redundancy on 21 December 2012.

[2] In particular Ms Ledger claims that the redundancy of her position is not justifiable on either substantive or procedural grounds.

[3] Ms Ledger further claims that Delmaine breached s.41 and s.49 of the Parental Leave and Employment Protection Act 1987 (the PLEPA).

[4] Delmaine denies that Ms Ledger was unjustifiably dismissed from her employment on 21 December 2012, or that she has a valid parental leave complaint under the PLEPA.

Issues

[5] The issues for determination are whether:

- a. Ms Ledger was unjustifiably dismissed by Delmaine, specifically:
 - Whether Delmaine had genuine reasons for the restructuring exercise which lead to the termination of Ms Ledger's employment
 - Whether Delmaine followed a fair and proper process
- Delmaine breached s. 41 and s. 49 of the PLEPA.

Background Facts

[6] During 2010 Delmaine had determined that there was a requirement for a Foodstuffs Account Manager, and in late 2010 Ms Ledger had been approached by Ms Nicky Morton, Sales and Marketing Director, to assess her interest in the position. Ms Ledger had subsequently been appointed and commenced employment with Delmaine as National Key Account Manager (Foodstuffs) in February 2011. In that position she reported to Ms Morton as Sales and Marketing Director.

[7] Ms Ledger, her husband, and Ms Morton had previously worked together in another organisation and Ms Ledger and Ms Morton both agreed that they had a good professional working relationship.

[8] Ms Ledger was issued with an individual employment agreement (the Employment Agreement). Clause 11 of the Employment Agreement stated:

Employees are entitled to Maternity Leave, Paternity Leave, Extended Leave and Special Leave in accordance with the Parental Leave and Employment Protection Act 1987.

[9] In December 2011 Ms Ledger had advised Ms Morton of her pregnancy and of her intention to take 6 months maternity leave with effect from July 2012, and they had discussed options for the coverage of Ms Ledger's duties whilst she was on maternity leave.

[10] Ms Ledger said that at this time she had agreed, at the request of Ms Morton, to consider returning to work after 3-4 months maternity leave for 10 hours a week. Ms Morton denied that she had asked Ms Ledger to return to work after 3-4 months maternity leave.

[11] Ms Morton said that during Ms Ledger's absence on maternity leave she had determined that she would undertake responsibility for the Foodstuffs Auckland and South Island accounts, while Ms Diane Fleming, Senior Territorial Manager for Wellington, would undertake responsibility for the Foodstuffs account in that region.

[12] Ms Ledger said that during the course of two handover meetings which she and Ms Morton attended at Foodstuffs South Island, Ms Morton had advised the client that she (Ms Ledger) would be returning from maternity leave on a part-time basis in November 2012.

[13] Ms Morton said that the only commitment she had made to Foodstuffs South Island had been that Ms Ledger would resume management of its account upon her return to work following her maternity leave.

[14] On 16 April 2012 Ms Ledger applied in writing for seven months' parental leave from 2 July 2012 until 28 January 2013. Whilst Delmaine confirmed verbally that that her position would be kept open for her with a return work date of 29 January 2013, Ms Ledger said that it did not provide written notification as it was required to do pursuant to s. 36 of the PLEPA.

September 2012

[15] In September 2012 Ms Ledger said she and Ms Morton had an informal discussion about whether or not she should return early on a part-time basis to manage the Foodstuffs South Island account; however Ms Morton had said that she would need to discuss this with Mr Rick Carlyon, Managing Director.

[16] Ms Morton said she had advised Ms Ledger that she did not think it necessary for her to return to work early as her work duties were being adequately covered in her absence, and she had confirmed this in an email dated 16 October 2012.

[17] Ms Morton said that during the course of 2012 and whilst Ms Ledger was on maternity leave, there had been a strong rumour in the food retail sector of a merger of the Wellington and Auckland Foodstuffs companies. As a result, during the course of the informal discussion in September 2012, she had indicated to Ms Ledger that there might be some changes to the sales team later that year or in early 2013.

[18] Ms Ledger agreed that Ms Morton had informed her that Delmaine intended to conduct a restructure across that sales team in early 2013, but that Ms Morton had made it clear to her that her position would not be affected.

[19] Ms Ledger said that Ms Morton had explained to her that she believed Ms Fleming was capable of retaining the Foodstuffs Wellington responsibilities after she (Ms Ledger) returned from maternity leave, and that Ms Fleming would report to her and she (Ms Ledger) would be appointed to the more senior role of Business Manager for Foodstuffs Wellington.

[20] Ms Morton said she had not advised Ms Ledger that her role would evolve into that of Business Manager for Foodstuffs Wellington as this was part of her complete responsibility as Sales and Managing Director for both the Foodstuffs and Progressive Enterprises chains.

16 October 2012 email

[21] On 16 October 2012 Ms Morton sent Ms Ledger an email which stated:

*Hi Katherine,
Need to chat to you. ASAP. Unfortunately I am unable to offer any
part time Capacity this side of Xmas.
Talk soon
Nicky*

[22] Ms Ledger said that when she had telephoned Ms Morton as requested in the email, Ms Morton had advised her that she was no longer required to return early in a part-time position due to the fact that the Export Manager was relocating from Christchurch to Auckland and required additional work. Further that he would be managing the Foodstuffs South Island account until her return from maternity leave in January 2012.

[23] Ms Morton said that during the telephone conversation with Ms Ledger following the 16 October 2012 email, she had simply confirmed that everyone was coping with managing the Foodstuffs accounts whilst she was on maternity leave and that there was no part-time work available prior to Christmas.

Restructure exercise

[24] Ms Morton explained that during September 2010 and July 2012 Delmaine had been undertaking consolidation of its business with a view to improving efficiency and cost effectiveness. As part of this process, Ms Ledger and other managers had been informed that due to the economic situation they needed to find ways of working more efficiently, and Ms Ledger would have been fully aware that Delmaine had been under continuous financial pressure.

[25] As part of the process, Ms Ledger had been invited to a meeting on 9 May 2012 to discuss progress with such changes and invited to bring suggestions for improvement projects and other ideas, and on 23 May 2012 Ms Ledger had emailed Ms Morton her suggestions.

[26] Ms Ledger said she had understood that suggestions had been invited from the managers with the focus on not wasting money, but that she had not been made aware that the economic position of Delmaine was such that her position was at risk prior to her going on maternity leave.

[27] Ms Morton said that the strong rumour in the food retail sector of a merger of the Wellington and Auckland Foodstuffs companies had significant implications for Delmaine and that this had been a major impetus behind the restructuring exercise.

[28] Additionally, in August and September 2012 and during Ms Ledger's maternity leave, Delmaine had asked the Export Manager working out of Christchurch to agree to transfer to Auckland.

[29] In the absence of such agreement Ms Morton would have been expected to undertake export duties, however in late November 2012 the Export Manager had agreed to transfer to Auckland. As a consequence Delmaine had identified that Ms Morton had capacity to absorb aspects of Ms Ledger's role, namely managing Foodstuffs Auckland and South Island with the support of the Auckland sales support team.

[30] Ms Morton said that she had therefore identified that the sales team could be restructured by the reduction of the National Key Account Manager (Foodstuffs) position which would reduce overheads for Delmaine.

[31] Following a meeting with Mr Carlyon to discuss her proposals, Ms Morton said he had approved her giving preliminary advice to Ms Ledger about the proposal concerning the disestablishment of her position with a view to formal consultation commencing upon her return from maternity leave.

[32] Ms Gloria Hogan, Human Resources Manager, said she had been consulted by Ms Morton in December 2012 about the possible disestablishment of Ms Ledger's position. She had advised Ms Morton that the situation was complicated by Ms Ledger being on parental leave, however it was important that the proposed changes were discussed with her at an early stage.

[33] Ms Hogan said she had advised Ms Morton that there was a Delmaine redundancy procedure to be followed, that she should have another person present when she spoke to Ms Ledger, and that Ms Ledger was entitled to have a support person present. However Ms Morton's response had been that she had experience in the area of redundancy exercises and that she preferred to have a one-to-one discussion with Ms Ledger.

[34] Ms Ledger had received an email from Ms Morton on 14 December 2012 advising that she would like to meet her the following week, and on 17 December 2012 she had received a telephone message from Ms Morton to the effect that she wanted her to call "ASAP".

Telephone Conversation on 17 December 2012

[35] Ms Ledger said that when she called Ms Morton on 17 December 2012 the initial part of the conversation had been general conversation but then Ms Morton had reminded her about the brief discussion they had earlier about the possibility of a restructure within the sales team.

[36] Ms Morton had told her that the management of the Foodstuff's account was proceeding well in her absence and that Ms Fleming would be retaining the Wellington key account responsibilities which only left Auckland and the South Island accounts to be managed, and as a result she and Mr Carlyon had decided that the position of National Key Account Manager was no longer required.

[37] Ms Ledger said that she had become worried at this stage in the conversation and had texted her husband to let him know that she was talking to Ms Morton, and it appeared to be bad news. She asked Ms Morton how the change regarding management of the Foodstuff's accounts might affect her, and had been informed that it meant her position was redundant.

[38] Ms Morton denied that she had told Ms Ledger her position was redundant. She had explained the proposed changes to Ms Ledger and had advised her that she and Mr Carlyon had considered that there would no longer be the need for a full-time National Key Account Manager position on the basis that she (Ms Morton) had been able to manage the Foodstuffs Auckland account within her own portfolio.

[39] The conversation had concluded with the advice to Ms Ledger that she was to think about the proposed restructure and that they would meet to hear her feedback, however it was possible that her position might become redundant.

[40] Ms Ledger said that the conversation had concluded with Ms Morton telling her that she did not need to attend at the Delmaine office, that she would obtain an indication of her

(Ms Ledger's) final pay from Ms Hogan, and that she would like to meet her for a coffee to say good-bye.

[41] Mr John Ledger said he had been concerned at the text messages he had received from his wife and had left work early as a result, returning to find her in a very distressed state.

[42] Mr Ledger said that Ms Ledger had been very clear that she had been informed that her position was redundant, not that it was a proposal, and he had been surprised as he was aware of the procedure that an employer needed to follow if it was restructuring. He advised Ms Ledger to obtain a copy of the Employment Agreement.

[43] Ms Hogan said Ms Ledger had telephoned her on 17 December 2012 to request a copy of the Employment Agreement, and an email request had followed the telephone call.

[44] Ms Hogan confirmed that the request had sounded 'alarm bells' for her and as she was concerned, she had emailed Ms Morton to inform her of the requests. On 18 December 2012, which was her last day at work that year, she had met with Ms Morton to ask her for an update on the situation regarding Ms Ledger and been informed that it was going well.

[45] On the basis that she considered employees when considering the possibility of redundancy preferred to be aware of their entitlements, Ms Hogan said she had offered to obtain these figures for Ms Morton to use when further discussing the situation with Ms Ledger.

[46] Ms Ledger said that a meeting had been arranged for her to meet with Ms Morton on 21 December 2012 at a café near Ms Ledger's home as this was convenient for Ms Ledger who was without a company motor vehicle during her period of maternity leave.

Meeting on 21 December 2012

[47] At the commencement of the meeting held on 21 December 2012 Ms Ledger said that Ms Morton had discussed her redundancy and final pay calculations, and she had then asked for an explanation for the cause of the redundancy of her position as National Key Account Manager (Foodstuffs).

[48] The explanation with which she had been provided by Ms Morton had attributed the redundancy to a 'Domino' effect due to the Export Manager moving to Auckland and the Senior Sales representative in the South Island resigning.

[49] Ms Morton agreed that there had been a discussion about a 'Domino' effect, and that Ms Ledger's position would be incorporated into her and Ms Fleming's roles. At some point

in the discussion Ms Morton said that Ms Ledger had agreed that the National Key Account Manager (Foodstuffs) position was not a full-time role, and that it looked like a redundancy situation.

[50] Ms Ledger said that Ms Morton had asked her not to speak to anyone in the sales team about their discussion, and that she would advise them of the situation in the New Year. Ms Ledger said she had been told that there was nothing more required of her, and that when she asked if any consultation process was needed in the New Year, Ms Morton had told her that was not necessary.

[51] Ms Morton said that she had asked if Ms Ledger, who had become distressed in the meeting, would return to the workplace as planned on 29 January 2013 at the conclusion of her maternity leave, however Ms Ledger's response had been that she would find that humiliating and that she would prefer Ms Morton to inform the sales team in the New Year about the redundancy of her position.

[52] Ms Morton said at the conclusion of the meeting she had told Ms Ledger that in the New Year Delmaine would issue a formal notification of the termination of her employment and final pay.

[53] Ms Ledger said that she had been expecting to receive written confirmation of the termination of her employment and final pay from Ms Hogan prior to Christmas, however this did not arrive. On 8 January 2013 she had been surprised to receive telephone calls from two colleagues who had received an email from Ms Morton announcing her redundancy.

[54] Ms Ledger explained that she had not considered her redundancy to be official until 29 January 2013 on the basis that she had received no written confirmation from Ms Hogan.

[55] Ms Hogan said that she had been busy on her return to work and it had not been until Delmaine had received a letter from Mr Eggleston dated 18 January 2013 advising that Ms Ledger had decided to raise a personal grievance that she had realised that a final letter had not been sent to Ms Ledger.

[56] As a result she had drafted a letter and sent it to Ms Morton asking her to arrange for the payroll and HR advisor to complete the details and send it to Ms Ledger.

[57] The letter was subsequently sent to Ms Ledger, signed by Ms Morton and dated 29 January 2013. The reason given for Ms Ledger's redundancy was stated as: "*The Company very much regrets the need to make this decision which has been brought about by the economic downturn.*" This letter did not refer to the letter sent by Mr Eggleston.

[58] A second letter dated 30 January 2013 and signed by Ms Hogan, was sent to Mr Eggleston in response to his letter and advised that:

Delmaine, like many other companies is experiencing some financial difficulties due to the current economic downturn. ...

Although Katherine was employed as a full-time employee, it became apparent while she was on parental leave, that this was not in fact a full-time position, which ultimately Katherine agreed with. ...

Delmaine believe that Katherine was fully consulted – a decision was not made regarding redundancy until the end of the 21 Dec. meeting when Katherine herself decided she did not wish to return to work in January to continue further discussions ...

[59] The parties subsequently attended mediation, however this did not resolve matters between the parties and on 16 April 2013 Ms Ledger filed a Statement of Problem with the Authority.

Determination

Was Ms Ledger unjustifiably dismissed by Delmaine?

(i) *Did Delmaine have genuine reasons for the restructuring exercise?*

[60] The Court of Appeal statement of the law regarding the genuineness of a redundancy in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹(*Hale*) was that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[61] However since *Hale* was decided, justification for dismissal is now as stated in the Employment Relations Act 2000 (the Act), which at s 103A of the Act sets out the Test of Justification as being:

S103A Test of Justification

- i. *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

¹ [1991] 1 NZLR 151

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[62] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[63] The Employment Court has issued recent decisions in this area which have re-examined the statement of the law in *Hale* in light of s 103A of the Act.

[64] In *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson*² (*Rittson*) the Court referred to *Hale* and its previous comments about *Hale* in *Simpsons Farms Limited v Aberhart*³. His Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] ... the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[65] In that case, the Court was critical of the lack of information provided to the employee, and held that the employer had not adequately explained why the money saved by the disestablishment of the employee's position justified the position being made redundant. The Court found upon analysis that the employer had been mistaken in concluding that there would be a wage saving of 10% per annum, when in fact it was 6%. This "*threw into doubt*" the genuineness of and, therefore, the justification for, the dismissal.

[66] In *Brake v Grace Team Accounting Limited*⁴ (*Brake*) Travis J firmly endorsed *Rittson*, finding in that case that although the employer claimed that its financial position had deteriorated over the six months the employee had been employed requiring a reduction in

² Unrep [2013] NZEmpC 39 20 March 2013

³ [2006] ERNZ 825,842

⁴ [2013] NZEmpC 81 13 May 2013

salaries, in fact analysis by the Court concluded that the employer's figures were incorrect and there had been no sudden deterioration.

[67] On this basis it was held that the employer's justification for the dismissal was mistaken, with the consequence that the dismissal of the employee was unjustified.

[68] In *Catherine Tan v Morningstar Institute of Education Ltd T/A Morningstar Preschool Ltd*⁵ the Court adopted a similar approach. As in the case of the employee in *Brake*, Ms Tan had been provided with factually incorrect information about the employer's financial position. She had been misled into thinking that the redundancy of her position was inevitable when it was not; the cost savings were relatively minor and insufficient to have satisfied the employer's requirements.

[69] Despite Delmaine claiming in the letters of 29 January and 30 January 2013 that economic reasons prompted the disestablishment of the National Key Account Manager (Foodstuffs) position, no detailed financial records or copies of projected cost savings have been provided to either Ms Ledger or to the Authority to support this position.

[70] Although the letter dated 29 January 2013 referred to '*the economic downturn*' as the only reason for the redundancy, Ms Morton's evidence was that it was in fact the transfer of the Export Director from Christchurch to Auckland that had enabled her have the capacity to absorb the work carried out by Ms Ledger and consequently disestablished that position.

[71] The letter dated 30 January 2013 also claims "*economic downturn*" but goes further and clarifies the reason for the redundancy as:

Katherine was employed as a full-time employee, it became apparent that while she was on parental leave, that this was not a full time position Katherine's work could be absorbed by others.

[72] Moreover, it is evident from Ms Morton's evidence that the need for Delmaine to improve efficiency in light of the difficult economic climate had been the case since 2010, which is prior to the decision to appoint Ms Ledger to the position of National Key Account Manager (Foodstuffs), the appointment having taken place in February 2011 in light of that knowledge.

[73] It is therefore unclear to the Authority, in the lack of detailed supportive financial information or projected cost savings, exactly why the position of National Key Account Manager (Foodstuffs) had become untenable, particularly as there had been no indication to

⁵ [2013] NZEmpC 82 16 May 2013

Ms Ledger that the economic climate had significantly worsened Delmaine's financial situation during the period of her appointment.

[74] I accept that the National Key Account Manager (Foodstuffs) responsibilities may have been able to have been absorbed by other employees, however there is no evidence to support the level of savings to be achieved by the disestablishment of the position, in particular there is no detailed analysis of the proposed restructuring and commensurate savings, or whether these would be at such a level as to justify the disestablishment of the position, or the effect of any reduction in business, which is not itemised, would have.

[75] Ms Morton indicated that an important factor in the decision to make the National Key Account Manager (Foodstuffs) position redundant had been the strong rumour in the food retail sector of a merger of the Wellington and Auckland Foodstuffs companies. I do not find that this is borne out by the evidence provided to the Authority, nor supported by any draft financial figures.

[76] In any event, the letter confirming the decision to terminate Ms Ledger's employment was dated 29 January 2013, which pre-dated the confirmation of the rumoured merger of the Wellington and Auckland Foodstuffs companies.

[77] Even if I were to accept that the fair and reasonable employer would make a redundancy decision based on a rumour, there is no evidence of any detailed analysis of the impact such a merger would have on the National Key Account Manager (Foodstuffs) position, or to support the justification of the decision.

[78] I find that there is insufficient evidence that Delmaine had genuine reasons for the restructuring exercise.

(ii) *Did Delmaine follow a fair and proper process?*

[79] An employer who is proposing to restructure its business must not only have genuine reasons for undertaking the restructuring, but must follow a fair procedure in respect of affected employees.

[80] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation 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 an employee to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[81] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*⁶ noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”⁷

[82] Prior to any discussion with Ms Ledger about the disestablishment of the National Key Account Manager (Foodstuffs) position, it is clear that Ms Morton had been authorised by Mr Carlyon to discuss the proposal with formal consultation occurring after Ms Ledger had returned to work following maternity leave.

[83] In addition Ms Morton had been advised by Ms Hogan that Ms Ledger was entitled to have a support person present at any discussion, and that there was a Delmaine redundancy procedure to be followed in a redundancy situation.

[84] However despite this advice, and whatever Ms Morton’s intentions in having a telephone discussion with Ms Ledger on 17 December 2012, I accept that Ms Ledger, as supported by Mr Ledger’s evidence, had clearly understood that there was not a restructuring proposal which might result in her position as National Key Account Manager being redundant, but that this was a *fait accompli*.

[85] Ms Hogan had been concerned by Ms Ledger’s request for a copy of the Employment Agreement and had informed Ms Morton of the request on 18 December 2012, however despite this information, Ms Morton had not taken any steps at this point to contact Ms Ledger to ascertain if there had been any misunderstanding about what had been discussed in the telephone conversation on 17 December 2012.

[86] At the subsequent meeting held on 21 December 2012 the discussion had centred on the fact of the redundancy of Ms Ledger’s position and her final pay entitlements. The only justification for the decision provided to Ms Ledger at her request had been of a ‘Domino’

⁶ [2006] ERNZ 825,842

⁷ Ibid at para [40]

effect, but there had been no supporting paperwork, no financial information or explanations, and no opportunity provided for Ms Ledger to provide feedback.

[87] Ms Ledger has stated, and Ms Morton confirmed, that there had been no reference to economic factors or financial justification for the disestablishment of the National Key Account Manager (Foodstuffs) referenced in the letters dated 29 and 30 December 2012 prior to the termination of her employment. Consequently Ms Ledger had been deprived of the opportunity to provide feedback on this aspect, or to provide alternative arguments, for example about the benefits provided by the position which out-weighed the proposed cost savings.

[88] Accordingly Delmaine could not have considered Ms Ledger's feedback before confirming the decision to terminate her employment as no opportunity had been given to Ms Ledger to provide it.

[89] I find that Delmaine failed to follow a fair and proper process.

[90] I determine that Ms Ledger has been unjustifiably dismissed by Delmaine.

Did Delmaine breach s. 41 and s. 49 of the PLEPA?

[91] Section 41 of the PLEPA states:

S. 41 Presumption that employee's position can be kept open in the case of other periods of parental leave

(1) Where an employee takes a period of parental leave ... the employer shall be presumed in any proceedings under this Act, to be able to keep open for the employee, until the end of the employee's parental leave, the employee's position in the employment of the employer, unless the employer proves that the employee's position cannot be kept open –

...

(b) because of the occurrence of a redundancy situation.

[92] Section 49 of the PLEPA states:

Part 6

Protection of employment

49 Dismissal by reason of pregnancy or parental leave prohibited

(1) No employer shall terminate the employment of any employee-

...

(c) during the employee's absence on parental leave or during the period of 26 weeks beginning with the day after the date on which any period of parental leave ends.

[93] Section 50 of the PLEPA states::

50 Special defences relating to dismissal

Where-

(a) It is alleged in any proceedings that the employer terminated the employee's employment either-

(i) during the employee's absence on parental leave;

or

(ii) during the period of 26 weeks beginning with the day after the date on which any period of the employee's parental leave ended-

The defences set out in sections 51 and 52 of this Act shall be available to the employer

[94] Section 51 of the PLEPA addresses special defences and states:

51 Special defences relating to dismissal during parental leave

Where the termination is proved to have taken place during the employee's absence on parental leave, it shall be a defence for the employer to prove-

(a) That-

(i) In the case of a period of parental leave to which section 40(1) of this Act applies, on the ground of the occurrence of a redundancy situation that occurred in the employer's business after the employer gave the employee notice in

terms of section (36)(1)(c)(i) of this Act, the employer was unable to keep the employee's position open; or

(ii) In the case of other periods of parental leave, on the ground of circumstances (of the type referred to in section 41 of this Act) that occurred in the employer's business after the employer gave the employee notice in terms of section 36(1)(c)(i) of this Act, the employer was unable to keep the employee's position open; and

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

[95] Mr Eggleston for Ms Ledger submits that Delmaine breached ss. 41 and 49 of the PLEPA by taking insufficient steps to keep her position open for the period of her parental leave. Further that the special defences available under s 51 of the PLEPA are not available to Delmaine because the redundancy was not justified and also because the events giving rise to the redundancy did not arise after Ms Ledger gave notice in terms of s 36 (1)(c)(i) of the PLEPA.

[96] The leading decision in this area is *Lewis v Greene*⁸ (*Lewis*) in which the Employment Court noted in respect of a special defence that:

[83] The defence can only be relied on if the position cannot be kept open because a temporary replacement is not reasonable practicable due to the key position occupied within the employer's enterprise or because of a redundancy situation. In addition, the redundancy situation is to be judged on statutory criteria which I conclude create a higher threshold for an employer to meet than a non-parental leave case.

[86] The PLEPA contemplates that a position will be kept open by temporary measures until the employee returns. Ms Watson, for the plaintiff, acknowledged that there is an inherent disadvantage to a person on extended parental leave. This disadvantage can occur at times of reorganisation of an office when the parent is not part of the office dynamic and therefore is at risk of being sidelined. For this reason, she says, any disadvantage is inherent by reason of the parental leave rather than as a result of a legal breach by the

⁸ [2004] 2 ERNZ 55

employer. I do not accept that submission. The policy of the PLEPA is to ensure that inherent disadvantage is mitigated by proper notice and a stringent test for making a person on parental leave redundant. It is an employer's obligation to comply with those requirements.

[97] Delmaine had offered to keep Ms Ledger's position open at the time she applied for maternity leave, and Ms Ledger said, and Ms Morton confirmed, that Ms Morton had assured her during the period of her parental leave that her position was not affected by any proposed restructuring.

[98] However Delmaine had terminated the National Key Account Manager (Foodstuffs) position after Ms Ledger had commenced maternity leave. Ms Ledger's duties were subsumed into positions occupied by other employees, the reason being attributable to the economic situation and improved efficiencies.

[99] I have found that the need to improve efficiencies in light of the economic situation pre-dated the establishment of the National Key Account Manager (Foodstuffs) position, it did not occur after Ms Ledger commenced her maternity leave.

[100] In *Lewis* the Employment Court observed:

[98] Those differences between the positions which did exist came about because of the way Mr Lewis had allowed matters to develop. Having told Ms Greene he would keep her position open for her, he took no steps to do that. Instead, by absorbing the work into Ms Skelton's otherwise light workload gradually redefined the position. I find that this was in breach of his undertaking to Mrs Greene that her work would be kept open for her and in breach of the presumption in the Act that her work would be kept open.

[101] The fact that other employees cover the duties of a colleague absent on parental leave does not mean that the employer has failed to keep the employee's position open for her until she returns from parental leave, on the contrary such temporary measures are permissible, however as noted in *Lewis* there is a higher threshold created by the criteria in the PLEPA which the employer must meet.

[102] During Ms Ledger's absence on parental leave, Delmaine had temporarily re-allocated her duties to other employees only to decide that as a result that the permanent re-allocation of her duties could result in cost savings, and to find business justification for this to occur.

[103] This is the ‘*inherent disadvantage*’ situation identified in *Lewis* and which the PLEPA seeks to mitigate and which informs the presumption that the position of an employee on parental leave will be kept open. I note that there is no evidence of a restructure exercise which affected any position other than that of Ms Ledger.

[104] It is clear that Delmaine envisaged that a cost saving could be made by the permanent reallocation of Ms Ledger’s duties to other employees, but no cost analysis information was provided to the Authority or Ms Ledger to support this, nor is there any evidence that there had been consideration of any benefits which might be lost by the disestablishment of the National Key Account Manager (Foodstuffs) position.

[105] Further there has been evidence presented to the Authority that the sales team head count had been increased prior to the termination of the National Key Account Manager (Foodstuffs) position by the addition of a new full-time sales representative for Foodstuffs Auckland and by the appointment of a part-timer to a full-time position in the South Island.

[106] I conclude that the special defences available to an employer pursuant to s 51 of the PLEPA are not available to Delmaine on the basis that I have found the dismissal of Ms Ledger on the grounds of redundancy to be unjustifiable, and because I do not accept that the events which gave rise to the alleged redundancy arose after Ms Ledger had given notice in terms of s 36(1)(c)(i) of the PLEPA. Delmaine has failed to rebut the presumption that Ms Ledger’s position would be kept open for her.

[107] I find that Delmaine failed in its obligation to keep Ms Ledger’s position open during the period of her parental leave contrary to the presumption contained in the PLEPA.

Remedies

[108] Ms Ledger has been unjustifiably dismissed and she is entitled to remedies.

Lost wages

[109] Ms Ledger provided evidence to the Authority of her efforts to mitigate her loss following the termination of her employment with Delmaine. Ms Ledger obtained a part-time contractor position after two and a half months which I accept was less advantageous than her position with Delmaine.

[110] Ms Ledger stated that she had not applied for any jobs commensurate with her experience in the food retail sector since she had assumed that she would not obtain a reference from Delmaine.

[111] I find that there had been a clear and unequivocal statement in the letter dated 29 December 2013 that Delmaine would not only provide Ms Ledger with a written reference, but assist her in obtaining alternative employment. There is no evidence that Delmaine would not have adhered to this offer, such that I consider the assumption held by Ms Ledger to have been a wrong assumption.

[112] I order that Delmaine pay Ms Ledger the sum of \$19, 230.77 gross in respect of lost wages, calculated as 10 weeks at \$100,000 gross per annum (\$86,000.00 salary plus \$14,000.00 motor vehicle allowance) pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[113] Ms Ledger is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Ledger suffered significant distress, resulting in health affects including weight loss, eczema, and anxiety in addition to a loss in confidence.

[114] I order Delmaine pay Ms Ledger the sum of \$15,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[115] I have considered the matter of contribution as I am required to do under s124. There is no evidence that Ms Ledger contributed to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Penalties

[116] Ms Ledger is seeking penalties in respect of breaches of the employment agreement and the good faith provisions of s 4 of the Act. The alleged breaches are:

- i. The notification on 17 December 2012 that her position had been disestablished;
- ii. Carrying out a sham consultation procedure;
- iii. Failing to provide full and appropriate information on the decision to disestablish the position; and
- iv. Failing to keep her position open as agreed when parental leave was granted;
- v. Failing to consider redeployment options as required by section 51 (b) of the PLEPA

[117] In regards to the breaches claimed under i.- iii. above, these are connected to the unjustifiable dismissal claim which I have addressed and for which remedies have been applied. On this basis I award no penalty⁹

[118] I find the breaches claimed under iv. and v. above to be breaches of clause 11 of the Employment Agreement

[119] I order Delmaine to pay a penalty of \$2,000.00 pursuant to s 135(2)(b) of the Act. I direct that the whole of that amount is paid by Delmaine to Ms Ledger pursuant to s 136 (2) of the Act.

Costs

[120] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority

⁹ *Xu v McIntosh* [2004] ERNZ 448, at para [43]