

[4] By letter dated 13 November 2007, the Board withdrew the 7 November 2007 letter.

[5] The Board wrote to Ms Savage by letter dated 20 November 2007 setting out in detail options to avoid dismissal and the parties met formally with their legal advisers present on 28 November 2007 to discuss those options. Ms Savage says that at that 28 November meeting, the Board agreed not to persevere with its intended disestablishment of her position until after she returned from planned surgery in the New Year.

[6] Conversely, the Board says there was no such agreement and accordingly by letter dated 7 December 2007, the Board dismissed Ms Savage effective 4 January 2008.

[7] Ms Savage claims she was unjustifiably dismissed twice, once on 7 November 2007 and once on 7 December 2007, and she seeks findings in her favour and the usual awards.

[8] For its part, the Board denies that the 7 November letter constituted a dismissal but in any event notes that it did contain an error and was immediately withdrawn as soon as the error was brought to its attention and contends that the dismissal effective on 7 December 2007 was procedurally fair and substantively justified. Critically, the Board denies the existence of any agreement of the kind alleged to exist by Ms Savage as a consequence of the meeting of 28 November 2007.

Issues

[9] The significant focus of the Authority's investigation must be on the meeting between the parties on 28 November 2007, but the other central allegation which might loosely be referred to as *the first dismissal* also needs to be the subject of inquiry.

[10] Accordingly, the Authority will consider the following issues:

- (a) Was Ms Savage dismissed on 7 November 2007; and
- (b) What happened at the meeting on 28 November 2007?

Was Ms Savage dismissed on 7 November 2007?

[11] The focus of the investigation meeting, the documents filed by the parties and ultimately the centrepiece of the dispute between the parties revolves around the second and continuing dismissal rather than this first event which, even if it were a dismissal, was a dismissal that was swiftly withdrawn by the Board.

[12] However, for the sake of completeness, it is appropriate that the Authority deals with this first *dismissal*. The position adopted by Ms Savage was that there was an unjustified dismissal on 7 November but that such dismissal was speedily withdrawn once the Board realised it was *in error*. Compensation for the stress is sought.

[13] Conversely, the Board says that the letter on which Ms Savage relies to constitute the alleged unjustified dismissal was nothing of the sort and was simply a formal notice that her position had been disestablished with effect from a particular date as a consequence of the restructure. The Board says that the only error in the letter was a failure to *follow process* in that the notice prescribed in the letter failed to honour the contractual requirements and that that error was *an honest mistake*.

[14] Looking at the letter in question in its totality, there can be no doubt that the letter provides for a dismissal by reason of redundancy. That is the plain effect of the terms of the letter. The question is whether the dismissal effected by the letter is unjustified because of the mistake on its face. The letter proposes a notice period of 17 days which falls short of the four weeks required by the agreement between the parties. It follows that the letter could not have ever constituted a dismissal of any kind because it failed to honour the contractual obligations between the parties.

[15] As I have already noted, once the Board was made aware of the error on the face of that letter, it immediately withdrew the letter, both informally (by telephone call counsel-to-counsel), and then promptly thereafter by letter confirming the decision already taken.

[16] It seems to me to follow that even if I were to hold that the letter constituted an unjustified dismissal, the damage suffered by Ms Savage would have been slight indeed. Given the prompt response of the Board once the matter was drawn to its attention, the terms of that letter were effectively only extant for a period of less than one week.

[17] Having reflected on the matter, I think the position is that the letter was designed to be, and written as if it were, notification of dismissal by reason of redundancy. I do not think that the error on the face of the letter concerning notice somehow turned that notification from being a legitimate termination by reason of redundancy into an illegitimate one. I think the better view is that the effect of the error was to simply make the letter a nullity on the basis that the contractual arrangements between the parties had simply not been complied with and therefore the notification of termination was not an unjustified dismissal but was in truth a nullity given that the communication was activated by a mistake.

[18] Given that there was, in my view, no unjustified dismissal at this point, Ms Savage cannot expect to be compensated for the wrong allegedly done to her.

[19] Even if I am wrong in my analysis of this matter, the fact that the letter remained in force for less than seven days makes the possibility of Ms Savage suffering any compensatable damage very doubtful indeed. Even if I were to hold that the matter could, in effect, be relabelled as a personal grievance caused by an unjustified action of the employer causing disadvantage (and I am not minded to do that on this occasion), there is no evidence before the Authority that Ms Savage suffered hurt, humiliation or injury to her feelings as a consequence of this particular event and given the timeline I rely upon, it would be surprising if she did.

[20] I am satisfied this was a simple mistake by the Board which, as soon as the Board was advised of it, was readily corrected. I am satisfied there was no unjustified dismissal at this point, nor any other grievance established and there is inadequate evidence before the Authority to justify any conviction that Ms Savage suffered damage as a consequence of this event.

What happened at the meeting on 28 November 2007?

[21] The events of this meeting are really the main feature of this dispute. Ms Savage and her experienced and able counsel, Mr Cranney, both considered that the meeting had concluded with an agreement that the Board would keep Ms Savage in the employment until a fresh meeting could be arranged in the New Year whereas the Board and its counsel, Ms Reuvecamp, were equally adamant that no such understanding had been reached and that it was available to the Board to dismiss Ms Savage for redundancy by letter dated 7 December 2007.

[22] Having dealt with the consequences of the mistaken 7 November letter, the parties agreed to meet. Ms Savage had been away from work sick and Mr Cranney had clearly been having difficulty getting instructions about Ms Savage's intentions given that her position was disestablished and the agreement between the parties required their active engagement to seek alternatives to dismissal for redundancy.

[23] The Board's evidence was that, by this stage, it was completely frustrated by Ms Savage's apparent unwillingness to address the issue of which of the options she might want to pursue. In that context then, Ms Reuecamp wrote a letter to Mr Cranney dated 20 November 2007 in which she methodically set out matters such as the Board's attempts to establish Ms Savage's intentions, a minor skirmish around Ms Savage's taking of sick leave allegedly without notifying her superiors, the options available under the agreement exclusive of severance, and in particular, in respect of redeployment within the Board's service, the efforts that the Board had made to engage with Ms Savage in respect of particular positions.

[24] Although the letter sought a response from Ms Savage as to which option she wished to pursue by a date and time, it is acknowledged by common consent that the letter never, as it were, called time on the Board's attempts to engage with Ms Savage in respect of her future option and/or intentions.

[25] This was the critical issue because the Board's position was that it had invested some three months in endeavouring to interest Ms Savage in a variety of other positions in its organisation (and in particular to seek her active engagement in the recruitment of the three positions that her disestablished position was turned into), entirely without success. While Ms Savage had always contended that she wished to be redeployed, it was the Board's position that Ms Savage had never actively participated in that process and that that view was best demonstrated by Ms Savage's absolute failure to apply for any of the new positions that had been created out of her old position, positions for which the Board said in evidence Ms Savage would have been ideally suited.

[26] After Mr Cranney's receipt of the 20 November letter, there was further telephone discussion between counsel with Mr Cranney suggesting and Ms Reuecamp agreeing that there be a meeting between the parties to discuss the options set out in Ms Reuecamp's 20 November letter.

[27] That meeting took place at 12 noon on 28 November 2007. Ms Reuecamp began the meeting by raising the sick leave issue again. There is a dispute between the parties as to whether Ms Reuecamp raised this matter in an appropriate way or in a hostile and aggressive way. However it was raised, it seems to be common ground that Mr Cranney sprang briskly to his client's defence. In his evidence, Mr Cranney describes Ms Reuecamp as *belligerent* and she in response describes his approach as *aggressive*. As the matter is not central to the Authority's investigation, it does not fall to me to make a decision about which recollection of events I prefer. The issue about Ms Savage's sick leave and whether she properly notified her employer or not is not central to the dispute between the parties.

[28] The meeting then went on, in Mr Cranney's words, *to discuss the redeployment issue*. At this point, it seems that Mr Cranney told the meeting that Ms Savage was shortly to have an operation. This was the first notice that the Board had had that the operation was coming up. That fact, of itself, may well be symptomatic of the poor communication that now existed between the parties.

[29] In any event, Ms Reuecamp remembers Mr Cranney saying that Ms Savage would be out of action for up to six weeks post-surgery but that after that *she wanted to find a position*.

[30] There was then discussion about particular positions. Ms Lowry, a Board manager, indicated that usually vacant positions were advertised in the staff circular but that in preparation for this meeting, she had discussed Ms Savage's circumstances with colleagues and had identified two further positions which were yet to be advertised in the staff circular but were becoming available. Ms Savage expressed an interest in one but was firmly of the view that the other was unsuitable.

[31] The parties agreed that there would be a further exchange of information about that position (Ms Lowry providing a job description when it became available and Ms Savage supplying her CV and an application should it be of interest to her), and the discussion then moved on to consider if there were other redeployment possibilities. The Board representatives asked Ms Savage *what she was interested in doing*. This developed into a request, according to the Board evidence, that Ms Savage ... *think about the positions she might be interested in* and ...*get back to the Board*. A timeframe was agreed in which that was to happen and the deadline agreed was 5 December 2007. It is common ground that in the context of that part of

the discussion, Ms Reuevecamp said that it was not possible for the Board to wait for months until a redeployment option came up.

[32] Ms Reuevecamp says that the meeting concluded on the footing that there was a brief discussion about what was expected by each party of the other, specifically that the Board would provide a position description for the position Ms Savage thought she might be interested in, and Ms Savage would respond by 5 December in respect of other positions she might have an interest in. Further, it was agreed that Ms Reuevecamp and Ms Savage would liaise in order to facilitate any applications (including a potential application by Ms Savage for the position for which the job description was supplied) rather than have Ms Savage deal with Ms Lowrey given that there appeared to be tension between the two of them.

[33] All of that seems clear and straightforward except that, for whatever reason, Ms Savage and Mr Cranney did not come out of the meeting with the same set of expectations. Mr Cranney was adamant that the parties would need to meet again in the New Year (unless of course Ms Savage was successful in an application before then), given that Ms Savage was going to be on sick leave for a significant period after her surgery. Ms Reuevecamp and Ms Lowrey both reject any such understanding and are adamant that no such undertaking was given. They put the matter rather more strongly than I heard Mr Cranney postulate it when they allege that Ms Savage and her adviser were suggesting an open ended arrangement. I did not understand Mr Cranney to be proposing anything other than that there was agreement for a further meeting early in the New Year, not that there be an open ended requirement for the Board to continue Ms Savage on pay indefinitely.

[34] For her part, Ms Savage also gave evidence on oath that she understood the outcome of the meeting in similar terms to Mr Cranney's view and it was also clear from her actions that she did not understand the 5 December deadline in the way that Ms Reuevecamp did. Ms Reuevecamp said that she expected Ms Savage to provide information about what positions she might be interested in, whereas what Ms Savage actually did by that date was identify to Ms Reuevecamp some of her *skill sets*.

[35] It is impossible to reconcile the fundamental difference between the parties on the outcome of that meeting. On the one hand, the Board felt it had made it clear that it was not going to *wait for months* until a redeployment option for Ms Savage came up. However, the Board also acknowledges that it did not say in its otherwise full and

clear letter of 20 November 2007 that the point was being reached at which it felt it had fulfilled its legal obligations nor did it say that, in so many words, at the 28 November meeting. However, the Board is adamant that whatever was said or not said about its position, there was never an agreement to meet again in the New Year which is in effect the cornerstone of Ms Savage's argument.

[36] I have reached these conclusions about the relative position of the parties after the 28 November meeting:

- (a) I am satisfied on the evidence before me that the Board at no stage made it clear that it was coming to the end of its tether with respect to the attempts to redeploy Ms Savage. I accept that the Board indicated that it *could not wait for months* but that is a generic statement without specificity and in my opinion simply indicates that the party who expresses it is reaching the end of its patience but does not say or suggest when that end might come. Furthermore, the Board did not take the opportunity in its 20 November letter to indicate its timeframe.
- (b) It seems to me to follow that the Board did not adequately communicate that the meeting and its aftermath was in truth the end of the line and that being the position, it will have been easier for Mr Cranney and Ms Savage to have left the meeting with a conclusion about outcomes which is different from the conclusion the Board had.
- (c) That does not mean that I accept Ms Savage's and Mr Cranney's understanding of the outcome of that meeting. I think they were both mistaken but I hold that the mistake was an innocent one and in the context of what must have been, by any account, an unpleasant meeting, it seems to me not in the least surprising that confusion would exist.
- (d) I am particularly drawn to the conclusion that the Board's recollection of events is to be preferred precisely because the meeting seemed to have been so unpleasant. It seems unlikely, to say the least, that after a meeting which everybody seems to agree was less than satisfactory as a piece of human interaction, Mr Cranney and his client would have wrung a concession from the Board which was of real significance.

Furthermore, the Board's representatives said in their evidence that had they undertaken to meet in the New Year, as Ms Savage and Mr Cranney thought they had agreed, then the Board would have done precisely that and fulfilled its obligations to the letter. The only reason that the matter is being argued about now is precisely because the Board said it did not make that commitment.

[37] So my conclusion about the 28 November meeting is that the Board failed to make it clear that that meeting and its outcome was the end game for Ms Savage, but that equally, the Board did not agree to a further meeting in the New Year. That seems to me to leave matters pretty well evenly balanced as between the parties with each, in my view, bearing part of the blame for the confusion that has resulted.

[38] However, it seems to me that to some extent the outcome of the 28 November meeting is a little bit of a red herring because the real issue is whether the Board had an obligation to provide continuing employment for Ms Savage while redeployment options were pursued or whether there was a point at which, after the passage of some time, it was available to the Board to say that it had provided a *reasonable* opportunity for redeployment to take place and that in the absence of that redeployment having been effected satisfactorily, the only recourse was dismissal on the grounds of redundancy.

[39] On this broader platform of argument, I accept the Board's position without reservation. I am satisfied that the relevant agreement does not provide within its terms a length of time in which the parties are to explore redeployment. It follows I think as a matter of law, that the amount of time that must be used in a pursuit of this kind is a *reasonable* amount of time.

[40] In the instant case, Ms Savage was originally notified that her position had been disestablished on 20 August 2007 and despite Ms Savage's complaints about the failure of the Board to engage with her over the proposed restructure, I am not satisfied that her complaints are made out. Having reflected on the evidence I heard, it seems to me that the restructure was undertaken in an entirely proficient fashion and that Ms Savage's complaints about the process are not made out. Indeed, as I said at the investigation meeting, it struck me as surprising that Ms Savage had not engaged with the Board as much as she might have, and in particular had made no submission to the Board about the restructure although it was her position that was being

restructured. It follows that if there can be any criticism of a party for failing to fulfil its obligations, I think that criticism must be directed at Ms Savage rather than at the Board. Each party has an obligation in an employment relationship to be engaged and communicative with the other and in that dimension, I much preferred the evidence of the Board to Ms Savage's on the necessary engagement that the one party had with the other.

[41] In any event, having been told that her position was going on 20 August 2007, the evidence discloses that the Board did what it could to get Ms Savage to, in the first instance, commit to applying for one of the three positions that had devolved from her old position. The Board's evidence, which I accept, was that Ms Savage would have been ideally placed to fulfil any of those positions and would have been a strong candidate for all three. Yet she chose, for reasons she was unable to explain to me at the investigation meeting, to apply for none of them. Again, I have to say that if there was any failing in this matter, any want of engagement by one part to the other, then that failing is a failing of Ms Savage's and not a failing of the Board's. I think the Board did all it could to try to interest Ms Savage in applying for one or all three of those positions as she was an ideal candidate for all three. It was in the Board's interest for her to be engaged in that way and the Board was very clear that she would have been a strong candidate. But she chose not to volunteer herself.

[42] As I said to Ms Savage at the investigation meeting, redeployment is not an abstract concept and there was no ability of an employer to redeploy an employee if the employee will not participate in the process. In my view, this was such a case. Ms Savage declined to offer herself for the three obvious positions in the new hierarchy and in the result, despite maintaining throughout the exercise that she wished to be redeployed, she only volunteered to be considered for one position and that was at the very end of the employment relationship.

[43] When Mr Cranney raised his client's personal grievance on 9 November 2007 (this was in relation to the 7 November *dismissal* letter), Ms Savage and the Board had been engaging on the consequences of the disestablishment of her position for 2½ months. By the time the Board sent its letter of 7 December 2007 dismissing her finally by reason of redundancy, the total elapsed time since the disestablishment of Ms Savage's position was 3½ months.

[44] In my opinion, that is a reasonable period in which parties can consult with each other with a view to exploring whatever options might exist short of termination. I consider that that is precisely what these parties did and on the evidence I heard, I am not persuaded that the Board failed to meet its obligations to Ms Savage in any way.

[45] I am equally satisfied that Ms Savage can have no legitimate expectation of continued employment in the absence of any proof of a representation having been made. Furthermore, I am satisfied there has been a proper opportunity to explore the alternatives to termination. In this case, 3½ months is adequate time for the parties to see if there is an alternative to termination and on the basis that that alternative was not found and agreed to, termination is, I hold, a reasonable outcome in all the circumstances and there can be no legitimate expectation that employment would continue when a position has been disestablished and the contractual alternatives to termination have been explored over a reasonable period.

Determination

[46] In reaching the conclusions that I have, I have approached the matter in the same way as Chief Judge Colgan addressed the issues in *Simpsons Farms Limited v. Aberhart* AC52/06. First, I considered the relevant contractual provisions essentially contained in clause 24 of the Operative Collective Employment Agreement between the parties. That clause is entitled *Cooperation, Consultation and Management of Change*.

[47] In particular, sub-clause 24.3 relates to staff surplus. This is the relevant provision in the instant case. The fundamental operative provision provides that when the Board, as a consequence of a restructuring can no longer employ an employee in their current position then the options in sub-clause 24.3.4 shall be invoked.

[48] Clause 24.3.2 requires there to be at least one months notice of a staffing surplus situation although the clause continues by saying that that may be varied by agreement. The provision then continues as follows:

During this period (presumably the month or such other timeline as has been agreed between the parties), the employer and the employee, who can elect to involve the Union representative, will meet to agree on the options appropriate to the circumstances.

[49] Next, there is a requirement that where the Board intends to relocate an employee, at least three months notice is to be given.

[50] Then clause 24.3.4 lists seven options which includes redeployment.

[51] There is nothing else in this succession of provisions which provides any further guidance to the question of how long the parties are expected to engage in order to seek to reach agreement on an outcome following a restructure. On the face of it, the provisions I have just referred to could be read as requiring a minimum period of one month in which to achieve such an agreement failing which agreement the Board could contemplate bringing the employment relationship to an end by reason of redundancy.

[52] The only other timeline referred to in the provisions is a requirement of at least three months notice in respect to employees who are to be relocated. That is not the position in the present case but even if it were, that timeline has been exceeded by the Board's process.

[53] After Chief Judge Colgan has considered the contractual provisions in *Simpsons Farms Limited* (supra) His Honour then proceeds to look at the statutory enactments which assist. He refers first to the test for justification at s.103A of the Employment Relations Act 2000 which at the time he wrote his judgment was a relatively new enactment. For the purposes of the present case, it is enough for me to say that I am satisfied that, in its termination letter of 7 December 2007, the Board was acting as a fair and reasonable employer would have acted after having worked its way through a proper process over a reasonable period of time.

[54] Then Chief Judge Colgan refers to the good faith obligations required by s.4 of the statute and the need for parties to be *active and constructive in establishing and maintaining a productive employment relationship* and to be responsive and communicative. In the present case on the evidence I heard, I do not think the Board can be criticised for its fulfilment of those legislative obligations. However, as I have made clear in the course of the determination, I think Ms Savage's engagement with her employer was less than could reasonably be required in the good faith environment. In particular, I think Ms Savage failed to accept that she too had obligations in engaging with the Board and that she did not do so as fully as she might.

[55] Chief Judge Colgan refers particularly to s.4(1A)(c) which casts an onus on the Board, in the present case, to provide all relevant information to the employee about and pertaining to any restructure. There is no complaint about the Board's behaviour in this regard and I am satisfied the evidence discloses that the Board fulfilled its obligation.

[56] For the reasons I have advanced in this determination, Ms Savage's claims fail in their entirety. I am not satisfied that Ms Savage has made out her claim for unjustified dismissal on 7 November or her claim of unjustified dismissal on 7 December 2007 nor am I satisfied there has been any breach of contract by the Board in respect of her employment.

Costs

[57] Costs are reserved.

James Crichton
Member of the Employment Relations Authority