IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 258
5379755

	BETWEEN	KEITH WILLS Applicant
	AND	GOODMAN FIELDER NEW ZEALAND LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Jeff Goldstein and Linda Ryder, Counsel for the Applicant Elizabeth Coats, Counsel for the Respondent
Investigation Meeting:	13 June 2013 at Christchurch
Submissions received:	Submissions heard by teleconference on 31 July 2013. Further written submissions received on 6 August, 3 September and 9 September 2013.
Determination:	20 December 2013

DETERMINATION OF THE AUTHORITY

- **Mr Wills was not unjustifiably disadvantaged in his employment. Goodman Fielder New Zealand Limited did not breach its duty of good faith or any provision of Mr Wills' employment agreement.**

- **Goodman Fielder New Zealand Limited was not bound by Mr Wills' employment agreement and its redundancy policy to make his position redundant and he is not entitled to redundancy compensation.**

Employment relationship problem

[1] Keith Wills is a baker. He was employed by Goodman Fielder (GF) in 1978. He was the Christchurch bread plant manager from 1998. In October 2010 he also took on responsibility for the food coatings operation on an interim basis. His job title became bread/food coatings plant manager. He was paid a higher duties allowance.

His direct manager in Christchurch was Brett Pfahlert, the site and manufacturing manager.

[2] On 22 February 2011 the catastrophic Christchurch earthquakes[1] caused the bread plant and the food coatings operation to shut down because of damage to the buildings and equipment. GF and staff hoped that the bread plant and the food-coatings operation would recommence within 3-6 months.

[3] In April 2011 the food-coatings operation was able to recommence however the bread plant was unable to re-open and remained totally inoperable. Over half of the buildings at the site were assessed as non-repairable.

[4] GF retained all the bread plant staff in the hope that the operation could begin again within months of the February earthquake. Mr Wills remained the manager of the staff who were deployed in receiving and distributing bread from GF's other South Island bakeries to the Christchurch bakery's customers.

[5] In April 2011 in recognition of the ongoing difficulties caused for staff by the large earthquake and ongoing aftershocks GF notified them that they could take two days of special leave over and above annual leave entitlements. This leave was to be taken by 30 June 2011. Two days special leave had also been provided after the September 2010 earthquake.

[6] In May 2011 Mr Wills signed a new employment agreement, backdated to 1 January 2011, because he had been permanently appointed as bread and foodcoatings plant manager. He received a pay increase in recognition of his new role.

[7] In June 2011 Mr Wills was asked by Tony Andrew, then GF's regional operations manager[2], to undertake the acting Christchurch site and manufacturing manager's role[3]. Mr Wills took on the duties but made it clear that he was not interested in taking on the site/manufacturing manager's role permanently[4].

[8] In July 2011 GF announced that the bread plant was unlikely to become operational within two years; the building was not repairable and it was in negotiation with its insurer.

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[1] The largest and most destructive of which was magnitude 6.3 (Richter scale) and occurred at 12.51 p.m. when the bakery was in operation.
[2] To whom Mr Wills and Mr Pfahlert reported.
[3] Mr Pfahlert had been seconded to Auckland to work on the Continuous Improvement Team.
[4] The role was a more senior one but did not involve baking, which was Mr Wills' passion.

[9] All the bread plant employees, with the exception of Mr Wills, were consulted and offered the opportunity to be redeployed in other GF operations on two-year fixed-term contracts or to be made redundant. Redeployed staff could retain their pre-earthquake pay level on the fixed-term contracts even if they took on a more junior role. If the bakery reopened within the two years, as GF then hoped that it would, the redeployed staff would be able to resume their positions in the bakery. The redundancies were effective from 19 August 2011 and redundancy pay was covered by GF's insurer.

[10] Mr Andrew and Colin Avis, GF's manufacturing director of baking in New Zealand, decided that Mr Wills was one of the people GF wanted to retain, especially for when the bakery was rebuilt. Mr Andrew says:

> *…Keith was a very well respected baker and was technically very experienced and skilful. For this reason we ideally wanted to retain him in the business. On that basis, we did not discuss with Keith the possibility of him being made redundant …*

[11] On 13 July Mr Wills had a meeting with Roger Gray, then managing director of Quality Bakers NZ[5], about his own position. He asked Mr Gray if he was going to be made redundant like his bakery staff. Mr Gray told Mr Wills GF was not going to make him redundant as it wished to retain him, because of his considerable skills and experience, in the business.

[12] Mr Gray offered Mr Wills the role of bread plant manager at one of the Auckland bread plants. When Mr Wills declined and said he wanted to remain in Christchurch Mr Gray asked him to travel to Auckland to help improve the production at that Auckland bread plant which was then without a plant manager. Mr Wills' says he was not keen to go to Auckland but wanted to help Mr Gray out and agreed to do so.

[13] On 21 July 2011 Mr Wills visited his general practitioner principally about a rugby injury but his doctor's notes also include:

> *Sleeplessness and mind racing*
>
> *Redundancies at work having to administer*
>
> *EQ outfall*

[5] The GF division that ran the Christchurch bakery.

Poss depression

Address sleep initially…

See 6 to 8 weeks if not improved

[14] Mr Wills was prescribed sleeping tablets. Mr Wills says that his health was also badly affected by not being busy enough at work once the bread line staff had been redeployed or made redundant.

[15] Mr Wills did not tell GF at that time about his health problems that he attributed to not having enough work to do as well as to the stress of having to assist in the redundancies of his staff.

[16] Mr Wills travelled to Auckland approximately every second week for a few days at a time. He remained the plant manager – bread and foodcoatings of the Christchurch plant and continued to undertake site/manufacturing manager's responsibilities when he was in Christchurch.

[17] On 11 August 2011 Mr Wills emailed Sean Parker, the newly appointed bakery hub manger, about *helping out in Auckland* and, in part, wrote:

> *I am still very keen to help out and want to see Project 7000 through to achieving this target. Other areas that I had started on which I believe will improve OEE, quality and training.*

He went on to explain his ideas for improvement. Project 7000 was the project to get plant one in Auckland *working better*. A new Auckland Bakery manager had been appointed by then.

[18] Mr Wills says that on 3 September 2011 he went back to his general practitioner because:

> *I had become unwell as I was run down from the stress of all the events plus living away from home, traveling back and forward from Christchurch to Auckland, living in a motel and not eating correctly, the novelty of going to Auckland was starting to wear off.*
>
> *When I returned to Christchurch, I had very little work to do… It was awful having the day slowly ticking by. The days really dragged. Most of my financial reporting had stopped. The foodcoatings plant ran itself with little input from me. It was so demoralising, I knew there was no way I could continue to do this for an indefinite period.*
>
> *It was depressing.*

[19] Although the financial responsibility for the bread plant had stopped the acting site/manufacturing manager's role involved financial accountability. Mr Will says he tried to understand the financial aspects of the operation but *that was something I did not feel comfortable with.*

[20] On 12 September 2011 Mr Wills sent Mr Gray an email which included:

> *Also thxs for the opportunity for the chance to work at the Auckland plant. Believe or not but starting to warm to the area about working in Auckland, very hard for a Cantab.*

He did not mention any of the issues he raised with his doctor set out in paragraph [18] above.

[21] In an email of 1 October 2011 Mr Wills asked Debbie Fife, the South Island manager of human resources, whether there would *be some financial reward for taking on the acting Manufacturing Manager's Role?* In October 2011 Mr Wills received a pay increase as a part of his annual performance review process[6]. No decision had been made by then on whether to rebuild the Christchurch bakery and there was no set time by which a decision would be made.

[22] Mr Wills says he did not have enough work to do when he was in Christchurch especially after his regular trips to Auckland ceased. Throughout 2011 he sought information on the future of his role and of the Christchurch bakery including from the chief executive officer, human resources staff, Mr Parker, and Darron Curphey, the newly appointed NZ baking director. His efforts to get answers intensified in October and November 2011. However, no one was able to answer his questions with any certainty and he was consistently told there was still no firm idea of when a decision about rebuilding the Christchurch bakery might be made.

[23] In October 2011 restructuring took place with Mr Gray and his immediate manager in the baking division, Mr Avis, being made redundant[7]. Mr Wills was aware that there were to be other structural changes throughout GF's operations nationwide. He says that had a negative effect on the remaining Christchurch staff:

> *By the beginning of October, I was seriously concerned about the situation and the impact it was having on me. I felt that I was not happy or motivated. It was demoralising going to work each day in*

[6] From 1 October 2011 to a base salary of $94,819 per annum.
[7] Through Project Tower a company-wide restructuring. In March 2012 Mr Andrew was also made redundant.

> *Christchurch when I had either nothing or very little to do. It started to consider alternative options.*

[24] Mr Wills set up a meeting with Mr Parker for 10 November 2011 to try and get some certainty about his position as the bakery and food-coatings plant manager and also about what was intended to happen with the site/manufacturing manager's position. His email requesting the meeting shows that he was essentially concerned with the security of his plant manager's role and his ongoing employment with GF. Mr Parker could not give Mr Wills the certainty he was seeking about the timing of a decision on the bakery's future. Mr Wills told Mr Parker he was looking for another job and was told that he was not the only one doing so.

[25] On 20 November 2011 Mr Wills emailed Ms Fife saying that his role has changed *more than 60%* since the February earthquakes and he believed he was entitled to a redundancy pay out. He also outlined his uncertainty about the future of his role because of the ongoing restructuring.

[26] It was relatively common knowledge by this time that Mr Wills was dissatisfied with his current role/s and was looking for other work. Mr Parker emailed Mr Curphey on 23 November 2011 to tell him Mr Wills was looking for other work.

[27] A teleconference discussion took place on 28 November 2011 between Mr Wills, Mr Parker and Mr Curphey. However, Mr Wills still did not receive the certainty he was seeking.

[28] On 30 November 2011 Mr Wills sent a letter to Carmel White, the human resources director, asking that the company consider the issue of his redundancy. He said he had had advice that his position was actually redundant since he no longer had a bread plant to manage. He had written the letter on 25 November 2011 but did not send it in the hope that he would get the answers he wanted from his meeting with Mr Parker and Mr Curphey.

[29] Ms White, who had heard Mr Wills was looking for work outside GF, instructed Lee Mackie, the newly appointed southern regional human resources manager, to investigate Mr Will's claim that he should be made redundant.

[30] On 1 December 2011 Mr Wills was offered a new job at Rolleston Feedmill. He did not accept the role straightaway.

[31] On 13 December Ms Mackie emailed Mr Wills to say she was investigating his claim for redundancy and sent him a series of questions.

[32] On 14 December 2012 Mr Wills emailed Ms Fife:

> *this whole issue is getting me down and is now affecting my sleep etc. I have added another email below of my attemp* (sic) *to try and get answers to the questions that I have been asking since the earth quake*.

[33] What he sent her was not an attached email[8] but a summary of his attempts to get certainty about the future of the bread plant and his position from Mr Parker and Mr Curphey.

[34] On 15 December 2011 Mr Wills responded to Ms Mackie. He used his position description as bread/foodcoatings plant manager to highlight the duties he was no longer undertaking as a result of the closure of the bread plant. On the same day he decided to accept the job at the Rolleston Feedmill.

[35] Ms Mackie also consulted Mr Andrew about Mr Wills' request to be made redundant but had made no official response to Mr Wills when he tendered his resignation on 21 December 2011 to take effect on 23 January 2012.

[36] On 23 January 2012 Ms Mackie wrote to Mr Wills to confirm a telephone conversation she had with him that GF did not consider that he was redundant and had not told him he would be made redundant at any stage. She also said that he agreed to undertake the site manager duties and continued doing so until he accepted a new role outside of GF.

[37] Mr Phalert returned to his role as site/manufacturing manager in Christchurch after Mr Wills left GF.

[38] A decision on the Christchurch bakery's future was not made until early in 2013 after GF's insurer changed its approach and allowed GF to use an agreed value payment as it saw fit. GF decided not to rebuild the bread plant, and to close the food coatings operation.

[39] It is common ground that if Mr Wills had remained employed at the time the decision not to rebuild the bakery was made that his position would have been

[8] Or if there was an attached email that was not reproduced for the Authority's proceedings.

redundant. That was likely to mean Mr Wills faced dismissal on the grounds of redundancy and would have been entitled to redundancy compensation.

The claims

[40] Mr Wills says he was unjustifiably disadvantaged and that the respondent failed to treat him fairly and reasonably. He claims that the respondent breached the terms of his employment agreement related to redundancy. He also claims that he was unjustifiably constructively dismissed on 23 January 2012.

[41] By way of remedy initially Mr Wills sought redundancy compensation of 34 weeks of his salary and interest on that amount. In submissions the remedy claimed was said to be special damages of $61,997 gross[9] plus interest. Alternatively Mr Wills seeks $61,997 gross as *compensation for the loss of a benefit* under s.123(1)(c)(ii) of the Employment Relations Act 2000 on the basis that his employment agreement provided for that amount of redundancy compensation.

[42] He seeks lost remuneration of $6,672.46 gross. He earns less than he did at GF in his new position and that is the amount extra he would have earned if he stayed at GF over the 72 weeks between 23 January 2011 and the date of the hearing.

[43] He also seeks $10,000 compensation for humiliation, loss of dignity and injury to his feelings, and legal costs.

[44] The respondent resists Mr Wills' claims and says that he was not constructively dismissed but voluntarily resigned. GF says that it treated Mr Wills fairly and reasonably and that he was not unjustifiably disadvantaged during his employment. GF says that it did not breach the terms of Mr Wills' employment agreement and that he was not made redundant but resigned therefore he is not entitled to redundancy compensation.

Issues

[45] The Authority needs to determine the central issue of whether Mr Wills should have been made redundant, and received redundancy compensation. In determining that issue I also need to consider in turn each claim of unjustified action causing disadvantage, claimed breach of good faith and claimed breach of Mr Wills'

[9] That is the exact sum, being the maximum redundancy compensation, that Mr Wills would have received under his employment agreement and the redundancy policy if he had been made redundant.

employment agreement to decide whether he was constructively dismissed. If I find any breach or unjustified disadvantage I need to consider appropriate remedies.

Should Mr Wills have been made redundant?

[46] The central issue is a disagreement over whether and when the redundancy policy and clause 20 of Mr Wills' individual employment agreement should have been triggered and dealt with by GF, if at all.

[47] Ms Ryder submits that GF should have consulted Mr Wills about the potential redundancy of his position when the other bakery staff were being redeployed or made redundant. She submits that was clear to GF at that point that a decision on whether and/or when to rebuild the bakery was not imminent and so at that point the redundancy policy should have been triggered. That is, that GF was required under the redundancy policy to consider whether the work available in the bread and food coatings plant manager position had disappeared or was significantly diminished or altered to such a degree that the position no longer existed. In essence Ms Ryder's submissions mean that the circumstances, namely the February earthquake resulting in closure of the bread plant dictated that GF was contractually bound to make Mr Wills' position redundant.

[48] The fact that Mr Wills was not made redundant has led to a number of claims of unjustified disadvantage, breaches of good faith and breaches of his employment agreement as a result of which he submits he was constructively dismissed by GF. I will consider each of the claims of unjustified disadvantage and breach of contract in turn.

Was there an unjustified disadvantage to Mr Wills in his employment in July/August 2011 when the bread line staff were made redundant?

[49] To be successful in a claim for unjustifiable disadvantage, pursuant to s.103(1)(b) of the Act, an employee must show:

> *That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.*

[50] There are two limbs to the test for unjustifiable disadvantage as set out in s.103(1)(b): first, there must be an unjustifiable action by the employer, and secondly, that action must have caused disadvantage to the employee.

[51] The test of justification for an employer's action is set out in section 103A of the Employment Relations Act 2000. The Authority needs to determine whether the way that GF acted was what a fair and reasonable employer could have done in all the circumstances at the time.

[52] When the bread line staff were made redundant was when Mr Wills lost what he submits, at his lowest estimate, was 60% of his duties[10]. Mr Wills' provided information for Ms Mackie's consideration of his redundancy and confirmed that at the investigation meeting. He says he lost 75-90%[11] of his pre-earthquake roles and responsibilities in the bakery and food coatings plant manager position.

[53] Mr Wills says that in not considering his position redundant and not consulting him about what he wanted GF *made the decision for me and took away my choice in the matter*.

[54] There is no doubt that the uncertainty Mr Wills felt about his own position and future with GF increased around the time the bakery staff were being made redundant especially when that was coupled with uncertainty about the timing of a decision about the future of the bakery. However, Mr Gray clearly conveyed to Mr Wills that GF did not want to make him redundant which I consider reduced Mr Wills' anxiety about his own future at the time.

[55] Mr Gray offered to redeploy Mr Wills to the Auckland bakery plant manager's role. Mr Wills declined that offer for understandable reasons and instead accepted temporary part-time duties in Auckland which he carried out along with the site manager responsibilities he had earlier accepted and ongoing management of the food coatings operation. I accept that in the absence of a decision about the rebuilding of the bakery Mr Wills suffered some disadvantage by way of uncertainty over the future of his position as Christchurch bakery and foodcoatings plant manager.

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[10] Email to Debbie Fife, 20 October 2011.

[11] He estimated 90% of his financial accountability was from his bakery plant management. Mr Andrew in an email to Ms Mackie says that Mr Wills had a 64% reduction in the number of people reporting to him and that 90% of his financial responsibility lay with the bread line.

[56] There is no evidence that Mr Wills told Mr Gray in July/August 2011[12] when Mr Gray told him GF did not intend to make him redundant, that he considered that his position was redundant and so he should be made redundant and offered redundancy compensation. Instead, at least initially Mr Wills appears to have been grateful that GF did not make him redundant along with his bread line staff.

[57] Although the uncertainty Mr Wills felt was capable of being a disadvantage I need to consider whether GF's actions were justifiable in all the circumstances at the time it decided not to make his position redundant. GF decided not to make Mr Wills redundant because of the high value it placed on his skills and experience and the need for his skills in Auckland. It also envisaged at that time, despite the ongoing seismic activity[13] and the ongoing uncertainty of when the bakery might be able to be rebuilt, that Mr Wills would be the bakery manager during planning to rebuild and refit the bakery.

[58] At least until Mr Wills' duties in Auckland ceased in November 2011 GF's decision to retain Mr Wills was within the range of decisions a fair and reasonable employer could have made in all the circumstances at the time. Therefore, its decision not to make Mr Wills redundant in July/August 2011 was justifiable and Mr Wills was not unjustifiably disadvantaged in his employment.

Was Mr Wills unjustifiably disadvantaged, or did GF breach Mr Wills' employment agreement by treating him differently from other bakery staff who were re-deployed or made redundant?

[59] This is a slightly different consideration to the disadvantage issue considered immediately above. The legal test in assessing whether an employer has subjected an employee to disparity of treatment so as to render a dismissal unjustified is set out in the Court of Appeal case of *Chief Executive Officer v Buchanan (No 2)*[14]. This is also the appropriate test to apply when considering whether disparity of treatment can amount to an unjustified disadvantage. The Authority must consider whether:

(a) There was a disparity of treatment;

[12] Or anyone else in GF at that time.
[13] On 13 June 2011 there were several aftershocks the largest two of which were 6.4 and 5.9 magnitude on the Richter scale.
[14] [2005] ERNZ 767

(b) If so, whether there is an adequate explanation for the disparity; and

(c) If not, is the dismissal justified despite the existence of disparity?

[60] For there to be disparity of treatment the employees considered must have 'parity'. However, Mr Wills' situation was different to those of the bread line staff who were made redundant. In July 2011 Mr Wills was managing those staff and the food-coatings operation. After the bread line staff were redeployed or made redundant the food-coatings operation remained and required Mr Wills' management. However, the bread line staff positions were wholly taken away as a result of the closure of the bread plant. In addition by that stage Mr Wills had become the acting site/manufacturing manager. I consider that Mr Wills' management was still required at the Christchurch site despite his evidence that the food-coatings operation virtually ran itself. Even if the duties did not take a large amount of Mr Wills' time a manager at his level was required by GF under the management structure in place in the bakery division at the time.

[61] There was no disparity of treatment. However, if I am wrong and there was disparity then the disparity was justified. When GF made its decision to retain Mr Wills' position it was within the range of decisions a fair and reasonable employer could have made in all the circumstances at the time.

Was Mr Wills unjustifiably disadvantaged in his employment by GF failing to provide him with ongoing meaningful work?

[62] It is an implied term in all contracts of employment that an employer will provide an employee with ongoing work of the kind they were engaged to do. Work has value to an employee over and above the monetary value of a salary.[15]

[63] Mr Wills says he found it depressing and very difficult when he had only a little work to do, especially when his Auckland work stopped. It is understandable Mr Wills found the situation dispiriting. However, is it possible to say he was disadvantaged in his employment by not being busily engaged in his work?

[64] Mr Ryder submits that the Employment Court case of *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* – in which Mr Gray was effectively shut out of his role by being suspended when he refused to resign – is

[15] *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672

comparable to Mr Wills' situation. The Court found it was a breach of Mr Gray's employment contract as a minister to have been unilaterally suspended and deprived of work in the job or office he had been appointed to.

[65] Chief Judge Goddard held:

> *The employment contract is a continuous wage/work bargain, with neither side at liberty to suspend its operation against he will or without the consent of the other, except as authorised by law or by the contract itself. This rule has many implications, but it is necessary to mention only some of those that affect the employer. They include the proposition that employees have the right to work, and that right has an intrinsic value of its own and may not be taken away or prejudiced against the employee's will. At any rate, where there is work to be done; it cannot be helped if there are fluctuations in available work, then it may be enough to pay the employee for being available but otherwise the employee must be allowed the satisfaction of doing his or her work. It is not enough to pay the wages, withholding the work.*[16]

[66] Judge Goddard's conclusion is not disputed. However, I do not accept that Gray's case is sufficiently similar to apply to Mr Wills' situation. Mr Wills was not suspended unilaterally or entirely deprived of work by a unilateral decision of GF. Indeed, Mr Wills' argument is that GF *should have*[17] concluded that he had no work and did not do so.

[67] Mr Wills may not have had as much work or as challenging and satisfying work as before the February earthquake. However, that was not taken away by any action of his employer. Chief Judge Goddard recognised that there may be permissible fluctuations in available work and while this is perhaps at the extreme end of such fluctuations I consider that this is such a situation.

[68] Also in contrast to *Gray* GF tried to ensure Mr Wills had sufficient work to perform including work that was meaningful to him and useful to the company. Therefore, I consider that even if Mr Wills was disadvantaged to a small extent by a shortage, not a total lack, of meaningful work that was caused by the extraordinary circumstances GF and Mr Wills were in taking into account the February earthquake and its ongoing aftershocks with their consequent effects on GF's ability to make a decision about the future of the bakery. GF's actions were within the range of ways a fair and reasonable employer could have acted in all the circumstances at the time.

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[16] *Gray* ibid., pp 694-695
[17] My emphasis

Was Mr Wills unjustifiably disadvantaged in his employment by GF failing to address his concerns about his situation despite being aware that the situation was having a negative impact on his wellbeing?

[69] Ms Ryder submits that GF must have been aware what a negative impact the ongoing uncertainty was having on Mr Wills because he had asked so many people, so many times, to update him on the future of his role and the timing of a decision on the future of the bakery.

[70] Certainly Mr Andrew was aware that Mr Wills would not be happy if he was not busy enough. Mr Andrew took part in the decision to ask Mr Wills to help out in Auckland. Mr Wills told Mr Andrew that when he was in Christchurch he was not busy enough. Mr Andrew says:

> *Keith is the sort of person who likes to keep busy. Keith did not enjoy* [not having enough to do].
>
> *…by the end of November, 2011 it became apparent that the rebuild of the Christchurch plant would be years not months away. …*
>
> *Around the end of December 2011, my focus moved away from the day to day management of the Christchurch plant towards my own situation in relation to the national restructure. Roger Gray had already left the Company in around September, October 2011. This put some uncertainty into the future of the Christchurch bread plant as I was aware that Roger was strongly advocating for a Christchurch rebuild. However, it was unclear what the view of any new CEO may have been.*
>
> *There was no further clarity at the time around the insurance issues with the Christchurch plant either*[18] *and it left a lot of uncertainty.*

[71] Mr Andrew' evidence was that by the end of November 2011 it was apparent from structural reports from Beca. ongoing issues with building codes and the Christchurch City Council zoning plans that the possibility of work resuming in the Christchurch bakery was a minimum of two years away. GF was also considering other options. In December 2011 Mr Andrew says that he and Ms Fife[19] were of the opinion that Mr Wills should have been *consulted about the potential for his position to be made redundant and to receive redundancy compensation.*

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[18] Mr Andrew was working closely with GF's insurer on the possibility of rebuilding the bakery on the same site or on a new site in Christchurch.

[19] Ms Fife ceased working for GF In January 2012 and did not give evidence at the investigation meeting.

[72] Jane Dore, the South Island regional quality manager, at the time also gave evidence that Mr Wills had a lack of work in Christchurch and says she got the impression he was unhappy. She also says:

> *I ended up resigning from the business* [in December 2011] *due to the uncertainty of the Christchurch bread plant business, the restructuring occurring at Goodman Fielder and because an alternative role came up in Christchurch.*

[73] There is a mutual duty of good faith on employers and employees. It requires them to both be active and constrictive in maintaining a productive employment relationship in which they are, among other things, responsive and communicative[20].

[74] Mr Wills did make many enquiries of various GF managers. He told Mr Andrew and Ms Fife that he was unhappy not to be managing the bakery, that he felt dissatisfied with a lack of work and that he was frustrated by the ongoing uncertainty about timing of a decision on whether and/or when the bakery would be rebuilt. However, Mr Wills invites me to conclude from that that GF should have known he was so unhappy that he was unwell.

[75] The only medical evidence is the GP's notes from July 2011 in which Mr Wills' problems sleeping and possible depression are considered to stem from post EQ *outfall* and having to administer redundancies at work. He did not tell anyone at GF about his health problems at the time. Mr Wills says that he had to go back to his doctor in September because of health issues caused by his having to travel and work away from home. However, there is no evidence that he told anyone in GF about any health effects at that time.

[76] It is important to distinguish between enquires with GF management about the bread plant's future and actually communicating that he was so unhappy with the ongoing uncertainty that it was affecting his wellbeing. He first did that in his email to Ms Fife on 14 December 2011 when he disclosed that it was getting him down and affecting his sleep.

[77] The following day without waiting for any response to his request to be considered for redundancy or giving GF a chance to respond to his disclosure that his wellbeing was suffering Mr Wills decided to accept a new job outside of GF. He did so even though Ms Mackie had not had an opportunity to get back to him about his

[20] Section 4(1A)(b) of the Act.

request for redundancy. On 20 December 2011 Ms Mackie emailed Mr Wills and told him that she hoped to submit a draft response to Ms White and Mr Curphey by 23 December 2011. Mr Wills submitted his resignation on 21 December 2011 in any event.

[78] Mr Wills failed in his responsibility to communicate his concerns about his health and wellbeing in a sufficiently timely manner to his employer to allow it to assist him in any way in his employment before he decided to accept another role and to resign.

[79] Even if the ongoing uncertainty, which I consider stemmed by then from both the bakery closure due to the earthquakes and the wider company restructuring, was disadvantageous to Mr Wills I consider that GF:

- acted in the way a fair and reasonable employer could have acted in all the circumstances at the time when it told Mr Wills that no decision had been made on the future of the bakery and therefore on the future of his position and that it did not know when a decision would or could be made. I note that there has been no suggestion that the company-wide restructuring was of any disadvantage to Mr Wills; and

- could not have been expected, in the absence of clear, timely good faith communication from Mr Wills to know the uncertainty was affecting his wellbeing sufficiently prior to his decision to accept the other role and to resign. Acting to address any wellbeing issues was not something a fair and reasonable employer could have done in all the circumstances at the time because it did not know that Mr Wills considered that his health and wellbeing were affected.

Did GF disadvantage Mr Wills in his employment by failing to properly consider his request to be made redundant in November/December 2011?

[80] Up until Mr Wills submitted his resignation on 21 December 2011 there can be no criticism of GF's response to his request to have his redundancy considered. Ms Mackie was investigating the history of Mr Wills' work in 2011 and asked for his input, as well as Mr Andrew's and Mr Curphey's, to her investigation and she communicated her progress to Mr Wills. She also spoke to Mr Parker and

communicated with Ms Fife. However, that may have changed after Mr Wills submitted his resignation. Mr Wills still expected GF to make a decision on his redundancy and communicated with Ms Mackie on 30 December 2011 and 9 January 2012 asking for a decision. However, no decision was communicated to him until the last day of his employment with GF on 23 January 2012. Ms Mackie wrote:

> *…that the Company did not deem your management position as redundant nor did we advise you at any stage that redundancy would occur.*
>
> *After the February 2011 Christchurch earthquake you agreed to perform the duties of Site Manager and had several discussions with management to that effect. You continued in this role until you accepted a new position external to Goodman Fielder.*
>
> *The Company acknowledges your valuable contribution and service and has accepted your resignation from the business.*

[81] Ms Mackie says that Mr Wills' resignation did not make any difference to the enquiry she undertook and to GF's decision conveyed in the 23 January 2012 letter. Ms Mackie accepted that she had not looked at the GF redundancy policy when she was considering Mr Wills' request. I consider that Mr Wills' resignation meant that GF did not consider that he would have been eligible to be made redundant and so not able to be paid redundancy compensation. It is precisely this point which Ms Ryder submits caused unjustified disadvantage to Mr Wills.

[82] Ms Ryder submits that if Ms Mackie had considered the redundancy policy she would have been bound to consider that Mr Wills' position was superfluous to the company's needs and therefore he should have been made redundant.

[83] Mr Wills submits that he loved his job and had been a loyal employee with longstanding service but GF took its own concerns about retaining him in the business into account above its duties to him to treat him in good faith and to apply the redundancy policy and provision in his employment agreement.

[84] GF submits it was not compelled by either clause 20 of Mr Wills' employment agreement or the redundancy policy to begin considering whether Mr Wills' position was redundant. GF says that it recognised Mr Wills' role had been significantly altered and reduced but at no time was GF compelled to enter into consideration of whether or not to make Mr W's position redundant.

[85] Relevant clauses of Mr Wills' individual employment agreement are:

> ***5. POSITION AND RESPONSIBILITIES***
>
> *The employee accepts appointment to the position of* ***Plant Manager – Bread and FoodCoatings*** *on the terms and conditions contained in this agreement.*
>
> *The responsibilities of the position are set out in the attached position description. The employee's job description may be changed by the employer from time to time after discussion with the employee.*
>
> *In addition to the responsibilities set out in the position description, the employee will undertake other duties as requested and shall carry out all reasonable and lawful work related requests by the Company.*
>
> ***6. PLACE OF WORK***
>
> *The principal place of work for the employee will be* ***Quality Bakers Christchurch*** *or wherever the Company may reasonably relocate its premises to from time to time to meet the Company's business opportunities.*
>
> *However, effective performance of the responsibilities of the position may require the employee to change location or travel away from that location from time to time. The employee will be given as much advance notice as possible of any change.*
>
> ***20. REDUNDANCY***
>
> *Redundancy is a situation where the employee's employment is terminated by the Company, by reason, wholly or mainly, of the fact that the employee's position has, or will, become superfluous to the needs of the Company.*
>
> *In the event that the Company dismisses the employee on the grounds of redundancy, the employee will receive one month's notice of termination or payment in lieu of notice, and the parties agree that redundancy compensation is payable as follows:*
>
> *(a) Four weeks base salary/wage for the first year or part year of service completed by the employee; and*
> *(b) Two weeks base salary/wage for each subsequent completed year of service completed by the employee, subject to a maximum payment of 34 weeks pay calculated at the employee's base salary rate of pay.*
>
> *No redundancy shall arise and the company will be under no obligation to provide you with any form of notice of redundancy or redundancy compensation in the event of:*
> *…*
>
> *(b) An internal restructuring in which your position is disestablished and you are offered redeployment with the Company on terms and conditions which are generally no less favourable than your existing terms and conditions; or*

> *(c) An internal restructuring in which your position is disestablished and you accept any offer of redeployment with the Company.*
>
> *Paragraph (b) is consistent with the redundancy policy which states that redundancy does not occur if the employee is offered suitable or comparable alternative employment.*

[86] The employment agreement also provided that if there was any conflict between the terms set out within it and any general terms contained in the redundancy policy then the terms of the employment agreement *shall prevail*.

[87] GF's company policy on redundancy states that its purpose is:

> *To ensure that employees whose roles become redundant are treated in accordance with the Policy, with equity and sensitivity within the applicable legislative frameworks.*

[88] In response to the question *what does redundancy mean?* the policy states:

> *A position may become redundant when the work available for an employee in that position disappears, or is significantly diminished or altered to such a degree that the position no longer exists.*
>
> *Situations which may lead to a position becoming redundant include but are not limited to:*
>
> - *Technological change;*
> - *Job redesign/change resulting in a requirement for a substantially different set of skills, competencies and/or capabilities;*
> - *Process re-engineering;*
> - *Rationalisation of existing operations;*
> - *Organisational restructuring including mergers and acquisitions;*
> - *Closure of a plant or section of a plant;*
> - *Reduced levels of business requiring reductions in staffing levels;*
> - *Sale of part of the business where re-employment into a similar role is not possible;*
>
> *Redundancy is a situation where an employee's employment is terminated by the Company, and the termination is attributable to the fact that the position filled by the employee has, or will become, superfluous to the needs of the Company and therefore redundant.*
>
> *Although an employee's position may become redundant, redundancy does not occur if the employee is offered suitable or comparable alternative employment.*

[89] It is also relevant to consider the policy's answer to the question *what will happen if my position becomes redundant?* The policy states:

> *Goodman Fielder will actively seek opportunities for re-deployment of employees who are affected by redundancy either in a similar role/ location or a new role/location. Where redeployment is unsuccessful, Goodman Fielder will provide notice of redundancy, access to outplacement and support services, and redundancy compensation where applicable (see below).*
>
> *Where a role or roles is/are no longer required in New Zealand, all affected employees must be consulted before a final decision is made regarding whether or not their position is redundant.*

[90] Generally speaking redundancy applies to the situation where:

> *A worker's employment is terminated by the employer, the termination being attributable wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer.*[21]

[91] Redundancy is a misfortune for an employee. It is a no-fault dismissal at the employer's instigation. It is unusual, although not unheard of, that an employee claims they should have been made redundant[22]. In the *Watties* case the Court of Appeal held that:

> *…an employer's refusal to accept that a worker is redundant, if unjustifiable, will give rise to a personal grievance if the worker's employment is thereby affected to his or her disadvantage …*

[92] The law attempts to ensure that as far as possible the employer has treated the employee fairly and reasonably in the process of coming to a decision to make an employee redundant.

[93] The purpose of any redundancy pay, which is often pro-rated based on the period an employee has been employed, is to compensate the employee for his or her loss of employment and income. Any redundancy pay or other redundancy benefits, such as outplacement services, are contractually established in employment agreements, whether individual or collective.

[94] Employment agreements and employer policies often contain their own definitions of *redundancy* and *redundant*, as Mr Wills' agreement and GF's policy do. I need to interpret the words as used in the agreement and in the policy.

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[21] This definition was included in the Labour Relations Act 1987 (s.184(5)(a)(i)) but was affirmed as *corresponding with ordinary usage* by the Court of Appeal in *GN Hale & Son Ltd v Wellington etc. Caretakers etc. IUOW* (1990) ERNZ Sel Cas 843 at 848.

[22] For example, *Watties Frozen Foods Ltd v United Food & Chemical Union of New Zealand* [1992] 2 ERNZ 1038 (CA), *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 (EC), *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 (CA).

[95] Clause 20 of the employment agreement makes redundancy *a situation where the employee's employment is* ***terminated by the Company*** *by reason, wholly or mainly, of the fact that the employee's position* ***has****, or will,* ***become superfluous to the needs of the Company*** [my emphasis]. The words are not ambiguous. They clearly require the company to, first, consider that the position of Christchurch plant manager of the bakery and food coatings operations was superfluous to its needs and, secondly, to terminate Mr Wills' employment wholly or mainly for that reason.

[96] GF's evidence, which I accept, is that although the bakery section of plant was closed it required a manager at Mr Wills' level to be sited primarily at the Christchurch site to oversee the food coatings operation and that part of his role continued. Mr Wills' position was not *superfluous to the needs of the Company* despite a section of the plant being closed. In all the circumstances that was a conclusion that was reasonably open to GF and meant the position was not superfluous to its needs.

[97] When I read the redundancy policy alongside clause 20 I consider the two documents are consistent. The wording of the redundancy policy strengthens the interpretation that I have reached over the meaning of clause 20. The policy says that a position ***may*** become redundant when the work available for an employee in that position disappears, or is significantly diminished or altered to such a degree that the position no longer exists [my emphasis].

[98] Despite Ms Ryder's submissions to the contrary, when the plain and ordinary meaning of the words is considered redundancy is not an automatic consequence of an employee's available work being significantly diminished or altered. It is a possibility only as the word *may* shows.

[99] The purpose of GF's redundancy policy and the redundancy provisions in Mr Wills' employment agreement when read together is to avoid making an employee redundant, by considering other suitable work, and if that is not possible to treat the employee as fairly and reasonably as possible through compensation and other assistance. That underlying purpose serves to reinforce my interpretation of the contractual provisions above.

[100] Finally, Ms Ryder submits that Mr Wills' situation is analogous to that of Mr Sanson in *Auckland Regional Council v Sanson*[23]. I disagree. In that case the Council instigated a significant restructuring in which Mr Sanson's role, which had some staff management responsibility, was disestablished. The Council considered that it was entitled to redeploy Mr Sanson to another role with no staff management responsibility. He asserted that under the terms of the Council's redundancy agreement (the equivalent at the time of a collective employment agreement) which applied to him his job had become superfluous to the Council's needs and the newly created job did not require the same or similar skills. The Court of Appeal agreed that the new role was not the same and did not require similar skills so that Mr Sanson had been made redundant, and therefore was entitled to the contractual redundancy compensation.

[101] Mr Wills' position was not disestablished at his employer's initiative. The duties of the bakery and food coatings plant manager's position were diminished but his position was not superfluous to his employer's needs.

[102] For the sake of completeness Mr Wills situation is not sufficiently factually similar to the *Watties* case of the *Wallis* case for those cases to have precedent.

[103] GF did not breach clause 20 of Mr Wills' employment agreement in failing to make his position and him redundant. He was not entitled under the contractual provisions to be made redundant.

[104] In addition, Mr Wills was not disadvantaged in his employment by any delay in GF making a decision on his question about redundancy or by any delay in Ms Mackie communicating to him GF's decision not to make his position and him redundant. If he was disadvantaged GF's delay was justified in all the circumstances which included Mr Wills' resignation.

[105] Ms Ryder submits that another relevant provision of the policy is the answer the question *how long after being made redundant before I can apply for a role with Goodman Fielder again?*

> *The minimum time which needs to expire before an employee who received a redundancy payment may apply for a role within Goodman Fielder is a period of at least six months.*

[23] Ibid.

She submits that GF could have made Mr Wills redundant and if it had wanted to bring him back to assist in rebuilding and to manage the new bakery it would have been able to do so under that provision. That is an uncontroversial statement. It is also clear that Mr Wills could have applied for any such position even though he had resigned if GF had made the decision to rebuild the bakery. However, that provision only applies if Mr Wills had been made redundant in the first place. I have determined that he was not made redundant and was not entitled to be made redundant.

Did GF breach its duty of good faith to Mr Wills by failing to constructively respond to his requests for information?

[106] Mr Wills submits until he finished his employment GF was non-responsive and insufficiently communicative. GF was aware he did not have enough work to do, but failed to consult with him about whether his position was redundant and therefore failed to discuss possible suitable re-deployment with him.

[107] GF submits that there was on-going uncertainty about when a decision could be made about rebuilding the bakery and Mr Wills was told that repeatedly.

[108] Mr Wills did get answers to his questions about when a decision about the bakery would be made and when a decision about the site/manufacturing manger's role would be made. Those answers were that GF did not know about the timeframe on either matter. GF did give Mr Wills answers but they were not the answers he hoped for. An employee not getting the answers he wants is not the same as his employer breaching its duty of good faith to communicate with him.

[109] I do not consider Mr Wills' enquiries went so far as to request the information (such as engineering reports or land damage assessments or the content of board discussions) on which GF based its answers to him. Therefore, I do not consider that GF was obliged to give Mr Wills that information.

[110] Also for the sake of completeness I note additional the good faith obligation on employers in s.4(1A)(c) of the Employment Relations Act 2000, which requires:

> *an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees 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 the decision is made*

[111] I do not consider s.4(1A)(c) applied to GF at any time before Mr Wills left its employ. At no time was GF proposing to make a decision that was or was likely to have an adverse effect on the continuation of Mr Wills' employment.

Did GF breach its duty of good faith to Mr Wills by failing to consult him about his own redundancy when it decided to make the bread plant staff redundant?

[112] I have already decided that Mr Wills was not unjustifiably disadvantaged by not being made redundant at the same time as the bread line employees.

[113] This is a different enquiry. Mr Gray had an individual meeting with Mr Wills at which they did discuss the possibility of his redundancy with Mr Gray conveying GF's desire not to make Mr Wills redundant. That was Mr Wills' opportunity to tell Mr Gray that he was incorrect and that GF should make him redundant. He did not do that. Instead he accepted some temporary duties in Auckland and carried out the duties he already had in managing the food coatings operation and as acting site/manufacturing manager in Christchurch.

[114] GF met its duty of good faith to communicate properly with Mr Wills in July/August 2011. If Mr Wills considered at that time that it should make him redundant and did not say so then he breached his own duty of good faith to be communicative.

Was Mr Wills constructively dismissed?

[115] Constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[116] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*[24], regarding the correct approach to constructive dismissal, the Court of Appeal said:

> *In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the*

[24] [1994] 1 ERNZ 168

> *part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*[25]

[117] Therefore in examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation?

[118] Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[119] Justice Williamson in *Wellington Clerical Workers IUOW v Greenwich*[26] observed in describing this type of constructive dismissal[27]:

> *It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

[120] There must have been repudiatory conduct by GF that went beyond making Mr Wills unhappy and went to the root of the employment relationship being was destructive of mutual trust and confidence. However, in this case the opposite applies. GF did not do anything that struck at the heart of the employment relationship between it and Mr Wills. It wanted to retain Mr Wills in its employment and did what it could to do so in all the circumstances that applied at the time.

[121] Ms Ryder submits that the fact that some GF staff and Mr Wills' managers knew that he was looking for another job meant that GF could foresee that Mr Wills was likely to resign. However, understanding that he may wish to leave in the

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[25] Ibid At p 172
[26] [1983] ACJ 965
[27] at [975]

circumstances is not the same as foreseeing that he is likely to resign due to a breach by GF and I have found no breach by GF in any event.

[122] Even if there has been a breach of an employer's duty in *NZ Amalgamated Engineering etc. IUOW v Ritchies Transport Holdings Limited*[28] the Labour Court said:

> *…there is an obligation on the part of the innocent party to communicate acceptance of the guilty party's repudiation. A failure to do so may mean that the contract has not been rescinded as a result of the guilty party's breach*[29].

[123] In that case the Court found that the employee had continued to work without protest and left because he was unhappy with his employer's behaviour in a number of areas and because he had found another job. Therefore, it held that he had not been constructively dismissed[30].

[124] I have not found that GF breached any of its duties to Mr Wills or breached his employment agreement so the argument that he was constructively dismissed must fail. However, if I am wrong and there was a breach or breaches by GF, Mr Wills, by continuing to work for GF and receive pay, including increased pay, affirmed the contract (after every potential breach that he has claimed) all the way through until he gave notice because he had found another job.

[125] I accept that Mr Wills resigned because of continuing uncertainty about the future of the bakery and about his future with GF. That uncertainty was the reason he began seeking other employment. However, I consider that Mr Wills left GF because he had secured new employment which he considered would solve the uncertainty problem for him. Therefore, I find that Mr Wills was not constructively dismissed.

[126] Mr Wills was a conscientious employee who wanted more work, more satisfying work and more certainty about his career future with GF. However, redundancy is a misfortune not a privilege or a right. Redundancy compensation is to compensate an employee for the loss of their job and income. It is not a windfall for a long-standing employee who wishes to leave due to misfortune in his employer's business however much that misfortune and the underlying reasons for it have personally affected him.

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[28] [1991] 2 ERNZ 267
[29] Ibid, at 278
[30] Ibid at 279.

[127] The on-going nature of the earthquakes and associated aftershocks played a large part in GF's inability to make a decision in 2011 about the future of the bakery. Indeed there were further large earthquakes causing yet more land damage in Christchurch on 23 December 2011[31] which was two days after Mr Wills tendered his resignation to take effect on 23 January 2012. GF was also in ongoing negotiations with its insurer.

Determination

[128] Mr Wills was not unjustifiably disadvantaged in his employment. Goodman Fielder New Zealand Limited did not breach its duty of good faith or any provision of Mr Wills' employment agreement. GF was not compelled by its redundancy policy and Mr Wills' individual employment agreement to make the Christchurch bakery and food coatings plant manager's position redundant and therefore Mr Wills is not entitled to redundancy compensation or its equivalent in special damages or any other remedies.

Costs

[129] Costs are reserved. As the successful party GF is entitled to a reasonable contribution towards its actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then GF has 28 days within which to file a costs memorandum and Mr Wills has 14 days within which to respond.

[130] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff (of $3,500) approach. The investigation meeting took one day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority

[31] The two largest shocks that day were 6.2 and 5.9 on the Richter scale. Large aftershocks also occurred throughout Mr Wills' period of notice, such as two of 5.3 and one of 5.6 on 2 January 2012.