IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 109
5308294

	BETWEEN	MARIE-ANNE DALLIMORE Applicant
	AND	WHOLESALE BUYING LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Gerald Nation and Sarah Waggott, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	12 April 2011 at Christchurch
Further Documents:	12 April 2011 from the Respondent 13 April 2011 from the Applicant
Submissions received:	4 May 2011 and 24 May 2011 from Applicant 18 May 2011 from Respondent
Determination:	1 June 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement

[1] Regrettably, the issuing of this determination has been delayed. The investigation meeting occurred in April 2011. Work on this determination was deferred while I attended to other matters delayed as a result of the September 2010 and February 2011 earthquakes. Also, determinations require careful analysis of exhibits, evidence and submissions, tasks which have been difficult in the Authority's present working circumstances. Preparation of the determination has also been affected by the issue referred to by the Chief of the Authority in his memorandum dated 7 May 2012.

[2] Since turning my attention to this matter, I have reviewed the administrative files and reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes of the evidence and the parties' considered submissions.

[3] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

Employment Relationship Problem

[4] Wholesale Buying Limited (WBL) operates a business called Cherrytree based in Christchurch which it took over from a previous owner in about October 2008. Tracey Lewis and Simon Thomson are the principals of WBL. Through separate companies they have interests in Cherrytree businesses elsewhere in New Zealand. When WBL took over the Christchurch business they re-employed existing staff, including Marie-Anne Dallimore.

[5] In April 2010 WBL consulted with Christchurch staff over a restructuring proposal. Following that, Mrs Dallimore was dismissed as redundant. She says that her dismissal was substantively unjustified, that she was unjustifiably disadvantaged and that WBL did not act in good faith towards her. These claims arise from the consultation process and WBL's implementation of the restructuring proposal. WBL says that it properly consulted with Mrs Dallimore and other staff about the proposal, following which Mrs Dallimore was justifiably dismissed for redundancy.

[6] To resolve this problem I must set out fully what happened prior to Mrs Dallimore's dismissal and resolve some evidential disputes before determining whether WBL's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances.

Further information

[7] After the investigation, in accordance with my direction, counsel for the applicant provided a diary that was mentioned in the evidence of one of the witnesses (Mrs Alldred). On my review of the diary, it contains nothing of relevance.

[8] Much of the disputed evidence arose from evidence given by Mrs Alldred. As explained below it has not been necessary to resolve most of those disputes. To the extent necessary my conclusions about any evidential conflicts follow.

Mrs Dallimore's employment

[9] There is a written employment agreement dated 4 October 2008 under which Mrs Dallimore was employed for around 20 hours per week but it is common ground that Mrs Dallimore's hours increased in 2009 to be about 35 per week. Mrs Dallimore's position was as a member services assistant. That involved some reception duties, dealing with quotes, orders and suppliers and other tasks associated with meeting members' purchases.

[10] The individual employment agreement includes provision for redundancy at clause 11. It states that a redundancy situation arises when the employment is terminated due to the fact that the position held by the employee is superfluous to the needs of the employer. There is a requirement to give not less than four weeks' notice of termination. There is no requirement to pay redundancy compensation. The redundancy clause also states:

> *In such cases, the employer will follow a fair procedure, will consult with the affected employees and explore any alternative options before terminating the employment.*

Restructuring proposal

[11] Ms Lewis' evidence is that their Wellington Cherrytree business is successful and profitable while the previous operator of the Christchurch Cherrytree business was not financially successful. There is no reason to doubt that evidence.

[12] The Wellington Cherrytree business had used a finance software package called Exonet for some while. This software reduced double handling and paper-work associated with quotes, orders and processing sales. WBL decided to introduce Exonet to Christchurch as part of its business improvement plan. Ms Lewis came to Christchurch for several days in March 2010 to start the onsite transition to Exonet. At the same time Ms Lewis met individually with the full time member services staff including Mary Alldred (team leader) and Mrs Dallimore. There are notes of these

meetings which Ms Lewis says were made at the time. Ms Lewis says that Mrs Alldred suggested during their individual discussion, in response to a question, that her ideal staffing structure would be one full time team leader, two part time member services staff, one part time receptionist and one full time stock controller. Ms Lewis' notes reflect such a discussion.

[13] Mrs Alldred says that there was no discussion about restructuring with her in March 2010. When questioned, Mrs Alldred told me that she first heard about the restructuring proposal on 20 April 2010.

[14] Ms Lewis was in Christchurch again on 31 March and 1 April and from 7 April until 9 April. She says that she discussed a number of matters including the restructuring proposal with Mrs Alldred and the two other Christchurch managers (Jo Falconer and Kim Harding) on these latter dates. There is an email dated 14 April 2010 that Ms Lewis sent to Ms Falconer, Ms Harding and Mrs Alldred summarising their discussions. As printed, the second page includes a summary of the restructuring proposal. When questioned about this, Mrs Alldred said that she could not recall seeing the second page and indicated some doubt about its bona fides. Mrs Alldred also said that she did not recall saying anything to Ms Lewis about part time positions in March. There is a further piece of documentary evidence to mention. By email dated 19 April 2010, Ms Lewis sent Ms Falconer a copy of the restructuring proposal with a request for her to review it with Mrs Alldred and then ring to discuss it. Ms Falconer's evidence is that she did discuss this document with Mrs Alldred who at the time did not raise any objection to the proposal.

[15] There is insufficient reason to doubt the bona fides of the 14 April 2010 email. Given that, there must have been a discussion about the restructuring proposal with Mrs Alldred prior to 14 April 2010. Mrs Alldred may also have forgotten discussions with Ms Falconer on 19 April. I find that Mrs Alldred was involved in discussions prior to 20 April with Ms Lewis about a restructuring proposal affecting Mrs Dallimore.

[16] Around lunchtime on 20 April, the Christchurch staff were asked to attend a meeting after work that evening. Mrs Dallimore was otherwise engaged so did not attend the combined meeting. However, she met with Ms Lewis shortly before 5pm. Mrs Dallimore's evidence is that she was told that there was a restructuring proposal, given a letter which she read, told something about part time positions which she did

not take in because of the shock, and said that she would need to speak to her husband but could not afford to only work part time but would if that was what was decided. Mrs Dallimore also says she was told not to worry because they only wanted feedback about the proposal.

[17] Ms Lewis' evidence is that she encouraged Mrs Dallimore to discuss the proposal with her husband and that Mrs Dallimore told her she had no worries about becoming part time. Ms Lewis also told Mrs Dallimore they would be interested in hearing her preferences but first wanted to get feedback on the restructuring proposal.

[18] The differences are perhaps more of perspective than substance and it is not necessary to do more than recognise the differing perspectives at this point.

[19] There is no dispute about the documentation that was given to Mrs Dallimore at this time. There was a letter dated 20 April 2010. It mentions the introduction of Exonet and the need to reduce costs as reasons for the restructuring proposal. It describes the proposal to have two part time member services assistants, two Saturday member services assistants and one full time stock coordinator. The documents included a job description for the member services positions. The letter asks for feedback on the proposal and advises that there will be an individual meeting with Ms Lewis and Mrs Alldred shortly, ahead of the decision by Friday 23 April and (if proceeded with) implementation by Monday 24 May. The letter also states:

> *Should the proposal proceed, the selection criteria that will apply for appointments to roles, will be based on skills and experience for each position.*
>
> *Should this proposal result in any redundancies the provisions contained in the affected employee Individual Employment Agreement will apply.*

[20] Mrs Dallimore discussed the documents with her husband that evening. They could see no sense in dividing her full time role into two part time positions. Next day, Mrs Dallimore discussed it further with Mrs Alldred and Hannah Armstrong (a WBL employee) who both agreed with that view. Mrs Alldred also told Mrs Dallimore not to worry as they were only being asked for feedback about the proposal.

[21] Ms Falconer (in place of Ms Lewis) and Mrs Alldred met with Mrs Dallimore and others in individual meetings on Wednesday, 21 April.

[22] Mrs Dallimore's evidence is that she told Ms Falconer and Mrs Alldred that she did not think the proposal would work because members wanted to deal with the same person; that Ms Falconer started to tell her that the company was within its rights to restructure and that Christchurch would have the same structure as Wellington; that Ms Falconer told her that she would have to apply for one of the part time roles and be interviewed with other applicants; and that Ms Falconer tried to reassure her that it was just a proposal and they were seeking feedback.

[23] There are notes of this meeting which Ms Falconer says she made at the time. However, Mrs Alldred's evidence is that the notes in evidence marked "JF2" are not the notes made by Ms Falconer during the meetings with the staff. The notes for Mrs Dallimore's meeting include some parts that read as if added later in time. I will be cautious about treating the notes as a contemporaneous record. Despite that, it is clear enough that Mrs Dallimore told Mrs Alldred and Ms Falconer that she thought that the position should not be split into two part time positions because members preferred continuity. Mrs Dallimore also said that she could not afford to go part-time. Mrs Dallimore was told that the business structure would change, that existing staff would be invited to apply for the new roles and that the positions would be advertised to ensure that there were the necessary skills for the positions. At the same time, Mrs Dallimore was told this was just a proposal for consultation.

[24] Susanne Holmes is employed by WBL in Christchurch. On 22 April she had a discussion with Mrs Dallimore that left her thinking that Mrs Dallimore had not understood that the proposal would result in her redundancy. Ms Holmes then mentioned that concern to Ms Falconer who repeated it in an email on 22 April to Ms Lewis. There may also have been an earlier discussion between Ms Lewis and Ms Falconer as to Mrs Dallimore's lack of understanding. In response to the 22 April email Ms Lewis suggested that Ms Falconer meet again with Mrs Dallimore to ensure that she did understand the proposed restructure and its potential impact. Ms Falconer also says that Mrs Alldred commented to her about Mrs Dallimore's lack of understanding about the proposal. Mrs Alldred denies such a conversation. It is not necessary to resolve this conflict.

[25] The further meeting suggested by Ms Lewis occurred on Monday 26 April. Present were Ms Falconer, Ms Holmes and Mrs Dallimore. Mrs Dallimore says that they kept asking if she understood the proposal and she asked for the reasons behind it

as they did not make sense to her. Mrs Dallimore says that Ms Falconer told her that the proposal was going ahead and that everyone except Mrs Dallimore had agreed with it. However, Mrs Dallimore told Ms Falconer that others disagreed with the proposal.

[26] Ms Falconer's evidence is that she took notes during this meeting which she later typed up and which she and Ms Holmes signed as accurate very soon after to confirm their recollection of the meeting. When questioned by counsel, Ms Falconer said that she could only assume that she had typed up these notes on 26 April. In response to my question on the same point, she said that she typed up the notes *"immediately"* after the meeting. Ms Falconer also told me that she did not know where the actual notes made by her during the meeting were now. The typed notes themselves are signed by Ms Falconer and Ms Holmes. Ms Holmes told me that she could not recall when she had signed these notes but that she thought by that time that Mrs Dallimore had already involved her lawyer. The notes themselves read as if they had been written after rather than during a meeting. At the end they mention an event that occurred after 5pm on Tuesday 27 April. Ms Holmes did not work on Wednesdays so she must have signed the notes on Thursday 29 April at the earliest. It seems likely that the typed notes (JF4) were made on Wednesday 28 April or later and in the knowledge that Mrs Dallimore had engaged a solicitor. They are to some extent self-serving. I will treat these notes with some caution as to whether they represent an accurate account of the discussions on 26 April with Mrs Dallimore.

[27] Nonetheless, it is clear that Mrs Dallimore communicated her reasons for disagreeing with the restructuring proposal and she questioned the legality of changing her full time role into two part time roles. Mrs Dallimore was told that staff whose roles were disestablished would be invited to apply for the new positions. She was not told that the roles would not be advertised. Mrs Dallimore took from this meeting that the proposal had been confirmed. She rang Mrs Alldred who was at home sick that day. Mrs Alldred told her that she was not aware that the proposal had been confirmed.

[28] After the meeting, because Mrs Dallimore could not concentrate at work, she told Ms Falconer that she was feeling ill and wanted to go home, which she did.

Termination of employment

[29] Ms Lewis' evidence is that she reviewed all the feedback and decided to proceed with the restructuring proposal. Ms Lewis travelled to Christchurch to advise staff. Ms Lewis met with Mrs Dallimore on Tuesday 27 April. Mrs Alldred was also present and led the meeting for WBL while Ms Lewis took notes. These notes I find are a fair reflection of the meeting. Mrs Alldred told Mrs Dallimore that they had decided to proceed with the proposal with the result that Mrs Dallimore's role would be disestablished. Mrs Dallimore was encouraged to look at the new structure and roles and decide which role she would be interested in. Mrs Dallimore asked if she was being made redundant. Mrs Alldred told her *"No"* as WBL wanted her to look at the other roles and say which ones she was interested in. Mrs Dallimore was asked to let them know by the next day. Ms Lewis apologised that the decision meant that Mrs Dallimore's role would need to change. She told Mrs Dallimore to talk it over with her husband and let them know the next day.

[30] Mrs Dallimore was given a letter dated 27 April confirming the decision to disestablish her position and asking for her to indicate interest in any of the new roles, the job descriptions for which were included with the letter. The letter continued:

> *Appointments to roles will be made following an interview process which will focus on the skills and capabilities required for the role. We intend to start these interviews as soon as possible after Wednesday and are looking to complete them by Tuesday 4th May 2010.*
>
> *We appreciate your continued support.*
>
> *Yours sincerely,*
> [signed]
> *Jo Falconer*
> *Manager*

[31] Mrs Dallimore worked only part of the next day (28 April). Later, she phoned Mrs Alldred and told her that she would let them know by Monday what she wanted to do. Mrs Dallimore's evidence is that she instructed her lawyer to tell WBL that she was not able to make a decision as yet. Ms Lewis's evidence, which I accept, is that she received a call from a lawyer asking for an extension. The lawyer said he was meeting with Mrs Dallimore the following week. Ms Lewis did not object to deferring matters pending that meeting. Ms Lewis took no further steps with the

restructuring at that stage. Mrs Dallimore also saw her doctor who certified her unfit to return to work meantime.

Grievance raised

[32] Mrs Dallimore apparently met with her lawyer on 4 May and the lawyer sent Ms Lewis a letter on 6 May by email. To summarise: the letter alleges that Mrs Dallimore was not consulted about the restructuring despite a promise in the 20 April letter that there would be an individual meeting with her; it states that Mrs Dallimore's position was not genuinely superfluous; it advises that Mrs Dallimore considered that her employment was terminated on 27 April 2010 and that she would not be accepting a part time role; and it concludes that the failure to consult was in breach of good faith and that Mrs Dallimore has a personal grievance.

[33] Ms Lewis responded on 6 May. To summarise, the letter says that WBL consulted with Mrs Dallimore by meeting with her on 20 April, 21 April and 26 April following which, on 27 April, Mrs Dallimore was advised that the proposal would proceed; that the implementation had been stalled pending further contact from Mrs Dallimore's lawyer; that Mrs Dallimore has not been dismissed; and asks for advice about whether she would meet to discuss applying for one of the roles.

[34] Mrs Dallimore's lawyer responded on 11 May rejecting most of the assertions in Ms Lewis's letter. Ms Lewis wrote again on 12 May in response. For present purposes, I just note that the letter included the following paragraph:

> *Following our consultation process on the proposed re-structure of Cherrytree Christchurch, the confirmed disestablishment of the role that Marie-Anne is performing and her decision not to express and interest in any of the roles in the new structure, I now advise that we give Mrs Dallimore formal notice of termination due to redundancy, effective today, 12th May 2010. We would have preferred to have met with her and discussed this in person, but can confirm that the provisions of her employment agreement will apply. This action is taken purely as a business decision and is being taken following genuine consultation with Marie-Anne and the other staff involved. I propose that we pay Marie-Anne in lieu of her notice period, which we would have otherwise hoped she would have worked while we supported her to secure other employment.*

Justification

[35] These events occurred in 2010. To summarise the applicable test, justification for a dismissal or disadvantageous actions must be assessed on an objective basis by

considering whether WBL's actions and how WBL acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[36] A fair and reasonable employer will always comply properly with their contractual obligations. I have already set out an extract from clause 11 of the employment agreement.

[37] Addressing the statutory good faith obligations under s.4 of the Employment Relations Act 2000, in *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 the Employment Court said at [42]:

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[38] To summarise s.4(1A)(c), an employer who proposes to make a decision that is likely to have an adverse effect on an employee must give the employee access to relevant information and an opportunity to comment on the information before making that decision.

[39] Accordingly WBL had both a contractual and a statutory obligation to consult with Mrs Dallimore.

[40] In *Simpsons Farms Ltd v Aberhart* [2006] 825 the Employment Court was considering the application of s.103A of the Employment Relations Act 2000 in the context of a redundancy situation. As well as confirming the continued application of long standing principles about substantive justification for redundancy dismissals the Court went on to say this about consultation:

> *Fundamental elements of consultation that are now strengthened and required by s4 in redundancy cases include …:*
>
> *• Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.*
>
> *• If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.*
>
> *• Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*

> • *Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.*
> • *The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.*

[41] In the letter dated 6 May 2010 Mrs Dallimore's lawyer says that the employment was terminated on 27 April 2010. However, on 27 April Mrs Dallimore was told that her position was disestablished but she was not given notice of dismissal. If there was any doubt in Mrs Dallimore's mind after the meeting the 27 April letter clarified that her position had been disestablished but she had not yet been dismissed. WBL promptly conveyed the same position in response to the solicitor's letter. Accordingly I find that WBL dismissed Mrs Dallimore by written notice dated 12 May 2010. That is the point at which circumstances must be assessed for the dismissal grievance.

[42] I find that WBL gave Mrs Dallimore access to the information relevant to its decision about restructuring. During the brief meeting on 20 April Mrs Dallimore was told that the restructuring related to aligning Christchurch with Wellington, the introduction of Exonet and a need to increase membership and product sales. The 20 April letter set out full details of the proposal, and referred to the rationale and the expected benefits. This information was also canvassed during the meetings with Mrs Dallimore on 21 April and 26 April.

[43] Ms Lewis thought that a change from full-time to part-time staff would give greater cover for leave and sickness, ensure that there were two staff present in the members' lounge throughout the day, give the opportunity to build product specialisations and give the business two sales persons rather than one. The 20 April letter mentioned the point about cover and improved member service throughout the day. During the 21 April meeting there was discussion about a future emphasis on sales as Exonet reduced the requirement for sales administration. These matters were also discussed during the 26 April meeting. Overall Mrs Dallimore was given sufficient information to enable her to state a view. Her view was that there was a need for extra full-time staff and that members preferred continuity in dealing with the same staff member. Mrs Dallimore expressed that view on 21 April and again on

26 April. That reflects that she had sufficient information to form a view about the proposal.

[44] There is a submission that WBL's decision was pre-determined. The argument is that WBL did not get Mrs Dallimore in her existing role to focus on sales; that WBL had already formed a view about the desirability of part-time positions based on its Wellington experience; and that WBL was anxious to ensure that Mrs Dallimore understood that her redundancy would follow from the proposal.

[45] I do not accept this submission. Exonet had only just been introduced and the administrative efficiencies starting to accrue. It was an obvious time to review the staffing structure and consider whether, in Ms Lewis' judgement, it best supported the achievement of WBL's business plans. If Mrs Dallimore had been retained no doubt there would have been a focus on sales in place of the previous focus on sales administration. Ms Lewis is entitled as a matter of her business judgement to think that there are benefits in employing part-time employees. WBL clearly signalled that it wanted to align Christchurch and Wellington. That extended to the re-introduction of part-time positions in Wellington, a restructuring proposal that was subject to consultation at the same time as the Christchurch restructuring proposal. None of that means that the outcome was pre-determined in any improper way. A fair and reasonable employee would react if it was apparent that someone in Mrs Dallimore's situation had not understood something such as a restructuring proposal – that was part of being responsive and communicative.

[46] Ms Lewis' evidence is that she considered employees' responses to the proposal which were a mixture of support and opposition and decided to proceed. There is no evidential basis to reject Ms Lewis' evidence.

[47] For these reasons I find that WBL did properly consult with Mrs Dallimore about the restructuring proposal.

[48] A major part of Mrs Dallimore's case is the contention that there was no genuine redundancy situation. There is a definition of redundancy in the employment agreement but it accords with common parlance in the cases. I am referred to a number of cases dealing with this issue.

[49] In *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378 the employer wanted to disestablish all firefighter positions and establish fire officer positions, the latter involving some different emphasis in duties. I am referred to the following part of the judgment:

> *The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant.*

[50] In the present case the work remained although there was to be some change to the activities making up the job content. However, in *McCulloch* the Court went on to say:

> *The issue whether the job is the same with a change of focus/emphasis or a different position is a question of fact and degree determined exclusively and conclusively by the evidence.*

[51] The present case is the reverse of a case mentioned in *McCulloch*, *Auckland Clerical etc IUOW v Puhi Nui Motel* [1981] ACJ 97. In that case the employee worked part-time but the employer decided it needed a person full-time in the position. The employer offered the employee the full-time position and when that was declined dismissed her as redundant. The Court upheld the dismissal. Even though there was no change to the activities making up the job content, the new position was different and the existing employee's position was therefore superfluous. Applying the *Puhi Nui* reasoning I find that the proposed part-time positions in the present case were different positions. That is the essential difference between the present case and *McCulloch*.

[52] There is a submission that a variation in duties of 20% or more is required to render a position significantly different: see *Westpac Banking Corp v Stephen* [2000] 1 ERNZ 566. In the present case the duties proposed for the new position reflected much less than a 20% difference but that does not rule out the possibility of a genuine redundancy as is apparent from the *Puhi Nuin* case.

[53] I am also referred to *Wilkinson v Wairarapa Crown Health Enterprise Limited* [1999] 2 ERNZ 133. In that case the Court said:

> *A genuine redundancy can justify a dismissal. Before there can be a genuine redundancy, there must be a redundancy. The general test asks whether the job content has gone. If the job content substantially remains but the*

> *employer wants to give the position to somebody else, then it cannot justifiably dismiss the incumbent …*

[54] This extract too must be read subject to the *Puhi Nui* case.

[55] In the end I am satisfied that there was a genuine redundancy situation because, for genuine business reasons, WBL decided that Mrs Dallimore's full-time position was superfluous to its needs.

[56] There is a submission that WBL was obliged to consider redeployment options as an alternative to redundancy. I am referred to *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102 and *Wang v Hamilton Multicultural Services Trust* [2010] ERNZ 468. I agree with counsel that *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 no longer represents the law in this area. I should also note that in this case there was a contractual obligation to *explore any alternative options* before dismissing for redundancy.

[57] Here, Mrs Dallimore received inconsistent messages about an appointment to one of the part-time positions. Curiously, a draft of the 20 April letter just refers to the redundancy provisions in the employment agreement. The 20 April letter actually given to Ms Dallimore states *Should the proposal proceed, the selection criteria that will apply for appointments to roles, will be based on skills and experience for each position*. Ms Lewis' notes record Mrs Dallimore expressing interest in a part-time position. Judging by Mrs Dallimore's evidence that was probably a fallback option but she may not have expressed it clearly that way in light of her state of shock. In any event Ms Lewis said that they would be interested in hearing from Mrs Dallimore about that in due course. During the 21 April discussion Mrs Dallimore was told that the staff would be invited to apply for the new roles but they would be advertised to ensure that there were the necessary skills. Something similar may have been said on 26 April or at least there was no revocation of the previous statement. On 27 April nothing was said about advertising the new positions but there was still mention of Mrs Dallimore having to apply for the new roles. The 27 April letter refers to Mrs Dallimore being invited to indicate her interest in a role but also says:

> *Appointments to roles will be made following an interview process which will focus on the skills and capabilities required for the role.*

[58] Some days later, Mrs Dallimore stated that she had been dismissed and was not in a position to take up either part-time position. I note my earlier finding that Mrs Dallimore had not been dismissed at that point. WBL subsequently terminated the employment after Mrs Dallimore rejected an offer to meet to discuss applying for the new roles.

[59] The contractual obligation was to *explore any alternative options*. WBL's choice of language was either a breach of contract or misled Mrs Dallimore. I will return to this point shortly. However, prior to the dismissal, Mrs Dallimore made it very clear that she was not interested in a part-time position. That brought any exploration of alternatives to an end and the dismissal followed.

[60] To summarise, WBL properly consulted with Mrs Dallimore. Following that consultation, the company decided to implement a restructuring proposal the result of which was to create a genuine redundancy situation. WBL then attempted to explore alternatives to dismissal but in the face of Mrs Dallimore's response could take that no further. Mrs Dallimore was then dismissed. Regarding the dismissal, WBL's actions and how it acted were those of a fair and reasonable employer in the circumstances. The decision to dismiss Mrs Dallimore was therefore justified.

Unjustified disadvantage

[61] There is a claim that Mrs Dallimore's employment was affected to her disadvantage by WBL's unjustified actions. The claim arises from the same facts.

[62] In Christchurch only Mrs Dallimore was substantially affected in a negative way by the restructuring proposal although others were affected in minor ways. Mrs Dallimore formed the view that WBL wanted to get rid of her and proceeded with the restructuring to achieve that end. However, the evidence does not establish such a case as explained above.

[63] Despite not establishing that case, I find that Mrs Dallimore's employment was otherwise affected to her disadvantage. Mrs Dallimore disengaged from any discussion about appointment to the new roles. Mrs Dallimore also was unnecessarily upset by WBL. Both results were caused in particular by the inconsistent statements

about appointments to the new roles and what Ms Falconer and Mrs Alldred told her on 21 April. The message from Mrs Alldred on 21 April was that the positions would be advertised to ensure that WBL got the right skill set for the positions. Ms Falconer did not correct that statement and must be taken as affirming it. Mrs Alldred was Mrs Dallimore's supervisor and Ms Falconer was the Christchurch manager. Mrs Dallimore was entitled to believe that their statements represented WBL's position.

[64] This action by WBL was unjustified because it was a breach of both the statutory and the contractual obligation to consider redeploying Mrs Dallimore to a part-time position. Alternatively, it was misleading as to WBL's actual intentions. In the *Puhi Nui* case the Court stressed the fact that the employee had been offered the full-time position as a matter of priority and the inevitability of dismissal once the employee did not accept the new position. In the present case the new role would have involved a change in emphasis in the duties to be performed. Mrs Dallimore's willingness to adapt was something that should have been explored with her without it being dressed up as an application for a new job.

[65] There is a submission that WBL had to comply with its obligations to other employees as well as to Mrs Dallimore and for that reason could not simply offer to redeploy her into one of the part-time positions. I do not accept this submission. WBL had a contractual obligation to Mrs Dallimore that arose from an employment agreement that it had drafted. WBL cannot escape the consequences of breaching that agreement just because it may have had obligations to others. I put it that way because WBL's contractual obligations to others are not part of the evidence. In any event, the real problem was that WBL couched its approach in the language of a job application by Mrs Dallimore rather than an exploration of alternative options. It emphasised the prospect of her being thought unsuitable for job functions substantially similar to her existing job by reference to assessing her skills and capabilities and the prospect of advertising the positions.

[66] It follows that Mrs Dallimore has established a personal grievance of unjustified disadvantage.

Remedies

[67] There was no blameworthy conduct by Mrs Dallimore that contributed to the situation giving rise to the grievance.

[68] There is a claim for compensation of $8,000.00 for distress. Mrs Dallimore can properly be compensated for distress caused by the way WBL dealt with her about redeployment or options other than redundancy but she cannot be compensated for distress arising from the loss of her full-time position given the finding that there was a genuine redundancy concerning that role. The finding of an unjustified disadvantage grievance also permits compensation for distress arising from Mrs Dallimore not being redeployed to one of the part-time positions.

[69] Mrs Dallimore says that she was placed under great stress because of the sudden loss of income. She felt like a failure because of her inability to provide for her family. Mrs Dallimore lost confidence in herself, struggled to find other employment, could not sleep or eat properly and needed medical assistance with the sleeping and anxiety issues. Mrs Dallimore was extremely hurt that WBL wanted to get rid of her. This evidence, all of which I accept, is relevant as explained above. Mr Dallimore also gave evidence about the effects on Mrs Dallimore. I will refrain from repeating the evidence but there is no reason to doubt its accuracy. I assess $7,500.00 the sum necessary to compensate Mrs Dallimore for this proven distress.

[70] There is a claim for lost remuneration. Mrs Dallimore is not entitled to any compensation for the loss of remuneration from her full-time position but she is entitled to compensation for the loss arising from not being redeployed to one of the part-time positions. Mrs Dallimore commenced new employment on 26 September 2010. It appears that she may have been paid at a lower rate in this new job but I will limit the recovery of lost remuneration to the date that Mrs Dallimore commenced in this new position. Mrs Dallimore was dismissed on 12 May 2010 on four weeks notice. I assume that she was properly paid up to 9 June 2010 pursuant to the notice requirement. Mrs Dallimore would probably have accepted *member services assistant Role A* which was 22.5 hours per week plus alternative Saturdays. I will leave it to the parties to calculate the gross that would have been paid between 10 June 2010 and 25 September 2010 at Mrs Dallimore's hourly rate prior to the dismissal. That is the

gross sum to be paid to Mrs Dallimore as compensation for lost remuneration. Leave is reserved in case of any difficulty with the calculations.

[71] Counsel for WBL submits that Mrs Dallimore failed to mitigate her loss because she chose not to consider the part-time work because of her need for full-time employment. However, Mrs Dallimore would have accepted part-time employment as a fallback option. The reason why she was not prepared to consider WBL's part-time positions was because of the way WBL dealt with her over those positions which, I have found, gave rise to her personal grievance. In those circumstances I do not accept that there was a failure to mitigate. The evidence is that Mrs Dallimore searched for other employment once she had recovered to an extent from this experience and she eventually obtained another job. I find that Mrs Dallimore did properly mitigate her loss of income.

Summary and orders

[72] Mrs Dallimore was not unjustifiably dismissed but has a personal grievance of unjustified disadvantage.

[73] To remedy this grievance, Wholesale Buying Limited is ordered to pay Mrs Dallimore:

a. compensation of $7,500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000; and
b. reimbursement of lost wages between 9 June 2010 and 25 September 2010 based on the hours of work for *member services assistant Role A* and at Mrs Dallimore's hourly rate immediately prior to the dismissal.

[74] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority