NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 407
3235639

	BETWEEN	JORDAN FIETJE Applicant
	AND	KFV Respondent

Member of Authority:	Lucia Vincent
Representatives:	Leonard Fietje, advocate for the Applicant Respondent in person
Investigation Meeting:	2 April 2024 in Christchurch
Submissions and further information received:	2, 4, 10 and 11 April 2024 from the Applicant 2, 3, 4, 10 and 11 April 2024 from the Respondent
Determination:	9 July 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Ms Fietje worked as a nanny for KFV from August 2022 until her redundancy in March 2023. Ms Fietje says KFV followed an unfair process before deciding to make her role redundant, then replaced her. She says KFV unjustifiably dismissed her.

[2] KFV says she followed a fair process after her family's needs changed. She employed someone in a different role with more focus on duties like cooking and cleaning - a role Ms Fietje did not want. She rejects Ms Fietje's grievance.

How did the Authority investigate?[1]

[3] I investigated by reviewing all the information provided by the parties and holding an investigation meeting. The written material included statements of evidence from Ms Fietje, her mother, KFV, her father, and a friend. At the investigation meeting I asked questions of Ms Fietje and KFV under oath or affirmation. I received further information and submissions from both parties after the meeting.

What are the issues?

[4] The issues I investigated and determined were:

(a) Should I make an order for non-publication?

(b) Did Ms Fietje raise her personal grievance within time?

(c) Did KFV unjustifiably dismiss Ms Fietje when she made her redundant?

(d) What remedies should I award (if any), such as compensation?

(e) Should I award a penalty for a breach of good faith?

Should I make an order for non-publication?

[5] KFV asked the Authority to prohibit from publication the name of her child and any details that could identify her, such as schools. Ms Fietje did not make an application for her own name to be prohibited from publication. She objected to an order for KFV's name on open justice principles, although acknowledged publishing KFV's child's name was undesirable.

[1] As permitted by section 174E of the Employment Relations Act 2000 (**Act**), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] I may prohibit from publication all or any part of any evidence given or pleadings filed, or the name of any party or witness or other person.[2] Any such order may be subject to such conditions as the Authority thinks fit. I made an interim order at the investigation meeting and reserved my decision about whether to make it permanent.

[7] KFV's child is under the age of five. The public does not have an interest in knowing her name. I have decided to prohibit from publication the name of KFV's child on a permanent basis, along with any details that could identify her. These include KFV's name because she is her mother and any reference to her schools or the names of other family members such as her grandfather.

Did Ms Fietje raise her grievance within time?

[8] The Employment Court has summarised the applicable principles when considering whether someone has raised a personal grievance for the purposes of section 114 of the Act:[3]

> [36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there has been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
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> [37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employer's communications complied with s 114 (2) of the Act by conveying the substance of the complaint to the employer.
>
> [38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[9] Ms Fietje raised concerns about her redundancy in a letter to KFV dated 31 March 2023.[4] KFV acknowledged that letter and responded to it with a letter of the same date. I am

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[2] Under clause 10 of Schedule 2 of the Act.
[3] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 footnotes omitted.
[4] Set out in full at [23] below.

satisfied that the substance of Ms Fietje's letter raised a personal grievance because it described Ms Fietje's concerns about the redundancy process and KFV's failure to comply with good faith obligations.

[10] Following Ms Fietje's letter, Mr Fietje communicated with KFV or KFV's representative. For example, an email on 1 April 2023 summarised concerns:

> When I read through the material she sent me, along with communications from [KFV], I'm frankly appalled at the way my daughter has been treated and will encourage her to seek remedy. Fair process has clearly not been followed and, in my view, what happened effectively amounts to unfair dismissal rather than redundancy.

[11] Ms Fietje raised her grievance within time.

Did KFV unjustifiably dismiss Ms Fietje?

What happened?

[12] Ms Fietje and KFV agree they worked amicably together from August 2022 until her redundancy in March 2023. KFV appreciated Ms Fietje's skill and good fit as a nanny.[5] Ms Fietje enjoyed the opportunity to work with KFV and appreciated her considerate approach and communication.[6]

[13] The individual employment agreement (**Agreement**) recorded that KFV had employed Ms Fietje as her nanny on a fixed term for two years.[7] The Agreement also contained a clause about redundancy:[8]

> **Redundancy**
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> h) Due to the nature of the work the employee performs for the employer, no restructuring will occur in terms of Part 6A of the Employment Relations Act. If the employee's position becomes superfluous to the employer's needs, then this Agreement may be terminated by reason of redundancy.

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[5] For example, KFV referred to the "great working relationship" with Ms Fietje at [7] of her statement of evidence, offered to be a referee for Ms Fietje and commented on Ms Fietje being good with kids and a well-liked member of the family.

[6] For example, Ms Fietje sent a text message to KFV thanking her for giving her a "dream job" and for her kindness when unwell which she appreciated.

[7] Clause 3 of the Agreement.

[8] Clause 15, page 10 of the Agreement.

i) The employer will not pay redundancy compensation to the employee. The employee will be entitled to notice as set out in Schedule A. The employee may be required to either work out that notice period or will be paid in lieu, at the employer's discretion.
j) Where the employee's position has been terminated by reason of redundancy, the employer will where appropriate:
i) Prior to a final decision being made, fully consult with the employee and his/her representative (if any) about the positions being made redundant, the selection criteria (where used) and options for redeployment (if available);
ii) Provide the employee with reasonable time off to attend interviews for an alternative position;
iii) Offer the employee a certificate of employment and provide an opportunity to the employee to undertake outplacement service;
iv) comply with its obligations of good faith.

[14] The notice period for redundancy was two weeks.[9]

[15] On 26 January 2023, a relative of Ms Fietje sent her a job advertisement that read very much like her role. Ms Fietje raised concerns with KFV. KFV assured Ms Fietje that she had a job as her nanny and that any role advertised was for a complementary role.

[16] Despite that assurance, KFV says she posted a letter to Ms Fietje dated 3 March 2023 (**3 March letter**):[10]

Dear Jordan,

Notice of Termination Due to Redundancy

I request you to attend a meeting to discuss a proposed redundancy of your position.
Details of the proposed termination due to redundancy will be provided to you at the meeting.

I will meet with at you on Friday 10th March in person and will confirm the meeting place with you. We will discuss the following;

- How the potential redundancy will affect you.
- Any suggestions you had to avoid the redundancy.
- Any options for you to be redeployed in another role.

You are welcome to have a support person with you, or legal advisor.

[9] Page 20 of the Agreement.
[10] I have removed reference to KFV.

If you have any questions, please do not hesitate to contact me.

Yours sincerely,
[KFV]

[17] KFV's production of the 3 March letter sparked strong criticism from Ms Fietje, who noted that it was first mentioned in an email from KFV's representative on 4 April 2023. He said the document properties were missing in the 3 March letter, unlike the three other letters that had been received. These factors, he said, pointed to the 3 March letter being created after Ms Fietje raised a grievance. For reasons that follow, I have found that even if KFV sent the 3 March letter, Ms Fietje did not receive it, and this is one of several procedural flaws that made Ms Fietje's dismissal unjustified.

[18] On the morning of 10 March 2023, Ms Fietje responded to a text from KFV asking to meet at 10:00am that morning. Ms Fietje recalled that at the time, she did not know what the meeting would be about. Text messages between Ms Fietje and her mother confirm her lack of awareness.[11]

[19] When Ms Fietje and KFV met, Ms Fietje recalled KFV told her that her role was being made redundant. The discussion swiftly moved to an alternative role Ms Fietje could move into outside of KFV's employment. Both Ms Fietje and KFV agree the meeting was amicable as their relationship had been. KFV said she would pay Ms Fietje for two weeks of her notice period while she looked for other jobs and offered to act as a referee. KFV says she offered an opportunity to Ms Fietje to come back to her with alternatives including an option to have a role as a housekeeper and babysitter. For reasons that follow, I find that if that option was discussed, it was not a genuinely openminded discussion about a redeployment option, because KFV had already offered the role to someone else.

[20] After Ms Fietje's mother asked Ms Fietje how the meeting had gone, Ms Fietje messaged at 3:42pm and said, "Basically she made me redundant today." The decision letter,

[11] Ms Fietje messaged her Mum at 5:57am on 10 March 2023 about her boss wanting to meet her for a coffee later that morning, also saying, "I hope the coffee isn't anything serious!"

dated 10 March 2023 (but Ms Fietje says she received it on 13 March 2023), supported that an external role was discussed at the meeting. The letter said:[12]

> Dear Jordan,
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> **Notice of Termination Due to Redundancy**
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> I write further to our recent redundancy consultation meeting Friday 10th March 2023 on where you met with [KFV] at the meeting we discussed:
> - How the potential redundancy will affect you.
> - Any suggestions you had to avoid the redundancy.
> - Any options for you to be redeployed in another role.
>
> In the meeting you raised the following points: we discussed the open position at [school], and you agreed to submit your resume to [person] on Friday 10th March 2023.
>
> Having now had to time to consider the matter fully we write to confirm that your role will be made redundant as we no longer require it to be performed by anyone. We also confirm that there are no suitable redeployment opportunities available. Accordingly, we confirm that your employment will terminate due to redundancy.
>
> **Notice**
>
> You are entitled to a notice period of two weeks. You will receive a payment in lieu of your entitlement to notice of termination and you are not required to work your notice period. Therefore, your employment will terminate effective on Monday 13th March 2023.

[21] The letter included a copy of the redundancy clause from the Agreement, confirmed KFV would pay any outstanding leave and payment in lieu of notice in the next pay cycle, asked Ms Fietje to return property by Friday 17 March 2023, and wished Ms Fietje well in her future endeavours.

[22] Soon after, Ms Fietje secured an alternative role. She felt understanding about her redundancy until she heard she had been replaced by someone who was working as a nanny.[13]

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[12] I have removed reference to KFV, the school and teacher named in the letter.

[13] Ms Fietje sent a message to her mother saying, "I found out through grape vine of teachers that someone has my job and starts today."

Ms Fietje then wrote KFV a letter dated 31 March 2023 expressing her concerns about the process followed:[14]

> Dear [KFV]
>
> **Re: Notice of Termination Due to Redundancy**
>
> It's been three weeks since our meeting on 10th March where you advised my position had become redundant, followed up by a letter of the same date.
>
> I left the meeting extremely upset, for several reasons including total surprise at what we discussed, having received no prior warning, no opportunity to prepare or bring a support person and no opportunity to say goodbye to [KFV's child].
>
> When I asked you several weeks ago about the job advertisement that read very much like mine, you assured me that I was very much part of your family, and my job was secure. I had no reason to believe otherwise when you invited me for our meeting, which made the news of my redundancy all the more surprising.
>
> Having now had some time to reflect on our meeting and the contents of your letter, I have concerns about the process followed.
>
> Under the heading "Redundancy Pay" your letter quotes directly from my contract but left out the very last clause referencing obligation to act in good faith. Given the above, I believe the process followed has not been one of acting in good faith.
>
> My contract also states all legislative requirements will be met.
>
> I have had a look at the website *employment.govt.nz* and believe the requirements set out have not been followed, for example:
>
> - I received a text from you asking to meet for coffee. It was at this coffee meeting that I received news of my redundancy effective immediately.
> - This gave me the impression that the redundancy was a done deal.
> - I was not offered a letter inviting me to the meeting and stating the purpose.
> - I was not offered to bring a support person for this meeting.
>
> This process left me feeling blind-sided, and very upset and stressed.
>
> I've also heard through friends that the new nanny is working in a very similar role. It was embarrassing and humiliating to find this out and made me doubt myself and question what I had done, also the impression it gave to others that I had done something wrong that I had been replaced so quickly.

[14] I have removed reference to KFV and KFV's child.

> I would like to hear any response you may have on the matters raised before I seek advice from family and friends as to what I should do.
>
> Regards,
> Jordan Fietje

[23] KFV responded to Ms Fietje in a letter of the same date. Among other things, KFV reiterated her family needs had changed significantly, resulting in a redundancy situation. KFV said she had offered to meet again with Ms Fietje with her support person to discuss alternatives. KFV described the increasing need discussed with Ms Fietje over the course of her employment for "… an inhouse cook, cleaner, driver and babysitter working most weekends…" – a role Ms Fietje did not want. The letter did not refer to the letter of 3 March 2023.

Legal Principles

[24] KFV must justify her decision to dismiss Ms Fietje as being what a fair and reasonable employer could have done in all the circumstances at the time including how she went about it.[15] The Court of Appeal has confirmed section 103A of the Act must be satisfied in redundancy situations - it requires an objective assessment of substance and process, including whether an employer has consulted in good faith.[16]

[25] Good faith required KFV to consult over her proposal with Ms Fietje with a mind open to alternatives that could prevent her redundancy. It specifically required KFV to provide Ms Fietje with all information relevant to the proposal, and an opportunity to comment on that information, before KFV decided what to do.[17] Ms Fietje was entitled to a meaningful opportunity to comment on that information, and for her responses to be genuinely considered by KFV, before a decision was made.

[26] The Agreement required KFV to consult in good faith too. Prior to making a final decision, KFV agreed to "… fully consult" with Ms Fietje and her representative (if any) about

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[15] Section 103A of the Act.
[16] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].
[17] Section 4(1A)(c) of the Act.

the positions being made redundant, selection criteria (where used) and options for redeployment (if available).

Findings

[27] KFV points to the 3 March letter as the proposal upon which she consulted Ms Fietje before making a decision. On balance I accept Ms Fietje's evidence she did not receive the 3 March letter, however:

(a) In Ms Fietje's messages to her mother on the day of the consultation meeting, Ms Fietje said she did not know what the meeting was about. If Ms Fietje had received the 3 March letter, she would have known the meeting was serious, about her redundancy, and not just a coffee with her boss.

(b) Neither party referred to the 3 March letter until after a grievance was raised:

(i) Ms Fietje did not refer to the 3 March letter in her letter of 31 March, consistent with her claims in that letter that "I was not offered a letter inviting me to the meeting and stating the purpose" and she felt total surprise at what they discussed, having received no prior warning nor opportunity to prepare.

(ii) KFV did not refer to the 3 March letter in her letter in response dated 31 March 2023. Its first mention is from KFV's representative in an email on 4 April 2023. It would be reasonable to expect the parties to discuss such a letter at a meeting convened for the purpose of consultation given its importance to the process, if it had been received.

(c) If Ms Fietje had received the 3 March letter, she would have known to bring a support person or legal advisor. Ms Fietje says in her letter of 31 March she did not know to do so, adding to her surprise at what occurred.

[28] As the employer, KFV ought to have ensured Ms Fietje had received the 3 March letter. Because Ms Fietje did not receive the 3 March letter, she ended up being in a meeting to discuss her redundancy without any prior knowledge of the proposal. She did not have an opportunity

to consider information relevant to her redundancy prior to the meeting. She also did not have a meaningful opportunity to provide feedback in that meeting. Consulting in good faith requires an employer to provide information about a restructuring proposal to an employee before asking for feedback. This did not occur because KFV presented it to Ms Fietje for the first time at the meeting. In short, KFV did not consult in good faith.

[29] I also find KFV did not consult Ms Fietje with a genuinely open mind. When she met with Ms Fietje, I find it was more likely than not that KFV communicated her decision to make the role redundant, then moved on to discuss external employment opportunities. Ms Fietje recalled KFV told her that her role was redundant at the meeting on 10 March. Ms Fietje messaged her mother after the meeting saying she had been made redundant, consistent with that understanding.

[30] That KFV had already made her mind up is supported by the steps she took to recruit and employ someone in the other role before she communicated the redundancy decision to Ms Fietje. The other role was a redeployment option KFV should have explored in good faith with Ms Fietje. Although there was some dispute over what the role was (nanny or a housekeeper/babysitter role), it was problematic that KFV had already advertised and offered the role to someone else before communicating anything to Ms Fietje about her redundancy especially when KFV had recently reassured Ms Fietje that her role was secure. Comparing the respective job descriptions shows some cross over between duties[18] – a decision to employ one impacted on the other and was an important piece of information for Ms Fietje to have an opportunity to comment on before a decision was made (as well as being offered an opportunity to discuss it as a redeployment option before it had been offered to someone else).

[31] My findings about when KFV made a decision to employ someone else are supported by evidence provided on the day of the investigation meeting and following. For example, KFV emailed the Authority with a copy of the covering email and employment agreement sent to the person she said she employed in a different role after she decided to make Ms Fietje's role redundant. The covering email was sent on 10 February 2023 with the subject line "Letter of

[18] Such as clause 1.3 to maintain a safe, clean environment for children.

offer and contract". The employment agreement attached to the email contained dates indicating an offer had been made in February 2023 for a start date of 20 March 2023 in the position of nanny. Even if I accept KFV's evidence that the position title was a mistake, the dates show KFV made a decision to employ someone in a role that directly impacted on Ms Fietje and resulted in her redundancy. KFV subsequently sent a copy of a job description for the role of housekeeper/babysitter to the Authority, with a copy of a text message she sent to the new employee on 24 February 2023 saying the contract would be put in the post.[19] This all occurred before making Ms Fietje redundant, showing KFV had closed her mind to alternatives like redeploying Ms Fietje, because the role had already been offered to someone else. At the very least, KFV failed to consult in good faith about a reasonable redeployment option that Ms Fietje ought to have had an opportunity to consider in the light of a proposal to make her redundant. The Agreement required KFV to "fully consult" where appropriate about the position being made redundant and options for redeployment (if available). This did not occur.

[32] Ms Fietje and KFV disagree about whether Ms Fietje would have wanted a role that focussed more on duties like cooking and cleaning. KFV and Ms Fietje agreed KFV's father had contributed by cooking and cleaning and undertaking these tasks for Ms Fietje and KFV's child. Due to a deterioration in his health, these tasks became more difficult and KFV wanted to employ someone in a role that would do more of these tasks than the role of a nanny typically undertook.

[33] Whatever the new role was (whether it was a straight nanny replacement or a housekeeping/babysitter role), I find the decision to employ someone else was made before Ms Fietje had a chance to comment and indicate interest (or not) after knowing her role was at risk of redundancy. I find it more likely than not that at the time of the meeting on 10 March, KFV had already decided what she was going to do – make the role held by Ms Fietje redundant. Even if KFV asked Ms Fietje to come back to her about alternatives like a role focussing on

[19] At 12:26pm on 24 February 2023 KFV materially messaged the new employee, "… am going to pop 2 copies in the mail to you. What is the best address to send? Could you please sign and bring one copy with you on 20th March please?"

cooking and cleaning, that suggestion was hollow given KFV had already offered that kind of role to someone else.

[34] In all the circumstances, I find KFV's decision to dismiss Ms Fietje for redundancy unjustified. KFV did not act as a fair and reasonable employer could. Ms Fietje has a personal grievance for unjustified dismissal.

What remedies should I award?

[35] Ms Fietje did not progress her claim for lost remuneration at the investigation meeting. She described having secured an alternative role in her profession soon after her employment ended with KFV and being better off financially.

[36] Despite that, Ms Fietje describes the impact of the process leaving her "feeling blind-sided, and very upset and stressed".[20] She felt embarrassed, humiliated, and lost confidence. Ms Fietje says she should receive an award of compensation in the middle band.

[37] Having considered awards in other cases and trends generally,[21] I award Ms Fietje $25,000 in terms of section 123(1)(c)(i) of the Act.

Should I award a penalty for a breach of good faith?

[38] KFV breached her obligations of good faith in relation to the restructuring process as set out above – these were the obligations of good faith as set out in section 4 of the Act, not section 4A. I do not consider it appropriate to award a penalty. The breaches did not in my view reach the threshold required, even if it had been argued they did (it was not).

Costs

[39] As neither party was legally represented, I do not anticipate they incurred legal costs. If, for any reason, there is a claim for costs and parties are unable to resolve it between themselves, Ms Fietje may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum KFV will

[20] Letter dated 31 March 2023.
[21] Such as *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [153] to [164].

then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[40] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[22]

Lucia Vincent
Member of the Employment Relations Authority

[22] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1