IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 528/10
5309185

	BETWEEN	CHLOE KING Applicant
	AND	PHYSIO REHAB GROUP LIMITED First Respondent
		TEPID BATHS PHYSIOTHERAPY LIMITED Second Respondent
		COLLEGE RIFLES PHYSIO & REHAB CENTRE LIMITED Third Respondent
Member of Authority:	Alastair Dumbleton	
Representatives:	Peter King, counsel for Applicant Karen Sutton, advocate for Respondents	
Investigation Meeting:	14 December 2010	
Determination:	23 December 2010	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Chloe King and one or more of the three respondent companies were in an employment relationship that lasted just over a year until Ms King was dismissed on the grounds of redundancy.

[2] Just after qualifying as a physiotherapist, from March 2009 until April 2010 she was employed in that work at several of the clinics operated by the respondents. In particular she worked at the College Rifles and the Tepid Baths clinics in Auckland, and another at Mt Ruapehu.

[3] In November 2009 while Ms King was working at the Tepid Baths clinic the Auckland City Council, which owned or controlled the baths, confirmed to the public the facility would be closed for four years so that extensive repair and renovation work could be carried out.

[4] Ms King's employer was given formal notice terminating the lease or licence under which it operated at the Tepid Baths, in March 2010.

[5] A few days after receiving that notice Ms King's employer gave her one months notice terminating her employment with effect from 16 April 2010. The reason stated for this was "due to your position having to be made redundant." Ms King worked out the notice and was then without a job for a fortnight before she started work as a physio at North Shore Hospital.

[6] In October 2010 a statement of problem was lodged in the Authority by Ms King's solicitors. Her problem was described as a personal grievance claim that Ms King had been unjustifiably dismissed on 16 April 2010. In the application it was confirmed that she had tried to resolve that problem by using Mediation Services before bringing a case to the Authority.

[7] To remedy her claim Ms King sought:

- A declaration that she had been unjustifiably dismissed;
- Reimbursement of lost income;
- Compensation of $12,000 for distress, humiliation and injury to feelings;
- A penalty under s 4 of the Employment Relations Act 2000 for breaching the requirement of good faith dealing;
- A penalty under s 63A of the Act for breaching requirements in relation to bargaining for an employment agreement;
- Legal costs.

[8] A statement in reply lodged on 1 November 2010 asserted that Ms King had been employed by the first respondent Physio Rehab Group Ltd and that she had been

made redundant due to the closure of the Tepid Baths. The claim of unjustified dismissal was strongly denied by the employer. The statement in reply outlined how the employer considered it had consulted Ms King and other employees before dismissal, once it became known in late 2009 that the baths would be closing for some time from May 2010. The statement in reply was provided by Ms Karen Sutton who is a director of each of the three respondent companies which are part of the Physio Rehab Group (PRG).

Physio Rehab Group

[9] A "Company Profile" bearing the logo "Physio Rehab Group" states that Physio Rehab Group Ltd, the first respondent, is the umbrella company for eight Auckland based physio clinics. The owners of the company are stated to be Ms Karen Sutton and Mr Jordan Salesa. PRG's clinics listed in the profile include those at College Rifles in Remuera and the Tepid Baths in the Auckland CBD, and another at Mt Ruapehu.

[10] Much of the information and advice Ms King received, particularly about her employment package and pay was on paper headed Physio Rehab Group and which referred to Physio Rehab Group Ltd, the first respondent company.

[11] When she commenced employment Ms King worked at the College Rifles clinic. The employer party to her written individual employment agreement was stated to be College Rifles Physiotherapy Ltd. It appears that there was no company registered under exactly that name and that the employer was College Rifles Physio & Rehab Centre Ltd, the third respondent. That company is joined to Ms King's claim by consent of Ms Sutton who is a director of it.

[12] The employment agreement provided that Ms King's place of work was to be College Rifles "or other PRG Clinics if agreed to." Ms King agreed to transfer to the Tepid Baths clinic and started work there in about June 2009.

[13] Although she had agreed to work at another location she did not, I find, agree to have a new employer at that place. Therefore the terms and conditions of her written contract of employment with the third respondent company continued to apply to her work at the Tepid Baths clinic.

[14] While there is no real dispute that one or more of the three respondents was the employer of Ms King at material times some confusion arose from the mis-naming of the third respondent on the written employment agreement and also to the use of the name Tepid Baths Physio Ltd. The letter of termination given to Ms King on 18 March 2010 was signed by Ms Sutton and her co-director Mr Salesa as directors of "Tepid Baths Pysio Ltd & Physio Rehab Group Ltd."

[15] Although the Companies Office files show the second respondent Tepid Baths Physiotherapy Ltd to be a currently registered company, it did not become so until 21 May 2010, over a month after Ms King had finished her employment. As Ms King could not have been employed by a non-existent entity the second respondent was not her employer at material times.

[16] Some muddlement or confusion on the part of Ms King's employer about its identity seems to have contributed to the employment relationship problem in this case. It appears the view was taken that Ms King's employer was site specific to the Tepid Baths. This may explain the reference at the bottom of the termination letter to Tepid Baths Physio Ltd (at that time a non-existent company). It appears more likely that Ms King was employed by an entity which had a number of sites around Auckland and one at Ruapehu, including the Tepid Baths.

[17] Confusion about this may in turn have had some impact on the consideration given by Ms King's employer to opportunities for her redeployment as part of consultation, a requirement in any genuine redundancy situation.

Redundancy as a ground for dismissal

[18] In the leading case on redundancy under the Employment Relations Act 2000, *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, the Employment Court confirmed that so long as an employer acts genuinely and not with ulterior motive, a business decision to declare positions or employees redundant is the employer's to make. The Authority may review only the existence of that decision, not its quality.

[19] There is no dispute in this case that Ms King's employer in deciding to terminate her employment was genuinely motivated by the long term closure of the Tepid Baths premises from where it had been operating. There is no suggestion that the employer had reasons for its action that were to do with the performance or

conduct of Ms King. The evidence is that she was a very good performer of her job and was well regarded by her employer as a physiotherapist and employee.

[20] The real issue in this case is whether the employer in responding to a considered need to shed staff, dealt with Ms King fairly and in good faith when it chose her to be made redundant, or when it did not choose her for any alternative positions of employment that were available.

[21] In this regard the focus of the investigation by the Authority has been on the requirements of good faith dealing and on consultation in particular. Those matters are directly relevant to a consideration of whether Ms King's dismissal was justified under the test which is to be applied of s 103A of the Employment Relations Act. In this regard the Employment Court held in *Simpsons Farms* (above), at [65]:

> *Following the new s.103A the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time.*
>
> *The statutory obligations of good faith dealing and, in particular, those under s.4(1A)(c) inform the decision under s.103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s.4 including as to consultation because a fair and reasonable employer will comply with the law.*

[22] Ms Sutton on behalf of Ms King's employer (one or more of the three respondent companies) has strongly argued that Ms King was consulted as part of the process of a termination claimed to be justifiable on the grounds of redundancy.

Consultation

[23] General principles relating to consultation are set out in the judgment of the Employment Court in *Julian v. Air New Zealand Ltd* [1994] 2 ERNZ 612 at pg.637, as follows:

> *(1) The word "consultation" does not require that there be agreement.*
>
> *(2) On the other hand it clearly requires more than mere prior notification.*

(3) *If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views" (see* Port Louis Corp).

(4) *This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with the reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*

(5) *The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: 'they must be free to say what they think' (see* Port Louis Corp).

(6) *Consultation must be allowed sufficient time (McGechan J).*

(7) *Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade (McGechan J).*

(8) *Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus (McGechan J).*

(9) *Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done (McGechan J).*

(10) *The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh (McGechan J).*

(11) *There are no universal requirements as to form or as to duration of consultation.*

(12) *Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at agreement.*

[24] Ms Sutton contended that the employer discharged its obligations to consult Ms King in the following way. Early in November 2009 a management meeting was held with all staff of the Tepid Baths clinic, including Ms King. Minutes kept by Ms Sutton note that the meeting was to discuss "possible closure of Tepid Baths" for

renovation in mid 2010. Ms Sutton also noted "other employment opportunities – very quiet in other clinics/in NZ generally!!" Her minutes indicate that there was a discussion about the consequences of a temporary closure of the baths for a short period or alternatively a much longer one of 2 to 4 years. Against that item she noted a query "what physios want to do?" and in relation to Ms King she noted "Chloe - ? OE/hospital stability?" In respect of action to be taken Ms Sutton noted there would be a meeting held with the YMCA, the lessor the Tepid Baths premises, which someone from PRG management would attend.

[25] A Herald newspaper report shows that in November 2009 it became public knowledge the baths were to close for four years from mid May 2010, when repair and renovation work was due to begin. Ms King was away from work from late December 2009 until February 2010.

[26] On 9 March a staff meeting was held. Ms King was present. A copy of the minutes produced by Ms Sutton make no reference in the agenda to the impending closure of the baths or the effect that might have on staff employment.

[27] On 18 March 2010, Ms King arrived at work as usual and almost immediately was handed a letter terminating her employment and was spoken to by Ms Sutton. In telling Ms King she was being made redundant I accept that Ms Sutton also said it was a "technical redundancy" as it had arisen from closure of the Tepid Baths.

[28] Ms Sutton's evidence was that from about the time of the staff meeting in early November 2009 until Ms King was given her notice of dismissal on 18 March 2010, she had believed that Ms King was making plans either to leave her job and travel overseas or to find alternative employment either as a physiotherapist attached to a hospital or at the Mt Ruapehu clinic operated by PRG.

[29] Ms King's evidence is that in casual conversations with Ms Sutton and other staff she had mentioned that working overseas or in a hospital would be a good option for a physiotherapist in the unfavourable economic climate, particularly following the ACC law change in November 2009 which was expected to seriously affect the earnings of physiotherapists privately employed outside the public health sector. She said she had not mentioned those options as those of interest to herself specifically but to physiotherapists generally.

[30] Ms King's evidence was that any mention she had ever made about travel for OE or working at a hospital was not in any discussion had by the employer to consult her about a proposal to dismiss her or anyone else at the Tepid Baths on the grounds of redundancy. Any mention she had made was only as general observations of the sort that people make in passing at any time about what they might consider doing in the future. I accept that evidence.

[31] Also Ms King's evidence was that at no time prior to being given notice of termination on 18 March 2010 had Ms Sutton or any other director of the employer approached her to discuss her personal employment situation. Ms King told the Authority, "prior to 18 March 2010, the word redundancy was never mentioned to me. I never had any one on one meeting with Karen, Jordan, or anyone else in management at PRG to discuss these issues or my future." When the likely closure of the Tepid Baths was discussed with staff by Ms Sutton she had given them some assurance that if closure occurred the clinic would be relocated nearby in Albert St and that their employment would be continued. I accept Ms King's evidence of the lack of consultation with her by Ms Sutton or by her employer.

[32] Ms Sutton in her evidence also referred to the meeting with staff that took place on 18 March 2010, the day on which Ms King and other employees were given written notice of termination of their employment. The meeting took place after "redundancy letters" had been issued to all staff. By then it was too late to consult, as the decision to dismiss Ms King had been made.

[33] The receipt by Ms King's employer of notice terminating its lease or licence for the Tepid Baths premises on 15 March, led the employer to consider whether the employment of Ms King and other employees could be continued. A decision was made to terminate Ms King's employment and she was notified of it on 18 March. I have considered whether what took place before termination amounted to consultation as required of an employer under s 4 of the Act and under the employment agreement as an implied term requiring the employer to deal fairly and reasonably with any employee.

[34] Section 4(1A) of the Act, which imposes a duty of good faith on parties to any employment relationship, requires an employer who is proposing to make a decision likely to have an adverse effect on the continuation of employment of any employee to provide access to information relevant to the continuation of the employee's

employment about the decision. The employer must also provide the employee with an opportunity to comment on that information before the decision is made. Under s 4(4) the employer is required to act in good faith in matters including making any employees redundant and any proposal by the employer that might impact on an employee.

[35] I find when considering the circumstances surrounding the termination of Ms King's employment and the relevant propositions or principles of law as outlined above at [23], that her employer failed to consult her when it had been required to do so.

[36] From the principles and propositions set out above, it can be seen that consultation, when required, proceeds from the presentation or communication by the employer of a proposal to the employee. The consultation required to take place is in relation to that proposal, as proposition (3) above makes clear:

> *If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation or those required to be consulted.*

[37] Proposition (9) also makes this clear:

> *Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.*

[38] Rather than presenting Ms King with any proposal for her consideration before deciding whether to terminate her employment, Ms Sutton or the directors of the employer seem to have assumed the employees knew that in the event the Tepid baths lease or licence was terminated their employment would also be terminated. That outcome may have been in the minds of some but a decision was first required to be made by the employer. Consultation was to precede a proposal leading to that decision being made. No matter how likely termination of employment was as a consequence of termination of the lease or licence, consultation was still required.

[39] To simply draw attention to a possible or even a likely future event that might impact adversely on a business, and to urge employees to plan for that event, is not adequate consultation in a redundancy situation.

[40] In this case consultation before a decision to terminate was made would not have been futile. This was because the Tepid Baths was not the only clinic run by

Ms King's employer and in which physiotherapists were employed. PRG had several others around Auckland, some of which Ms King had worked in since commencement of her employment. The Group also had, as it demonstrated, the ability to relocate its Tepid Baths clinic to other suitable premises nearby, although with some scaling down of the services. Those were matters that could usefully have been discussed with Ms King in the course of consultation with her, one-on-one, about any proposal to make her position redundant. She was entitled to be given information about redeployment opportunities before a decision was made to dismiss her.

[41] While I accept that Ms Sutton thought Ms King had made or was making other arrangements, to travel overseas, work for a hospital or work at Ruapehu, I also accept that Ms King had said nothing to reasonably lead Ms Sutton to believe she intended taking up or pursuing any of those options. Another purpose of consultation would have been to establish what plans if any Ms King had made to leave her employer for any reason or to work again at Mt Ruapehu. Ms Sutton could simply have asked Ms King whether she had sought or obtained a hospital position, or had decided to travel overseas, or do anything else. With an answer, Ms Sutton could have made a better informed decision about the necessity of making Ms King redundant.

[42] Another purpose of consultation would have been to allow input from Ms King as to her suitability to work, as was the wish she expressed after the event, in any new premises the employer opened nearby to the Tepid Baths. The back to front sequence of events had Ms King, immediately after receiving notice of termination, emailing Ms Sutton about working for the employer in a proposed Albert Street clinic. She advised "I am keen to work in any of PRG's other clinics".

[43] In the absence of consultation, as was a requirement under the Employment Relations Act and also under an implied term of the employment agreement, I find applying the test of justification under s 103A of the Act that Ms King's dismissal was not justifiable. Considered objectively, her employer's actions and how her employer acted, were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. Consultation should have preceded that dismissal or action.

Determination

[44] For the above reasons I find that Ms King has a personal grievance arising from her unjustified dismissal on 16 April 2010. I also find in the way the dismissal was implemented without prior consultation, that the employer breached the employment agreement.

Remedies

[45] In considering remedies for the personal grievance the Authority is required to examine whether there was any contributory fault or conduct on the part of Ms King. It is not suggested there was any in the circumstances of this case and therefore no reduction in remedies is required.

[46] An award is sought of lost wages for two weeks during which Ms King was unemployed after the expiry of the notice period and before she commenced new work as a physio at North Shore Hospital. The amount claimed is $1,500 for that fortnight, which is based on the original contractual salary of $40,000 per year. There were some variations to the remuneration agreed to during the year, but I am satisfied that $1,500 gross or $750 per week, is the appropriate amount for lost wages. This seems to equate very closely with the actual remuneration of $2,311.35 net received by Ms King in her last four weeks of employment.

[47] The abovenamed respondent employers are ordered to pay Ms King $1,500, pursuant to s 123(1)(b) of the Act.

[48] As compensation under s 123(1)(c)(i) of the Act the sum of $12,000 has been sought. In assessing the appropriate amount to award I take into account that this was a case where consultation might well have led to the continuation of Ms King's employment in some way. There were other opportunities, particularly in relation to the Albert Street clinic planned by PRG to be set up. Ms King was precluded from having a say in whether she could work there. There were also the other clinics around Auckland employment at which was not considered with her input. This is far from a case where consultation would have achieved nothing. Ms King, I accept, felt the worse for not being consulted.

[49] The circumstances of this is case are not an instance such as that referred to by the Court of Appeal in *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315. The Court held at [81] that when fixing compensation;

> *……where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed.*

[50] Had Ms King been fully and properly consulted there is a real likelihood she would not have been dismissed but would have been redeployed within PRG. Compensation should reflect that.

[51] The real measure of compensation is the harm caused to the employee as an individual, Ms King in this case. I accept that she was considerably shocked and distressed by the events that occurred on 18 March when told suddenly that her position would no longer exist after a month. She was a new graduate who had been attracted to work for PRG because it was a larger organisation offering some security with its several clinics in which it employed quite a number of people. She had been naturally keen to establish her name and reputation as a physiotherapist. That opportunity was denied to her, fortunately only briefly.

[52] There were also aggravating factors, including the decision to employ one of her colleagues in the new Albert Street premises. This led Ms King to believe or suspect that some personal problem between her and that employee arising earlier in the year had been a factor in the employer's selection of staff for the new clinic. Without consultation Ms King had no idea what selection process had been applied. Ms King was left to hear about developments at Albert Street through other employees, and she was upset to see a flyer put out to the clients which tended to minimise the change made to her employment situation. She had no input into the material in that leaflet, which suggested she was happy not to continue having a position and was simply making up her mind what she would do next.

[53] I take it into account that there was no intention by Ms Sutton to harm Ms King and that the employment was relatively short. Clearly Ms King knew that she was well regarded as an employee and appeared to have had a good relationship with Ms Sutton, up until 18 March at least. Making things harder for her was the usual and natural response to try and put a brave face on the situation, hiding her true feelings of distress.

[54] I consider that in a case which does not involve dismissal for misconduct or poor performance but is a situation where forced closure of the premises led to a restructuring, $12,000 is too high. I award $7,500 compensation to Ms King pursuant to s 123(1)(c)(i) of the Act, which sum the abovenamed respondents shall pay to her.

[55] A penalty is also claimed under s 134 of the Act for breach of the employment agreement. Although there was a breach to support that claim, it must be disallowed. It was never identified as a claim until the submissions were made on behalf of Ms King at the end of the investigation meeting. The statement of problem originally sought penalties but they were in respect of alleged breaches of s 4A and s 63A of the Act and were not pursued. Instead the claim for penalty under s 134 was substituted in final submissions. I consider that the employer was entitled to be given notice of that claim, if not in the statement of problem then before the investigation meeting commenced. There was a telephone conference at which no indication was given of a different penalty claim being substituted for those originally made under s 4A and s 63A.

Costs

[56] An application has been made on behalf of Ms King for costs. An award should in this case follow the success she has had with her claim after incurring the expense of having legal representation. Any additional material in support of the application already made is to be sent to the Authority no later than 21 January 2011. A copy will be sent to Ms Sutton who shall have 14 days to reply to the costs application.

A Dumbleton
Member of the Employment Relations Authority