

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 12
5550472

BETWEEN HARIATA SIMES
 Applicant

AND SILVER FERN FARMS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: David Beck, Counsel for the Applicant
 Timothy Cleary, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 September 2015 from the Applicant
 9 October 2015 from the Respondent

Determination: 16 February 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Silver Fern Farms Limited (SFF) was accredited by ACC to manage its own work-related claims. Ms Simes was an ACC Case Manager employed by SFF. In early 2015 SFF decided to contract its ACC claims management out to Aon, a third party ACC partnership programme provider.

[2] Ms Simes says SFF wrongly refused to pay her the redundancy compensation set out in her individual employment agreement (IEA). In the alternative, she claims that SFF's actions amounted to a breach of contract. Also in the alternative, Ms Simes claims that the parties are in dispute about the meaning of clauses 7 and 15.4 of her IEA.

[3] Ms Simes claims that she was unjustifiably disadvantaged by:

- (a) The process used, which she considers was pre-determined, and
- (b) The manner in which SFF identified that she would be made redundant.

[4] She also says that SFF has breached its duty of good faith to her by failing to give her access to information prior to making its decision to outsource her work. By way of remedy Ms Simes claims the amount of redundancy compensation set out in her IEA, a penalty for breach of good faith to be paid to her, and reimbursement of her legal costs.

[5] The parties agreed to this matter being determined on the papers¹. Both parties have provided written submissions which I have considered carefully. Upon deliberation it is apparent that the issue about redundancy compensation was able to be decided on the papers. However, as explained below, there is not sufficient evidence filed so far from either side to support their submissions on the claims of unjustified disadvantage and breach of good faith.

[6] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that the Chief of the Authority has decided under 174D(3) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination of findings later than the latest date specified in s 174D(2) of the Act.

Issues

[7] In establishing whether Ms Simes is entitled to payment of redundancy compensation under IEA the Authority needs to determine whether Ms Simes resigned or met the definition of redundancy in her IEA. If she did not resign I need to determine:

- (i) Whether Ms Simes was offered employment by Aon in the same or a substantially similar capacity on conditions of employment that were, overall, comparable and whether her service with SFF would have been accepted as being continuous with her proposed new service with Aon.

¹ Section 174D(1) of the Act.

- (ii) Whether and when SFF met its obligations to negotiate with Aon to discuss Ms Simes' continued employment with it and whether she would be offered the same terms and conditions of employment including whether her service with SFF would be treated as continuous service with Aon.
- (iii) Whether Ms Simes employment was terminated in a way attributable wholly or mainly to the fact her position was no longer required by SFF, or whether she resigned.
- (iv) Whether SFF unjustifiably disadvantaged Ms Simes in the way it acted over the redundancy proposal, and, if so, whether she is entitled to compensation for humiliation, loss of dignity and injury to her feelings.
- (v) Whether SFF breached its duty of good faith to disclose all relevant information prior to the redundancy decision.
- (vi) Whether a penalty for breach of good faith should be imposed, how much should it be and to whom should it be paid?

Factual background

[8] SFF received a pitch for its ACC work from Aon. On 27 January 2015 Gary Williams, SFF's Employment Relations Manager, presented a proposal to Ms Simes and four other potentially affected staff. SFF proposed to outsource its current ACC programme to Aon. The proposal set out which functions would transfer to Aon in the event that the decision was made to outsource the ACC programme. It was proposed that Ms Simes and her Napier counterpart, Mary Beaumont², would be offered work with Aon if the proposal proceeded.

[9] The proposal set out which tasks SFF would continue to be responsible for. Mr Williams set out five potential benefits of the restructure. These included an overall saving to SFF, the removal of risks associated with information and data management, better information management and reporting on SFF's ACC data, better benchmarking opportunities and a clearer definition of SFF's employer

² I received a copy of an email from Ms Beaumont to Ms Simes about the terms of her employment with Aon. However, I can put very little weight on this email as Ms Beaumont has not provided an affidavit. In any event it appears Ms Beaumont's situation is different from Ms Simes' situation because Mr Williams was communicating with her and with Aon about her.

responsibilities. In particular, Mr Williams says that SFF was attracted to the proposal because SFF *would no longer be seen making ACC decision claims as employer.*

[10] SFF received a pitch for the ACC work from Aon. Mr Williams sought feedback from the affected staff in the period ending on Monday, 2 February 2015. He said he wanted to make a decision on the proposal by 4 February 2015.

[11] On 1 February 2015, by email Ms Simes sent a number of questions combined with some submissions regarding the proposal. On Monday, 2 February 2015 at 7.50am, Mr Williams emailed answers to Ms Simes' questions.

[12] One of the questions Ms Simes asked was:

How much are the overall savings to Silver Fern Farms and how is this measured against current costs? Please be specific in where the savings are made and how.

[13] Mr Williams replied:

The savings amounted to \$22K. This was the difference between the quote David Wood sent me and current overhead and operating cost that we estimated was like for like.

[14] The documents that existed to allow Mr Williams to make that comparison were not supplied to Ms Simes.

[15] Also on 2 February 2015, Mr Williams sent Ms Simes an email entitled *Potential transfer conditions*. This set out what he had advised Aon's David Wood were Ms Simes' current terms and conditions. This was important because at that stage there was the possibility of Ms Simes working in a similar role but for Aon. He told Ms Simes that if the proposal proceeded she could expect to be made an offer by Aon on 4 February 2015 with the following terms:

<i>Position:</i>	<i>Case Manager</i>
<i>Location:</i>	<i>Christchurch, Blenheim Road</i>
<i>Role:</i>	<i>Case Management of high risk claims in the Canterbury region (including but not limited to Silver Fern Farms)</i>
<i>Anticipated Caseload:</i>	<i>45-55 claims</i>
<i>Salary</i>	<i>\$62,000</i>
<i>Health Subsidy</i>	<i>1.5% or \$930</i>
<i>KiwiSaver</i>	<i>3% or \$1,860</i>
<i>Trauma</i>	<i>\$10,000</i>

<i>Life</i>	<i>\$100,000</i>
<i>Income Protection</i>	<i>75% salary, 90 day stand-down period, 5 year benefit</i>

I note there was s no mention of the length of Ms Simes' period of service with SFF.

[16] On 4 February, Mr Williams communicated SFF's decision to outsource the ACC claims management to Aon by telephone and by letter:

I have been consulting with you on a proposal to outsource our ACC claims management programme over the past week. I have had significant feedback from all staff concerned and I really appreciate your honesty and thoughts that you have been (sic) put into this feedback.

I do have to make a decision however and therefore please be advised that my decision is to outsource the ACC claims management to AON as a third party administrator.

This decision is by no means any reflection on your performance or the performance of the team. We have simply got to a point where it is viable to outsource an area of our business which is not core business and can, as a result, de-risk the business.

Process from here

I will discuss with you how this decision will impact on your role but clearly there will be a transition period where we will be working with AON to ensure a smooth handover of the infrastructure.

Our target date for handover is 2 March 2015.

Mike Rutherford will co-ordinate this handover with David Wood (AON) and he will discuss with you the next steps in that transition process.

In the meantime thank you again for your engagement in this process it is much appreciated.

[17] Also on 4 February 2015 Ms Simes and Mr Wood met. Ms Simes says he was waiting outside the office while Mr Williams delivered SFF's decision to the ACC programme employees by telephone. Mr Wood expressed Aon's interest in Ms Simes working for it in Christchurch. He handed Ms Simes a copy of Aon's proposed employment agreement, dated 2 February 2015. Mr Wood also invited her to visit Aon's office that afternoon to meet other staff and look around but she says she was too upset that day.

[18] At some point Ms Simes rang Mr Wood and asked if her service with SFF, of nearly 12 years, would be carried over to Aon. She also told him that she had been approached about another similar role by another business and was considering that

offer. Mr Wood told Ms Simes that Aon would not carry over her entitlements based on her length of service with SFF. Later Mr Wood rang and offered Ms Simes a pay increase of \$4,000 per annum *to make her decision a little harder*. I accept Ms Simes' evidence that he did not tell her he intended that to be in place of Aon carrying over Ms Simes' length of service with SFF.

[19] Mr Simes informed Mr Williams of this by email on 10 February and said that he had *misleadingly suggest[ed she] would have continuous service for all service related benefits*. Because of that the Aon offer *is not a comparable employment agreement*. Ms Simes asked Mr Williams to let her know whether SFF would pay her redundancy compensation because she would lose that *significant benefit* if she accepted Aon's offer.

[20] Mr Williams replied the same day:

... I have spoken with David who acknowledged they had some problems with transferring the redundancy over to AON. He said he had offered you an additional \$4,000 per annum in consideration of this. What is your preference, the consideration (\$4,000) or the redundancy provisions transferring over? I am happy to go back to the service transferring as that was my understanding (same terms and conditions).

[21] On 11 February Ms Simes asked Mr Williams to clarify what he meant by *service transferring* and wrote *please stop negotiating with Aon on my behalf as I wish to deal with them directly*.

[22] Mr Williams replied:

I am negotiating with the new employer to get an outcome for you. Your employment agreement requires me to do this.

If you wish to deal with AON directly please do so but ultimately I must appraise what the terms are being offered as you are emailing me saying they are not substantially similar or acceptable.

To be clear, I do not believe redundancy will be a point that we get to, as Aon will offer substantially similar terms and conditions.

[23] Ms Simes responded by email that Mr Wood had at no time mentioned that the increased salary offer had anything to do with the redundancy clause in her SFF IEA. She also wrote:

I have received further legal advice and that is that Silver Fern Farms have already fulfilled their obligations by getting me an offer with Aon who then presented that to me on an individual basis, so

technically you are no longer required to negotiate on my behalf and because of this you may be subject to a claim of interference in contractual relationships or even worse if Aon were to withdraw the offer, inducement to breach of contract. To be clear I have legal advice and I want to negotiate directly with my prospective employer. I do want however, to thank you for getting this offer on the table and if I do need your further assistance I will get back to you.

[24] Mr Williams responded that he did not agree with her legal advice but that he respected her wishes and would *leave it with her*.

[25] I have no further evidence of any correspondence between Ms Simes and SFF or of any other conversations or correspondence between Ms Simes and Mr Wood of Aon.

[26] Ms Simes accepted the role she had been offered by the other employer, not Aon. On 16 February Ms Simes emailed Mr Williams:

I'm just writing to inform you that I have accepted a job elsewhere as I am not satisfied that the contract from Aon is substantially similar to my existing contract.

As an act of good faith I will continue to work until the handover date of 2/3/15 (effectively then my last day will be the 27th February when my current contract ceases to exist.)

I would appreciate if all outstanding leave (long service and annual) is paid out on the 25th February along with my final pay.

[27] On 17 February Ms Simes wrote to Mr Williams requesting that redundancy compensation be paid to her in terms of her IEA because of the *subsequent offer from Aon (the contracted party) being substantially different from that of my existing terms and conditions*. Ms Simes also wrote that on 16 February she had been advised by Mr Wood that *none of our accrued leave (whether annual/sick or bereavement) would carry over into employment with Aon*.

[28] On 18 February Mr Williams responded:

... You were/are not redundant. If you disagreed with the terms of transfer in accordance with Section 7 of your agreement then I believe I could have resolved any areas of concern. You specifically asked me not to "negotiate" on your behalf.

You then advised me that you had accepted an offer of employment with another employer and asked for a significantly shortened notice period. Which I have agreed to.

You are now suggesting you are redundant. I have had no opportunity to look for other suitable positions for you (which I am obliged to do

even if you contend that the AON offer is not substantially similar to your existing terms). The question of redundancy does not come into this situation...

Ms Simes' IEA

[29] The relevant clauses of Ms Simes' IEA are set out below:

5. ***Transfers***

After consultation with you we may transfer you to another location within reasonable commuting distance of your current workplace where the duties of the vacant position are the same as, or similar to, the duties of your current position.

7. ***Redundancy***

7.1 ***Compensation for redundancy:*** *Where the termination of your employment is attributable wholly or mainly to the fact that your position is no longer required by us, our liability to you for redundancy or any other form of compensation for the loss of your employment is limited to an amount calculated in accordance with the redundancy formula set out in Schedule 2.*

7.2 ***No payment for technical redundancy:*** *No entitlements to compensation for redundancy (whether technical or otherwise) or for any shortfall in notice will arise where all or part of our business is sold, transferred, contracted out or otherwise disposed of, and the person taking the interest in our business:*

- *Offers you employment in the same or a substantially similar capacity (or in any other capacity that you are willing to accept) on conditions of employment which are, overall, comparable; and*
- *Agrees to treat your service with us as being continuous with your new service.*

7.3 ***Transfer not a redundancy:*** *For the avoidance of doubt, a transfer in accordance with clause 5 of this agreement does not constitute a redundancy.*

15. ***External Restructure***

In the event that our business undergoes an external restructure, being:

- *entering into a contract or arrangement under which our business (or part of it) is undertaken for us by another person (the new employer); or*
- *selling or transferring our business (or part of it) to another person (the new employer)*

then the employee protection provisions in clauses 15.2 and 15.3 will apply.

An external restructure does not include situations where:

- a contract or arrangement under which we carry out work on behalf of another person is terminated; or
- any or all of our shares are sold or transferred; or
- any contract or arrangement for sale or transfer is entered into, made or concluded while we are adjudged bankrupt or in receivership or liquidation.

15.1 **Process for negotiation with new employer:** In the event of an external restructure which will affect your continued employment with us, we will meet the new employer to discuss our employees' continued employment with the new employer.

15.2 **Matters for negotiation with new employer:** In the event of an external restructure which will affect your continued employment with us, we will negotiate with the new employer to determine the following matters:

- whether you will be offered employment by the new employer; and
- (if so) on what terms (including whether you will be offered the same terms and conditions of employment); and
- whether your services with us will be treated as continuous service with the new employer.

15.3 **Process to determine entitlements for non-transferring employees:** Where the termination of your employment is attributable wholly or mainly to the external restructure and the fact that the new employer will not be offering you employment on the external restructure, and we do not redeploy you, we will consider and advise you of your entitlements (if any) on termination.

15.4 **No payment for technical redundancy;** In any event, you will not be entitled to compensation for redundancy or payment for any shortfall in notice in the event of an external restructure where all or part of our business is sold, transferred or otherwise disposed of, and the person taking the interest in our business:

- offers you a position which you accept or;
- offers you employment in the same or substantially similar capacity on conditions of employment which are, overall, comparable to your then current conditions, and agrees to treat your service with us as being continuous with your new service.

15.5 **No payment for redeployment;** You will not be entitled to compensation for redundancy or payment for any shortfall in notice where due to an external restructure or where all or part of our business is restructured for other reasons and we offer you redeployment into a position for which you have appropriate skills and experience, on conditions of employment which are, overall, comparable to your then current conditions.

SCHEDULE 2

Starting date	<i>To be confirmed. Original start date is recognised as 28/04/2003.</i>
Hours of work	<i>40 hours per week between 8.00am and 5.00pm (Monday-Friday). Recognising that this is a salaried position and that your employment is within a seasonal, export based industry, the times that you must attend work will vary according to the Employer's operating requirements and you may be required to perform additional hours to meet required time frames.</i>
Location	<i>Silver Fern Farms Limited, Christchurch Support Office After consulting with you, we may transfer you to another location within reasonable commuting distance of our existing premises (see clause 5).</i>
Annual Leave:	<i>20 days per 12 month period</i>
Sick Leave:	<i>5 days per calendar year</i>
Notice for termination:	<i>One month</i>
Redundancy formula:	<i>Redundancy formula: ((a) + (b)) x (c) up to a total; maximum redundancy payment of thirteen weeks base salary (being approximately three months base salary), where: (a) = 15 days for the first year of current continuous employment or part thereof (b) = 10 days per each year subsequent to (paragraph a) above up to and including the tenth year of employment (c) = Current salary/260 For the avoidance of doubt, employment must be current and continuous.</i>

Submissions and discussion**Interpretation of the IEA's contractual terms**

[30] The principles of contractual interpretation are well established. In *New Zealand Professional Fire Fighter Union & ors v New Zealand Fire Service*

*Commission*³ the Employment Court summarised the principles from the Supreme Court decision in *Vector Gas Limited v Bay of Plenty Energy Limited*⁴ as:

In summary, it would appear ... that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is nevertheless, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which seems plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve.

[31] Any dispute as to the meaning of the clauses in Ms Simes’ IEA was not expressed as such until the application was made to the Authority. There is little in either party’s submissions on this point and no evidence of the contractual context.

[32] There is no disagreement that Ms Simes’ role with SFF was being disestablished due to SFF’s ACC business being externally restructured and that therefore the employee protection provisions in clauses 15.2 and 15.3 applied. In addition, the termination of Ms Simes employment with SFF by SFF would have been *attributable wholly or mainly to the fact that [her] position is no longer required by [SFF]*, as set out in clause 7.1 potentially triggering consideration of payment of compensation for redundancy.

[33] However, clauses 7.2 and 15.4 provide that there will be no redundancy compensation payment in the event of a *technical redundancy*. For redundancy compensation not to be payable clauses 7.2 and 15.4 require that Aon had to offer Ms Simes employment:

- in the same or a substantially similar capacity⁵ on conditions of employment which are overall comparable⁶; **and**
- agrees to treat your service with [SFF] as being continuous with your new service.

[34] The parties agree on which parts of the IEA are applicable. However, both parties have cited different case law and reached different conclusions about what the

³ [2011] NZEmpC 149

⁴ [2010] NZLR 444

⁵ Clause 7.2 also adds *or in any other capacity that you are willing to accept*.

⁶ Clause 15.4 includes *to your then current conditions*.

IEA means. There is agreement about what correspondence there was between Mr Williams and Ms Simes. However, the parties put different emphasis on some of that and ultimately disagree whether and when SFF's liability to pay Ms Simes' redundancy occurred.

[35] Mr Beck for Ms Simes submits that the Aon offer was not substantially similar particularly because continuity of service was not offered to Ms Simes. Therefore the argument must be because SFF did not offer Ms Simes suitable redeployment it became liable to pay Ms Simes' redundancy compensation.

[36] Simply put Ms Simes' position is that the fact of redundancy was crystallised after SFF made the decision to outsource her role to Aon when Mr Wood told her Aon would not let her length of service, accumulated leave and redundancy compensation provisions be carried over.

[37] There is also an assertion by Ms Simes in her brief of evidence that the Aon role itself was not substantially similar to the SFF role in terms of the kind of work. She states that the Aon role was *vastly different ... as far as the number of claims I would handle, the overall responsibility I held and the amount of travel I would do*. Mr Beck submits that the offered Aon role had sufficiently different conditions of employment to trigger eligibility for redundancy compensation. Mr Cleary for SFF does not address the issue of the type of work offered.

[38] The issue of whether the Aon work role itself was substantially similar or not was not an issue raised by Ms Simes with Mr Williams before she instructed him to cease negotiating with Aon on her behalf. In light of what I decide below, I do not need to determine that issue.

[39] SFF says that the process leading to a decision about whether or not Ms Simes was to be made redundant had not commenced. It says that it had not given Ms Simes notice of redundancy because it was still in the process of working out whether Aon could be persuaded to accept and carry over all of Ms Simes' terms and conditions. SFF submits it could have persuaded Aon to do so but that it was prevented from doing so by Ms Simes herself.

[40] Beyond that Mr Williams says that if Aon could not be persuaded to that position he had in mind a health and safety job that was so newly vacant that it had not yet been internally advertised to talk with Ms Simes about in the hope she would

accept transfer or redeployment⁷ to that role. However, he did not get that opportunity because Ms Simes resigned.

[41] I put aside SFF's evidence and submissions about a possible redeployment because the situation did not arise and there is no way of assessing whether any proffered position would have been one that met the requirements of clause 15.5 of the IEA.

[42] There is a fundamental disagreement about whether clause 15 means there is to be a one-off discussion between SFF and Aon or an ongoing process.

[43] My view of clause 15 is that the decision to externally transfer the ACC claims management process to Aon triggered SFF's responsibilities to Ms Simes set out in clauses 15.1 and 15.2. Those clauses set out SFF's role in protecting Ms Simes' interests; they are referred to in clause 15 as *employee protection provisions*.

[44] Ms Simes' view expressed to Mr Williams in her 11 February email that SFF had *already fulfilled their obligations by getting me an offer by Aon who then presented it to me on an individual basis*. Mr Beck submits that clause 15.2 means that SFF only had to negotiate with Aon to get an initial offer.

[45] I do not agree. Instead, I accept Mr Cleary's submission that the plain meaning of the words used in clauses 15.2 and 15.3 support the view taken by SFF that the negotiation was not a one-off discussion or time-limited but could be an ongoing process. Clause 15.1 is headed ***Process for negotiation with new employer***. These words are a useful cross-check as to the meaning of the clause. Mr Williams was willing to keep negotiating with SFF about whether Ms Simes' service with SFF would be treated as continuous service. He was willing to keep undertaking a negotiation process covering the matters set out in clause 15.2, which includes whether Ms Simes' service would be treated as continuous service with Aon.

[46] Logically, there must have been an end-point in SFF's responsibility for the negotiation process. However, I do not accept that point had been reached on 10 February 2015 prior to Ms Simes instructing Mr Williams to stop negotiating with Aon on her behalf.

⁷ Although Mr Williams seems to talk about 'transfer' and 'redeployment' as if they are the same I consider in these circumstances it would have been clause 15.5 that would have been applicable, rather than clause 5.

[47] When Ms Simes first instructed Mr Williams to stop negotiating with Aon he rightly pointed out that he was contractually bound to negotiate on her behalf and he had already clarified that he did not believe that redundancy compensation would be necessary because Aon would offer substantially similar terms and conditions. At that point he understood that carrying over Ms Simes' continuous service and provision for redundancy compensation was important to her.

[48] Mr Williams' evidence is that in his initial negotiation with Mr Wood Aon had agreed to carry over Ms Simes' service. He formed that view because Mr Wood had told him no redundancies would be necessary. SFF had the right to check and insist on what it understood Aon had agreed to.

[49] It is my view that in instructing Mr Williams to cease negotiating with Aon Ms Simes waived her right to the contractual protections SFF had put in place in the event that her role was disestablished.

[50] Ms Simes cannot now insist that SFF is liable to pay her redundancy compensation when it is possible, although no-one can now assess how likely it was, that Aon's subsequent offer may have been one which recognised and carried over both her length of service with SFF, her accumulated leave and her redundancy compensation provisions and provided a role that was substantially similar to her role at SFF.

Is it equitable in all the circumstances for Ms Simes to be paid redundancy compensation?

[51] Another way of viewing the situation is that it would be inequitable for Ms Simes to instruct Mr Williams to cease trying to get Aon to carry over her service and the protective provisions she had in her IEA but to insist it pay her redundancy compensation anyway.

Did Ms Simes resign?

[52] A third way of analysing whether or not there were any unmet obligations on SFF's part is to consider whether Ms Simes' letter of 16 February 2015 was actually a resignation which cut across any possible dismissal by way of redundancy.

[53] Mr Beck's submissions are premised on the letter of 4 February notifying Ms Simes of the external restructure and the target date for handover of 2 March being notice of her dismissal.

[54] Dismissal occurs when the employment relationship actually comes to an end, not when an employee is given notice that it will end. Had nothing further occurred it is possible that SFF would have given Ms Simes notice of her dismissal by way of redundancy. However, I do not consider that it had done so when it informed Ms Simes that the target handover date to Aon was 2 March 2015. Contractually SFF was bound to give Ms Simes a month's written notice⁸ and she was bound to do the same⁹. Neither of them gave the other a month's notice.

[55] In Judge Couch's Employment Court decision of *Westpac Banking Corporation v Smythe*¹⁰ Ms Smythe's position had been dis-established. After Ms Smythe declined an alternative position Westpac gave her notice that her employment would be terminated on the grounds of redundancy and that she was not eligible for redundancy compensation as she had declined to take up a substantially similar position. Westpac's notice of termination meant her employment was to end on 5 December 2003. However, after that Ms Smythe gave notice of her resignation to take effect on 4 December 2003. Judge Couch decided that Ms Smythe's employment was terminated by her resignation rather than by dismissal and as a result she was not entitled to the benefit of the redundancy compensation provisions set out in her employment contract.

[56] Ms Simes denies that she resigned. I accept that her letter did not use the term resignation. However, it did say she had accepted a job elsewhere and gave notice of the last day she would be employed by SFF. She asked for all her leave to be paid out along with her final pay. The letter was notice of the fact and the time of the cessation of her employment with SFF. In effect, it was a resignation letter.

[57] The triggering of Ms Simes' right to redundancy compensation had not occurred when Ms Simes wrote her letter of 16 February which was notice of the termination of her employment with SFF at her initiative. Ms Simes is not entitled to the payment of redundancy compensation.

⁸ Clause 6.2 of the IEA.

⁹ SFF did not insist on a month's notice being given.

¹⁰ [2006] NZEmpC 6

Was Ms Simes subjected to unjustified disadvantage?

[58] Mr Beck's submissions address the assertions that SFF's process of making the decision to make Ms Simes' role redundant means Ms Simes was unjustifiably disadvantaged and that SFF failed to provide her with adequate information so breaching SFF's good faith obligation under s 4(1A) of the Act.

[59] Section 4(1A) provides that when an employer is proposing to make a decision that is likely to have an adverse effect on the continuation of the employment of an employee it must provide access to information relevant to the continuation of that employee's employment. The employee must have an opportunity to comment on that information before a decision about the continuity of their employment is made.

[60] SFF says there was no pre-determination because its decision was made after the consultation process had ended, that the consultation period was not inappropriately short and that the decision and process to reach it were justified.

[61] Mr Cleary submits that SFF did not breach its duty of good faith. He submits that SFF gave Ms Simes access to all relevant information during the consultation process, except for an exchange of emails between Mr Williams and Mr Wood. Mr Williams says he did not provide these and would not have provided them had they been requested because they were commercially sensitive.

[62] Sections 4(1B) and 4(1C) of the Act, as they were at the relevant time¹¹, provided that an employer did not have to provide the information to the affected employee if there was *good reason* to maintain confidentiality. *Good reason* included protecting the commercial position of the employer from being unreasonably prejudiced.

[63] It is certainly arguable that in the circumstances SFF should have provided access to more information than was provided. Since I have not seen the emails and have not had an opportunity to question Mr Williams, I consider I am unable to make a determination on the two remaining claims unless I hold an investigation meeting.

[64] In all the circumstances, Ms Simes and Mr Beck may wish to consider Ms Simes' position. If Ms Simes wishes to pursue the two further claims, considering

¹¹ Sections 4(1A), (1B) and (1C) were amended by the Employment Relations Amendment Act 2014 with the amendments coming into effect on 6 March 2015.

that further legal costs will be incurred, Mr Beck should let the Authority Officer know and we will hold a telephone directions conference as soon as possible to set an investigation meeting date.

Costs

[65] Costs are reserved until all matters are disposed of.

Christine Hickey
Member of the Employment Relations Authority