IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 233
CRC 3/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEITH WILLS Plaintiff
AND	GOODMAN FIELDER NEW ZEALAND LIMITED Defendant

Hearing:	3 - 6 November 2014 (Heard at Christchurch)
Appearances:	L Ryder and J Goldstein, counsel for the plaintiff T Clarke, counsel for the defendant
Judgment:	22 December 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Keith Wills was employed as a baker by Goodman Fielder New Zealand Limited (Goodman Fielder) or its predecessor company, from 1978. By 2011, he was the Bread Plant Manager at the bakery operated by Goodman Fielder at Essex Street in Christchurch (Essex Street site). The bakery building and plant was seriously damaged in a significant earthquake which occurred on 22 February 2011.

[2] This case concerns what happened to Mr Wills' role following the earthquake. Although his staff were eventually made redundant, he was not because Goodman Fielder hoped to retain his skills and experience. He held some temporary roles, but by late 2011 he was very uncertain as to whether the bakery would be rebuilt, and as to what would be required of him in the meantime. In December 2011, he resigned in frustration. He then brought proceedings in the

Employment Relations Authority (the Authority), asserting that he had been constructively dismissed because Goodman Fielder had breached duties owed to him. In particular, he contended that his position should have been disestablished, and that he should have been offered redundancy compensation. He sought various remedies including an amount equal to his redundancy compensation. He also brought a breach of contract claim in similar terms.

[3] The Authority determined Mr Wills was not unjustifiably disadvantaged in his employment, and that Goodman Fielder was not bound to make Mr Wills' position redundant; it was also held that he was not entitled to redundancy compensation.[1] Mr Wills challenges the Authority's determination, essentially putting his case on the same basis as previously. Goodman Fielder contends that he resigned voluntarily, that there is no proper basis for asserting a constructive dismissal grievance and that it was not in breach of contract. It also says that he is not entitled to the remedies sought.

Background

[4] On 15 July 1978, Mr Wills commenced work as an apprentice baker for a business enterprise which was subsequently transferred to Goodman Fielder. In December 1998, he became Bread Plant Manager at the Essex Street site.

[5] In 2004, Goodman Fielder was incorporated, and Mr Wills became an employee of that company with his previous service being treated as continuous.

[6] Goodman Fielder had two main divisions: the Baking Division, which produced bread products under the trade-name of Quality Bakers; and the Dairy Division which produced products under the trade-name Meadow Fresh. Each division had its own management structure. It thereby operated two separate trading arms.

[7] In his role as Bread Plant Manager, Mr Wills managed the day-to-day operations of the plant, including overall plant efficiencies, waste, quality and the administration of staff holidays' and rosters. Twenty-seven staff reported to him.

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[1] *Wills v Goodman Fielder New Zealand Ltd* [2013] NZERA Christchurch 258.

The bakery operated three shifts of nine staff, seven days a week except for Christmas day. An important part of Mr Wills' role was the training of apprentice bakers. To become qualified, three to five years' training and work experience was required. Goodman Fielder employed up to nine qualified bakers. Mr Wills was also responsible for ensuring the quality of the bread product was maintained, and that it was available for distribution in a timely way.

[8] Mr Wills said he was passionate about bread-making and took pride in producing consistently top quality bread, on a continuous basis. It was common ground that he possessed excellent technical skills; he was regarded by management and colleagues as being very competent in his role.

[9] On 4 September 2010, a major earthquake occurred in Christchurch. Although some damage was sustained by the plant at the Essex Street site, it continued to operate.

[10] Between September 2010 and May 2011, Mr Wills took over responsibility for the Food Coatings division on a temporary basis which was also located at the Essex Street site. It was intended that the temporary role would continue until a replacement manager could be appointed, because the previous manager had transferred to Napier. Ultimately the Regional Operations Manager, Mr Tony Andrew, determined that Food Coatings did not require a full-time manager. The role was neither technical nor full-time. He offered Mr Wills the role, who then took over responsibility for Food Coatings.

[11] The management of the Food Coatings occupied approximately 25 per cent of Mr Wills' full-time role; the Bread Plant Manager role, when the plant operated, occupied 75 per cent of his full-time role; and it constituted 90 per cent of his overall financial responsibilities.

[12] At this point Mr Wills reported to the Manufacturing Manager, Mr Brett Pfahlert (based in Christchurch); Mr Pfahlert reported to Mr Andrew as the Regional Operations Manager (based in Christchurch); Mr Andrew reported to Mr Colin Avis, Manufacturing Director of Baking (based in Auckland); and Mr Avis

reported to the General Manager of Goodman Fielder New Zealand, Roger Gray, (based in Auckland).

[13] On 22 February 2011, a second earthquake occurred in Christchurch. The bakery building and plant was seriously damaged; this meant that both the bread and crumb plants had to cease operations.

[14] In the aftermath, it was initially decided that the company would continue to pay as many staff as possible despite production having ceased. This was achieved by providing staff with alternative duties. Arrangements were made to bring in bread from plants beyond Christchurch; those at the Essex Street site arranged distribution. Mr Wills assigned some of his staff to these tasks, at the request of the Distribution Manager. The receipt of bread products to the Essex Street site meant that the production of breadcrumbs was able to recommence in April 2011; ten of Mr Wills' staff were thus able to return to normal duties.

[15] In May 2011, Mr Pfahlert offered Mr Wills an appointment to the permanent role of Plant Manager – Bread and Food Coatings. The purpose of this role was to manage both the Bread Plant and the Food Coatings operations efficiently. Mr Wills had direct responsibility for the operation of those plants in all respects; key accountabilities included operational effectiveness, maintaining quality, ensuring the plants kept to their budgets, providing leadership of staff in both plants, ensuring health and safety standards were maintained, and effecting improvements. An employment agreement for the purposes of the new role was provided to Mr Wills, and both parties had signed this by 25 May 2011.

[16] In April 2012, Mr Pfahlert was seconded to the Continuous Improvement Team in Auckland for 12 months. By June 2012 Mr Andrew was concerned that Mr Wills was finding the ongoing uncertain circumstances stressful. It had become clear that it could take two years to rebuild the baking manufacturing building and plant. After discussion with senior managers, Mr Andrew decided to announce at a meeting of staff that Mr Wills would cover some aspects of Mr Pfahlert's role while he was working in Auckland. It was his view that formalising this role with Mr Wills in advance was likely to be unacceptable to him. Before the two had

discussed the additional duties he announced that Mr Wills would be assisting him. Then they informally agreed the details. Mr Wills' job description was not amended.

[17] It was agreed that Mr Wills would be responsible for manufacturing at the Essex Street site; but he was not to be responsible for the distribution or logistics functions which operated at that site. Nor would he undertake some financial responsibilities which would otherwise fall on the Manufacturing Manager; those would be conducted by Mr Andrew.

[18] For his part, Mr Wills did not consider that the role involved significant extra work. There were other managers at the site, and he saw the role as being a point of contact for staff or others if needed. He had on previous occasions been asked to undertake a Manufacturing Manager role, and had declined such an offer. A Manufacturing Manager had administrative and financial accountabilities which he said the company was well aware were tasks with which he did not feel comfortable; he made his concerns about taking on the full role clear to Mr Andrew, and the South Island HR Manager, Ms Debbie Fife. He took on only some of the tasks of Manufacturing Manager.

[19] I find that there was effectively a split of the Manufacturing Manager's function between Mr Wills and Mr Andrew.

[20] Later in the year Mr Andrew stated in an email that Mr Wills commenced this function in April. Mr Wills himself, however, stated that the assistance commenced in June; I consider Mr Wills' evidence to be more reliable on that detail, since the issue related to his own responsibilities.

[21] At about the same time, June 2011, a decision was made to consult with the bakery staff as to the possibility of them being declared redundant. At a meeting held with members of the bread plant on 13 July 2011, staff were addressed by Mr Gray and the recently appointed National Human Resources (HR) Manager Bakery, Ms Susan Walls. Staff were advised that having regard to the significant earthquake damage to the baking manufacturing building and plant, it was considered that there was now no option but to close the bread plant for

approximately two years. This meant that all roles in the breadline and in some associated support functions would need to be disestablished. Affected staff would be offered the option of applying for vacant roles within Goodman Fielder, which would include relocation assistance. If staff were unsuccessful in applying for other positions, or if staff chose not to apply for an alternate position, they would be offered redundancy compensation. Eighteen-month fixed-term contracts were offered with no loss of pay for alternate roles at the bakery site. Only fixed-term contracts could be offered, because management was unsure as to the future of the bread plant.

[22] The object of this initiative was to redeploy as many affected employees as possible. Management wished to avoid redundancies as the situation was already uncertain and stressful for many employees as a result of ongoing earthquakes and aftershocks. The company hoped to retain employees' skills in the business so that they could assist in operating any new bread plant that might be rebuilt in the future.

[23] Mr Wills was not included in this consultation process. Prior discussions had occurred between Mr Andrew, Mr Pfahlert, Mr Avis and Mr Gray regarding Mr Wills' position. It was known that he was unhappy and that he was expressing frustration over the situation which had arisen. It was decided that redundancy would not be discussed with Mr Wills, as it was hoped his skills could be retained in the business. It was decided that Mr Gray would offer Mr Wills the opportunity to work in Auckland on a baking-related project, which it was thought would appeal to him.

[24] Following the consultation meeting with staff, Mr Gray met privately with Mr Wills, and told him that he would not be made redundant as Goodman Fielder wanted to retain him. He was asked to work in Auckland, as a stand-in Manager while a permanent Manager was recruited (he did not wish to relocate to Auckland to assume the role himself) and to assist on a bakery-related initiative, Project 7000. This would be on a part-time basis; he would work in Auckland, approximately every second week. Mr Wills considered this option, discussed it with his family and accepted. He was very positive about it because it would allow him to return to

baking work. No formal agreement was entered into. He was not asked to accept this temporary role as a redeployment in the context of redundancy.

[25] Mr Wills was asked to remain at Goodman Fielder principally because the company wished to retain his skills, but also so that he could assist with the redundancy process relating to his staff. Ms Fife gave evidence stating that an additional reason for Mr Wills' retention related to the fact that were Mr Wills to be made redundant, he would receive a "sizeable payout" and that the company wished to avoid this. Mr Andrew as the Regional Operations Manager did not accept this was a relevant factor. Since Mr Andrew was directly involved in the discussions which led to the suggestion that Mr Wills would work on a part-time basis in a bakery in Auckland, I prefer his evidence that the cost to the company of a redundancy payment to Mr Wills was not a factor which prompted the offer to work fortnightly in Auckland.

[26] Mr Wills was concerned as to the welfare of his staff members, and assisted in the transitional issues. By late July 2011, Mr Wills was stressed by the uncertain circumstances which had arisen which included the fact that he was feeling under-utilised. He took medical advice. But there is no evidence that senior managers were advised of the medical consultation at the time.

[27] On 25 July 2011, Mr Wills commenced the part-time temporary role in Auckland. The new Plant Manager was recruited in late August 2011. Mr Wills maintained the week-about arrangement, so as to assist the new appointee, and also to be involved in Project 7000 although this was only short term. It then became apparent to Mr Wills that he was no longer needed in Auckland. The arrangement eventually ceased in November 2011.

[28] As far as his Christchurch responsibilities were concerned, once the redundancy processes had concluded in mid-August, Mr Wills managed the Food Coatings operation, but it was only a small part of his role; he also undertook some aspects of the role of Manufacturing Manager as had previously been agreed. Mr Andrew, to whom Mr Wills reported, described these as being, in practice, "basic labour control and compliance matters". He acknowledged these were tasks that

Mr Wills did not particularly enjoy, and did not involve any of his technical bakery skills. The reality, he said, was that the role and tasks Mr Wills was performing in Christchurch were not long-term options or solutions. They were interim functions until a decision could be made regarding the future of the Christchurch bread plant. It was his opinion that Mr Wills was not meaningfully or gainfully employed in his various fill-in roles.

[29] Further uncertainty developed from approximately July 2011, because a significant company-wide restructure involving the merger of three divisions was in the course of being implemented. This was called Project Tower, and involved multiple senior roles being disestablished.

[30] In September 2011, Mr Wills raised a question to Mr Chris Delaney during a CEO briefing as to when a decision would be made as to the rebuild of the bakery at Christchurch. Mr Wills said he was given no real or clear answer. Soon after he also raised a question as to what was happening as to the restructuring. He was told that Project Tower was being managed in stages, and that the new appointees would have to assume their positions, before decisions as to the future structure of the bread operations would be made.

[31] With effect from 1 October 2011, Mr Wills' base-salary was increased from $92,057 to $94,819. At the same time Mr Wills asked the local HR manager for increased remuneration for taking on the Acting Manufacturing Managers' role. There is no evidence linking this request to the increase actually given to him. I accept Mr Wills' evidence that he was given an annual increase.

[32] On 13 October 2011, Mr Wills sent an email to Mr Darron Curphey, who had just been appointed Operations Director under the Project Tower restructure. In his email he explained he was Plant Manager for the Bread and Food Coatings operation in Christchurch, and was also covering for Mr Pfahlert whilst the latter was seconded to Auckland. He said that neither Mr Pfahlert nor himself were being kept in the loop, and that he was also keen to understand what was planned as regards the rebuild for the bakery. Mr Curphey responded, indicating that announcements were about to be made in respect of the appointment of some senior managers, and that he

would be speaking to relevant management personnel as to what was intended for the bakery. There is no evidence, however, that information regarding the future of the bakery was provided to Mr Wills by way of response to his enquiry.

[33] In the context of the overall restructuring, the positions which Mr Avis and Mr Gray formerly held were disestablished. So was Mr Andrew's position, although it was intended that he would assume a leadership role at the Essex Street site, focusing on a rebuild strategy. From about this time Mr Wills was regarded as an Acting Site Manager, Bread and Food Coatings, rather than Manufacturing Manager. There is no evidence that this was the subject of any formal agreement, or that the substance of the previous understandings changed. By this time Mr Wills reported to Mr Sean Parker, who had been appointed National Bread Hub Manager; Mr Parker reported to Mr Curphey as Operations Director. Mr Curphey reported to Mr Peter Reidie, Managing Director (NZ), Baking, Diary and Meats, Home Ingredients. Ms Walls who had been the National HR Manager (Baking) reporting to Mr Gray, became the National HR Manager, and reported to Ms Carmel White, HR Director (NZ), who in turn reported to the Managing Director. All these appointees were based in Auckland

[34] On 7 November 2011, Mr Wills sent an email to Mr Parker, seeking information as to what was to happen on several issues at the Essex Street site. He asked what was intended for the site manager and plant managers' roles; he also asked whether there would be a site coordinator (a person who would deal with the rebuild of the bakery).

[35] Mr Parker met with Mr Wills soon after this email on 10 November 2011 to discuss his questions. Mr Wills also sought clarity as to who he was supposed to be reporting to, Mr Parker or Mr Andrew. Mr Parker said he could not provide any answers. Mr Wills told him that he was so concerned about the uncertainty of the situation and how it was affecting him, that he had now started looking for alternative employment. Mr Parker told him that he would arrange a "telephone meeting" with Mr Curphey, and that they would ring him the following week.

[36] On 20 November 2011, Mr Wills sent an email to the local HR Manager, Ms Fife, stating that since the February earthquake, the baking operation had ceased and that his role as "Bread/Food Coatings Plant Manager" had "changed dramatically". He believed also that his role would change further under Project Tower. He believed he was entitled to redundancy, and wished to discuss these circumstances with her further.

[37] On 23 November 2011, Mr Parker advised Mr Curphey that he had become aware that Mr Wills (whom he described as Christchurch Plant/Temporary Site Manager) was close to obtaining alternative employment.

[38] On 28 November 2011, Mr Curphey and Mr Parker rang Mr Wills to discuss his concerns. Mr Wills described the uncertainties regarding his role. Mr Curphey said that he would need to speak to Mr Pfahlert regarding his own future; that issue had to be resolved before other decisions relating to the site could be made. Mr Curphey said he would attend to this the following day. Mr Wills spoke to Mr Pfahlert on the afternoon of 29 November 2011 to ask if that conversation had occurred. It had not.

[39] In response to a lack of progress, Mr Wills sent a letter to Ms White which Ms Fife had assisted him to draft. He summarised the post-earthquake events and the particular roles on which he had been assisting. He then said:

> However the bulk of my job was managing the bread plant, and now that this no longer exists, I have had advice which suggests my position with the company is actually redundant because there has been a significant change to my responsibilities now that I no longer have a bread plant to manage.
>
> So I am now asking the company to please respond to me on this. I am sure with so much going on with Goodman Fielder and the redundancies of all the bread plant people that this is just something that hasn't been considered. But based on the advice I have received, I am interested to hear the company's position on my employment status and whether redundancy is an option as my job is very different to what it has always been before the bakery closure.

[40] Mr Curphey's reaction when informed of this letter was that Mr Wills was seeking redundancy compensation after securing a job offer; the implication was that he considered the payment of redundancy compensation to be unjustified.

[41] Ms White asked Ms Janice-Lee Mackie recently appointed as (Regional HR Manager, Southern) to review the situation. Ms White considered that Mr Wills still had a plant to manage even if the work had changed. She told Ms Mackie she would be discussing the issue further with Mr Curphey.

[42] Mr Wills described his position by this time as being one where he was at a "loose end". He had ceased working in Auckland, and although he had some increased Site Manager functions, this was minimal. The future was very uncertain. Mr Andrew also considered that Mr Wills was not "meaningfully or gainfully employed" in his alternative roles. For her part, Ms Fife considered that the company was not giving Mr Wills any indication as to whether or not the bread plant would be rebuilt, and that he therefore did not know how long he would have to continue without undertaking baking work, a matter which was very frustrating for him. She was of the view that the company needed to consult him about disestablishing his position and making him redundant. She discussed this with Mr Andrew who agreed with her assessment. She said that she also told Ms Walls that Mr Wills was looking for other work; the response was "if he leaves, he leaves".

[43] Ms Jane Doré, Quality Manager with oversight in respect of four South Island sites, also observed that Mr Wills did not have much to do. When he ceased his fortnightly trips to Auckland, it was her assessment that he felt "lost". He had been trying to obtain answers, but local managers were unable to provide those.

[44] On 1 December 2011, Mr Wills was offered a position with another employer. He was unsure whether to accept it.

[45] On 12 December 2011, Mr Wills contacted Ms Mackie, seeking an update as to the redundancy enquiry he had made by letter two weeks previously. She responded the next day saying that she was now seeking information as to what had occurred. To that end she asked a series of questions as to what he had been asked to do and when, and whether he had raised any concerns over his position. Similar questions were asked of Mr Parker and Mr Andrew.

[46] On 14 December 2011, Mr Wills advised Ms Fife that the issue was troubling him, and affecting his sleep; she passed this information on to Ms Mackie.

[47] On 15 December 2011, Mr Andrew forwarded Ms Mackie a summary of the functions undertaken by Mr Wills that year, as requested. He said that the main purpose of the position as outlined in Mr Wills' position description had changed, because the bread line was no longer operating. His direct reports had been reduced by 64 per cent, and he no longer held 90 per cent of his financial responsibilities.

[48] Mr Wills emailed Ms Mackie on the same day summarising his post-earthquake circumstances. Mr Wills confirmed that he had raised the issue of whether he should be made redundant with Mr Gray and Ms Fife on several occasions; he referred also to the letter he had sent to Ms White in late November, and a phone query he had made to Ms Mackie as to whether he was entitled to redundancy. He attached an annotated position description, which showed that substantial proportions of his role were either no longer being undertaken, or undertaken only to a minor extent.

[49] By this time Mr Wills felt he could no longer cope with the uncertainty, and decided to accept the external position which had been offered to him, resigning on 21 December 2011. In his resignation letter he stated:

> In July 2011 when the consultation process with our Baking Team started, I approached Roger Gray (who was the then Managing Director for Quality Bakers NZ) regarding my position, as with the pending closure of the bread plant, it was fairly obvious my role would also be disestablished but nothing had been communicated to me at that point. Roger said he wanted to avoid redundancy if possible to keep my experience and skills in the baking business somehow, and since then I have enquired several times about my position and my future within Goodman Fielder, however no one has been able to give me any answers.
>
> This decision has not been an easy one to make after 33.5 years working for Goodman Fielder, however the ongoing uncertainty and stress has unfortunately left me with no choice but to resign.

[50] Ms Mackie continued with her review of Mr Wills' contention that he was redundant. In an email to Ms Walls of 22 December 2011, she advised she had received information from Mr Wills and Mr Andrew, and that she had also spoken to Mr Parker who agreed that Mr Wills should have been offered redundancy "months

ago". Mr Curphey's reaction was that the resignation meant the company would lose "a lot of experience for the future – [Mr Wills] is apparently one of our strongest from a technical perspective however [he is] not a people manager".

[51] Mr Wills still wanted to know if the company accepted that it should pay redundancy compensation, and sent follow-up emails to that effect. On 23 December 2011, he also advised Mr Parker as to what he thought the management options at the Essex Street site could be following his departure. At about this time, Mr Pfahlert was asked to return to Christchurch to manage the site since Mr Wills was leaving.

[52] In December 2011 and January 2012, Ms Mackie discussed Mr Wills' status with Ms White; they also discussed the position with Ms Walls and Mr Curphey. They were of the view that Mr Wills was not redundant; he was still performing work which the company wanted him to perform. They considered that the tasks he was performing were within the scope of his previous management role even if the bread plant was not operating. The company still needed his skills and experience. Because he decided to resign, they considered he was not entitled to redundancy compensation.

[53] In early January Ms Mackie met with Mr Wills and told him that senior management did not believe his role had substantially changed as he was still in a leadership role; if they had thought his role was redundant, they would have considered redeployment so as to retain his skills. He asked for this to be confirmed in writing.

[54] Initially Ms Mackie drafted a letter for Ms White to send to Mr Wills which summarised what she told Mr Wills when she spoke to him. However this was revised so that a response was given to Mr Wills by Ms Mackie herself on 23 January 2012 as follows:

> In response to your letter dated 25 November 2011 and your subsequent discussions with me, this letter confirms as requested by you that the company did not deem your management position as redundant nor did we advise you at any stage that redundancy would occur.

> After the February 2011 Christchurch earthquake you agreed to perform the duties of Site Manager and had several discussions with management to that effect. You continued in this role until you accepted a new position external to Goodman Fielder.
>
> The company acknowledges your valuable contribution and service and has accepted your resignation from the business.

[55] Mr Wills commenced employment with the external employer on 24 January 2012, on a salary of $90,000.

[56] In April 2013, Goodman Fielder decided not to rebuild the bread plant. The manufacturing part of the Essex Street site was closed in June 2014, although the site continues to operate as a bread depot with a site leader and 15 staff.

Mr Wills' individual employment agreement

[57] Mr Wills' individual employment agreement (IEA) was signed in May 2011. It stated that it took effect on 1 January 2011. It also stated with regard to position and responsibilities that:

> The responsibilities of the position are set out in the attached position description. The employee's job description may be changed by the employer from time to time after discussion with the employee.
>
> In addition to the responsibilities set out in the position description, the employee will undertake other duties as requested and shall carry out all reasonable and lawful work-related requests made by the company.

[58] The agreement contained a redundancy clause in the following terms:

> **20. REDUNDANCY**
>
> Redundancy is a situation where the employee's employment is terminated by the Company, by reason, wholly or mainly, of the fact that the employee's position has, or will, become superfluous to the needs of the Company.
>
> In the event that the Company dismisses the employee on the grounds of redundancy, the employee will receive one month's notice of termination or payment in lieu of notice, and the parties agree that redundancy compensation is payable as follows:
>
> (a) Four weeks base salary/wage for the first year or part year of service completed by the employee; and
> (b) Two weeks base salary/wage for each subsequent completed year of service completed by the employee, subject to a

> maximum payment of 34 weeks pay calculated at the employee's base salary rate of pay.
>
> No redundancy shall arise and the company will be under no obligation to provide you with any form of notice of redundancy or redundancy compensation in the event of:
>
> > (a) a sale, transfer, lease, succession, merger, amalgamation or reconstruction of all or part of the Company's business such that your employment with the Company is terminated and you are offered employment with the purchaser or any party to the transfer, lease, succession, amalgamation or reconstruction on terms and conditions which are generally no less favourable than your existing terms and conditions; or
> >
> > (b) an internal restructuring in which your position is disestablished and you are offered redeployment with the Company on terms and conditions which are generally no less favourable than your existing terms and conditions; or
> >
> > (c) an internal restructuring in which your position is disestablished and you accept any offer of redeployment with the Company.
>
> Paragraph (b) is consistent with the redundancy policy which states that redundancy does not occur if the employee is offered suitable or comparable alternative employment.

[59] Clause 4 of the IEA contained an obligation for the employee to abide by any policies, rules and procedures of the employer which were in effect and which applied generally to the company's employees; the company reserved the right to amend or revoke its policies or introduce new policies from time to time on reasonable notice.

[60] One such policy was a redundancy policy dated March 2007; it provided:

a) That the policy applied to all permanent Goodman Fielder based employees; where an employee was party either to an IEA or a collective employment agreement which governed redundancy, the terms of that agreement would prevail.

b) That Goodman Fielder may from time to time be required to review its operations, technology, processes and/or strategy, which may result in employee positions becoming redundant. In all instances, the company would act to manage those redundancies in an objective and consultative manner, with redeployment to other suitable positions

being the primary goal. If redeployment was unsuccessful, the company would provide notice and pay redundancy compensation in accordance with the policy.

c) In a section which described what redundancy meant, the following descriptions were given:

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

[61] It will be necessary to discuss these provisions later in this decision.

The pleadings

[62] Mr Wills claims that as a result of a breach of duties by Goodman Fielder, he resigned in circumstances amounting to a constructive dismissal. The breaches of duty are alleged to be:

a) Failure to provide him with meaningful work.

b) Failing to treat him in good faith.

c) Treating him differently from other bread line staff.

d) Failing to constructively respond to his requests for information about the rebuild of the bread plant.

e) Failing to address his concerns over the rebuild situation despite the company being aware the situation was having a negative impact on him.

f) Failing to properly consider his request to be made redundant in November 2011.

[63] Mr Wills accordingly seeks reimbursement of lost wages and other money, including loss of benefits in the form of redundancy compensation as well as compensation for hurt, humiliation and injury to feelings. Interest is also claimed.

[64] Alternatively Mr Wills brings a claim in contract, alleging the following breaches:

a) In circumstances where the position of Bread Plant Manager was significantly diminished as a result of the closure of the breadline, Goodman Fielder failed to consult him about whether or not his position was redundant.

b) Goodman Fielder failed to redeploy him into suitable or comparable alternative employment.

c) He should have been paid redundancy compensation.

d) The terms of his employment agreement and of the redundancy policy were accordingly breached by a unilateral decision not to make Mr Wills' position redundant.

[65] Under this head Mr Wills seeks general damages for humiliation, loss of dignity and injury to feelings, and special damages in respect of his redundancy compensation, together with interest.

[66] With regard to the constructive dismissal claim, it is Goodman Fielder's case that:

a) Mr Wills actively engaged with Goodman Fielder so as to remain in employment, notwithstanding the uncertainty regarding the future of the Christchurch bakery.

b) He was treated in good faith throughout 2011 and 2012, and until he decided voluntarily to resign.

c) Goodman Fielder constructively considered all requests for information, and took into account Mr Wills' concerns regarding the future of the Christchurch bakery.

d) Goodman Fielder was not required to terminate his position on the grounds of redundancy once it received his request to do so.

[67] In respect to the breach of contract claim, it is the company's case that:

a) Mr Wills held the position of Plant Manager – Bread and Food Coatings.

b) That position still remained at the time he resigned, and his position was not surplus to the company's requirements.

c) Alternatively, and without prejudice to the contention that he had resigned his position, Mr Wills accepted redeployment opportunities within the company's business during 2011.

d) In the circumstances, Goodman Fielder was not required to provide notice of redundancy, or pay redundancy compensation.

e) His employment ended by way of resignation.

f) There was accordingly no breach of the employment agreement or the redundancy policy.

[68] In short, Goodman Fielder's case is that Mr Wills' employment was terminated as a result of a voluntary resignation, and not because Goodman Fielder wanted him to go. His position was not superfluous to the needs of the company. He was gainfully employed for nine months after the February earthquake until he chose to resign. Alternatively, even if his position had become superfluous, by his conduct he accepted a variation of the content of his duties or redeployment within Goodman Fielder. He enjoyed ongoing employment until his resignation, continued to work and be paid for his work, and suffered little financial loss as a result of resigning to join a new employer.

Interpretation issues

[69] I next consider the obligations in respect of a potential redundancy under the IEA and the redundancy policy.

[70] I first consider the employer's obligations as to consultation. The redundancy policy provided that in all instances, Goodman Fielder would act to manage redundancies in an objective and consultative manner, redeployment to other suitable positions being a primary goal. In addition, s 4 of the Act provides that the parties to employment relationships must deal with each other in good faith which includes, whether directly or indirectly, not doing anything which misleads or deceives the other party, or is likely to do so. This duty is described as being wider in scope than the implied mutual obligations of trust and confidence and also requires them to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative.[2] Specifically, the duty of good faith requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide the employee access to information about the decision which is relevant to the continuation of the employee's employment; and to provide an

[2] Section 4(1A)(a) and (b).

opportunity to comment on the information before the decision is made.[3] The Court of Appeal has recently confirmed that the s 4 provisions are a clear departure from the law as stated in previous Court of Appeal decisions.[4]

[71] Next it is necessary to consider what the employment documents say about the making of a redundancy decision by the employer. For the defendant it was submitted that the redundancy policy contemplates that a position "*may* become redundant" where work disappears, a list of examples being given on a non-exhaustive basis. The point was made that the policy does not state definitively that the position *will* become redundant in those (and presumably any other) relevant circumstances. That submission implied that the employer had a discretion as to whether or not to decide that the position was superfluous to the needs of the company.

[72] However, I accept the submission made for Mr Wills that the use of the word "may" in the policy should not be construed as meaning that the employer has a discretion whether or not to make a position redundant where a position is actually surplus to company needs, this is because:

a) The definition of redundancy makes it clear that such a situation occurs where a termination is attributable "to the fact" that the position filled by the employee has or will become superfluous to the needs of the company.

b) Where a potential redundancy situation occurs, genuine consultation is required to be undertaken pursuant to s 4(1A)(c) of the Act; it therefore cannot be assumed that redundancy is inevitable. Thus the situation may or may not lead to the position being declared redundant.

[73] I also observe that cl 20 of the IEA, which describes the employer's primary obligations in a redundancy situation, does not use the word "may" or any other language which might suggest that the employer has a residual discretion.

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3 Section 4(1A)(c).

4 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [62].

[74] It is necessary to consider the meaning of the term "redundancy". The IEA describes such a situation in cl 20. A very similar description appears in the policy, although the policy enlarges on the circumstances in which a position has or will "become superfluous to the needs of the Company." The policy makes it clear that such a situation will occur "when the work available for an employee in that position disappears, or is significantly diminished or altered to such a degree that the position no longer exists". Illustrations are then given. I do not consider the descriptions contained in the policy conflict with the core definition contained in the IEA. Rather, the policy provides examples as to when the position will be superfluous.

[75] The next issue relates to the interface between:

a) Clause 5 of the IEA which makes it clear that the employer can change the employee's job description "from time to time after discussion"; and that the employee will "undertake other duties as requested and shall carry out all reasonable and lawful work requests made by the company."

b) Clause 20 of the IEA, which provides for redundancy when a position falls within the definition I have just discussed.

[76] Goodman Fielder submits in effect that pursuant to the provisions of cl 5, it could, and did, change Mr Wills' job description and/or required him to undertake other duties which were reasonable and lawful work-related requests; accordingly, it is argued, there was no need to resort to the provisions of the redundancy clause and/or policy.

[77] Of assistance on this issue is the dicta of this Court in *Sanson v Auckland Regional Council*,[5] and of the Court of Appeal in *Auckland Regional Council v Sanson*.[6] At issue in that case was an employment contract, which referred to a job description that was "subject to change at the discretion of the General Manager … [i]t may be decided at some future date, for reasons such as need elsewhere, altered

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5 *Sanson v Auckland Regional Council* [1999] 1 ERNZ 708 (EmpC) [*Sanson* (EmpC)].
6 *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 (CA) [*Sanson* (CA)].

workloads or career development, to transfer you to another appropriate position".[7] There was also a redundancy agreement, which provided for termination which was "attributable wholly or mainly to the fact that the position filled by a worker is/or will become superfluous to the needs of the employer".[8]

[78] In the Employment Court, the Judge accepted that the word "appropriate" in the position clause meant "suitable" or "proper". The appropriateness or suitability of a proposed position needed to be tested against the characteristics of the former position. That assessment would involve objective consideration of fact and degree which would include the characteristics of the employee.[9] The Judge held that a position which the employer proposed by way of transfer was not "another appropriate position" for the purposes of the position clause.[10] The Court of Appeal upheld that finding.[11] In short, the discretion possessed by the employer under the position clause had to be exercised in terms of the contractual arrangements, which included the terms of the redundancy agreement.

[79] Turning to the IEA which applies in this case, I find that although the position clause is expressed in broad terms as to the changes which may be made to the job description, the employer's ability to request the employee to undertake other duties must be "reasonable and lawful" as the agreement states. However, the ability to do so is not open-ended. If any purported change or request is such that the employee's original position disappears or is significantly diminished or altered to such a degree that it no longer exists, then the redundancy provisions will take effect.

[80] The decision of *Sanson* is relevant to the facts of this case in another respect. There, the employer also argued that the provisions of the redundancy agreement did not operate because its provisions had not been invoked by the employer. As to this the Court of Appeal stated:

> [46] It does not lie in the mouth of the [employer] to repudiate the application of the redundancy agreement on the basis that the union has not been consulted or that it has not yet formally terminated Mr Sanson's

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7 At [4].
8 At [5].
9 *Sanson* (EmpC), above n 5, at 721.
10 At 726.
11 *Sanson* (CA), above n 6, at [48].

> employment. Failure to consult the union cannot be fatal to a worker's rights under the agreement. It is a provision intended to benefit the worker and included in the employment contract for that purpose. Nor can the application of the redundancy agreement turn on the [employer's] decision to terminate a position as distinct from the termination in fact of that position. In this regard, Mr Sanson's employment has been effectively terminated in that his position has been "disestablished". Moreover, cl 4(b), which defines the rights of redundant workers, uses the phrase: "Where an employee is rendered redundant". This phrase would seem to confirm that an employee may be made redundant when the position he or she fills has become superfluous to the needs of the employer irrespective of whether the Union has been consulted or the [employer] has formerly terminated the employee's employment.

[81] The Court considered that the redundancy agreement applied to the actual circumstances although the employer had not invoked them; it was open to the Employment Court to consider whether the redundancy provisions in fact applied.

[82] Counsel for Goodman Fielder submitted that the *Sanson* decision was distinguishable, because the employee in that case conducted himself on the basis that his position had been disestablished, and because the language used in the redundancy agreement was different from that which applies in this case. Although other cases are of course specific to their facts and the terms of the particular employment agreements, I nonetheless consider that the principle applied by the Court of Appeal is applicable. Goodman Fielder could not repudiate the application of the redundancy clause by electing not to undertake consultation or not to make a decision to terminate Mr Wills' position. As the Court of Appeal emphasised, such provisions are intended to benefit the worker.[12] What was important in *Sanson* was the actual factual position. In the present case such a conclusion is underscored because the definition of redundancy in cl 20 refers to "the fact" that the employee's position has or will become superfluous to company needs.

[83] Other cases were relied on by Goodman Fielder to support a submission that Mr Wills did not have a right to choose or insist upon being made redundant. It was submitted that redundancy is "a misfortune, not a privilege"; by reference to cases where the Courts have held that an employee cannot insist on being made redundant, or resign and claim redundancy. Certainly, there are cases where such conclusions were appropriately reached, and I refer to two such examples:

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[12] At [46].

a) In *Zip Commercial Interiors Ltd v New Zealand Building Trades Union*, five employees resigned.[13] The question was whether they were in the circumstances entitled to compensation for redundancy notwithstanding the resignation. Chief Judge Goddard made the point that an employee could not resign and claim to have been redundant or insist upon being dismissed for redundancy.[14] But he also made it clear that the issue in the case before him was whether the termination was in substance a resignation; he held that what was required was an analysis of the "character and consequence" of the termination of the employment. In that instance an incoming purchaser assumed control of the employer company and manipulated employees into resigning by reducing their wages and conditions unilaterally. That was held to be a repudiation of the contracts of employment, to which the employees responded by cancellation. The employees were taken to have been dismissed.[15] There was accordingly a clear liability on the employer to perform the requirements of the relevant redundancy agreement if the employees were actually redundant.[16]

b) In *Westpac Banking Corp v Smythe* an employee's role was disestablished, and she was offered an alternate position.[17] She declined the position and was notified that her employment would terminate on grounds of redundancy. Before it took effect, she resigned.[18] There was no dispute as to the disestablishment of the employee's position. The Court concluded that the alternative position which the employee was offered was not a "substantially similar position" as the relevant employment agreement required.[19] However in the context of a breach of contract claim, the Court considered whether a resignation which occurred prior to the expiration of a period of notice meant that the redundancy provisions did not apply. The

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13 *Zip Commercial Interiors Ltd v New Zealand Building Trades Union* [1993] 1 ERNZ 34 (EmpC).
14 At 46.
15 At 46-47.
16 At 46.
17 *Westpac Banking Corporation v Smythe* EMC Auckland AC5/06, 9 February 2006.
18 At [1]-[2].
19 At [80].

Court examined the particular, and somewhat unusual, circumstances that arose. The Judge held that the employee gave notice of resignation, which made it plain that she wished her employment to be terminated. Resignation in those circumstances was held not to be compatible with dismissal: the employee was accordingly not entitled to the benefit of the redundancy provisions.[20] The Court also raised a question as to whether there was a constructive dismissal; following a review of the pleadings and the way in which the case had been put, the Judge concluded that the issue was not before the Court and it could not be considered.[21]

[84] I am satisfied that the authorities relied on considered circumstances that differ from the present;[22] but they emphasise the necessity of objectively analysing the reality of a purported resignation. As a result, in a case where an employee resigns but asserts an entitlement to redundancy compensation:

a) the Court must consider the facts and whether they fall within the relevant contractual definitions, as in *Sanson*; and

b) whether the fact of resignation precludes a redundancy claim will involve a consideration of all the circumstances to assess whether the termination was in substance a resignation.

[85] Finally, in this discussion of the legal implications of the IEA and redundancy policy, reference should be made to the redeployment options as referred to in the redundancy clause. It is clear that no redundancy can arise following the disestablishment of a position where either:

a) the employee is offered redeployment on terms and conditions which are generally no less favourable than existing terms and conditions or;

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[20] At [86]-[97].
[21] At [99]-[109].
[22] In addition to the examples analysed, reference was also made to *McCarthy v Owens Project Services* [1994] 2 ERNZ 572 (EmpC); *Nelson Timber Industry IUOW v Nelson Pine Forest Ltd* [1989] 1 NZILR 451 (LC); *New Zealand Public Service Assoc v Land Corp Ltd* [1991] 1 ERNZ 741 (LC) and *Gearry v Armourguard Security Ltd* EMC Christchurch CC22/09, 15 December 2009.

b) the employee accepts any offer of redeployment.

[86] The provisions relating to the first of those options provides an express cross-reference to the redundancy policy when it states that redundancy does not occur if the employee is offered "suitable or comparable alternative employment". In the first instance, the offer must be not only no less favourable than the existing terms and conditions, but must meet the requirement of providing a suitable or comparable alternative. That is of course a question of fact. If an offer is made which meets these criteria and it is declined, the employee is not entitled to redundancy compensation.

[87] The second instance covers the possibility of any other kind of offer of redeployment (that is one that was either less favourable, or could not otherwise be regarded as providing suitable comparable alternative employment). In the second instance, the employee has a choice as to whether he or she accepts the offer. If the offer is accepted redundancy compensation is not payable. Conversely, if the employee chooses not to accept such an offer, redundancy compensation is payable.

Principles applicable to the two causes of action

[88] The plaintiff primarily relies on the constructive dismissal claim, asserting that in the circumstances there is a personal grievance.

[89] In *Grace Team Accounting*, the Court of Appeal agreed with dicta of this Court which emphasised that in a redundancy situation the clear words of s 103A require the Court (and the Authority) to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done in all the circumstances at the time.[23] In that case the Court of Appeal held there were multiple breaches of the obligation to act as a fair and reasonable employer which included careless miscalculations of financial information, reliance on that wrong information, the provision of wrong information to the employee, and a decision to make her redundant on the basis of wrong information.[24] These were all steps that meant the employee was not treated as a fair and reasonable employer

[23] *Grace Team Accounting*, above n 4, at [81], [84].
[24] At [97].

would have done (the Court making it clear that under the current test, the issue would be what a fair and reasonable employer could have done).[25] In this instance, the issue in the end will be whether Goodman Fielder's actions in respect of Mr Wills were what a fair and reasonable employer could have done.

[90] The principles relating to the concept of constructive dismissal are well known.[26] In this case, Mr Wills' case was put on the basis that there were multiple breaches of duty by the employer which led him to resign – this being one of the well-established categories of such a dismissal.

[91] With regard to this category, the first relevant question is whether the resignation was caused by the alleged breach or breaches of duty on the part of the employer. If breach and causation are established, the question will then turn to whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.[27]

[92] A constructive dismissal may occur even if an employer is not seeking the resignation of the employee, and wishes to retain that person in its employment. Thus, in *Hwang v Boyne Co Ltd t/a Goodday Newspaper* the Court stated:[28]

> Because of the nature of a constructive dismissal, it may be that the employer does not intend the employment relationship to end and may, as here, so advise the employee. But if the employer in doing so acts in continued fundamental breach of the contract or evinces an intention not to be bound by fundamental elements of it, that may nevertheless give the employee grounds to treat the position as a constructive dismissal even although it may appear to be the antithesis of an actual dismissal.

Analysis

[93] Before considering the application of the relevant provisions of the IEA and the redundancy policy, it is necessary to analyse the factual circumstances.

[94] In the period from February to July 2011, following the earthquake, there was an inevitable period of uncertainty. It was hoped that the bread plant would re-open.

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[25] At [85], [93] and [98].

[26] See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

[27] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR 415 (CA) at 419.

[28] *Hwang v Boyne Co Ltd t/a Goodday Newspaper* [2004] 2 ERNZ 412 (EmpC) at [23].

As far as Mr Wills was concerned, he and his staff undertook necessary alternative duties. It was hoped by all that normality could be restored as soon as possible. Progress was evident. The distribution centre was operational by April 2011; the crumb plant, ready foods plant and pikelet manufacturing were all operating again by late April 2011 or early May 2011.

[95] It was in this context that Mr Wills was offered and signed the IEA as Plant Manager – Bread and Food Coatings. Although the bread line was not operating at the time, it was anticipated that this would occur, although precisely when could not be predicted. Mr Wills hoped it would be before too long. I also accept Mr Andrew's evidence that an aspect of this formal appointment, which added the role of managing the Coatings Plant to Mr Wills' previous role, was to offer him some variety and to keep him interested. The additional duties were neither technical nor full-time, amounting to some 25 per cent of Mr Wills' full-time role.

[96] Mr Andrew wanted to provide Mr Wills with additional tasks so that he would remain with the business. After discussion with Mr Avis, he announced to staff that Mr Wills would assist with regard to some of the duties of the Manufacturing Manager's role. Then he raised the issue with Mr Wills himself. As Mr Andrew put it later:

> This was done quietly and one-on-one with myself and [Mr Wills]; no fixed period was given for this as we had no defined timeline to work to.

[97] Although it was submitted for Goodman Fielder that this was a significant role, and one that should have resulted in Mr Wills taking on significant responsibilities because he was managing the entire Essex Street site including oversight of the distribution centre which distributed bread products to Christchurch on a daily basis, this was not the reality. The clear evidence which I summarised earlier is that Mr Wills and Mr Andrew divided the Manufacturing Manager's functions. Whilst it may have been the expectation of senior managers based in Auckland that Mr Wills would undertake all the functions of a Site Manager, including overseeing all divisions on site, health and safety, compliance, finance matters, as well as leadership, I find that that is not what was agreed between Mr Andrew and Mr Wills following on from informal discussion between the two of them.

[98] As explained earlier, Mr Wills did not manage the distribution and logistics of bread products at the site, and did not undertake administrative tasks such as finance which it was known he was not interested in and did not want to perform. These latter functions were undertaken by Mr Andrew, to whom he reported until at least October 2011. The evidence establishes that at no time was Mr Wills' job description amended, and at no time was he formally requested to perform all the functions of Manufacturing Manager or Site Manager.

[99] In July 2011, it was determined that it was no longer sustainable to retain the bakery staff at the Essex Street site, and the appropriate consultation process was commenced. A deliberate decision was made not to declare Mr Wills' position surplus to requirements.

[100] Mr Wills had believed that his position would be disestablished. He met Mr Gray following the consultation meeting with staff. He was told that he would not be made redundant, as the company wished to retain him in the business, rather than have him seek alternative employment elsewhere. Mr Gray succeeded in persuading Mr Wills that he should stay, working in Auckland to cover for a position which was in the course of being filled, and to assist in the improvement of the running of a bread line (Project 7000). Mr Wills agreed to take up this temporary role so as to help the company and as a favour to Mr Gray, with whom he got on well with. At this time, it was not known whether or when any rebuild of the bread plant would occur. Having regard to the information that was presented to staff at the consultation meeting, it is obvious that any resumption of the bread line would not occur for a considerable period; staff were told that repairs to or rebuilding of the breadline was estimated to take "approximately two years".

[101] In these uncertain circumstances, Mr Wills agreed to assist the company by working about every second week in Auckland; for a time he enjoyed doing so. However, the tasks which he was asked to undertake there were soon accomplished.

[102] Further significant uncertainty arose because of the restructuring occasioned by Project Tower. In September and October 2011, Mr Wills asked managers at the Essex Street site such as Mr Andrew and Ms Fife what was intended. They could

not provide any clarification. Mr Gray had been a strong advocate for the rebuild of the bakery in Christchurch, but his position was disestablished in October 2011. This appears to have led to further uncertainty as to whether the rebuild of the bakery could or would be advanced.

[103] Mr Wills not only regularly asked Mr Andrew and Ms Fife what was to occur; but also asked Mr Parker (to whom he was now reporting under the post Project Tower restructure), and then by Mr Curphey. None of them could or did give definite answers as to what was intended for the future of the bakery, one way or the other.

[104] Mr Wills ceased travelling to Auckland for work purposes in mid November 2011; whereas he had been engaged for half of his working time on Auckland-related duties, this was no longer the case, and there is no evidence that, upon returning to work full-time at the Essex Street site he had sufficient duties as to keep him fully occupied in the time he now had available to him.

[105] Witnesses called for Goodman Fielder such as Mr Gray, Ms Walls and Mr Curphey, considered that Mr Wills should have been fully engaged as Acting Site Manager. However, they were not party to the agreement reached between Mr Andrew and Mr Wills as to this role and did not have an accurate appreciation of the particular tasks that it had been agreed he would perform.

[106] Nor did they issue any instructions with regard to his performance of the Site Manager's role. That is understandable. It is clear that there was a significant preoccupation with the Project Tower restructuring and that it created significant uncertainty. As mentioned, Mr Gray, who had some knowledge and awareness of Mr Wills' circumstances, had left the company. Ms Walls had a limited involvement with Mr Wills during the redundancy processes at the Essex Street site, but she became heavily involved in the implementation of Project Tower. Mr Curphey was in the course of assuming a new role where he had responsibility for 16 sites around the country, of which the Essex Street site was only one.

[107] However, senior management was on express notice from mid November of Mr Wills' concerns. Mr Wills met with Mr Parker on 10 November 2011 seeking clarification; he was told there would be a follow-up phone call with Mr Curphey immediately, but that did not happen. On 20 November, Mr Wills formally raised with the local HR Manager, Ms Fife, a concern that he was entitled to redundancy compensation, because of the significant changes in his role. A telephone discussion between Mr Wills and Messrs Parker and Curphey on 28 November did not advance the issues, with Mr Curphey stating he would need to talk to Mr Pfahlert regarding his intentions, before any decisions could be made as regards to what was to occur at the Essex Street site. There was no indication in this conversation that Mr Wills would have a role with regard to the reinstatement of the bakery line; despite requesting information as to what was to happen (for instance when he initiated communications with Mr Curphey in his new role on 13 October 2011), no information on that topic was provided to him. No decision had been made as to whether it would be rebuilt.

[108] In November, when Mr Wills ceased the fill-in role he had agreed to undertake as a favour to Mr Gray, he became increasingly vocal as to what was to occur next. Senior management were on clear notice that there was a long-running issue that needed to be resolved with regard to Mr Wills' employment. It was obvious that his contracted responsibilities as Manager of the bread plant could not be fulfilled, and that this had been the position since February, with all other bakery positions declared surplus in July. The managers who were not familiar with the background assumed that Mr Wills had agreed to and should have been undertaking the different role of Acting Site Manager. But they were not aware of the details of the agreement that had been reached between Mr Andrew and Mr Wills, and did not seek any clarification of his circumstances.

[109] On 30 November 2011, Mr Wills wrote formally to Ms White, asking to be considered for redundancy. The essence of his concern was that the core of his position was to manage the bread plant; he believed that as the position no longer existed he was in fact redundant.

[110] Ms Mackie conducted a review which ascertained the relevant information, particularly from Mr Wills, Mr Andrew and Mr Parker. Notably, Mr Parker (to whom Mr Wills now reported) expressed the view that Mr Wills "should have been offered redundancy months ago". This was also the opinion of those who had worked with Mr Wills at the Essex Street site, particularly Mr Andrew to whom he previously reported.

[111] Although Mr Wills provided a carefully annotated version of his job description which showed that substantial proportions of his role could not be carried out and were not being carried out, senior managers in Auckland continued to assume that he had a full-time alternative role as Acting Site Manager. A factor which influenced the reaction of Mr Curphey and his colleagues to Mr Wills' letter was that, by early December, it was known Mr Wills had been offered an external position. It was their view that the company wished to retain his skills for the business, and that he should continue in what they assumed was a significant role as Acting Site Manager.

[112] There was an incorrect focus on Mr Wills' skills and the company's wish to retain them, rather than on the question as to whether his contracted position was surplus to requirements, as should have been the case. In short, the company's interests were put ahead of Mr Wills' rights.

Constructive dismissal

[113] The first legal issue is whether the company breached a duty or duties, such that Mr Wills' resignation was reasonably foreseeable. In considering this question I must focus on what a fair and reasonable employer could have done in the circumstances.

[114] For Mr Wills, it is contended that there was a failure properly to consider the disestablishment of his role as Plant Manager – Bread and Food Coatings in July/August 2011 when all other bread line staff underwent a redundancy process; and then when he specifically raised the matter in November 2011.

[115] No formal decision was made declaring Mr Wills' position surplus to requirements. The company asserts that Mr Wills was deliberately excluded from the restructuring proposal in July 2011 and that for his part he went along with a decision not to offer him redundancy. As to this issue:

a) By July 2011, it was clear that the bread line could not be reinstated for approximately two years, if at all. The positions of the bread line staff were accordingly disestablished. The bread plant infrastructure was seriously damaged in February, and there were no relevant staff to manage from July 2011. Management of the bread plant had occupied 75 per cent of his full-time role, and had constituted 90 per cent of his overall financial responsibilities. The work with regard to his contracted position as Plant Manager – Bread and Food Coatings had significantly diminished so that the position no longer existed. It was plainly surplus to requirements.

b) Because the company wished to retain Mr Wills' skills, it did not commence consultation with him in July when this occurred with all other relevant staff. Mr Gray and his colleagues appear to have been concerned that unless some other arrangement could be resolved, Mr Wills would be redundant and he would seek employment elsewhere. As a personal favour, however, Mr Wills agreed to stay on and assist the company. But this was not by way of redeployment. I find that had Mr Wills' not been willing to accommodate the company, it is more probable than not that his position would have been formally disestablished at that time.

c) As already mentioned, the submission is made for Goodman Fielder that redundancy is not a matter of choice for the employee, and that in a situation where an employer does not consider it necessary to declare a position surplus to requirements, the redundancy clause does not apply. In that respect, I consider the dicta of the Court of Appeal in *Sanson* to be applicable.[29] It is the reality of what occurred based on the facts as ascertained which must determine what should have happened under

[29] *Sanson* (CA), above n 6, at [46].

the employment agreement; the reality was that Mr Wills' position no longer existed in substance. It was not Mr Wills' responsibility to determine whether the provisions should have applied. They were included in the agreement for his benefit. Consistent with its good faith obligations, a fair and reasonable employer could not have concluded that it was unnecessary to disestablish the surplus position.

d) The company relies on the fact that Mr Wills had a responsible role as Acting Site Manager. In effect, the company asserts that it was entitled to, and did, supplement the core responsibilities which Mr Wills had under the employment agreement by reason of the position clause, with additional functions; and that Mr Wills consented to an assumption of these supplementary duties. I have found that Mr Wills assumed some only of the functions of Manufacturing Manager/Site Manager on a temporary basis. And it is clear from the dicta in *Sanson* that the right of the employer under a position clause such as the present is not open-ended, given the rights which an employee has by the reason of redundancy provisions in his IEA.[30] Under the position clause, any additional responsibilities had to be a "reasonable" work-related request. It could not be reasonable to insist that Mr Wills work in the wholly different role of Site Manager against his wishes, if his position had disappeared, or had significantly diminished or had been altered to such a degree that it no longer existed. That was plainly the case here. It was not open to Goodman Fielder to assert that Mr Wills' contracted position still existed so that the redundancy clause did not apply.

e) It was also submitted for Goodman Fielder that Mr Wills in effect affirmed the contract or acquiesced in the employer's breaches, thereby preventing any later resignation from being a constructive dismissal. A related submission is that Mr Wills took no steps to object or otherwise assert his rights. In the circumstances which pertained to the Essex Street site, and given the regular requests Mr Wills made of local colleagues and senior managers in Auckland, I am satisfied that he

[30] At [36]-[37]. See also *Sanson* (EmpC), above n 5, at 719-720.

continued to be concerned about his position, and appropriately raised his concerns. They were not responded to constructively, largely because of the considerable uncertainty which existed by reason of the Project Tower restructuring. Relevant personnel were not in a position to give answers, and thus the uncertainty continued. In legal terms, Mr Wills reserved his right not to accept the repudiation of his employment agreement and allowed his employer an opportunity to remedy its breaches.

f) Goodman Fielder submits that Mr Wills was treated in good faith, and that communications with him were appropriate. For the reasons I have previously explored, however, this was not in fact the case. From July 2011 onwards, he was provided with practically no information as to the status of plans for the future of the bakery; nor was there any indication as to what was intended for him personally in connection with the reinstatement of the bakery. Mr Gray considered that there would be a need for Mr Wills' expertise in assisting in the rebuild, which would involve planning, scoping of equipment, sourcing of equipment, hiring of individuals and so on. He considered that these activities could have occurred within a two-year period. I am not satisfied that these details were discussed with Mr Wills, or that it was agreed that he would perform functions of this type. No doubt that is because the decision to rebuild the bakery was never made. In short, on this issue the company was not active and constructive in providing information to Mr Wills as to whether or not it would proceed with reinstatement, and if so his possible role in that context.

g) Finally, the company asserts that Mr Wills resigned voluntarily, thereby bringing his employment relationship to an end. A related submission is that he did not make any effort to resolve the issues with his employer before he resigned, for instance by requesting mediation. I have earlier referred to authorities which have discussed a situation which can arise, where a resignation will relieve an employer of its redundancy obligations. I am satisfied in this case that the resignation

> was caused by the considerable frustrations Mr Wills experienced, built up over a period of months of uncertainty and under-utilisation. This issue will need to be considered more fully later when assessing the respective causes of action brought by Mr Wills, but at this stage I find that but for the company's breaches with regard to its obligations under the redundancy clause in the circumstances, Mr Wills would not have resigned in the way he did. The resignation did not relieve the company of its redundancy obligations, since as I shall shortly elaborate its failure to deal with those obligations caused the resignation.

[116] I conclude that Goodman Fielder breached the redundancy clause by failing to consider properly the disestablishment of the position of Plant Manager - Bread and Food Coatings at the same time it undertook a redundancy process in respect of all bakery staff. It was obvious that Mr Wills was in the same position as all other staff, and the redundancy process should have included him. That could have, potentially, included a formal process of redeployment to another role, or an offer of redundancy compensation as his IEA provided.

[117] In November 2011, there was a further breach of the same nature when he specifically raised his considerable frustration and concerns. After several informal attempts to have his concerns addressed, he wrote formally to management in the letter which was sent on 29 November 2011. It was not until he prompted Ms Mackie on 12 December regarding her review of the matter, that a process to obtain information was initiated. That proved to be inadequate because it did not consider the facts properly or in a timely way. Understandably Mr Wills resigned. Again there was a failure on the part of the company to institute a fair and reasonable process under the redundancy clause.

[118] Other breaches were alleged, such as a failure to treat the plaintiff in good faith, failure to respond constructively to Mr Wills' requests for information and failure to address Mr Wills' concerns despite an awareness that the situation was having a negative impact on his wellbeing. I consider these separate allegations are subsumed by the primary allegations on which I have made findings.

[119] I am satisfied that Mr Wills has established that the company did not fulfil its redundancy obligations, and thereby breached the duties which it owed him; because the situation continued with no obvious end in sight, Mr Wills resigned. The breach of those fundamental duties caused the resignation.

[120] The next issue is whether a substantial risk of resignation had been reasonably foreseeable having regard to the seriousness of the breaches. The breaches went to the core of the relationship of trust and confidence between the parties, and I am satisfied that the situation was sufficiently serious as to justify Mr Wills' decision to resign. I also consider that it was obvious – and reasonably foreseeable – that Mr Wills would reach the point where he would resign because he could not continue his employment where his future role was so uncertain.

[121] Accordingly, Mr Wills was constructively dismissed. I am satisfied that the steps taken by the company were not those which a fair and reasonable employer could have taken in all the circumstances. I accept the submission made for Goodman Fielder that the circumstances which were initiated by the February earthquake were particularly unusual. However, there was an adequate opportunity for Mr Wills' situation to be properly addressed, as occurred in respect of other bakery staff. The ultimate problem which gave rise to the breaches of duty was not the earthquakes and aftershocks, but the national restructuring which resulted in inadequate communication between senior managers and those working at the Essex Street site, and Mr Wills.

[122] Mr Wills' personal grievance is accordingly established.

Breach of contract

[123] An alternative claim is brought by way of breach of contract. For the reasons already given there were breaches of the obligation to carry out the processes as to redundancy in the IEA and policy, so that claim is also established.

[124] However, the constructive dismissal claim was advanced as the primary claim, and in the present case I consider it to be the more appropriate means of analysing the situation which arose.

Remedies

[125] I deal with the remedies relating to Mr Wills' constructive dismissal claim.

[126] The first is for reimbursement of lost wages. At the time of his resignation, his salary was $94,819 per annum. His salary at the position he assumed following his resignation was $90,000. There is accordingly a difference of $4,819 gross per annum, which is $92.67 per week. The amount claimed from the date of dismissal on 23 January 2012 to 3 November 2014 is accordingly $13,437.15. In terms of the steps outlined in *Trotter v Telecom Corporation of New Zealand Ltd*, the question is whether the amount sought is equal to or less than the equivalent of three-month's ordinary time remuneration.[31] It plainly is.

[127] The defendant raised an issue as to whether there was adequate mitigation. He was not cross-examined on this topic, and in the post-earthquake circumstances I am satisfied that his acceptance of the alternative position offered on a salary just short of his salary with Goodman Fielder was not unreasonable.

[128] Next, Mr Wills submits that he would receive his full contractual entitlement to redundancy compensation in the sum of $61,997, either as reimbursement of money lost,[32] or as a lost benefit which he might reasonably have been expected to obtain if the personal grievance had not arisen.[33]

[129] In *McKendry v Jansen* a full Court discussed these provisions, concluding that compensation for loss of a parental leave payment would fall within either sub-section.[34] Further, s 123(1)(c)(ii) was not to be interpreted narrowly.[35]

[130] When reviewing the history of such provisions, reference was made by the full Court to the judgment of Richardson J in *Telecom South Ltd v Post Office Union (Inc)* where it was held that:[36]

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[31] *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 694.
[32] Employment Relations Act, s 123(1)(b).
[33] Section 123(1)(c)(ii).
[34] *McKendry v Jansen* [2010] NZEmpC 128, [2010] ERNZ 453 at [78].
[35] At [67]-[68].
[36] At [54], citing *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA) at 284 per Richardson J.

> Paragraph (c)(ii) is directed to a benefit "which the worker might reasonably have been expected to obtain if the personal grievance had not arisen". It is a prospective benefit, one to be obtained in the future, not the continuation of an existing benefit. The provision is intended to reach potential future service-related benefits and no doubt to include long service leave, superannuation, redundancy and golden handshakes in various forms for which the worker has not already qualified but which he or she might reasonably have expected to obtain with further service.

[131] Given that dicta, I consider the appropriate section to consider for the purposes of the present claim is s 123(1)(c)(ii).

[132] As counsel for the defendant submitted, it is necessary for the purposes of this claim to undertake a counter-factual analysis. Causation must be established.[37] The counter-factual analysis must first address the question as to what form of redeployment would have been offered to Mr Wills had the redundancy process been instituted; second, whether Mr Wills would have had a choice to accept redundancy compensation; and third, whether he would have exercised that choice.

[133] The evidence establishes that there was a potential role as Site Manager at the Essex Street site, and that the employer considered Mr Wills appropriate for the role. Indeed senior managers thought (incorrectly as I have found) that he was fully engaged in that role. Nor had it been formally offered to him as a permanent position in all respects. The company wished to retain Mr Wills' skills in the business. For the purposes of the counter-factual analysis, it is probable Mr Wills would have been offered redeployment to such a position. Ms Mackie told him precisely this in early January 2012.[38] I find that his terms and conditions would have been generally no less favourable than his existing terms and conditions, since the company would have wished to retain his services.

[134] But the real question is whether such an offer would have been "suitable or comparable alternative employment" under the redundancy clause of the IEA. In *Sanson*, as I have already mentioned, the Employment Court at first instance was required to consider the term "suitable" which was used for the purposes of a redeployment clause in the relevant redundancy agreement, against the right of the

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[37] *McKendry*, above n 34, at [68].
[38] See [53] above.

employer to transfer the employee to another "appropriate position" under the position clause. I set out the finding made by the Employment Court Judge on this point:[39]

> As to the meaning of "appropriate" Ms Latimer referred to the dictionary meanings which define appropriate as "suitable" or "proper". I accept Ms Latimer's submissions that "appropriate" and "suitable" are synonymous in the context of both the position clause and cl 4(b) of the redundancy agreement and thus the appropriateness or suitability of the proposed position must be tested against the characteristics of the former position. This will involve objective considerations of fact and degree which include the characteristics of the employee. The position clause and the redundancy agreement do not confer an absolute power on the defendant to dispose of its employees as it thinks fit. … This accords with the evidence given by Ms Brosnahan that the transfer needed to be a fair and reasonable alternative for both the defendant and the plaintiff. Ms Brosnahan also accepted that the new position must be comparable, with similar responsibilities.

[135] I consider that this passage describes the considerations which are relevant when determining whether the offering of a Site Manager's role to Mr Wills could be regarded as suitable or comparable alternative employment. The analysis must involve a consideration of the former position, objective considerations of fact and degree including the characteristics of the employee, and any transfer would need to be a fair and reasonable alternative for both parties.

[136] It is clear on the evidence before the Court that the Site Manager's role was very different from the role which Mr Wills was contracted to undertake as Plant Manager – Bread and Food Coatings. As described earlier, the purpose of that position was to manage both the Bread and Food Coating Plants efficiently with responsibility for the staff of those plants. It required a direct involvement in the two manufacturing processes which were the subject of the job description, and included the training of those who wished to become qualified bakers. Mr Wills was an experienced and suitable candidate for a Plant Manager's role, which he had carried out for many years.

[137] I have already found that he was not comfortable in the higher level of administration and financial responsibilities which the Site Manager's position entailed. He did not regard himself as being adept in dealing with such issues; and

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[39] *Sanson* (EmpC), above n 5, at 719, 721 (citations omitted), citing *Pilgrim v Director-General New Zealand Department of Health* [1992] 3 ERNZ 190 (EmpC) at 204.

Mr Curphey recognised that although he was strong from a technical perspective, he was not a "people manager", that is of the kind required of a Site Manager.

[138] I do not consider that the offering of a Site Manager's role to Mr Wills would have been either the offering of a role which was sufficiently similar to his former position, or one which would have been a fair and reasonable alternative for him in the circumstances. Had an offer of redeployment of such a role been made, it would not have met the description of being a suitable comparable alternative employment. Such an offer would therefore have fallen under sub-cl (c) in the redundancy clause,[40] the consequence of which was that Mr Wills would have had a choice of accepting that offer of redeployment, or of leaving the company and accepting redundancy compensation. I find that Mr Wills, who was very frustrated indeed by December 2011, would not have been satisfied by the offer of a Site Manager's role, and would have elected to take redundancy compensation.

[139] Accordingly, his redundancy compensation entitlements constitute a lost benefit which he might reasonably have expected to obtain if the personal grievance had not arisen. The sum of $61,997 gross is accordingly payable.

[140] The next claim is for compensation for humiliation, loss of dignity and injury to feelings. Mr Wills asserts that the way in which he was treated had a major impact on him. He describes sleep problems, becoming withdrawn, and being irritable with family and colleagues in an uncharacteristic way. He gave evidence that he had become depressed, and it was apparent from his demeanour when giving evidence that he regarded the events under review as having been very painful. Other witnesses who observed the way in which he reacted to the significant uncertainty which had arisen at the Essex Street site confirmed the accuracy of his account. He claims the sum of $15,000.

[141] Goodman Fielder submits that there is insufficient evidence in respect of this claim; and emphasises the principle of moderation which is well established on the authorities.

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[40] See [58] above.

[142] I am satisfied that appropriate evidence has been provided to the Court, both as summarised above, and in the form of GP notes which verified Mr Wills' condition, as at mid-July 2011. The evidence established that the stress he was enduring at that time continued until the termination; I consider it was caused by the failure of the company to consult and carry out its redundancy obligations.

[143] I acknowledge the principle of moderation, but I also regard the elements of humiliation, loss of dignity and injury to feelings to be significant. I award the sum of $12,000 under this head.

[144] It is submitted for Goodman Fielder that there should be a substantial reduction in remedies, because Mr Wills contributed to the situation which gave rise to his constructive dismissal. Specifically, it is submitted that he was not active, constructive, responsible or communicative in his dealings with the employer. It is contended that the first time Mr Wills raised the option of redundancy was on 20 November 2011, when he was close to securing a new role, and that he was offered a position with an alternative employer on 1 December 2011, accepting it on 15 December 2011, without waiting for the company to respond to his enquiry as to redundancy entitlements.

[145] I do not accept either of these submissions. I have found that Mr Wills raised his concerns as to his role on numerous occasions, both with his colleagues in Christchurch, and with members of senior management in Auckland. It is evident that his Christchurch colleagues were well aware of Mr Wills' circumstances, and indeed there was a view held by Mr Andrew and Ms Fife in Christchurch that he should have been offered redundancy well before he raised the issue; Mr Parker also considered that he should have been offered redundancy by the company. Nor do I regard the fact that Mr Wills resigned before an answer was given on his redundancy query, as amounting to relevant contributory conduct. The query was not dealt with expeditiously; and he was in a difficult position in that on the one hand he had an offer of work for an alternative position, and on the other he had been attempting without success to obtain clarity as to his future role with Goodman Fielder, to whom he had given long and dedicated service and to whom he was plainly loyal.

[146] I find there is no relevant contributory conduct which requires reduction of remedies.

[147] Finally, interest is sought. That claim is to be considered under cl 14(1) of Sch 3 to the Act. I consider it appropriate to award interest on the amounts awarded for lost wages and for lost benefits, on the basis that these are sums which it was necessary for Mr Wills to issue proceedings to obtain. Having regard to the discussion of this Court in *Salt v Fell*, I do not award interest in respect of the payment to be made under s 123(1)(c)(i).[41]

[148] Given the conclusions as to remedies on the personal grievance, it is not necessary to award remedies in respect of the breach of contract claim. Had I been required to do so, I would have considered that special damages for lost wages would have been in the same amount as has been awarded in respect of the personal grievance; and general damages for stress compensation would have been the same as has been awarded under s 123(1)(c). However, having regard to the difficulties of the rule in *Addis v Gramophone Company Limited* as discussed in *McKendry* the award in respect of the redundancy compensation benefits may well have been more controversial.[42]

Conclusion

[149] Mr Wills was constructively dismissed; his personal grievance is accordingly established.

[150] Remedies are awarded as follows:

a) Goodman Fielder is to pay Mr Wills lost wages in the sum of $13,437.15, together with interest at five per cent from 23 January 2012 to the date of payment.

b) Goodman Fielder is to pay Mr Wills $61,907 gross being redundancy compensation entitlements, payable as a lost benefit which Mr Wills

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[41] *Salt v Fell* [2006] ERNZ 499 (EmpC) at [131], [133]-[134]. This holding was undisturbed on appeal: *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193.

[42] *McKendry*, above n 34, at [33], [37]-[44], citing *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

might reasonably have expected to obtain if the personal grievance had not arisen, together with interest at five per cent from 23 January 2012 to the date of payment.

c) Goodman Fielder is to pay Mr Wills compensation for humiliation, loss of dignity and injury to feelings in the sum of $12,000.

[151] Mr Wills is entitled to costs. The parties may be able to resolve this issue directly. If not, Mr Wills is to file any application and relevant evidence by 6 February 2015; Goodman Fielder is to file any submissions and evidence if any in response by 27 February 2015.

B A Corkill
Judge

Judgment signed at 3.45 pm on 22 December 2014