

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER

of a challenge to determination
of Employment Relations
Authority

BETWEEN

Michael Baguley

Applicant

AND

Coutts Cars Limited

Respondent

Court: Goddard CJ
Travis J
Shaw J

Hearing: Auckland
18 and 19 December 2000

Appearances: Garry Pollak and Mr J Roberts, Counsel for Applicant
M P Reed, QC, and P A Morten, Counsel for Respondent

Judgment: 3 April 2001

JUDGMENT OF THE FULL COURT

Introduction

1. The applicant, Mr Baguley, is a former employee of the respondent, Coutts Cars Limited (Coutts), a motor vehicle dealer specialising in the luxury car trade. His employment there ended when it was terminated by Coutts. He raised a personal grievance based on a claim that he had been dismissed unjustifiably. He referred his grievance to the Employment Relations Authority. He was unsuccessful there. The Authority found that, according to the substantial merits of the case, Coutts had acted lawfully in making Mr Baguley redundant. He is dissatisfied with the whole of the Authority's determination. He elects to have his case heard anew by the Court.

2. Thus, this is a case within the contemplation of s179 of the Employment Relations Act 2000 (the Act) which reads as follows:

179 Challenges to determinations of Authority

- (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.
- (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.
- (3) The election must—
 - (a) specify the determination, or the part of the determination, to which the election relates; and
 - (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing de novo**).
- (4) If the party making the election is not seeking a hearing de novo, the election must specify, in addition to the matters specified in subsection (3),—
 - (a) any error of law or fact alleged by that party; and
 - (b) any question of law or fact to be resolved; and
 - (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the Court and the other parties of the issues involved; and
 - (d) the relief sought.

3. The Employment Relations Authority was established by s156 of the Act and was given exclusive jurisdiction over employment relationship problems generally, including personal grievances: see s161(1)(e) of the Act. It was required to deliver speedy, informal and practical justice to the parties (s174). The exclusiveness of its jurisdiction is modified by other provisions of the Act including s179. The Court derives its jurisdiction from that section and s187(1)(a) which is as follows:

187 Jurisdiction of Court

- (1) The Court has exclusive jurisdiction—
 - (a) to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority:

And s188(4) reminds us:

188 Role in relation to jurisdiction

- (4) It is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers, and jurisdiction.

Moreover, s183 provides:

183 Decision

Where a party to a matter has elected under section 179 to have that matter heard by the Court, the Court must make its own decision on that matter and any relevant issues.

4. The draftsman has added a footnote drawing attention to the contrasting provisions of s95(4) to (7) of the Employment Contracts Act 1991 which severely limited the scope of

appeals from the Employment Tribunal to this Court to those issues, explanations and facts, evidence and arguments that had been placed before the Tribunal unless one of the exceptions could be invoked.

5. Thus it is unnecessary for us to rehearse the Authority's determination. Rather, it is enough to say that the Court has before it the personal grievance that the Authority investigated. As required by s188(2) of the Act, we satisfied ourselves, by inquiry from counsel, that an attempt had been made to resolve the matter by the use of mediation. We did not think that any further mediation would contribute constructively to resolving the matter because both parties seemed determined to treat it as one of principle.

6. This is the first case of its nature. It is an important case for this reason and also because within it the question was raised as a central issue whether the principles declared by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 when the Employment Contracts Act 1991 (the ECA) was in force continue to apply under the new legislative scheme. Accordingly a full Court was convened for the hearing of the case pursuant to the provisions of s209 of the Employment Relations Act 2000.

7. As required by the Employment Court Regulations 2000 reg 7(2), the statement of claim containing the election to have the matter determined by the Court was accompanied by a copy of the Authority's decision. There is no requirement to file as well the statement of the problem originally submitted by the applicant to the Authority. However, the parties agreed that it was proper and necessary for the Court to have this statement and it was received by consent. It is clear that, as stated, the applicant claims that he was unjustifiably dismissed. He also says that Coutts has not acted in good faith in its dealings with him when making him redundant.

8. The applicant is seeking reinstatement to his former position, \$10,000 as compensation for breach of good faith by Coutts, \$10,000 as compensation for hurt and humiliation, such other relief as the Court deems appropriate, one month's additional wages in lieu of notice and costs.

9. Coutts admits in its statement of defence that it did not discuss with the applicant a suitable notice period and that it gave him no reasons and provided no information when making him redundant. Coutts denies that it failed to act in good faith in the respects alleged or that it failed to give sufficient or adequate notice of dismissal. It asserts that it has established substantive justification on the ground of redundancy.

10. Originally the parties appeared to be substantially agreed on the facts and a possibility existed that these might be agreed in their entirety, but the case grew and, in the end, the Court heard oral evidence in the ordinary way. The parties did produce a substantially agreed statement of issues.

The case before the Court

11. The case before the Court is a personal grievance by an employee based on a claim that he was unjustifiably dismissed. It is timely to recall that, from the earliest days of this jurisdiction under s117 of the Industrial Relations Act 1973 it has been held that it is –

... not ... a process aimed at producing cut and dried answers to allegations which in the conventional Court setting would be the subject of pleadings together with formal claims and counterclaims. As the marginal heading indicates the section is concerned with the settlement of personal grievances. Thus in such a situation as that disclosed by the present case the wider issue of the worker's grievance is the direct issue for assessment and resolution rather than the underlying complaint of dismissal. per Woodhouse P put it in *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd* [1982] ACJ 663, (1982) ERNZ Sel Cas 10 (CA) at 666 and 13 respectively.

The emphasis is ours. The marginal heading may have disappeared but the focus on the settlement of personal grievances remains – see s123 of the Act.

The facts

12. We found the following facts to be admitted or proved.

13. The applicant worked for Coutts between November 1998 and 31 October 2000. His work consisted of grooming or detailing used cars, fitting accessory parts, and some general driving duties. He was one of four groomers and reported to a supervisor. He had no written employment contract or agreement. The general manager of Coutts is Mr Paul Trenberth.

14. In addition to the four groomers on its staff, Coutts was also using the services of a specialist company, Newmarket Auto Valet, to groom cars in preparation for sale. This was seen as a convenient way of handling incoming shipments of new vehicles often arriving in large numbers and always needing to be processed quickly because they had been pre-sold. When that happened, it was beyond the on-site capacity of the four groomers employed who were busy with detailing second-hand vehicles.

15. On advice from the company's accountant, Mr Trenberth considered that the company would save approximately \$30,000 a year by employing two groomers rather than four and using the Newmarket company, whose rates were favourable, as required. He determined on that basis that two of the existing four grooming positions were surplus to requirements and that redundancies would be necessary.

16. On 25 September 2000 he spoke to the applicant and two colleagues about restructuring the grooming department. However, the applicant did not take it from this that his future employment was under consideration. Late on 27 September he was given a memorandum requiring him to attend a meeting at 9.30 the following morning. This time he was told that his job was at stake. He was also told that he should be represented but he could not secure a representative at such short notice and sought an adjournment, to which Mr Trenberth agreed although, according to the applicant, grudgingly and with hostility. The meeting was postponed by one day until 29 September.

17. The applicant attended that meeting with his solicitor, Ms Michele Ryan. There is some dispute about what was said, particularly whether Mr Trenberth said that the applicant's work was to be assessed (the applicant's and Ms Ryan's version) or that it had already been assessed (Mr Trenberth's). We accept the former version and reject the latter. Neither the applicant nor Ms Ryan was cross-examined and Ms Ryan gave evidence carefully. By contrast, Mr Trenberth did not impress us as a consistent witness.

18. The fact of the matter is that Mr Trenberth had already had the appraisal done. He had its results. He was content to let the applicant and his solicitor think that the appraisal lay ahead and that he only had blank appraisal forms. He was at least aware that the applicant and Ms Ryan were under that impression and that is why they were after the criteria that were to be used. Mr Trenberth did nothing to disabuse them and maintained merely that the criteria were confidential. It is difficult to see how they could have been, given what was at stake for the applicant. Counsel for Coutts did not seek to defend this stance.

19. In his brief of evidence Mr Trenberth attempted to put his role in the matter in a better light for Coutts but, given the failure to cross-examine either of the applicant's witnesses and given the many concessions and retractions made by Mr Trenberth in cross-examination, we cannot attach any weight to what he said in this respect. In particular, we

do not believe Mr Trenberth's evidence that at the meeting of 29 September he told Mr Baguley that the company had already used a selection process to determine which of the existing four groomers should be consulted. Equally unconvincing is his claim that, in asserting that the selection criteria were confidential to the company and that the process of selection was a management duty and prerogative, he was acting in good faith on advice received from the Employers and Manufacturers Association. He cannot abdicate responsibility for his actions in this way. He conceded that the meeting became "*a little heated*" but claimed that in due course everybody calmed down and it proceeded. However, he essentially accepted Ms Ryan's evidence and admitted in the end that he did not disclose that the assessment had already been carried out. We find that without this information Mr Baguley and Ms Ryan were at a significant disadvantage.

20. At the meeting, Ms Ryan, having been led to believe in the existence of undisclosed criteria, continued to ask for them. Mr Trenberth became angry. At first this may have been because he thought that the applicant was entitled to a support person who, however, in his view should not intervene. Later, it was because of Ms Ryan's persistence on the issue of disclosure of criteria.

21. We make the following findings about the sequence of events at the crucial and only meeting. Ms Ryan and Mr Baguley were invited into a very small office where she introduced herself to Mr Trenberth and another man, Mr Gary Harvey, the business management manager of the Giltrap Group. At the start of the meeting Ms Ryan and Mr Baguley knew nothing about the restructuring or what the employer was planning and neither of them was aware that his employment was to end. Mr Trenberth stated at the outset that the company had decided to restructure the grooming department and that it no longer required two of the four groomers employed in the yard. He stated that, as some of the grooming work was contracted out, the company no longer required as many groomers as it had previously. He asked Mr Baguley what, if any, views he had about the restructuring and whether he wished to make a comment on it. Ms Ryan asked Mr Trenberth for more details of the contracting out of the grooming work. Mr Baguley was very upset and stated that he was distressed at having been asked to the meeting. He asked why only he and one other groomer were required to meet with Mr Trenberth and not all the groomers. Mr Trenberth replied that he did not want to discuss the other groomers and that he was only required to discuss with Mr Baguley his views or comments in regards to the restructuring. However, neither Mr Baguley nor Ms Ryan was able to respond as they knew nothing about the restructuring. Ms Ryan restated Mr Baguley's concern at being singled out to attend restructuring meetings.

22. It was at this point that Ms Ryan asked Mr Trenberth what criteria the company was using to determine which of the employees would be made redundant. Mr Trenberth retorted that he was not required to provide her with the criteria being used to make the selection beyond saying that, although criteria did exist, the company had advice that it was not obliged to disclose what they are. Mr Trenberth was adamant and refused to explain or provide any information. Ms Ryan restated Mr Baguley's concerns and told Mr Trenberth that employment law required the employer to advise the employee about the criteria being used so that the employee could respond or comment on the criteria.

23. The meeting then became heated, with Mr Trenberth raising his voice and arms, standing up from his chair, and walking to the door of his office. His attitude became threatening, aggressive, and intimidating. Mr Trenberth said the meeting would be over should Ms Ryan continue to request information as to criteria; he made it plain that he would not discuss the issue; and went so far as to show Ms Ryan and Mr Baguley the door of his office which he opened indicating that he wanted them to leave. Ms Ryan was shocked by this outburst and recoiled. She was quite taken aback by Mr Trenberth's behaviour but it was clear from it that he would not allow her to discuss any further Mr Baguley's right to be advised on what criteria would determine his future employment. By this point Ms Ryan had become acutely aware that she was sitting in a strange office with three men whom she did not know, one of whom was yelling at her. She concluded that, if she continued to assert her client's right to be advised of the selection criteria, she would be thrown out of the meeting. She therefore agreed not to continue to request the company to provide the criteria during the meeting but stated that, in her view, the failure to provide the criteria was unfair and that this would remain an outstanding issue for her client. Mr Trenberth thereupon reiterated that the meeting had been called to hear Mr Baguley's comments and that he, Mr Trenberth, was not going to give out any information. Ms Ryan then asked Mr Baguley to speak about what he perceived to be his attributes and why he should remain in his position, despite being unaware as to why he was to be made redundant. Mr Baguley spoke for a few minutes. Mr Trenberth said that he would consider the issues raised by Mr Baguley.

24. During that meeting, Mr Harvey had been taking notes and, at its end, Ms Ryan asked to read those notes, which she did. She then asked that a typed copy be sent to her. Mr Trenberth promised to comply. Ms Ryan concluded by stating that she was unhappy with the tone of the meeting and thought that it had precluded a proper discussion. She also said that she felt that Mr Baguley was going to be made redundant and that it had all been

predetermined. Her last words were to the effect that, in her view, the process was not carried out in good faith.

25. Apart from her brief comments and Mr Baguley's comments regarding his attributes as a groomer, Mr Trenberth did all the talking and controlled the meeting. In the environment, in Ms Ryan's opinion, it was impossible for Mr Baguley to contribute any substantial views as he had no information of substance to work with. We agree with this assessment.

26. Ms Ryan left the meeting expecting to receive a copy of the notes and to hear from Mr Trenberth about his decision concerning who was to go and who was to stay. Her plan was then to discuss consequential matters such as notice, redeployment, and/or compensation. On 3 October 2000 she rang Mr Trenberth to confirm that he would be sending her the notes taken by Mr Harvey. He replied that he did not have to and that he would not. Later the same day she received instructions from Mr Baguley that he had received a letter terminating his employment. She confirmed to Mr Trenberth her request for the notes but did not receive them until 20 October 2000. Other documents that she sought needed an order of the Authority before they were produced.

27. The applicant stresses that on 29 September 2000 only two of the four groomers were called to meetings. He therefore considers that his dismissal had been predetermined. He has now seen the assessment and strongly disagrees with the written comments made. He does not understand why he has been dismissed or why he was dismissed ahead of others and he has found the process "*very distressing*".

28. Soon after this meeting, the applicant underwent surgery, for this purpose taking sick leave that had been approved by Coutts in advance. His employment finished on 31 October 2000 pursuant to a letter written by Coutts on 3 October 2000 which reads as follows:

Dear Mike,

As you are aware from our previous discussions, the company is now outsourcing a significant amount of grooming for operational reasons, and this necessitates restructuring the grooming department and a reduction in the number of grooming staff.

We appreciate the comments you provided during last week's consultation meeting. We have carefully considered your comments and observations.

Unfortunately, in the circumstances, we have determined that your position with the company will not be able to be maintained.

We regret we now give formal notice that your employment with Coutts Cars Limited will be terminated on Tuesday 31 October 2000 due to redundancy.

During the 4 week period of notice, you will be allowed reasonable time off without loss of pay to attend job interviews, provided you obtain the prior consent of your manager and that reasonable proof of having attended can be furnished if so requested. Should you obtain a new position during the period of notice, the company will give favourable consideration to an earlier release from your duties. In such circumstances, you would not be paid for the balance of the notice period.

At time of termination you will receive all entitlements normally due at the end of employment, such as any annual holidays that you have not yet taken and/or the entitlement accrued since your last anniversary date.

The company will be happy to supply you with a certificate of service if desired.

We appreciate that over the next few days or weeks you will have to make many decisions about your future and we give you our assurance that we will do as much as we reasonably can to assist you during this period.

We thank you for your service to the company and regret that this situation has arisen.

29. Despite the offers of assistance and expression of thanks, Coutts made no further contact with the applicant. Coutts took no steps to ascertain whether other positions were available within the Giltrap Group, the group of companies of which Coutts is a member. No alternatives to dismissal were considered. In the end the position is that, under the contract, there is no agreed notice period. It is also common ground that Coutts paid no redundancy compensation, nor did it consider a longer notice period for the applicant and no assistance of the kind referred to in the letter was ever given. No wages in lieu of notice were paid no doubt because the applicant was receiving accident compensation or was on (unpaid) sick leave.

30. A few days before the Authority hearing, Ms Ryan became aware that the selection criteria had been applied to Mr Baguley some time prior to the consultation meeting of 29 September 2000. The documents specifying the selection criteria were not disclosed until an order was made by the Employment Relations Authority to that effect. The assessment sheets so produced were dated 26 September 2000, 3 days prior to the meeting. Ms Ryan said that she was astonished when she found this out and said that she and Mr Baguley had been misled at the 29 September meeting.

31. The applicant also feels that he is still none the wiser about the substantive reasons for his dismissal other than some vague assertions about contracting out. He is distressed by events and has been on a sickness benefit since his dismissal and generally unwell. His

case is that the manner of his dismissal has caused him considerable distress beyond what he would have experienced if he had been made redundant in a more appropriate way. He went on to say that the whole process, from the time he received the memorandum of 27 September 2000, had made him feel so unwell and distressed that his GP prescribed antidepressants. He said that he would like to remain employed at Coutts Cars, despite the unfair treatment. He explained that Coutts had always had a contractor on site to help detail cars but its role was to assist with new cars only, whereas Mr Baguley's job was to deal with yard vehicles and to drive cars. He was almost never involved with new cars. He said that the other three groomers also did yard cars in the morning, one of whose roles was to cut and polish vehicle bodies which Mr Baguley did not do. He said that the company has never explained the restructuring to him or why he has lost his job. He saw the assessment forms for the first time at the mediation hearing. He disputed whether Mr Trenberth was in a position to assess him or, indeed, to distinguish the cars that he had groomed from those groomed by others; whilst his supervisor was not called on to do an assessment while being the best person to do so. He said that he always did his work well, efficiently, and on time and never received a customer complaint. He confirmed that he learned for the first time at the mediation hearing that the company had already assessed him by the time of the meeting of 29 September 2000. He said that this came as a complete shock to him, thus confirming that Mr Trenberth had misled him and Ms Ryan.

Submissions

32. Mr Pollak told us that it was central to the applicant's grievance that he was not consulted or, if he was, that the consultation was a charade. He pointed out that Coutts accepted that it consulted and argued that it was therefore required to do so properly and in good faith. He relied on *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195 for the proposition that a failure to inquire or consult was fatal to justification. Referring to the modification of that proposition by *Aoraki Corporation*, Mr Pollak submitted that, even on the authority of that case and of *Clemow v McKechnie Pacific (NZ) Ltd* [1998] 1 ERNZ 36, Coutts was obliged to consult about the restructuring because it was reorganising the way it did its work.

33. Mr Pollak argued that the meeting of 29 September 2000 could not be anything but a charade because the applicant was not made aware of the details of the restructuring, of what was to occur, of what alternatives might exist, or of when it might occur, and had no opportunity to respond in any meaningful way. Information was withheld when it was relevant, no real explanation was offered, and no consideration was given to any

alternatives. Mr Pollak contended that Coutts barely went through the motions of consultation.

34. Mr Pollak argued that, as a fundamental part of the consultation, Coutts was obliged to consider alternatives to dismissal, relying on the judgment of the Court of Appeal in *G N Hale & Son Ltd v Wellington, etc Caretakers, etc IUW* [1991] 1 NZLR 151. He also relied on it under good faith. In addition, he submitted that no consideration was given to counselling, other careers, financial advice, or retraining.

35. Turning to the selection process, Mr Pollak submitted that Coutts was required to show that it had acted fairly and reasonably and that this included showing that it used a proper selection process. He contended that, far from doing so, Coutts conducted its assessment without the applicant's involvement or knowledge and, moreover, acted in a deceptive manner and withheld the information that it already had. Mr Pollak submitted that it was well settled that selection criteria must be clearly communicated to staff, relying on *Apiata v Telecom NZ Ltd* [1998] 2 ERNZ 130, and *Brookers Employment Law* para 103.22.

36. As to the correct period of reasonable notice, Mr Pollak relied on the Canadian cases which, while recognising that the law of contract applies, also has regard to the unique characteristics of an employment relationship. He referred in particular to *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701. He also relied on the discussion in that case of the obligation of good faith and fair dealing. Mr Pollak derived a number of propositions from that case which he invited us to adopt.

37. He next submitted that, after 2 October 2000, the relationship between the parties was one that was subject to obligations of good faith in all aspects of that relationship. He argued that the Employment Relations Act 2000 imposed a positive obligation on Coutts to act in good faith and not a mere negative duty toward acting in bad faith. It was for Coutts to establish to the degree necessary that it had acted in good faith. The applicant's complaint was that Coutts had acted in a deceptive manner.

38. Mr Morten submitted that Coutts was not obliged by law to supply the applicant with what he called every last bit of information and, in particular, was not obliged to supply the selection criteria. He argued that there was no evidence to suggest that redundancy was a mere pretext masking some other reason for dismissal. He pointed to clear evidence of a decision to outsource the car grooming and the need to make two car groomers redundant. He said this was a *bona fide* commercial decision, made with the sole motive of reducing

costs and achieving greater efficiency in operation. He submitted that *Aoraki* remains good law and that, once it is accepted as a matter of commercial judgment that there are too many employees, it is a matter for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what positions should be dispensed with in the implementation of that strategy.

39. He relied on *Dunn v Methanex NZ Ltd* [1996] 2 ERNZ 222 for the proposition that employers are allowed considerable latitude when determining criteria for selecting for redundancy. He argued that there was proper consultation with the applicant at the 29 September 2000 meeting, and that in the circumstances the company's selection of which employees should be made redundant was carried out fairly and objectively using a method that enabled the company to rank employees. Mr Morten provided his own analysis of the assessments and of what the rankings would have been even if Mr Trenberth's assessment were taken out. This tended in his submission to show that it would have made no difference.

40. Mr Morten submitted that 4 weeks' notice was a proper period to give having regard to the fact that the applicant was a relatively junior employee, having been in his job just under 2 years.

41. As to general principles, Mr Morten relied heavily on the judgment of the Court of Appeal in *Thwaites*, especially at 571 and 573 and also at *Aoraki*. He relied on *NZ Building Trades Union v Hawke's Bay Area Health Board* [1992] 2 ERNZ 897, 913, and urged us not to follow *Apiata* but, instead, to prefer the judgment of Palmer J in *Mastertrade Ltd v Te Kooro* unreported, 17 November 1998, CC43/98, and *Dunn v Methanex*. He argued that the Court could be assisted to reach a conclusion that the employer had discharged the burden of justifying the termination by the following factors:

- a. The assessments of the employees were simply a tool in the selection process and not the only method used.
- b. An interview was used to obtain an overall picture of each person.
- c. The initial rankings of each employee were then looked at again.
- d. Each employee was given the opportunity to discuss where they saw themselves in the new structure.
- e. This was not a case where the employer was a judge in its own cause but, rather, was indifferent as between the candidates for redundancy.

42. Mr Morten argued that this was not a case like *Murfitt v Centreport Ltd* [1999] 2 ERNZ 955 where at 967 where it was held that the employer's ultimate prerogative did not give it *carte blanche* to select individual employees on an irrelevant ground or without proper inquiry as to suitability. Mr Morten submitted that, in this case, there was a genuine redundancy situation in which there were two surplus car groomers on the staff, the employer took professional advice and acted on it in good faith throughout, it properly consulted the staff, redeployment was not an option, consultation was a reality not a charade, and it was irrelevant that the selection criteria were not disclosed. There was, in the circumstances, no other procedural unfairness on which the applicant could rely.

The legal principles

(i) *The new Act*

43. The passing of the Employment Relations Act 2000 is a proper and necessary occasion, at any rate for the Court, to revisit first principles and to determine how the law has been modified by the new legislation. The Employment Contracts Act 1991 has been repealed. A markedly different regime has been established in its place. It is therefore not satisfactory to make decisions in reliance on cases decided while the Employment Contracts Act 1991 was in force unless they state principles of general application as opposed to principles peculiarly arising out of the Employment Contracts Act 1991. *Aoraki Corporation Ltd v McGavin* is a case very much in point. As the Court of Appeal made plain, that decision was tied very much to the Employment Contracts Act 1991 and the emphasis in that Act on the supremacy of the employment contract. Here is how the Court of Appeal put it, firstly at pp611-2:

The 1991 Act represents a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining. In adopting a contractual approach, however, the statute also recognises that the nature of employment and the employment relationship differentiate employment contracts from conventional commercial contracts governing the supply of goods and services. The Act departs from the common law of contract in setting the yardstick of unjustifiable dismissal and unjustifiable action, in specifying procedures and remedies, and in other respects. As well, the personal grievance provisions themselves can be traced back to the Industrial Conciliation and Arbitration Amendment Act 1970, s 4, and the Industrial Relations Act 1973, s 117 and, unlike under earlier legislation, now apply to all employees whether covered by individual or collective employment contracts. But the context in which they operate is sharply changed by the emphasis in the 1991 Act on contractual freedom. The remedies, too, are narrowed by the scheme and language of the whole statute and by particular changes reflected in s 40. Nevertheless it is important to emphasise again that the personal grievance provisions are part of the overall balance reflecting the special characteristics of employment contracts and under which, as we have noted, employees and employers have mutual obligations of confidence, trust and fair dealing.

Inevitably there is a tension between a pure contract approach and social and economic concerns inherent in the relationship. The responsibility on the Courts is to give effect to the intent of Parliament as expressed in the statute.

at p616:

*There are three considerations which persuade us that it is proper and timely to reconsider **the application of the 1991 Act to redundancies.***

and at p617:

*The third is that redundancy is an important area of the law affecting large numbers of New Zealanders every year. It is imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are. Redundancy should lend itself to a short statement of governing **principles drawn from the straightforward application of the 1991 Act.** In that regard there are obvious dangers in drawing on discussions in employment cases in other jurisdictions, influenced as they inevitably are by the different statutory regimes. **And counsel did not rely on International Labour Organisation Conventions or on the complaint by the New Zealand Council of Trade Unions to the ILO (Case No 1698) that the 1991 Act contravened Conventions Nos 87 and 98 through various violations of the right to organise and to bargain collectively.***

44. The emphasis is ours. The reliance on the Employment Contracts Act 1991 is clear. The Employment Relations Act 2000 sets out to abolish the state of affairs described by the Court of Appeal at p611 and to reverse it. Part 1 of the Act is called "**Key provisions**". There are two key provisions in Part 1. The first states the object of the Act. It is s3 which reads:

3 Object of this Act

The object of this Act is —

- (a) *to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship—*
 - (i) *by recognising that employment relationships must be built on good faith behaviour; and*
 - (ii) *by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and*
 - (iii) *by promoting collective bargaining; and*
 - (iv) *by protecting the integrity of individual choice; and*
 - (v) *by promoting mediation as the primary problem-solving mechanism; and*
 - (vi) *by reducing the need for judicial intervention; and*
- (b) *to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.*

45. We found paras (a)(i) and (ii) of this section to be particularly apposite to the relative positions of the parties in their employment relationship.

46. The second provision, s4, reads thus —

- 4 Parties to employment relationship to deal with each other in good faith**
- (1) *The parties to an employment relationship specified in subsection (2)—*
- (a) *must deal with each other in good faith; and*
 - (b) *without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) *to mislead or deceive each other; or*
 - (ii) *that is likely to mislead or deceive each other.*
- (2) *The employment relationships are those between—*
- (a) *an employer and an employee employed by the employer;*
 - (b) *a union and an employer;*
 - (c) *a union and a member of the union;*
 - (d) *a union and another union that are parties bargaining for the same collective agreement;*
 - (e) *a union and another union that are parties to the same collective agreement;*
 - (f) *a union and a member of another union where both unions are bargaining for the same collective agreement;*
 - (g) *a union and a member of another union where both unions are parties to the same collective agreement;*
 - (h) *an employer and another employer where both employers are bargaining for the same collective agreement.*
- (3) *Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.*
- (4) *The duty of good faith in subsection (1) applies to the following matters:*
- (a) *bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining;*
 - (b) *any matter arising under or in relation to a collective agreement while the agreement is in force;*
 - (c) *consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business;*
 - (d) *a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business;*
 - (e) *making employees redundant;*
 - (f) *access to a workplace by a representative of a union;*
 - (g) *communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.*
- (5) *The matters specified in subsection (4) are examples and do not limit subsection (1).*

47. The phrase "good faith" is used three times. In addition, there is reference to the inherent inequality of bargaining power in employment relationships and an absolute prohibition against doing anything directly or indirectly to mislead or deceive or even anything that is likely to mislead or deceive. Section 4(4)(d) and (e) expressly provides that the duty of good faith applies to any proposal by an employer that might impact on the employer's employees including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business and making

employees redundant. It is made clear that these matters are examples and do not limit the good faith obligation generally.

48. Elsewhere the Act requires the Employment Relations Authority to “*aim to promote good faith behaviour*”, to “*support successful employment relationships*” and “*generally further the object of this Act*” (s157(2)). For its part, the Court is given the power to act in equity and good conscience expressly “*for the purpose of supporting successful employment relationships*” (s189(1)). It is not necessary to define these terms which are expressed in simple language. It is enough to say that behaviours that were previously sanctioned merely because they were not prohibited by contract may not be able to be relied on any longer.

49. For that reason, the following propositions expressed or implied in *Aoraki* can no longer apply:

- (a) the Employment Contracts Act 1991 is no longer the source of the law relating to unjustified dismissal;
- (b) the pure contract approach sanctioned by *Aoraki* no longer applies, the balance having been changed by Parliament with the result that it no longer matters that the contract may be silent on the employer’s obligations in the events that have arisen in this case; and
- (c) the ILO conventions can no longer be disregarded (but have no direct application to this case).

50. Instead, the Act of 2000 requires something of a return to the collectivist principles of previous legislation and some discarding of the model of free contractual bargaining. In its place are the doctrines of good faith and the principles underlying ILO Conventions 87 and 98. Also, the duty of good faith applies expressly when consultations are in progress. It follows, of course, that if an employer chooses to consult, even if not bound to do so, it must observe the dictates of good faith expressly required by the Act to be observed when consultation is being undertaken or a proposal is being made that can possibly impact on the employer’s employees. That was precisely the situation here. In *Auckland City Council v Hennessey* [1982] ACJ 699, (1982) ERNZ Sel Cas 4 the Court of Appeal approved the following statement by Sir John Donaldson in *Earl v Slater & Wheeler (Airlyne) Ltd* [1973] 1 WLR 51:

... good industrial relations depend upon management not only acting fairly but being manifestly seen to act fairly.

51. In *Hennessey* the Court of Appeal was concerned with a statute directed to securing harmonious industrial relations. The present Act goes further. Its object is to build productive employment relationships through the promotion of mutual trust and confidence. And in relation to personal grievances, the Act says:

101 Object of this Part

The object of this Part is—

- (a) *to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; ...*

(ii) The personal grievance remedy

52. As stated, the case before the Court is a personal grievance. It is based on an allegation of unjustified dismissal. While the focus is on unjustified dismissal, the grievance is about the way the employer treated the employee. The dismissal was but the culmination of a behaviour by which the applicant has been aggrieved. It is arid to debate whether the real grievance is about unjustified action because, without the actions complained of, there may have been no dismissal. The broad argument is that the unjustified action was so closely bound up with the dismissal in terms of both time and causality that the dismissal is tainted by it and cannot be separated from it. The action was unjustified precisely because it was wanting in good faith.

53. The personal grievance is now a well-established remedy. Its basic rules are clear and require no citation of authorities. Quite simply, it is against the law for an employer to dismiss an employee unjustifiably. A dismissal will be justifiable only if the employer can show that a fair and reasonable employer would have dismissed at the time and in the circumstances. Genuine redundancy can justify a dismissal provided the proper notice of termination is given and a proper payment made of any compensation provided for as a term of the bargain. This formulation, approved often enough by the Court of Appeal, comes from *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965, (1983) ERNZ Sel Cas 95 at 981 and 109 respectively. In that passage the Arbitration Court spoke of genuine unavoidable redundancy caused by external circumstances without the initiative or the fault of either party. Today, we accept also that a redundancy may be genuine though avoidable and though the result of initiative on the part of the employer.

54. As with serious misconduct, non-performance and ongoing illness, it is not enough for the employer merely to assert that a dismissal is for redundancy. The termination must be for genuine reasons of redundancy and the selection of employees for redundancy, where

there is a choice, must be fair. The mere fact that some positions will no longer exist is not a general warrant for singling out employees who are unpopular with their managers. A fair procedure must be followed. The situation must be handled sensitively.

55. Although a dismissal for redundancy can be a justified dismissal, it too must pass the test of fairness and reasonableness if it is to qualify as just. What is fair and reasonable now depends on the facts and circumstances of each case. It also depends on the current law. The jurisprudence developed under the Employment Contracts Act 1991 focused on the presence or absence of an obligation to consult as a term of the employment contract. Now that the spotlight is on the employment relationship, it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or of never being required. Usually it will be. The Employment Relations Act 2000 strongly suggests so. It does so not only in the provisions already set out but in altered provisions governing the personal grievance remedy. So s101, dealing with the object of Part 9 of the Act, highlights the importance of access to information and places it in a hierarchy different from and superior to adherence to rigid formal procedures.

56. Thus, the provisions of the Act require a new approach to the question whether the particular employer acted as a fair and reasonable employer would. This is still a question of fact and degree in each case but it is informed and illuminated by Parliament's declared intention to reform the nature of the employment relationship. That question of fact and degree as so informed involves a common sense assessment of the situation, bearing in mind:

- (i) the employer's business requirements;
- (ii) the employee's right to relevant information;
- (iii) the employer's ability to mitigate the blow to the employee;
- (iv) the nature of the employment relationship as one calling for good faith.

57. These factors can be further developed in this way. Under (i), the employer wants to make a commercial decision, cannot postpone it indefinitely but can reasonably be expected to postpone it for a short time, long enough to accommodate the other factors. Of these, factor (ii) will usually require some real dialogue with the employee starting with the provision, in all good faith, of accurate information. The employer needs to find out what will cause the greatest havoc to the employee in order to try to avoid it, what will injure him the least in order to try and achieve it, whether the employee can be used in another position though his or her current position may be redundant, and which employees should be selected for redundancy if there is a choice to be made. It is convenient to call this

dialogue consultation but that term does not imply that the employer has to seek the employees' concurrence in the commercial decision, although sometimes employers may have found other solutions as a result of the employees' input. The timely provision of useful information will often be decisive of the justness or lack of it of the employer's actions. Factor (iii) speaks for itself but, as with factor (ii), the answer may not be obvious without a contribution to it from the affected employee. Factor (iv) involves recognising the employee's worth as a human being even if no longer valued or required as an employee.

(iii) Other rules of law

58. We should not be taken as departing from what was said in *Dunn v Methanex*, although we note that to some extent the case turned on the terms of a particular contract. Employers are entitled to considerable latitude when redundancies are looming in deciding upon the criteria to use to select the employees to be made redundant or, as some employers would no doubt prefer to say, to select the employees to be retained. They are also entitled to exercise discretion in applying the criteria. However, they must do so honestly and openly. We approve as correct the following statement of the law contained in Brooker's Employment Law para ER103.22 (citations omitted):

Any decision as to the selection of staff to be made redundant must be carried out in good faith, without reference to irrelevant criteria, and with reference to relevant criteria: Performance may be a relevant consideration in selection:

....

However, such criteria should be clearly communicated to staff, and opportunities to contest or discuss the criteria should be given: Any such criteria should be objectively measurable, although the Employment Tribunal and Court have recognised that subjective assessments will be involved: ...

See also *Murfitt v Centreport Ltd* [1999] 2 ERNZ 955, 968-9. Contrary to Mr Morten's submissions, we think that the present is a similar case by reason of the non-disclosure of the criteria and of assessments made that the applicant may have been able to refute or explain.

59. As a matter of contract law, all employment contracts that are not for a fixed term can be terminated by notice, although there can be no assurance that such a termination will be a justifiable dismissal. The proper period of notice is the period provided for by the contract. If the contract is silent on the subject, the period must be a reasonable one. What is reasonable is a question of fact to be decided at the time the notice is given. The answer depends on a number of obvious factors.

Our decision

60. Applying these principles to this case, we are unable to accept that Coutts treated the applicant as a fair and reasonable employer would. The only redeeming feature of the whole history is that Coutts seems to have been spurred into action in the first place by a commercial motive. But that is the end, as well as the beginning, of any spark of justification.

61. In putting its motive into effect, it behaved in such a way as to debar it from claiming that its dismissal of the applicant was justified. It was making a serious decision affecting the livelihood of four men. Its decision-making process displayed a total disregard for the position and feelings of the applicant. It adopted selection criteria which it would not show him, thus preventing him from addressing the concerns it saw as relevant. It misled him into thinking that the selection lay ahead when it had already been made. It had in its possession some criticisms of the applicant of a highly subjective kind and which he is likely to have been able to refute. He was entitled to a chance to try. It did not let him. We accept Mr Pollak's submission that Coutts went through a charade, controlling the meeting and preventing the applicant from being represented effectively. It never put on the table why it was selecting him for redundancy. It made no offer to help him other than through the standard form letter that it wrote on advice but never intended to act out. What it did act out was a "script" conceived in advance (though possibly not reduced to writing in advance) and which it regarded as immutable. It was not a genuine process but a mockery.

62. As such it rendered the dismissal unjustifiable. We accept that the common sense approach earlier mentioned imports that, in dismissing an employee, especially for redundancy, the employer is under a duty to do so in a manner which will not cause the employee undue anxiety and to treat the employee with concern and common decency: *Bernadin v Alitalia Air Lines* (1993) 50 CCEL 156 and *Carrick v Cooper Canada Ltd* [1983] 2 CCEL 87.

63. It is necessary to deal with the complaint that Coutts did not act in good faith. As an employer, Coutts was required by s4 of the Employment Relations Act 2000 to deal with the applicant, its employee, in good faith generally and in particular it was required to refrain from misleading or deceiving him. This duty is to be exercised not only generally but in specific situations. Those defined include the very activities that Coutts was engaging in at the relevant time. We are sorry to say that the conduct of Coutts fell a long way short of the required standard of fair dealing and amounted to deceptive conduct in pretending that the

assessment lay in the future, refusing to disclose the criteria being used and concealing adverse conclusions already reached. It would make no difference if these conclusions were only tentative. All the more reason to give the employee a chance to displace any false impressions about him that may have been arising. However, we do not believe that there was anything tentative about them.

Remedies

64. The applicant has claimed a discrete award of compensation for the breach of good faith committed by Coutts. It may be that in an appropriate case, damages can be recovered for a breach of s4 of the Act. But this is not such a case. It is a personal grievance for which the statute prescribes the remedies. We intend to confine ourselves to these statutory remedies, while bearing in mind that these may be affected if the nature of the employer's conduct has been such as to inflame the injury to the employee. We record our consciousness of the fact that remedies come to be discussed only after the behaviour in question has been found to be unjustifiable, so there will always be an element of reprehensible behaviour. It is one thing to compensate the aggrieved employee and a completely different thing to punish the employer found to be in the wrong. The proper vehicle for that is the action for a penalty or a properly formulated action for damages.

65. Mr Pollak argued for reinstatement, relying on s125 of the Employment Relations Act 2000, additional notice (seeking an additional month's notice), and compensation for breach of good faith, hurt, and humiliation, plus loss of earnings to the date of reinstatement. He submitted that the applicant had suffered damage well beyond that which would occur in a genuine redundancy handled fairly and in good faith.

66. While the personal grievance has remained similar in content for a quarter of a century, the remedies have undergone change. Reinstatement is now once more the primary remedy. It is mandatory to grant it when it is sought, "*wherever practicable*" (s125). The remedies of reimbursement of wages lost and compensation for non-exhaustive specified injuries continue to be available in addition. The underlying philosophy of the personal grievance jurisdiction is that the aggrieved employee is to be made whole again. The remedies provided may not undo the grievance but can at least start the healing process.

67. In that spirit, and because reinstatement is the primary remedy, we consider it first. We have regard to the fact that this is to be treated as the primary remedy unless it is

impractical. The applicant expressed it to be his belief that his job is still there and a strong wish to be reinstated. We are bound by law to attach weight to his wishes. Mr Trenberth admitted that two groomers had been retained and that they were still doing grooming work. However, he asserted in evidence that the work carried out by the applicant had been contracted out and that there was no work for him in this area or anywhere else in the company.

68. There is a good deal to be said in favour of reinstating the applicant and requiring Coutts to go through a proper process which, on our findings, may or may not reach the same result. We consider, however, that to grant reinstatement in this case would serve no useful purpose, especially as the applicant's fitness for work is not clear. It would not be proper to grant it in any case because it would not be practical to do so. It would not work. We accept that Coutts has reduced its groomer workforce to two persons and that it has currently two persons doing that work. There is at least one chance in three that, if reinstated, the applicant might again be made redundant and in short order. To reinstate the applicant to a position in which the sword of Damocles would hang above his head would not help to heal the grievance. We decline this remedy.

69. Since his dismissal Mr Baguley has been ill and on a sickness benefit and on medication, it seems. He did not receive any assistance, not even any counselling or career guidance which he says would have been of great help to him, given his limited qualifications, and may have avoided his need to be on antidepressants..

70. In an undated supplementary brief, Mr Baguley told the Court that his wages had been \$885.60 gross per fortnight or \$709.52 net, and his lost earnings to the date of hearing were 7 weeks' pay totalling \$3,099.60. He produced the following medical certificate:

To Whom It May Concern

12 December 2000

Dear SIR /MADAM

Regarding my patient

Mr Mike BAGULEY

...

MIKE CONSULTED Me ON THE 24/10/2000. HE WAS VERY DISTRESSED AND INDICATED TO Me THAT HE WAS BEING MADE REDUNDANT AT THE END OF THE MONTH. HE FELT THIS WAS VERY UNFAIR AND THAT HE HAD SORT LEGAL ADVICE.

ON FURTHER QUESTIONING BESIDES ANXIETY HE HAD SYMPTOMS OF DEPRESSION. HE WAS UNABLE TO SLEEP AT NIGHT AND HIS APPERTITE

WAS DEMINISHED. I ELECTED TO START HIM ON AN ANTI DEPRESSANT. I STARTED HIM ON NORTRIPTYLINE.

I REVIEWED HIM AGAIN ON THE 8/11/2000. THERE HAD BEEN NO IMPROVEMENT IN HIS CONDITION IF ANYTHING HE WAS MORE DESPONDANT.

I COMMENCED HIM ON A SICKNESS BENEFIT AS HE WAS IN NO CONDITION TO LOOK FOR WORK. HE FOUND THAT ALTHOUGH THE NORTRIPTYLINE HELPED HIM SLEEP HE WAS DROWSY DURING THE DAY AND HE STOPPED THE MEDICATION. WE ELECTED TO JUST KEEP AN EYE ON THE SITUATION AND DISCUSSED COUNSELLING BUT FINANCES ARE A BARRIER TO THIS.

I HAVE SEEN HIM AGAIN ON THE 1/12/2000-AND HIS CLINICAL CONDITION IS UNCHANGED I AM CONSIDERING PUTTING HIM BACK ON MEDICATION. DUE TO HIS STATE OF MIND HE CERTAINLY CANT LOOK WORK AT PRESENT AND HAVE EXTENDED HIS SICKNESS BENEFIT.

71. The applicant on this evidence sustained a major injury. He lost the ability to go out and find other work. He also lost the chance of retaining his position by being deprived of two opportunities –

- to address the criteria; and
- to refute the adverse conclusions reached about his suitability. He also lost the right to be treated with decency and respect if he did indeed have to lose his position.

72. While the first opportunity was unlikely to succeed unless the second was also fruitful, we think that the applicant had good prospects of refuting some of the adverse comments or clarifying the position, where they were in conflict. Examples were “looks for angles to reduce work load”, “very rarely would he express what he is actually thinking” but the same person marked him as consistently adequate at the ability of clearly transmitting and receiving information relating to the job; one said he had a satisfactory and one other a marginal attendance record. It should have been possible to provide a more objective description from the records.

73. There is also a prospect, as Mr Morten demonstrated in argument, that the applicant may have been ranked last whatever opportunities he had been given but, while recognising this as a possibility, we note that Coutts has only its own conduct to blame for any uncertainty that now exists about the situation. In addition, the applicant was made to suffer unnecessary trauma by witnessing his representative belittled (though she was merely doing her duty or trying to) and by experiencing his own feelings and position being treated lightly and in a degrading way.

74. In arriving at this conclusion we have also borne in mind the kind of factors that weighed with the Court of Appeal in *Aoraki*: see p624. Among them:

- the circumstances surrounding notification of dismissal for redundancy,
- the abruptness of the dismissal meeting,
- the failure to give adequate reasons,
- the absence or inadequacy of prior warning,
- inducing a false sense of security in the employee, which would have increased the force of the blow which fell upon him when the announcement was made but might have been dissipated to some extent by an earlier and fuller explanation,
- although a general offer of counselling was made, the circumstances were such that the employer should have taken further steps given the particular situation and the reaction by the employee to his dismissal and, we would add, his particularly vulnerable situation as an unskilled, low-paid worker who was about to go into hospital for surgery.

75. Unlike the situation in *Aoraki*, the employer did not act in a conscientious way by disseminating information by means of a process that was deserving of praise. By further contrast with *Aoraki*, this was not a case of mass redundancies (in which consultation might not be expected) but on the contrary it was a case of a small number of affected persons in which dialogue would be expected (see *Hale*).

76. It seems to us that these factors both render the dismissal unjustifiable and entitle the applicant to a real measure of compensation. We would fix this in the sum of \$10,000. This is the full amount claimed as compensation for hurt and humiliation but we found this claim to be modest and are satisfied that it is appropriate in this case to award it without deduction.

77. We are not persuaded to increase the notice period or to compensate the applicant for Coutts's omission to do so. A month's notice is not deficient when regard is had to the period of his service with Coutts (2 years) and to his relatively low position in its organisation. It is the applicant's misfortune that he was undergoing surgery during the period of notice and therefore received no wages during it.

78. The applicant has claimed other relief. As this claim was developed, it was a claim for money other than wages lost by the employee as a result of the grievance or (as seems more appropriate to us) compensation for the loss of any benefit which the employee might reasonably have been expected to obtain if the personal grievance had not arisen: Employment Relations Act 2000 s123(c)(ii). If it had not arisen, the applicant could

reasonably have been expected to be left in a frame of mind that enabled him to look for other work.

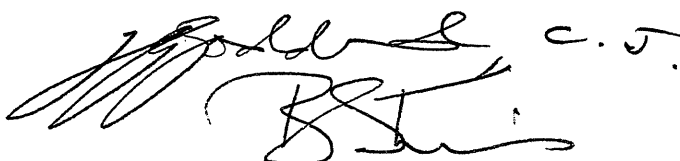
79. However, it seems quite clear from the medical evidence that his ability to obtain work subsequently was seriously affected by the way in which he was treated, occasioning him loss of income or loss of the opportunity to earn it from other employment. At the time the case was heard, he had been out of work for only 2 months and it is difficult to know how much longer the consequences referred to in the doctor's certificate would have continued. Doing the best that we can with the evidence before us, we conclude that the effects would have continued for at least a further month thus disabling him from obtaining work for a total of 3 months from the date when his employment finished as a minimum. We are going to treat that also as a maximum because of uncertainties relating to his fitness for work in the absence of the consequences caused by the treatment meted out to him.

80. Taking all these matters into account we assess his loss of benefit at the equivalent of 3 months' wages. This, according to the only evidence before the Court, amounted to \$5,756.40. In terms of ss123(c)(ii) of the Act, we award him \$5,750 by way of compensation for loss of benefit.

81. That leaves only costs. The applicant was legally aided. It is the policy of the Court, whenever possible, in the interests of cost containment to invite counsel to address us on costs at the main hearing. In this case, only Mr Pollak did so and then in a somewhat general and unorthodox way. We do not feel able to assess costs on that basis. We reserve costs for further consideration in the usual way, that is to say that the applicant is to file and serve a memorandum on costs and Coutts is to have 14 days after service in which to reply, also by memorandum. In view of the new institutional arrangements, counsel will need to address the question whether the Court's power to award costs is limited to the *de novo* hearing before it or extends to the entire personal grievance including (a) mediation and (b) investigation by the Employment Relations Authority.

Conclusion

82. In summary, therefore, we find, upon a hearing *de novo* of the applicant's personal grievance, that he has established that he has a valid personal grievance based on a claim that he was unjustifiably dismissed. Further, we find that he has established entitlement to the remedies of compensation but not to reinstatement and we have fixed the amount of his entitlement in sums of money totalling \$15,750. We have reserved costs.

 c. j. 