



# New Zealand Employment Relations Authority Decisions

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## Dowds v Martin Hydraulics Limited (Christchurch) [2010] NZERA 949 (21 December 2010)

Last Updated: 11 January 2011

**Attention is drawn to the order prohibiting publication of certain information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

CA 236/10 5289465

BETWEEN

JAMES DOWDS Applicant

A N D

MARTIN HYDRAULICS LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Helen Doyle

Terry Devlin, Advocate for Applicant

John Shingleton, Counsel for Respondent

20 August 2010

27 August 2010 from Applicant

27 August 2010 from Respondent

Date of Determination:

21 December 2010

### **DETERMINATION OF THE AUTHORITY**

#### **Prohibition from publication**

[1] I order prohibition from publication of commercial material put before the Authority about clients and sales for the purpose of assessing the genuineness of the redundancy except to the extent they have been referred to in this determination.

#### **Employment relationship problem**

[2] Jim Dowds says that he was unjustifiably dismissed from his employment as a senior applications engineer at Martin Hydraulics Limited because his redundancy was not genuine and the process undertaken was unfair. Further, Mr Dowds says he was not paid full and proper notice and he is owed one day's sick leave.

[3] Martin Hydraulics Limited (Martin Hydraulics) says that Mr Dowds was not unjustifiably dismissed and that it acted at all times in a procedurally fair way. It does not accept that notice was short paid or that any other money is owing.

#### **Issues**

[4] The Authority is required to determine:

- Whether the redundancy was genuine;
  - Whether the process including consultation, selection and implementation of the redundancy was carried out in a fair and reasonable manner, including an assessment of whether there had been dealings in good faith in accordance with the obligations set out in the [Employment Relations Act 2000](#).
  - Was notice paid correctly and is there any money owing for special leave.

[5] In assessing justification of the decision that was made by Martin Hydraulics about the redundancy and the process and implementation of its decision, the Authority is required to have regard to the test for justification in [s.103A](#) of the [Employment Relations Act 2000](#) and consider, on an objective basis, whether the decisions made by Martin Hydraulics were what a fair and reasonable employer would have done in all the circumstances at the time.

### **The events leading to the redundancy**

[6] Mr Dowds was employed in the sales and design area at Martin Hydraulics and worked in that position for 5½ years before his redundancy. His work consisted of design work and selling and he was allocated customers and areas in terms of sales.

[7] There were four employees in sales including a sales manager. The evidence supports that local sales were largely shared between the team and Mr Dowds said that the three sales members worked as a team.

[8] Whilst Martin Hydraulics kept a record of employees individual sales which could be accessed by employees, Mr Dowds said that he did not view the figures himself.

[9] Mr Dowds was party to an individual employment agreement. Clause 9 of the agreement dealt with redundancy. Clause 9.1 provided the circumstances when an employee shall be regarded as redundant and their position becomes surplus. This included a genuine business decision of the employer, such as restructuring. Clause 9.2 of the employment agreement provided that if the employee's employment terminated on account of redundancy, the employee shall be entitled to four weeks' notice of that termination or payment in lieu of notice, but not compensation.

[10] The managing director of Martin Hydraulics is Alan Martin. The other director of Martin Hydraulics is Mr Martin's son, Shane Martin. I shall refer to Alan Martin in this determination as Mr Martin and when I refer to Shane Martin I shall use his Christian as well as his surname to prevent confusion.

[11] Mr Martin said in his evidence that the company made a decision to make one sales position redundant because the market was slow and there were no forward orders. Mr Martin said that there was a sense that they were entering into difficult times and that there was a need to take a positive approach and look at building sales for the future. Mr Martin said that he worked on a possible restructuring with his son and the other director of Martin Hydraulics, Shane Martin, with both these objectives in mind. Mr Martin said that together they spent some time working on the criteria to assess which one of the three positions in sales should go so that better market penetration could be achieved and sales pursued more aggressively.

[12] In late August 2009, Mr Dowds was given an undated letter headed *Notice of consultation*. This letter provided that Martin Hydraulics was starting a process of consultation regarding restructuring the sales team. It provided that if the restructure proceeded, one sales position might be made redundant. The letter set out the background as:

*As you will be aware, the market has tightened and our competitors have become more aggressive. The aim of the restructure is two fold. First, to reduce costs and in order to achieve this reduction, we propose making one sales position redundant. Secondly, to place an emphasis on new business development. In order to achieve better market penetration, there would have to be a greater focus on building our client base by aggressive sales strategies such as cold calling and networking.*

[13] The notice included a criteria of redundancy as follows:

*The company has identified the following five criteria of redundancy:*

*(a) Length of years of service to the company;*

*(b) Prospects of future years of service to the company;*

*(c) Prospects of being successful at cold calling and building new business;*

*(d) Competitive characteristics of employee versus account management characteristics;-*

*(e) Past sales performance with a particular emphasis on past performance in building new client base.*

[14] Mr Dowds was invited to a consultation meeting with Shane Martin and Mr Martin on Wednesday, 26 August 2009 at 2pm. The aim of the meeting, it was stated in the notice of consultation, was to discuss the restructuring proposal and how it may affect Mr Dowds' employment. It was also set out that the meeting would be an opportunity to have an open discussion regarding the market challenges facing the sales team and a discussion in relation to the criteria and how the criteria would

influence the company's decision-making.

[15] Mr Dowds was invited to bring a representative with him to the meeting. He said in his evidence that he chose not to because he did not have any concerns about his job and any restructure was couched as *a possibility*.

### **Meeting 26 August 2009**

[16] Although the meeting was to have started at 2pm, Mr Dowds recalled it was late getting under way and did not commence until about 2.30pm. Mr Martin accepted that it was possible that that was the start time for the meeting. Some emphasis was placed on this later time to suggest that the meeting was not a particularly serious matter. That was strongly disputed by the Martins and I accept that from their perspective it was a serious meeting. Mr Dowds recalled the meetings duration as 15-20 minutes and Mr Martin 20-25 minutes.

[17] Mr Martin commenced the meeting by discussing the state of the hydraulics industry and the turndown in the dairy business. He spoke about it being a difficult time for the industry generally as part of the reason for the restructure.

[18] There is a difference between Mr Dowds and Mr Martin about whether the possibility of redundancy was suggested in vague and uncertain terms. Mr Dowds, for example, in his evidence at the Authority investigation meeting, said that he concluded at the end of the meeting that it was a *casual chat* and he did not think it was going to be taken seriously and that there could be one or two further meetings. Mr Dowds could not recall any mention of restructuring and redundancy.

[19] Mr Martin, on the other hand, said it was definitely a possibility that Mr Dowds would be made redundant and that this message was conveyed to him during the meeting. He said that it was clear the meeting was serious because the selection criteria was discussed with a view to determining the candidates for redundancy.

[20] I find it likely that as there was discussion about background to the need to restructure, then it would have been clear from what was said, and in particular the discussion around the criteria used to determine who would be made redundant, that redundancy was a possibility.

[21] After the opening by Mr Martin, the meeting then turned to a discussion about the criteria for redundancy. There is a dispute as to whether all five criteria were discussed.

[22] Mr Dowds says that they were not and that all Mr Martin seemed interested in was his age about which he asked and whether he intended to retire at 65 years. Mr Dowds, who is 62 years of age, said that he responded that he intended to continue to work and did not intend to leave at 65 years. Mr Dowds said that when he had received the notice of consultation he wrote at the bottom of it five clients that he thought could potentially provide new business growth. Mr Dowds said there was no discussion about the third criterion about new business but that he read from his list of clients without being asked to do so.

[23] There is a dispute about that list of clients that occupied some time in the evidence. Both of the Martins say that they were surprised at the clients referred to by Mr Dowds because they did not consider he had brought any of those referred to the company. In fact they said they could not recall any new clients that Mr Dowds had brought into the company. In his evidence at the Authority investigation meeting Mr Dowds referred to the new clients that he had brought to the company.

[24] Mr Martin, in his evidence, said that he pointed out during the 26 August meeting that one of the companies referred to by Mr Dowds was a very old client of the company and asked him how he could have found that client through cold calling. Mr Martin said that Mr Dowds did not respond to this. Mr Dowds, on the other hand, said that nothing was said after he read out the list of clients. He knew that they were not new clients and had Mr Martin raised this matter, then he could have answered it very clearly.

[25] I prefer Mr Dowds' evidence about that matter as inherently more likely. I find that there was in all likelihood a misunderstanding on the part of the Martins about the reason Mr Dowds talked about those clients. I am not satisfied that they talked to Mr Dowds in a way that enabled him to understand that they thought he was referring to new clients. I accept that had the confusion been raised Mr Dowds would have agreed that they were not new clients but that he was putting them forward because there was potential for growth in the amount of business with them.

[26] Mr Dowds said that there was no reference at all to the criteria numbered 4 and 5 during the meeting. The Martins say that all five criteria were discussed but accept that the focus of the discussion was on the third criterion about the prospect of being successful at cold calling and building new business. Mr Martin said that the fourth criterion was considered to be a personal assessment as to the characteristics of Mr Dowds and that the fifth criterion was not really discussed because it had already been made clear to Mr Dowds that his performance needed to improve and that he knew his performance was below that of other employees. I find that if these last two criteria were referred to at all it was only very briefly and there was no real discussion.

[27] In terms of how the meeting ended, Mr Dowds recalled Mr Martin saying that he would let Mr Dowds know the next step in the process. Mr Martin said that he recalled saying that he and Shane Martin were going to assess what had been said in

other meetings with the rest of the sales team and get back to him. Mr Martin said he advised Mr Dowds that there would be other meetings held with the other sales employees in the team, and that they would get back to him with their decision.

[28] Whilst I accept it likely that Mr Martin did say something along those lines, I also accept that Mr Dowds did not expect the next step to be the advising of an outcome.

[29] Mr Dowds heard nothing further in respect of the restructuring until 24 September 2009 when Mr Dowds and the other two sales representatives were handed a letter from Mr Martin. I find that Mr Martin did not say anything other than *if you have any questions let me know*. Mr Dowds' letter provided as follows: *21 September 2009 Attention Mr Jim Dowds*

*I would like to thank you for participating in the restructuring consultation and your useful contribution made during the meeting on 26th August 2009.*

*For the record, you were advised in advance of the meeting that you were entitled to have a Lawyer or support person present at the meeting.*

*After further deliberation which involved reviewing all the information gathered at the meeting, the Company has decided to make your position redundant as of 23rd September 2009.*

*Pursuant to your contract, we are required to give you 4 weeks notice which you are required to work out. We can discuss alternative arrangements if you wish.*

*Thanking you, Alan Martin*

[30] Mr Dowds said that he opened the letter, noting with some shock that his position was redundant. He said that he was concerned that the notice period ran from the previous day and was further concerned because he was unclear as to why he was the one to go. He said it was obvious from the looks on the faces of the other two sales representatives that they had not been made redundant.

[31] Mr Dowds had been at work on 21 September 2009 and was then absent sick on 22 and 23 September 2009.

[32] Mr Martin said that he presented the letters in the way that he did so as to be discrete to the sales people.

## **28 September 2009**

[33] Mr Dowds and Mr Martin both gave evidence about a discussion they had in the morning and in the afternoon of Monday, 28 September 2009. Mr Dowds asked Mr Martin why his length of service had been ignored and why it was not *last on first off*. Mr Dowds was not the last employed in the sales team.

[34] One of the other sales representatives had a shorter length of service than Mr Dowds. Mr Dowds said that Mr Martin told him *there were other reasons*. Mr Martin, on the other hand, did not accept that he responded in that way and says that he said that they looked at other criteria.

[35] I think it likely Mr Martin did say other criteria was considered. Mr Martin advised Mr Dowds that he did not see cold calling as Mr Dowds' field of expertise.

[36] Although in his written evidence Mr Martin said that he could not recall saying that Mr Dowds had taken a lot of time off, in his evidence at the Authority's investigation meeting, he accepted that he could possibly have made such a statement on 28 September because Mr Dowds *liked his holidays*. Mr Dowds explained in his evidence that he had only taken his holidays and authorised sick leave over his employment period. He said that he had been under a bit of pressure with his wife's father on the West Coast being terminally ill in terms of taking leave, but that he did not exceed his sick leave. The morning conversation then ended as Mr Martin had other things to attend to.

[37] Later that same day, there was a discussion about when Mr Dowds was to leave his employment. Mr Martin said that he was happy for Mr Dowds to continue and work through his notice period but advised him that, if he preferred, he could leave earlier and not work out his full notice. Mr Dowds said that he advised that he would leave sooner. He said that the other sales people were upset at his leaving and the atmosphere in the office was quite uncomfortable. It was agreed that Mr Dowds would leave on Wednesday, 30 September 2009 at midday.

## **30 September 2009**

[38] Mr Dowds had another discussion with Mr Martin on 30 September 2009 before he left during which he advised Mr Martin that he was not happy with his age being the reason for redundancy. Mr Dowds said that Mr Martin said that there were other things as well. Mr Martin did not accept that he had said that. He said that his advice to Mr Dowds was that age was not the reason and that Mr Dowds knew the criteria being applied.

[39] I accept Mr Martin's evidence that the purpose of the question about intended service was to ascertain whether the sales

representatives did in fact intend to leave the company at any point in the near future. The first question, which was length of service, was something that could be assessed in terms of last on first off. I am not satisfied that Mr Dowds age was the basis for his selection. Mr Martin said that the length of service and length of future service criteria was neutral because all three employees had little difference in the length of service and all intended to stay.

[40] I am not satisfied, from the evidence, that Mr Dowds was selected on the basis of his age. Mr Dowds formed the view that was the reason for his position being selected for redundancy because that was what he could recall the focus being on during the meeting on 26 August 2009.

[41] Mr Dowds said in his evidence that after he was made redundant he applied for three positions but the applications did not result in him being appointed to a position.

### **Genuineness of the redundancy**

[42] Mr Martin said that sales were dropping and he talked with Shane Martin about how to reduce costs. Mr Martin said that they focused on the number of sales invoices that were processed in the sales department and concluded that these were reducing. He said that the company was struggling to find wages.

[43] The Authority heard from an associate chartered accountant, Stephen Pawsey, who had been asked to review the trading results for Martin Hydraulics Limited to the end of March 2010 and compare the results with the end of July 2009 accounts. Mr Pawsey said that the figures indicated a reduction by 15.1% of the amount of sales turnover in comparison with the trading pattern before the restructuring.

[44] He noted a significant decline during October 2009 to February 2010 and said in his opinion he considered the company should have taken further steps than it did to reduce its overheads during August and September 2009. He said in his evidence that the business performance did not appear to have improved in more recent months.

[45] Mr Devlin, in his submissions, challenged the evidence of Mr Pawsey and the data he relied on. He submitted that the monthly figures from March to September 2009 were in each case higher than the corresponding 2008 to 2009 figures.

[46] He submits that it was only after Mr Dowds was made redundant that there was a significant decline in the sales invoicing from September 2009. Further, Mr Devlin submits that the gross profit for the company was, for the period during which Mr Dowds was made redundant, running at 23.4% which was a reasonable profit, particularly in times of recession.

[47] In determining whether Mr Dowds' redundancy was genuine or not, I have taken into account Mr Dowds was not replaced by another sales person after his position was made redundant. In terms of the industry itself, Mr Martin said in his evidence, and I have no reason not to accept this, that other hydraulic companies had laid staff off.

[48] In *Simpsons Farms v. Aberhart* [2006] NZEmpC 92; [2006] ERNZ 825 at p.842, Chief Judge Colgan said that he did not consider the recent statutory changes in [s.103A](#) of the [Employment Relations Act 2000](#) were intended to revisit longstanding principles about substantive justification for redundancy that were exemplified by judgments such as that from the Court of Appeal in *G N Hale & Son Ltd v. Wellington Caretakers' IUOW* (1990) ERNZ Sel Cas 843. The Court of Appeal in *Hale* said, amongst other matters, that:

*... an employer is entitled to make his business more efficient,... a worker does not have a right to continued employment if the business can run more efficiently without him.*

[49] Chief Judge Colgan said in *Simpsons Farm* that so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court to make even under [s.103A](#).

[50] I am not satisfied, from the evidence, that Mr Dowds' position was made redundant for some ulterior motive other than a commercial decision given the concerns in the industry and the prospect of reducing sales. The reducing sales were reflected in later trading months and have not improved. Whilst Mr Devlin challenges whether it was the right commercial decision given the sharp decline in sales invoicing after Mr Dowds' redundancy, that was a matter for the company in terms of how to reduce costs.

[51] In conclusion, therefore, I find that the decision to reduce the sales team by one person was a decision made for genuine commercial reasons and that there were no other reasons for Mr Dowds dismissal.

### **Was the process fair and reasonable?**

[52] The first notification Mr Dowds had of the possibility of a restructuring was when he was handed the undated letter inviting him to the meeting on 26 August

2009.

[53] The letter inviting Mr Dowds to the meeting was headed notice of consultation. I have considered whether there was consultation at the meeting as described in *Cammish v. Parliamentary Service* [\[1996\] 1 ERNZ 404](#):

*Consultation is to be a reality not a charade. The person to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.*

[54] The focus at the meeting was on the criteria for redundancy and not on consultation about the restructuring decision itself and whether or not there should be a reduction of one sales position. The decision to reduce the sales team by one position had already been made and the purpose of the meeting on 26 August was to discuss the criteria so that Martin Hydraulics Limited could then determine whose position was to be made redundant. There was no real opportunity for Mr Dowds at the meeting to respond to the proposal to reduce one sales team member.

[55] I do not find that satisfied the obligations in terms of good faith dealing. That is because consultation involves putting a proposal that is not yet finally decided on to an employee and listening to what an employee may have to say on that and then considering any response before deciding what to do. This is a mandatory requirement under [s 4 \(1A\)\(c\) of the Employment Relations Act 2000](#).

[56] In this case the first and only meeting was to discuss and assess criteria as to who would be made redundant. I am not satisfied that the meeting on 26 August provided an appropriate opportunity for Mr Dowds to comment on the proposal for restructuring and any alternatives before the decision to reduce the sales team by one was made.

### **Selection criteria**

[57] In terms of selection criteria, the Court of Appeal in *Coutts Cars Ltd v. Baguley* [\[2001\] NZCA 382](#); [\[2001\] ERNZ 660](#) stated:

*If criteria are properly formulated and applied according to the standards of a reasonable employer acting fairly and in good faith towards the employee subsequent challenge is unlikely to be fruitful.*

[58] I accept that the selection criteria was set out in the consultation letter that Mr Dowds received. There are matters I find to be unfair with the selection process.

[59] The first is that I have found there was no discussion to clarify why Mr Dowds had put forward clients names. By not raising their concerns clearly with Mr Dowds the Martins left that meeting with an incorrect view as to why he had provided those clients names and that counted against him and was unfair.

[60] The other matter in terms of the selection criteria that I find was unfair was that there was little discussion about criteria 4 and 5.

[61] In particular, Mr Dowds takes significant issue with Mr Martin's conclusion that Mr Dowds knew his performance was below that of the other two employees. Mr Dowds said in his evidence that he could only recall one meeting in 2008 in the smoko room with Mr Martin in which Mr Martin had said that his sales were not high enough. Mr Dowds said that he advised Mr Martin he had picked up some design work for the Sales Manager and that was the reason for lower sales. Mr Dowds should have been given an opportunity, when the criteria were discussed, to have the Martins' concerns about his performance put to him and have an opportunity to answer those.

[62] The Martins referred to the selection of Mr Dowds for redundancy as relatively straightforward, that was because although the length of service and expected service was relatively neutral amongst the three employees but Mr Dowds performance was less satisfactory in terms of aggressive sales and cold calling and he fell below the other two sales representatives. There was no evidence that Mr Dowds was asked whether he thought he was capable of performing in these areas. Mr Dowds evidence was that he was but that he had no opportunity to persuade the Martins that he should be retained.

[63] Although Mr Dowds was considered to be the worst performer at sales the figures do not support that this was in fact the case. It appeared that an allowance was made for one of the other employees on the basis that he had come into the sales team from elsewhere and had been working there about two years. Mr Dowds had no opportunity to talk about the sales figures.

[64] The inadequacy and the unfairness of the selection process is supported by Mr Dowds' bewilderment at why he had been selected after he was handed the redundancy letter. Mr Dowds concluded that he had been selected because of his age.

[65] There was reference to customer complaints about Mr Dowds following dismissal but there was no evidence that these were raised with Mr Dowds at the time or during the selection discussion.

[66] I am not satisfied that the selection criteria was fairly discussed and Mr Dowds given in terms of good faith requirements access to information that was relevant to the continuation of his employment and an opportunity to comment on it. He was not told of Mr Martin's views about his performance in key areas of the criteria and he did not have an opportunity to comment on them.

[67] I find that the process of advising Mr Dowds of his redundancy fell short of that which a fair and reasonable employer would adopt when implementing such a redundancy. Mr Dowds was simply handed a letter without explanation and it was left to him to approach his employer if he had any questions.

[68] I accept that Mr Dowds was concerned with the fact that the letter was dated 21 September but not handed to him until 24 September. An explanation for this was probably that he was away unwell, but the letter advises the notice period for the redundancy itself ran from 23 September, the day before the notice was given to Mr Dowds.

[69] There was no discussion about any assistance that may have been available to Mr Dowds in terms of obtaining other roles or providing a reference.

### **Determination**

[70] I find that Martin Hydraulics decision to reduce the sales team by one person was for a genuine reason and not for an ulterior motive to otherwise dismiss

Mr Dowds. I find that the process was unfair in that consultation was inadequate and the manner of selection of Mr Dowds' position as the one to be made redundant and the implementation of that redundancy decision was unfair and not in accordance with the good faith obligations. The process was not that which a fair and reasonable employer would have adopted in all the circumstances and is unjustified.

[71] Mr Dowds has a personal grievance that he was unjustifiably dismissed from his employment at Martin Hydraulics Limited and he is entitled to remedies. There is no issue as to contribution.

### **Lost wages**

[72] I have found the redundancy to be for a genuine reason. Lost wages therefore cannot generally be awarded I have considered whether, if the process had been properly undertaken, Mr Dowds may have still retained his position. I am unable to conclude that there was certainty that that would have been the case. There was a view that Mr Dowds was not the strongest person in the team at establishing new clients and increasing sales.

[73] Nevertheless, I find that a fair and reasonable employer, in terms of consultation, would have held a meeting about the proposal to restructure and then a further meeting to discuss the selection criteria. There should then have been a meeting with Mr Dowds to discuss the outcome of the decision rather than simply handing him a letter.

[74] I find that Mr Dowds is entitled to a further one month's payment of wages because it would in all likelihood have taken that long if the process had been undertaken in a fair and reasonable way.

### **Compensation**

[75] Compensation is limited to an assessment about hurt and humiliation in terms of the process adopted rather than the loss of Mr Dowds position. Mr Shingleton is correct to a degree that the evidence about hurt and humiliation was limited. I do find though that Mr Dowds was indeed hurt and humiliated by the process adopted by the company.

[76] Mr Dowds was unclear as to the reasons he had been selected for redundancy and considered that his age was a significant factor in his selection. He was simply handed a letter dated two days earlier advising him of his redundancy to take effect from the previous day. Any attempts by him to discuss the reason for that redundancy after being handed that letter were not fruitful and there was no other assistance offered. As Mr Dowds says in his written evidence *I know that redundancy is a problem faced by many employees these days but I feel this situation could have been handled in a more sensitive way.*

[77] I am not satisfied that an award of \$15,000 is justified in this case, but I am of the view that a fair and reasonable award in all the circumstances would be \$8,000 compensation without deduction under [s.123\(1\)\(c\)\(i\)](#) of the Employment Relations Act 2000.

### **Notice period**

[78] Mr Dowds did not receive, as I understand the evidence and consideration of the pay slip, four weeks' notice. His notice was backdated by one day. Mr Dowds is entitled to be paid four weeks' notice.

[79] Mr Devlin refers to the working week or pay week from Monday to Friday. The four week period should run from the

date notice is given which was 24 September 2009 notwithstanding it is not a Monday, as long as Mr Dowds is paid 20 days' salary. I find that one days pay is owed in relation to the notice period and I order payment of this be made.

### **Sick pay**

[80] There was no evidence to support this claim that Mr Dowds was not paid correctly for the period when he visited his wife's terminally ill father.

### **Overtime**

[81] In the statement of evidence, for the first time, there was reference to Mr Dowds being entitled to overtime. As I explained to Mr Dowds and Mr Devlin, it was inappropriate to make a claim for the first time in a statement of evidence and the Authority would not be investigating that matter as the respondent was unprepared for such a claim. If Mr Dowds wishes to make such a claim, then he will have to lodge a further application.

### **Costs**

[82] I reserve the issue of costs.

### **Summary of findings and orders made**

- I have found that Mr Dowds redundancy was genuine but that the process including selection was unfair.
- I have found Mr Dowds was unjustifiably dismissed from his employment.
  - In the circumstances I have found Mr Dowds is not entitled to lost wages unless he should not have been selected for redundancy. I have not concluded that but have given one months lost wages because a fair process would have taken a longer period of time.
  - I have ordered Martin Hydraulics Limited to pay to Jim Dowds the sum of \$8000 compensation without deduction under [s. 123](#) (1)(c)(i) of the [Employment Relations Act 2000](#).
- I have found that Mr Dowds is entitled to one days pay for short paid notice.
- There was no evidence to support the sick leave claim.
- I have reserved the issue of costs.

Helen Doyle

Member of the Employment Relations Authority