

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 120
5464025

BETWEEN PAM GLOZIER, ALAN
CAMERON and MARGARET
BENNETT
Applicants

A N D ALSCO NZ LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Peter Cranney, Counsel for the Applicants
Craig Smith, Counsel for the Respondent

Investigation Meeting: 19 June 2015 at Invercargill

Submissions Received: 19 June and 22 July 2015 from the Applicants
19 June and 24 July 2015 from the Respondent

Date of Determination: 12 August 2015

DETERMINATION OF THE AUTHORITY

- A. Ms Glozier, Ms Bennett and Mr Cameron were each unjustifiably dismissed from their employment.**
- B. Ms Bennett is reinstated to her former position in accordance with the conditions referred to in this determination. Ms Glozier, Ms Bennett and Mr Cameron are each awarded remedies as set out in this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] The three applicants claim that they were unjustifiably dismissed by the respondent company and seek remedies of reimbursement of lost wages, compensation for hurt and humiliation, loss of dignity and injury to feelings and their legal costs. Although all three also sought reinstatement in their joint statement of problem, Ms Glozier and Mr Cameron withdrew their applications for reinstatement during the Authority's investigation meeting.

[2] The respondent denies that the three applicants were unjustifiably dismissed, saying that their positions were disestablished due to a genuine redundancy situation that was carried out in a procedurally fair manner in full consultation with the applicants and their union. The applicants do not dispute that there was a need to restructure the Invercargill branch of the respondent company.

Brief account of the events leading to the dismissals

[3] The three applicants were employed by the respondent company at its Invercargill site as laundry workers. The applicants and the respondent were bound by a collective employment agreement between the respondent company and the Service & Food Workers Union Nga Ringa Tota Incorporated (the Union), which was effective between 1 July 2013 to 30 June 2015.

[4] On or around 25 February 2014 the manager of the Invercargill branch, Karen Purdue, contacted an organiser for the Union, Anna Huffstutler, who represented 17 employees at that time, to discuss the respondent's restructuring proposals. On or around 4 March 2014 detailed proposals were announced, which involved a reduction at the Invercargill branch of the respondent's permanent production staffing levels from 42 full time equivalent staff to 34 full time equivalent staff and engineering staffing levels from 3 to 2 full time equivalent staff.

[5] The stated reason for the need to reduce staffing numbers was that the branch had lost two major linen accounts and a reduction in work from another major customer. In addition, new rail systems and added equipment had allowed the plant to become more efficient and reduce operating hours, apart from the 14 week period from January to Easter.

[6] The company proposed that a consultation period of four weeks would commence on Monday, 10 March 2014 and that eight criteria would be used to select the staff who would be made redundant. The Union objected, and proposed that only three criteria should be used to select the staff, namely productivity, skills and length of service. The company did not agree, as its proposed criteria were the ones used when considering promotions within the workplace, and eventually settled on seven of the eight criteria originally proposed, namely:

- a. Skills;
- b. Productivity;
- c. Multi-skills;
- d. Attitude;
- e. Teamwork;
- f. Attendance; and
- g. Misconduct.

[7] On 7 March 2014, a meeting was held with all staff outlining the proposal, and at which a memorandum was handed out. Ms Huffstutler then held a meeting with her members following the all staff meeting and, on 13 March 2014, forwarded to Ms Purdue a list of questions to be addressed at a meeting of the Union members, which took place on 17 March 2014 and at which Ms Purdue answered the questions of which she had been forewarned. At this meeting with the Union members, Ms Purdue also handed out a schedule showing the comparative production kilograms processed between 2012 and 2014.

[8] On 20 March 2014, Ms Huffstutler wrote to Ms Purdue saying that a few members would like to take voluntary redundancy, although the majority of the membership had stated that they would like to retain their employment.

[9] Ms Purdue's evidence was that, in addition to the meetings that were held with the Union and its members, a meeting was also held with the non-Union members and that their questions were *better ones*, as they asked for information on how the point

scoring system involved in the selection criteria would operate, and who would be making the selections.

[10] The respondent decided at the conclusion of the consultation process to reduce the number of full time positions to be disestablished from eight to five. Having then accepted one request for voluntary redundancy, this left four positions that were deemed surplus to requirements.

[11] The scoring of the production staff against the seven selection criteria took place at some point between around 7 April 2014 and 15 April 2015. It is the evidence of Ms Purdue that production staff were split into two groups, with four staff being grouped into specialist positions, as they had skills that needed to be retained in areas such as sewing. Despite this, Ms Purdue said that those staff members were not necessarily safe from being made redundant when they were measured on the same criteria as all other staff.

[12] In respect of the selection of staff for redundancy, staff members were given a score out of 10 for each of the categories of skill level, productivity and multi-skills. For the remaining attributes of attendance, attitude, teamwork and misconduct, they were given a combined score out of four. Therefore, the maximum that any staff member could score was 34.

[13] It is the evidence of Ms Purdue that she did not carry out the scoring herself, but that this was carried out by the production manager and four production supervisors, two of whom were relatively new to the position. None of these five individuals were present at the Authority's investigation meeting to give evidence.

[14] Ms Purdue was able to give some limited evidence about the selection process, however, as she had spoken to the production manager and the four supervisors after they had concluded their scoring. She said that, every member scored either an 8 or a 10 for the two criteria of productivity and skill levels.

[15] Staff tended to score more variably in the multi-skill criterion category where scores ranged from 8 out of 10 to 2 out of 10, with all but two employees having scores between 8 and 5. These two employees with 2 out of 10 for multi-skills were Ms Bennett and Mr Cameron. Seven employees had combined scores of 22 or less when measured against the three main criteria of skill, productivity and multi-skills, including the three applicants. It was therefore the four remaining criteria of

attendance, attitude, teamwork and misconduct which caused the three applicants to score lower than anyone else.

[16] The final scores of the three applicants were as follows:

- a. Ms Glozier scored a total of 24 points, having been given a 6 for multi-skills, and zero out of one each for the criteria of attitude and teamwork;
- b. Ms Bennett scored a total of 21 points, having received 2 out of 10 for multi-skills, and zero for the criterion of attitude; and
- c. Mr Cameron scored 20 points having received a 2 out of 10 for multi-skills and zero for the criteria of attitude and teamwork.

[17] It is the evidence of Ms Purdue that when the scores were presented to her she challenged the selection team on the scores that had been attributed. She said that having heard the explanations and reasons behind the scores, she was *absolutely satisfied that the scoring was fairly done and was a fair reflection of the rankings of staff members to the criteria*. Ms Purdue then had to justify the selection of the four staff members who had got the lowest scores to the company's HR manager.

[18] Ms Purdue arranged to meet with Ms Huffstutler and another Union colleague on 17 April 2014 to give her advance warning that three of the four employees selected for redundancy were Union members. Ms Purdue then held meetings with the four selected employees on or around 18 April 2014, including the three applicants.

[19] It is the evidence of each of the applicants that they did not know that the company was going to score them the way that it did and that they only found out about this at the end of April 2014. None of the three applicants was told what their specific scores were, nor how their scores compared with other production staff.

[20] Ms Purdue says in her evidence that, if the Union had requested that the process be halted so that an analysis of all the scores could have been undertaken, she would have been happy to have agreed to that. She said that she had been prepared to delay announcing the decision until after 30 April 2014 but the workers wanted to

know where they stood. She said that the Union made no request for scores or raised with her any concerns about the process that had been completed.

[21] Termination letters were sent out to the three applicants dated 28 April 2014 in which they were notified that their final day of employment would be 16 May 2014. They were also each notified of the contractual redundancy compensation payment that they were entitled to receive. Each applicant was also issued with a certificate of service which set out their length of service with the company and their duties.

[22] On 29 April 2014, Ms Huffstutler asked for information including how each applicant had been rated, which was provided to Ms Huffstutler by Ms Purdue on the same day. Personal grievances for unjustified dismissal and unjustified disadvantage were raised on behalf of each applicant by Ms Huffstutler by letter dated 12 May 2014.

The issue to be determined

[23] The applicants do not seek to argue that there was not a genuine need for the Invercargill branch of the respondent company to lose four positions. The issues that the Authority must determine, therefore, are:

- a. whether the process followed by the respondent company rendered the dismissals unjustified; and
- b. whether the terms of the collective agreement between the parties had been breached.

Did the process followed by the respondent company result in the applicants' dismissals being unjustified?

[24] Section 4(1A) of the Employment Relations Act 2000 (the Act) provides as follows:

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.

(1A) The duty of good faith in subsection (1)—

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) an opportunity to comment on the information to their employer before the decision is made.*

[25] Section 103A of the Act provides as follows:

- (1) For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) minor; and*
 - (b) did not result in the employee being treated unfairly.*

[26] Under cross-examination, Ms Purdue accepted that, in hindsight, the company had failed in its process in the following ways:

- a. By not discussing with the Union representatives how the scoring system was to be implemented prior to the selection process being carried out;
- b. By not having given to each affected employee the opportunity to comment on their individual scores prior to the decision to dismiss them; and
- c. By not having given to each affected employee sufficient information so they could understand how they had been scored in comparison to their colleagues.

[27] It does not need a great deal of analysis to come to the conclusion that each of the applicants was significantly disadvantaged in the following ways:

- a. Not having been told expressly that a scoring system would be applied to assess them against the specific criteria which the company was using to select those for redundancy. Interestingly, Ms Purdue conceded that she had told non-Union employees about the scoring system because they had asked about it. However, it was a fundamental part of the process which would lead to employees losing their positions and therefore the scoring system should have been explained in detail to each and every potentially affected employee prior to it being implemented. There was a duty upon the respondent under s.4(1A) of the Act to proactively make the process clear, which was not relieved by any failure on the part of the Union to ask specific questions about the process.
- b. Not having given the three applicants information setting out exactly what they had been scored against each criterion, why they had been given that scoring and not giving them a chance to comment upon their scores. During their evidence, each applicant took issue with their scores. For example, Mr Cameron took issue at being scored 2 out of 10 for multi-skills and said that he should have been scored at least the same as another one of his colleagues called Lana, who was given a 7 for that criterion. Whilst this may or may not be objectively correct, Mr Cameron (along with the other two applicants) was deprived of the

opportunity to make that argument prior to his dismissal and to have it properly considered.

[28] In addition, all three of the applicants had been marked down in respect of their attitude. However, it is not at all clear (as the people who actually did the scoring of each employee did not appear before the Authority to give evidence and their working papers were not made available to the Authority), what it was about the attitude of each of the applicants which led to them being marked down. Whilst Ms Purdue gave evidence that each of the three applicants had had run-ins of various kinds with their supervisors and two of them had received disciplinary sanctions, it is fair to say that it is highly unlikely that any of the applicants had been told at the time that these run-ins would be used against them in a subsequent redundancy exercise which would result in their scores for attitude being reduced to zero, thereby leading to their dismissal. This was particularly important in Ms Glozier's case, as she scored just one point less than two employees who were not dismissed for redundancy. No fair and reasonable employer could have failed to have given each affected employee the opportunity to argue against being given a zero score for their attitude.

[29] It also appeared that, in Mr Cameron's case, he was doubly penalised as the same issue (an argument in the washroom which led to him being required to work elsewhere) led in turn to him being given a poor mark for attitude and teamwork as well as a very poor mark for multi-skills because, Ms Purdue said, the washroom incident showed that Mr Cameron was only able to work on his own.

[30] In conclusion, the process adopted by the respondent company in the way that it scored the applicants and, following that scoring, its complete failure to give each applicant a reasonable opportunity to respond to their scores, were not the actions that a fair and reasonable employer could have taken in all the circumstances at the time the dismissals occurred. Accordingly, I find that the dismissals of Ms Glozier, Mr Cameron and Ms Bennett were unjustified in each case.

Was there a breach of the collective employment agreement?

[31] The collective employment agreement provides, at clauses 27 and 28, as follows:

27.0 **Management of Change**

- 27.1 *Regular consultation between the employer, employees and Union is desirable on matters of mutual concern and interest.*
- 27.2 *The aim of mechanisms established for this purpose will be to reach agreement and to make recommendations to management, who will endeavour to take the views of those groups into account as far as possible before making final decisions.*
- 27.3 *In accordance with the principles contained in 26.1 and 26.2, the employer agrees that the Union will be advised of any review (prior to the commencement) which may result in significant changes to either the structure, staffing or work practices affecting employees, and will provide the Union with an opportunity to be involved in the review. When the implementation of decisions arising from any such reviews will result in staff surpluses the procedures in clause 28 below shall be adopted.*

28.0 **Staff surplus**

- 28.1 *When as a result of the restructuring of the whole, or any parts, of the employer's operations, either due to the reorganisation, review of work method, change in plant (or like cause), or at the conclusion of the processes described in clause 26, the employer requires a reduction in the number of employees, or, employees can no longer be employed in their current position, at their current grade or work location (i.e. the terms of appointment to their present position), then the options in subclause 28.3 below shall be invoked and negotiated on a case by case basis between the Union and the employer.*

28.2 Notification

The employer will advise the Union that an employee's position is to be declared surplus prior to notifying the employee whose position is required to be discharged. Notification of a staffing surplus shall be forwarded to the Invercargill office of the Union. During the month following this notice the Union and the employer will meet to reach agreement on the options appropriate to the circumstances. The period of one month may be varied by agreement between the parties (and agreement shall not be unreasonably withheld), and shall be concurrent with the period of notice given to the employee in accordance with clause 31.

If employees are to be relocated, at least three months' notice shall be given to employees, provided

that in any situation, a lesser period of notice may be mutually agreed between the Union and the employer where the circumstances warrant it (and agreement shall not be unreasonably withheld).

28.3 *If the services of an employee are no longer required in any given position on the grounds that their position is surplus to requirements then the employer shall negotiate with the Union the application and detail of any of the following options to be applied to the affected employee:*

- (a) Reconfirmed in position;*
- (b) Attrition;*
- (c) Redeployment;*
- (d) Leave without pay;*
- (e) Retraining;*
- (f) Severance;*
- (g) Technical redundancy.*

Option (a) will preclude employees from access to the other options. The aim will be to minimise the use of severance. When severance is included, the provisions in subclause 28.9 will be applied as a package.

[32] It would appear that, whilst the respondent advised the Union that the positions of Ms Glozier, Mr Cameron and Ms Bennett were to be declared surplus prior to notifying those individuals themselves, during the month following that notice, the Union and the employer did not meet to reach agreement on the options appropriate to the circumstances, in breach of clause 28.2.

[33] In addition, in breach of clause 28.3, the options of redeployment and retraining were not discussed in respect of any of the three applicants. Retraining was particularly relevant given that each of the applicants had scored poorly in respect of their multi-skills. Therefore, I find that the respondent did act in breach of the collective employment agreement in respect of each of the three applicants. The applicants did not seek the imposition of a penalty in respect of these breaches and so I take the finding no further.

Remedies

[34] Sections 123(1)(a)-(c) of the Act provide as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[35] Sections 125 and 126 of the Act deal with reinstatement and state as follows:

125 Remedy of reinstatement

(1) This section applies if—

(a) it is determined that the employee has a personal grievance; and

(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).

(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

126 Provisions applying if reinstatement ordered

Where the remedy of reinstatement is provided by the Authority or the court, the employee must be reinstated immediately or on such date as is specified by the Authority or the court and, despite any challenge to or appeal against the determination of the Authority or the court, the provisions for reinstatement remain in full force pending the outcome of those proceedings unless the Authority or the court otherwise orders.

[36] Section 128 of the Act provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Ms Bennett

[37] Ms Bennett seeks reinstatement to her position with the respondent.

[38] Although reinstatement is no longer a primary remedy under the Act, the Employment Court in *Angus v Ports of Auckland (No 2)*, observed that reinstatement may still be *the most significant remedy claimed because of its particular importance to the grievant* in a particular case and whether an order for reinstatement should be made needed to be examined on a case by case basis.¹

[39] Ms Bennett told the Authority that, although she had been upset by the scores that she had received and at having been made redundant, she thought that she could get over that and that she could build bridges.

[40] It was the evidence of Ms Purdue that the respondent opposed the reinstatement of Ms Bennett because the culture of the factory had moved on since Ms Bennett had been dismissed and that *a lot of water had flowed under the bridge*. Ms Purdue said that she was not sure that Ms Bennett would be able to carry out all the roles that would be required and that, in effect, greater demands were being placed on staff than previously. Ms Purdue also said that there were no vacancies at the plant at the moment and so they would have to go through another process as Ms Bennett being reinstated would result in over-staffing.

[41] During the evidence about Ms Bennett being scored negatively for her attitude, Ms Purdue said that she had a negative attitude and was a *glass half empty person*, who could be difficult to deal with. Ms Purdue said that she was sometimes difficult to deal with because Ms Bennett would say that she could not do something.

[42] The Authority also heard evidence that Ms Bennett had suffered from depression, which had been exacerbated after her dismissal. It is understood that the respondent suggests she may find it difficult to cope with the stress being back at the plant.

[43] Whilst Ms Purdue alluded to changes that had occurred in the plant since Ms Bennett had been dismissed, there was no detail given about these new requirements. There was also no evidence put before the Authority from

¹ [2011] NZEmpC 160 at [61]

Ms Bennett's personnel file, for example, in relation to what training she had received or any assessments of her performance.

Reasonableness

[44] The reason that Ms Bennett seeks reinstatement is, I understand, partly because she has secured part time employment only, which gives her less than half the hours she worked at the respondent company. Mr Cranney also submitted on her behalf that Ms Bennett also needed vindication, because the effect on her self-esteem of having been made redundant had affected her significantly.

[45] No evidence was adduced from the respondent that Ms Bennett's reinstatement would result in other employees being disgruntled, and it seems to have been accepted by the respondent that Ms Bennett had never been given any written disciplinary warnings. Although Ms Purdue referred to trust and confidence being a factor in the respondent opposing Ms Bennett's reinstatement, it seems that she was referring to Ms Bennett's willingness to work in different areas of the factory, rather than any misconduct issues.

[46] The reason that Ms Bennett received such a low score (the second lowest of all the staff) during the redundancy selection process was because she had been scored 2 out of 10 for her multi-skills. However, it appears that this may be connected to her not being able to work in the hospital area, in which, I understand, she had sustained an injury and was therefore not able to work for medical reasons.

[47] Although no firm evidence exists that Ms Bennett had been scored so low in multi-skills solely or principally because of this medical restriction, it is possible to infer that it is the case given the number of areas of her experience (eight) that were listed in the certificate of service issued to her by the respondent, as they do not suggest someone seriously lacking in multi-skills within the factory.

[48] If it were the case that her inability to work in the hospital area led to a very low score against the criterion of multi-skills, then there would be a further inference that could be drawn; namely that the respondent discriminated against Ms Bennett directly by reason of a disability. I hold back from making such a finding as there was insufficient evidence to enable me to do so. However, I do not find it reasonable to decline to reinstate Ms Bennett due to her very low score in the criterion of multi-

skills given that she does, in fact, appear to have a number of relevant skills according to the respondent.

[49] On balance, I am satisfied that it is reasonable to reinstate Ms Bennett to her former position, or in a position no less advantageous to her.

Practicability

[50] The meaning of practicability in the context of a reinstatement application was considered by the Court of Appeal in *Lewis v Howick College Board of Trustees*² as follows:

Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.

[51] There are few recent decisions of the Employment Court or higher courts which have specifically considered reinstatement in a situation where a restructuring exercise has been carried out and the respondent asserts that reinstatement would require a new redundancy exercise to be carried out. In the case of *Walker v Firth Industries*³, which was not a redundancy dismissal case, His Honour Judge Couch considered that the fact that no vacancies for drivers (the position held by Mr Walker) existed at his former plant did not, of itself, make reinstatement impracticable⁴. Judge Couch also held that the mere fact of delay did not make reinstatement impracticable⁵.

[52] In the Employment Court case of *Baguley v Coutts Cars Ltd*⁶ [2000] the Court stated:

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 Courts 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

² [2010] NZCA 320 at [2]

³ [2014] NZEmpC 60

⁴ At [83]

⁵ At [84]

⁶ [2000] 2 ERNZ 409 at [68]

position in which the sword of Damocles would hang above his head would not help to heal the grievance. We decline this remedy.

[53] Whilst this particular finding was not overturned by the Court of Appeal, I believe that it may be distinguished from the present case on the facts. First, enough time has passed (over one year) between the redundancy process that was followed by the respondent and the present to require the respondent to reappraise in good faith its requirements in terms of full time production staff at the Invercargill branch. This includes, but is not limited to, its current and projected work load, any plans it may have to recruit staff in the future, and any knowledge it has of the intentions of staff to leave its employment.

[54] Second, there is by no means anything like a one in three chance that Ms Bennett may be made redundant again, as there was in the *Baguley* case. There are around 30 non-specialist production employees working at the Invercargill branch, and this presents a far greater flexibility for the respondent to manage the workload.

[55] In any event, the redundancy process enshrined in its collective agreement requires the respondent to consider alternatives to redundancy, including retraining. I refer to clause 28.3 in which it is stated that *The aim will be to minimise the use of severance.*

[56] Furthermore, it appears from the certificate of service prepared by the respondent on behalf of Ms Bennett that she has skills in eight different areas of the factory. Therefore, provided she is prepared to work flexibly, subject to any medical restrictions she is under, it cannot be said with any force that the sword of Damocles would be hanging over Ms Bennett's head.

[57] In addition, there was evidence that during the last redundancy process some staff wanted to volunteer for redundancy. It is not the case, therefore, that even if the respondent was forced by economic circumstances to reduce its staff numbers, it would necessarily have to do so by way of a compulsory redundancy.

[58] Finally, a fundamentally unfair process had been followed by the respondent in making Ms Bennett redundant. If it is determined after a proper analysis that a staff member needs to be dismissed for redundancy, then the result may be quite different.

[59] In summary, I believe that, despite the fact that the respondent asserts that it would have to make someone redundant if Ms Bennett was to be reinstated, that possibility does not necessarily follow, and even if it did follow, after a careful analysis by the respondent of its needs, it is by no means clear that it would have to resort to a compulsory redundancy dismissal or that Ms Bennett would again be chosen.

Conclusion

[60] Having considered both the reasonableness and practicability of the possibility of reinstating Ms Bennett, I come to the conclusion that it is both reasonable and practicable. However, I will order reinstatement to her former position in accordance with the following conditions:

- a. The respondent may, at its discretion, place Ms Bennett in an alternative position no less advantageous to her;
- b. Ms Bennett is to co-operate with the respondent in respect of the exact work that she is to carry out, save that such work must be reasonable by reference to Ms Bennett's skills and experience and any limitations imposed upon her by any existing medical conditions; and
- c. If, as a result of Ms Bennett's reinstatement the respondent deems it necessary to undertake a restructuring process, prior to effecting that process it must carry out an objective analysis of its staffing needs and, in carrying out any resultant restructuring process, it must abide by the requirements of the Act and the terms of the relevant collective agreement in force at the material time.

Reimbursement of lost wages

[61] Ms Bennett earned \$15.80 an hour and worked 40 hours a week at the respondent. Ms Bennett's first day of unemployment was 17 May and her last day of unemployment was 9 September. This is a total of 16 weeks and 4 days. She was paid a gross sum of \$7,113 by way of a contractual redundancy payment.

[62] Three months loss of income would amount to the gross sum of \$8,216. Loss of earnings for sixteen weeks and 4 days would amount to the gross sum of \$10,617.60.

[63] There is a well-known principle that full loss of wages may not be awarded where a redundancy is determined to be genuine and the dismissal substantially justified. I refer to *Christchurch City Council v Davidson*⁷, and *Aoraki Corp Ltd v McGavin*⁸ in which the remedy for a personal grievance in respect of a process failure was held to be confined to compensation for humiliation and distress. Indeed, it is for this reason that representatives regularly plead redundancy related dismissals in the alternative, as unjustified disadvantage grievances.

[64] However, I am satisfied that the failure in this case was so significant that there is more than a 50% chance that Ms Bennett's dismissal, and that of Ms Glozier and Mr Cameron, were not substantially justified, given that the whole basis of the scoring process was never put to them for challenge, and that each had arguments to suggest that their respective scores were fallaciously low. Therefore, I find that it is appropriate to award reimbursement of lost wages.

[65] The respondent submits that the contractual redundancy payment should be deducted from the loss of wages claimed by Ms Bennett. There is no recent case law on this point, presumably because contractual redundancy payments are rare nowadays. However, Member Cheyne very helpfully summarised the law in the matter of *Summers v Nelson Pine Industries Limited*⁹. I replicate the relevant passages from *Summers*, which examines three authorities cited by Mr Cranney and Mr Smith.

[100] There is a submission for NPI that the redundancy compensation paid must be offset against any proven lost remuneration. I am referred to New Zealand Fasteners Stainless Ltd v Thwaites [2000] 1 ERNZ 739 (CA). That was a case of a genuine redundancy but procedural deficiency and the decision of the Court of Appeal provides no guidance on the present point. In the Employment Court (New Zealand Fasteners Stainless Ltd v Thwaites [1998] 3 ERNZ 894) there had been a finding of a lack of genuineness but the Court held that in assessing compensation, in equity and good conscience, credit should be given for redundancy compensation mistakenly paid at the time of dismissal. The mistake related to a change in the law as a result of Aoraki. The aspect of the Court's decision just mentioned was neither affirmed nor

⁷ [1997] 1 NZLR 275, [1996] 2 ERNZ 1 (CA)

⁸ [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA),

⁹ [2012] NZERA Christchurch 88

*criticised by the Court of Appeal. In its reasoning the Employment Court distinguished an earlier case on the basis that it concerned a substantively unjustified dismissal for redundancy where the employer had paid contractual redundancy compensation at the time of the dismissal. That case was *Muru v Coal Corp of NZ Ltd*, unreported, Finnigan J, 12 March 1997, AEC19/97. In *Muru* the employee had been made redundant and paid contractual redundancy compensation. His selection was a mistake but for which he would have retained his employment. Taking account of the redundancy compensation the Employment Tribunal declined to compensate Mr Muru for proven distress arising from the dismissal. On appeal, the Employment Court overturned that finding. The Court held that the payment of redundancy compensation, particularly of a substantial sum, may reduce the force of a claim that the employee has suffered distress. However, the Court went on to say:*

“I think that to succeed in obtaining a reduction the employer would have to show that it did something more than merely comply with its contractual obligations in making a prompt and full payment of redundancy compensation.”

*[101] The Court in *Muru* approved the Tribunal’s decision to award full lost wages. After citing a passage from *Queenstown Lakes District Council v Edmondson & Wilson*, unreported, Palmer J, 31 March 1995, CEC12/95 the Court said:*

“To me this means that if redundancy compensation is paid for a job loss then that does not rule out compensation for humiliation, loss of dignity and injury to feelings; neither does it rule out reimbursement of any proved remuneration loss, if one or both is justly payable on its own grounds in the particular facts of any case.”

*[102] This passage was specifically approved in *Mid Central Health Ltd v Drummond* [1998] 1 ERNZ 408.*

*[103] I am referred to *Wallace Corp Ltd v Paalvast*, unreported, Colgan J, 22 November 1999, AC94/99. In that case the dismissal was dressed up as a redundancy. The employer had paid seven weeks wages at the time as redundancy compensation despite the absence of a contractual obligation to do so. The Court assessed remedies on a global basis and took that payment partly into account in reducing the award for lost remuneration. The case appears to be an applicable in the particular circumstances of the principles discussed in *Queenstown Lakes* and *Muru*.*

[104] From this I conclude that there is no rule or principle that redundancy compensation must be offset against proven claims for compensation, whether for lost remuneration or for distress.

[66] I conclude that there is no firm rule either way as to whether redundancy compensation must be deducted from awards of lost wages and compensation for hurt and humiliation, loss of dignity and injury to feelings. In the present case, where the

redundancy compensation payment that each applicant received reduced the financial impact upon them of their dismissal, it would not be just to ignore the receipt of those payments. Accordingly, I shall take them into account in calculating each applicant's loss.

[67] The respondent has argued that Ms Bennett, Ms Glozier and Mr Cameron failed to mitigate their losses because they did not register with a recruitment agent which Ms Purdue had spoken with. However, the Authority saw an email from Ms Purdue dated 18 June 2014 (one month after Ms Bennett had been made redundant) in which Ms Purdue stated, *inter alia*, that the recruitment agent did not *have a lot on at present (worst time of year)* and *Have had the same response from my network....worst time of year, freezing works finishing etc...*

[68] In light of this, I am not satisfied that if Ms Bennett, Ms Glozier and Mr Cameron had registered with the recruitment agent it would have been able to have found work for them significantly more quickly than they were able to. Indeed, the respondent has not adduced any evidence from the recruitment agent showing what suitable vacancies were available in Invercargill between mid-June and early September 2014, when both Ms Bennett and Ms Glozier finally found work.

[69] Turning back to Ms Bennett's situation, under the circumstances, I am satisfied that Ms Bennett did what she could to find new work after her dismissal, given her state of health.

[70] I believe that it is just to exercise the Authority's discretion under s.128(3) of the Act and to award loss of earnings for 16 weeks, 4 days. However, as indicated above, I also believe that it is just to take into account the contractual redundancy payment that Ms Bennett was paid. Deducting the gross sum of \$7,113 from the total gross loss of earnings over 16 weeks, four days of \$10,617.60 results in the gross sum of \$3,504.60.

Compensation under s.123(1)(c)(i) of the Act

[71] Compensation for humiliation, loss of dignity, and injury to the feelings of the employee must arise out of the unjustified action of the employer. Where a redundancy is substantially justified, therefore, but the process defective, compensation under s.123(1)(c)(i) can only be awarded for the effects of the

unjustified process and not the actual dismissal. However, in this case, I am satisfied that there is a more than 50% chance that the dismissal of Ms Bennett was substantively unjustified, and so I am able to take into account the effects on her of the dismissal as well.

[72] Ms Bennett's evidence was that she felt as if her life had been turned upside down and that she had trouble sleeping. She says her existing depression was worsened, and she was prescribed extra medication for that. She says that she ended up telling people she had been dismissed on a last on first off basis, as she felt that people would think she had been chosen because she was a *no good worker*.

[73] Although no medical evidence was tendered to support her evidence I accept that Ms Bennett suffered reasonably significant effects as a result of having been chosen for redundancy. I assess the appropriate level of compensation at \$8,000.

Contribution

[74] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[75] I am satisfied that there should be no reduction in Ms Bennett's remedies as she did not contribute to the flawed process that resulted in her unjustified dismissal.

Ms Glozier

[76] Ms Glozier does not seek reinstatement. She was unemployed between 17 May and 7 September 2014, being a total of 16 weeks and 2 days. She earned \$15.80 an hour and worked 40 hours a week at the respondent and was paid a contractual redundancy payment of \$10,685 gross.

[77] I believe that Ms Glozier took such steps as were reasonable to have found alternative employment and mitigate her loss. I also believe that it is just to exercise the Authority's discretion under s.128(3) of the Act and to take into account loss of earnings for 16 weeks, 2 days, which amounts to the gross sum of \$10,364.80. However, it is also just to take into account the contractual redundancy payment that

Ms Glozier was paid. As her gross contractual redundancy payment exceeded her loss of earnings, I do not make any award in that respect.

[78] Turning to compensation under s.123(1)(c)(i) of the Act, I shall ignore the balance of the contractual redundancy payment, as I do not believe that it is just to view that as comprising compensation for humiliation, loss of dignity, and injury to feelings where there has been a fundamental failing in the process followed.

[79] As in Ms Bennett's case, I am satisfied that there is a more than 50% chance that the dismissal of Ms Glozier was substantively unjustified, and so I am able to take into account the effects on her of the dismissal as well as the flawed process. Ms Glozier's evidence was that it was hard being unemployed for three months, and that it was embarrassing for her to apply for jobs. Like Ms Bennett, she told people that she had been made redundant on a last on first off principle.

[80] She also said that she found herself crying quite often and felt that she had been penalised for being a hard honest worker. She says that she still feels humiliated to this day.

[81] Taking into account this evidence, I fix the compensation under s.123(1)(c)(i) at \$7,000.

[82] I am satisfied that there should be no reduction in Ms Glozier's remedies under s.124 of the Act as she did not contribute to the flawed process that resulted in her unjustified dismissal.

Mr Cameron

[83] Mr Cameron does not seek reinstatement. He was unemployed between 17 May 2014 and 7 December 2014, a total of 29 weeks and two days. He received a contractual redundancy payment in the gross sum of \$7,113. He earned \$15.80 an hour and worked 40 hours a week at the respondent company.

[84] Mr Cameron's explanation as to why he took so long to find work was his age. I infer from his written brief that he may also have struggled at the beginning of his unemployment to have made the effort required because of the effect on him of his dismissal. By then, he was aware that he had been ranked with the lowest score of all

the production staff members in the entire factory. Under the circumstances, I do not find that Mr Cameron unreasonably failed to mitigate his loss.

[85] Mr Cameron's loss of earnings amounts to the gross sum of \$18,580.80. I believe that it is just to exercise the Authority's discretion under s.128(3) of the Act and to take into account loss of earnings for the entirety of the period of unemployment. However, I also believe it is just to deduct the gross sum of the contractual redundancy payment that Mr Cameron received. This leaves the gross sum of \$11,467.80.

[86] Turning to compensation under s.123(1)(c)(i) of the Act, as in Ms Bennett's case, I am satisfied that there is a more than 50% chance that the dismissal of Mr Cameron was substantively unjustified, and so I am able to take into account the effects on him of the dismissal as well as the flawed process.

[87] Mr Cameron says he was in a dark place after he was dismissed. He refers to the statement made to staff at the start of the consultation process that the area he was working in was a specialised area, which had initially led him to believe that his job would be safe. Ms Purdue said in evidence that the respondent's managers subsequently changed their minds about the specialised areas, and no longer included Mr Cameron's area amongst them, but did not tell Mr Cameron, or the Union about the change of mind. This had an adverse effect on him he says.

[88] I believe that Mr Cameron did suffer moderate effects, and that it would be just to fix his compensation at \$7,500.

[89] I am satisfied that there should be no reduction in Mr Cameron's remedies under s.124 of the Act as he did not contribute to the flawed process that resulted in his unjustified dismissal.

Orders

[90] I make the following orders.

Ms Bennett

[91] Within seven days of the date of this determination, the respondent is to reinstate Ms Bennett to her former position or to place her in a position no less advantageous to her, at its discretion, provided that:

- a. Ms Bennett co-operates with the respondent in respect of the exact work that she is to carry out, save that such work must be reasonable by reference to Ms Bennett's skills and experience and any limitations imposed upon her by any existing medical conditions; and
- b. If, as a result of Ms Bennett's reinstatement the respondent deems it necessary to undertake a restructuring process, prior to effecting that process it must first carry out an objective analysis of its staffing needs and, in carrying out any resultant restructuring process must abide by the requirements of the Act and the terms of the relevant collective agreement in force at the material time.

[92] The respondent must pay to Ms Bennett:

- a. The gross sum of \$3,504.60 in respect of lost wages arising out of the unjustified dismissal; and
- b. A compensatory payment under s.123(1)(c)(i) of the Act in the sum of \$8,000.

Ms Glozier

[93] The respondent must pay to Ms Glozier a compensatory payment under s.123(1)(c)(i) of the Act in the sum of \$7,000.

Mr Cameron

[94] The respondent must pay to Mr Cameron:

- a. The gross sum of \$11,467.80 in respect of lost wages arising out of the unjustified dismissal; and
- b. A compensatory payment under s.123(1)(c)(i) of the Act in the sum of \$7,500.

Costs

[95] I reserve costs. The parties are to attempt to agree how costs are to be dealt with between them, but if they are unable to do so within 21 days of the date of this determination, any party seeking costs may serve and lodge a memorandum of counsel within a further 14 days and any reply may be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority