NOTE: Attention is drawn to orders at p 25
prohibiting the publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 26
5330924

	BETWEEN	DAVID JOHN HISLOP Applicant
	AND	LOWE CORPORATION LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	G W Calver, counsel for applicant S Hornsby-Geluk, counsel for respondent
Investigation Meeting:	5, 6 and 7 September 2011 at Napier
Determination:	12 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Hislop says his former employer, Lowe Corporation Limited (LCL):

(a) breached terms of his employment agreement entitling him on his redundancy to the payment of redundancy compensation calculated according to a '4 + 2' formula, for which he seeks,-

. damages according to that formula, calculated with reference to his base salary of $201,000 per annum at the date of termination of employment and his 34.5 years of service,

(b) dismissed him unjustifiably, for which he seeks, -

. 12 months' salary as reimbursement of remuneration lost as a result of his personal grievance, and -

. compensation for injury to his feelings in the sum of $50,000; and

(c) failed to provide him with a written employment agreement, for which he seeks, -

. the payment of a penalty, and

. an order that all or part of the penalty be paid to him.

[2] LCL denies there was any express or implied term of employment regarding an entitlement to redundancy compensation on the termination of employment by reason of redundancy, and denies in any event that there was an entitlement to compensation calculated on a 4 +2 formula. It says in the absence of such terms LCL was not obliged to make any payment of compensation. Accordingly it denies breaching the employment agreement and declines to make the payment sought.

[3] Secondly, LCL says Mr Hislop's employment was terminated following a decision to disestablish his position which was based on genuine business reasons and was carried out in a fair and reasonable way. It denies that its actions amounted to an unjustified dismissal and declines to provide the remedies sought.

[4] Thirdly, LCL denies there is a penalty available to Mr Hislop in respect of the provision of a written employment agreement.

Was Mr Hislop entitled to redundancy compensation on a 4 + 2 formula

[5] There is no written employment agreement or other document recording an express agreement that, in the event of the termination of Mr Hislop's employment by reason of redundancy, he is entitled to the payment of redundancy compensation calculated on a 4 + 2 formula[1].

[6] The grounds for Mr Hislop's assertion of that entitlement were: he had an express entitlement to redundancy compensation calculated on a 4 + 2 formula prior to his entry into employment by what I refer to as the Lowe companies; the entitlement was either carried over as a term of employment when he commenced

[1] Meaning 4 weeks' pay for the first year of employment plus 2 weeks' pay for each year thereafter.

employment with the first of the Lowe companies, or was a term of his employment with the first Lowe company; and the entitlement continued to be carried over as he entered into successive employment relationships. In the process the service-related component of the formula was preserved, so that his employment was to be treated as continuous from the date of commencement of employment with his first employer or at the latest with the first Lowe company.

[7] In the alternative, Mr Hislop says that, by custom and practice in the meat industry, it was an implied term of his agreement with LCL that he receive redundancy compensation calculated on a 4 + 2 basis.

[8] Finally Mr Hislop said that in November 2010 Graeme Lowe communicated LCL's acceptance of an obligation to pay him compensation for redundancy on a 4 + 2 basis, which was binding on LCL.

1. Did an express entitlement exist and was it continued in subsequent relationships

A. Borthwicks

[9] Mr Hislop began his career in the meat industry in 1972, when he was employed by Thomas Borthwick & Sons Ltd (Borthwicks). Borthwicks is not one of the companies I refer to as the Lowe companies.

[10] According to Mr Hislop it was a term of his employment at Borthwicks, although unwritten, that in the event of redundancy he would receive compensation calculated on a 4 + 2 formula. There was no evidence in support beyond that assertion. Mr Hislop was unaware of any such formula at the time. Neither party's mind was turned to the inclusion of such a provision in the terms and conditions of employment, it was not discussed and there was no contemporaneous documentation. I do not accept the assertion.

B. Dawn Meat New Zealand Limited

[11] In 1976 Mr Hislop began discussions with the managing director Graeme Lowe and others regarding a move to the first of the Lowe companies, Dawn Meat

New Zealand Limited (Dawn Meats). He commenced employment at Dawn Meats in or about April 1976, where his position was described initially as marketing officer. There was no relevant letter of appointment or written individual employment agreement, and no collectively-negotiated document applied to the position.

[12] Mr Hislop said that during the recruitment process he was told his terms and conditions would be the same or better than those at Borthwicks. That is the ground on which he says his entitlement to redundancy compensation calculated on a 4 + 2 formula was carried over and became a term of his employment with Dawn Meats.

[13] I have not accepted the entitlement existed, so that even if it was capable of being incorporated as a term of his employment with Dawn Meats in the manner alleged by Mr Hislop, there was nothing to incorporate. Otherwise there was no suggestion that Dawn Meats and Mr Hislop had any more specific discussion about: provisions for redundancy compensation in Mr Hislop's agreement with Borthwick's; whether and how any provisions setting out that entitlement would be preserved and become terms of his employment at Dawn Meats; or what entitlement to redundancy compensation - and how any compensation would be calculated - would be included as a term of his employment with Dawn Meats.

[14] Finally Mr Hislop acknowledged that neither of the parties turned their mind to redundancy at that time. Instead he assumed several years later that a redundancy payment calculated at 4 + 2 would apply to him if he became redundant because that was the calculation talked about and applied in the meat industry.

[15] In such circumstances I do not accept it was a term of Mr Hislop's employment at Dawn Meats that on his redundancy he would be entitled to redundancy compensation calculated on a 4 + 2 formula, and even less that the period of service at Borthwick's would be included in the calculation.

C. Lowe Walker New Zealand Limited

[16] Changes in the government's economic policy including the removal of subsidies, other regulatory changes, and wider economic and other factors led to significant change in the meat industry in the 1980s. A number of meat processing

plants were sold or closed. Compensation for redundancy was a major issue for unions in the industry, and on occasion was the subject of high profile strike action. Compensation provisions were contained in awards and agreements negotiated by the unions and registered under the collective bargaining system underpinned by the Industrial Relations Act 1973 and Labour Relations Act 1987.

[17] With limited exceptions not applicable here, the unionised workforce in the meat industry did not include management employees such as Mr Hislop. Instead it encompassed employees on the slaughterhouse floor and in associated or ancillary roles. In turn arrangements contained in awards and agreements in the industry did not apply to management employees unless there was an agreement between the employer and the employee that the arrangements were to apply.

[18] Against that background several of Dawn Meats' processing plants were sold to the much larger W Richmond Limited (Richmonds) in 1986. Upon the sale Graeme Lowe formed Lowe Walker New Zealand Limited (LWNZL), the next of the Lowe companies employing Mr Hislop, which operated the remaining plants and opened some new ones.

[19] The sale included a proposal that all or most of the Dawn Meats staff commence employment with Richmonds on the same or similar terms and conditions of employment as they enjoyed at Dawn Meats. Under the proposal Mr Hislop was to transfer his employment to Richmonds, but had also reached an agreement with Mr Lowe under which he would resign from Richmonds immediately his employment commenced and take up employment with LWNZL. He did so on 3 November 1986, giving Richmonds one month's notice of his resignation and being permitted to leave immediately.

[20] Mr Hislop promptly commenced employment with LWNZL as assistant marketing manager.

[21] Again there was no written employment agreement, and Mr Hislop's position did not fall within the coverage of a registered award or agreement. There was no discussion of any entitlement to redundancy compensation calculated on a 4 + 2 formula. I have already found Mr Hislop did not have an existing entitlement of that

kind at Dawn Meats. Accordingly there was no entitlement which, without even a discussion, was carried over into his employment by Richmonds and back into his employment with LWNZL or was otherwise agreed as a term of his employment with LWNZL.

[22] In 1998 LWNZL, sold all of its slaughtering plants to Richmonds. Again most of the LWNZL staff were to commence employment with Richmonds while a few, including Mr Hislop, would remain with Mr Lowe's company.

D. Lowe Corporation Limited

[23] LWNZL was renamed in 1998, and has been registered in the name of Lowe Corporation Limited since then. It retained its tanneries and fellmongeries and, following the sale of the slaughtering plants, it processed skins, hides and rendering materials supplied pursuant to an agreement with Richmonds.

[24] Mr Hislop was responsible for the marketing of rendered products, and overseeing the marketing of lamb and mutton pelts. No written employment agreement was offered to him at the time, and there was no discussion of any entitlement to redundancy compensation. No collective employment agreement applied.

[25] In or about 2005 a draft individual employment agreement was given to Mr Hislop to consider. The document identified his position as general manager marketing, and included a redundancy provision specifying that no compensation for redundancy would be payable. Mr Hislop did not sign the agreement, and said he put it away without taking the matter any further. He did not seek to query the absence of a provision for entitlement to redundancy compensation of the kind he now asserts, because in his view it was not necessary to do so. That was not a wise reaction as it could have (although it did not) led to a suggestion he had acquiesced in the contents.

E. Conclusion

[26] Nothing in the above supports a conclusion that at any time it was an express term of an employment agreement that Mr Hislop would be entitled to redundancy

compensation at 4 + 2 - let alone with the qualifying period of service commencing at the start of his career in the meat industry - whether as a written or oral term. I find there was no such term.

2. Is there an implied term entitling Mr Hislop to compensation on a 4 + 2 formula

[27] The existence of an implied term that Mr Hislop receive redundancy compensation calculated on a 4 + 2 formula relied on the argument that such entitlement existed as a matter of custom and practice in the meat industry.

[28] In *Woods v Ellingham*[2] the Supreme Court (as it then was) a passage was quoted from *12 Halsbury's Laws of England,* which set out the principles involved in determining the existence of a term based on 'custom and usage'. The quotation was later summarised by the High Court in *Everist v McEvedy*[3] as:

> *First the custom must have acquired such notoriety that the parties should be taken to have known of it and intended that it should be part of their contract; second the custom must be certain; third it must be reasonable; fourth [until the Courts take judicial notice of the custom] it must be proved by clear and convincing evidence and fifth it must not be inconsistent with any express term of the contract.*[4]

[29] I apply that approach, but begin with some general observations.

[30] First, the custom and practice alleged is very broadly framed. It appears to be based on a proposition that the custom and practice in question existed at the commencement of Mr Hislop's career in the meat industry, leading to an implied term which has remained a term of his employment since. In the process, continuity of service for the purposes of the 4 + 2 formula has also been preserved. Alternatively - although I did not understand the matter to have been advanced in this way - the custom and practice existed and formed the basis for an implied term of employment at some time up to and including the period of Mr Hislop's employment with LCL. The implied term included a provision that all previous periods of employment counted as years of service for the purposes of the 4 + 2 formula.

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[2] [1977] 1 NZLR 218.
[3] [1996] 3 NZLR 348
[4] at p 360 and 361.

[31] Secondly, the alleged custom and practice does not directly address the position of management employees in the meat industry. The matter is relevant because the 4 + 2 and other formulae for calculating redundancy compensation developed when such provisions were negotiated into registered awards and agreements. In Mr Hislop's circumstances the question of custom and practice includes the extent to which these formulae were applied to members of the workforce who, like him, were neither covered by an award or agreement nor party to any other agreement expressly conferring such an entitlement.

[32] Thirdly, as illustrated by some of the examples discussed in evidence, there were variations on the 4 + 2 formula – for example some entitlements were capped, some took account of incomplete final years of service while others did not, and some preserved earlier periods of employment for the purpose of applying the formula while others did not. Still, Mr Hislop says in effect that the custom and practice in question conferred an entitlement calculated on a 4 + 2 formula, was uncapped, and preserved the continuity of service accrued in earlier employment relationships.

[33] Fourthly, as also illustrated by examples discussed in evidence, the terms of existing redundancy entitlements could be preserved and passed on to a new employer as part of the wider terms of the sale of an enterprise and for reasons associated with the sale process, rather than occurring simply as a matter of custom and practice. This has implications both for the questions of whether as a matter of custom and practice there was an entitlement to redundancy compensation calculated on a 4 + 2 formula and whether continuity of service was preserved even if the formula did apply.

[34] Finally, the state of the law of redundancy at various times is also relevant as it is part of the background to some of the more specific arrangements discussed in the evidence. For example, Part IIIA of the Wage Adjustment Regulations 1974 came into force in April 1976. The regulations meant that, for a period later in the 1970s, employers were not permitted to pay redundancy compensation in excess of 2% of the employee's pay during the 12 months preceding a redundancy, multiplied by 20 or the number of years preceding the date of notice of redundancy, unless approval was obtained under the regulations. Amendments to the regulations during the wage freeze of the early 1980s lifted the maximum amount of compensation payable to, in effect, 4 + 2, and removed the approval procedure for greater amounts.

[35] This is not consistent with the existence up to the early 1980s at least of a custom and practice regarding entitlement to compensation calculated on a 4 + 2 formula. In any event, except to the extent that registered awards and agreements were published, there is no information about the terms of redundancy arrangements applying under individual employment agreements in the late 1970s and early 1980s.

[36] I have referred briefly to the collective bargaining system under the Industrial Relations and Labour Relations Acts, and the awards and agreements negotiated under it[5]. Collective bargaining continued under the Employment Contracts Act 1991 but there was no system of registration and more attention began to be paid to individual agreements.

[37] A leading case at the time, *Brighouse Limited v Bilderbeck & Anor*[6] summarised recent statutory provisions for redundancy[7]. For present purposes the relevance of the decision of the majority is the finding that offers of compensation were relevant to the justification for a dismissal for redundancy even where there was no contractual provision for compensation. The next leading case, *Aoraki Corporation Ltd v McGavin*[8], also included a brief recent history of redundancy law and practice.[9] It overruled *Bilderbeck* and concluded that the terms of the contract govern the matter of payment of compensation. The result was that while some agreements continued to include formulae for redundancy compensation, others provided that no redundancy compensation would be payable. Some of the agreements in the evidence contained such a provision.

[38] The leading cases under the Employment Relations Act 2000 have been increasingly concerned with the obligation of good faith. I address that matter in addressing Mr Hislop's personal grievance.

A. Notoriety

[39] If reliance is being placed on the existence of the custom and practice at the commencement of Mr Hislop's career, his evidence that he was unaware of a 4 + 2

[5] S 184 of the Labour Relations Act further provided for the registration of redundancy agreements
[6] [1994] 2 ERNZ 243 (CA)
[7] At p 251
[8] [1998] 1 ERNZ 601
[9] At p 609 - 611

formula until about the mid-1980s makes it difficult to assert that he and his employer should be taken to have known of it, and intended that it be part of his employment contract, in the mid-1970s. As I have noted, the regulatory environment at the time makes such a proposition even less likely.

[40] If the custom and practice relied on gained the required degree of notoriety at a later stage it is not clear when, and in any event circumstances have changed so that I find the required degree of notoriety does not exist currently. Further, even if the later coming into existence of the custom and practice could be identified as a matter of notoriety, then for the purposes of Mr Hislop's claim it would be necessary to include the element of preservation of continuity of service. Although it was often present as a part of the terms of the sale and purchase of an enterprise in the industry, I do not accept that element is or has customarily been present independently of such an arrangement.

B. Certainty

[41] Two of the witnesses, Munro McLellan and Rod Lingard, had professional associations with several of the large employers in the meat industry. I accept in general that AFFCO and the Vesty Group companies are and have been parties to employment agreements applying to union members doing work covered by the agreements, and which provide for redundancy compensation on a 4 + 2 formula.

[42] Mr Lingard also referred to a series of current collective employment agreements applying to smaller employers in the industry, one of which provided for compensation on a 4 + 2 formula, one for 4 + 2 capped, one for 2 + 2 with a maximum of 4 weeks' pay, one for 4 weeks' pay only, and one for a notice period only.

[43] He also noted a number of agreements to which LCL or another company bearing Graeme Lowe's name was the employer party. Of these, some current collective employment agreements reached with the engineers' union had no express provision for redundancy other than references to Part 6A of the Employment Relations Act. Some current collective employments negotiated with the meat workers' union include provision for redundancy compensation according to a

formula which either is, or is similar to, the 4 + 2 formula and which is capped. An earlier collective employment agreement covering work on a slaughter floor provided for compensation calculated on a 4 + 2 formula.

[44] Individual employment agreements between LCL and members of the management staff, dated in 2004 and 2005, were also produced. These provided that no compensation would be payable in the event of redundancy. That was not necessarily the end of the matter for redundant management employees because, as I discuss later in this determination, Graeme Lowe had a philosophy of assessing what was fair and reasonable at the time of a redundancy.

[45] There was also evidence that Richmonds, another large employer, had at least on occasion paid compensation calculated at 6 + 2. One witness who was then employed in a marketing position produced her individual employment agreement with Richmonds dated March 1998, and which provided only for one month's notice in the event of redundancy. I do not accept her further argument that a generalised clause in the agreement, providing for continuity of employment for the purposes of service-related entitlements, is capable of incorporating an entitlement to redundancy compensation according to a formula. The same witness said that, following a series of takeovers, she was made redundant in 2006 and received compensation calculated at 6 + 2.

[46] Further to the entitlements of management or salaried staff in the industry, Mr McLellan said that in his experience as a manager who had implemented a large number of redundancies affecting managerial staff, compensation was paid to those staff members at 4 + 2. Even so, he acknowledged that some Richmond staff members received compensation calculated at 6 + 2 and said that there may have been a cap.

[47] I accept that redundancy compensation calculated on a 4 + 2 formula was common in the meat industry, and may often have been paid to management or salaried staff. However other redundancy arrangements were also made.

[48] Secondly while I accept the evidence of several of the witnesses to the effect that a going rate of 4 + 2 was often talked about and all-but taken for granted by

salaried and management employees, 'talk' is not necessarily enough. I have set out the background in the way I have in order to illustrate that redundancy was a complex matter especially in the 1980s and 1990s. That background does not establish to the required certainty that as a matter of custom and practice Mr Hislop was entitled to redundancy compensation calculated at 4 + 2 and with the qualifying period starting at the beginning of his employment in the industry.

C. Clear and convincing evidence

[49] For the reasons discussed above I find the existence of the implied term contended has not been proved by clear and convincing evidence.

[50] Since all factors must be present to support a finding that a custom and practice exists, and I have found at least three of them were not, it is not necessary to discuss the remaining factors in *Everist v McEvedy*.

3. Did Graeme Lowe bind LCL to pay compensation calculated on a 4 + 2 formula

[51] In or about 2005 Graeme Lowe began to experience a serious deterioration in his health. He relinquished the role of managing director, and a CEO was appointed. Mr Lowe's son, Andrew (Andy) Lowe, was already a director of LCL and when the CEO departed in 2008 Andy Lowe became LCL's managing director.

[52] When the redundancy situation affecting Mr Hislop arose in October 2010, Mr Hislop visited Graeme Lowe seeking to discuss the matter. He said that during a visit on 20 October he asked Mr Lowe to confirm he would be paid redundancy compensation calculated at 4 + 2, and in response Mr Lowe asked him how much that would be. When Mr Hislop replied 'around $300,000' Mr Lowe suggested he speak to Mike Hanson, the consultant who was assisting in the redundancy process.

[53] Mr Hislop said that on 18 November he made available to Graeme Lowe a copy of an emailed message dated 17 November in which he had set out his view of his entitlement to compensation calculated at 4 + 2. Later that day Mr Lowe told him not to 'give in' and said he would 'support you all the way'. Mr Hislop took that to mean Mr Lowe had read the message and supported what was in it. Shortly

afterwards Mr Hislop prepared an emailed message advising LCL that Mr Lowe was supportive of his stance, and asked Mr Lowe if he was happy for the message to be sent. Mr Lowe indicated the message could be sent.

[54] Even on that evidence, Mr Lowe did no more than indicate his support for Mr Hislop making a claim that he was entitled to compensation calculated at 4 + 2. Mr Lowe did not make any promise that LCL would pay compensation calculated that way. In addition Andy Lowe gave evidence that when he raised the matter with Graeme Lowe, Graeme Lowe indicated that he considered the company's offer of $75,000 as redundancy compensation was fair.

[55] In an affidavit Graeme Lowe said he did not believe he made any promise to pay compensation on a 4 + 2 formula, and pointed out that such a decision would not be his alone. The board makes decisions about significant expenditure and Andy Lowe makes decisions about employment matters.

[56] Graeme Lowe also expressed the view, which he confirmed in oral evidence and was supported by witnesses who knew him, that he believes in being generous to staff. Rather than including redundancy compensation formulae in employment agreements, he prefers to assess and has assessed what is fair and reasonable in the circumstances at the time a redundancy occurs. He did not believe a payment to Mr Hislop of the amount generated by applying the 4 + 2 formula to the entire period of Mr Hislop's career was fair.

[57] Moreover, Mr Lowe did not have actual or ostensible authority to bind LCL to make the payment Mr Hislop seeks. Mr Lowe is a highly respected businessman, is the founder and president of the company and the co-chairman of the board. Mr Hislop reported to Mr Lowe during much of his career. However that is not in itself sufficient to give rise to an actual or ostensible authority to bind LCL in an employment matter arising some years after Mr Lowe was known to have withdrawn from any direct involvement in the management of the company, and when his state of health was also known.

[58] LCL was Mr Hislop's employer, not Mr Lowe in any personal capacity. Strong personal loyalties which continued after Mr Lowe withdrew from his

management role could not create any continued authority to bind the company in management matters when it was clear the role itself had been taken over by others. Even if Mr Lowe remained a person of influence in such matters as those affecting Mr Hislop's employment, for example, he did not have any legal authority in respect of them. At relevant times Mr Hislop reported to Rob Pitcher, the general manager marketing, who reported to Andy Lowe. Mr Pitcher and Andy Lowe had actual or ostensible authority to bind the company in matters concerning Mr Hislop's employment.

[59] For these reasons I conclude that Graeme Lowe did not bind LCL to pay redundancy compensation to Mr Hislop calculated on a 4 + 2 formula.

4. Conclusion

[60] For the above reasons I find it was neither an express nor an implied term of Mr Hislop's employment at LCL that he receive redundancy compensation calculated on a 4 + 2 formula, and with the relevant period being calculated either from the commencement of his career in the meat industry or from the commencement of his employment with Dawn Meats.

Was the termination of employment on the ground of redundancy justified?

[61] Mr Hislop's employment was terminated before the coming into force of the Employment Relations Amendment Act 2010, which substituted a new s 103A in the Employment Relations Act. This proceeding was also commenced before the relevant amendment came into force. Accordingly I apply the test for justification in the now-repealed s 103A, which read:

> *… the question of whether a dismissal or action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[62] The scope of the test in a redundancy situation was discussed in *Simpsons Farms Limited v Aberhart.* [10] There the Employment Court summarised earlier case

[10] [2006] ERNZ 825

law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Act. It pointed out that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. Although an employer is entitled to have a working plan in mind, mere prior notification of a proposal was not sufficient and consultation must be a reality, not a charade. The obligation to consult does not, however, extend to a requirement that the consent or agreement of the employee consulted be obtained.

[63] The court concluded:

> *"[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law."*[11]

[64] I refer to the following additional comment in *Aberhart*:

> *"[67] … 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, even under s 103A."*

[65] A decision of the Full Court in *Vice Chancellor Massey University v Wrigley & Anor*[12] was also referred to in submissions. The decision contained a number of strong statements about the employer's obligations under s 4(1A) of the Act, made in the context of a case about whether particular information generated in the course of a process of selection for redundancy should have been disclosed to the plaintiffs. The court expressly did not address the disclosure of information in the context of a need to protect the commercial position of an employer when making decisions for

[11] P 842
[12] [2011] NZ EmpC 37

economic reasons[13], and the case was not concerned with the employer's decision to reduce the number of positions available in the first place.

[66] I do, however, take this statement into account:

> *[48] … When a business is restructured the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and real opportunity to express their thoughts about those issues.*

[67] With reference to the above, the questions arising in respect of the justification for Mr Hislop's dismissal are:

. was there a genuine redundancy situation;
. was the redundancy implemented in a fair and reasonable way with particular reference to,
- whether LCL met its obligation in good faith to consult, and
- whether the outcome of the process was predetermined;

. was dismissal the action a fair and reasonable employer would have taken at the time; and
. if not, what remedies should flow

1. Was there a genuine redundancy situation?

[68] In October 2008 Mr Hislop moved from marketing and commenced a position as trading manager. His role was to '.. *initially specialise in trading meat, but will also over time look to trade other produce and by-products'*. All marketing and trading staff reported directly to Mr Pitcher.

[69] In March 2010 a 12-year arrangement included in the terms of the sale of LWNZL's (LCL's) assets to Richmonds in 1998 was to expire. A restraint on LCL's commercial activities was to end so that LCL could resume slaughtering, and the supply agreement under which Richmonds (by then Silver Fern Farms) provided LCL with raw hides, skins and rendering material was also to end.

[13] at [113]

[70] The expiry of the supply agreement meant that certain guaranteed revenue and supplies would no longer be guaranteed and LCL needed to address the change. In turn the company needed to focus on core business and in particular on procurement and new sources of raw material. This, and factors such as issues arising under the Resource Management Act, changes in the market, and the effects of the global financial crisis meant that the senior management team reviewed the future of the company and considered restructuring. All areas of LCL's operation were assessed with reference to their costs, and their ability to meet the company's business needs.

[71] The trading business was addressed in that context. Mr Pitcher noted that the revenue being generated by trading was not covering Mr Hislop's salary and overheads. The management team concluded that the losses would no longer be covered by the rest of the business. This did not mean trading activities should be dispensed with, rather LCL proposed to reduce its risk by disestablishing the trading position and replacing it with a contracted or fixed term position to be made available to Mr Hislop. Its preference was for a contracted commodities trader's position, but a fixed term position was to be offered as an alternative to allow Mr Hislop access to certain employee benefits.

[72] Because Mr Hislop did not accept the trading position the role was subsequently offered to another employee. A review of the sustainability of the employee's position was to be conducted after the first year.

[73] In addition Mr Hislop had spent approximately one day a week selling rendered products, following the resignation of the incumbent salesperson and the termination of the Silver Fern Farms contract. Outsourcing of that activity was proposed on the ground that it would be most cost effective and efficient. Negotiations with an external provider were embarked on but not completed, and Mr Pitcher has taken over the work.

[74] Mr Hislop disagrees with the construction Mr Pitcher and Andy Lowe placed on the financial information in respect of the trading division. It is not the role of the Authority to decide who is correct in that regard – rather for present purposes to consider the matter in the context of whether there was a genuine redundancy situation. The views Messrs Pitcher and Lowe took of the financial information were

reached for genuine business reasons, and were taken into account in formulating the proposal regarding Mr Hislop's position accordingly.

[75] Mr Hislop also disagrees with outsourcing and says Graeme Lowe does not support that practice either. Again, however, it is not for the Authority to decide who is correct - only for present purposes to decide whether Messrs Pitcher's and Lowe's conclusions about the matter were reached for genuine business reasons. I find they were.

[76] A principal submission on behalf of Mr Hislop was that the redundancy was not genuine in that it was plain LCL did not intend to disestablish Mr Hislop's position. Instead nothing was to change beyond the basis on which Mr Hislop was remunerated.

[77] I do not accept that LCL sought simply to answer the question of 'how can we pay our trading manager less' rather than 'do we need a trading manager'. It addressed the need for a trading manager in the context of a wider restructuring proposal for its overall business and which affected the employment of several individuals. It did not consider trading to be part of its core business, but having decided to retain a trader's position it considered a package that would best address its core business needs and its drive for efficiencies. This led it to make a proposal which reduced, although it did not remove, the financial risk to it of a poor trading performance. On its face the package would amount to a drop in Mr Hislop's remuneration, although the inclusion of an incentive-based component meant an overall drop was not necessarily inevitable or at least not necessarily permanent.

[78] Mr Calver also suggested on behalf of Mr Hislop that that the redundancy could in effect be seen as a performance dismissal. I do not accept this. LCL's view of the financial performance of the trading division was reached in the context of its overall concern to enhance the future operation of LCL, and not in the context of Mr Hislop's performance of his duties as an employee. Any statement indicating that the trading division was performing poorly was not a statement about Mr Hislop's personal performance.

[79] For the above reasons I find the redundancy was genuine.

2. Was the redundancy implemented in a fair and reasonable way?

[80] Mr Lowe called a meeting of head office staff on 11 October 2010. At the meeting he referred to the expiry of the Silver Fern Farms agreement and the reduced nature of the renewed or new contracts entered into instead, and the implications for LCL's business. He said LCL needed to restructure to adapt to the new market reality, reduce costs and improve efficiency. Several positions were affected by the proposal, and managers would meet with the employees concerned.

[81] That afternoon Mr Hislop met with Mr Pitcher and Mr Hanson, where he was told his position was one of those being reviewed. The associated proposal, and the reasons, was explained. Mr Pitcher also wrote to Mr Hislop in a letter dated 11 October, advising:

> *… your current position of Trading/Rendering sales manager is one which would not be retained in the new structure. In other words, if the proposal went ahead without changes then your employment would be terminated due to redundancy unless there as (sic) suitable alternative position available.*

[82] The letter explained that rendering sales would be outsourced and that trading activities would be contracted either on a fixed term or independent contractor basis. Trading activities would be carried out through a commodities trader's position structured on a retainer plus 50% profit share. The letter repeated that this was a proposal and may be subject to change.

[83] Mr Pitcher and Mr Hislop met again briefly on 12 October. During that discussion Mr Hislop asked for what he called the 'dollars' attaching to the commodities trader's position. Mr Pitcher provided further information in an emailed message dated 12 October, where he confirmed:

- in relation to what was understood to be a question about the amount of the retainer, Mr Hislop would be offered a retainer of $50,000;
- the proposed restructuring document would be distributed that day;
- there was to be a consultation period of approximately 2 weeks; and
- while it was possible Mr Hislop's proposed role would change, Mr Pitcher believed this was 'highly unlikely'.

[84] Mr Hislop said in evidence that the last comment led him to believe the future of his employment had already been decided. Mr Pitcher said he included the comment in a spirit of openness as it reflected his opinion.

[85] On or about 14 October staff members including Mr Hislop were given a document which summarised all of the proposed changes, including the disestablishment of Mr Hislop's position as trading manager and its replacement with a commodities trader's position. The document also referred to the proposal that rendering sales be outsourced.

[86] A written timeline for working through the restructuring was also provided. The period 11 – 21 October was identified as a consultation phase, in which feedback would be received and considered and draft job descriptions prepared. Over the period 22 – 26 October, and subject to any extensions of time required, the senior management team would make decisions about whether or how the restructuring proposal would be implemented. The new structure was to be announced on 27 October and implemented from 1 November.

[87] The document also set out methods and types of feedback accompanied by a feedback form. Its purpose was to allow employees to comment on the proposal, seek explanations of any changes not understood, express views of whether the changes would work, make suggestions and ask any questions about the process. The form provided spaces for comments on the proposal's strengths and weaknesses and suggestions for addressing these, as well as a space for putting forward alternative options.

[88] Messrs Hislop and Hanson met to discuss Mr Hislop's feedback on either 13 or 18 October. The feedback was brief. Mr Hislop proposed that he take over the rendering position, and there was a discussion about the offer of the trader's position being on a contracted or fixed-term basis. Mr Hislop said he would speak to his lawyer. He did not say that he was not persuaded of the need for any change to his existing position, or seek further details of the information on which the proposal was based.

[89] Mr Hislop said in evidence that he did not feel he was in a position to respond appropriately to LCL until he had confirmation of his redundancy package. He said he wanted to make representations from a position of knowing what his position would be if negotiations to save his job were not fruitful. He sought confirmation of his entitlement to redundancy compensation calculated at 4 + 2 from the commencement of his career, or at least of the offer of compensation to be made to him, before embarking on further discussion. He did not say this at the time.

[90] LCL's approach was different. It was following a stepped process in which it sought first to consult on whether to proceed with disestablishing the position at all, what could replace it and would the alternatives it was proposing be acceptable to Mr Hislop. To LCL - but not to Mr Hislop - compensation would become an issue after the consultation process as it saw it had been completed, a decision was made to disestablish the position, proposed alternatives were found not to be suitable, and employment was to be terminated as a result.

[91] On 21 October Mr Hislop and Mr Hanson met again. By then Mr Hislop had spoken to Graeme Lowe. He advised Mr Hanson of this, and asked what redundancy compensation the company would pay. He asked that the offer be put in writing.

[92] Mr Hanson's evidence was that Mr Hislop also said he did not have the energy for a new position. Mr Hislop said - and I accept - it was more accurate to say he talked about the sense of burnout he had felt each time he had worked hard to help the company build up its business then seen profits taken when the business was sold. He implied he felt the same way this time. In addition he had recently experienced a health problem himself, as Mr Hanson knew, and did not wish to undertake the extensive travelling that the trader's position would have required.

[93] Acting on the view he had reached of Mr Hislop's wishes, Mr Hanson consulted with Mr Pitcher and Andy Lowe, and an offer of redundancy compensation of $75,000, in addition to a notice period, was decided on.

[94] In a message dated 21 October 2010 Andy Lowe updated staff on decisions about the restructuring. He advised that the disestablishment of the manager trading position would be implemented and a commodities trader function would be

established. He also advised of other changes decided on, as well as noting some decisions had not yet been made.

[95] The period 22, 23, 24 and 25 October was a holiday weekend in Hawke's Bay. However when, by 28 October, Mr Hislop had not received a written statement of a proposed redundancy package, he prompted Mr Hanson. He said he was '*leaving all my options open until we have an agreement*'. He also asked Mr Hanson if he was aware of the information in the 21 October update from Andy Lowe.

[96] In a message dated 28 October Mr Hanson confirmed that Mr Hislop was being offered a position of commodities trader as a contractor or on a fixed term basis with the term yet to be decided, or redundancy compensation of $75,000. In either case Mr Hislop's employment, and the terms and conditions, would continue to the end of the year. Mr Hanson also recorded his understanding that Mr Hislop was not seeking to argue for the status quo in respect of his position, or to present an alternative. If Mr Hislop was seeking to do either of these things, Mr Hanson invited him to go ahead and do so.

[97] Mr Hislop replied to Mr Hanson in a message dated 2 November. He said he had not proposed alternatives to the restructuring of his position because he believed that aspect was on hold while the parties discussed the possibility of voluntary redundancy if terms could be agreed. He did not say he had sought to discuss voluntary redundancy because the believed the disestablishment of his existing position was a fait accompli.

[98] Thus Mr Hislop went on to say in the message that his first choice was to continue in the job he had. He pointed to: his length of service and the value of the knowledge he had built up during that time; and his extensive contacts in the industry, and the usefulness of those attributes to the company. He also believed that outsourcing the marketing of rendering products was short sighted, referring to Graeme Lowe's philosophy of retaining control over the products being sold.

[99] Next, he expressed reluctance to accept the commodities trader position because of the reduction in income, and responded to the offer of redundancy compensation by saying he would be more inclined to accept a redundancy package

based on 'the usual' 4 + 2 formula. He also asked if he would receive redundancy compensation whether or not he accepted a commodities trader position. He ended by indicating he was available for further discussion.

[100] In a letter dated 1 November Mr Pitcher confirmed that the proposals for Mr Hislop's position, as contained in the restructuring document, would be implemented with effect from the end of December 2010. The options for Mr Hislop were:

> . to accept the commodities trader position as an independent contractor, with a retainer of $50,000 per annum plus a 50% share of net profit arising from trading activities;
> . remain an employee in the position of commodities trader, with no guarantee of ongoing employment and payment calculated on largely the same basis as above; or
> . to terminate employment on 31 December 2010 and receive redundancy compensation of $75,000.

[101] The letter asked Mr Hislop to consider these options and make a decision before the end of November. A full offer in respect of the commodities trader position would be prepared.

[102] Mr Hislop said he did not receive the letter until several days later. Meanwhile he sought a reply to his 2 November email.

[103] Mr Hanson replied to the 2 November email in a message dated 11 November. He advised there was nothing to stop LCL from revisiting the decision to disestablish Mr Hislop's position, and offered to meet again. While certainty before the end of the month was hoped for, time was available because Mr Hislop's employment was to continue to the end of the year. Mr Hanson said Mr Hislop's points about the retention of his position had been borne in mind when the decision was made to disestablish the position, but the company could not afford the cost of retention. He expressed the view that there was potential for Mr Hislop to build the commodities trader position so the income matched or exceeded Mr Hislop's current salary.

[104] Finally, he did not agree that a 4 + 2 formula for redundancy compensation was 'usual' but offered to reconsider if Mr Hislop provided more information. He noted his belief that, taking into account the notice period, Mr Hislop was expecting a payment equal to 72 weeks' pay or an amount in excess of $275,000. That was not considered reasonable.

[105] Mr Hislop replied in a message dated 17 November. The message was largely concerned with his view that the company had paid redundancy compensation on a 4 + 2 formula in the past, and he understood that was his entitlement. However it ended by saying that Mr Hislop was presenting that view because the company appeared to have made up its mind about the disestablishment of his position. Otherwise Mr Hislop's preference was to preserve the status quo. He also commented, without detailing why, that he had serious reservations about the consultation process.

[106] In a further message dated 18 November Mr Hislop advised Mr Hanson that he had again seen Graeme Lowe, who had indicated strong support for the contents of Mr Hislop's 17 November email. I understand the indication of support to be a reference to Mr Hislop's view that redundancy compensation calculated at 4 + 2 was payable, and have discussed that matter at [53] - [56] of this determination. Mr Hanson replied, again offering to meet.

[107] Mr Hislop met with Messrs Hanson and Pitcher on 24 November. I was advised that the meeting was expressed to be without prejudice. Nevertheless it was referred to in a letter dated 25 November 2010, where Mr Pitcher said he considered it clear Mr Hislop did not wish to take up a commodities trader's position and explained why LCL declined to pay redundancy compensation calculated on a 4 + 2 formula. He cited a policy of regarding redundancy compensation as a matter of company discretion, applied with reference to individual circumstances.

[108] Further correspondence followed but the matter was not resolved. The correspondence on behalf of Mr Hislop emphasised the entitlement to compensation calculated on a 4 + 2 formula. It also said in general terms that the consultation process was inadequate, with the allegation of predetermination being the only specific concern being identified.

[109] Mr Hislop's employment terminated on 31 December 2010. He received a payment of $75,000 as redundancy compensation.

[110] I now turn to a more detailed consideration of the submissions.

A. Did LCL met its obligation in good faith to consult

[111] According to the submissions for Mr Hislop, principal among the concerns about the consultation process were that Mr Hislop was not given sufficient information to allow him to: understand the context in which the proposal to disestablish his position was being made; compare his results with other divisions in the company; be in a position to make a counter-proposal regarding the better utilisation of his time; and be in a position to make any proposals as to possible redeployment.

[112] Four broad areas were discussed in relation to the particular information that should have been made available. They concerned:

. financial information about the performance of the trading division;
. financial information about the performance of other divisions;
. information about initiatives involving a trading operation in India; and
. information about the position Mr Hislop would be in if the offer of the trader's position was declined (that is, the compensation to be offered).

[113] I have already noted that Mr Hislop disagrees with the construction placed on the trading division figures, and commented on it in the context of whether the redundancy was genuine. In the present context his argument is in effect that the figures should have been made available to him during the consultation process.

[114] I record that, following exchanges between the parties and the Authority, certain information was made available on the basis that it was commercially sensitive and would not be disclosed to any third party except as required for the purposes of this proceeding. Some information of a personal medical nature was also provided. I confirm the orders under clause 10 Schedule 2 of the Employment Relations Act that the information not be published.

[115] Returning to the trading division figures, the points Mr Hislop made in evidence were that the trading role started in August 2009, a date which coincided with the diagnosis of a medical condition. Despite this, the trading division showed a gross profit in its first 12 months. Mr Hislop also pointed to the assistance he had given in other areas of LCL's activities, including to Mr Pitcher and in setting up the trading operation in India. Thirdly he pointed to the time he spent on rendering work, the results of which were not included in the trading division figures. He believed that, if proper account was taken of those results, the trading division figures would show a net profit.

[116] Mr Pitcher had prepared the relevant reports, and said he discussed them with Mr Hislop at the time they were prepared. He said, and I accept, that Mr Hislop knew and acknowledged that the trading business overall was not profitable if the cost of his salary and overheads was taken into account. He also said that, until October 2010, the figures did recognise Mr Hislop's work in other areas. In particular he and Mr Hislop had agreed on the proportion of time to be allocated to rendering, and the results were incorporated in the figures. The budget for the new financial year commencing in October 2010 did not contain such adjustments, and this was also discussed with Mr Hislop at the time. Further, the December 2010 figures showed a net loss greater than had been budgeted for in the trading activities of Mr Hislop and the operation in India.

[117] As for Mr Hislop's assistance in other areas, Mr Pitcher acknowledged this occurred but added Mr Hislop had time available and LCL was entitled to seek his assistance.

[118] Secondly, regarding information about the performance of other divisions, it was submitted that the absence of that information deprived Mr Hislop of the wider context in which the restructuring was undertaken, and he was unable to properly address the viability of the trading division without that information. In the circumstances facing LCL I do not accept Mr Hislop was unaware of the context in which the restructuring was undertaken, or that the obligation to consult extended to the provision to Mr Hislop of information about the other divisions. Further, with

reference to the discussion in the *Wrigley*[14] case, I would not accept that a process of determining which if any divisions of a company should be restructured and how is comparable with a process of determining which employees should be appointed to a limited number of positions when there are more suitably qualified employees than positions available.

[119] Thirdly, a concern expressed in submissions was that the operation in India was treated differently from the trading division, and Mr Hislop was not given information to allow him to make submissions on why different treatment was not appropriate. The employee involved in that operation is the employee who has taken the commodities trader's position Mr Hislop declined. The employee lived in India for some months each year and was working on developing a market there for exported primary products, extending to certain fruit, vegetables and honey. One of LCL's reasons for continuing with that initiative was that it retained an element of trading in 'core business' products.

[120] That matter could have been raised and discussed at the time but was not. Mr Hislop was aware of the operation and even of its costs to the extent they were recorded in trading reports, and could see that the operation had not been identified in the restructuring document. I do not accept that LCL had an obligation to second guess the possibility that Mr Hislop would raise concerns about the retention of the Indian operation and who would staff it, and provide him in advance with such information as it anticipated he might require.

[121] I find that, during earlier part of October in particular Mr Hislop, was focussed on the redundancy compensation that would be available to him. He was otherwise providing limited responses to the request for feedback. He has explained his approach in part by asserting that the decision to disestablish his position had already been made - which I discuss below - and in part by saying he wanted to know what compensation he would receive before making representations about the proposal.

[122] The nature of the path the parties had embarked on, as well as a possibility that they were at cross purposes over the content of their consultation, became clear in the exchanges of 28 October. Thus Mr Hanson offered Mr Hislop an opportunity to

[14] Supra

make representations about the retention of his position or to suggest an alternative. Mr Hislop responded on 2 November, making his wish to argue for the retention of his position clear for the first time.

[123] It was premature and unfortunate that Andy Lowe announced on 21 October that Mr Hislop's position was to be disestablished, although Mr Hislop contributed to the circumstances leading to the announcement in that his wish for retention had not been clear.

[124] Discussions continued in any event. In the associated mutual expressions of willingness to meet there was a further opportunity to explore the retention of Mr Hislop's position in more detail than either party had attempted to date. I accept that on the face of the matter LCL had given Mr Hislop relatively little detail about why his position was to be disestablished, but Mr Hislop was aware of: the termination of the Silver Farms agreement and its implications; the purpose of the restructuring; the divisions and positions affected and why; and the view being taken of the existing trader's position in that context. Although he was not given documentation in support of the kind raised in submissions, as I have said he had been party to the preparation of that information as it related to trading and could have asked for copies if he wished to discuss it in more detail. He was aware of the operation in India, and of its absence from the restructuring document, and could still have raised that matter if he wished to query it.

[125] Unfortunately the discussions began to concentrate again on whether Mr Hislop was entitled to redundancy compensation calculated at 4 + 2. Although Mr Hislop continued to assert that the disestablishment of his position had been decided, he did comparatively little to respond to Mr Hanson's offers to discuss the matter further and comparatively more to pursue the entitlement to redundancy compensation as he understood it to be. This extended to pursuing his point with Graeme Lowe.

[126] This view of the matter means I do not accept additional submissions that Mr Hislop did not have enough time to respond to the proposal, or that the timeline for consultation was not adhered to.

[127] Finally, it was submitted that LCL failed to consider redeployment during the consultation process. I do not accept that submission. LCL's evidence in general was that redeployment was considered when the overall restructuring proposal was made, and such redeployment as might be available to Mr Hislop took the form of the alternatives offered to him. If Mr Hislop believed there was another position that could have been made available to him, he has not identified it.

B. Was the outcome predetermined

[128] Mr Hislop believed the termination of his employment was inevitable in that:

> . the proposal put to him on 11 October was for the creation of a new fixed term employed position, a contracted position, or the termination of his employment but did not include the continuation of his employment as it was; and
>
> . Mr Pitcher indicated on 12 October that the proposal was unlikely to change.

[129] Regarding the first of these points, Mr Calver submitted that the lack of detail in the proposal of the terms and conditions to be available under a contracted or fixed term arrangement meant Mr Hislop, understandably, took the proposal as a proposal to terminate his employment. That is true of the proposal in the sense that the disestablishment of Mr Hislop's existing position underpinned it, but not in the sense that the door was closed to Mr Hislop's raising the continuation of his employment as it was. In particular the employee feedback form offered an opportunity to: comment on the weak points of the proposal, make suggestions for how to address them, and suggest alternatives. One such alternative could be that no change be made.

[130] Regarding the second point, the proposal was formulated following a consideration of LCL's business circumstances and of how they could best be addressed. In that sense it was not made arbitrarily or without foundation. It was a working plan. The senior management team was entitled to form a view of the strengths of the plan - since without such a view it could not form a sensible working plan at all - but it was obliged to keep an open mind to the possibility of change.

[131] Mr Pitcher's participation in the preparation of the plan could be expected to cause him to hold an opinion about it, which he expressed. Unfortunately the expression of his opinion was not helpful. However, taking into account all of the evidence of LCL's attempts to discuss the proposal with Mr Hislop, I do not consider that LCL was merely 'going through the motions'.

[132] The result of this is I do not accept that the disestablishment of Mr Hislop's existing position was predetermined from the outset, and I do not accept he was justified in assuming this was the case to the extent that he did not give any priority to arguing for the retention of the position until late October. Even then the priority was short-lived in that he did not raise the points and seek the information he could have, rather discussions reverted to the matter of compensation.

[133] For these reasons I do not accept that the outcome – namely the termination of Mr Hislop's employment by reason of redundancy – was tainted by predetermination.

3. Was dismissal the action a fair and reasonable employer would have taken

[134] I have found that the redundancy was genuine, and that while there were flaws in the consultation process I do not accept that they amounted to a breach of the parties' obligation to deal with each other in good faith.

[135] In turn I find that the termination of Mr Hislop's employment was the action a fair and reasonable employer would have taken in the circumstances at the time.

[136] I therefore conclude the dismissal was justified.

Is a penalty payable

[137] The penalty sought in the statement of problem was for the breach of obligation to provide Mr Hislop with a written employment agreement. I make no order because: no such obligation existed at the commencement of Mr Hislop's employment with LCL;[15] time limits apply to claims for penalties;[16] before 1 April

[15] s 242 Employment Relations Act.
[16] s 135(5).

2011 there was no provision for the payment of a penalty of the kind sought, and since 1 April 2011 any claim relating to the continuing absence of a written agreement has been a matter for a labour inspector;[17] Mr Hislop's own lack of response when a written agreement was offered to him is relevant in any event; and no other ground was identified for an order for the payment of a penalty in respect of any action or inaction on LCL's part.

[138] Penalties were addressed in the submissions for Mr Hislop in the form of simple requests for a penalty for breach of the employment agreement and/or a breach of the employer's duty of good faith. Nothing more was said in support. I make no orders.

[139] I add that all claims for penalties should be identified - including reference to the provision alleged to have been breached and to which a penalty attaches together with the particulars of the alleged breach - in the statement of problem or an amendment.

Costs

[140] Costs are reserved.

[141] The parties are invited to reach agreement on the matter. If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The responding party shall have 14 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority

[17] s 65(4).