

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 144  
5294434

BETWEEN	CHRIS PINN First Applicant
AND	KEITH VALLI Second Applicant
AND	RAY WAGHORN Third Applicant
AND	SOLID ENERGY NEW ZEALAND LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Tony Wilton, Advocate for the Applicants  
Andrew Shaw, Counsel for the Respondent

Investigation Meeting: 16 November 2010 at Invercargill

Submissions Received: At the investigation meeting

Determination: 13 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicants each claim their dismissal by the respondent (Solid Energy) was unjustified.

[2] Solid Energy accepts it dismissed the applicants but contends the dismissals to be justified by reason of redundancy and claims it acted fairly.

**Acknowledgement**

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation arose for a variety of reasons including a request from the

parties that a decision be delayed given Mr Valli's death in the Pike River tragedy and the file then became inaccessible for a considerable period due to Christchurch's earthquakes. I appreciate the parties patience and regret any inconvenience suffered. I also wish to extend my sympathies to Mr Valli's family, especially as the issuing of this determination may cause further pain.

## **Background**

[4] The applicants were employed by Solid Energy at its open cast coalmine near Ohai. They were, at all material times, members of the New Zealand Engineering, Printing and Manufacturing Union (the union) and covered by the National Mining Industry Multi-Employer Collective Agreement (the collective agreement).

[5] Contained within the collective agreement are the following relevant provisions:

### **16.1 Redundancy Procedures**

*16.1.1 For the purposes of this agreement, redundancy is a condition in which the employer has manpower surplus to his requirements because of the closing down or reorganisation of the whole or part of the employer's operation, due to changes in plant, methods, materials or products, reorganisation, economic circumstances, or like cause requiring a permanent reduction in the number of employees.*

*16.1.2 All redundancies shall be administered in accordance with the terms below.*

...

*16.1.5 The union shall be notified before notice is given to the employee to allow for consultation between the parties.*

...

### **16.2 Criteria for the Selection of Redundant Employees**

*16.2.1 It is recognised that the employer's need to maintain an efficient workforce and an efficient operation must be taken into consideration in the selection of employees to be made redundant. It is accepted that redundant employees may be selected on a departmental or sectional basis.*

*16.2.2 The employer will select employees to be made redundant on the basis of their skill and ability to perform the work required by the employer. Where*

*employees to be made redundant have equal skills and ability selection shall be on the basis of "last on first off".*

*16.2.3 It is recognised that voluntary redundancy is preferable to compulsory redundancy, and this preference shall be applied taking into consideration the matters listed above.*

...

[6] In March 2007, Ohai staff were told Solid Energy had lost two large contracts and, as a result, the Ohai operation would downsize. It is accepted by both the union and its members that redundancies were inevitable - it was only a question of who.

[7] Over the next three months, discussions occurred between Solid Energy and its staff, with copies of relevant correspondence being sent to the union. An assessment process was developed using 29 criteria and this was applied to each of 13 potentially affected staff.

[8] As a result three union members were dismissed on 31 July 2007. They challenged their dismissals and were successful in the Authority (*Manson & Ors v Solid Energy New Zealand Limited* 18 July 2008, Member Chrichton, CA 102/08).

[9] Solid Energy unsuccessfully challenged that decision (*Solid Energy New Zealand Limited v Manson & Ors* 15 December 2009, Judge Couch, NZEmpC, Christchurch CC 21/09; CRC 23/08). The outcome was influenced by the following conclusions:

- a. the collective agreement imposed a binding obligation to consult with the union. Solid Energy's view that the obligation had been met by forwarding correspondence it had sent to staff *was seriously in error*;
- b. there was a failure to approach the process in good faith;
- c. the selection criteria was fatally flawed (which was conceded by Solid Energy); and
- d. Solid Energy gave only cursory consideration to voluntary redundancy despite a contractual obligation to give it prominence.

[10] Early the following year (2008) and before either the Authority or Court had delivered their decisions, Solid Energy advised the union further redundancies would

be required. That led to a series of discussions and emails about the consultative process, the new structure and selection criteria.

[11] The workforce was assessed using Solid Energy's skills assessment tool between 25 and 28 March 2008. That tool was similar to the one used the year before but the union takes little issue with it – it considers the content to be consistent with the requirements of the collective agreement (as it also had the previous year).

[12] Nine operators were assessed and the applicants ranked 3<sup>rd</sup> (Waghorn), 5<sup>th</sup> (Valli) and 7<sup>th</sup> (Pinn). Those who were retained ranked 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup>.

[13] Staff were advised of their own grades on 1 April but not told whether or not they were to be made redundant. The union challenged the process almost immediately. There was dissatisfaction with one of the new positions but the thrust of the complaint was that gradings reflected skills used as opposed to held. Solid Energy maintains it acted appropriately.

[14] Redundancies followed soon after with the first on 2 April, though that was not one of the applicants.

[15] The applicants were amidst a group of eight advised of their selection on 4 April. Five of those were employed in the applicants section (or department), Operations, while the rest came from other parts of the business. Seven of the redundancies took effect on 30 May. Mr Valli was retained for a while longer due to a temporary ongoing need for his skills and the illness of another, retained, employee. His redundancy took effect on 20 July 2008.

[16] Two further points should be noted. The first was an allegation Solid Energy employed new staff soon after Messrs Pinn and Waghorn departed, thus undermining the veracity of the redundancies. The evidence shows these were contractors engaged to perform a specific unplanned task for a short period which the applicants accepted, when answering questions from Mr Shaw, they could not have performed. It shall therefore be taken no further. The second is that the Ohai mine subsequently closed with effect 30 June 2009.

## The parties' positions

[17] The union is of the view that the second round of redundancies used the same process that would later be considered flawed by both the Authority and the Court.

The union claims:

*The dismissal of the applicants was unjustified for essentially the same reasons as the earlier dismissals ... was unjustified:*

- (i) *While this time Solid Energy managers communicated with the union, they did so with closed minds. They were at pains to defend the process they had adopted for the earlier redundancies and made no significant changes as a result of the union's input.*
- (ii) *Solid Energy unfairly and unreasonably failed to apply the required redundancy selection criteria. In particular it*
  - *Was misleading and deceptive in its dealings with the applicants.*
  - *Failed to conduct the individual assessments in a fair, objective and consistent manner.*
  - *Selected for redundancy employees with better and more extensive skills and ability, greater experience and longer service, while retaining employees with fewer skills, less experience and shorter service.*
- (iii) *In total, the respondent's actions were not those of a fair and reasonable employer in all the circumstances.*

[18] Solid Energy disagrees. It is of the view it learned from the earlier (and then ongoing) disagreement and addressed the alleged shortcomings.

[19] Whilst Solid Energy accepts it retained employees who rated below those made redundant, it says it had to given its contractual right (and one might add duty) to maintain an efficient workforce and operation. According to the production manager (and manager responsible for choosing those to be retained), Mr Stodart, this meant the four operational staff who remained had to be able to perform four crucial operational tasks. In particular he mentioned the washing plant and bagging (which required two, preferably three, staff) which inevitably operated simultaneously. He also spoke about a need for someone proficient in operating the Stamler (a machine that crushes coal prior to it going into the wash) and noted that when it was functional a loader and operator was also required. The loader was also used to load client vehicles at the end of the operation. There were also two maintenance staff and they might be required to assist the operators at times.

[20] Solid Energy says the reason the applicants were chosen for redundancy related to their proficiency (or alleged lack there-of) in respect to washing and bagging. Mr Stodart notes none of the three had worked in the washery and while Messrs Pinn and Valli had bagged, they had not achieved the highest level of proficiency which was *trained to train others*. Mr Waghorn had previously tried bagging but after a day or two asked that he not be deployed there and Solid Energy had agreed.

### **Determination**

[21] Essentially the question is whether or not Solid Energy applied an amended approach to these applicants and if so, were the changes sufficient to overcome the deficiencies identified by both the Authority and Court.

[22] The applicants' claim has two parts to it. The first is that while there was consultation over the second round of redundancies it was meaningless as it was conducted with a closed mind. The second is the selection flaws which rendered the first round of redundancies unjustified remained.

[23] I shall not take the claims regarding improper consultation further. Mr Wilton essentially conceded the issue. He took the view the evidence confirmed Solid Energy had consulted directly with the union but chosen not to apply the input given a view (yet to be undermined by the Authority and Court decisions) their selection process was appropriate and valid. That could be addressed when considering the validity of the selection. Nor need I consider the issue of voluntary redundancies. There was no claim in that regard and that it was an option was clearly signalled relatively early in this process (see letter to staff dated 5 March 2008) and the message was reiterated shortly thereafter (letter of 12 March).

[24] Turning to the selection process. In its decision on the *Manson* claim the Court said [paragraph 33]:

*The manner in which the plaintiff carried out the selection process fell well short of that standard [that required by s.4(1) of the Employment Relations Act 2000]. The affected employees were expressly told in a letter dated 31 May 2007 that the selection process would be done using the assessment form, a copy of which was provided to them. Subsequently, Mr Stodart, Mr Todd and Mrs Reynolds chose not to tell them the truth that the selection process was being conducted on the basis of subjective assessments and had little or nothing to do with the form. That was deceptive and*

*misleading conduct on behalf of the plaintiff. The failure to tell employees that some criteria listed in the assessment form were more important than others was equally deceptive.*

[25] The Court, having commented on the failure to consider voluntary redundancy, which would in itself have rendered the dismissals unjustified, later said [paragraph 37]:

*The other feature of the selection process which was plainly defective was the nature of the process used. From the evidence of Mr Stodart and Mr Todd it emerged that they made broad, subjective assessments of the affected employees. They also made similarly broad comparisons between those employees. This amorphous process was inappropriate and almost inevitably unfair. A fair and reasonable employer in the position of the plaintiff would have used a structured method of assessment which was transparent and as objective as possible. Ironically, the assessment form produced by Mrs Reynolds, and which the employees were led to believe was the basis of the selection process, would have been appropriate had it been used fairly and relied on.*

[26] I conclude the same flaws remained the second time around.

[27] In his evidence Mr Stodart accepts the selection process in the first round was not correct and he had *allowed [his] own views to get in the road of what should have been a more consistent approach*, considered employees more fairly and *taken into account all relevant experience that they had to offer*.

[28] Despite that and when asked by Mr Wilton what he had done differently here, he was unable to provide an answer.

[29] Again the individual employee assessment was promoted as a central tool and this was confirmed in a letter to individual staff on 12 March. It advises *Each operator will be individually assessed against the selection tool (attached) that covers all applicable skills and attributes* [emphasis is mine]. That was not the case as evidenced by the fact employees ranked 6 and 8 were retained while 3 and 5 went and Mr Stodart's own admission. He said in evidence that he did not rely on the results in making his selection decisions but used other criteria. Indeed he says he told Mr Hobbs of this on 7 April, with his diary notes recording:

*Trevor then went on talking about the assessments and that staff have that higher points have kept their jobs, staff that have lower points have been put off. I said it has nothing to do with points, its about*

*what skills they have to do the jobs...* [note – the lower the points, the better the result].

[30] He also accepts he never discussed the relative value of the tasks with staff and that the four functions mentioned in 19 above would carry greater weight than the others mentioned on the assessment form (though there is evidence he told Mr Hobbs he considered bagging an essential skill at a meeting on 7 March). Various answers he gave indicate he simply assumed they would know that to be the case, though answers given by the applicants show that to be a poor assumption. As it turned out the four tasks became paramount and little weight would be placed on other skills mentioned on the form - truck driving, stone picking, start up and shut down procedures, an ability to perform minor maintenance and an understanding of coal quality and quality control.

[31] Mr Stodart also accepts staff were never told multi skilling was important and high proficiency in a limited number of tasks would prove inadequate.

[32] In other words a number of the deficiencies remained. They are the same as those the Court identified as fatal during the first round of redundancies and therefore must also render these decisions unjust.

### **Remedies**

[33] The conclusion the dismissals are unjustified raises the question of remedies.

[34] The applicants seek lost wages, the employer's superannuation contribution that would have accrued on that amount, compensation in the amount of \$10,000 each and reimbursement for the loss of free coal each would have received had they continued in Solid Energy's employ.

[35] Before looking at the individual claims, I address two issues holistically. The first relates to cases where a redundancy is found to be unjustified on procedural grounds but the fact of substantive justification means wages are not payable. The loss would have occurred in any event. That is not the case here – the deficiencies lie in selection and had they not occurred others may have been chosen and the applicants remained. Such wage loss as has occurred is therefore attributable to the grievance and is recoverable by the applicants. The second issue relates to the benefit of free coal. I heard no evidence about this benefit and have no basis upon which I can make an award. In any event, each of the applicants found alternate employment

in quick order and the entitlement would have then ceased. I shall not, therefore, consider this claim further.

[36] Mr Pinn obtained a replacement job a month after leaving Solid Energy. He also gave evidence about being disillusioned that the gradings did not appear to determine the outcome. He was hurt by a resulting conclusion his selection was personal and he was not good enough for Solid Energy.

[37] As a result of his delayed cessation, Mr Valli had time to source a replacement job at Pike River which he commenced immediately upon ceasing at Solid Energy, though at the cost of commuting. He did not, therefore, suffer a wage loss and no recompense is payable in that respect. In addressing the claim for compensation he spoke about the shock he felt at being selected and expressed dissatisfaction that the process repeated the events of 2007 which saw long serving and skilled employees discarded while at least one newcomer with limited skills and experience was retained. He says the experience was stressful on both he and his wife and he felt hurt as a result of being badly treated by a company he had worked at for 28 years.

[38] Mr Waghorn obtained another job which he commenced on 30 June. He talked about being upset by the process and, at the time, the engagement of the contractors (though he now accepts he could not have performed their work anyway). He talked of being deeply hurt and embarrassed as a result of being selected especially as that outcome was contrary to an earlier comment from Mr Stodart that he would continue to perform his job on the Stamler until the gates closed. Mr Stodart does not recall the alleged comment but nor does he deny it.

[39] Having considered the evidence I reach the following conclusions. Both Mr Pinn and Mr Waghorn are entitled to a month's wages as recompense for the loss resulting from the personal grievance. They are also entitled to the employers superannuation contribution that would have been payable on that amount. I do not have enough evidence to specify the actual amount so ask the parties to address the issue. If they are unable to agree, leave is given for them to return for a decision.

[40] Each seeks \$10,000 for the hurt and humiliation they suffered. That is not an unreasonable claim – indeed refreshingly realistic. Each supported his claim with evidence and as did my colleague Mr Crichton, I conclude they were badly treated

and felt a significant level of hurt as a result. In the circumstances I consider it appropriate to award the amount sought - \$10,000 each.

[41] The conclusion remedies accrue means the issue of contribution must be considered (s.124 of the Employment Relations Act 2000). These dismissals were for redundancy. Redundancy is, by definition and from the applicants perspective, a no fault situation to which they could not have contributed.

### **Orders**

[42] For the reasons given the following orders are made:

- (i) The respondent, Solid Energy New Zealand Limited, is to pay one months wages to both the first and third applicants, Mr Chris Pinn and Mr Ray Waghorn as reimbursement of wages lost as a result of the unjustified dismissal. In addition to that, each is to receive the sum that Solid Energy would have paid on that amount as an employer contribution to superannuation. The parties are to quantify this award but if unable to do so may return to the Authority for a determination; and
- (ii) Solid Energy is to pay each of the three applicants the sum of \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

### **Costs**

[43] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority