IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 88
5280182

	BETWEEN	KEN SUMMERS Applicant
	AND	NELSON PINE INDUSTRIES LIMITED Respondent

5305455

	BETWEEN	PETER CONNELLY First Applicant
		BRIAN REGAN Second Applicant
		TREVOR BARNES Third Applicant
		PAT BENTON Fourth Applicant
		TONY CHRISTALL Fifth Applicant
		BRENT STEEL Sixth Applicant
	AND	NELSON PINE INDUSTRIES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Clare Abaffy, Counsel for Applicant (5280182) Greg Lloyd, Counsel for Applicants (5305455) Scott Wilson, Counsel for Respondent
Investigation Meeting:	12 & 13 October 2010 at Nelson
Further Submissions:	11 April 2012 from Mr Lloyd (5305455) 12 April 2012 from Ms Abaffy (5280182) 27 April 2012 from Mr Wilson
Determination:	10 May 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement

[1] Regrettably, the issuing of this determination has been delayed. The investigation meeting occurred after the September 2010 earthquake. Work on the determination was deferred while I attended to other matters delayed as a result of that earthquake. Following the February 2011 earthquake all my files and hearing notes were trapped in the Authority's Kilmore Street offices for some months. The papers from this and my other reserved determination files including my hearing notes were then retrieved from the office. It took some while for me to reorder the retrieved material. Like this matter a number of those other files had been the subject of multi-day investigation meetings. Determinations, especially of complex or lengthy matters involving significant numbers of documents, require careful analysis of exhibits, evidence and submissions, tasks which have been difficult in the Authority's present working circumstances.

[2] Since turning my attention to this matter, I have reviewed the administrative files and reread the statements of problem, statements in reply, statements of evidence, all the exhibits, my full notes of the evidence and the parties' considered submissions. I also requested and have considered further submissions provided by the parties.

[3] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

Employment Relationship Problems

[4] Nelson Pine Industries Limited (NPI) owns and operates a wood processing plant at Richmond. In March 2009 a number of employees were dismissed for redundancy. The applicants challenge their dismissals as substantively and procedurally unjustified.

[5] Mr Summers was a member of the National Distribution Union (NDU). On his behalf NDU lodged his statement of problem with the Authority in March 2010 (File 5280182).

[6] Messrs Connelly, Regan, Barnes, Benton, Christall and Steel were members of the New Zealand Engineering, Printing and Manufacturing Union Inc (EPMU). The union lodged a single statement of problem for these men in May 2010 (File 5305455). NPI instructed the same counsel on both matters. Counsel for NPI requested that the matters be heard together in light of the shared factual background and similar legal issues. Counsel for Mr Summers opposed that course but I agreed with the respondent's request on the basis that it was likely to be more efficient overall to convene one investigation meeting for both proceedings.

[7] Despite the consolidated investigation process I am mindful that all the claims are personal grievances. I will set out an overview of events generally before considering whether NPI's actions and how it acted with regard to each applicant were what a fair and reasonable employer would have done in all the circumstances at the time.

[8] I note that the third applicant (Trevor Barnes) withdrew his matter before the investigation meeting commenced. I also note that the second applicant's name is Brian Regan and the sixth applicant's name is Brent Steel. I amend the application accordingly.

Terms of employment

[9] Many of NPI's employees belong to NDU or EMPU. The applicants were members of one or the other union at all relevant times. A collective employment agreement (CEA) binding NPI, NDU and EPMU applied from 7 July 2008 until 4 July 2010 throughout the relevant period. There are provisions in the CEA that are relevant.

[10] Clause 4 DEFINITIONS includes:

> *4.2* ***Shift Work****:*
> *Shift work means work which is carried out by two or more successive relays or spells of employees.*

4.3 ***<u>24 Hour per day continuous operation</u>****:*

4.3.1 ...

4.3.2 Covers all employees engaged to work on the MDF Energy Plant, Refiners and MDF Forming and Press lines to the outfeed of the board coolers shall be engaged on a 12 hour shift roster covering 24 hours per day and seven days per week on a three day on and three day off pattern.

[11] Clause 11 FLEXIBILITY provides:

11.1 To enable processing to be carried out efficiently it is agreed that employees who are employed as 12 hour shift workers may be required to work as 12 hour day employees.

11.2 Those employees who are employed as 12 hour employees will not be required to work as 8 hour employees without their prior agreement.

11.3 ...

[12] Clause 12 HOURS OF WORK provides:

12.1 The normal hours of work shall be as per the roster agreed between the employer and employees and will be paid at the employee's hourly rate of pay.

12.2 ...

[13] Clause 33 TERMINATION OF EMPLOYMENT provides:

33.1 Either party may terminate the employment by giving a minimum of seven calendar days notice to the other party. Where the required notice is not given, one weeks' pay shall be paid or forfeited in lieu of notice. Where the employer elects to pay in lieu of notice, this shall not constitute summary dismissal.

33.2 ...

[14] Clause 34 REDUNDANCY includes:

34.1 A redundancy situation is one where the position occupied by an employee is declared surplus to the employer's requirements and as a result the employee's employment is subsequently terminated.

34.2 The employer shall give four weeks notice of a situation that may result in redundancy to the affected employee/s and their representative. This period is to be used to consult on the situation and possible resolution to it. This period may be shortened by agreement between the parties.

34.3 If as a result of consultation as provided above, the employer does declare an employee redundant, that employee shall:

a) Be given notice as required by the provisions for termination contained in this agreement (clause 33.1); and

b) ...

c) ...

<u>Criteria for Selection of Redundant Employees</u>

34.4 The employee shall select employees to be made redundant on the basis of its need to maintain a balanced and efficient operation by comparing job knowledge, skills, efficiency and effectiveness of employees. Where the application of these criteria establishes that

employees are in the same comparative category the principle of "last on – first off" shall apply.

34.5 The parties recognise that redundancy selection may be made on a plant-wide, departmental or work area basis.

34.6 Notwithstanding the above, a reduction in labour may be achieved on a voluntary basis. The employer may accept voluntary applications for redundancy at its discretion.

Rights of Redundant Employees

34.7 In order to best ascertain and deal with problems associated with the loss of permanent employment, the employer will arrange individual counselling sessions if requested by any employee. Upon request the employer will arrange liaison with New Zealand Employment Service and Income Support so that redundant employees are aware of their entitlements.

34.8 All redundant employees will be given reasonable time to attend interviews for alternative employment without loss of pay, providing they obtain the prior consent of the employer and that reasonable proof of having attended can be furnished if so requested. Employees shall ensure that they return to work as soon as practicable unless the employer's approval is otherwise obtained.

Business Circumstances

[15] Brian Rhoades was employed by NPI as chief operating officer from August 2008 until July 2009. During that time he had overall responsibility for the production of medium density fibreboard (MDF) and laminated veneer lumber (LVL). Mr Rhoades' evidence, no doubt correct, is that the global financial crisis had a significant effect on NPI and began to affect the business from mid 2008 onwards. About 85% of NPI's product is exported so the international crisis affected demand, initially for LVL product then for MDF product.

[16] At the time the MDF plant operated three production lines and finishing operations on a continuous 24 hours per day, 7 days per week basis. There were 4 MDF crews who worked on rotating 12 hour shifts. From late 2007 NPI began the installation of a new saw line and a new sanding line that was expected to reduce labour requirements and permit finishing operations to be covered by day shift work only.

[17] Mr Rhoades' evidence is that in late 2008 and early 2009 NPI gave consideration as to how the difficult situation faced by the company might be addressed. Continued 24 hour per day 7 day per week operation would result in significant excess capacity. NPI reviewed the way it was operating and considered

various options including alternative work patterns and redundancies and the introduction of a 9 day fortnight. NPI also gave consideration to whether an overall pay reduction would achieve its objectives. The option that NPI believed best addressed the situation involved restructuring its operations to match expected demand. In MDF that involved moving away from shift work to undertaking as much work as possible on a Monday - Friday day shift basis. That required disestablishing existing shift positions and creating new day shift rosters. Mr Rhoades' evidence is that the review of staff requirements against expected demand indicated that 33 positions were identified as potentially surplus to requirements in MDF production.

[18] George McMahon is NPI's production manager. He told me that the NPI's process of reviewing run times for different plant items and consequent production mix started in about November 2008. He also told me that the process of ranking staff members ahead of decisions about selection for redundancy started in late February 2009.

NPI's meetings with employees and unions

[19] Murray Sturgeon is NPI's managing director. On 4 March 2009 at about 4.30 pm Mr Sturgeon sent an email to Alan Clarence for EPMU and Stan Renwick for NDU confirming that he had earlier left phone messages for them advising of a meeting for all NPI Richmond plant employees *to acquaint and advise the conclusion of a review of our revised forecast production/sales for the 2009 year* at 3pm the next day. Both union officials were also invited to attend.

[20] The unions requested and NPI agreed to provide a briefing in advance of the staff meeting. Alastair Richmond was NDU's head delegate for NPI at the time. He attended the briefing along with Paul Watson (NDU secretary). NPI declined to allow another NDU site delegate to attend. Mr Richmond's evidence is that NPI told them it had to restructure because of the recession and the introduction of new plant; that the company had already considered all the alternatives and none were suitable; that (in response to a question) the company said it was not interested in a 9 day fortnight; and that (in response to a further question) the company said there would be a call for voluntary redundancies. Mr Richmond's evidence is that the company did not seem genuinely interested in exploring alternatives and appeared to have already made its

decision. Mr Rhoades was one of those present for NPI. His evidence is that NPI outlined the situation it faced, its proposal to address it and some of the alternative options that had already been considered. NPI outlined projected and historic sales volumes and the uncertainty around forward orders. Mr Sturgeon also attended. He confirmed that NPI was giving four weeks notice under the CEA. Mr Rhoades rejects Mr Richmond's evidence. He says that this was simply a preliminary meeting and that there was insufficient time for detailed discussions. Mr Rhoades agrees that the unions were told that the company had considered a 9 day fortnight option but thought it was not practicable. I will return later to the evidential dispute.

[21] Following this briefing on 5 March 2009 the company meet with its employees. Mr Rhoades spoke from a prepared speech. To summarise, he told staff about reduced sales forecasts and the unpredictability of future orders; this coinciding with the introduction of the new MDF finishing technology; NPI's plan to take plant out of service for a period and to move as much as possible away from shift work to weekday daytime work; the review of staff requirements indicating that approximately 60 positions across the site would be surplus (33 in MDF production); the giving of four weeks notice of a redundancy situation under the CEA; a broad outline of the shift patterns appropriate to expected demand in each area of the plant; the criteria to be used in selecting which staff members would be made redundant; the assistance that would be available; and the process for staff to express an interest in voluntary redundancy. I should set out fully what was said about selection:

> *Employees will be selected on the basis of the Company's need to maintain a balanced and efficient operation, by comparing job knowledge, skills, efficiency and effectiveness.*
> *Naturally we have started to draw up a list of names of the people affected as we know it is important that individuals know as soon as possible.*
> *In preparing this list we have tried to take a consistent approach across the company, but obviously different criteria are more important in some roles than others so some judgement is required. This is not an easy process.*
> *The list prepared is a preliminary list. We can expect changes as a result of discussion with individuals and unions and the outcome of any requests for volunteers. We can also expect changes as staff whose shift work positions have been declared redundant consider alternative day work roles which may be available.*

[22] Mr Rhoades had some scripted answers to anticipated questions which he also presented. I should mention two in particular:

> *What criteria were used in selecting which staff should become redundant?*
> *Employees have been selected on the basis of the Company's need to maintain a balanced and efficient operation, by comparing job*

> *knowledge, skills, efficiency and effectiveness. As far as possible a consistent approach was taken across the company, but obviously different criteria are more important in some roles than others so some judgement has been required. This has not been an easy process.*
>
> *How fixed are the decisions as to which individuals will lose their jobs?*
>
> *The list is a preliminary list. We can expect changes as a result of discussion with individuals and unions and the outcome of any requests for volunteers. We can also expect changes as staff whose shift work positions have been declared redundant consider alternative day work roles which may be available.*

[23] Following this meeting there was a meeting with union representatives. There was some discussion about timeframes for voluntary redundancies. Mr Richmond says that the company did not want to discuss the selection criteria and methodology but simply referred to the CEA. He also says that he was told that the company would later supply him with the selection methodology. Mr Clarence says that they discussed available support services; whether the consultation period could be extended (which NPI rejected); more details about the reasons for the redundancies to which NPI said they anticipated savings of a million dollars; media contact, with the company providing a copy of an embargoed media release; whether or not the company would continue various sponsorships; and access to the list of employees mentioned by Mr Rhoades in the employees' meeting, to which NPI said the list would be published after voluntary redundancies had been determined. Mr Rhoades' evidence is that some or all of this must relate to the employees' meeting since the meeting with the union officials was quite brief and dealt principally with setting the date and time for the next meeting. There is no dispute that these things were said at some point so it is not necessary to resolve the dispute about precisely when they were said. The only other point to mention is that NPI, not wanting to delay its decision making, rejected the idea of meeting a week later so the next meeting was scheduled for Friday 6 March 2009.

[24] There were meetings on 6 March, 10 March and 13 March 2009. It is not necessary to carefully analyse precisely what was said at which meeting. Mr Rhoades says that NPI outlined the production forecasts, required staffing levels and proposed shift patterns It is common ground that the unions expressed the view that agreement was required to implement alternative work patterns and that it could not be done through restructuring. That was not NPI's position. Mr Rhoades says that there was discussion about alternatives to which the company responded that it had considered

but discounted both a 9 day fortnight and an overall pay reduction. Mr Rhoades told the unions that NPI remained open to consider alternatives. Mr Rhoades explained the methodology by which NPI proposed to apply the selection criteria in the CEA – in MDF each operator would be scored from 1 to 5 against the list with production managers ultimately responsible for the selection process in each area but in consultation with appropriate supervisory staff. Mr Rhoades' evidence is also that *The employee's attendance record was also subsequently considered as a criterion*. It is not suggested that the unions were told this during these meetings. Mr Rhoades says that at an early stage a draft list was prepared for each production area. It is common ground that he referred to this list during the 5 March 2009 employees' meeting. The unions requested this list but NPI declined to provide it. Mr Richmond's uncontroverted evidence is that he asked when people were going to be able to see their selection sheets for comment. There was also some discussion about the process and content of NPI's forthcoming meetings with the various production crews and the process for voluntary redundancies. Various other matters were discussed and agreed such as pro-rata redundancy payments to employees with less than a year's service, full vesting of company superannuation, the availability of WINZ on site and so on. NPI also extended the time for voluntary redundancy applications because of some issues with the accuracy of the information that had been circulated to staff. However, NPI declined to extend the CEA consultation period.

[25] Late on 12 March 2009 Mr Rhoades sent an email to Mr Richmond and Mr Clarence with a blank form setting out a job evaluation methodology for MDF and the other areas under the headings *Job Skills, Effectiveness, Efficiency* and *Job Knowledge*.

[26] During the 13 March meeting the unions proposed a new shift roster for staff except the MDF production staff. However, NPI did not agree to this proposal.

[27] In between the consultation meetings with the unions NPI also convened meetings with the four MDF crews. There were similar meetings in the other departments.

[28] On 17 March 2009 the unions made a written proposal about timeframes and process for the acceptance of voluntary redundancy applications and the announcement to those selected by the company to be made redundant. There was then a meeting with union delegates on 18 March 2009. Mr Rhoades' evidence is that NPI agreed at this meeting to the union proposal that staff declared redundant not be asked to return to work. The union proposal was that redundant staff be told, given the opportunity to go home to talk with family then be afforded a personal interview several days later to be told in detail of the reasons for their selection and given an opportunity to raise any questions.

[29] There was a further consultation meeting on 19 March 2009. George Hollinsworth was present in place of Mr Clarence for the EPMU. Mr Hollinsworth's evidence is that NPI was asked but refused to provide the list of redundant employees. His evidence is that he specifically pointed out that NPI had to provide that and other relevant documents to staff and give them an opportunity to have some input into any decision affecting their employment. There is no reason to doubt Mr Hollinsworth's evidence. Mr Rhoades declined to provide this material. NPI's position was that they would offer positions to staff not selected for redundancy, allow them 48 hours to decide whether to accept the revised terms and then advise others that they had been selected as redundant. The unions objected to this as likely to cause unnecessary distress for the redundant staff. Because NPI would not change its approach the unions decided to bring the consultation period to an end so as to avoid further delay for affected members. That resulted in Mr Rhoades writing to the unions on 19 March 2009 as follows:

> *Dear Unions*
> *We record that today you agreed that the consultation process provided for under the Collective Employment Agreement clause 34.2 is shortened to two weeks and therefore will end on 19 March 2009.*
> *The parties record that there were a number of issues that could not be agreed but determined that the notification process not be delayed any longer.*
> *Sincerely*
> *[Signed]*
> *Brian Rhoades*
> *Chief Operating Officer*

[30] There was also a brief report released to staff recording that the 22 voluntary redundancy applications meant that there would be further compulsory redundancies with 14 required from MDF. The report also advised various dates between 22 March

and 25 March when selected staff on the different crews would be offered continued employment with 48 hours to accept, following which those to be made redundant would be advised and paid in lieu of notice.

[31] In correspondence dated 25 March 2009 the unions formally recorded their objection to the process on the basis that NPI had denied members access to relevant information and an opportunity to comment prior to the employer's decision terminating their termination; and the additional stress resulting from the order in which staff were to be advised.

[32] The implementation of NPI's restructuring plan meant that in the MDF plant four out of twelve press operators, seven out of twelve sander operators, three out of six saw operators and three out of five finishing utility operators were surplus to requirements.

The applicants' dismissals – Ken Summers

[33] Ken Summers was a leading hand with over 22 years experience at NPI. He was a saw operator on the MDF C crew and operated the B saw. He was one of six saw operators.

[34] Mr Summers was on leave on 5 March and did not attend the staff meeting. He did however hear from a friend about the announcement. He returned to work on 14 March 2009 when he learnt from other staff that those on C Crew who were to be retained would be advised of that on 22 March 2009. Mr Summers worked night shift on 22 March 2009. He was aware that a number of employees were being called up to the manager's office for job offers but he never received a call. Mr Summers became very upset when he learnt that the manager had left without calling him up to the office. Mr Summers went to work the next day. Others were called up to the manager's office. Eventually Mr Summers was asked to go to George McMahon's office.

[35] Mr Summers was accompanied by Mr Richmond, his union delegate. The following account is a summary of Mr Richmond's (principally) and David Elvy's uncontested evidence. Mr McMahon handed Mr Summers a letter of dismissal.

Mr McMahon told Mr Summers that there was no position for him and that he was terminating his employment. He gave Mr Summers a redundancy information pack. Mr Summers asked *Why me?* Mr McMahon would not give any explanation. Mr Summers asked again why he was chosen but there was no answer. Mr Richmond then pressed Mr McMahon for an answer. Mr McMahon told Mr Summers that he had been graded on certain areas and had scored the lowest of all the saw operators. Mr McMahon said that only he had been involved in compiling the scores. Mr Richmond asked for a copy of the scores and the information that had been considered by NPI but Mr McMahon refused to provide anything. Mr Richmond asked for the other operators' scores but again Mr McMahon declined to provide the information. Mr Richmond asked again about Mr Summers' scores and Mr McMahon told him that he had scored 1 out of 5 for job skills. Mr Summers took that as an assessment that he was not competent, by analogy with the scoring process for performance appraisals. Mr Richmond asked how the score had been arrived at given Mr Summers' length of service, experience and training, seniority and his role training others. Mr McMahon said that he had heard that there had been complaints about Mr Summers' performance. Mr Richmond asked who had said that but Mr McMahon declined to answer. Mr Richmond made the point that it was unfair that Mr Summers had not had a chance to respond. Mr Richmond asked about saw crew reports but Mr McMahon declined to provide the information and refused to look into the issue. Mr McMahon said that Mr Summers had been rated 3 out of 5 for attendance. Mr Richmond said that Mr Summers had only ever had approved leave and that attendance was not one of the selection criteria in the CEA. At some point during the exchanges Mr McMahon explained that the scoring was comparative and that a low score did not mean that a person was a bad operator, just that they were operating at a lower level compared to higher scoring employees. Mr Richmond asked if Mr McMahon would consider Mr Summers for an alternative position or a transfer position but was told *No* and *We have no job offer for Ken* respectively. Mr Summers was very upset and tearful. The meeting ended. Before then however Mr Summers said to Mr McMahon:

> *George, you've been on this side of the table. You couldn't have done it any worse if you'd wanted to!*

[36] Shortly afterwards Mr Richmond found out that another saw operator had turned down a transfer offer. Mr Richmond again asked Mr McMahon to consider Mr Summers for the position but Mr McMahon repeated *We have no job offer for*

Ken. Meantime Mr Summers cleared out his locker and left having been told that he was not required to work out his notice period.

Peter Connelly

[37] Peter Connelly was a finishing utility operator on the MDF B crew. He ran a sander and operated a forklift and was learning the A sander. He was one of five finishing utility operators.

[38] Mr Connelly, one of EPMU's site delegates, was involved in bargaining in July 2008. At a heated point during those negotiations Mr Sturgeon told him that he was looking after his own interests and not the interests of union members who he was representing. Mr Sturgeon went on to say that with the new finishing lines there would be redundancies next year and he should be careful. When challenged about this apparent threat Mr Sturgeon withdrew the statement.

[39] Mr Connelly attended the staff meeting on 5 March 2009.

[40] In March 2009, because he was to represent affected members in their meetings, Mr Connelly asked Mr McMahon to defer his meeting until others had been advised. Mr Connelly's dismissal letter is dated 25 March 2009. It advises him that his position as a *Shift Work Operator* is surplus to production requirements and has been disestablished and his employment consequently terminated for redundancy. Mr Connelly received this letter from Mr McMahon on 30 March 2009.

[41] When Mr Connelly received his termination letter he asked to see his personal assessments as well as the assessments of the other finishing utility operators. These requests were refused on the basis of the need to protect privacy. Mr Connelly's evidence is that this response was *insulting, condescending, and offered no real justification for their decision*. That is a comment about how Mr Connelly perceives the substance of NPI's response rather than about Mr McMahon's manner or demeanour at the time.

[42] Like others Mr Connelly was not required to work out the period of notice.

[43] Mr Connelly first saw details of NPI's assessment of him in NPI's statement in reply.

Brian Regan

[44] Mr Regan worked at NPI for 7½ years and was employed on B crew as a sander operator.

[45] About five weeks before the 5 March 2009 meeting, and in the face of rumours then about possible redundancies, Mr Regan was told by a leading hand that no sander operators would be made redundant. He was therefore not particularly concerned for his own job when NPI announced the restructuring on 5 March 2009. Mr Regan did attend the staff meeting on 5 March 2009.

[46] Mr Regan was aware that NPI was calling those it wanted to retain into one on one meetings where they would be offered continuing employment. On 25 March 2009 at about 8.15 pm Mr Regan was asked by a colleague if he had been called to a meeting yet and told him he had not. Soon after, Mr Regan was called by Mr McMahon who asked him to come up to his office. Outside the office Mr Regan found Mr Connelly present who offered to go into the meeting. Both men went into Mr McMahon's office. Mr McMahon said to Mr Regan *I'm sorry but we have to make you redundant*. Mr Regan was given a letter addressed to *Bryan Regan* but otherwise identical to the letter received by the others who were dismissed.

[47] Mr Regan's evidence which I accept is that he was aware that there was going to be a redundancy selection process and he recalls Mr McMahon saying that there was a system in place and that the staff had all been rated. However, he first saw NPI's assessment of him when he saw NPI's statement in reply.

[48] Like others, Mr Regan was not required to work out his notice period.

Pat Benton

[49] Mr Benton worked at NPI for 21 years. At the time of his redundancy he was a sander operator and was able to operate the four different sanders.

[50] Mr Benton attended the staff meeting on 5 March 2009.

[51] On 29 March 2009 Mr Benton was given a letter of dismissal dated 25 March 2009. He reported for work with others that evening as usual but was told to wait in the smoko room rather than start working. Fewer than usual crew members were present. Those waiting in the smoko room were individually called up to meet with Mr McMahon. When Mr Benton was told of his dismissal he was not given any opportunity to see or discuss his assessment and no explanation of the reasons for his selection. Mr Benton first saw NPI's assessment of him when he saw the company's statement in reply.

[52] As with the other redundant employees Mr Benton was not required to work out his notice period so 29 March 2009 was his last shift.

Tony Christall

[53] Tony Christall worked at NPI for 22 years before he was made redundant. He had been a leading hand for 17 years but was a sander operator at the time of his dismissal. In this latter role he sometimes was asked to assist with problem solving in relation to the operation of the sanders and he was also asked to assist with the preparation of the operating manuals.

[54] Mr Christall had suffered a period of illness requiring several days off work about two years before the redundancy situation, the details of which were known to Mr McMahon. He had also been off work for about two weeks for an operation about three or four months beforehand.

[55] Mr Christall attended the staff meeting on 5 March 2009.

[56] On 26 March 2009, having waited to hear more about the redundancy situation, Mr Christall asked his supervisor to arrange a meeting with Mr McMahon so he could find out where he stood. The meeting was arranged promptly. At the meeting Mr McMahon told Mr Christall that it was bad news and that he was being made redundant. He received a letter dated 25 March 2009 to that effect.

Mr Christall asked about the reason for his redundancy and if there was a problem with his work or the way he operated the machine. Mr McMahon said there was no problem with the quality of his work and that the reason he was being made redundant was because he had taken too much time off work. Mr Christall took that as a reference to at least his most recent absence for the operation.

[57] Like the others Mr Christall was not required to work out the notice period so he finished up on 26 March 2009.

[58] Mr Christall first saw NPI's assessment of him when he saw the statement in reply.

Brent Steel

[59] Mr Steel worked at NPI as a press operator for five years before he was made redundant. He operated the press line 2 on B crew.

[60] Mr Steel attended the staff meeting on 5 March 2009.

[61] NPI's restructuring plan was for each production crew to lose one press operator. Crews A and C both had press operators apply for voluntary redundancy which NPI accepted.

[62] When Mr Steel was called to a meeting with Mr McMahon on 29 March 2009 he was still hopeful of retaining his position because he had heard that three voluntary redundancies had been accepted against the four positions to be disestablished. However, he realised as soon as he went in to Mr McMahon's office what was happening. Mr McMahon had a letter there which he signed and gave to Mr Steel. It was a letter of redundancy dated 25 March 2009. Mr McMahon said he was sorry and that the company was losing a lot because they had spent a lot of money training Mr Steel up as a press operator. Mr Steel was not told anything about the reasons for his redundancy or why he had been selected.

[63] Mr Steel was not required to work out his notice. As he put it in evidence:

I just packed up my personal belongings and left. In the space of about 30 minutes I had gone from working on the press to walking out of the building unemployed.

Justification

[64] These dismissals occurred in 2009 prior to the statutory amendment to the test for justification which came into effect on 1 April 2011. With reference to s.103A of the Employment Relations Act 2000 as formerly expressed, whether the decision to dismiss the applicants 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.

[65] A fair and reasonable employer will always comply properly with their statutory and contractual obligations. I have referred above to relevant aspects of the CEA. S.4 of the Employment Relations Act 2000 requires parties to an employment relationship such as the employees, the unions and NPI here to deal with one another in good faith. That means they must not mislead or deceive each other or do anything likely to mislead or deceive each other. The section also provides:

> ***4 Parties to employment relationship to deal with each other in good faith***
>
> *(1) ...*
>
> *(1A) The duty of good faith in subsection (1) -*
>
> *(a) is wider in scope than the implied mutual obligation 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, amongst 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.*
>
> *(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.*
>
> *...*
>
> *(4) The duty of good faith in subsection (1) applies to the following matters:*
>
> *...*
>
> *(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective*

> *employment interests, including the effect on employees of changes to the employer's business:*
> *...*
> *(e) making employees redundant:*
> *...*

[66] Consultation is a well understood concept in the present context. For example in *Cammish v Parliamentary Service* [1996] 1 ERNZ 404 the Employment Court said:

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

[67] In *Simpsons Farms Ltd v Aberhart* [2006] 825 the Employment Court was considering the application of s.103A of Employment Relations Act 2000 in the context of a redundancy situation. As well as confirming the continued application of long standing principles about substantive justification for redundancy dismissals the Court went on to say this about consultation:

> *The consultation principles were stated by this Court in a redundancy case, Communication & Energy Workers Union Inc v Telecom New Zealand Ltd [1993] 2 ERNZ 429, as having been extracted from the judgment of the Court of Appeal in Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671. Fundamental elements of consultation that are now strengthened and required by s4 in redundancy cases include (as summarised by Mr Menzies for SFL):*
>
> > *• Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.*
> > *• If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.*
> > *• Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
> > *• Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.*
> > *• The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.*

[68] It is accepted that there existed a genuine redundancy situation in that NPI faced both a reduction in demand for product and therefore lower production requirements, more or less coinciding with the introduction of new plant likely also to affect staffing requirements. However, as the Court in *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 said at [42]

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[69] There are substantial aspects of NPI's approach to consultation that are challenged by the applicants.

Attendance as a selection criterion

[70] I have already referred to clause 34.4 of the CEA. The employer *shall select employees …on the basis of its need to maintain a balanced and efficient operation by comparing* the four criteria: *job knowledge, skills, efficiency* and *effectiveness*. This is an exhaustive list. That conclusion is reinforced by the beginning of the next sentence *Where the application of <u>these</u> criteria establishes that employees are in the same comparative category the principle of "last on – first off" shall apply* (emphasis added). It was not open to NPI to use the words *its need to maintain a balanced and efficient operation* to add further criteria.

[71] There is a spreadsheet dated 4 March 2009 (Document OO, page 1 and 2) prepared by NPI with rankings of all potentially affected Forklift Drivers, Sanders, Saw Operators, Finishing and Utility Operators. These job classifications cover Mr Summers, Mr Connelly, Mr Regan, Mr Benton and Mr Christall. The spreadsheet shows each employee having been allocated a score between 1 and 5 against the criteria *Efficiency, Effectiveness, Attendance, Job Knowledge* and *Skills*. Totals are shown. Employees within each job classification are ranked on the basis of their total scores across the five criteria. The list also shows *Service*. Employees within each job classification with the same score are then ranked on the basis of their seniority.

[72] There is another spreadsheet dated 16 March 2009 (Document OO, page 3) prepared by NPI with rankings for all potentially affected Press Operators, Refiner & Energy and Utility employees. The first job classification covers Mr Steel. None of

the other applicants fall within these classifications. Given Mr Steel's evidence that Mr Rhoades made a comment approximately a week after 5 March 2009 about working on spreadsheets it appears that NPI may have finalised its position with respect to Mr Steel a little later than it did with the other applicants. The spreadsheet shows each employee having been allocated a score between 1 and 5 against the criteria *Efficiency, Effectiveness, Job Knowledge* and *Skills* (but not *Attendance*). Totals are shown. Employees within each job classification are ranked on the basis of their total scores across the four criteria. The list also shows *Service*. Employees within each job classification with the same score are then ranked on the basis of their seniority.

[73] On 5 March 2009 when Mr Rhoades spoke to the unions and the staff meeting there was no mention of A*ttendance* as a criterion to be applied in the selection process. Further, I note that *Attendance* is not one of the criteria referred to in the CEA and it was not included in the job evaluation methodology template that Mr Rhoades sent to Mr Richmond, Mr Clarence and Mr Watson on 12 March 2009.

[74] Mr Rhoades' evidence is that *The employee's attendance record was also subsequently considered as a criterion* (emphasis added). He also said *I don't think we tried to withhold anything apart from the list of names.* While Mr Rhoades was not personally involved in scoring any of the employees on the list, he told me *The lists started to come together just days before the announcement was made* and *My diary shows that soon after 5 March I met with managers to confirm the list*. Mr Rhoades also told me *Attendance was not intended to be a separate criterion*.

[75] Mr McMahon told me that the ranking process started in late February 2009. His evidence is that attendance was included as a factor relevant to NPI maintaining a balanced and efficient operation. It was assessed by reference to each employee's record of attendance. He and Murray Mills (Processing Supervisor) separately ranked the staff against the five criteria and then met to discuss and agree on each person's score. Mr McMahon told me that his best guess of when they met is 28 February 2009. According to Mr McMahon, Mr Mills had the best knowledge of each employee's abilities. However, Mr McMahon was not able to give me a copy of Mr Mills' scores. Mr Mills apparently wrote his scores out by hand and when they met Mr McMahon amended the scores on the spreadsheet to reflect the agreed scores.

Mr McMahon also told me that Mr Rhoades peer reviewed the scores. There is no reason to doubt any of this evidence from Mr McMahon.

[76] There are some difficulties with Mr Rhoades' evidence in light of the spreadsheet dated 4 March 2009 and Mr McMahon's evidence. I find as a fact that NPI intended to and did use *Attendance* as a criterion in determining who it selected for offers of continued employment, except for the press operators. In doing so NPI breached the CEA. *Attendance* was used as a criterion for the list drawn up prior to the 5 March 2009 announcement. Mr Rhoades' evidence noted above is therefore wrong. In addition, when NPI met with staff and unions on 5 March 2009 and thereafter, NPI told them that the criteria specified in the CEA would be used and made no mention of the inclusion of *Attendance* as a criterion. NPI mislead staff and the unions about this. That is partly why Mr Richmond reacted so strongly when Mr Summers was dismissed.

[77] Based on the materials provided by NPI the inclusion of *Attendance* as a factor may not have made a material difference to the outcome for any of the applicants. There is more on this point in what follows.

Application of the selection criteria generally

[78] In *Massey University v Wrigley* [2011] NZEmpC 37 the University decided to disestablish a number of positions and create a smaller number of new positions to be filled by selecting from existing staff who could apply for the new positions. The selection process was based on interviews conducted by panels comprised of several members. Candidates were scored on their responses to questions and consensus scores were given following discussion between panel members. The grievants scored lowest and were not recommended for appointment. They were given a summary of why the panels had not recommended them and some but not all the information compiled by the panel members (the disputed documents). The grievants had several opportunities to respond to the information that had been disclosed but the outcome did not change. They were then dismissed as redundant. In personal grievance proceedings about justification for the dismissals the Full Court was required to consider whether the University had complied with s.4(1A)(c) of the Employment Relations Act 2000 as to access to relevant information and opportunity

to comment prior to the dismissal. The Court noted the requirement to ascertain the meaning of a statute from its text and in light of its purpose. S.3 of the Employment Relations Act 2000 emphasises good faith as the principal means of achieving successful employment relationships. The Court said at [47]:

> *This supports an interpretation of the specific obligations in s 4 which minimises the likelihood of employment relationship problems developing. In general, that is more likely to be achieved by giving timely and ample access to relevant information. More informed employee involvement will promote better decision making by employers and greater understanding by employees of decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems.*

[79] The Court went on to say that recognition of the inequality of bargaining power was also relevant. Employers generally have almost total power over the outcome in a restructuring. Employees may influence the outcome only if they have knowledge and understanding of the relevant issues and a real opportunity to express their views. Knowledge is the key to giving employees a measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer. At [55] the Court held:

> *The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.*

[80] The requirement is to provide access to relevant information, about which the Court said at [62] and [63]:

> *What is within the scope of s 4(1A)(c) in any given case will, however, depend on the particular circumstances of the case. The starting point must be the nature of the decision which the employer proposes to make. For example, if the employer has restructured its business and is deciding whether an employee whose position is disestablished is suitable for an alternative position, what will be relevant is information relating to that person's attributes and to the new position. On the other hand, if the employer is downsizing and selecting employees for dismissal on grounds of redundancy, the process is likely to be a comparative one and information about the other candidates will also be relevant. In cases, the perceptions and opinions of those involved in the process leading to a decision will be relevant.*
>
> *Although is was not in dispute between the parties, we comment briefly on the nature of the information potentially within the scope of s 4(1A)(c). It must include not only information which is written down or otherwise recorded but also information in the minds of people.*

[81] Applying those principles, in *Massey* the Court found that much of the information generated by the interview process was confidential information. The disclosure requirement therefore turned on whether there was good reason to maintain confidentiality for the purposes of s.4(1B) and s.4(1C). However, the Court's preliminary view was that there was no sufficiently good reason to withhold any of the disputed documents. The Court deferred reaching any final conclusion concerning the non-recorded information.

[82] *Massey* was decided after the investigation meeting for this matter. The principles are perhaps not new but the case is a stark example of their application. I sought further submissions from the parties about how the *Massey* principles might apply in the present case. For NPI counsel points out the differences in context – *Massey* involved a small scale restructuring in a tertiary institution while this case involved a large scale restructuring in a manufacturing environment. The Court in *Massey* at [62] recognised the importance of context. However the principles set out in *Massy* at [47] and [55] are of general application.

[83] Turning to the present case, Mr McMahon's evidence (which I accept) is that in assessing each of the criteria he and the supervisor had regard to:

Efficiency	*Production output*
	Use of materials
Effectiveness	*Quality*
	Co-operation
	Flexibility
Job Knowledge	*How many jobs known*
	Qualification, e.g. FITEC
Job Skills	*Ability to find fault*
	How well the operator knew their machine
Attendance	*Record of attendance*

[84] Mr McMahon's evidence is that the scoring was done on a comparative basis and reflected each person's ranking compared to others in the same classification. Hence a person marked 1 would be the lowest ranked within their classification but might still be fully competent while a person ranked 5 would be the highest. However, the scoring must have referenced something other than strict ranking because scores of 1 and 5 do not appear over a number of the specified criteria. I note that in his email of 12 March 2009 Mr Rhoades told Mr Richmond and Mr Clarence *In some cases there is measured performance information available as a basis for the rating, in other cases a subjective judgement is required.* That evidence better reflects

what probably happened. NPI conducted something of a performance review on each employee but without the employee's input. There is no reason why each employee could not have been advised of their ranking score across all the criteria, told where it placed them compared to their colleagues and been given the *measured performance information* or had the *subjective judgement* explained. They could each have been advised of the production supervisor's assessment and Mr McMahon's assessment. That would have given each employee an opportunity to comment on NPI's assessment before any decision about their selection and dismissal. None of that would have involved a breach of privacy issues as asserted by Mr Rhoades and Mr McMahon. It may have generated stress and anguish as claimed by Mr Rhoades but the failure to provide it at the time has caused much more stress, anguish and distrust. There was no good reason to withhold any of the information from any of the affected individuals.

[85] At the investigation meeting each employee gave evidence disputing to a greater or lesser extent various aspects of their own scores, the combined scores having been disclosed prior to the investigation meeting. In return NPI gave evidence to justify each of the scores. NPI in doing so referred to more about its methodology for allocating scores across particular classifications and relied on production and other data which Mr McMahon and the production supervisor apparently had regard to when compiling the scores originally. It is not necessary for present purposes to resolve the differences, although understandably the employees expressed strong views about the implicit and explicit criticisms of their work performance. The exchange of information and views for the purposes of the Authority's investigation is precisely what was envisaged by good faith as part of the restructuring and redundancy process where the parties had to be active and constructive and responsive and communicative (see s.4(1A)(b) as well as s.4(1A)(c)). NPI failed to comply with these good faith obligations. Accordingly each of the dismissals was unjustified.

Predetermination

[86] To a significant extent NPI predetermined its position regarding the restructuring and the selection of redundant employees so that there was no genuine consultation.

[87] I will not repeat in detail what is said above regarding the application of the selection criteria but it is relevant to this conclusion. Before the announcement to staff on 5 March 2009 NPI had actually or substantially completed its selection of employees to be made redundant subject only to changes that might arise from the voluntary redundancy process. In other words, NPI predetermined the dismissal decisions and there was no meaningful consultation with the affected individuals prior to the announcement of the decisions.

[88] In large measure NPI also predetermined the outcome of the restructuring. NPI had spent considerable management time assessing production requirements and it had decided how it should reconfigure MDF shift patterns to match those requirements before initiating consultation with unions and staff. NPI genuinely consulted on a number of peripheral (although still important) matters of implementation but there was no genuine consultation beyond that. The assessment by Mr Richmond, Mr Clarence and others about the limited extent to which NPI was prepared to meaningfully consult was accurate.

[89] An argument for the employees concerns the order in which NPI advised employees of their retention or redundancy. In the typical redundancy situation those selected as redundant are notified first while those who remain are notified second. However, NPI required those it retained to agree to different roster arrangements. NPI could not be sure who to dismiss as redundant until it had secured the agreement of those it wanted to retain. Hence meetings were held first with those who NPI wanted to retain. Quite quickly it became apparent to those not called to a meeting in the first wave that they were likely to be made redundant. The applicants are critical of being put in that situation. While the applicants' criticism of the effects on them of the process adopted by NPI is understandable, I do not consider that NPI's actions in this regard were inconsistent with those of a fair and reasonable employer.

Personal grievances

[90] It follows from the foregoing that NPI has failed to justify its decisions to dismiss the applicants and they each have a personal grievance of unjustified dismissal as a result.

Remedies

[91] There was no blameworthy conduct by any of the applicants that contributed to the situation giving rise to their grievances.

Ken Summers

[92] Mr Summers was a long serving employee with more than 22 years service. He seeks reinstatement, compensation for distress and reimbursement of lost remuneration.

[93] There is compelling evidence (including from Mr Richmond) of the distress suffered by Mr Summers, some of which has been referred to above. Mr Summers' evidence is also that he felt worthless, had many unanswered questions, had trouble sleeping, kept going over and over things in his head; that he was irritable and snappy and could not concentrate on other things; that he was embarrassed at having to tell people that he had been made redundant; that he felt ashamed, worthless and a no-hoper by reason of having to go to WINZ; and that he was extremely worried about his financial circumstances. Mr Richmond's evidence is of having seen Mr Summers go through severe depression, anger, feelings of worthlessness and marital tension. Mr Richmond also says that Mr Summers' attitude to life, people and his personal outlook were affected. Mr Summers' kept ringing Mr Richmond asking if there were any jobs available at NPI. There is no reason to doubt any of this evidence. To remedy these effects NPI must pay Mr Summers $17,500.00 in compensation.

[94] There is a claim for lost wages pursuant to s.123(1)(b) of the Employment Relations Act 2000. In *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 (CA) held that at 620:

> *The remedy can relate only to what has been lost as a result of the particular breach or failure. In a genuine redundancy situation where any unjustifiability is procedural in character any compensation must be tied to the personal grievance, which is not the loss of the job as such.*

[95] Although *Aoraki* was decided under a different statutory regime, the remedies provisions have not materially been amended and it remains applicable as an authority on the present point. It needs to be remembered that there was a substantial reduction in NPI's workforce principally caused by extraordinary economic circumstances.

However, the plant was not closed and NPI retained a substantial number of employees to meet its ongoing production requirements. To succeed with the claim for lost wages, Mr Summers needs to establish that he was not retained in NPI's employment and therefore suffered a loss of wages because of NPI's breaches such as including attendance as a criterion and failing to consult with him about its assessment.

[96] There were six saw operators including Mr Summers. Mr Summers was ranked the lowest. That ranking does not change if *Attendance* is discounted. Mr McMahon's evidence is that the top three ranked saw operators were offered and accepted the remaining saw operator positions. I note the evidence from Mr Richmond that Mr McMahon told him that they did not have a position for Mr Summers. There is also evidence, which I accept, that when NPI was subsequently hiring staff they showed no interest in re-engaging Mr Summers. From all of this however I am unable to conclude to the standard of probability that NPI's substantial breaches of its good faith and contractual obligations to Mr Summers caused the loss of his employment and therefore his lost remuneration. The loss of employment was the result of redundancy. It follows that Mr Summers cannot succeed with the claim for lost remuneration or the claim for reinstatement.

Peter Connelly

[97] Peter Connelly claims $10,000.00 compensation for distress and compensation for lost remuneration.

[98] Mr Connelly found his redundancy notification difficult to take. He still considers that NPI's conduct was insulting, condescending and lacking in justification. He also believes that NPI took the opportunity to purge the workforce and get rid of employees that they did not want. Those views demonstrate the humiliation, injured feelings and lost dignity suffered by Mr Connelly as a result of the way he was made redundant. To remedy these effects NPI must pay Mr Connelly $10,000.00 in compensation.

[99] There were five finishing utility operators and the three with the highest ranking were retained. Mr Connelly was ranked fourth. If I discount *Attendance* the

third ranked person falls to last position and Mr Connelly and the fifth ranked person end up as third equal on the rankings. On that basis Mr Connelly would have been retained because of his longer service. From this I find that NPI's breach did cause Mr Connelly's dismissal and any proven loss of remuneration. Mr Connelly was unemployed for approximately 2 months after his dismissal although his evidence is that he had some casual work and received some accident compensation for part of these two months. I infer that in his replacement permanent employment Mr Connelly was paid at a higher rate than had been the case at NPI as there is no claim for the period after 2 months. I accept that Mr Connelly properly attempted to mitigate his loss.

[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 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.

[105] In the present case Mr Connelly was dismissed when he should not have been. He lost his job and received redundancy compensation. The modest claim for compensation for distress does not relate to his lost position. NPI did no more than pay the contractual redundancy compensation. Applying *Muru* I decline to offset the redundancy compensation against Mr Connelly's proven wage loss. NPI must pay him his ordinary time rate from the end of his notice period until his commencement in a permanent position approximately 2 months later. A deduction must be made for the casual earnings and the earnings related compensation received during this period.

Brian Regan

[106] Mr Regan claims $10,000.00 compensation for distress and compensation for lost remuneration.

[107] Mr Regan was shocked and stunned at his selection for redundancy. His evidence is that he felt gutted, could not understand why he had been selected and had no idea that his work was supposedly so substandard. Mr Regan told me that he was *Gobsmacked* about his low score. He feels that he could have scored a lot better if he had been able to discuss the reasons with Mr McMahon. Mr Regan's evidence is that given his age he felt extremely stressed at the prospect of unemployment and had to sell land and an apartment because he could no longer afford the mortgage payments. There is no reason to doubt any of this evidence. To remedy these effects NPI must pay Mr Regan $10,000.00 in compensation.

[108] There were 12 sander operators including Mr Regan. The top five ranked were retained. Discounting *Attendance* does not affect the rankings so Mr Regan would probably have been selected regardless. I cannot say to a standard of probability that NPI's failings towards Mr Regan caused the loss of his employment and therefore his lost remuneration. The loss of employment was the result of redundancy. There cannot be any award for lost remuneration.

Pat Benton

[109] Mr Benton claims $10,000.00 compensation for distress and compensation for lost remuneration.

[110] Mr Benton's evidence is that he felt like he had been *kicked in the head* when he lost his job. He felt used and thrown-away by NPI where he had worked for 21 years. He believed he had standing at NPI and was worth something but obviously was wrong about that. Mr Benton believes that he was dismissed because he would speak up if he felt management was wrong or had made a bad decision. There is no reason to doubt any of this evidence. It illustrates the humiliation, injured feelings and lost dignity suffered by Mr Benton as a result of the way he was made redundant. To remedy these effects NPI must pay Mr Benton $10,000.00 in compensation.

[111] Mr Benton was one of the 12 sander operators and was ranked sixth. He was amongst the highest ranked on *Attendance* so excluding its effect lowers rather than improves his ranking. I cannot say to a standard of probability that NPI's failings towards Mr Benton caused the loss of his employment and therefore his lost remuneration. Those losses must be attributed to redundancy.

Tony Christall

[112] Tony Christall claims $10,000.00 compensation for distress and compensation for lost remuneration.

[113] Mr Christall also told me that he reapplied for a job at NPI a few months before the Authority hearing but was told by Mr McMahon that he would never get a job at NPI again. Mr McMahon denies saying this. On my assessment, Mr Christall's evidence is his honest recollection. However Mr McMahon would have been mindful of the forthcoming Authority investigation meeting. In the end I cannot say to a standard of probability that Mr McMahon did tell Mr Christall that he would never get a job at NPI again. I put this matter to one side.

[114] Mr Christall was a long serving employee with 22 years service. He finds it impossible to believe the low assessment he received and is sure that he could have persuaded the company to increase his scoring if he had been given a chance. Mr Christall's evidence is that *being made redundant basically made me feel like shit*. It has played on his mind continuously and some days makes him feel really low. He has been affected by stress and anxiety from not having a job for a long time after his dismissal. There is no reason to doubt this evidence. To remedy these effects NPI must pay Mr Christall $10,000.00 in compensation.

[115] Mr Christall was the ninth ranked sander operator. He was one of three employees to receive the lowest ranking for *Attendance*. Excluding that criterion moves him into sixth position but two points short of the fifth ranked employee who was retained. Mr Christall was assessed as less efficient and less skilled than the fifth ranked employee. I am unable to say to a standard of probability that NPI's failings

towards Mr Christall caused the loss of his employment and therefore his lost remuneration. Those losses must be attributed to redundancy.

Brent Steel

[116] Mr Steel claims $10,000.00 compensation for distress and compensation for lost remuneration.

[117] Mr Steel's evidence is that it took him quite a while to get over the redundancy. At the time it made him feel pretty upset and worthless. His evidence is that the complete lack of involvement in the process by which he lost his job was one of the most difficult things to accept. As he put it *My fate was determined by others and they did not even think it necessary to talk to me.* There is no reason to doubt this evidence. To remedy these effects NPI must pay Mr Steel $10,000.00 in compensation.

[118] Mr Steel was the tenth ranked of 12 press operators. *Attendance* was not part of the assessment for press operators As a result of voluntary redundancies Mr Steel was the only press operator on B crew to be forced into redundancy. His evidence is that he found out later that a floater was appointed to one of the press operator positions so he ended up competing with more than just the press operators. However, Mr McMahon's evidence is that each production crew needed to lose one press operator. The A and C crews each lost a person by voluntary redundancy. That did not happen with B crew. Mr Steel was therefore ranked for selection against two other B crew press operators who were retained. I note that the CEA at clause 34.5 recognises that selection can be on a plant-wide, departmental or work area basis. From this I cannot say to a standard of probability that NPI's failings towards Mr Steel caused the loss of his employment and therefore his lost remuneration. Those losses must be attributed to redundancy.

Summary and orders

[119] Each of the applicants was unjustifiably dismissed and therefore has a personal grievance.

[120] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Nelson Pine Industries Limited must pay compensation as follows: $17,500.00 to Mr Summers; and $10,000.00 each to Messrs Connelly, Regan, Benton, Christall and Steel.

[121] Pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000, Nelson Pine Industries Limited must pay compensation for lost remuneration to Mr Connelly from the end of his notice period until he commenced permanent employment (approximately 2 months) less income received by him during that time. Leave is reserved in case of any disagreement.

[122] All other claims are dismissed.

[123] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority