IN THE EMPLOYMENT COURT
AUCKLAND

AC 52/06
ARC 12/06
ARC 13/06

IN THE MATTER OF	challenges to a determination of the Employment Relations Authority
BETWEEN	SIMPSONS FARMS LIMITED Plaintiff in ARC12/06 and Defendant in ARC13/06
AND	GEOFFREY IAN ABERHART Defendant in ARC12/06 and Plaintiff in ARC13/06

Hearing: 26 and 27 July 2006
(Heard at Hamilton)

Appearances: Simon Menzies and Andrea Twaddle, Counsel for Plaintiff
Lou Yukich, Advocate for Defendant

Judgment: 14 September 2006

JUDGMENT OF CHIEF JUDGE GL COLGAN

Introduction

[1] The issues for decision in this challenge and cross challenge by hearing de novo from the determination of the Employment Relations Authority finding that Geoffrey Aberhart had been dismissed unjustifiably by Simpson Farms Limited (SFL) and awarding him compensation for non-economic loss of $15,000, include:

- the application of the new s103A of the Employment Relations Act 2000 to redundancy dismissals;
- whether dismissal was by reason of genuine redundancy;
- whether dismissal was fair and reasonable;

- if not, what remedies are available to Mr Aberhart including whether he should be reinstated in employment as he seeks and, in particular, the level of compensation for non-economic loss in light of the judgment of the Court of Appeal in *NCR (NZ) Corporation Ltd v Blowes* [2005] 1 ERNZ 932.

The Authority's determination

[2] It determined that SFL dismissed Mr Aberhart for genuine redundancy reasons but did so unfairly, causing the dismissal to have been unjustified. Taking account expressly of the judgment of the Court of Appeal in the *NCR* case, it awarded Mr Aberhart compensation for non-economic loss totalling $15,000 pursuant to s123(1)(c)(i) of the Employment Relations Act 2000.

Mr Aberhart's/SFL's claims

[3] Filed first in time, SFL's challenge seeks to have the finding of unjustified dismissal set aside so that no remedies should be granted to Mr Aberhart. His cross challenge seeks to retain the finding of procedurally unjustified dismissal but to reinforce this with a finding that dismissal was also unjustified for substantive reasons including that there was not a genuine redundancy. In addition, Mr Aberhart asks that the Court increase the Authority's award of compensation for non-economic loss to $28,000, to reinstate him in employment (as the Authority had declined to do), and to award him compensation for remuneration loss from the date of his dismissal to the date of his reinstatement but taking into account net earnings received by him since dismissal. So everything is in issue again.

Relevant facts

[4] Until 2003 Simpson brothers Robert and Trevor owned and operated both a Huntly based bus service and Waikato farms. The Simpson brothers sold their buses, changed the name of their company to Simpsons Farms Ltd, and concentrated on dairying, drystock farming, and property development at a number of locations around the Waikato.

[5] The plaintiff is a 59 year old farm manager having been employed by the company for almost 16 years until his dismissal in January 2006. He managed one of SFL's farms, its largest, at Waingaro west of Ngaruawahia. In addition to this

farm, described as a drystock unit, SFL has a smaller drystock farm at Te Akau near Raglan and a yet smaller cropping and drystock farm at Horotiu near Hamilton that was purchased in June 2005. SFL also has three dairy farms together milking approximately 1,500 cows. Finally, the company has a "run-off" property at Rangiriri. In addition to beef, dairy and sheep farming, the defendant is also engaged in property development including the subdivision of some of its properties.

[6] Ignoring the dairy units except for noting that they were the subject of a managerial reorganisation beginning before the events affecting Mr Aberhart in this case, the drystock farms were managed as follows. The largest, at Waingaro, was managed by Mr Aberhart and employed a farm labourer. The Te Akau property had a nominal "manager" but who was engaged principally as a fencer/stockman. The other drystock/cropping units were managed directly by Trevor Simpson, the working director of the company who retained overall day to day control of all farms. His brother, Robert Simpson, is an accountant and deals with financial aspects of the company's operations.

[7] In addition to a salary, Mr Aberhart's terms and conditions of employment included the provision of a house on the Waingaro property in which he lived with his partner and two secondary school aged children. Mr Aberhart's partner, Kathleen Green, worked from time to time on the property as needed and was involved especially in the development by SFL of a herd of "Boer" goats. As a reward for her unpaid labour, Ms Green was allowed to select a dozen or so of these goats as her own when it became increasingly likely that Mr Aberhart would not retain his position on that farm.

[8] The duties expected of and performed by Mr Aberhart as the manager of the Waingaro farm, assisted by one full-time general hand, included diverse tasks that would generally be expected of a farm manager except that Mr Trevor Simpson retained for himself a number of roles including making major decisions about stock purchases and sales and cheque signing. Mr Aberhart had some liaison with the manager of the dairy farms about replacement heifers that he was grazing.

[9] Because of expansion of its farming operations and a desire to co-ordinate and to deploy staff more efficiently, in early 2005 the Simpson brothers began to

consider the options for restructuring the company's farming operations. They engaged a farming consultant to assist them in this exercise.

[10] On 24 June 2005 Mr Trevor Simpson arranged to call at the farmhouse to meet Mr Aberhart and his partner. Mr Simpson advised them of a proposed management restructuring of the company and for this purpose brought two documents with him. The first was a hand drawn diagram of the current and proposed managerial structures. The proposed structure clearly indicated a single position of "Drystock Manager" reporting directly to Mr Simpson and responsible for the work of staff on each of the three drystock farms at Waingaro, Te Akau and Horotiu. There was a similar reporting line for a dairy manager plus the proposed retention of two general maintenance/tractor driver staff, presumably available to operate at any of the company's farms. The second document that Mr Simpson brought was a *"Position Description"* for the drystock farm manager position. It set out 16 categories of intended duties, the first two of which Mr Simpson said would differ significantly from those duties that Mr Aberhart was then performing. They were:

> *1. Responsibility for managing and co-ordinating staff on all Beef farms for maximum productivity and profit.*
>
> *2. Liasing with the Contract Milker and Director, to maximise heifer grazing performance and integration of other dairy grazing.*

[11] Although the handwritten diagram was headed with the word *"Proposed"*, I accept that the manner in which these announcements were made to and discussed with Mr Aberhart left him and Ms Green with the impression that they were being advised of changes that the company would make, rather than consulted about how it might achieve greater efficiencies. Consistently with what I assess to be Mr Aberhart's quiet and generally non-confrontational demeanour, the shock of this announcement caused him to go quiet. He did, nevertheless, say to Mr Simpson that it appeared that he was being made redundant. Mr Simpson's response was that the company would advertise for the new drystock manager position, that this would happen about six months hence, that Mr Aberhart would be welcome to apply, and that *"the best man"* would get the job. Ms Green felt the need to protect their position and asked Mr Simpson if Mr Aberhart could be given the new position for a trial period to demonstrate his capabilities. Mr Simpson, however, declined to consider that suggestion reiterating that the position would be advertised and would

go to "*the best man*". The meeting was relatively short, certainly in its discussion of these matters and, I accept, occupied no more than 15 minutes.

[12] Mr Simpson left the house saying that he needed to go to give the same information to the manager of the Te Akau farm. Although Mr Aberhart assumed from this that the other manager was also to be told of the disestablishment of his position in the proposed restructuring and of his entitlement to apply for the new managerial job, that was not what Mr Simpson intended to convey. As he confirmed in evidence, Mr Simpson's view even at that stage was that the Te Akau manager's position would probably remain (although not so termed), that the new drystock manager would be located at the larger Waingaro property, and that the Waingaro manager's position would be disestablished. Mr Simpson left, also indicating that he would return another week later to speak with Mr Aberhart further about the matter. Both Mr Aberhart and Ms Green were left wondering why Mr Simpson intended to do so, reflecting their impression that there was nothing further to discuss and they had been advised what was going to happen.

[13] Over the course of the next week Mr Aberhart considered the draft job description and concluded that its contents either reflected what he then did on the Waingaro property or what he considered he was capable of doing in the management of a number of properties.

[14] Mr Simpson returned as promised a week later on 1 July and again met with Mr Aberhart and Ms Green. Mr Simpson said that the restructuring was likely to happen sooner than he had previously stated (within the next three months) but when reminded by Mr Aberhart of the previous advice of six months, conceded that this longer term was more likely. In the course of this second and also short meeting, Mr Aberhart acknowledged the common sense of the restructuring plan from a business point of view. He did not discuss it further in any detail with Mr Simpson, either on 1 July or on those occasions over subsequent months when the two men met necessarily to discuss matters relating to the Waingaro farm. Consistently with his almost fatalistic attitude to the disestablishment of his farm manager position, Mr Aberhart indicated, as Mr Simpson said in evidence, that he would "*go with the flow*". Mr Simpson left this shorter meeting, indicating to Mr Aberhart that he would let him know when the new drystock manager position would be advertised.

[15] On 5 October Mr Simpson advised Mr Aberhart by telephone that the new position would be advertised shortly. By this time Mr Aberhart had sought some advice about his position and, on the same day, wrote to Mr Simpson setting out his understanding that Mr Simpson was *"intending to advertise my current position"*. Mr Aberhart asked to be sent the company's proposals in writing so that he could consider his future, particularly because his partner's daughter was in her first NCEA year and he had to consider her position. Mr Aberhart's letter concluded: *I have always understood that I hold permanent employment and not one of fixed term employment"*.

[16] Mr Aberhart first saw the advertisement for the drystock farms' manager in the New Zealand Farmers Weekly of 10 October which he received in the mail on 12 October. The closing date for applications was 21 October. The advertisement referred only to the company's drystock farms at Waingaro and Te Akau but it did not include the Horotiu unit.

[17] Mr Simpson responded to Mr Aberhart's letter of 5 October by letter dated 12 October received by Mr Aberhart on 14 October. Mr Simpson reiterated that the position advertised was a new position referred to in their discussions on 24 June. Mr Simpson noted that Mr Aberhart had not taken the opportunity to respond to the matters discussed with him in June and July. The letter continued:

> *As I have not heard from you, I assumed you did not wish to provide any response and the Company is now moving on to implement the changes proposed. This will mean that the position you presently hold will be disestablished. There will be a new role (the one being advertised) and you will be able to apply for that job if you wish. That role will be different and requires different skills.*
>
> *If you are unsuccessful in applying for that job, your current position will be disestablished and your employment with the Company will then come to an end. You will be given one months notice if that occurs and given $10673.10 redundancy compensation.*
>
> *A copy of the job description for the job being advertised is attached for you to consider. …*

[18] Mr Simpson advised Mr Aberhart to get in touch with him to discuss the matter or for any further information. The letter included a *"REDUNDANCY CALCULATION"* based on a formula of one week's pay per year of service and the enclosed job description was identical to that which had been given to Mr Aberhart on 24 June.

[19] Mr Aberhart wrote again to Mr Simpson on 17 October requesting a copy of his current employment agreement and confirmation of the company's intention to terminate his employment by reason of redundancy. The letter included the following:

> *Were this to eventuate I may be prepared to consider an alternative position with Simpsons Farms Limited, can you please now also provide me with the proposed employment agreement for the alternative position and tell me how the alternate position differs from my existing role.*

[20] By written reply on 29 October 2005 Mr Simpson sent Mr Aberhart a copy of his current employment agreement and confirmed the defendant's intention to disestablish this position as part of the *"proposed restructuring process"*. This was said to occur when an appointment had been made to the new position. The letter continued:

> *After that appointment, your employment will be terminated on the grounds of redundancy with the consequences set out in my earlier letter. This assumes you have either not applied for the new position or having done so you are not the successful applicant.*
>
> *Before making the final decision to terminate your employment, the Company will continue to consider any redeployment options that might be available. There are none presently available and it appears unlikely that position will change. If you have any specific ideas in that area, please let me know.*

[21] Mr Aberhart elected not to apply for the new position as Mr Simpson had invited him to do. He said his reasons for not doing so were two. First, he said he thought he should not have to apply for his own job, what I understand to be his description of another position that was materially identical to his. Mr Aberhart's second reason for not applying was that the company did not send him a proposed employment agreement for the position as requested.

[22] Mr Aberhart submitted a personal grievance to the defendant by letter dated 15 November 2005. In response to Mr Simpson's request for specific ideas (about redeployment), Mr Aberhart advised:

> *In accordance with clause 21 of my employment agreement and in light of the expressed intentions contained in your letter of 29 October 2005 I reluctantly advise you of a personal grievance in respect of the unjustified unlawful nature of your proposal to terminate my employment on grounds of redundancy arising from the upcoming restructuring process.*

[23] I interpret this to be the raising of an unjustified disadvantage grievance. In addition, Mr Aberhart asked for prompt confirmation of a number of things including the company's agreement to attempt to resolve the grievance by mediation,

reiteration of the request for advice of the difference between his current work and that proposed in the new position, a reiteration of the request for the proposed employment agreement, and a request for consultation over restructuring in accordance with the good faith obligations contained in s4 of the Employment Relations Act 2000. Finally, Mr Aberhart requested a copy of his payroll and leave records from December 1995 with particular reference to the number of weeks of annual leave and lieu days arising in that period.

[24] Interviews for the new position were held with applicants on 16 and 28 November and these included, on the first date, showing applicants around the Waingaro farm property on which Mr Aberhart was working. The successful applicant accepted the position on 4 December and an employment agreement with that person was signed on 20 December. His start date was scheduled to be 23 January 2006 and the agreement with the new drystock farms manager included occupation of the farm cottage in which Mr Aberhart and his family were then residing.

[25] In the meantime, Mr Aberhart had sent Mr Simpson a further letter on 21 November advising that Mr Yukich had been appointed his representative and that further communication should be with him. Mr Aberhart reiterated his requests for written details of the differences between the two jobs, a copy of the intended employment agreement, and his payroll and leave records.

[26] On 29 November the parties and their legal advisers met in an unsuccessful attempt to resolve their differences.

[27] On 5 December Mr Simpson called on Mr Aberhart with a letter formally advising him of the termination of his employment with effect from 10 January 2006. The letter advised that the company had considered alternative employment options but, regrettably, there was none. The company's letter gave the four weeks' notice of dismissal required by the employment agreement (indeed a little more) and reiterated the ex gratia proposal to pay redundancy compensation of $10,673.10 on 10 January together with outstanding holiday pay. Mr Simpson thanked Mr Aberhart for his 15 years of service, wished him well for the future, and offered a reference including confirmation of redundancy if this was required.

[28] Mr Aberhart applied to the Employment Relations Authority for an order restraining SFL from dismissing him. Instead, however, the Authority arranged for an urgent investigation of his personal grievance that took place on 18 January and it gave its determination on 20 January dismissing his claim to reinstatement. Mr Aberhart and his family subsequently moved out of the accommodation at the Waingaro Farm and SFL's new manager of the drystock farms took up his appointment.

[29] Although there was no evidence of when, Mr Aberhart subsequently obtained temporary employment as the manager of two leased farms south of Pirongia. To retain grazing land for Ms Green's goats and to ensure continuity of the girls' schooling in Raglan, Mr Aberhart now drives 180 kilometres per day to and from work, seven days per week. Ms Green drives for an hour and 20 minutes a day to deliver her daughters to and collect them from their school bus. The costs of this additional travel are substantial. I have no evidence about any losses of earnings that Mr Aberhart may have incurred as a result of the termination of his employment with SFL.

[30] Very shortly after Mr Aberhart's dismissal, SFL sold the Te Akau farm although settlement of the sale will not take place until 31 March 2007. No decisions have yet been made about the employment implications of this sale although it may potentially involve further redundancies at that time.

[31] Finally, to reinstate Mr Aberhart to a position in the company no less advantageous to him (his former position having disappeared), SFL says it would be required to terminate the employment of the drystock farms' manager or another employee. Under the company's present structure, it would not be possible to absorb back into its management both a previously disestablished position and its incumbent without significant dislocation of others and, in effect, a court-directed second restructuring.

Relevant contractual obligations

[32] In determining the fairness and reasonableness of the events leading to and of Mr Aberhart's dismissal itself, I must consider first the written individual employment agreement between the parties including its object, "… *to establish and maintain a secure and stable employment relationship for the benefit of both*

parties". Clause 18 (termination of employment) provides for a period of notice of four weeks in all circumstances including redundancy. Clause 20 addresses redundancy expressly and requires consultation between the parties before termination by reason of redundancy. Clause 20.2 provides that there shall be no entitlement to compensation for redundancy.

Statutory tests

[33] Section 103 of the Employment Relations Act 2000 and its predecessors have long addressed unjustified dismissals and unjustified disadvantage in employment. Since the Employment Relations Act (No 2) 2004 came into effect in December 2004, this has been qualified by s103A that provides:

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[34] Other provisions of the Employment Relations Act 2000 govern questions of justification for dismissal generally and, in particular, by reason of redundancy. Section 4 provides that parties to employment relationships must deal with each other in good faith which includes, but is not limited to, not doing anything, either directly or indirectly, to mislead or deceive each other. Section 4(1A) now provides that this duty of good faith is wider in scope than the implied common law mutual obligations of trust and confidence. The good faith obligation requires parties to employment relationships to be *"active and constructive in establishing and maintaining a productive employment relationship"* in which they are, among other things, responsive and communicative.

[35] More particularly, under s4(1A)(c), the law 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 an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision and an opportunity to comment on the information to the employer before the decision is made. That provision does not extend to access to confidential

information but there is no suggestion in this case of any potentially restructuring information having been confidential.

[36] Section 4A provides for penalties for certain breaches of good faith obligations but these are not sought in this case. However, irrespective of penal consequences, the statute affects expressly the conduct of an employment relationship, breach of which obligations will be a factor in determining whether a dismissal or disadvantage was justified in all the circumstances.

The new legislative tests and redundancies

[37] This is the first case of which I am aware in which the Court has had to consider the application and effect of the new s103A of the Employment Relations Act 2000 in a redundancy case. The new section has recently been the subject of examination and pronouncement by this Court in *Air New Zealand Ltd v Hudson* unreported, Judge CM Shaw, 30 May 2006, AC 30/06. That was, however, a case of dismissal for cause, alleged serious misconduct in employment. Redundancy situations including dismissals in reliance upon them are different in the sense that the employee, as here, is usually without fault but may nevertheless suffer the same consequences of disadvantage in employment and/or dismissal from it as if he or she had been in serious breach of the employment agreement and disadvantaged or dismissed for cause.

[38] Parliament has made no distinction in the enactment of s103A between different sorts of personal grievance. The new section applies to all dismissal and disadvantage grievances. So the new s103A is applicable to the issues for decision in this case.

[39] As with dismissals for cause narrated by Judge Shaw in *Hudson*, judicial definitions of justification for dismissals and disadvantages in cases of redundancy have altered over the period of almost the last 20 years. To determine how s103A may have been intended by Parliament to affect the legal position immediately before the enactment, it is necessary to go back and analyse the statements of those positions, and its reasoning, of the Court of Appeal in a number of cases.

[40] The usual starting point for such an examination is the judgment of the Court of Appeal in *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1990] 2 NZILR 1079; [1991] 1 NZLR 151. There the Court of Appeal made landmark

statements about the courts' role in redundancy cases and, therefore, the roles of employers on the one hand and employees and their unions on the other. *Hale* was concerned predominantly with questions of substantive justification of dismissal by reason of redundancy and restriction of the courts' role in such cases to determinations of genuineness of reasons. Cooke P, delivering the leading judgment of the Court, wrote at p1084:

> *… an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him. The personal grievance provisions of the Labour Relations Act, and in particular the existence of remedies for unjustifiable dismissal, should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or expediency of the employer's decision. When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal. …*
>
> …
>
> *What I have said about redundancy is merely an application of the broad principle, stated for instance in* BP Oil NZ Ltd v Northern Distribution Workers Union *[1989] 3 NZLR 580, 582, that the question is essentially what it is open to a reasonable and fair employer to do in the particular circumstances. A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented. Constructive alternatives may emerge as a result. For example, the possibility of part-time employment of the workers, or engagement on contract, may warrant exploration. This is a field where probably hard and fast rules cannot be evolved. …..*

[41] At p1086 Richardson J, delivering the second judgment of the Court, wrote:

> *… the question is whether the worker has been "unjustifiably dismissed" … That term is not defined in the statute. It is an elusive concept. The underlying inquiry must be whether or not what was done and how it was done can be justified in the particular circumstances having due regard to the special importance attached under the Labour Relations Act to the relations between workers and employers and to any mutual obligations of confidence, trust and fair dealing …*
>
> *The statutory concept of unjustifiable dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness. The nature and circumstances of the particular case must be of paramount importance and this Court has deliberately avoided the temptation to formulate detailed principles and rules by which the justifiability or unjustifiability of dismissals is to be determined.*
>
> …

> … *If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the courts or the unions or workers to substitute their business judgment for the employer's.*

[42] Later leading cases in the Court of Appeal, including *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (under the Employment Contracts Act 1991) and *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (under the Employment Relations Act 2000) focused more on the procedural fairness of redundancy dismissals.

[43] The judgment in *Aoraki* followed an earlier judgment of the Court of Appeal, *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243; [1995] 1 NZLR 158. Contrary to some suggestions in earlier cases including *Hale*, the Court of Appeal in *Brighouse* concluded there was no general requirement for an employer to pay compensation to every redundant employee dismissed. The majority of the Court of Appeal in *Brighouse* (Cooke P, Casey J and Sir Gordon Bisson) concluded that obiter dicta in *Hale* allowed the Court to conclude that in some situations, despite no agreement about redundancy compensation, employers' implied obligations of fair treatment would require the payment of compensation to justify dismissal for redundancy. Factors in assessing whether there should be a payment of compensation included the reason for redundancy, the length of the employee's service, the period of notice, and the ability of the employer to pay. Richardson and Gault JJ had dissented from this conclusion.

[44] In *Aoraki*, redundancy was the genuine reason for dismissal. A seven judge bench of the Court of Appeal "*overruled*" the judgments of a five judge bench in *Brighouse* with Thomas J dissenting in part. The Court of Appeal emphasised the objects of the Employment Contracts Act 1991 under which employment law regime *Aoraki* was decided. These emphasised that employment issues were matters of contract where the contents were essentially for the parties freely to negotiate. Also emphasised was the legislation's promotion of an efficient labour market.

[45] The majority of the Court of Appeal in *Aoraki* rejected the approach that Chief Judge Goddard had adopted in *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195, 208 as follows:

> … *the Employment Contracts Act 1991 poses a straightforward question: has the respondent answered the appellant's grievance that she had been unjustifiably dismissed by showing that the admitted dismissal was, in the circumstances proved, justifiable. It will be justifiable if, and only if, the action taken by the respondent was such as a fair and reasonable employer would*

> *have taken, or could have with a clear conscience. … No genuine reasons can be formed about either redundancy or misconduct in the absence of input from the employee concerned, or at least a reasonable opportunity in which to contribute it. The employee's representations may well show that there is, on a better view of her or his functions, no redundancy at all or that there are alternatives to dismissal. A failure to inquire or consult is fatal to justification.*

[46] The majority of the Court of Appeal in *Aoraki* held at p618:

> *… justifiability is directed at considerations of moral justice. It is not tied to common law rights. Conduct is unjustifiable if it is not capable of being shown to be just in all the circumstances. It is a matter of considering and balancing the interests of employee and employer. It is whether what was done and how it was done is just to both parties in all the circumstances.*

[47] Later, at p618 the Court in *Aoraki* found:

> *Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.*

[48] The Court of Appeal continued that it could not be mandatory for the employer to consult with all affected employees in making any redundancy decision and that to impose an absolute requirement of that kind would be inconsistent with an employer's right to organise and run its business operation as it saw fit. It concluded that consultation would often be impracticable, particularly where circumstances were seen to require mass redundancies. But in some cases, the Court concluded, an absence of consultation where it could reasonably have been expected and/or a failure to consider any redeployment possibilities, may cast doubt on the genuineness of the redundancy or its timing.

[49] The Court held that even in the case of a genuine redundancy, a just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decision in a fair and sensitive way. Procedural fairness will determine the period of notice or payment in lieu which recognises that commercial circumstances may dictate that redundancies take immediate effect. The Court also recognised that fair treatment might call for counselling, career and financial advice

and retraining and related financial support among other considerations in particular cases.

[50] After enactment of the Employment Relations Act 2000, the Court of Appeal dealt with justification for dismissal by reason of redundancy in *Coutts Cars*. This case addressed questions of process as opposed to substance in the sense that it was not in issue that redundancy was genuinely the reason for the employee's dismissal. *Coutts Cars* was a case of reducing a particular workforce by more than one employee so that considerations of selection were relevant. The Court of Appeal considered that the new express statutory obligations on employers to deal with employees in good faith did not differ significantly from the common law implied obligations of mutual trust and confidence that had underpinned its earlier judgment in *Aoraki*. The Court concluded that its judgments in *Aoraki* and, subsequently, in *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 should continue to provide guidance on the applicable principles.

[51] The Court in *Coutts Cars* considered that consultation should be assessed as a question of its adequacy and timing. Because the employee affected was at a relatively low level in the corporate hierarchy, the extent of consultation necessary in an area of business decision making discretion had to be assessed realistically. If consultation was embarked on, it had to be carried out in good faith but obligations to act in good faith did not require consultation to take place. The Court held that the duty of good faith would require consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable. Consultation could not be practicable in every situation. A duty of consultation was not inconsistent with the employer's right to organise and run its business.

[52] The Court emphasised that selection criteria used by an employer to determine redundancy should be disclosed to employees affected by it. However, it was entirely appropriate for the employer to maintain confidentiality in relation to the application of those criteria to other employees and to the employer's assessment of them. The Court held, however, that it would not follow from non-disclosure of selection criteria that a dismissal for redundancy would then be necessarily flawed. If the criteria were properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge would be unlikely to be fruitful.

[53] Gault J in *Coutts* Cars concluded that the good faith requirement of s4 of the Employment Relations Act 2000 (as it then stood) did not warrant the introduction into what was a contractual relationship of terms and conditions that the parties had not agreed to but which the Employment Relations Authority or a court might think it fair to impose. That conclusion was made in the context of whether there was an obligation of consultation. Gault J concluded at para [43]:

> *Plainly the obligations to act in good faith and to avoid misleading and deceiving, together with the importance accorded the provision of information, will make consultation desirable, if not essential, in most cases. But as said in* Aoraki*, to impose an absolute requirement would lead to impracticabilities in some situations.*

[54] Tipping J, delivering a judgment that added to Gault J's, concluded that advice of criteria to determine redundancies ought to have been provided. The Judge equated this breach with one of the implied term of fair dealing between employer and employee which exists in all employment relationships. Tipping J concluded that the employer was probably also in breach of a duty of consultation which lay upon it in all the circumstances. The Judge concluded, at para [67], that the 2000 Act *"simply ratifies and incorporates much of what was regarded as implicit under the earlier regime"*.

[55] McGrath J, dissenting in part, disagreed with the view of the majority of the Court of Appeal in *Coutts Cars* that the obligation to consult about potential redundancy was as limited as that determined in *Aoraki*. McGrath J concluded that although there had been little if any legislative change in 2000 affecting justification for dismissal or disadvantage, the introduction in s4 of a statutory duty to deal with others in good faith in the employment relationship did change the previous decision. The Judge concluded that although the agreement of the parties (the contract) is the underlying foundation for terms of employment, the Employment Relations Act 2000 also imposes a regulatory overlay including the duty of parties to deal with each other in good faith. The Judge concluded at para [82]:

> *… Provision of information concerning business decisions affecting employees is in my view now no longer a matter of discretion but an implicit part of the duty of good faith. Sufficient information must be provided to inform an affected employee of the factual basis on which decisions are being made.*
>
> *[83] In my view, in this context, it is a necessary implication that in providing for a duty of good faith in the employment relationship the 2000 Act goes beyond what the Courts recognised at common law or under the Employment Contracts Act as implied contractual terms controlling freedom of contract. It*

> *has imposed a higher standard of conduct. I consider that the Legislature intended that the duty of good faith would require consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable. I recognise that consultation cannot be practicable in every situation such as instances of great urgency or a need for mass redundancies. I do not regard such a duty of consultation as inconsistent with the employer's right to organise and run its business operation. Consultation does not involve a sharing of those functions. It does however in the present context require that they be undertaken by an employer after having been informed of an employee's perspective of his situation ….*

[56] Assessed by reference to these cases just summarised, did Parliament intend to change the judge-made law of justification for redundancy disadvantages or dismissals in 2004? An examination of the relevant law making documents (the explanatory note to the Bill, the report of the Select Committee and transcripts of the three readings of the Bill in the House) reveal no particular references to the tests of justification for disadvantage or dismissal for redundancy. Although, in one other respect, one judgment of the Court of Appeal (*Coutts Cars*) was referred to expressly as being intended to be affected by legislative changes (as to s4), in all of the material relating to s103A the only reference to a judgment was to that of the Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, a case of dismissal for cause.

[57] However, the words used by Parliament in s103A are so broad and clear that they must be taken to encompass not only dismissals or disadvantages for cause but also for other reasons including redundancy. It is notable that in her first reading speech on the introduction of the Employment Relations Law Reform Bill, the Minister summarised s103A as follows:

> *Overall, the test is to be an objective one. This is not a radical revamp of the dismissal law. It draws from existing case law and fits well within good human resources practice.*

[58] Although not, or at least not only, in s103A, Parliament contemporaneously legislated expressly for minimum requirements of procedural fairness in employment relationships including, in particular, the circumstances of or leading to redundancies. Section 4(1A) enacted in 2004, and particularly in response to the Court of Appeal's judgment in *Coutts Cars*, emphasises that:

- The duty of good faith is wider in scope than the implied mutual obligations of trust and confidence at common law in employment contracts.

- The parties to employment relationships are required to be "*active and constructive*" in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.
- Without limiting the foregoing, the duty of good faith 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 his or her employees, to provide them with access to information, relevant to the continuation of their employment, about the decision, and to provide the affected employees an opportunity to comment on that information to their employer before the decision is made.

Consultation obligations

[59] In *Coutts Cars*, the majority of the Court of Appeal noted at para [43]:

> *Plainly the obligations to act in good faith and to avoid misleading and deceiving, together with the importance accorded the provision of information, will make consultation desirable, if not essential, in most cases. ….*

[60] Mr Menzies, counsel for SFL, accepted in argument that this cannot now be the legal position, s4 of the Employment Relations Act as amended in 2004 making the good faith dealing obligations, including consultation, mandatory in all cases. I agree with that assessment. Consultation was also, of course, a contractual obligation in this case as noted at para [31].

[61] The parties were agreed that these statutory and contractual obligations are for the relevant "consultation" that has long been a feature of, and defined in, employment law.

[62] 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.

[63] It is equally plain that the consent of persons consulted is not necessary following proper consultation and that there need not be an agreement: *Cammish v Parliamentary Service* [1996] 1 ERNZ 404 following *Wellington International Airport*. In *Cammish* the Court stated:

> *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.* (p417 per Chief Judge Goddard)

Summary of new justification tests in redundancy cases

[64] In the Employment Relations Amendment Act (No 2) 2004 Parliament intended to alter and prescribe the tests for justification for disadvantage in, or dismissal from, employment in general and to change the judge-made law exemplified by the judgments of the majority of the Court of Appeal in *Coutts Cars*. It addressed these latter changes by adding specific information sharing provisions in

s4. These set out a fair and reasonable employer's minimum obligations where redundancy may ensue and are thus an element of the new s103A tests of justification.

[65] Following the new s103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

[66] Especially in redundancy personal grievance cases, the use by Parliament of the phrase *"at the time the dismissal or action occurred"* at the end of s103A is important. Unlike most (but not all) personal grievances, especially allegations of unjustified dismissal for cause where both the events leading to the decision to dismiss and the decision itself are part of the same process so that justification for a dismissal for cause must take account of relevant events leading to it, dismissals for redundancy often consist of a series of discrete events over a period of time as the facts of this case illustrate.

[67] I do not consider that the recent statutory changes were intended to revisit longstanding principles about substantive justification for redundancy exemplified by judgments such as *Hale*. The words and phrases of s103A echo the statements of Cooke P and Richardson J in *Hale* as set out in paras [40] and [41]. Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s103A, to return to the position espoused by the courts in cases such as and following *Hale*. So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.

Decision of challenge and cross challenge on justification

[68] Pursuant to s103A, I am satisfied that a fair and reasonable employer would have concluded that in all the circumstances then confronting SFL in early to mid 2005, managerial restructuring was not only appropriate but necessary. Staying with *"the employer's actions"* under the section, I am satisfied that a fair and reasonable employer in all the circumstances at that time, and following consultation with Mr Aberhart, would have concluded, as SFL did, that both a drystock farms' manager's position should have been created and that the position at the Te Akau farm occupied by Mr Aberhart would have to be disestablished. I am reinforced in those conclusions by Mr Aberhart's own acknowledgement to SFL during this process that he understood and accepted the business needs leading to these decisions. It follows, also in my conclusion, that once a decision had been made to disestablish the Te Akau farm manager position and Mr Aberhart had not applied for or of course been successful in obtaining the new managerial position, it was fair and reasonable that he be dismissed on notice as he was.

[69] It is the other statutory consideration under s103A (*"how the employer acted"*) and whether a fair and reasonable employer would have so acted in all the circumstances at the time of dismissal or disadvantage action in employment, that provides difficulty for SFL in this case.

[70] For reasons earlier set out, consultation with Mr Aberhart was necessary before SFL made its restructuring decisions. As part of consultation, Ms Green's reasonable proposal made on behalf of Mr Aberhart that he be trialled in the proposed new position to gauge his suitability for it, was rejected immediately, out of hand, and without any consideration by Mr Simpson. That is not to say, of course, that SFL was bound to have agreed to this proposal. But it was, as I have already found, a reasonable suggestion warranting consideration in all the circumstances. The principles of consultation now accepted by SFL's counsel required open-minded consideration by the employer and not immediate rejection that indicated a closed mind, if not predetermination. That was the first breach by SFL of its consultation and other good faith dealing obligations under s4 that constituted an unjustified disadvantage in employment to Mr Aberhart.

[71] Later in the process, Mr Aberhart wanted to consider alternatives to the disestablishment of his position and indicated this to SFL at an early stage. He reasonably sought information about the proposed reorganisation and about the new position to be created. Although I accept that a draft employment agreement had not been prepared even at the stage of interviewing applicants for the position, it is inconceivable that no thought whatsoever had been given to terms and conditions of employment. Some information, in addition to a draft job description, would have been available, not only to outside applicants for the position but to Mr Aberhart who was considering his options. SFL did not respond at all to that reasonable request for information from Mr Aberhart. It is difficult to understand why it could not have done so in the circumstances and the refusal even to acknowledge his reasonable requests, let alone the failure to supply any information at all, was a breach of the consultation requirements of Mr Aberhart's employment agreement and of s4 of the Act. That was an independent element of unjustified disadvantage in employment.

Disadvantage or dismissal grievance?

[72] Although framed by Mr Aberhart, addressed by SFL, and determined by the Employment Relations Authority as an unjustified dismissal grievance, the reality of the case is that it is one of alleged unjustified disadvantage in employment under s103(1)(b) of the Employment Relations Act 2000 rather than a case of unjustified dismissal under s103(1)(a). SFL's reason for dismissal (redundancy) was the genuine reason as opposed to any form of pretence by which other grounds for dismissal were dressed up as redundancy. With the disestablishment of his position, Mr Aberhart became superfluous to SFL's business needs. In that sense, his dismissal was substantively justified. It is rather the means by which SFL went about making that decision to dismiss that are the subject of serious challenge by Mr Aberhart.

[73] Having advised the parties in the course of the hearing of this possibility and having invited them to address the question, I determine, pursuant to s122 of the Employment Relations Act 2000, that Mr Aberhart's grievance is of a type other than that alleged. He was unjustifiably disadvantaged in employment, but not unjustifiably dismissed from it.

Review of compensation for non-economic loss

[74] Having confirmed the Authority's findings of lack of justification, albeit as a disadvantage rather than a dismissal grievance, it is necessary to address the compensation for the effects of these wrongs. Mr Aberhart says that the Authority's award of $15,000 was inadequate and that it should be almost doubled. SFL says that the award was excessive and should be reduced if one is warranted. Critical to the cases of both parties (and indeed to the Authority) is the judgment of the Court of Appeal in *NCR*.. That was a case of unjustified constructive dismissal for genuine redundancy. The Employment Court fixed monetary compensation for the non-economic losses at $15,000. The Court of Appeal (Robertson, Wild and Williams JJ) revisited in detail the levels of such awards and concluded that the Employment Court's was excessive, reducing this to $7,000. There are a number of statements of principle in the judgment of Wild J for the Court that warrant analysis. These include:

- The award of $20,000 upheld by the Court of Appeal in 1992 in *Telecom South v Post Office Union* [1992] 1 ERNZ 711; [1992] 1 NZLR 275 must have been at or near the outer end of the permissible range.
- Allowing for inflation during the last 13 years, the upper end of that range may need to be lifted to $27,000.
- The circumstances of an employee can be compared to the circumstances of awards made presumably within that range including, in particular, to the circumstances of Mr Devlin, the grievant in the *Telecom South* case.
- By comparison with the circumstances of Mr McGavin, the grievant in *Aoraki*, the Employment Court's award in *NCR* was "*considerably too high*".
- An award of $15,000 was also too high in the *NCR* case when considered in light of Employment Relations Service statistics for 2004 showing that the Court and the Authority made such awards of $10,000 or more in only 10 percent of cases and awards of $15,000 or more in only 2.5 percent of cases.

[75] I respectfully conclude that the Court of Appeal could not have established a range within which such awards must fall so, in effect, setting a ceiling in such cases.

That is for two reasons. The first is that the statute (unlike some in other jurisdictions) imposes no cap upon awards of what is commonly called distress compensation. In the absence of legislative direction, courts cannot usurp that statutory function. The Court of Appeal itself so confirmed this principle in questions of costs in this Court in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438.

[76] The second reason is more pragmatic. The analysis of cases by the Court of Appeal in the *NCR* case discloses no reference to a number where awards of distress compensation exceeded the upper level set by the Court of Appeal including cases in which the Court itself either affirmed or did not interfere with substantial distress compensation awards made by this Court.

[77] These other cases include: *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections* [2000] 1 ERNZ 332 where $75,000 was awarded for non-economic loss, *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 ($50,000), *Turner v Ogilvy & Mather (NZ) Ltd* [1995] 1 ERNZ 11 ($50,000 upheld by the Court of Appeal), and *Staykov v Cap Gemini Ernst & Young New Zealand Limited* unreported, Judge BS Travis, 20 April 2005, AC 18/05 ($30,000 awarded).

[78] There is another relevant factor, although one that can only be known anecdotally, albeit confidently. The cases decided by the Employment Court and even the more numerous cases decided by the Employment Relations Authority are only a small fraction of such employment relationship problems, the vast majority of which are settled without litigation or, if proceedings are issued, without a judgment. The Employment Court Judges are aware of the general levels of settlement of compensation for non-economic loss in such cases. They often exceed the sorts of levels examined by the Court of Appeal in *NCR*. Indeed, the lid kept on awards by cases such as *NCR* is a persuasive factor in achieving larger settlements in such cases without incurring the unrefundable costs of litigation to do so.

[79] I understand the Court of Appeal in *NCR* to have intended to signal that most awards will fall within a range up to about $27,000 but that exceptional cases may attract higher awards. The Authority's in this case was, of course, a little more than half way along the Court of Appeal's range and, coincidentally, precisely the same award as the Employment Court made at first instance in *NCR*..

[80] Bearing in mind the need to apply considerations of consistency with other cases to the extent that their facts can be ascertained and compared, and to assess compensation in light of other benefits received by a grievant (in this case the ex gratia payment of a before tax equivalent to 15 weeks' remuneration), the discretionary amount of an award is in part a question of impression on the evidence presented in each case.

[81] Here, the relevant factors are as follows. Mr Aberhart had been engaged for the whole of his working life in farming and, more latterly, farm management. He had, as he said, an unblemished record never having been reprimanded let alone dismissed from any previous employment including for redundancy. His position had never before been disestablished under him. He was 59 years of age, the eldest and most experienced of a farm workforce at SFL. Mr Aberhart supported a younger partner and two school aged children. He had held his job, in effect with the same employer, for 15 years and not only worked but lived on the property. Although not absolute, Mr Aberhart had a substantial degree of responsibility for the operation and profitability of the Waingaro farm.

[82] Mr Aberhart can only be compensated for the consequences of his employer's unjustified actions or omissions that resulted in disadvantage to him in his employment. Mr Aberhart cannot be compensated for the consequences, economic or non-economic, of the loss of his job which was justified in all the circumstances. The disadvantages that Mr Aberhart suffered occurred during the period beginning as early as 24 June 2005 but ceased by 5 December 2005 at the latest when he was advised formally of the termination of his employment. The consequences of those unjustified disadvantages are not necessarily confined to that period however. Mr Aberhart continued to suffer from them but at the same time as suffering from non-economic consequences of his dismissal that are not compensable because the dismissal was justified.

[83] Mr Aberhart did not manifest many of the outward signs of humiliation, distress, embarrassment and the other human consequences of unjustified action for which s123(1)(c) requires the Court to compensate. I assess that absence of some (but not all) of the observable reactions of many people in that situation to be consistent with Mr Aberhart's general demeanour already noted. Without wishing to overgeneralise, he is not unlike many New Zealand farmers of his generation. He is

stoical, almost fatalistic in some respects, and sublimates his outward reactions to adversity. This does not mean, however, that these consequences are any the less real for Mr Aberhart and the evidence of his partner Ms Greene that I accept was a good indicator of the reality of the existence of these consequences for him. Knowledgeable and objective observers can understand that role disestablishment leading to dismissal for redundancy is not a criticism of an employee's work performance. However, longstanding, loyal and competent employees such as Mr Aberhart nevertheless suffer from real senses of failure, betrayal and disillusionment in their reasonable and lawful attempts to be fully involved in a process that is likely to have significant effects upon their employment and career, when they are deprived of that opportunity. That is especially when, as now, Parliament has specified the steps that a fair and reasonable employer must take in such circumstances. The feelings of powerlessness in a formulaic "consultation" that is in some respects just going through the motions are not to be underestimated. They translate into the *"humiliation, loss of dignity and injury to … feelings …"* of which s123(1)(c)(i) speaks.

[84] The evidence in this case does not go so far as to establish what may have happened had SFL dealt with Mr Aberhart in good faith as s4 requires. He may have applied for the drystock farm manager position although, against that, his second reason for not doing so (he felt he should not have to apply for his own job) may not have been dislodged. It is even more speculative whether Mr Aberhart might have been appointed to the position had he applied. Although I would not go so far as to conclude that his decision not to apply for the job was conduct that contributed to the personal grievance that should reduce his remedies (because the unjustified disadvantage was brought about by SFL's acts and omissions before the opportunity to apply was closed off), with the benefit of hindsight Mr Aberhart may have been better advised to have attempted to keep his options more open by applying for the new position.

[85] The Authority assessed compensation at $15,000 taking account of what was then the recent judgment of the Court of Appeal in *NCR*. Interpreting that judgment to say that most compensation awards for personal grievances should fall within a range up to about $27,000, I do not consider the circumstances of this case to be so extraordinary that consideration of a figure in a higher range should be given.

Fifteen thousand dollars is a little more than half of that range for unexceptional cases. The Authority Member had the advantage, as I have had, of observing Mr Aberhart give unchallenged evidence about the consequences to him of the unjustified disadvantage in his employment. We have both also heard from the other person best placed to give such evidence, Mr Aberhart's partner Ms Green. Although not referred to expressly by the Authority, I must nevertheless take into account the payment by SFL of ex gratia redundancy compensation that it was not required by contract to pay but nevertheless did, as it had signalled it would do from the outset. This was a responsible and sympathetic gesture on SFL's part and must have tempered somewhat the non-economic consequences to Mr Aberhart of his wrongful treatment by his employer.

[86] Although $15,000 awarded by the Authority is at the highest end of discretionary awards that could have been made for these consequences in the circumstances of this case, I am not prepared to conclude on the case heard by me that it was so wrong that a lesser award should be substituted.

[87] Both the challenge and the cross challenge to the Authority's decision awarding $15,000 compensation under s123(1)(c) are dismissed and its award is affirmed.

[88] Having concluded that Mr Aberhart's grievance is that he was unjustifiably disadvantaged in employment before he was dismissed, but that his dismissal by SFL was justified in all the circumstances, his challenge to other aspects of the Authority's determination must be dismissed. In case there may be any suggestion that Mr Aberhart should be reinstated in employment as a remedy for unjustified disadvantage, I have concluded that reinstatement would now be impracticable for the reasons set out earlier in this judgment.

[89] SFL's challenge is dismissed. I reaffirm the Employment Relations Authority's finding that Mr Aberhart has a personal grievance but that this is because he was unjustifiably disadvantaged in employment but not dismissed unjustifiably. Although differing from the Authority in the categorisation of the personal grievance and perhaps also in some reasoning, the substance of its determination is correct and SFL's claims must fail as do Mr Aberhart's.

[90] In these circumstances I reserve costs as the parties requested at the conclusion of the hearing but express my preliminary view as a result of the outcome of the challenge (but from which I am prepared to be persuaded by written submissions), that neither party should be ordered to contribute to the costs of the other. If either party seeks an order for costs, it or he should do so by written memorandum filed and served within one month of the date of this judgment with the respondent to such an application having the further period of one month to respond likewise.

GL Colgan
Chief Judge

Judgment signed at 3.45 pm on Thursday 14 September 2006

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