IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 16/07
CRC 8/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RUSSELL WAYNE RICHARD HARRIS Plaintiff
AND	CHARTER TRUCKS LIMITED Defendant

Hearing: 2 October 2006
(Heard at Christchurch)

Appearances: D G Beck, counsel for plaintiff
P M James, counsel for defendant

Judgment: 11 September 2007

JUDGMENT OF JUDGE A A COUCH

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[1] Russell Harris was employed by Charter Trucks Limited as a driver. For a period of 4 weeks or so ending on 5 September 2005, he was off work on accident compensation. When he returned to work, the company began a restructuring process which ended on 16 September 2005 when Mr Harris was given notice of dismissal on grounds of redundancy.

[2] Mr Harris believed his dismissal was unjustifiable and raised a personal grievance seeking reinstatement, compensation for distress and reimbursement of lost wages.

[3] During the period from his return to work on 5 September 2005 until his dismissal 11 days later, Mr Harris was directed by the company not to present

himself for work. Mr Harris regarded that as an unjustifiable action affecting his employment to his disadvantage and also raised a personal grievance to that effect.

[4] Mr Harris's personal grievances were investigated by the Employment Relations Authority which held an investigation meeting on 2 February 2006. In a determination issued on 22 March 2006 (CA 41/06), the Authority rejected both of Mr Harris's grievances. Mr Harris challenged that determination and the matter proceeded before the Court by way of a hearing de novo.

History and events

[5] Mr Harris is a middle aged man who has been a truck driver for effectively all of his working life. In 1979, he began work with Rapid Dispatch Carriers Limited. With three interruptions, during one of which he worked as a truck driver for another employer, Mr Harris worked for that company for 25 years. In November 2004, the business of Rapid Dispatch Carriers Limited was merged with that of Charter Trucks Limited. Mr Harris was offered continuing employment by Charter Trucks Limited which he accepted. This arrangement was recorded in a written employment agreement dated 21 December 2004.

[6] Charter Trucks Limited was managed by its managing director and principal shareholder, Noel Sutherland. It was he who decided to initially acquire an interest in Rapid Dispatch Carriers Limited and subsequently to merge the business of that company with Charter Trucks Limited. Mr Sutherland's evidence was that Rapid Dispatch Carriers Limited was running at a loss and that he saw an opportunity to improve its performance by merging the businesses and rationalising the larger organisation.

[7] During the first half of 2005, some rationalisation did occur. Overall staff numbers were reduced from 52 to less than 40 but this occurred largely through attrition. Staff who left were not replaced. It appears that there was also some rationalisation of equipment during this period.

[8] Mr Harris was a skilled and experienced truck driver. He gave evidence that, during his career, he had driven a wide range of vehicles. He also said that he had

done a range of other jobs associated with the transport business from dispatching to sweeping the floor. During the last several years of his employment by Rapid Dispatch Carriers Limited and during the time he was with Charter Trucks Limited, most of the work Mr Harris did involved use of a "*swing lift*" semi-trailer. This is essentially a specialised crane mounted on a trailer and used to load containers on and off other trucks. Operating a swing lift required training and experience. Mr Harris was particularly skilled at this work.

[9] Charter Trucks Limited had four drivers whose principal duties were to operate swing lifts. They included Mr Harris, Graeme Chinnery and James Naylor. The fourth swing lift operator for some time was Neville Mead but, in about July 2005, he moved to other driving duties and was replaced on the swing lift by another operator. Charter Trucks Limited owned four swing lifts and the practice was that each of these four machines was usually operated by one particular person. I infer from the evidence that part of the reason for this was that the four swing lifts were not all the same and that the operating controls varied significantly. While Mr Harris could operate all of the swing lifts, some of the other operators could not. As an example of this, Mr Chinnery gave evidence that, when asked to operate the swing lift normally used by Mr Harris, he had considerable difficulty in doing so.

[10] A major client of Charter Trucks Limited was Foodstuffs. A large part of the work Mr Harris did on a day to day basis was either at Foodstuffs' premises or involved handling goods belonging to Foodstuffs.

[11] When Mr Harris was initially presented with an employment agreement by Charter Trucks Limited in December 2004, he sought advice from an employment advocate, Robert Thompson. With Mr Thompson's assistance, issues regarding the form of the agreement and an associated document were quickly resolved and the agreement signed.

[12] Mr Thompson had no further involvement with the parties until 13 July 2005 when Mr Sutherland telephoned him to say that he had some issues with Mr Harris which they had attempted to discuss but which remained unresolved. Mr Sutherland suggested that Mr Thompson might be able to assist and asked Mr Thompson to

arrange a meeting between the three of them. Mr Thompson agreed, and at Mr Sutherland's request, the meeting was held in Mr Thompson's office. By way of preparation for that meeting, Mr Thompson asked Mr Sutherland to set out in a letter the issues for discussion. Mr Sutherland faxed such a letter to Mr Thompson later that day.

[13] Mr Sutherland listed the topics for discussion as:

> *Truck maintenance*
> *ACC (time off)*
> *Relations with other staff*
> *Break in at Shands Road*
> *Management employee relations (A Moore)*

There was no suggestion by Mr Sutherland, either in his telephone discussion with Mr Thompson or in his faxed letter, that the proposed meeting was of a disciplinary nature. Rather, it seemed to be a constructive attempt by Mr Sutherland to resolve issues relating to Mr Harris which were of concern to him.

[14] The meeting took place on 15 July 2005. The people present were Mr Thompson, Mr Sutherland and Mr Harris. By agreement, the meeting was recorded. Both the recording and a transcript of it were put in evidence but it is not necessary for the purposes of this decision to record and analyse the discussion that took place. Some of the issues were resolved by agreement. In respect of other matters, Mr Sutherland said that he regarded them as "*history*". The only outstanding issue related to Mr Harris working overtime. Mr Harris's position, supported by Mr Thompson, was that he was willing to consider any reasonable request to do overtime but that he would only do such work by agreement. Mr Sutherland did not dispute that but wanted an undertaking from Mr Harris that he would agree to do overtime on a regular basis. At the conclusion of the meeting, Mr Sutherland said:

> *The meeting today was to really confirm that as an employer Charter Trucks are happy to have Russell on our staff. That's the first thing, but from today on we would like Russell to work within the bounds of how the other people work and that will be weighed by your suggestions, by writing to Russell in the next couple of days about saying that there's going to be regular overtime between half an hour and hour every other day of the week.*

…

If there's no mutual agreement we will discuss that after a couple of weeks.

[15] One of the other issues discussed at the meeting on 15 July 2005 was the extent of Mr Harris's sick leave and time off work on accident compensation. The background to this was that Mr Harris had a long-standing shoulder injury covered by accident compensation. From time to time, Mr Harris experienced episodes of pain related to this injury and required time off work either on accident compensation or as sick leave. Mr Sutherland was fully aware of this injury and its ongoing effects when he offered Mr Harris continuing employment with Charter Trucks Limited in December 2004. As at July 2005, however, Mr Sutherland was concerned that Mr Harris had 51 days off work during the previous year. Mr Sutherland initially thought that some of this absence might not be for genuine reasons but, in the course of the meeting on 15 July 2005, he accepted that Mr Harris had properly supported all absences with medical certificates.

[16] It appears that, following the meeting on 15 July 2005, Mr Sutherland's concerns about Mr Harris were resolved and they resumed a good working relationship.

[17] On 8 August 2005, Mr Harris suffered an accident in the course of his work. When climbing into the cab of a truck, he slipped and fell onto a container, injuring his shoulder. As a result, Mr Harris was off work on accident compensation for 4 weeks until he was certified fit to resume work on 5 September.

[18] When Mr Harris reported for work that day, Mr Sutherland immediately asked him to participate in an re-enactment of the events which led to his injury. Mr Harris co-operated in doing this. Mr Sutherland then told Mr Harris to go to the board room where they had a meeting. Another member of management was also present. At that meeting, Mr Sutherland handed Mr Harris a pre-prepared letter which read:

Dear Russell

Please be advised I would like to hold a formal meeting regarding your position at Charter Trucks Limited.

You are entitled to have a representative or support person with you at this meeting and you are encouraged to do so. That person can be anyone of your choice, a fellow worker, a relative, a union delegate, your lawyer or a friend.

At the meeting I would like to discuss:

Your position and your time off work.

I will also discuss the possibility of your position being made redundant.

The meeting is to also provide you with the opportunity of putting forward any comments and suggestions you may have regarding the making of your position redundant.

We will also discuss your entitlements regarding redundancy as stated in your Employment Agreement (If applicable) and any assistance that may be offered should it become necessary to make your position redundant.

The meeting will be held at 45 Shands Road on Thursday 8th September 2005 at 2.15pm.

[19] As Mr Harris has a reading disability, he was unable to quickly read this letter for himself at the meeting and asked Mr Sutherland to explain what it was about. Mr Sutherland's evidence was that he then read the letter out almost word for word. Whatever Mr Sutherland said, however, Mr Harris immediately got the impression that Mr Sutherland had decided to dismiss him and the two men then had a discussion about doing a "*deal*". This discussion quickly came to nothing and Mr Harris asked if he could start work. Mr Sutherland replied that Mr Harris was not to work but that he would be on full pay. Mr Harris then went home.

[20] Later that day, Mr Harris telephoned Mr Sutherland. Mr Harris said that he wanted Mr Thompson to be present at the meeting called by Mr Sutherland but that Mr Thompson was on leave until the following week and therefore unavailable that Thursday. It was agreed that the meeting would be held the following Monday 12 September 2005, when Mr Thompson was available. In the course of this conversation, Mr Harris asked Mr Sutherland again when he could start work. Mr Sutherland told him he was not to return to work prior to the meeting on 12 September 2005.

[21] The meeting rescheduled for Monday 12 September 2005 took place as arranged. Mr Harris was there, represented by Mr Thompson. Mr Sutherland was

also there with the solicitor for Charter Trucks Limited, Mr James. This meeting was also recorded. Again, the recording and a transcript were put in evidence. I note, however, that the transcript was inaccurate in many respects, some of them significant. Accordingly, I have had regard to the recording rather than to the transcript.

[22] At the outset, Mr James took control of the meeting. He referred to Mr Sutherland's letter of 5 September 2005 and to both of the proposed topics of discussion which he described as "*the position, time-off work and the possibility of the position being made redundant*." Mr James then proceeded to make a lengthy statement dealing solely with the issue of restructuring and possible redundancy.

[23] As presented by Mr James, the company's position was that, as part of continuing rationalisation of the business, only three swing lift drivers were required rather than four. He then went on to say that the company proposed "*that Mr Russell Harris' position be made redundant and that he will be given two weeks notice*." The basis for selecting Mr Harris for redundancy was said to be that swing lift drivers "*must be prepared to be involved with other work and at present Mr Harris apparently shows no inclination to do that*." Having stated the company's position, Mr James said that Mr Harris was invited to make "*alternative proposals to that form of restructuring which would see his position not being made redundant*" but that any response had to be provided by 5pm on Thursday that week.

[24] In response to that opening statement, Mr Thompson immediately questioned the basis on which Mr Harris was being selected for redundancy. The response was that the basis for selection was the ability to do other work in the business. When asked to expand on that, Mr Sutherland said:

> *It's everything – everything that we do here from being in the store, unloading containers, sweeping the yard, cleaning trucks, servicing trucks, to furniture trucks, to flat deck trucks and flat deck truck and trailers and basically between the hours of 6 in the morning to 6 at night-6 days a week.*

[25] To this, Mr James added "*The situation is that the restructuring won't be able to cope with anyone that can't do all that work*." This statement was made in

the context of the view expressed by Mr Sutherland shortly beforehand that Mr Harris was unable to do certain work associated with flat deck truck driving because of his long-standing shoulder injury.

[26] After this brief interchange, Mr James attempted to draw the meeting to a close by reiterating that this was the company's position and that it was now for Mr Harris to present any alternative proposals by 5pm on Thursday.

[27] Mr Thompson clearly did not accept that the meeting should conclude so quickly and asked for further information about the proposed restructuring. This led to a somewhat terse exchange with Mr Sutherland telling Mr Thompson to "*shut up*." This prompted Mr Thompson to say that he and Mr Harris were not prepared to continue the meeting and that he would write to Mr James expressing their concerns. Mr James took that opportunity to say yet again that the company required any response to its proposal to be made by 5pm on Thursday and added that a decision would be made on Friday morning.

[28] Although Mr James clearly intended that statement to be the end of the meeting, discussion continued. One of the topics of discussion was what had been said at the meeting on 15 July 2005. When there was disagreement about this, Mr Thompson suggested that the recording be transcribed and a further meeting held once that had been done. Mr James then said adamantly that there would be "*no more meetings*". When Mr Thompson then sought further information and drew the company's attention to its statutory obligation to provide information as part of the duty of good faith, Mr James made it clear that no further information would be provided and said "*a decision will be made by 5pm Friday*."

[29] Shortly after that, there was a break in the meeting to enable Mr Harris and Mr Thompson to talk privately. When the meeting resumed, there was a good deal more discussion.

[30] Mr Harris told the meeting that he had done a wide range of other work associated with the business and gave an assurance that he would be willing to do whatever was asked of him. He also questioned whether other swing lift operators

had a similar range of experience. In response, Mr James said "… *there is only room for three swing lift drivers and the other three existing swing lift drivers are more adaptable or have been found by the employer to be more adaptable*."

[31] There followed a discussion about hours of work. Mr James said "*Mr Harris does not want to work overtime and is happy with his 8 hours per day. Mr Sutherland wants him to work beyond 40 hours. …Overtime is a big issue as everyone else works overtime except Mr Harris*." In response, Mr Thompson gave an assurance that Mr Harris was prepared to work the hours required by the company and that he was willing to work overtime by agreement.

[32] As the discussion progressed, Mr Thompson and Mr Harris questioned further the ability of the other swing lift drivers to do the wide range of work that Mr Harris had previously done and said he remained willing to do. In that context, Mr Thompson suggested that the company should consult with all affected employees. Mr James initially replied "*The employer does not need to consult with all employees*." Later, when Mr Thompson suggested more specifically that the four swing lift drivers should be consulted, Mr James said "*Well that may have been done but Mr Harris has never been party to that so we will look at that in considering 4 employees need to be consulted. I don't accept that, but we will consider it*."

[33] The next issue raised by Mr Thompson was why Mr Harris had been told not to come to work for the previous week. Mr James initially denied that this was so and then became evasive in his responses. Despite the question being asked at least four times by Mr Thompson, no clear answer was ever given by Mr James or Mr Sutherland. During this part of the meeting, Mr James became increasingly impatient, interrupting Mr Thompson several times and repeatedly trying to change the subject.

[34] The discussion then returned to the selection criteria being used by the company. Mr James said that the criterion was the "*work adaptability*" of the four swing lift drivers. In response to further questions from Mr Thompson, Mr James said "*They have made a decision of who is the least adaptable*" and confirmed that this was a reference to Mr Harris. There followed the following exchange:

Thompson *– And what objective test were they using to measure that by?*

James *– Because of his refusal or inability to take on other tasks that he was required to take on and that is just a historical matter that Mr Sutherland has articulated to me.*

Thompson *– Wouldn't it have been fair to put that to him before that assumption has been made?*

James *– It has been put to him. That is what we are doing at this meeting. If it is wrong we want Mr Harris to say so.*

Thompson *– So you are saying that he has refused to carry out tasks before?*

Harris *– No.*

James *– That is a position that is not accepted by the employer and no doubt it can be articulated if necessary but it is not accepted. Mr Harris has been very limited in the positions he would fulfil.*

[35] At that point, there was a break in the meeting while the tape was changed. Following that, Mr Harris said emphatically that he had never been asked to do any job other than his normal role as a swing lift operator and had therefore never refused to do other work. He also confirmed that such issues had never been discussed with him.

[36] Following this exchange, Mr Thompson said that he and Mr Harris were confused about the company's position. He questioned the company justifying its conclusions on the basis of an investigation in which Mr Harris had not been involved. Mr James replied that this meeting was his opportunity to be involved. Mr Thompson then questioned the company's position that Mr Harris should be selected for redundancy on the basis of a conclusion that he was less adaptable than the other swing lift drivers when that proposition had never been put to him or discussed with him. Mr James disputed that this was so and implied that such discussion had taken place at the meeting in Mr Thompson's office on 15 July 2005.

[37] It was then agreed that Mr Thompson would provide the tape recording of the meeting on 15 July 2005 to Mr James who would have it transcribed. The meeting ended shortly after that.

[38] On 15 September 2005, Mr Thompson faxed a letter to Mr Sutherland. The text of that letter was:

> *We refer to our recent meeting on 12 September 2005. We are required to provide a submission on alternatives to redundancy. Our client does not accept that the process that has been adopted is fair or reasonable. Our client has not been provided with all of the relevant information and feels somewhat ambushed by the Company's actions. The process for selecting our client is flawed and lacks natural justice. In addition to this, our client has been on paid suspension since 5 September 2005. We submit that to suspend or not allow our client to attend work is an unjustified action causing a disadvantage.*
>
> *It must be noted that we are aware that a decision is to be made on Friday 16 September 2005. We submit that you do not have enough information to make a decision on our client's future employment. Furthermore, you have not engaged in a genuine process of consultation.*
>
> *We look forward to receiving additional information and a clarification of the justification. We also seek a copy of the transcript of the meeting held on 12 September 2005. This information will enable our client to consider all options available to him.*
>
> *We look forward to hearing from you urgently.*

[39] Mr Sutherland responded by fax later that afternoon saying that Mr Thompson should direct his fax and anything further he wished to say to Mr James. He noted that he planned to have a meeting with Mr James the following day at 2pm and said that anything Mr Thompson wished to say would be considered by them at that meeting.

[40] At about the same time, a copy of a transcript of the tape recording of the meeting of 12 September 2005 was faxed to Mr Thompson from Mr James's office.

[41] At about 3pm the following day, Friday 16 September 2005, Mr James faxed a letter to Mr Thompson. In that letter, Mr James referred to Mr Thompson's letter of 15 September 2005 but did not address the issues raised in it. Mr James said only "*Rather unfortunately no proposals came through from you and/or Mr Harris other than your letter of the 15th September which did not set out any alternatives that could be considered*". Mr James then set out the company's position as follows:

> *1* *A necessity to restructure so there is one less swing lift driver.*
>
> *2* *The remaining swing lift drivers be available to attend to all facets of the wide-ranging transport business operated by Charter Trucks Limited.*
>
> *3* *After considering all matters and looking at all options to try and avoid the redundancy, our client has come to the conclusion that they need to restructure and the person whose position has become redundant is that of Mr Harris.*

[42] Mr James went on to say that Mr Harris was being dismissed on this basis with 2 weeks' notice but that he would not be required to work out that period. Mr Harris was invited to collect his final pay from the company's premises and required to return a list of company property. As this letter was sent to Mr Thompson, he was obliged to tell Mr Harris of his dismissal.

[43] Two of the other three swing lift drivers employed by Charter Trucks Limited at the time Mr Harris was dismissed, Mr Chinnery and Mr Naylor, gave evidence. The unchallenged evidence of them both was that they knew nothing at the time about a restructuring taking place in September 2005. Neither Mr Sutherland nor anyone else on behalf of the company ever spoke to them about reducing the number of swing lift drivers or about their willingness to do alternative work. It also emerged from the evidence that other staff at Charter Trucks Limited were not told that Mr Harris had been dismissed or why.

[44] I also heard evidence from Mr Mead, who had been a swing lift driver and was employed at the time in question as a general driver. On 3 October 2005, he gave 1 week's notice of his resignation. Mr Mead said that he left Charter Trucks Limited in order to travel overseas and that he had been discussing his intention to do so with co-workers prior to giving his resignation. Mr Mead said that he learned of Mr Harris's dismissal on 6 October 2005, 3 days after he had given his resignation. Mr Mead finished his employment with Charter Trucks Limited on 10 October 2005.

[45] On Saturday 22 October 2005, Charter Trucks Limited placed an advertisement in the situations vacant column of the Christchurch Press for a truck driver. This was described as a full time position for container cartage and general freight and that "*Swinglift experience would be an advantage*".

[46] Shortly after that, a new employee named Tim Stevens began working for Charter Trucks Limited. Mr Naylor said that Mr Stevens worked full time as a driver, doing similar work to that which he and other drivers were doing. This included driving container trucks and operating a swing lift. Mr Sutherland said in his evidence that Mr Stevens had been employed as a "*management cadet*". When that proposition was put to Mr Naylor, his response was that, having worked with Mr Stevens and having got to know him, he did not think Mr Stevens was "*a management sort of type of guy*" and that he never saw Mr Stevens in the office involved with clerical work. Mr Naylor was clear in his evidence that Mr Stevens was a truck driver. I was provided with a copy of a letter from Mr Stevens to the company dated 15 January 2006 in which he said that he did not wish to renew his temporary employment agreement which was due to expire at the end of that month. Under his signature on that letter, Mr Stevens put his name and described himself as "*Driver*". The letter contained no reference to his having been engaged as a management cadet or as anything other than a driver.

[47] In November 2005, Charter Trucks Limited lost Foodstuffs as a client. Day to day work finished on 25 November 2005 and, while some work remained to be done for a few weeks after that, it was finished by 1 December 2005. Mr Sutherland had been aware since May 2005 that Charter Trucks Limited might lose the

Foodstuffs work and the increasing likelihood that this would occur. I return to this issue in more detail later in this judgment.

Issues

[48] In the context of these events, the issues which arise out of the plaintiff's claims are:

a) Whether Mr Harris's dismissal was genuinely for reasons of redundancy.

b) Whether the restructuring process carried out by Charter Trucks Limited was fair and in accordance with its obligation of good faith to Mr Harris as an employee.

c) Whether the selection of Mr Harris for redundancy was justifiable.

d) Whether Mr Harris's dismissal for redundancy was implemented appropriately.

e) Whether Mr Harris was disadvantaged in his employment by being directed not to work from 5 September 2005 onwards.

f) If so, whether Mr Sutherland's action in directing him not to work was unjustifiable.

[49] These issues fall to be decided by reference to fundamental principles set out in the Employment Relations Act 2000. In applying those principles, I have regard not only to the events outlined above but also to the motivation for the decisions made on behalf of Charter Trucks Limited. This emerged largely from the evidence of Mr Sutherland.

Statutory principles

[50] The key statutory principle applicable to this case is that set out in s103A of the Employment Relations Act 2000:

> ***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*

[51] With very few possible exceptions, a "*fair and reasonable employer*" will comply with the obligations imposed on employers generally by the Employment Relations Act 2000. Those obligations include the duty of good faith as set out in the following provisions of s4 of the Act:

> ***4 Parties to employment relationship to deal with each other in good faith***
>
> *(1) The parties to an employment relationship specified in subsection (2)—*
>
> *(a) must deal with each other in good faith; and*
>
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
>
> *(i) to mislead or deceive each other; or*
>
> *(ii) that is likely to mislead or deceive each other.*
>
> *(1A) The duty of good faith in subsection (1)—*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
>
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
>
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

Evidence of Mr Sutherland

[52] The impression given by Mr Sutherland and Mr James at the meeting on 12 September 2005 was that the proposal to reduce the number of swing lift drivers from four to three was simply part of an ongoing rationalisation flowing from the merger of the two businesses in late 2004. At the same time, Mr Harris was told that the sole criterion for selection was adaptability in the sense of ability to do other jobs within the business. These impressions were reinforced in Mr James' letter of 16 September 2005 giving notice of Mr Harris's dismissal.

[53] In his evidence-in-chief, Mr Sutherland revealed that the company's actions had been motivated by several other factors. He said firstly that, while Mr Harris had been off work in August 2005, other staff had been able to cover his absence without difficulty and that the vehicle normally used by Mr Harris had largely been idle. Mr Sutherland said that this prompted him to do an analysis of swing lift usage over a 6- week period beginning the week before Mr Harris's accident. In answer to questions in cross-examination and from the Court, Mr Sutherland confirmed that he completed this analysis prior to the meeting on 12 September 2005 and that it was an important factor in his decision. He also confirmed that this analysis was not mentioned at the meeting and that its content was not disclosed to Mr Harris or Mr Thompson.

[54] Mr Sutherland also revealed in his evidence–in-chief that another significant factor in his decision to dismiss Mr Harris was that he knew the company was likely to lose the Foodstuffs contract. He said that he knew this would inevitably reduce the company's need for swing lift operators and, because Mr Harris was largely doing work associated with Foodstuffs at that time, he decided Mr Harris should be the one to go. In answer to questions in cross-examination and from the Court, Mr Sutherland said that he had been aware since May 2005 that Charter Trucks Ltd may lose the Foodstuffs contract and that, by September 2005, this was almost certain. He also confirmed that he deliberately did not mention this to Mr Harris or to Mr Thompson. When asked why he had not told Mr Harris, Mr Sutherland said that he regarded such information as "*none of his business*."

[55] In his oral evidence, Mr Sutherland gave further insights into his motivation for dismissing Mr Harris. He initially said that while Mr Harris was away from work on accident compensation in August and early September 2005, the business had run perfectly well without him. When pressed in cross-examination to expand on that statement, Mr Sutherland said that he selected Mr Harris for redundancy because he was the one who had been away. When Mr Sutherland was then asked if Mr Naylor had been off work for 3 weeks would he have been the one dismissed. Mr Sutherland answered *"Possibly."*

[56] Also in his oral evidence, Mr Sutherland shed more light on the restructuring process adopted by the company. He said that the timing was driven by a meeting he had with the company's accountants on or about 1 September 2005. At that meeting, a further meeting was scheduled for 16 September 2005. In Mr Sutherland's mind, that became a deadline for completion of the restructuring process. When asked why he did not respond to the concerns expressed in Mr Thompson's letter of 15 September 2005 and the request for further information, Mr Sutherland said that he had *"tunnel vision"*.

[57] Mr Sutherland confirmed that no staff other than Mr Harris were spoken to in the course of the restructuring process. When initially asked by Mr Beck asked why not, he said that he did not want to disturb the smooth running of the business. As Mr Sutherland put it *"If everybody's happy why rock the boat."*

[58] Mr Beck returned to this issue later in his cross-examination of Mr Sutherland when the following exchange occurred:

Mr Beck:	*Okay you've done an analysis. What input did you get from the other drivers on that analysis?*
Mr Sutherland:	*Zero.*
Mr Beck:	*Zero. Did you think that it would have been a good idea to ask them about it?*
Mr Sutherland:	*No.*
Mr Beck:	*Why not?*
Mr Sutherland:	*I run the business.*

[59] Later, it was put to Mr Sutherland that, if Mr Harris was dismissed because of the loss of the Foodstuffs contract, it would have been fair to him to extend his employment until that contract concluded on 1 December 2005. Mr Sutherland replied simply "*Business isn't fair*."

[60] In the course of the meeting on 12 September 2005, Mr James was recorded as saying that the company would have regard to three points made by Mr Harris in the course of the meeting. When asked in cross-examination about how those issues had been addressed, Mr Sutherland's immediate reply was "*There were none raised.*" In answer to further questions, Mr Sutherland said that he took no notes at the meeting, relying on the tape recording. He subsequently said that he had never listened to the tape recording or read the transcript of it.

[61] Another topic dealt with in Mr Sutherland's oral evidence was the resignation of Mr Mead. Mr Sutherland said that, at the time Mr Harris was dismissed, he did not know Mr Mead was intending to leave. He also agreed that Mr Harris was a good worker and that he had no problems with Mr Harris on the job. That led to three significant exchanges in the course of questions I asked of Mr Sutherland. The first was:

> *Court:* *If you had known on the 15th of September Mr Mead was planning to leave, would you have dismissed Mr Harris?*
>
> *Mr Sutherland:* *No Mr Harris could have driven his truck. There's no problem.*

[62] The next exchange was:

> *Court:* *There's one other issue that your evidence has been rather equivocal on that I just want to be clear what you are saying. Was Mr Harris's injury or his record of sickness a factor which you took into account in your decision to dismiss him?*
>
> *Mr Sutherland:* *No. If Mr Mead had given his notice three weeks earlier or a month earlier Russell could have transferred over to that truck.*

[63] Later, the following exchange took place:

> *Court:* *No, I'm putting you back into September last year. That if you had consulted the other drivers about the need to reduce the number of swing lift drivers from four to three,*

> *you may well have found out then that Mr Mead wanted to leave and you would have had no need to dismiss Mr Harris. Has that ever occurred to you?*
>
> *Mr Sutherland: No.*

[64] Mr Sutherland confirmed that he had told Mr Harris not to come to work from 5 September 2005 onwards. In his evidence-in-chief, he said that the reason for doing so was *"to enable me as the employer to carry out an operational review"*. When questioned further about this in cross-examination, Mr Sutherland changed his position by saying that the reason was the other drivers were covering well for Mr Harris's absence and that there was no work for him to do. Mr Sutherland maintained that position despite agreeing that other drivers were doing overtime while Mr Harris was prevented from working.

Genuine Redundancy?

[65] In the statement of claim, it was alleged that Mr Harris was dismissed for reasons other than redundancy. As Mr Beck acknowledged in his submissions, it is difficult to establish such an allegation. The scope of an employer's right to manage its business is wide and includes the right to restructure for genuine business reasons. In this case, however, the conduct of the employer was such that it is understandable that Mr Harris believed the redundancy might not be genuine.

[66] At the meeting on 15 July 2005, Mr Sutherland raised the suggestion that Mr Harris had inappropriately been taking sick leave or time off on accident compensation. Having been compelled to admit that he may have been wrong about this, Mr Sutherland again raised the issue of Mr Harris's time off work less than 2 months later on 5 September 2005, the day Mr Harris returned from a period on accident compensation. In the letter he gave Mr Harris that day, it was one of the two topics he specified for formal discussion, along with possible redundancy. While Mr Sutherland, may not have intended to link the two concepts, the connection in Mr Harris's perception was almost inevitable. The inference was strengthened by the suspension of Mr Harris without discussion or warning. At the meeting on 12 September 2005, the inference was strengthened further when Mr James linked the two concepts at the very start of the meeting and later referred to concern about Mr Harris's time off work in the context of a discussion about

selection for redundancy. Given that the restructuring was said to involve the positions of four staff, the fact that Mr Harris was the only employee spoken to could only have strengthened the inference still further.

[67] Notwithstanding these events and the suspicion they inevitably aroused, I do not find that the dismissal was for reasons other than redundancy. Mr Harris was not replaced and it appears that the company carried on with three swing lift operators.

The restructuring process

[68] There can be no doubt that the restructuring process conducted on behalf of Charter Trucks Limited was seriously flawed in many respects.

[69] A fundamental flaw was the failure to consult all employees potentially affected by the proposed restructuring. At the meeting on 12 September 2005, Mr James was at pains to say repeatedly that the proposal was to reduce the number of swing lift operators from four to three. At the very least, all four operators should have been involved in the process and, to be truly fair, the inquiry should have extended further.

[70] A fair and reasonable employer will not dismiss an employee if there is a sensible alternative. Mr Sutherland's evidence was that he would have been happy for Mr Harris to have remained in the company's employment doing the work Mr Mead was doing. By September 2005, that was principally driving a truck. A fair employer in Mr Sutherland's position would therefore have gone beyond the swing lift operators and enquired whether any drivers might be intending to leave or wished to take voluntary redundancy. Either option would have been cost neutral to the company and avoided the dismissal of Mr Harris.

[71] Another fundamental flaw in the restructuring process was the failure by Mr Sutherland and Mr James to make proper disclosure of information to Mr Harris and Mr Thompson. The duty of good faith imposed by s 4 of the Employment Relations Act 2000 required full and candid disclosure of all information relevant to the restructuring process not only to Mr Harris but also to the other employees potentially affected by it. That is the effect of s 4(1A)(c).

[72] That information undoubtedly included the analysis of vehicle usage Mr Sutherland said he had completed prior to the meeting and which influenced his decision. In my view, it also included the very likely loss of the Foodstuffs contract.

[73] In expressing that view, I am mindful of subsections (1B) and (1C) of s4 which provide:

> *(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.*
>
> *(1C) For the purpose of subsection (1B), good reason includes—*
>
> *(a) complying with statutory requirements to maintain confidentiality:*
>
> *(b) protecting the privacy of natural persons:*
>
> *(c) protecting the commercial position of an employer from being unreasonably prejudiced.*

[74] Mr Sutherland said that he did not mention anything about the Foodstuffs contract to Mr Harris and Mr Thompson because it was confidential. While I accept that he genuinely believed that to be so, the test under subsections (1B) and (1C) is not the subjective belief of the employer. Rather, in a case such as this, the test is whether the commercial position of the employer would have been unreasonably prejudiced by the disclosure. That is an objective test. Mr Sutherland's evidence was that, by the time the meeting on 12 September 2005 was held, the loss of the Foodstuffs contract was virtually certain. The work was being divided and put out to tender. Charter Trucks Limited had been excluded from that tender process. In such circumstances, I find that the commercial position of Charter Trucks Limited would not have been prejudiced at all, let alone unreasonably so, by disclosing to Mr Harris that the Foodstuffs contract was going. This is consistent with Mr Sutherland's reliance on the loss of the Foodstuffs contract to justify the restructuring. Had he believed the contract could be retained or alternative work for Foodstuffs secured, he would not have relied on this issue.

[75] Other aspects of the manner in which the restructuring process was conducted were also in breach of the company's duty to act in good faith. Section 4 (1A)(b) of the Employment Relations Act 2000 required Charter Trucks Limited to be active

and constructive in maintaining the employment relationship. This included being responsive and communicative.

[76] The manner in which the meeting on 12 September 2005 was conducted by Mr James and Mr Sutherland fell far short of those obligations in many respects. Throughout the meeting, Mr Thompson asked for information which was clearly relevant to the restructuring process. Many of the responses were oblique or unhelpful. The little information which was provided in response to Mr Thompson's questions was provided grudgingly. Throughout the meeting, Mr James was anxious to bring it to an end and declared part way through that there would be no other meetings. He frequently interrupted Mr Harris and Mr Thompson when they were speaking. Mr Sutherland denied that he was aggressive but he clearly gave that impression to Mr Harris and Mr Thompson.

[77] This situation was aggravated by the company's response to Mr Thompson's letter of 15 September 2005. That letter unquestionably required a thoughtful and constructive response. By ignoring what was said in the letter, the company was being neither constructive nor responsive. This constituted a serious breach of the duty of good faith.

[78] Another fundamental flaw in the company's approach to the restructuring process was that Mr Sutherland did not approach it with an open mind. Indeed, it is clear from the evidence that the final outcome was determined at an early stage. Mr Sutherland's evidence was that Mr Harris was selected for redundancy because he was the one who was absent during the latter part of August. This was reflected in the process adopted on behalf of the company. From the outset, Mr Harris was isolated as the only employee whose job was at risk. Although the process was said to relate to at least four employees, Mr Harris was the only one even made aware that a restructuring process was being conducted. Throughout the meeting on 12 September 2005, the only potential outcome of the process suggested on behalf of the company was that Mr Harris would lose his job. Mr Sutherland's evidence was that he took no notes of what was said at the meeting on 12 September 2005. He said that he relied instead on the recording of the meeting to refresh his memory but admitted that he had never listened to the recording or looked at the transcript of it.

During the meeting on 12 September 2005, Mr James was at pains to say that three specific statements made by Mr Harris would be taken into account yet Mr Sutherland thought Mr Harris had said nothing he needed to consider. As Mr Sutherland said in his evidence, he had *"tunnel vision"*.

[79] In his submissions, Mr James relied on the decision of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] ERNZ 660. He submitted that the level of consultation in this case was much greater than in *Baguley's* case and, by implication, sought to persuade me that this rendered the employer's conduct in this case acceptable.

[80] I do not accept that submission. What it overlooks is that it was the nature and quality of the consultation carried out in *Baguley's* case which was found to be unfair and in breach of the employer's duty of good faith. The quality of consultation in this case was far less acceptable than even that in *Baguley's* case. Here, the employer not only withheld the true reason for the restructuring but also misled the employee as to the criteria for selection and predetermined the outcome.

[81] It must be noted also that the decision in *Baguley* proceeded on the view expressed in paragraphs [38] to [42] of the judgment by the Court of Appeal that the obligation of good faith imposed by s 4 of the Employment Relations Act 2000 was essentially similar to the obligations of trust and confidence discussed and applied in its decisions in *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 and *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739. Since then, s4 has been substantially amended by the introduction of what are now subsections (1A) to (1C). Section 4(1A)(a) now expressly provides that the obligation of good faith is "*wider in scope than the implied mutual obligations of trust and confidence*."

[82] On the evidence, I am driven to the conclusion that the decision to dismiss Mr Harris was made at an early stage and that the restructuring process undertaken was no more than a cynical attempt to dress up as fair what was fundamentally unfair. Charter Trucks Limited was seriously in breach of its duty of good faith to Mr Harris and its actions were certainly not what a fair and reasonable employer would do.

[83] In conclusion on this issue, I find that the seriously flawed process adopted by Charter Trucks Limited rendered the dismissal of Mr Harris unjustifiable.

Selection

[84] In light of the evidence given by Mr Sutherland, the selection of Mr Harris for redundancy cannot be justified.

[85] The ultimate selection criterion used was that Mr Harris happened to be the employee off work at the time Mr Sutherland carried out his analysis of the work of swing lift drivers. Such an arbitrary criterion is entirely unreasonable and unfair. The selection of Mr Harris for redundancy was therefore unjustified on the criterion actually used.

[86] On the evidence, it is not possible to justify the selection of Mr Harris on any reasonable criteria. Mr Sutherland himself acknowledged that Mr Harris was an experienced driver who had a good work ethic. Mr Harris's evidence that he was able to do perform a wide range of duties was unchallenged and, to a large extent, this was accepted by Mr Sutherland. On the other hand, very little evidence was given about the skills, experience and personal attributes of the other three swing lift operators employed by Charter Trucks Limited at the time. It is therefore not possible to make any form of meaningful comparison between the four men.

[87] The only objective factor Mr Sutherland could point to was that he believed Mr Harris's long-standing shoulder injury would make it difficult for him to throw retaining straps over a load on a flat deck truck. As this proposition was not put to Mr Harris in cross-examination, however, it is difficult to put much weight on it. It is also fundamentally inconsistent with Mr Sutherland's evidence that he would have been happy for Mr Harris to take over Mr Mead's position. When Mr Mead resigned in October 2005, his duties included driving a flat deck truck. In any event, Mr Sutherland acknowledged that he was well aware of Mr Harris's long-standing injury at the time he offered Mr Harris continued employment in December 2005 and it would only be in unusual circumstances that a disability accepted by the employer could be relied on to justify selection for redundancy.

[88] In conclusion on this issue, I find that the selection of Mr Harris for redundancy also rendered his dismissal unjustifiable.

Implementation of dismissal

[89] In *Aoraki Corp Ltd v McGavin*, the Court of Appeal discussed the manner in which a good employer would implement a dismissal for redundancy. The majority said in their judgment at p619:

> *A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decisions in a fair and sensitive way. The procedural fairness standard will determine the period of notice or payment in lieu which recognises that commercial circumstances may dictate that redundancies take immediate effect. It is a matter of how long would a just employer provide for in treating the employee fairly. Where the contract is silent as to the redundancy notice period and payment in lieu, the contractual period for terminating on notice and in the absence of any contractual provisions the common law requirement of reasonable notice in the circumstances, may help in striking a reasonable balance between employee and employer, but modified to recognise that the employment is being terminated in a redundancy situation and the inevitable impact on the employees of the manner in which it is done and the time involved. As well, fair treatment may call for counselling, career and financial advice and retraining and related financial support. No doubt other considerations will be relevant in particular cases.*

[90] In this case, Charter Trucks Limited failed almost entirely to meet this standard. I note five particular aspects in which this was so.

[91] Communicating the dismissal to Mr Harris by means of a letter from the company's lawyer faxed to his advocate was grossly insensitive. A proper approach would have been for Mr Sutherland to have told Mr Harris of his dismissal in a private meeting and in circumstances where a support person was available to Mr Harris if he wished.

[92] Charter Trucks Limited appears to have given no consideration to what was an appropriate period of notice. The applicable employment agreement provided for *"at least two weeks notice of termination"* on grounds of redundancy. Although Mr Harris had only been employed by Charter Trucks Limited since December 2004, he

had been employed in the business for more than 25 years with only a few breaks. Being dismissed and having to find alternative employment was obviously going to be a traumatic and difficult process for Mr Harris. A fair and reasonable employer would have recognised that and given consideration to providing Mr Harris with a longer period of notice than the bare minimum stipulated in the employment agreement.

[93] Charter Trucks Limited elected to pay Mr Harris in lieu of notice rather than allow him to work out the period of notice. This was not a situation where there was no work that Mr Harris could do. While it appears the company was able to cope with Mr Harris's absence, that was achieved to an extent through other staff doing overtime. I note also the evidence of Mr Naylor that, during the period leading up to and immediately following Mr Harris's dismissal, the business appeared very busy. Equally, this was not a case where there was any other good reason to keep Mr Harris out of the work place. In this regard, I do not accept the suggestion made by Mr Sutherland that having Mr Harris return to work would have disrupted an otherwise harmonious work environment. I prefer the evidence of Mr Mead, Mr Chinnery and Mr Naylor that Mr Harris was an excellent worker who was well liked by his colleagues. The effect of paying Mr Harris in lieu of notice and keeping him out of the workplace was to deprive him of the dignity of working and of being able to say goodbye to his colleagues as equals.

[94] Mr Sutherland did not tell other staff at Charter Trucks Limited what had happened to Mr Harris. He simply disappeared from the work place, never to be mentioned again. Handling Mr Harris's dismissal in this manner invited others to speculate and to draw wrong conclusions. That was entirely unnecessary. It also prevented other staff from having a farewell function for Mr Harris and from offering support in what was inevitably a very difficult time for him.

[95] Charter Trucks Limited offered Mr Harris no support or assistance in coping with the effects of dismissal in circumstances where he had done no wrong and had no alternative employment prospects. This was a case in which a fair and reasonable employer would have provided the type of assistance referred to by the Court of Appeal in the passage from *Aoraki* set out above.

[96] The failure of Charter Trucks Limited to implement Mr Harris's dismissal appropriately was so serious as to further render his dismissal unjustifiable.

Suspension

[97] Although Mr Sutherland was reluctant to accept the use of the word "suspension" to describe his treatment of Mr Harris from 5 September 2005 onwards, that is undoubtedly what it was. Mr Harris was deprived of the opportunity to work and kept out of the workplace against his will.

[98] It is well established that the employment relationship creates an obligation on the employer to do more than simply pay wages. Employees have a right to work. Other than by agreement or for good reason, the employer should provide the employee with work and allow the employee to do that work. By suspending him, Mr Sutherland deprived Mr Harris of one of the benefits of his employment he was entitled to have. The suspension therefore inevitably affected Mr Harris's employment to his disadvantage and the only issue is whether that suspension was justifiable.

[99] In this case, the employment agreement between the parties provided for suspension but only in a disciplinary context. Mr Sutherland agreed there was no disciplinary issue with Mr Harris. Charter Trucks Limited therefore had no contractual right to suspend Mr Harris and he certainly did not agree to it. On the contrary, he twice asked to return to work.

[100] Other than in a very few exceptional circumstances, a fair and reasonable employer will give an employee an opportunity to be heard before deciding to suspend the employee. In this case, Mr Sutherland did not give Mr Harris such an opportunity and offered no reason for his failure to do so. On procedural grounds alone, therefore, the suspension was unjustifiable.

[101] Mr Sutherland nonetheless attempted to justify the suspension substantively on the grounds that the work which would otherwise have been done by Mr Harris was being done by other staff. As noted earlier, that involved other staff doing overtime but, in any event, it could not justify suspension of Mr Harris. If there was

insufficient work to keep four swing lift operators busy, there were many options open to Mr Sutherland other than suspension of Mr Harris. Overtime could have been eliminated. Staff could have been given other work to do, including such things as deferred maintenance. Staff could have been encouraged or required to take annual holidays. As a last resort, the work available could have been shared amongst the four men equally. For the reasons given earlier, I do not accept Mr Sutherland's assertion that to have done so would have caused disruption.

[102] Mr James submitted that the suspension of Mr Harris was justifiable because this enabled the company to effectively put one of its swing lifts out of use and thereby effect cost savings. I reject that submission. As a matter of logic, the cost to the company of using the swing lifts must have been proportional to the volume of work done, rather than the number of machines used. In any event, it was not necessary to suspend Mr Harris to change the number of swing lifts in use. Mr Harris was able to operate all four swing lifts. If the company had wished to use only three machines excluding the one Mr Harris normally operated, he could therefore have operated any of the ones in use.

[103] I find that the suspension was substantively unjustifiable as well as the result of an unfair process.

Findings and remedies

[104] For the reasons set out above, I find that Mr Harris was unjustifiably dismissed. I have also found that his suspension constituted an unjustifiable action which affected his employment to his disadvantage.

[105] In many cases, an unfair process leading to a dismissal for redundancy will result in an award of compensation for the distress caused by the process but not to remedies for loss of the job. This is because it can properly be said that the redundancy was genuine and that the employee would inevitably have been dismissed for redundancy even if an appropriate process had been followed.

[106] This is not such a case. I have found as a fact that the selection of Mr Harris for redundancy was unjustifiable. Thus, it cannot be said with any certainty which of

the potentially affected employees of Charter Trucks Limited would have been selected for redundancy if a proper process had been followed.

[107] In the unusual circumstances of this case, it is possible to go further. It is very likely that, had a proper process been followed, no dismissal for redundancy would have been necessary at all. Rather, the employee selected for redundancy could have been redeployed to the position vacated by Mr Mead.

[108] Mr Mead gave notice of his resignation on 3 October 2005. Prior to that, he had been discussing his intention to leave with other staff for a period he was unable to specify with certainty but which he estimated to be about 2 weeks. Mr Mead said in his evidence that, if he had been consulted about possible redundancies, he would have *"considered voluntary redundancy"*. I infer from this that he would have mentioned his intentions to management if he had been consulted at the same time as Mr Harris.

[109] Mr Harris was given 2 weeks' notice of his dismissal on 16 September 2005. The dismissal did not therefore take effect until 30 September. On Mr Mead's evidence, his intention to leave was certainly known to other staff before that date. Had a proper process been followed, including consultation with all of the swing lift operators, it is very probable that Mr Mead's intentions would have been mentioned to Mr Sutherland by one of them. Alternatively, had Mr Harris not been suspended, he would also have been aware of Mr Mead's intentions and would certainly have mentioned this to Mr Sutherland.

[110] Mr Sutherland said that, had he been made aware of Mr Mead's intention to leave, he would have been happy to continue employing Mr Harris in Mr Mead's position. This is consistent with what a fair and reasonable employer in Mr Sutherland's position would have done. I have no doubt that, if this occurred after he had been given notice of dismissal, Mr Harris would have agreed to that notice being withdrawn.

[111] For these reasons, it is appropriate to award remedies to Mr Harris not only for the distress arising out of the manner in which he was treated prior to his dismissal but also remedies relating to the loss of his employment.

[112] Mr Harris gave evidence that he was distressed and frustrated by the events following his return to work on 5 September 2005 and his dismissal. This included his suspension and the restructuring process adopted by the company.

[113] Mr Harris said that his dismissal was a severe blow to him. He said that he enjoyed his job and spoke of the long-standing relationships he had developed with clients and with other staff members. He was a single man living alone and the loss of work related contact affected him greatly. Following his dismissal, Mr Harris became withdrawn and suffered increased symptoms of asthma which he attributed to losing his job. He spoke with particular emotion about the effect on his relationship with his young grandson and his embarrassment at having to tell friends that he had lost his job.

[114] Following his dismissal, Mr Harris made efforts to obtain alternative employment. More than a year later, he had been unable to do so and was undertaking retraining as a welder. It was clear from Mr Harris's evidence, however, that he felt there was little likelihood that such a job could give him the satisfaction he enjoyed as a driver.

[115] Mr Harris's daughter also gave evidence about the effects on her father of his dismissal. She elaborated on the importance of Mr Harris's position as a driver to his self esteem and to his relationship with her son. She said that Mr Harris was very distressed when he had to tell the boy that he could no longer ride in trucks with his grandfather. She went on to say that Mr Harris had become withdrawn from other family relationships and that he had largely lost his former lively personality.

[116] I assess the effects of the dismissal on Mr Harris as relatively severe. He was a man whose social status and pride depended significantly on his position of employment. He was dismissed from a job he had been in for virtually all of his adult life. Having regard to the awards made in broadly comparable cases, I

conclude that an appropriate award of compensation for distress arising out of the dismissal is $12,000.

[117] Mr Harris is also justly entitled to reimbursement of some of the wages he has lost as a result of his dismissal. In all, he has lost more than a year's wages and there was no evidence to suggest that, but for his unjustified dismissal, he would not have continued to work for Charter Trucks Limited for an extended period. Indeed, the evidence was that, since Mr Harris was dismissed, other drivers have been employed by the company. Making some allowance for contingencies, Mr Harris is awarded 9 months' wages.

[118] There was no evidence about the rate of wages paid to Mr Harris prior to his dismissal. For the purposes of reimbursement, I direct that the sum to be paid to him as reimbursement of lost wages be calculated on the basis of his average rate of earnings during the last 6 months of his employment from 1 April to 30 September 2005. During that period, Mr Harris was receiving accident compensation for several weeks. No deduction should be made for that. Rather, his rate of earnings while in receipt of accident compensation should be calculated as if he had worked 40 hours per week during that time. If the parties are unable to agree on the necessary calculations, the matter should be referred back to me with evidence of Mr Harris's earnings during the period mentioned.

[119] Mr Harris is also justly entitled to interest on the reimbursement for loss of wages. This will be at the rate of 8 percent per annum from 15 February 2006 down to the date of payment.

[120] I award Mr Harris a further $500 for distress arising out of the suspension.

[121] Having found that Mr Harris's personal grievances have substance, I am required by s124 of the Employment Relations Act 2000 to consider the extent, if any, to which Mr Harris may have contributed to the situation giving rise to his personal grievances. I find that he did not contribute to that situation at all and that, accordingly, the remedies awarded to him should not be reduced on that account.

Summary

[122] In summary, my judgment is:

a) The challenge is allowed. The substantive determination of the Authority is set aside and this judgment now stands in its place.

b) Mr Harris was unjustifiably dismissed by Charter Trucks Limited.

c) The action of Charter Trucks Limited in directing Mr Harris not to work after 5 September 2005 was unjustifiable and affected his employment to his disadvantage.

d) Mr Harris did not contribute to the situation giving rise to his personal grievances.

e) Charter Trucks Limited is ordered to reimburse Mr Harris for 9 months' loss of earnings in accordance with the directions in paragraph [118] of this judgment.

f) Charter Trucks Limited is ordered to pay Mr Harris interest on that sum at the rate of 8 percent per annum from 15 February 2006 down to the date of payment.

g) Charter Trucks Limited is ordered to pay Mr Harris $12,000 as compensation pursuant to s123(1)(c) of the Employment Relations Act 2000 in respect of his unjustifiable dismissal and $500 in respect of the unjustifiable action to his disadvantage.

Comment

[123] It will be apparent that I have reached conclusions in this case which are entirely different to those reached by the Authority in its determination. With respect to the disadvantage grievance, the Authority was wrong in its perception of the law. As regards the claim of unjustifiable dismissal, it would appear that I had the benefit of five additional witnesses and of critical evidence from Mr Sutherland not given in the course of the Authority's investigation.

Costs

[124] On 24 May 2006, the Authority gave a supplementary determination as to costs (CA 41A/06) in which it ordered Mr Harris to pay $1,250 to Charter Trucks Limited as a contribution to its costs associated with the Authority's investigation. This costs determination was not explicitly the subject of challenge but, in light of my judgment setting aside the Authority's substantive determination, it cannot stand. It is also set aside.

[125] Mr Harris is entitled to a contribution to the costs and disbursements he has incurred in relation to the proceedings before the Authority and the Court. The parties are invited to agree upon an appropriate contribution. If they are unable to do so, Mr Beck is to file and serve a memorandum within 21 days after the date of this judgment. Mr James is then to have a further 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 3.20pm on 11 September 2007