IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 21/09
CRC 23/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SOLID ENERGY NEW ZEALAND LIMITED Plaintiff
AND	BARRY MANSON GORDON BENNETT CHRISTOPHER PROCTOR Defendants

Hearing: 5 and 6 March 2009
(Heard at Christchurch)

Appearances: A C Shaw and Fiona McMillan, Counsel for the Plaintiff
J A Wilton, Counsel for the Defendants

Judgment: 15 December 2009

JUDGMENT OF JUDGE A A COUCH

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[1] An employee who is unjustifiably dismissed may claim remedies including reimbursement of lost remuneration. The essential issue in this case is the length of time for which lost earnings ought to be reimbursed. Section 128 of the Employment Relations Act 2000 ("the Act") sets a 3-month base level but gives a discretion to extend that period. The question in this case is whether that discretion ought to be exercised and, if so, to what extent.

[2] The defendants were all employed by the plaintiff as mine workers. On 31 July 2007 the plaintiff dismissed the defendants on grounds of redundancy. Through their union, they pursued personal grievances alleging that those dismissals were

unjustifiable. In particular, they alleged that the plaintiff failed to consult the union as it was required to do and that the process of selection for redundancy was unfair.

[3] In its determination dated 18 July 2008 (CA 102/08), the Employment Relations Authority concluded that all three defendants had been unjustifiably dismissed. The plaintiff was ordered to pay each of them $10,000 compensation for humiliation, loss of dignity and injury to their feelings. The Authority also ordered the plaintiff to reimburse the defendants for the remuneration they had lost during the 12 months following their dismissal.

[4] The plaintiff challenged the whole of the Authority's determination other than the finding that Mr Proctor had been unjustifiably dismissed. Subject to that one concession, the matter proceeded before me by way of a hearing *de novo*. At the conclusion of the evidence, the plaintiff conceded that none of the dismissals could be justified and accepted the quantum of compensation awarded under s123(1)(c)(i) of the Act. The plaintiff also accepted that an order to reimburse the defendants for the remuneration they had lost following their dismissals up to 3 months' ordinary time pay was appropriate but maintained its challenge to the Authority's decision to extend that to remuneration lost during the 12 months following their dismissals.

Sequence of events

[5] The plaintiff operates an open-cast coal mine near Ohai in eastern Southland. The defendants were all employed there until their dismissal on 31 July 2007. At that time, Mr Manson and Mr Bennett had 20 years' service and Mr Proctor had 10 years' service.

[6] The defendants were all members of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc ("the union"). The organiser of the union responsible for members at the Ohai mine was Trevor Hobbs.

[7] The plaintiff and the union were parties to a collective agreement which covered the defendant's work. The terms of that agreement included the following:

16.1 Redundancy Procedures

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

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

16.1.3 All employees to be declared redundant shall receive not less than one month's notice of the termination of their employment. In lieu of such notice an employee shall receive one months wages.

…

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

…

16.2 Criteria for the Selection of Redundant Employees

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

16.2.2 The employer will select employees to be made redundant on the basis of their skill and ability to perform the work required by the employer. Where employees to be made redundant have equal skills and ability selection shall be on the basis of "last on first off".

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

[8] Two of the plaintiff's customers for coal mined at Ohai were Fonterra, who used the coal at its Clandeboye factory, and Meridian Energy. On 20 March 2007, the plaintiff's human resources manager told Mr Hobbs that it was very likely the plaintiff would lose the Fonterra contract and that the Meridian contract was also at risk.

[9] On 26 March 2007, the workforce at the Ohai mine was told that both of these contracts had been lost and that the mining operation would be downsized in August 2007, resulting in redundancies.

[10] The plaintiff, the union and the defendants accepted that this loss of business required the plaintiff to restructure its workforce at Ohai and that, as a result, some redundancies were inevitable.

[11] Between March and July 2007, the plaintiff corresponded and met with the workforce to discuss the proposed restructuring. Proposals were made to staff and feedback from them received. Copies of correspondence sent to employees were sent to the union but there was little if any discussion directly with the union.

[12] The plaintiff developed an assessment process for selecting those employees to be made redundant. This consisted of a two-page form listing 29 criteria under the headings "operational, work performance, health and safety and environmental". Each employee was scored 1, 2 or 3 for each criterion, with 1 being most favourable. This form was developed by Mary Reynolds, the plaintiff's Christchurch based human resources manager, and sent to staff for comment.

[13] In the first half of June 2007, each of the 13 staff potentially affected by the restructuring was assessed using this form. These assessments were carried out by Stan Todd, the processing supervisor at the mine and Ant Stodart, the production manager. Mrs Reynolds then used their scores to produce a single result for each employee.

[14] On 29 June 2007, Mr Hobbs sent an email to Mrs Reynolds expressing concern that there had been no consultation with the union about the proposed restructuring. By this time, the plaintiff had announced that redundancies would take effect on 31 July 2007. Mr Hobbs noted that, allowing for the required 1 month's notice of dismissal, this left only 1 week for consultation. Mrs Reynolds' response was that all written communication between the plaintiff and the employees had been copied to the union.

[15] On 18 July 2007, the 13 potentially affected employees were individually interviewed by Mr Stodart, Mr Todd and Mrs Reynolds. In each case, the employee was shown a copy of the assessment which had been made of him or her and invited to comment on the scores given. Employees were not permitted to keep a copy of their assessment, even when they asked to do so, and were not told the scores of other employees. Comments made on the copies of the forms held by management, many of which were adverse, were not disclosed unless the employee challenged the score to which the comment related.

[16] The union was not told that these interviews were to take place and it was only by chance that Mr Hobbs was at the mine on the day they were conducted. He raised a series of issues with Mrs Reynolds about the process the plaintiff was following, including its failure to consult with the union and what Mr Hobbs saw as unfair aspects of the selection process.

[17] Following the interviews on 18 July 2007, the plaintiff accepted that the process adopted that day was unfair. Copies of the assessment forms were sent to staff on 25 July 2007 but not the comments made on copies of those forms used by the plaintiff. The plaintiff also altered four of the original scores for Mr Manson, one for Mr Proctor and none for Mr Bennett. They were advised of this in letters dated 27 July 2007.

[18] On Sunday 29 July 2007, Mrs Reynolds wrote to Mr Hobbs telling him that the plaintiff intended to dismiss four employees for redundancy on 31 July 2007 and to pay them in lieu of notice. The employees to be dismissed were not identified. In that letter, Mrs Reynolds also set out the process which the plaintiff had followed and asked Mr Hobbs to tell her if he had any queries regarding that process. The letter was sent to Mr Hobbs by email at about 6.30pm.

[19] The following morning, Monday 30 July 2007, Mr Stodart and Mr Todd decided which employees were to be dismissed. Mrs Reynolds then obtained formal permission from the plaintiff's chief operating officer to proceed with the dismissals.

[20] In the afternoon of Monday 30 July 2007, Mr Hobbs responded to the email Mrs Reynolds had sent him the previous evening. He set out in detail his concerns about the redundancy process and raised the prospect of personal grievances if the plaintiff proceeded with the dismissals. Mrs Reynolds telephoned Mr Hobbs in response to his email but did not address the substance of his concerns.

[21] On 31 July 2007, four employees were dismissed as redundant, including the defendants. Each was paid wages in lieu of notice and redundancy compensation in accordance with a formula in the collective agreement.

Other important evidence

[22] It was clear from the contemporary correspondence that Mrs Reynolds believed that providing the union with copies of the correspondence sent to staff satisfied the plaintiff's obligation under the collective agreement to consult with the union. In her evidence, she maintained that position. She agreed that she knew from 18 July 2007 onwards that Mr Hobbs had a different view and was asking for a meeting but deliberately did not respond to that request. She relied on the correctness of her view that the union had been sufficiently consulted and was prepared to take the risk that she was wrong.

[23] The selection of the defendants for dismissal was made by Mr Stodart and Mr Todd, with Mr Stodart taking the leading role. In the course of his evidence, Mr Stodart made the following admissions about how he conducted that process:

a) He came to the Ohai mine in 2004, he had no knowledge of the defendants' work experience prior to his arrival and, in assessing their abilities and performance, took no account of that previous work experience.

b) He selected the defendants for redundancy on the basis of his subjective assessment of them.

c) That subjective assessment involved comparing employees to each other but they were not told this and were not given an opportunity to comment on their skills relative to one another.

d) He did not allow for the possibility that two employees may be equal.

e) He took into account concerns he had about the performance of Mr Manson which had never been put to Mr Manson.

f) He was biased in his opinions about the abilities of some employees.

g) He assessed some employees on the basis of potential but not others, including the defendants.

h) He never added up the scores on the assessment forms although he was aware that the employees would do so.

i) The assessment forms played little part in the selection of the defendants for redundancy.

j) He regarded some of the criteria on the assessment form as more important than others but this was never made known to the employees.

[24] Mr Todd made many similar admissions in the course of his evidence. He began at Ohai in 2001 and had no previous experience in the coal industry. He had no knowledge of the work experience of the defendants prior to 2001 and gave them no credit for that experience. He took into account adverse views about the defendants' performance and skills which were not put to them. He relied on subjective assessments of employees rather than the scores on the assessment form. He gave some employees credit for skills obtained in other employment but not the defendants.

[25] In a letter to affected staff dated 31 May 2007, the plaintiff had said "*We also wish to advise you that should you wish to explore the option of taking voluntary*

redundancy we will discuss this with you, …". Mr Stodart said that he enquired of one staff member whether he thought anyone might be interested in voluntary redundancy but, otherwise, the possibility was never raised. Mrs Reynolds and Mr Todd said they did not raise the possibility of voluntary redundancy with anyone.

[26] In September 2007, the plaintiff reduced its workforce at the Ohai mine by one more when the fixed term employment agreement of an employee expired and was not renewed.

[27] In July 2008, the plaintiff restructured the workforce at the Ohai mine again. This resulted in the dismissal of a further five staff on grounds of redundancy. It was accepted by the defendants that, had they not been dismissed in July 2007, it is likely they would have been justifiably selected for redundancy in July 2008.

Conclusions about the selection process

[28] At the end of the evidence, the plaintiff accepted that the selection process was fatally flawed. That was a proper concession. In order to decide the remaining issues, however, it is important that I make findings about the nature and degree of the defects in that process.

[29] The collective agreement imposed a binding obligation on the plaintiff to consult with the union about the proposed restructuring. Mrs Reynolds' view that simply providing the union with copies of correspondence sent to employees constituted consultation was seriously in error. Consultation required a direct, proactive approach by the plaintiff to the union, including the provision of all relevant information and an invitation to have considered input into the process. That never happened.

[30] The plaintiff's failure to be proactive in its dealings with the union was aggravated by its failure to be properly reactive. An essential aspect of the statutory duty of good faith is that set out in s4(1A)(b) of the Act:

> *(1A) The duty of good faith in subsection (1)—*
>
> …
>
> *(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;*

[31] The plaintiff and the union were in an *"employment relationship"* as that term is defined in s4(2). Thus, when Mr Hobbs raised his concerns about the restructuring process, the plaintiff was obliged to respond fully and constructively. Mrs Reynolds' response to Mr Hobbs' email of 29 June 2007 was brief and dismissive. Similarly, when Mr Hobbs reiterated his concerns in person on 18 July 2007, he received no better response. Even when he expressed his concerns in the plainest possible terms on 30 July 2007 and warned of the likely consequences, the plaintiff failed to engage with the union.

[32] The obligation to be active, constructive, responsive and communicative applied equally to the relationship between the plaintiff and its employees but the statutory provision of even greater significance is s4(1):

> *(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.*

[33] The manner in which the plaintiff carried out the selection process fell well short of that standard. The affected employees were expressly told in a letter dated 31 May 2007 that the selection process would be done using the assessment form, a copy of which was provided to them. Subsequently, Mr Stodart, Mr Todd and Mrs Reynolds chose not to tell them the truth that the selection process was being conducted on the basis of subjective assessments and had little or nothing to do with the form. That was deceptive and misleading conduct on behalf of the plaintiff. The failure to tell employees that some criteria listed in the assessment form were more important than others was equally deceptive.

[34] In his final submissions, Mr Wilton did not seek a finding of fact that the plaintiff had acted in breach of good faith but, on the evidence, such a finding is irresistible.

[35] In addition to its statutory duty of good faith, the plaintiff had a fundamental duty to treat its employees fairly in the selection process. It fell well short of that duty in many respects, including:

a) The failure to take into account the defendants' work experience prior to 2001 in the case of Mr Todd and 2004 in the case of Mr Stodart.

b) The failure to disclose to the defendants all of the adverse views about them relied on in the selection process.

c) Inconsistency in the manner in which employees' skills and experience were assessed.

d) Bias on the part of Mr Stodart.

[36] Under the collective agreement, the plaintiff had a commitment to dealing with a surplus staffing situation by voluntary redundancy in preference to compulsory redundancy. The only real step the plaintiff took to honour that commitment was one sentence towards the end of its letter of 31 May 2007. That consisted of an invitation to staff to raise the option of voluntary redundancy. On its own, that was insufficient. It was at an early stage of the restructuring process and was unsupported by any information which would assist employees in assessing the value to them of that option. In particular, employees were not told the amount of compensation and other benefits they would receive if they did seek voluntary redundancy. Mr Stodart's casual enquiry of a staff member later in the process did nothing to remedy this default.

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

Remedies

[38] As noted earlier, the plaintiff accepted that each of the defendants should receive an award of $10,000 by way of compensation for humiliation, loss of dignity and injury to their feelings. I confirm the Authority's order to that effect.

[39] The other remedies sought were by way of reimbursement of lost remuneration. Included in this were employer superannuation contributions and the value of domestic coal supplied free to employees of the plaintiff at Ohai. For the plaintiff, Mr Shaw accepted that these were proper inclusions.

[40] Reimbursement of remuneration lost as a result of a personal grievance is dealt with in s128 of the Act:

> ***128 Reimbursement***
>
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
>
> *(a) that the employee has a personal grievance; and*
>
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
>
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
>
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[41] As a result of the plaintiff's concession that all three defendants were unjustifiably dismissed, it was also conceded that they were entitled to the benefit of subsection (2), that is reimbursement of the remuneration they had lost up to an amount equal to 3 months' ordinary time remuneration. The one issue between the parties was whether the discretion conferred by subsection (3) ought to be exercised to order payment of a greater sum. The defendants sought reimbursement of the

remuneration lost over the 12 months following their dismissal. The plaintiff opposed any extension of the sums prescribed by subsection (2).

[42] For the plaintiff, Mr Shaw referred me to the decision of the Court of Appeal in *Rongotai College Board of Trustees v Castle* [1] in support of the proposition that there must be a causal link between the plaintiff's actions and the loss suffered to found a claim for reimbursement. Based on this general proposition, he made two principal submissions. The first was that, had the plaintiff followed a proper process, the defendants would still have been dismissed on 31 July 2007. The second was that the defendants had failed to properly mitigate their loss.

[43] On the first issue, Mr Shaw submitted that Mr Manson and Mr Bennett clearly had *"less desirable skills"* compared to the other affected employees and that, applying a proper process, it was inevitable they would have been selected for redundancy. Somewhat ironically, he relied on the total scores from the assessment forms in support of this proposition.

[44] Mr Shaw then submitted that the plaintiff's failure to properly consult with the union and any failure to properly promote voluntary redundancy did not affect the outcome. He suggested that the plaintiff had fully consulted with the affected employees and noted the evidence that none of the employees had sought voluntary redundancy.

[45] Linking this submission to the issue of the extent to which the discretion under s128(3) ought to be exercised, Mr Shaw relied on the decision of the Court of Appeal in *Telecom NZ Limited v Nutter*[2] and, in particular, the following passage:

> *The longer the period in respect of which compensation is sought, the more uncertain and speculative the assumptions underlying the eventual award become.*[3]

[46] I find little merit in this first submission. The process adopted by the plaintiff to select the defendants for dismissal was so fundamentally flawed, inappropriate

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[1] [1998] 2 ERNZ 430
[2] [2004] 1 ERNZ 315
[3] Paragraph [73]

and unfair that it cannot be said with any confidence what the outcome may have been if a proper process had been followed. Mr Wilton referred me to the decision of the former Chief Judge in *EDS (NZ) Limited v Shaddox*[4] which provides an example of a similar approach being taken in a case where the process was far less defective than that followed in this case.

[47] In relation to the decision in *Nutter*, Mr Wilton accepted the validity of the general proposition relied on by Mr Shaw but submitted that assessment of loss in this case involves no uncertainty or speculation because the period for which reimbursement is claimed has entirely passed. While there is considerable force in that submission, there remains the possibility that any of the defendants might have been dismissed for some other reason prior to the end of July 2008. Given that they all had in excess of 10 years' service and no history of misconduct, however, that possibility must be regarded as remote.

[48] I conclude that there is no reason in this case to deny the defendants reimbursement of the loss of remuneration they have actually suffered as a result of their unjustifiable dismissals. Accordingly, it is appropriate to exercise the discretion conferred by s128(3) to extend the period of loss for which they are to be reimbursed. The obvious limit to that extension, however, must be the end of July 2008 when the defendants accept they could justifiably have been selected for redundancy.

[49] Mr Shaw's second principal submission was that the defendants had failed to mitigate their loss, although this submission appeared to be made only in respect of Mr Manson and Mr Bennett.

[50] Mr Proctor gave evidence that he had made constant efforts to obtain alternative employment and was not successful until after July 2008. Nothing he said in answer to questions in cross-examination altered the effect of his evidence-in-chief which I accept. Mr Shaw invited me to take into account that Mr Proctor suffered from diabetes and that this restricted his ability to work underground. I do not accept that this alters the position. The plaintiff was well aware of Mr Proctor's

[4] [2004] 1 ERNZ 497 at paragraph [18]

diabetes but had no difficulty in employing him and, while that condition limited one alternative employment option, it cannot be said that it prevented him from working and was therefore the reason for his loss of remuneration.

[51] Mr Manson gave evidence that he first obtained alternative employment in August 2007 and that this continued until February 2008. He then obtained another position on 13 March 2008 which he held until after July 2008. Mr Manson applied for a total of eight jobs which were advertised and three which were not. He did not apply to any recruitment agencies or use outplacement services offered by the plaintiff.

[52] Mr Bennett said that he had been largely self employed after his dismissal by the plaintiff. He listed 16 people for whom he had done work during the 12-month period after his dismissal and the various times he worked for each of them. Mr Bennett did not apply for any jobs or to any recruitment agencies or use outplacement services offered by the plaintiff.

[53] Mr Shaw submitted that both Mr Manson and Mr Bennett failed to mitigate their loss in three respects. The first was that they did not apply for positions available at the plaintiff's New Vale mine in Southland in August 2008. There is an irony in this submission. One of the claims originally made by the defendants was that the plaintiff had failed to properly consider redeployment to the positions at New Vale which, at the time they were dismissed, the plaintiff knew would be arising. Part of the plaintiff's answer to that claim was that New Vale was some 95km from Ohai and the defendants could not have been expected to take work so far away. In any event, when this issue was put to Mr Manson, he said that the way he had been treated by the plaintiff made him unwilling to work for it again. This issue was not put to Mr Bennett.

[54] I do not accept this submission. Both Mr Manson and Mr Bennett made reasonable attempts to replace the income they had lost as a result of their dismissal and both were quickly successful in obtaining other work. I accept Mr Manson's explanation for not applying for the New Vale positions and, as it was not put to Mr Bennett, no explanation is required from him.

[55] Mr Shaw's second submission was that Mr Manson and Mr Bennett failed to mitigate their loss by applying for positions with the plaintiff other than those at New Vale. I reject this submission for similar reasons to the first. In any event, the only vacancies identified were in Huntly or underground on the West Coast.

[56] Mr Shaw's third submission was that Mr Manson and Mr Bennett failed to mitigate their loss by utilising outplacement services offered by the plaintiff. I also reject this submission. Both Mr Manson and Mr Bennett were successful in finding alternative work within a short time after their dismissal. They did not need assistance in doing so. I note also that there was no evidence which would suggest that use of outplacement services would have enabled them to obtain more work or better paid work.

[57] Focussing solely on Mr Bennett, Mr Shaw submitted that he failed to mitigate his loss by taking contract painting work rather than seeking mining work. This submission was made in reliance on my decision in *Nimon & Sons Limited v Buckley*[5]. The facts here are far removed from that case. Mr Buckley had been offered two alternative positions at good rates of pay but turned them down to train and then work as a real estate salesman. He therefore had specific alternatives to the career change he chose. There is no evidence in this case that Mr Bennett had any such alternatives or that he chose training over paid employment. Mr Bennett was an experienced painter and used that experience to gain as much work as he could as quickly as he could. He cannot be criticised for that.

[58] Mr Shaw then made two further submissions. The first was that there was evidence of comparable positions within the region and gave as an example Eastern Corporation. That evidence was given by Mr Stodart and was to the effect that one of the plaintiff's employees made redundant in August 2008 obtained a job at the mine operated by Eastern Corporation. In the course of cross-examination of Mr Manson, Mr Shaw asked him whether he had applied for a job at Eastern Corporation. Mr Manson replied that he had but was unsuccessful. This issue does not assist the plaintiff.

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[5] Unreported, 5 October 2007, WC 26/07

[59] Mr Shaw's final submission was that long term unemployment resulting from the defendants' decision to stay in the Ohai region should not be visited on the plaintiff. He invited me to adopt the reasoning of the Authority in *Allen v Riversun Nursery Limited*[6]. In that case, Ms Allen had been dismissed from a relatively senior management position in Gisborne but, despite sustained efforts, had been unable to find comparable alternative employment after 7 months. The Authority took the view that it was unreasonable for her former employer to bear her loss indefinitely if she decided to remain living in the Gisborne area after all efforts to find suitable employment there had failed. This was a factor the Authority took into account in exercising the discretion under s128(3). That approach was open to the Authority in that case but I see no scope for similar reasoning in this case. Both Mr Manson and Mr Bennett obtained work relatively quickly and were employed during most of the 12 months following their dismissal. Mr Proctor was unable to find work but did not limit his efforts to the Ohai region. He applied for jobs in Southland, Otago and the West Coast and was willing to move in order to take up employment had it been offered to him. He eventually obtained employment with a company based in Greymouth.

[60] I find that the loss of remuneration suffered by all three defendants during the 12 months after 31 July 2007 was the result of their unjustifiable dismissal and that it is appropriate to order the plaintiff to reimburse them fully for that loss.

[61] As that loss was suffered some time ago and the defendants will not receive payment until after this decision, it is appropriate that they receive interest on the sums involved. The purpose of awarding interest is to reflect the fact that the plaintiff has had use of the money in the meantime and the defendants have been deprived of its use. The power to award interest is conferred on the Court by clause 14 of Schedule 3 to the Act. It permits interest to be awarded at *"such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Court thinks fit"*.

[62] This formula is problematic and produces an unjust result in this case. During the period for which the defendants are to be reimbursed, the 90-day bill rate

[6] Unreported, 19 February 2008, AA 52/08

was between 8 and 9 percent but it is now a little over 2.5 percent. Thus, the benefit to the plaintiff of having use of the money in the meantime, and the corresponding loss to the defendants, is approximately double the maximum rate which can now be awarded. In my view, this requires legislative attention and that it would be more just and appropriate to adopt of the interest rate regime provided for in s87 of the Judicature Act 1908.

Conclusion

[63] The effect of s182(3) of the Act is that the determination of the Authority is set aside and this decision now stands in its place. That is so, notwithstanding that the conclusions I have reached are the same as those reached by the Authority. It is therefore necessary to restate all of the remedies to which I find the defendants are entitled.

[64] In summary, I make the following findings and orders:

a) The defendants were unjustifiably dismissed by the plaintiff.

b) The plaintiff is ordered to pay each of the defendants $10,000 as compensation pursuant to s123(1)(c)(i) of the Act.

c) The plaintiff is ordered to reimburse each defendant for the loss of remuneration he suffered during the period 1 August 2007 to 31 July 2008. Those calculations should include the value to each defendant of employer superannuation contributions and free domestic coal. Allowance should be made for all income received by each defendant during that period.

d) The plaintiff is ordered to pay each defendant interest on the total amount of reimbursement to which he is entitled at the rate of 4.5 percent per annum from 1 February 2008 (being half way through the period of reimbursement) down to the date of this judgment.

e) If the parties are unable to agree on the quantum of reimbursement or interest, leave is reserved to apply to the Court to fix those amounts.

Comment

[65] There has been a lengthy delay between the hearing of this matter and the issue of this judgment. The inconvenience to the parties is acknowledged and regretted.

Costs

[66] The defendants have been entirely successful in resisting the plaintiff's challenge and in retaining the remedies awarded to them by the Authority. They are entitled to an award of costs. If the parties are unable to agree, a memorandum on behalf of the defendants should be filed and served by 31 January 2010. The plaintiff is then to have 21 days to file and serve a memorandum in response.

A A Couch
Judge

Signed at 12.30 pm on 15 December 2009